

Chapter 30

International Law

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International law

231.

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

Customary international law

232.

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Application of international law

233.

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Interpretation of Bill of Rights

39.

- (1) When interpreting the Bill of Rights, a court, tribunal or forum:
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.¹

30.1 International law and its relationship with domestic law

(a) The nature of international law

(i) Definition

International law is traditionally defined as that body of law which binds or regulates states in terms of their relationships with other states.² While there is some debate as to whether international law constitutes a system of law separate

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1 Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC').

2 H Waldock (ed) *The Law of Nations* (6th Edition, 1963) 1.

and distinct from the domestic law of states, most domestic systems automatically incorporate, or else incorporate through a separate act of adoption, many rules of international law into their system of municipal law.³ International law also influences the manner in which courts interpret domestic law. This chapter is concerned with those provisions of the Final Constitution that deal with the manner in which international law determines or informs our municipal law.

(ii) The transformation of international law

Traditionally, states were considered to be the only subjects of international law.⁴ State sovereignty and firm adherence to the principle of non-intervention in the affairs of other states meant that international law did not concern itself with the manner in which states treated their own citizens.⁵

Since the Second World War and the advent of the United Nations, however, international law has increasingly concerned itself with protecting the rights of

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3 The relationship between international law and municipal law is controversial. It has long troubled both theorists and courts, mainly because international lawyers have for some time been divided on which of two main approaches to adopt — monism or dualism. The monists see all law as a unified body of rules. Since international law is law, monists regard international law as automatically forming part of the same legal structure that includes municipal law. For them, international law is incorporated directly into municipal law without any specific act of adoption. State judges, argue monists, are consequently obliged to apply the rules of international law in their municipal courts. Dualists, by contrast, see international law and municipal law as completely different legal systems. For a dualist, the question of which legal system ought to govern a dispute is dependent on both the nature of the dispute and the forum in which the matter arises (ie. whether the adjudicating body is a municipal court or an international tribunal). Obviously, dualists accord international law primacy over municipal law in the international arena; for example, where the dispute is one between states. Similarly municipal law enjoys primacy in domestic disputes. The two legal orders are thus, for a dualist, quite distinct and separate — both in their application and purpose. For this reason, a dualist will never see international law as being applicable in a municipal court unless there has first been a specific act of adoption. As we will illustrate below, South Africa has traditionally adopted a mixed approach to the incorporation of international law into our domestic law — adopting a dualist approach in respect of treaties and a monist approach in respect of customary international law. The Final Constitution maintains this mixed approach. Most standard international law textbooks contain some literature on this long-standing debate. See, for example, J Dugard *International Law: A South African Perspective* (2nd Edition, 2000) 43-44; D Harris *Cases and Materials on International Law* (5th Edition, 2004) 66-72; R Wallace *International Law* (3rd Edition, 1997) 36-37; M Shaw *International Law* (5th Edition, 2003) 120-123. For a more detailed analysis of the debate, see A Aust *Modern Treaty Law and Practice* (2000) 146-161.

4 Dugard (supra) at 1.

5 Article 2(7) of the United Nations Charter endorses this view when it states that 'nothing contained in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'. This anti-human rights stance adopted by earlier international law is probably the reason for the international community's acceptance of the atrocities committed in South Africa during the apartheid era. Of course this changed as international law became more human rights friendly. See K Hopkins 'Assessing the World's Response to Apartheid: An Historical Account of International Law and its Part in the South African Transformation' (2002) 10 *Univ of Miami Int and Comparative LR* 241; MD Prevost 'South Africa as an Illustration of the Development in International Human Rights Law' (1999) *South African Yearbook of International Law* 211.

individuals. This transformation was largely a reaction to the atrocities committed by the Nazi German government. Since then numerous multi-lateral and regional treaties that protect individual human rights have been adopted by states.⁶

Many of the rights afforded by these treaties have been incorporated into the domestic law of states — often in the form of justiciable bills of rights. Our own Bill of Rights, Chapter 2 of the Final Constitution, quite consciously echoes the language found in international human rights instruments. Moreover, FC s 39(1)(b) turns international law into a mandatory canon of constitutional interpretation.⁷

(b) Sources of international law

There are four sources of international law:

- (a) International conventions, otherwise known as treaties;
- (b) Customary international law;
- (c) The general principles of law recognized by civilized nations; and
- (d) Judicial decisions, and the teachings of the most highly qualified publicists.⁸

The source of the law will often determine the manner in which it is incorporated into domestic law.

(i) Treaties

Treaties are international agreements entered into between states in terms of which states expressly agree to be bound by the terms of the treaty.⁹ Treaties can be bi-lateral, where two states enter into a treaty to regulate a particular aspect of their relationship (for example, extradition arrangements or trade relations) or they may be multi-lateral, where a number of states enter into a treaty (as is the case with human rights conventions such as the ICCPR and the ICSECR). Multi-lateral treaties normally have the purpose of codifying international law with regard to the subject-matter in question.

6 Some of the most important international human rights treaties are: the International Covenant on Civil and Political Rights ('ICCPR') (ratified by South Africa in 1998); the Covenant on Economic, Social and Cultural Rights ('ICSECR') (signed by South Africa in 1994 but yet to be ratified); the International Convention on the Elimination of All Forms of Racial Discrimination (ratified by South Africa in 1998); the Convention on the Elimination of All Forms of Discrimination Against Women (ratified by South Africa in 1995); the Convention on the Rights of the Child (ratified by South Africa in 1995); Convention on the Crime of Genocide (ratified by South Africa in 1998) and the Torture Convention (ratified by South Africa in 1998). South Africa also ratified the African Charter on Human and Peoples' Rights in 1996.

7 FC s 39(1)(b) reads: 'When interpreting the Bill of Rights, a court, tribunal or forum must consider international law.'

8 See Statute of International Court of Justice, art 38(1).

9 In terms of article 2(1)(a) of the Vienna Convention on the Law of Treaties (1969), a treaty means 'an international instrument concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.'

Treaties are usually negotiated and signed by the executive branch of government. In many systems, however, the legislature has a role to play in the treaty-making process. In some instances treaties only become binding upon the state concerned if ratified by the legislature. In addition, they often only become part of the domestic law if the legislature promulgates a law incorporating the contents of the treaty into domestic law. Under the old constitutional dispensation in South Africa, the power to enter into treaties was entrusted solely to the executive branch of our government.¹⁰ The legislature played no part in the treaty-making process, and treaties did not become part of our domestic law unless they were incorporated through legislation.¹¹

In terms of FC s 231, although treaties are still negotiated and signed by the executive, a treaty only becomes binding on the South African state at the international law level if approved by a resolution of both houses of the national legislature.¹² Unlike under the old constitutional dispensation, ratification by Parliament is therefore a necessary component of the treaty-making process under the Final Constitution. Consistent with the dualist approach to the incorporation of treaties, a further enactment by the national legislature is required to make the treaty part of domestic law.

(ii) Customary international law

Customary international law is that source of international law developed through state custom or practice. It is the 'common law' of the international legal system.¹³

A custom will become a rule of customary international law where it is a sufficiently widespread practice adopted by states out of a sense of legal obligation. There are, accordingly, two elements to customary international law — settled practice (*usus*), and *opinio iuris et necessitatis* (the psychological element of acceptance of an obligation to be bound).

According to the International Court of Justice in *The Asylum Case*, for a practice to become a rule of customary international law, the practice must be 'constant and uniform'.¹⁴ Such a practice may be evinced in a number of ways: through decisions of national and international courts, diplomatic correspondence, the opinions of state law advisors and resolutions of international organizations like the United Nations.¹⁵

10 Republic of South Africa Constitution Act 110 of 1983, s 6(2)(c).

11 See *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A), 161; *S v Tuhadeleni & Others* 1969 (1) SA 153 (A), 175; *Maluleke v Minister of Internal Affairs* 1981 (1) SA 707 (B), 712; *Binga v Administrator-General, South West Africa & Others* 1984 (3) SA 949 (SWA), 968; *Tshwete v Minister of Home Affairs* 1988 (4) SA 586 (A), 606; *S v Muchindu* 1995 (2) SA 36 (W), 38; *Azapo v President of the Republic of South Africa* 1996 (4) SA 671 (CC), 1996 (8) BCLR 1015 (CC) ('Azapo') at para 26.

12 Treaties of a 'technical administrative or executive nature' or any other treaty 'which does not require ratification or accession' binds us without ratification by the National Assembly. FC s 231(3).

13 Dugard (supra) at 26.

14 *Columbia v Peru* (1950) ICJ Reports 266 ('Asylum').

The creation of international customary law rules through resolutions by the political organs of the United Nations is a hotly contested practice, especially with regard to UN resolutions that are non-binding and that fall under the category of mere recommendations. The International Court of Justice in *Legality of the Threat or use of Nuclear Weapons* explains its treatment of such resolutions as follows:

The Court notes that General Assembly resolutions, even if they are not-binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.¹⁶

(iii) General principles of law recognised by civilised nations, and judicial decisions and the writings of highly qualified publicists

Although less seldom invoked, these residual sources of international law may be drawn upon in the absence of treaty law or customary international law.

(iv) The impact of overriding principles and values

While there is generally no hierarchy of lower and higher norms making up the international legal system, two concepts of recent origin suggest that certain principles, norms or values may have such overriding importance for international co-existence and that their enforcement trumps other international obligations of states.

Jus cogens denotes the peremptory nature of certain norms. According to Brownlie, the least controversial examples of such norms are the prohibition of the use of force in international relations, the law of genocide and crimes against humanity, the principle on racial non-discrimination, and the rules prohibiting piracy and the trade in slaves.¹⁷

The concept has found its way into the 1969 Vienna Convention on the Law of Treaties. Article 53 of the Convention states that a treaty will be void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. Such a norm, Article 53 continues, is one that is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

Erga omnes obligations have been defined by the International Court of Justice as obligations a state owes 'towards the international community as a whole' as opposed to obligations that arise vis-à-vis another state.¹⁸ In contemporary international law, such obligations arise, according to the Court, from the 'outlawing

15 Dugard (supra) at 28.

16 (1996) ICJ Reports 226.

17 I Brownlie *Principles of Public International Law* (6th Edition, 2003) 488, 489.

18 *Belgium v Spain* (1970) ICJ Reports 3, 32 ('*Barcelona Traction*').

of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.¹⁹

In *Prosecutor v Furundzija*, the International Criminal Tribunal for the former Yugoslavia ('ICTY') clarified the distinction between *erga omnes* obligations and *jus cogens*.²⁰ In ruling that the prohibition against torture has acquired the status of *jus cogens*, the ICTY made clear that at the level of international enforcement:

the violation of such an [*erga omnes*] obligation [to enforce the prohibition] simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfillment of the obligation or in any case to call for the breach to be discontinued.²¹

With respect to international treaty monitoring bodies, the findings of such bodies regarding *jus cogens* 'enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture.'²² Such *jus cogens* status, for example, deligitimates any legislative, executive or judicial measure authorizing or condoning torture or absolving its perpetrators through an amnesty law.²³

At the national level, the *jus cogens* nature of a norm would mean that individual victims of a violation could institute proceedings in a competent national or international tribunal with a view to having the violating measure annulled. The *jus cogens* nature of a norm also means that a civil action can be instituted in a foreign court for the claiming of damages and that the perpetrators can be held criminally responsible either in a foreign state or in their own state under a subsequent regime.²⁴

(c) The constitutionalisation of international law in South Africa

As we shall see below, the Final Constitution contains provisions that govern the manner in which international law is incorporated or adopted into our domestic law to form part of our substantive law — FC ss 231 and 232 — and provisions that determine the kind of influence international law has on the interpretation of our domestic law — FC ss 39 and 233.²⁵

¹⁹ See also *Bosnia and Herzegovina v Yugoslavia* (1996) ICJ Reports 615–616 ('*Genocide*').

²⁰ (2002) 121 International Law Reports 213.

²¹ *Ibid* at 260.

²² *Ibid*.

²³ *Ibid* at 261.

²⁴ *Ibid*.

30.2 The incorporation of international law into substantive domestic law in South Africa

A substantive rule of international law can become part of a state's domestic law if it is incorporated into the body of domestic law in that particular state. The incorporation of international law into domestic law can occur in one of two possible ways: (1) automatically; (2) by a specific act of adoption. Whether or not a special act of adoption is required is a matter to be determined by the domestic laws of each individual state. The Final Constitution is clear that customary international law automatically forms part of our domestic legal system, whilst treaties only become a part of our law through a separate act of adoption.

(a) Customary international law as part of South African domestic law

The South African common law has long regarded international law as part of South African domestic law.²⁶ FC s 232 endorses the common law's recognition subject to the condition that the international law in question is not inconsistent with the Final Constitution itself or else an Act of Parliament. This process of incorporation is monist. It should, however, be noted that the place of customary international law in the hierarchy of laws renders it subordinate to the Final Constitution itself and to Acts of Parliament.²⁷ It is superior to all other sources of South African domestic law.

International law differs quite radically from domestic law in that it knows no doctrine of *stare decisis*. This means that the doctrine of judicial precedent 'cannot be invoked as an obstacle to the application of a new rule of international law.'²⁸ In *Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia*,²⁹ the Supreme Court followed the reasoning of an English court in *Trendtex Trading Corporation v Central Bank of Nigeria*.³⁰ The *Trendtex* Court had held that:

International law knows no rule of *stare decisis*. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago,

25 See also FC s 35(3)(1)(Everyone has the right 'not to be convicted of an act or omission that was not an offence under either national or international law at the time when it was committed or omitted'); FC s 37(4)('Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that the legislation is consistent with the Republic's obligations under international law applicable to states of emergency'); FC s 201(2)('[T]he primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.')

26 *Ex Parte Belli* 1914 CPD 742, 745-6; *Crooks and Company v Agricultural Co-operative Union Ltd* 1922 AD 423; *R v Lionda* 1944 AD 348, 352; *S v Penrose* 1966 (1) SA 5 (N), 10.

27 Whilst an Act of Parliament will trump customary international law, subordinate legislation will not.

28 Dugard (supra) at 52.

29 1980 (2) SA 709 (E), 715 ('*Kaffraria Property*').

30 [1977] QB 529 ('*Trendtex*').

it can give effect to that change — and apply that change in our English law — without waiting for the House of Lords to do it.³¹

Trendtex and *Kafraria Property* thus allow for an exception to the doctrine of judicial precedent where international law has changed since the earlier domestic decision was delivered. For example, a High Court can arrive at a different legal conclusion in a similar matter already decided by the Supreme Court of Appeal

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where it finds that the relevant rule of customary international law upon which that SCA decision was based has subsequently changed. The absence of *stare decisis* at international law thereby frees the High Court to depart from the domestic precedent in question.

It is, of course, another matter to convince the High Court that a particular rule or practice ought to be regarded as a rule of customary international law, or that customary international law has itself changed. As we noted above, a rule or practice will be recognized as a rule of customary international law only when it meets the twin requirements of *usus* and *opinio juris*. A court making such an assessment would need to consult the decisions of international courts and tribunals (or those of other domestic courts addressing the same point, as well as academic works.³²) This is not always easy to do and there is very little consistency in South African domestic courts on how this ought to be done.

Some South African decisions wrongly suggest a test for such determinations that is far stricter than the test laid down by international law itself. International law requires that before a customary rule of international law be accepted as such, there needs to be 'evidence of a general practice accepted as law.'³³ The South African decisions that require evidence of a 'universal' practice should be viewed as incorrect statements of law.³⁴ Rebecca Wallace states the correct position as follows:

How many states must be involved in a particular activity before the practice is accepted as law? Universal practice is fortunately not necessary. Article 38(1)(b) speaks not of a universal practice, but of a general practice. A practice can be general even if it is not

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31 Ibid at 554.

32 See *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) ('*Kaunda*'). The Constitutional Court had to consider whether or not there was a constitutional duty on South Africa to afford diplomatic protection to its nationals when their fundamental human rights were being violated in a foreign state. It stands to reason that if such a duty exists under customary international law then it also exists under South African domestic law through the operation of FC s 232 — the duty under customary international law would automatically be incorporated into our domestic law. The *Kaunda* Court accepted the view that states, under customary international law, have the right to espouse a claim on behalf of a national. The Court also accepted (based on a report from the International Law Commission) that there is in fact evidence that the municipal laws of many states actually make diplomatic protection obligatory. However, the Court still held that 'this is not the general practice of states.' Ibid at para 29. The Court, in fact, found that the general practice of states was that 'diplomatic protection remains the prerogative of the state to be exercised at its discretion.' Ibid. The Court went on to state that 'it must be accepted, therefore, that the applicants cannot base their claims on customary international law.' Ibid. There simply was not sufficient evidence of state practice to say that the rule had developed from a mere right into a legally binding duty.

33 See Article 38(1)(b) of the Statute of the International Court of Justice.

universally followed, and there is no precise formula indicating how widespread a practice must be. What is in fact more important than the number of states involved, is the attitude of those states whose interests are actually affected.³⁵

In the *North Sea Continental Shelf Cases*³⁶ the ICJ likewise held that something less than 'universal' acceptance is required:

an indispensable requirement would be that within the period in question . . . state practice, including that of states whose interests are specifically affected, should have been both extensive and virtually uniform.³⁷

Conradie J in *S v Petane* recognized that the Appellate Division itself had erred in this regard when he wrote:

It is not clear to me whether Rumpff CJ in giving the judgment [in *Nduli*] meant to lay down any stricter requirements for the incorporation of international law usages into South African law than the requirements laid down by international law itself for the acceptance of usages by states. International law does not require universal acceptance for a usage of states to become a custom.³⁸

The correct approach ought to be that if a rule is accepted at international law as customary international law then the rule must also be accepted by our domestic courts as customary international law. There is only one exception to this: the persistent objector principle. As far as South Africa is concerned, a practice to which it has persistently objected is simply not a customary rule of international law and can thus never be regarded as part of substantive South African domestic law.

(b) Treaties and conventions as part of South African domestic law

According to FC s 231, the incorporation of treaties and conventions follows the dualist approach.

Treaty-making falls exclusively within the competence of the executive. Treaties are negotiated and signed by the executive. Parliament then ratifies them by means of a resolution. Only those treaties specifically incorporated by an Act of Parliament become part of South African domestic law.³⁹ The rationale for the dualist approach flows from the separation of powers doctrine. If treaties could become part of our domestic law without any participation or endorsement from

34 See *Du Toit v Kruger* (1905) 22 SC 234, 238 (De Villiers CJ stated that 'the rules which are laid down by some writers for exempting the private property of an enemy from capture have not been so universally accepted and acted upon as to justify this court in treating them as binding principles of law.') See also *Nduli v Minister of Justice* 1978 (1) SA 893 (A), 906 (Rumpff CJ wrote that 'it was conceded by counsel for the appellants that according to our law only such rules of customary international law are to be regarded as part of our law as are either universally accepted or have received the assent of this country. I think that this concession was rightly made.')

35 R Wallace *International Law* (3rd Edition, 1997) 11.

36 *Federal Republic of Germany v Denmark and Federal Republic of Germany v Netherlands* ICJ Reports (1969) 3 ('*North Sea Continental Shelf*').

37 *Ibid* at 43. See also *Spain v Canada* ICJ Reports (1974) 3, 23-6 ('*Fisheries Jurisdiction*').

38 1988 (3) SA 51 (C).

the legislature, then wide law-making powers would be conferred on the executive. It is not, according to the separation of powers doctrine, the function of the executive to make law.⁴⁰

Where South Africa has ratified a treaty, it is bound by international law to honour the provisions of that treaty. As Mohamed DP notes in *Azapo v President of the Republic of South Africa*:

International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment.⁴¹

Thus, where a treaty has been ratified but has not been incorporated in municipal law by Parliament, and domestic courts cannot enforce our international obligations, the state may be found in breach of international law.⁴² Under the Vienna Convention

39 According to John Dugard, the legislature in South Africa employs three principal methods to transform treaties into domestic law — 'in the first instance, the provisions of a treaty may be embodied in the text of an Act of Parliament; secondly, the treaty may be included as a schedule to a statute; thirdly, an enabling Act of Parliament may give the executive the power to bring a treaty into effect in municipal law by means of a proclamation or notice in the Government Gazette.' Dugard (supra) at 57. Mere publication of a treaty for general information does not, according to Dugard, constitute an act of incorporation.

40 Some of these issues were dealt with in *Harksen v President of the Republic of South Africa*. 2000 (2) SA 825 (CC), 2000 (5) BCLR 478 (CC) ('*Harksen*'). The State President is empowered by s 3(2) of the Extradition Act to consent to the surrender of a person on an ad hoc basis, in other words, even where there is no extradition treaty between South Africa and the requesting state Act 67 of 1962. One of the issues raised in this case was the constitutionality of s 3(2) given that it seems to conflict with FC s 231(2). The Constitutional Court's decision is rather disappointing. The *Harksen* Court held that the President's consent under s 3(2) did not constitute an 'international agreement' and it was thus not subject to the provisions of FC s 231. Accordingly Parliamentary approval was not required. Ibid at paras 22-23. According to the Constitutional Court, the effect of Presidential consent is merely a domestic act and not conduct on the international plane because Germany (the requesting state in this instance) was 'not entitled to rely on the President's consent to establish any enforceable obligation against South Africa.' Ibid at para 28. We find it difficult to see how there could have been no agreement between South Africa and Germany — even if only an informal one. Call it what you will, the President agreed, unilaterally, to extradite Harksen to Germany, and this had consequences on both the domestic and international planes. To allow the State President to act unilaterally when it comes to the surrender or extradition of individuals is, we submit, contrary to the spirit of transparency and accountability which underlies FC s 231, if it is not, in fact, in direct violation of FC s 231(2) itself. The effect of the Court's ruling would allow the executive to extradite South Africans to states which may have extremely poor human rights records — and to do so contrary to the wishes of Parliament. See J Dugard & G Abraham 'Public International Law' (2000) *Annual Survey of South African Law* 114-118. Dugard and Abraham make the point that s 3(2) was inserted into the Extradition Act in 1962, at the height of apartheid, so as to allow South Africa to extradite fugitives at a time when very few states had treaties with South Africa. But it has no place in the new constitutional order because 'transparency and accountability in treaty-making are important values recognized in the Final Constitution.' Ibid at 118.

41 1996 (4) SA 671 (CC), 1996 (8) BCLR 1015 (CC) ('*Azapo*') at para 28.

42 A state could feasibly ratify an international treaty in which it undertakes (to the international community) to prosecute persons within its territory who are responsible for the commission of industrial acts that are destructive to the environment. If the state ratifies the instrument, it will then incur responsibility under international law to the international community where it fails to make the relevant prosecutions. The reality, however, is that the state will be unable to meet its international obligations until it incorporates the treaty into its domestic law. Domestic courts cannot enforce prosecutions in the absence of domestic laws that prohibit such conduct. This principle is known as *nullum crimen sine lege*.

on the Law of Treaties, Article 26 places an obligation upon a state that has become a party to a treaty to execute the treaty in good faith, while Article 27 prevents the state party from invoking the provisions of its domestic law as justification for its failure to perform in terms of the treaty.

(c) United Nations resolutions

Resolutions adopted by the Security Council in terms of chapter VII of the UN Charter are binding on all members of the United Nations. In terms of article 25 of the UN Charter member states undertake to carry out such resolutions. Consequently, if domestic measures are needed to give proper effect to such resolutions, domestic authorities must see to it that such measures are in place. In South Africa, the Application of Resolutions of the Security Council of the United Nations Act authorises the incorporation of such resolutions into national law by proclamation in the *Government Gazette*.⁴³

Non-binding resolutions, such as those adopted by the General Assembly or by the organs of other international organizations, do not have direct legal effect in the national legal system and must be transformed into national law by means of a legislative measure.⁴⁴

30.3 International law as an aid to interpreting a provision in the bill of rights

In recognition of the important influence that international human rights law has had on the drafting of our Bill of Rights, FC s 39(1)(b) makes it mandatory for our courts to *consider* international law when interpreting the Bill of Rights.

Although evidence of real *consideration* and application of international law is scant,⁴⁵ there has been significant *reference* to international human rights jurisprudence in a number of the judgments of the Constitutional Court.⁴⁶ In *S v Makwanyane*, Chaskalson P set out the approach that ought to be employed by a court when considering how to use international law in interpreting the meaning of a provision in the Bill of Rights:

43 Act 172 of 1993

44 See *Welkom Municipality v Masureik and Herman T/A Lotus Corporation & Another* 1997 (3) SA 363 (SCA), 371-372.

45 See M Olivier 'South Africa and International Human Rights Agreements, Policy and Practice' (2003) 2 *Journal of SA Law* 293.

46 Many of the initial judgments making reference to international law in the interpretation of the Bill of Rights were decided under IC s 35(1). It read: 'In interpreting the provisions of the [interim Bill of Rights] a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in [the bill of rights], and may have regard to comparable foreign case law.' Although there is a slight difference in emphasis, the two subsections are, in essence, identical and the jurisprudence of the Constitutional Court decided under IC s 35(1) remains relevant to the application of FC s 39(1)(b).

In the course of the arguments addressed to us, we were referred to books and articles on the death sentence, and to judgments dealing with challenges made to capital punishment in the courts of other countries and in international tribunals. The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention. They may also have to be considered because of their relevance to section 35(1) of the Constitution . . .

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. . . In the context of section 35(1) public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights and the European Court of Human Rights and in appropriate cases, reports of specialized agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].

. . . In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.⁴⁷

Two important guidelines emerge from these extracts. The first is that the obligation to consider international law when interpreting the Bill of Rights includes both treaty law and customary international law. Such law embraces both binding and non-binding international law. Thus, where there is a relevant treaty to which we are not yet bound, the obligation to consider international law would include such a non-binding treaty. Second, although there is an obligation to consider applicable international law,⁴⁸ our courts are not bound to apply it.⁴⁹ International law is merely a tool of interpretation, and the differing contexts of the applicable international law instrument or principle and our Bill of Rights should be borne in mind by the courts in assessing its influence. In *Coetzee v Government of RSA*, the Court held that what IC s 36 and FC s 39 require is not a rigid application of 'formulae' but rather that due regard be paid to the principles that can be extracted from international experience.⁵⁰

47 *S v Makwanyane* 1995(3) SA 391 (CC), 1995 (6) BCLR 665 (CC) ('*Makwanyane*') at paras 34, 35 and 39.

48 IC s 35(1) only required consideration of international law 'where applicable', whereas the obligation under FC s 39(1)(b) is not similarly qualified. However, in our view, it seems clear that a court is only obliged to consider 'applicable' international law.

49 See *S v Williams* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at paras 21 and 23 (Court held that 'valuable insights' may be gained from international law, and that FC s 35(1) required the Court to 'have regard' to 'international consensus.' Courts are 'not bound to follow it, but neither can they ignore it.')

50 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) at para 57.

While *Makwanyane* clarified the respective positions of both binding and non-binding international law, the Court's understanding of what should qualify as non-binding international law is less certain. One finds for instance no reference to non-binding standards, also known as 'soft law', and no explanation as to whether multilateral treaties not ratified by South Africa would qualify as

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non-binding international law. The Constitutional Court offered some clarification of its position in *Grootboom*.⁵¹ In considering the use of international law to advance the Court's gloss on the right to housing in FC s 26, Yacoob J wrote:

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.⁵²

In a footnote appended to the phrase 'binds South Africa', Yacoob J refers to FC s 231 in its entirety which can only mean that a binding international law norm can be inferred from a treaty ratified by Parliament, but not enacted into domestic law. It seems reasonable to conclude that the above understanding of the relevance of international law aims at a distinction between international law as an aid in constitutional construction and international law as directly applicable law. In terms of this understanding, the role of non-binding international law will be limited to providing guidance as to the correct gloss to place on a given provision. Thus, *Grootboom* invokes a non-binding international standard to give content to a specific constitutional provision.⁵³ The Court took a similarly restrictive view in *Treatment Action Campaign*.⁵⁴

The Court's reluctance to venture beyond the wording of the Final Constitution in interpreting fundamental rights has certain implications for the role of international law as an aid to interpretation. While directly applicable convention law still has a chance of receiving some *consideration*, non-binding norms of whatever kind are likely to be met with indifference. One must also not lose sight of the fact that, in

51 *Government of the Republic of South Africa & Others v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1160 (CC) ('*Grootboom*').

52 *Ibid* at para 26.

53 At issue was whether FC s 26 must be interpreted in a way that ensures compliance with the minimum core obligations to fulfil socio-economic rights articulated in General Comment No 3 (1990) by the Committee on Economic, Social and Cultural Rights. The *Grootboom* Court accepted that what the Committee intended was to set a minimum essential level below which state conduct must not drop with respect to socio-economic rights. It determined that, in international law, this minimum essential level means that regard must be had to the needs of the most vulnerable groups in society. However, the Court was quick to point out the difficulty in determining a minimum core obligation where needs in relation to adequate housing were diverse. *Ibid* at para 31. In addition, the Court rejected the argument that it was obliged to determine the minimum core content of a right, since FC s 26 states that the apposite test is whether the state has taken reasonable steps, within the state's available resources, to achieve the progressive realization of the right to housing. *Ibid* at 33.

54 *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1075 (CC) ('*TAC*'). The *TAC* Court concluded that FC s 27 should not be interpreted to provide for minimum core obligations, and that such benchmarks should be treated as *possibly* relevant only to the question whether the state's measures were reasonable or not. *Ibid* at paras 34-38.

general, South African courts have always favoured case law when applying comparative source material from other jurisdictions and the fact is that

they now *may* do so. That international law *must* be considered is unlikely to change that sentiment. It is also interesting to note that the preference for staying as close as possible to the Final Constitution has been entrenched in the Promotion of Equality and Prevention of Unfair Discrimination Act.⁵⁵ Section 3 of this Act determines that any person interpreting the Act *must* do so with a view towards giving effect to the Final Constitution, and in doing so *may be mindful of* international convention law or customary law and comparable foreign case law. Here international law is put on the same footing as foreign case law, a position that differs from that assigned to international law in terms of FC s 39. Against the background of these developments there is much to be said for the comment that 'the distinction between foreign and international law has not been fully realized [by the South African courts]; that reference has often been passing, cursory and largely 'ceremonial'; and that the number and nature of international sources used, has, by and large, been uncreative to say the least.⁵⁶

30.4 State conduct and obligations

(a) *Jus ad bellum and jus in bello*

The right to use armed force (*jus ad bellum*) is now constitutionally regulated. The primary function of the defence force is 'to defend and protect the Republic, its territorial integrity and its people in accordance with the constitution and the principles of international law regulating the use of force.'⁵⁷ The primary function referred to here is the defence of the Republic against external military aggression. The use of the military for internal policing is limited to exceptional circumstances.⁵⁸ The reference to 'international law regulating the use of armed force' outlaws the use of the defence force for a war of aggression and limits the deployment of the force to instances involving action to restore or to maintain international peace and security,⁵⁹ enforcement action under a regional arrangement,⁶⁰ and individual or collective self-defence action.⁶¹ The South African Defence Review, undertaken in

55 Act 4 of 2000.

56 N Botha 'The Role of International Law in the Development of South African Common Law' (2001) 26 *SA Yearbook of Int Law* 253, 255.

57 FC s 200(2).

58 *White Paper on National Defence for the Republic of South Africa: Defence in a Democracy* (1996), available at <http://www.info.gov.za/whitepapers/1996/defencwp.htm> (accessed on 1 October 2005) ('*White Paper*') 7.

59 UN Charter Article 42.

60 UN Charter Article 53.

61 See also *White Paper* (supra) at 8.

1998 to elaborate upon the defence force's policy framework contained in the 1996 White Paper on National Defence, makes it clear that the 'government does not currently, and will not in the future, have aggressive intentions towards any state.'⁶² It regards the use or threat of military force as a measure of last resort in the face of aggression 'when non-violent forms of conflict resolution have failed.'⁶³

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The deployment of the defence force for purposes commensurate with international law on the use of force must be understood in terms of the roles assigned to the executive and the legislature by the Final Constitution.⁶⁴ Only the President, as head of the national executive, may authorize the deployment of the defence force. This function must be exercised together with other members of the cabinet.⁶⁵ The purposes for which deployment is authorized are limited to co-operation with the police force, defence of the Republic and fulfillment of an international obligation.⁶⁶ If deployment takes place for any of these purposes, Parliament must be promptly informed, and in appropriate detail of: (1) the reason for the deployment; (2) the place where the defence force will be deployed; (3) the number of people involved in the operation: and (4) the period for which the force will be deployed.⁶⁷ Although it is not spelled out in the Final Constitution, once informed about the particulars of the operation, Parliament could either endorse or veto the deployment. Such an oversight role is often assigned to the legislature.⁶⁸

It is unclear whether, in the case of deployment in defence of the Republic, a prior declaration of a state of national defence is a pre-condition for deployment. The Final Constitution authorizes the President to declare a state of national defence in a provision that is textually and structurally unrelated to the provision that determines when the defence force can be deployed.⁶⁹ However, the word 'may' in this context indicates authority rather than possibility. Once a declaration has been made, Parliament must be informed about the reasons for the declaration, the place where the defence force will be deployed and the number of people who will be involved.

62 *South African Defence Review* (1998) Chapter 1, para 35, available at <http://www.dod.mil.za/documents/defencereview/defence/20review1998.pdf> (accessed on 13 September 2005).

63 *Ibid.*

64 According to FC s 198(d), national security is subject to the authority of Parliament and the national executive.

65 FC s 85(2).

66 FC s 201(2).

67 FC s 201(3).

68 For comparative developments, see LF Damrosch 'The Interface of National Constitutional Systems with International Law and Institutions on Using Military Forces: Changing Trends in Executive and Legislative Powers' in C Ku & H Jacobson *Democratic Accountability and the Use of Force in International Law* (2003) 39.

69 FC s 203.

Here, the President is not required to state the period for which the deployment will be effected, presumably because the period of deployment will coincide with the time during which the declaration remains in force. A declaration of national defence will lapse unless Parliament approves of it within seven days of the declaration.⁷⁰

One difficult institutional issue in a constitutional democracy is the ability of the courts to pass judgment on matters concerning national security. In *Hamdi*,

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the US Supreme Court rejected the government's assertion that the separation of powers doctrine divested the Court of its power to hold the executive accountable in times of war.⁷¹ It asserted its right and its duty to assess the constitutionality of any limitations placed on *habeas corpus* rights of enemy combatants.

The judicial branch is, however, unlikely to assess the substantive grounds for the actual deployment of the defence force. In *Turp v Chretien*, the applicants applied to a federal court for judicial review of an executive decision to involve Canadian forces in a military intervention in Iraq on the basis that such an intervention was not authorized by the Security Council and would be contrary to international law.⁷² In addition, the applicants moved for interim relief prohibiting the Canadian government from participating in any military intervention in Iraq pending the outcome of the court's ruling. The applicants further argued that a declaration of war, without the approval of Parliament, would be contrary to Canada's democratic commitments and that any executive decision to deploy the armed forces must be supervised by Parliament and be subject to both the Canadian Charter and international law. The motion for interim relief was dismissed on the basis that it was not yet ripe. As to the gravamen of the complaint, the court held that, unless there is a breach of the Canadian Charter, questions of 'high policy' are not reviewable by the courts.⁷³

The conduct of the military during armed conflict is now explicitly regulated by the Final Constitution. It states that the security services 'must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic'.⁷⁴ From this it follows that 'no member of any security service may obey a manifestly illegal order'.⁷⁵ As it stands, 'manifestly illegal order' must be interpreted

70 FC s 203(3).

71 *Hamdi v Rumsfeld* 542 US 507 (2004). See also HA Strydom 'The Case of the Guantanamo Detainees in United States (and Other) Courts' (2004) TSAR 294.

72 111 CRR (2003) 184.

73 In coming to this conclusion the *Turp* court relied on *Black v Canada*. (2001) 54 OR (3rd) 215, (2001) 199 DLR (4th) 228 (CA) ('*Black*'). The *Black* Court held that executive decisions involving the signing of a treaty or a declaration of war concern public policy and public interest considerations that far outweigh the rights of individuals or their legitimate expectations. See also *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 1 All ER 655 (CA).

74 FC s 199(5).

75 FC s 199(6).

as referring to an order that violates the principles in any of the sources mentioned in the previous provision.⁷⁶ A more open-ended reference to 'international humanitarian law' applies to the detention of aliens in consequence of an international armed conflict. In terms of FC s 37(8), which forms part of the Bill of Rights, the state must comply with the 'standards binding on the Republic under international humanitarian law in respect of the detention of such persons.' FC s 37(8) embraces both international customary and treaty law.

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The role of customary international law as a source of international humanitarian law principles must be read in conjunction with the constitutional provision that customary international law is *law in the Republic* unless it is inconsistent with the Final Constitution or an Act of Parliament.⁷⁷ Although this provision ranks customary international law below the Final Constitution and an ordinary Act of Parliament in the case of an inconsistency, inconsistencies will be rare. As far as treaty law is concerned, only treaties to which South Africa has become a party are law. South Africa is party to the Hague Conventions and Regulations (1899 and 1907),⁷⁸ the Geneva Conventions (1949)⁷⁹ and their Additional Protocols (1977).⁸⁰ In addition, South Africa is party to a number of multi-lateral treaties limiting the use of weapons designed to cause unnecessary suffering.⁸¹

Although the Final Constitution only refers to humanitarian law treaties to which South Africa has become a party, relevant and supplementary principles present in other sources cannot be left out of the equation. Though not coextensive, human rights law and humanitarian law do overlap.⁸² Thus, where the courts are called upon to apply and interpret the Bill of Rights as part of a humanitarian law issue, binding as well as non-binding international law will become part of the reference material.⁸³ FC s 233 obliges courts to follow international humanitarian law in instances in which a legislative measure is open to multiple interpretations: the courts must choose an

76 According to Article 33(2) of the Rome Statute of the International Criminal Court, an order to commit genocide or a crime against humanity is a manifestly illegal order.

77 FC s 232.

78 The following conventions were ratified on 29 July 1899: Convention (II) with Respect to the Laws and Customs of War on Land and Regulations concerning the Laws and Customs of War on Land; Declaration (IV, 2) concerning Asphyxiating Gases; Declaration (IV, 3) concerning Expanding Bullets. Ratified on 18 October 1907 were the following: Convention (III) relative to the Opening of Hostilities; Convention (IV) Respecting the Laws and Customs of War on Land and its Regulations Concerning the Laws and Customs of War on Land; Convention (VII) relating to the Conversion of Merchant Ships into War Ships; Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines; Convention (IX) concerning Bombardment by Naval Forces in Time of War; Convention (XI) relative to certain Restrictions with regard to the Exercise of the Rights of Capture in Naval War.

79 Ratified by South Africa on 31 March 1952.

80 Ratified by South Africa on 21 November 1995.

81 For such a list, see J Dugard *International Law: A South African Perspective* (2nd Edition, 2000) 432, 433.

82 See, eg, T Meron 'The Humanization of the Law of War' (2003) 24 *Recueil des Cours* 301.

interpretation of a legislative measure that is consistent with international law over an alternative interpretation that is inconsistent with international law.⁸⁴

The Geneva Conventions place the domestic effect of these multi-lateral treaties in doubt.⁸⁵ While the lack of an enactment in terms of FC s 231(4) could pose a problem for the domestic prosecution of individuals for the commission of war crimes, that problem is largely obviated by the domestic implementation of the Rome Statute of the International Criminal Court⁸⁶ through the Implementation

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of the Rome Statute of the International Criminal Court Act.⁸⁷ This Act gives the South African courts jurisdiction to adjudicate cases involving the Statute's core crimes in accordance with the principle of complementarity in article 17 of the Rome Statute. It directs the courts to consider and to apply, in addition to the Final Constitution and the domestic law of South Africa, conventional international law, customary international law and comparable foreign law.⁸⁸

(b) Diplomatic immunity

Diplomatic immunity is regulated by the Diplomatic Immunities and Privileges Act.⁸⁹ The Act incorporates certain important provisions of the Vienna Convention on Consular Relations (1963) and the Vienna Convention on Diplomatic Relations (1961).⁹⁰ In case of an ambiguity between the statutory and convention law on diplomatic immunities and privileges, the courts must prefer any reasonable interpretation of the statutory law that is consistent with international law.⁹¹ In addition to statutory and convention law, the rules of customary international law will be applicable unless such rules are inconsistent with the Final Constitution or an Act of parliament.⁹²

83 See FC s 39(1)(b); *Makwanyane* (supra) at 413-4.

84 FC s 233.

85 See Dugard (supra) at 439.

86 The Rome Statute was ratified by South Africa on 27 November 2000.

87 Act 27 of 2002 ('Implementation Act').

88 Implementation Act, s 2.

89 Act 37 of 2001 ('DIPA').

90 DIPA, s 2(1). It also incorporates the Convention on the Privileges and Immunities of the United Nations (1946) and the Convention on the Privileges and Immunities of the Specialized Agencies (1947). See also FC s 231(4).

91 FC s 233.

92 FC s 232.

Apart from convention rules and customary international law, the privileges and immunities in question here can also be extended to foreign dignitaries by agreement entered into with a foreign state, government or organization⁹³ and can even be conferred on the recipient by executive notice in the Government Gazette. Agreements of this nature must comply with FC s 231. That entails both parliamentary approval and the enactment of legislation incorporating the agreement into domestic law.⁹⁴

(c) State immunity

Jurisdictional immunity, which is granted to a foreign sovereign, forms part of the general principles of international law. In the words of Marshall CJ in *The Schooner Exchange v McFaddon*

One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign

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territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. This perfect equality and absolute independence of sovereigns, and the common interest compelling them to mutual intercourse, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.⁹⁵

Since the 1970's a number of states have started moving away from the absolute nature of this rule by adopting a restrictive approach to jurisdictional immunity.⁹⁶ Such immunity will only apply to the official acts (*acta jure imperii*) of a foreign state while rendering commercial transactions (*acta jure gestionis*) to which the foreign state is a party subject to domestic law.⁹⁷ South Africa endorsed this position in the Foreign States Immunities Act.⁹⁸ Consequently, while foreign states enjoy immunity

93 DIPA, ss 4(1)(a) and (b) and 4(2)(a) and (b).

94 FC s 231(2) and (4).

95 (1812) 7 Cranch 116.

96 The restrictive theory of state immunity has been endorsed in the first multi-lateral instrument on the issue of jurisdictional immunity. See *United Nations Convention on Jurisdictional Immunities of States and Their Property*, A/Res/59/38 (16 December 2004), reprinted in 44 ILM 803 (2005). Exceptions to the immunity of a state and its Property include claims arising from: (1) commercial transactions; (2) employment contracts; (3) personal injury and damage to property; (4) ownership, possession and use of property; (5) intellectual and industrial policy; (6) state-owned or state-operated ships used for purposes other than governmental non-commercial purposes; (7) arbitration proceedings; and (8) situations involving consent to jurisdiction. Ibid at articles 7-18.

97 *I Congreso del Partido* [1983] 1 AC 244 (HL); *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (T).

98 Act 87 of 1981 ('FSIA').

from the jurisdiction of the courts of the Republic,⁹⁹ immunity will not apply to commercial transactions¹⁰⁰ entered into by the foreign state¹⁰¹ or to a contractual obligation incurred by a foreign state if the contract falls to be performed wholly or partly in the Republic.¹⁰²

The erosion of the absolute doctrine of state immunity by excluding commercial transactions from its operation is only one phase in adapting the doctrine to changing circumstances. The doctrine is likely to be further eroded by two recent developments. The first is the entrenchment of the effective remedy provision in international human rights instruments. The second is the conflict between immunity and the institution of criminal and civil proceedings against immunity-bearing persons accused of gross human rights violations.

Both international and regional human rights instruments contain express provisions relating to the right of persons to an 'effective remedy' for acts violating human rights.¹⁰³

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References to a right to some form of restitution is also not uncommon.¹⁰⁴ The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power contains, for example, provisions relating to questions of restitution and mentions 'prompt redress' for harm done, 'fair restitution to victims, their families or dependants for harm or loss suffered', 'reimbursement of expenses incurred as a result of victimization', and the obligation of states to provide 'financial compensation' when compensation is not fully available from the offender.¹⁰⁵ In a more recent declaration on the obligations of individuals and organs of civil society

99 FSIA s 2(1).

100 FSIA, s 4(3)(For a definition of 'commercial transaction'.)

101 FSIA, s 4(1)(a).

102 FSIA, s 4(1)(b).

103 Article 8 of the Universal Declaration of Human Rights links the effective remedy requirement to the remedies of national tribunals; article 2(3)(a) of the International Covenant on Civil and Political Rights places an obligation on states parties to ensure that a person whose rights have been violated 'shall have an effective remedy'; article 6 of the Convention on the Elimination of All Forms of Racial Discrimination obliges state parties to assure to everyone 'effective protection and remedies'; article 25 of the Inter-American Convention on Human Rights proclaims the right of every person to simple and prompt recourse, 'or any other effective recourse' for protection against acts that violate fundamental rights; and article 13 of the European Convention on Human Rights states that everyone whose rights and freedoms are violated 'shall have an effective remedy before a national authority.'

104 Article 9(5) of the International Covenant on Civil and Political Rights speaks of an 'enforceable right to compensation' in the case of unlawful arrest or detention; article 14 of the Convention Against Torture states that each state party must ensure that the victim of an act of torture 'obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible'; article 6 of the Convention on the Elimination of All Forms of Racial Discrimination provides for a right to seek 'just and adequate reparation or satisfaction for any damage suffered'; article 63(1) of the Inter-American Convention on Human Rights entitles the courts to rule that the consequences of a breach 'be remedied and that fair compensation be paid to the injured party.'

to protect human rights, the General Assembly has once again drawn attention to the need for effective remedies by stating that:

In the exercise of human rights and fundamental freedoms. . . everyone has the right. . . to benefit from an effective remedy and to be protected in the event of the violation of those rights. To this end everyone . . . has the right . . . to complain to and have that complaint reviewed in a public hearing before . . . a competent judicial or other authority . . . and to obtain from such authority a decision . . . providing redress, including any compensation due, . . . as well as enforcement of the eventual decision and award.¹⁰⁶

In *Velásques v Honduras*, the Inter-American Court of Human Rights offers a clear statement regarding the victims of human rights abuses and the provision of reparation of damages resulting from violations committed by state actors.¹⁰⁷ Reaffirming this state obligation in *Barrios Altos*, the Inter-American court ruled that:

all amnesty provisions, provisions of prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial summary or arbitrary execution and forced disappearance.¹⁰⁸

The Human Rights Committee, established in terms of article 28 of the International Covenant on Civil and Political Rights (ICCPR), has also addressed this issue and concluded as follows in its General Comment 20:

The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of states to investigate such acts;

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to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.¹⁰⁹

It stands to reason that an immunity arrangement, whether under the diplomatic or state immunity doctrine, creates a procedural bar to a legal remedy. The Rome Statute of the International Criminal Court limits the reach of such arrangements in article 27. Article 27 states that 'immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'¹¹⁰ The enactment of this rule in South African domestic law further suspends immunity as a defence for past heads of state or government or other government officials or

105 GA resolution 40/34 of 29 November 1985.

106 GA resolution 53/144 (1998) — *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms*.

107 28 *ILM* (1989) 294.

108 41 *ILM* (2002) 93 at para 41.

109 General Comment 20 of 1992 reprinted in J Steiner & P Alston *International Human Rights in Context* (2000) 531, 532.

representatives regardless of whether a contrary rule exists by virtue of any other law, including customary and conventional international law.¹¹¹ Since the South African courts now have jurisdiction over the crimes listed in the Rome Statute, the courts' approach to immunity should be altered accordingly.¹¹²

As far as civil proceedings against violators are concerned, immunity is still a bar to claims against state officials.¹¹³ Although this approach was recently reinforced in decisions handed down by the European Court of Human Rights,¹¹⁴ there are definite signs of erosion in this doctrine as well. In *Al-Adsani* the applicant was the victim of torture committed by public officials in Kuwait. When civil proceedings were initiated in a British court against the government of Kuwait, the applicant learned that immunity legislation conferring immunity on foreign governments frustrated his attempts to obtain compensation for the physical and mental harm done to him. His further claim before the Strassbourg court that the immunity rule denied him access to court in violation of article 6(1) of the European Human Rights Convention was turned down on the basis that, despite the *jus cogens* nature of the prohibition on torture, state immunity still applies in respect of civil claims for damages. However, the ECHR Court split nine to

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eight on this issue. For the minority, the distinction between criminal and civil proceedings lacked merit. The only question, they argued, was the difference in status between the prohibition on torture and the immunity rule. Once the *jus cogens* nature of the prohibition on torture was established, reasoned the minority, a state could no longer invoke hierarchically lower rules such as immunity to avoid the consequences of a violation of the norm.¹¹⁵

Although not dealing with a *jus cogens* matter, the minority judgment in *McElhinney v Ireland* further illustrates this shift in sentiment.¹¹⁶ The applicant, an Irish police officer, was involved in a rather bizarre incident at a British checkpoint

110 28 *ILM* (1989) 294. See also Article 7(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted on the 25 May 1993 by Security Council resolution 827); Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda (adopted on the 8 November 1994 by Security Council resolution 955); Article 6(2) of the Statute of the Special Court for Sierra Leone (established pursuant to Security Council resolution 1315 of 14 August 2000).

111 The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ('Implementation Act'), s 4(2).

112 Implementation Act ss 3(d) and 4(3).

113 See, eg, *R v Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte* (No 3) [1999] 2 All ER 97 (HL) 157 (Lord Hutton) 179 (Lord Millet) 182 (Lord Phillips). See also J Dugard 'Immunity, Human Rights and International Crimes' (2005) *TSAR* 482, 485; H Strydom & SD Bachmann 'Civil Liability for Gross Human Rights Violations' (2005) *TSAR* 448.

114 *Al-Adsani v United Kingdom* (2002) 34 EHRR 273 ('*Al-Adsani*'); *Fogarty v United Kingdom* (2002) 34 EHRR 302; *McElhinney v Ireland* (2002) 34 EHRR 322 ('*McElhinney*').

115 *Al-Adsani* (supra) at 297.

116 *McElhinney* (supra) at 322.

that resulted in the applicant driving two miles into the Republic of Ireland with a British soldier clinging to his vehicle. The British soldier eventually discharged his weapon at the applicant's car and at the applicant. The applicant suffered from post-traumatic stress disorder as a result of the incident and sued the British government in the Irish courts, only to find himself barred by the principle of state immunity. The *McElhinney* Court concluded that:

there appears to be a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum state, but that this practice is by no means universal. Further, it appears from the materials referred to above that the trend may primarily refer to 'insurable' personal injury, that is incidents arising out of ordinary road traffic accidents, rather than matters relating to the core act of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security.¹¹⁷

The dissent found a clear violation of article 6(1) of the ECHR and grounded its finding on the principle that state immunity had long ceased to be a blanket rule exempting states from the jurisdiction of courts of law. This evolution, the minority argued, is reflected in exceptions to absolute immunity recognised by national legislatures and courts, in the codification of international law on state immunity and in international treaty law. The convergence of these developments was, according to the minority, 'sufficiently powerful to suggest, at any rate, that at present there is no international duty, on the part of States, to grant immunity to other States in matters of torts caused by the latter's agents.'¹¹⁸

As the law on immunity currently stands, immunity could still be granted in the case of civil proceedings regardless of the unlawful character of the conduct. Lord Millet, in the English House of Lords decision in *Pinochet*, wrote:

The international community had created an offence for which immunity *ratione materiae* could not possibly be available. International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose.

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In my opinion, acts which attract state immunity in civil proceedings because they are characterised as acts of sovereign power may, for the very same reason, attract individual criminal liability. The respondents relied on a number of cases which show that acts committed in the exercise of sovereign power do not engage the civil liability of the state even if they are contrary to international law. I do not find those decisions determinative of the present issue or even relevant. In England and the United States they depend on the terms of domestic legislation; though I do not doubt that they correctly represent the position in international law. I see nothing illogical or contrary to public policy in denying the victims of state sponsored torture the right to sue the offending state in a foreign court, while at the same time permitting (and indeed requiring) states to convict and punish the individuals responsible if the offending state declines to take action.¹¹⁹

117 Ibid at 335.

118 Ibid at 340.

119 *R v Bow Street Metropolitan Stipendiary Magistrate, ex Parte Pinochet Ugarte No 3* 1999 2 All ER 97 (HL) 179f-g.

Despite the clear distinction made between civil and criminal proceedings, the International Law Commission reached the conclusion that *Pinochet* stands for the proposition that 'State officials should not be entitled to plead immunity for acts of torture committed in their own territories in both civil and criminal actions.' Whether this gloss on the *Pinochet* case is accurate or not, Bianchi is surely correct to point out that *Pinochet* creates a 'manifest inconsistency which ought to be remedied by denying immunity to state and state officials in civil proceedings' because 'human rights atrocities cannot be qualified as sovereign acts' and because the characterisation of certain offences as *jus cogens* 'should have the consequence of trumping a plea of state immunity . . . in civil proceedings as well.'¹²⁰

(d) Diplomatic protection

In *Barcelona Traction Company*, the ICJ held that domestic law may lay upon the state an obligation to protect its citizens abroad and may even confer a right upon the national to demand the performance of such an obligation and further clothe the right with a corresponding sanction.¹²¹ This remedy, also known as diplomatic protection, normally arises in situations where the fundamental rights of a national of a state are under threat in a foreign country and there are no proper remedies in the foreign state upon which the national can rely.

At its forty-eighth session in 1996, the International Law Commission (ILC) identified the topic of diplomatic protection as one that warrants codification and progressive development.¹²² In 2003, the ILC published its Draft Articles on Diplomatic Protection in which the following definition of diplomatic protection was given:

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Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.¹²³

By holding that a state 'has the right to exercise diplomatic protection' the Draft Articles made it clear that there is no legal duty that rests on a state to come to the rescue of its national who faces denial of justice in a foreign country.¹²⁴ Furthermore, the state may not bring an international claim in respect of an injury to its national before the injured person has exhausted all local remedies.¹²⁵ For this purpose, 'local remedies' are defined as 'remedies which are as of right open to the injured person

120 A Bianchi 'Immunity versus Human Rights: *The Pinochet Case*' (1999) 10(2) *European JIL* 237, 264-265.

121 *Belgium v Spain* (1970) ICJ Reports 3.

122 *General Assembly Official Records*, 51st Session, Supplement No 10 (A/51/10) par 249 and Annex II, Addendum 1.

123 *Report of the International Law Commission*, 55th Session (2003), *General Assembly Official Records*, 58th Session, Supplement No 10 (A/58/10) 81, Article 1(1).

124 *Ibid* at Article 2.

125 *Ibid* at Article 8(1).

before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for the injury.¹²⁶ However, in the following instances local remedies need not be exhausted:

- When the local remedies provide no reasonable possibility of effective redress;
- When there is an undue delay in the remedial process attributable to the state;
- When the circumstances of the case make the exhaustion of local remedies unreasonable;
- When the responsible state has waived the requirement that local remedies be exhausted first.¹²⁷

Since diplomatic protection involves intervention by the executive, judicial control over executive action or inaction raises separation of powers concerns. In *Abbasi v Foreign Secretary*, a United Kingdom citizen detained by American forces in Guantanamo Bay petitioned a British court for an order instructing the foreign office to intervene on his behalf because his due process rights were ignored by the United States government.¹²⁸ While acknowledging that nationals of a state may, in certain instances, have a legitimate expectation that their government would act upon a request for assistance, it was also made clear that the remedy in such instances is fairly limited. This is so because the consideration of the request and what will constitute an appropriate response to it are matters only the executive can decide and are therefore not justiciable. Only in an extreme case where, for instance, the executive refuses to consider an application, will it be appropriate for a court to grant an order directing the executive to apply its mind to the matter. The most a court can do is to enquire into the nature and consequences of the action taken and to expect the executive to provide reasons for its decision.¹²⁹

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South African jurisprudence follows the same approach. In *Kaunda v President of the Republic of South Africa*, the Constitutional Court ruled that the currently prevailing view is that diplomatic protection is not recognized by international law as a human right and cannot be enforced as such.¹³⁰ Consequently, 'diplomatic protection remains the prerogative of the State to be exercised at its discretion.'¹³¹ Although the *Kaunda* Court accepted that such matters remain largely within the discretion of the executive, it pointed out that in the case of a material breach of a human right that forms part of customary international law, the courts ought not to simply acquiesce. Two constitutional provisions were cited for the argument that in

126 Ibid at Article 8(2).

127 Ibid at Article 10.

128 *Abbasi v Foreign Secretary* 42 ILM 359 (2003)('Abbasi').

129 Ibid at 381-382.

130 *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC)('Kaunda').

131 Ibid at para 29.

such cases there is a positive obligation on government to act. The first is FC s 7(2). FC s 7(2) places an obligation on government to not only respect and protect, but also to promote and to fulfill the rights in the Bill of Rights. The second is FC s 3. FC s 3 guarantees all South African citizens equal entitlement to the rights, privileges and benefits of citizenship. The *Kaunda* Court interpreted this section to mean that citizens have a right to request that government provide them with diplomatic protection and that there is a corresponding obligation on government to consider the request and to deal with it in a manner commensurate with the Final Constitution. There may even be a duty on government to act on its own initiative.¹³² However, a court cannot tell a government how to respond to the request for diplomatic protection, since the decision 'as to whether, and if so, what protection should be given is an aspect of foreign policy which is essentially the function of the executive.'¹³³ In exercising this function, the executive has broad discretion which must be respected by the courts.¹³⁴ That respect has its limits. Since the exercise of all government power is subject to constitutional review, the courts retain jurisdiction to review instances of bad faith or irrational responses to a request for diplomatic review.¹³⁵

Kaunda was followed by the High Court in *Van Zyl & Others v Government of the Republic of South Africa & Others*.¹³⁶ In this matter a number of companies registered in Lesotho and their South African shareholders unsuccessfully applied for a mandamus instructing the South African government to espouse their claims for compensation against the Lesotho government. The claims arose out of a longstanding legal battle with the Lesotho government over compensation for the

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expropriation and cancellation of certain mining leases granted to the companies by the Lesotho government.¹³⁷ Apart from the fact that the companies were registered in Lesotho and could therefore not claim entitlement to diplomatic protection by the South African government, the High Court also ruled that FC s 3, on which the judgement in *Kaunda* was partly premised, does not apply to legal *personae*. Such persons cannot claim the guarantees citizens of the Republic have in terms of FC s 3.¹³⁸ However, the *Van Zyl* Court also ruled that where a company is a national (i.e. registered in the Republic) and seeks diplomatic protection, the executive is obliged to consider the request and exercise its discretion whether to provide diplomatic

132 Ibid at paras 66, 67, 69, 70.

133 Ibid at paras 73, 77.

134 Ibid at para 77.

135 Ibid at paras 78–80.

136 *Van Zyl & Others v Government of the Republic of South Africa & Others* Case No 20320/2002 ('*Van Zyl*') (Unreported, 20 July 2005, Transvaal Provincial Division).

137 See *Attorney-General of Lesotho & Another v Swissborough Diamond Mines (Pty) Ltd & Others* 1997 (8) BCLR 1122 (CA); *Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa & Others* 1999 (2) SA 279 (T).

138 *Van Zyl* (supra) at para 93.

protection or not. In this instance, the source of the duty to consider the case for the company is grounded in FC ss 41(a)-(c)'s requirement of accountability. While FC ss 40 and 41 are predominantly about the relationship between the national, provincial and local spheres and organs of state, these sections have also been relied upon by private parties in disputes with the state. Whatever the textual basis for its conclusions might have been, the Court rightly noted that executive discretion is constrained by customary international law.¹³⁹

(e) Extradition

The rule that the courts of one country will not sit in judgement of the transactions of another country no longer applies in extradition cases where the standards of justice in the requesting state have implications for the fundamental rights of the person to be extradited.¹⁴⁰ In South Africa, the extradition of a person sought by a country with a poor human rights record may be successfully challenged.¹⁴¹

In *Mohamed v President of the Republic of South Africa* Mohamed, a Tanzanian national indicted in the United States on various charges carrying the death

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penalty, challenged his removal from South Africa to the United States for trial.¹⁴² Mr Mohamed's lawyers contended that his handing over to the US authorities was not a deportation but an extradition in disguise and that, as such, it constituted a clear breach of the Aliens Control Act.¹⁴³ They also sought an order directing the South African government to submit a written request to the US authorities that the death penalty would not be sought, imposed or carried out upon Mohamed's conviction.

On the validity of the deportation, the Constitutional Court pointed out the need to distinguish between extradition and deportation. While extradition involves co-operation between states for the delivery of an alleged criminal for the purpose of trial or sentence in the requesting state, deportation is a unilateral act by a state to get rid of an undesired alien. It was clear that the state's power to deport was

139 Ibid.

140 See *Kuwait Airways Corporation v Iraqi Airways Co* (Nos 4 & 5) [2002] 2 WLR 1353; *Buttes Gas and Oil Co v Hammer* (No 3) [1982] AC 932.

141 In this respect it must also be noted that in terms of the United Nations Model Treaty on Extradition (1990), it is mandatory for the requested state to refuse the extradition of a person if that state has substantial grounds for believing that the extradition has been requested for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality, ethnic origin, political opinions, sex or status. Another ground for a mandatory refusal is when the person to be extradited would be subjected to torture or cruel, inhuman or degrading treatment or would not receive the minimum guarantees in criminal proceedings as contained in article 14 of the International Covenant on Civil and Political Rights. South Africa's obligations in this regard would also arise under the 1990 Commonwealth Scheme relating to the Rendition of Fugitive Offenders whose principles were included in the 1996 amendments to the Extradition Act 67 of 1962 and under the European Convention on Extradition (1957) and Additional Protocols (1975 and 1978 respectively) to which South Africa acceded on 13 May 2003.

142 *Mohamed v President of the Republic of South Africa & Others* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC) ('*Mohamed*'). See also N Botha 'Deportation, Extradition and the Role of the State' (2001) *SAYIL* 227.

143 Act 96 of 1991.

regulated by the Alien Controls Act. Neither this Act, nor the Final Constitution, contains any *prerogative* power to deport or to determine the destination of the deportation. Thus, since the United States was not a destination in terms of the Act, the South African authorities acted unlawfully in deporting Mohamed to the US.¹⁴⁴ In ruling on the death penalty, the *Mohamed* Court held that since the South African authorities were actively involved in the deportation of Mohamed, it was incumbent upon them to secure a prior undertaking from the US government that the death sentence would not be imposed. Failure to have done so constituted a violation of Mohamed's constitutional rights under South African constitutional law. Although the unlawful deportation was irreversible and the US proceedings against Mohamed were already at an advanced stage, the *Mohamed* Court nevertheless found it appropriate to order the South African authorities to do whatever might still be possible to ameliorate the deleterious consequences of the State's unconstitutional acts.¹⁴⁵

In *Harksen v President of the Republic of South Africa*, the constitutionality of section 3(2) of the Extradition Act¹⁴⁶ was challenged on the grounds that the President's ad hoc exercise of powers of extradition — in the absence of an extradition treaty — did not comply with FC s 231's requirement that international agreements on such subjects must be enforced.¹⁴⁷ The *Harksen* Court held that FC s 231 did not govern the implementation or the interpretation of a piece of legislation that neither initiates nor concludes an agreement on extradition.¹⁴⁸

144 *Mohamed* (supra) at 696–698, 701.

145 *Ibid* at 711.

146 Act 67 of 1962.

147 *Harksen v President of the Republic of South Africa* 2000 (2) SA 825 (CC), 2000 (5) BCLR 478 (CC) ('*Harksen*').

148 *Ibid* at 484, 485.