

## Kaleidoscope

### International Law and the South African Constitution

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For over forty years, from 1948 to 1990, South Africa was in conflict with both the international community and international law. Apartheid, premised on race discrimination and the denial of human rights, was contrary both to the law of the UN Charter and to the norms of human rights, non-discrimination and self-determination generated by the post-World War II order. Although South Africa's foreign policy during this period was highly legalistic, it was the old law of state sovereignty and absolute respect for domestic jurisdiction that guided and shaped it. So it was that South Africa became a pariah state within the international community; a delinquent state in the context of the 'new' international law of human rights.

Domestically, international law fared little better. Although treaties were incorporated into municipal law, in accordance with the common law dualist approach, and customary international law was treated as part of municipal law, unless inconsistent with legislation, the hostility of successive apartheid governments to the United Nations and international human rights conventions undoubtedly influenced the attitudes of legislators, judges and lawyers. International law received no constitutional recognition and was largely ignored by the courts and lawyers. While international law was applied by the courts in politically neutral matters, such as sovereign immunity and diplomatic privileges, it was generally viewed as an alien and hostile legal order.<sup>1</sup>

All this has changed. South Africa is now a democratic state, with a democratically elected Parliament. Human rights and racial equality are constitutionally protected, and there is a new attitude towards international law. Whereas international law was previously seen as a threat to the state, it is now viewed as one of the pillars of the new democracy. In this article I shall describe the place of international law in the post-apartheid South African legal order.

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<sup>1</sup> For a general picture of the place of international law in South Africa before 1994, see J. Dugard, *International Law. A South African Perspective* (1994).

## I. The 1993 and 1996 Constitutions

In 1993 twenty-six political groups assembled at Kempton Park, near Johannesburg, to draft a constitution to bring an end to the apartheid legal order. As these groups were in most instances unelected, and simply reflected the political realities of the time, it was considered inappropriate to confer on them the power to draft a final constitution. Instead, the constitution which they fashioned in negotiations lasting some six months was to serve as an 'interim' constitution, pending the drafting of a constitution by a democratically elected Constitutional Assembly. As the Interim Constitution represented a political compromise between rival groups, notably the National Party (which had ruled South Africa since 1948) and the African National Congress (outlawed from 1960 to 1990), it was agreed at Kempton Park that the 'final' constitution would comply with thirty-four constitutional principles contained in a schedule to the Interim Constitution and that the Constitutional Court created by the 1993 Interim Constitution would be empowered to pronounce on the issue of compliance. This Interim Constitution, approved at Kempton Park, was duly endorsed by the last Apartheid Parliament and became the Constitution of the Republic of South Africa, Act 200 of 1993.

On 27 April 1994 the Interim Constitution came into effect to govern South Africa's first democratic elections.<sup>2</sup> The Parliament thus elected served the dual role of legislature and Constitutional Assembly. From January 1995 to May 1996 the Constitutional Assembly met regularly to draft the 'final' constitution in accordance with the thirty-four constitutional principles agreed upon at Kempton Park. A draft constitution was approved by the required two-thirds majority vote in the Constitutional Assembly on 8 May and forwarded to the Constitutional Court for certification. The Constitutional Court, however, found fault with a number of provisions in the draft constitution,<sup>3</sup> on the grounds that they failed to comply with the constitutional principles contained in the Interim Constitution, and referred it back to the Constitutional Assembly. After these faults had been remedied by the Constitutional Assembly, the Constitutional Court gave its final approval to the Constitution on 4 December 1996.<sup>4</sup> The new Constitution – the Constitution of the Republic of South Africa, Act 108 of 1996 – was signed into law by President Mandela on 10 December 1996. Appropriately, this ceremony took place on Human Rights Day at Sharpeville, the scene of the massacre of African demonstrators against the laws of apartheid in 1960.

The 1993 and 1996 constitutions are substantially similar. Both provide for a bicameral Parliament, with a lower house elected by voters on a national common

2 For an account of the adoption of the Interim Constitution, see van Wyk, 'Introduction to the South African Constitution', in D. van Wyk *et al.*, *Rights and Constitutionalism* (1995) 131.

3 *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) South African Law Reports (hereinafter SA) 744 (CC).

4 Case CCT 37/96, unreported.

roll, in accordance with proportional representation. The President is elected by the lower house, the National Assembly. Although South Africa is divided into nine provinces with important legislative and executive powers, the Republic of South Africa is not a federation. A Bill of Rights guarantees internationally recognized human rights and an eleven-person Constitutional Court is charged with the task of protecting the Constitution by means of judicial review.

Previous South African constitutions made no mention of the place of international law in the South African legal order. Both the 1993 and the 1996 constitutions remedy this omission. In this article I shall focus attention principally upon the international law provisions of the 1996 Constitution. Where the two constitutions differ, I shall draw attention to the divergence.

## II. Customary International Law

The South African common law – a blend of Roman-Dutch and English common law – adopts the monist approach to customary international law. Customary international law is part of South African law and courts are required to ‘ascertain and administer’ rules of customary international law without the need for proof of law – as occurs in the case of foreign law.<sup>5</sup> As a species of common law, customary international law is, however, subordinate to all forms of legislation.<sup>6</sup> The relationship between customary international law and municipal law described above was affirmed by South African courts on many occasions before 1993.<sup>7</sup>

The common law is given constitutional endorsement by section 232 of the 1996 Constitution which, in language substantially similar to the Interim Constitution, provides that:

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

There can be little doubt that the ‘constitutionalization’ of this rule gives it additional weight. Moreover, customary international law is no longer subject to subordinate legislation.<sup>8</sup> Only a provision of the Constitution or an Act of Parliament that is clearly inconsistent with customary international law will trump it. This is emphasized by section 233 of the 1996 Constitution, which provides that:

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.

5 *South Atlantic Islands Development Corporation Ltd v. Buchan* 1971 (1) SA 234 (C), at 238.

6 *Inter-Science Research and Development Services (Pty.) Ltd v. Republica Popular de Mocambique* 1980 (2) SA 111 (T), at 124; *Kaffraria Property Co (Pty) Ltd v. Government of the Republic of Zambia* 1980 (2) SA 709 (E), at 712, 715.

7 Dugard, *supra* note 1, at 41-51.

8 *Supra* note 6.

The recognition of customary international law in section 232 also has implications for the debate over the conflict between *stare decisis* and new rules of customary international law. In *Trendtex Trading Corporation v. Central Bank of Nigeria*<sup>9</sup> Lord Denning M.R.<sup>10</sup> and Shaw L.J.<sup>11</sup> held that the doctrine of precedent could not be invoked as an obstacle to the application of a changed rule of international law, *in casu* the restrictive doctrine of sovereign immunity instead of the absolute doctrine. Although there is judicial support for this view in South Africa,<sup>12</sup> its correctness is not fully accepted.<sup>13</sup> Section 232, however, gives support to the rule enunciated in *Trendtex* as it is 'customary international law' *per se*, and not customary international law as previously applied by South African courts, that is 'law in the Republic'.

Section 231 (4) of the Interim Constitution provided that 'the rules of customary international law *binding on the Republic* shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic' (emphasis added). The omission of the word 'binding' from the 1996 Constitution has led one commentator to argue that all rules of customary international law, including those to which South Africa may have 'persistently objected', are part of municipal law.<sup>14</sup> This, so it is argued, accords with a 1995 dictum of the Constitutional Court that the reference to international law in the Bill of Rights (discussed below) 'includes non-binding law as well'.<sup>15</sup>

The better view is that the word 'binding' was dropped from the 1996 Constitution on the grounds that it was considered to be unnecessary and, indeed, tautologous.<sup>16</sup> As far as South Africa is concerned, a practice to which it has persistently objected is simply not a customary rule. On the other hand, there can be little doubt that the omission of the word 'binding' will facilitate the proof of customary international law. Early South African decisions hold that only those rules of customary international law that have been *universally* recognized by states form part of South African law,<sup>17</sup> while later decisions hold that *general* acceptance is sufficient.<sup>18</sup> The omission of the word 'binding', with its undertones of consent, paves the way for a

9 [1977] QB 529 (CA).

10 *Ibid.*, 554.

11 *Ibid.*, 579.

12 *Kaffraria Property Co (Pty) Ltd v. Government of the Republic of Zambia* 1980 (2) SA 709 (E), at 715.

13 This matter was deliberately left open by Margo J. in *Inter-Science Research and Development Services (Pty) Ltd v. Republica Popular de Mocambique* 1980 (2) SA 111 (T), at 125.

14 Keightley, 'Public International Law and the Final Constitution', 12 *South African Journal on Human Rights* (1996) 405, at 408.

15 *S v. Makwanyane* 1995 (3) SA 391 (CC), at 413.

16 Botha, 'International Law and the South African Interim Constitution', 9 *SA Public Law* (1994) 245, at 255.

17 *Du Toit v. Kruger* 22 SC (1905) 234, at 238. *Nduli v. Minister of Justice* 1978 (1) SA 893 (A), at 906.

18 *Inter-Science Research and Development Services (Pty) Ltd v. Republic Popular de Mocambique* 1980 (2) SA 111 (T), at 125; *S v. Petane* 1988 (3) SA 51 (C), at 56-7.

more generous approach to the question whether a customary rule has sufficient *usus* and *opinio juris* to support it.

### III. Treaties

Before 1994 South Africa followed the English dualist approach to the incorporation of treaties.<sup>19</sup> Treaties were negotiated, signed, ratified and acceded to by the executive. Only those treaties incorporated by Act of Parliament became part of South African law. Thus, treaty-making fell exclusively within the competence of the executive.

The 1993 Kempton Park negotiators were strongly motivated by considerations of transparency and accountability – which had played little role in the Apartheid State. Thus, influenced by the Namibian Constitution,<sup>20</sup> they departed radically from the pre-1993 position in respect of the treaty-making power and incorporation of treaties. While the executive retained its power to negotiate and sign treaties under the Interim Constitution,<sup>21</sup> the National Assembly and Senate were required to agree to the ratification of and accession to treaties.<sup>22</sup> Moreover treaties ratified by resolutions of the two houses of Parliament became part of municipal law, 'provided Parliament expressly so provides'.<sup>23</sup>

The clear purpose of the Interim Constitution was to facilitate the incorporation of treaties into municipal law. The drafters of the Interim Constitution, however, failed to take account of the bureaucratic mind. Government departments required to scrutinize treaties before they were submitted to Parliament refused to present treaties to Parliament for ratification until they were completely satisfied that there would be no conflict between the provisions of the treaty and domestic law. The result was that few treaties were presented to Parliament expeditiously. The parliamentary procedures for dealing with treaties have further delayed ratification.<sup>24</sup> Moreover, few of the treaties ratified by Parliament have been incorporated into municipal law.<sup>25</sup> The slowness of the process is well illustrated by the history of the principal human rights conventions. Although South Africa signed the International

19 See Dugard *supra* note 1, at 51-57.

20 See Articles 32(3)(e), 63(2)(e) and 144. The text of this Constitution, together with a discussion of its international law provisions, appears in 15 *South African Yearbook of International Law* (1989-90). Two of the legal advisers to the 1990 Namibian Constituent Assembly - Arthur Chaskalson and Marinus Wiechers - also played a leading role in the drafting of the South African Interim Constitution.

21 Section 82(1)(I) of Act 200 of 1993 empowered 'the President' to carry out this task, but in practice it has been delegated to Ministers of State, particularly the Minister of Foreign Affairs.

22 Section 231(2) of Act 200 of 1993.

23 Section 231(3) of Act 200 of 1993.

24 The post-apartheid Parliament relies heavily on committees. Thus a treaty may have to be approved by several parliamentary committees before it is presented for ratification. See 1995 *Annual Survey of South African Law*, 76-79.

25 Botha, 'Incorporation of Treaties under the Interim Constitution: A Pattern Emerges', 20 *South African Yearbook of International Law* (1995) 196.

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Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1994, they have yet to be ratified by Parliament. The Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women were signed in 1993 and ratified in June 1995 and September 1995 respectively, but have not been incorporated into domestic law. The hopes of the drafters of the 1993 Interim Constitution have not therefore been realized: the ratification of treaties is more cumbersome than was the case previously and few treaties have been incorporated into municipal law.

In these circumstances the drafters of the 1996 Constitution elected to return to the pre-1994 position relating to the incorporation of treaties, without abandoning the need for parliamentary ratification of treaties. Section 231 provides:

- (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,<sup>26</sup> 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 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.

Although this provision ensures that Parliament will continue to play an active role in treaty-making, it is unfortunate that the realities of the bureaucratic process compelled the Constitutional Assembly to require an Act of Parliament, in addition to the resolution of ratification, for the incorporation of treaties into municipal law. It represents an abandonment of the idealism of 1993 that sought 'to bring international law and domestic law in harmony with each other'.<sup>27</sup>

The Interim Constitution suggested that all treaties signed by the executive were to be ratified by Parliament.<sup>28</sup> This took no account of the fact that many treaties are intended to come into operation immediately and that slow parliamentary ratification would undermine the value of such treaties. Consequently, government departments ignored the letter of the Interim Constitution and distinguished between 'formal' treaties that required parliamentary ratification and less formal treaties that did not.<sup>29</sup> The 1996 Constitution recognizes this distinction. While treaties that ex-

26 The upper house under the 1996 Constitution is the National Council of Provinces. It replaces the Senate of the Interim Constitution.

27 Keightley, *supra* note 14, at 412.

28 Section 231(2) of the Interim Constitution provides that 'Parliament shall ... be competent to agree to the ratification of or accession to an international agreement negotiated and signed' by the executive.

29 This interpretation was spelled out in a letter from the Minister of Foreign Affairs to other ministers, titled 'Procedures for the Conclusion of International Agreements', of 13 June 1994.

pressly or by necessary implication require ratification will have to be approved by Parliament after signature, 'technical', 'administrative' or 'executive' agreements and agreements that do not require ratification or accession will come into force upon signature. In practice, this may give rise to disputes about the precise meaning of the terms 'technical', 'administrative' or 'executive' in the context of treaty law. Ultimately, however, it is a question of intention.<sup>30</sup> Where parties intend that an agreement is to come into force immediately without ratification at the international level, it would be ridiculous for the South African Parliament to insist on parliamentary ratification.

The proviso to section 231 (4) is bound to create problems as it introduces the concept of self-executing of treaties into South African law. The provisions of a treaty ratified by Parliament, but not incorporated into municipal law by Act of Parliament, that are 'self-executing' become part of municipal law unless inconsistent with the Constitution or an Act of Parliament. Whether the provisions of a treaty are self-executing or not has troubled the courts of the United States for many years.<sup>31</sup> Now South African courts will be required to develop their own jurisprudence on this subject.

### Succession to Treaties

The transition from apartheid to democracy did not involve any change in the statehood of South Africa but simply a change of government – however dramatic that change. Consequently, as a matter of international law, it was unnecessary to provide for succession to treaties as a new government automatically succeeds to the rights and obligations of its predecessor.<sup>32</sup> Despite this, the Interim Constitution contained a clause providing for succession to treaties 'unless provided otherwise by an Act of Parliament'.<sup>33</sup> This clause, which gave to Parliament the power to terminate treaties unilaterally was strongly criticized by academic writers<sup>34</sup> as being contrary to the procedures for termination prescribed by the 1969 Vienna Convention on the Law of Treaties.<sup>35</sup> The 1996 Constitution remedies this 'lapse' by providing that:

The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.<sup>36</sup>

30 See article 14 of the Vienna Convention on the Law of Treaties which emphasizes the intention of parties in deciding whether a treaty requires ratification or not. This principle was approved by the South African Appeal Court in *S v. Eliasov* 1967 (4) SA 583 (A).

31 See, for example, *Foster v. Neilson* 27 US (2 Pet.) 253 (1929); *Sei Fujii v. California* 242 P 2d 617 (1952), 19 ILR 312 (1952).

32 R.Y. Jennings and A. Watts (eds.), *Oppenheim's International Law* Vol. 1 (9th ed., 1992) 1253.

33 Section 231(1) of Act 200 of 1993.

34 See Botha, *supra* note 16, at 253-4; Dugard, 'International Law and the "Final Constitution"', 11 *South African Journal on Human Rights* (1995) 241, at 245.

35 Articles 54 and 56.

36 Section 231(5).

#### IV. International Human Rights<sup>37</sup>

It was the discriminatory and repressive policies of the National Party, which were firmly entrenched in the legal order,<sup>38</sup> that alienated South Africa from the world for forty years. The 1993 and 1996 Constitutions seek to remedy this by bringing South African law into harmony with international human rights norms.

Both the Interim Constitution and the 1996 Constitution contain a Bill of Rights which guarantees the rights protected by international human rights conventions. Whereas the Interim Constitution is confined largely to civil and political rights, the 1996 Constitution extends its protection to both civil and political and social and economic rights. This is a response to Constitutional Principle Two in the Interim Constitution, which provides that 'everyone shall enjoy all *universally accepted* fundamental rights, freedoms and liberties'.<sup>39</sup> These rights are entrenched in the Constitution<sup>40</sup> and protected by a Constitutional Court with wide powers of judicial review over legislation and administrative action.<sup>41</sup>

Great care is taken to ensure that the Bill of Rights complies with international norms. Although the rights are formulated in simpler language than that found in most human rights conventions, in pursuance of a deliberate policy to make the Constitution accessible to the people, the rights are broadly modelled on their international counterparts. In part this was done in order to facilitate South Africa's accession to international human rights treaties. Moreover, some of the clauses in the 1996 Constitution refer expressly to international law. Section 37(4) provides that any legislation enacted in consequence of a declaration of a state emergency may derogate from the Bill of Rights only to the extent that, *inter alia*, the legislation 'is consistent with the Republic's obligations under international law applicable to states of emergency'. Section 35(3)(1) recognizes 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'.

The clearest evidence of the desire to achieve harmony between South African and international human rights jurisprudence is provided by section 39(1) (previously section 35(1))<sup>42</sup> which declares that:

37 See further on this subject, Dugard, 'The Influence of International Human Rights Law on the South African Constitution', 49 *Current Legal Problems* (1996) 305; Maluwa, 'International Human Rights Norms and the South African Interim Constitution 1993', 19 *South African Yearbook of International Law* (1993/4) 14.

38 For an account of these laws, see J. Dugard, *Human Rights and the South African Legal Order* (1978).

39 Schedule 4 of Act 200 of 1993 (emphasis added).

40 Section 74(2) of Act 108 of 1996 provides that the Bill of Rights may only be amended by a two-thirds majority vote in the lower house (National Assembly) and by at least six of the nine provinces in the upper house (National Council of Provinces).

41 Sections 167, 172 of Act 108 of 1996.

42 Section 35(1) of the Interim Constitution required 'a court of law' only to 'have regard to public international law'.



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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.

This provision, together with section 233, which requires a court when interpreting legislation to 'prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law', ensures that courts will be guided by international norms and the interpretation placed upon these norms by international courts and other institutions. Fears<sup>43</sup> that international human rights law in this context might be narrowly construed to cover only clear rules of customary law and those human rights conventions to which South Africa is a party have been dispelled. In one of its earliest decisions, in a case involving the constitutionality of the death penalty, the President of the Constitutional Court ruled:

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 specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].<sup>44</sup>

Since the establishment of the new constitutional order in 1994 courts have shown a great willingness to be guided by international human rights law. Decisions of the European Commission and Court of Human Rights have provided the greatest assistance, but courts have on occasion also considered the 'views' of the United Nations Human Rights Committee, and United Nations reports on human rights matters. The texts of the principal human rights conventions and the leading international human rights treatises have already become recognized constitutional source materials.

International human rights law has been employed in a wide range of cases, of which the following are probably the most important: *S v. Makwanyane* (constitutionality of the death penalty for murder);<sup>45</sup> *S v. Williams* (constitutionality of corporal punishment);<sup>46</sup> *Coetzee v. Government of the Republic of South Africa*

43 Dugard, 'The Role of International Law in Interpreting the Bill of Rights', 10 *South African Journal on Human Rights* (1994) 208.

44 *S v. Makwanyane* 1995 (3) SA 391 (CC), at 413-14.

45 *Ibid.* European Court of Human Rights cases are cited at 425-6, 430, 499; decisions of the UN Human Rights Committee are cited at 424-5, 430, 493; and international human rights conventions are cited at 414, 501-2, 430, 493.

46 1995 (3) SA 632 (CC). European Court of Human Rights, at 640-1; 643, 645-8; UN Human Rights Committee, at 640; international human rights conventions, at 639.

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(constitutionality of imprisonment for judgment debts);<sup>47</sup> *Ferreira v. Levin N.O.* (rule against self-incrimination and right to a fair trial);<sup>48</sup> *S v. Rens* (right of appeal);<sup>49</sup> *Bernstein v. Bester* (right to privacy and to a fair trial);<sup>50</sup> *Dabelstein v. Hildebrandt* (constitutionality of Anton Piller orders);<sup>51</sup> and *Ex Parte Gauteng v. Provincial Legislature In re Dispute concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* (language and religious rights of minorities).<sup>52</sup>

## V. International Humanitarian Law

South Africa's attitude towards international humanitarian law during the apartheid era was ambivalent.<sup>53</sup> Although a party to the Hague Regulations of 1907 and the four Geneva Conventions on the Laws of War of 1949, South Africa refused to sign the 1977 Additional Protocols<sup>54</sup> relating to the Protection of Victims of International and Non-International Armed Conflicts. The principal reason for this refusal was Protocol I's extension of the application of the Geneva Convention of 1949 to 'armed conflicts in which people are fighting against ... racist regimes in the exercise of the right of self-determination',<sup>55</sup> which the National Party government correctly saw as directed at it. Consequently, members of the military wing of the African National Congress were treated as ordinary criminals and not accorded prisoner-of-war status.<sup>56</sup> To make matters worse, there was strong evidence to support claims that the South African Defence Force failed to comply with its obligations under the Geneva Conventions of 1949. Certainly the Defence Force made little, if any, attempt to educate its members about the constraints on military action contained in the Conventions.

As in the case of human rights, the 1996 Constitution responds positively to past failures by constitutionalizing the principles of international humanitarian law. Chapter 11 on Security Services contains several provisions designed to ensure compliance with international humanitarian law. Section 198 lists as one of its gov-

47 1995 (4) SA 631 (CC). European Court of Human Rights, at 662; international human rights conventions, at 660-1, 663.

48 1996 (1) SA 984 (CC). European Commission and Court of Human Rights, at 1036, 1085; international human rights conventions, at 1020-21, 1035-6, 1085.

49 1996 (1) SA 1218 (CC). European Court of Human Rights, at 12-25.

50 1996 (2) SA 751 (CC). European Court of Human Rights, at 790-2, 805.

51 1996 (3) SA 42 (C). European Court of Human Rights, at 61-66.

52 1996 (3) SA 165 (CC). League of Nations, United Nations Practice, UN Human Rights Committee, international human rights conventions, European Court of Human Rights, at 190-207.

53 See generally, Dugard, *supra* note 1, at 330-337.

54 South Africa became a party to these Additional Protocols in September 1995.

55 Article 1(4).

56 *S v. Petane* 1988 (3) SA 51 (C); Dugard, *supra* note 1, at 336-7; Dugard, 'The Treatment of Rebels in Conflicts of a Disputed Character: The Anglo-Boer War and the "ANC - Boer War" Compared', in A.J.M. Delissen and G.J. Tanya (eds.) *Humanitarian Law of Armed Conflict Challenges Ahead. Essays in Honour of Frits Kalshoven* (1991) 447.

erning principles that '[n]ational security must be pursued in compliance with the law, including international law'. Moreover, '[t]he 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'.<sup>57</sup> The international law rule against the defence of superior orders is recognized in section 199 (6) which declares that 'No member of any security service may obey a manifestly illegal order.' Non-South African citizens detained in consequence of an international armed conflict are to be treated in accordance with 'the standards binding on the Republic under international humanitarian law in respect of the detention of such persons'.<sup>58</sup>

The *jus ad bellum* also receives constitutional recognition. Section 200(2) provides:

The 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.

The President of the Republic is authorized to employ the defence force 'in fulfilment of an international obligation'.<sup>59</sup> This will allow South Africa to participate in international peace-keeping operations, a role that South Africa has been denied since the Korean war.

## VI. Self-Determination

South Africa is a country of ethnic minorities. Inevitably, therefore, the principle of self-determination featured prominently in the negotiations preceding the adoption of both its post-apartheid constitutions. Two groups disenchanted with the African National Congress, the Inkatha Freedom Party (representing slightly over 50 per cent of the Zulu people) and a conservative Afrikaner grouping (representing a small section of the Afrikaner people), have consistently pressed for greater autonomy in the new South Africa. While the Inkatha Freedom Party has advocated autonomy within a federal structure, Afrikaner groups have called for an 'Afrikaner people's State' (*volkstaat*) within the borders of South Africa. Although the demands thus far have been for internal self-determination only, it would be unwise to dismiss the possibility that these demands may be converted into claims for external self-determination – secession – in the future. In this context, section 235 of the 1996 Constitution, which responds to the demands for internal self-determination, may yet prove to be politically dangerous. It reads:

The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right,

57 Section 199(5) of Act 108 of 1996.

58 Section 37(8) of Act 108 of 1996.

59 Section 201(1)(c).

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recognition of the notion of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic *or in any other way*, determined by national legislation (emphasis added).

While the purpose of this provision is to hold out hope to disaffected communities of a greater degree of territorial or community autonomy, it is not impossible that future secessionist groups may seize upon the phrase 'or in any other way' to justify their claim to external self-determination.

## VII. Amnesty

Although the South African Constitution strives to ensure compliance with international human rights and humanitarian law, there is one area in which it is possibly out of line with international law. This is in respect of amnesty.

Today it is argued with growing conviction that customary international law requires a successor regime to prosecute and punish members of the previous regime who had been guilty of egregious human rights violations.<sup>60</sup> The prosecution of officials of the predecessor regime in Rwanda and Ethiopia lend support to this view. In these circumstances it might have been expected that the new South African government, in pursuance of its commitment to international human rights standards, would have taken steps to prosecute *à la* Nuremberg officials of the previous National Party government who had planned and implemented the policy of apartheid and who were party to forced population removals, torture, murder and disappearances. Such action was, however, precluded by political reality. The 1993 Constitution is a compact voluntarily entered into by the old National Party regime and the ANC as a political compromise. It is not a constitution created by the victor after a civil war. Amnesty therefore features prominently in the Interim Constitution. A postscript to the Interim Constitution, generally known as the 'postamble', added after the Constitution had been drafted in multi-party negotiations, as a result of a political 'deal' between the ANC and National Party, declares:

In order to advance ... reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

60 Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale Law Journal* (1991) 2537; Asmal, 'Victims, Survivors, and Citizens - Human Rights, Reparations and Reconciliation', 8 *South African Journal on Human Rights* (1992) 491; M. Cherif Bassiouni, *Crimes Against Humanity in International Law* (1992) 503-508; N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (1995), Chs. 3 and 4.

This 'postamble', which was an integral part of the Interim Constitution,<sup>61</sup> is 'deemed to be part' of the 1996 Constitution for the purpose of the validity of amnesty legislation enacted in pursuance of the Interim Constitution.<sup>62</sup>

Effect is given to the 'postamble' in the Promotion of National Unity and Reconciliation Act of 1995,<sup>63</sup> which creates a Truth and Reconciliation Commission to investigate gross human rights violations during the apartheid years, to grant amnesty to those who make full disclosures of acts committed with a political objective during this period, and to consider reparations for victims of apartheid. The seventeen-member Commission presided over by Desmond Tutu, Nobel Peace Laureate and former Archbishop of Cape Town, was appointed early in 1996 and must complete its task by the end of 1997. As the National Party itself was a party to the political compromise that resulted in the Interim Constitution no attempt is made to criminalize with retrospective effect acts relating to the planning and execution of the policy of apartheid, despite the fact that apartheid was viewed as criminal in terms of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. Consequently, the perpetrators of such acts do not fall within the ambit of the amnesty legislation.<sup>64</sup> Instead, the Promotion of National Unity and Reconciliation Act provides for the granting of amnesty, upon application and after proof of full disclosure, to both the upholders of the apartheid state and members of the national liberation movements who committed gross violations of human rights, defined as 'killing, abduction, torture or severe ill-treatment of any person' with 'a political objective'<sup>65</sup> – which were crimes under South African law during the apartheid era.

The amnesty law and process is highly controversial in South Africa. Its constitutionality was challenged by the families of some of the best known victims of police brutality during the apartheid era, including the widow of Steve Biko, in *Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others*,<sup>66</sup> in which it was argued that section 20(7) of the Promotion of National Unity and Reconciliation Act, granting amnesty from both criminal prosecutions and civil claims to members of the apartheid police responsible for killing anti-apartheid activists, violated section 22 of the Interim Constitution which provides that 'every person shall have the right to have justiciable disputes settled by a court of law'. In dismissing this challenge, the Constitutional Court held that the

61 Section 232(4) of Act 200 of 1993.

62 Clause 22 of Schedule 6 ('Transitional Arrangements') to Act 108 of 1996.

63 Act 34 of 1995.

64 If legislation is later enacted to criminalize apartheid retrospectively it seems that this legislation would be constitutional in terms of section 35(3)(1) of the 1996 Constitution (*supra* in text between footnotes 41 and 42). Such a provision did not appear in the 1993 Interim Constitution.

65 Sections 20(1) and 19(3)(b)(iii) of Act 34 of 1995.

66 1996 (4) SA 671 (CC). The judgment of the Cape Provincial Division in this case is reported in *Azanian Peoples' Organization (AZAPO) and Others v. Truth and Reconciliation Commission and Others* 1996 (4) SA 562 (C).

'postamble' to the Constitution constituted a bridge from apartheid to democracy and that it trumped section 22. Consequently the amnesty legislation was constitutional.

Although the judgment of the Constitutional Court, written in moving and eloquent language by Deputy President Mahomed, accurately captures the intention of the two parties responsible for the amnesty compact contained in the 'postamble', and is probably correct as a matter of constitutional interpretation, it is disappointing from the perspective of international law.

This is the first judgment in which the Constitutional Court was required not merely to buttress its findings with international authority – as it has done so well in many cases under the Bill of Rights<sup>67</sup> – but instead to consider whether a rule of international law might be invoked to support an interpretation in favour of the unconstitutionality of a law enacted by a democratically elected Parliament. In the light of the previous record of the Constitutional Court and the prescriptions in the Interim Constitution relating to the importance of international human rights law in the process of constitutional interpretation<sup>68</sup> and the place of customary international law in municipal law,<sup>69</sup> it might have been expected that the Court would have thoroughly examined the conventional and customary rules that appeared to require prosecution of human rights violators, the practice of other states in transition and finally whether the drafters of the Interim Constitution intended to overrule international law on the subject of amnesty.

Unfortunately this was not done. The Court considered only the question whether the provisions of the 1949 Geneva Conventions requiring prosecution for 'grave breaches'<sup>70</sup> were applicable (which it held were not applicable to the South African situation), but made no attempt to examine whether the customary law rules relating to genocide, torture, war crimes and particularly crimes against humanity required prosecution of offenders. As apartheid has been labelled as a crime against humanity by the General Assembly<sup>71</sup> and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid,<sup>72</sup> and seems to fall squarely within the accepted definitions of this crime,<sup>73</sup> it is surprising that no attempt was made to address the question whether customary international law requires the prosecution of

67 *Supra* notes 45 to 52.

68 Section 35 (1) of Act 200 of 1993. *Supra* note 44.

69 Section 231 (4) of Act 200 of 1993. Text between footnotes 13 and 14 *supra*.

70 Art. 49 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; art. 50 of the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; art. 129 of the Convention Relative to the Treatment of Prisoners of War; art. 146 of the Convention Relative to the Protection of Civilian Persons in Time of War.

71 See, for example, resolution 39/72A (1984).

72 Art. 1. The text of this Convention appears in 13 ILM 50 (1974).

73 See art. 6 of the Nuremberg Charter; art. 5 of the Statute of the International Tribunal for the Former Yugoslavia; art. 3 of the Statute of the International Tribunal for Rwanda; and art. 18 of the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind (1996).

## International Law and the South African Constitution

those who commit this crime, particularly in respect of systematic murder, torture and disappearances which were crimes under South African law before 1990. State practice is likewise given inadequate attention. Some Latin American precedents (Argentina, Chile and El Salvador) are considered; but the important decisions of the American Court of Human Rights in *Velasquez Rodriguez*<sup>74</sup> and the Inter-American Commission of Human Rights in cases involving Uruguay and Argentina,<sup>75</sup> in which it was held that a successor government is obliged to prosecute those members of the previous government responsible for human rights violations, are overlooked. So too are the experiences of Rwanda, Ethiopia and Eastern European States.

Generally, international law received short shrift in the *AZAPO* case. The Constitutional Court was clearly guided by the following dictum in its judgment:

The issue which falls to be determined in this Court is whether section 20(7) of the Act is inconsistent with the Constitution. If it is, the enquiry as to whether or not international law prescribes a different duty is irrelevant to that determination. International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only to the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorize any law which might constitute a breach of the obligations of the State in terms of international law.<sup>76</sup>

As Mahomed D.P. rightly points out, the Constitution and other legislation is presumed to accord with international law. This requires a court of law first to ascertain the rule of international law in a thorough and proper manner and, secondly, to attempt to reconcile it with the Constitution or an Act of Parliament. Only when this has been done can the Court consider the question of consistency. In *AZAPO*, however, the Court appears to have proceeded from the assumption that international law was irrelevant if it was inconsistent with the Constitution, instead of attempting first to reconcile the two *before* considering the question of inconsistency.

Had the Court carefully considered the question whether customary international law requires prosecution of those alleged to have committed crimes against humanity as an absolute rule, it would probably have found that state practice is too uncertain and unsettled to support such a rule. Its failure to do so, however, evidences a disregard for international law – which compares unfavourably with the decisions of the Australian High Court in *Polyukovitch v. Commonwealth of Australia*<sup>77</sup> and the Ontario High Court in *R v. Finta*,<sup>78</sup> in which international law rules on crimes against humanity were thoroughly canvassed.

74 Judgment of 29 July 1988, Series no. 4, reported in 95 ILR 259.

75 Inter-American Commission of Human Rights. Reports nos. 28/92 and 29/92 (2 October 1992).

76 At 688, para. 26. See too the dictum at 689, para. 28.

77 172 CLR 501 (1991); 91 ILR 1.

78 61 DLR (4<sup>th</sup>) 85 (1989); 82 ILR 425.

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### **VIII. Conclusion**

The 1996 South African Constitution, like the Interim Constitution of 1993, seeks to ensure that South African law will evolve in accordance with international law. The legal profession and the judiciary, which during the apartheid era made little use of international law, have generally responded positively. Law libraries have acquired international law materials and arguments are frequently made in the language of international law, particularly in the field of human rights. Judges in both the ordinary courts and the Constitutional Court have not hesitated to invoke international law to support their findings. That international law is still unfamiliar terrain to the courts, however, is illustrated by the *AZAPO* case. Inevitably, it will take time for South African lawyers and judges to become fully conversant with the sources, rules and reasoning of international law. The Constitution which serves as the foundation stone for the new South Africa will ensure that this happens.