

Chapter 1

International Law and the Right To Health Care

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1.1 Introduction

International law generally is a dynamic concept upon which there are widely differing views amongst lawyers and nation states¹. In fact it would probably not be unfair to say

¹ Savaneli B, 'Transformation Of International Law Into Universal Human Rights Law In The Framework Of Pure Theory Of Law', www.iatp.org.ge p3 " There are four classical views of the international system: a 'Hobbesian' or realist tradition, a 'Vattelian' or internationalist tradition, a 'Grotian' or communitarian tradition, and a 'Kantian' or universalist tradition. In the Hobbesian or 'realist' tradition, states are seen in a permanent situation of cold or hot war. It is the world of power politics, temporary alliances, and national interest, a world which knows only zero-sum games. International law merely duplicates this power structure. A new strand of realism substitutes the rivalry of civilizations for that of states. Some 'critical' scholars of international law also seem to embrace a view which emphasizes the difficulty of a legal system attempting to bind different cultures, albeit from a completely different angle... On the other side of the spectrum we find a view labelled by Bull (see below) as 'Kantian' or universalist: this view 'sees at work in international politics a potential community of mankind'. Writers adhering to this view, although acknowledging that the state is here to stay for quite a while, do not regard the state as an aim in itself - or even as the 'primary unit' of international society. Rather, they tend to underline the role of international 'civil society', multinational cooperation and non-governmental organizations. The systemic value promoted by these authors

that for every statement one makes about international law, there are variations or contradictions that can be argued with as much justification. Since the concerns of this thesis are fundamentally pragmatic, an approach that is entirely in keeping with the real world concerns of the delivery of health care services, one of the issues that will be explored in this chapter is the value or usefulness of international law at this level. The concept of international law is explored in this chapter in its various aspects and as perceived and acknowledged by the South African Constitution. Specific attention is given to international law relating to the right to health or health care and the boundaries and content of this construct in order to establish the level and extent of its interface with the domestic legal system. The cogency of international law is considered against the backdrop of South African law and its validity and value for the domestic legal system are critically examined.

The term “international law” in its widest sense includes private and public international law, customary international law and the body of peremptory norms commonly referred to as ‘*jus cogens*’². Article 38(1) of the International Court of Justice Statute states that

is justice, which may entail a justification of community intervention for the protection of individuals against their own state. In the middle, Bull places a view, which he refers to as ‘Grotian’ or internationalist. According to this conception, international society is composed of states. Individuals, in principle, count only as representatives of their collectivity. However, cooperation between states is possible, and even to be encouraged in order to realize common values and interests. One view of international society may be called ‘Vattelian’, or inter-national in the narrow sense. It emphasizes the individual interest of states. Cooperation is the exception, not the rule. In most instances, common interests have to be accommodated in bilateral settings. International institutions may be useful for stabilizing cooperation, but their role is limited by the national interest. This is the view of classical international law, the famous ‘Westphalian system’. Its main value is not cooperation, but order. A truly ‘Grotian’ (or, because of its modern emphasis on institutions, ‘neo-Grotian’, ‘Friedmannian’ or ‘communitarian’) view, on the contrary, sees the international system on its way to an ‘organized state community’ with an emphasis on common interests, the development of common values, and the creation of common institutions. In the words of Christian Tomuschat, ‘it would be wrong to assume that states as a mere juxtaposition of individual units constitute the international community. Rather, the concept denotes an overarching system which embodies a common interest of all states and, indirectly, of mankind’.”

² McManus H ‘International Law: Constructing Power?’ observes that: “The creation of public international law relies on negotiation and ratification of formal treaties and conventions, and on the formation of custom. Customary international law arises through the “general practice” of states’ legally relevant actions resulting in stable expectations, and ultimately in rules widely believed by states to be legal requirements. This is to be contrasted with international law arising from treaties or other formal legal arrangements, which are negotiated by states, and must be signed and ratified in order to be considered legally binding upon a state. States cannot fail to participate in the formation of customary international law concerning their behavior, as it is a product of long term, legally relevant interactions. Conversely, a state may fail to contribute, through choice or through non-recognition by other states, to negotiations of treaties.”

<http://www.missouri.edu/~polawww/papers/pp011105.pdf>

These distinctions are far from clear cut. The precise nature and content of *jus cogens* in relation to other types of international law are the subject of argument. The only South African case which appears to have dealt expressly with the *jus cogens* is *Azanian Peoples’ Organisation (Azapo) and Others v Truth and Reconciliation Commission and Others* 1996 (4) SA 562 (C) in which the court observed that: “It is, however, unnecessary, in our judgment, to consider further the applicability of the *jus cogens* to the interpretation of the Constitution. That is because there is an exception to the peremptory rule prohibiting an amnesty in relation to crimes against humanity contained in Additional Protocol II to the Geneva Conventions, which was adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, and which came into force on 7 December 1978. In terms of Article 1(1) thereof this Protocol applies to ‘all armed conflicts . . . which take place in the territory of a High Contracting

international law has its basis in international custom, international conventions or treaties and general principles of law³. A detailed analysis of international law, a vast subject, is not within the scope of this thesis. However it is necessary to examine a few basic precepts and principles in order to acquire some background understanding of international law as it relates to health and health care.

Public international law generally consists of international conventions and treaties that expressly recognize rules and principles that bind the states parties. Only those states who are parties to such instruments are bound by them. According to some views, international law does not apply to relationships between states and persons or between persons *inter se*. It applies between nation states⁴. According to others the doctrine that

Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations . . .” This case involved section 231(4) the interim Constitution and not the final Constitution which is differently worded in regard to international law. However it does seem that the court in *AZAPO* preferred to use an express rule of public international law rather than to explore the *jus cogens* which does suggest a ranking by the court of *jus cogens* as being of less significance than an express rule of public international law. Although there are not many South African cases that refer to the *jus cogens* there are one or two southern African *dicta* worth mentioning. In *S v Banda and Others* 1989 (4) SA 519 (BG) the court observed at p544 with regard to the arguments of Dugard in that case: “I mean no disrespect to Mr Dugard’s remaining contentions if I do not deal with them specifically. Having arrived at this conclusion, it is unnecessary to consider the remaining submissions in detail, as they are not necessary for the determination of the issue before me. However, I pause only to consider certain of them. These are: (a) An entity does not qualify as a state, notwithstanding that it has the attributes of statehood expounded in the Montevideo Convention, if its creation is a result of a violation of a peremptory norm of international law (*jus cogens*). From the authorities that he has referred me to, it would appear that the doctrine of the *jus cogens* relates primarily to the question of invalidity of treaties. It is also correct that several jurists have contended that the *jus cogens* is applicable to unilateral acts of states in violation of peremptory norms. Furthermore, the implications of the *jus cogens* have also been advanced in support of the concept of non-recognition. I cannot agree with, nor accept the doctrine of *jus cogens* concerning the question of recognition or non-recognition. As I have already found, the fact of non-recognition is immaterial, provided the norms of international law, which I have accepted, have been complied with.” In *Mwandimi v Minister of Defence, Namibia* 1991 (1) SA 831 (Nm) the court observed at p862 that: “...counsel submitted that the words ‘which would not otherwise have been recognised by ‘international law’ refer to that body of international law which Brownlie *Principles of Public International Law* 3rd ed at 512 - 15 termed *jus cogens*. This embodies rules such as the prohibition of aggressive war, the law of genocide, the principle of non-racial discrimination, slavery, etc, and which, according to some opinions, are overriding principles of international law’. See also Perritt H Jr ‘Symposium on the Internet and Legal Theory: The Internet is Changing International Law’ 73 *Chicago-Kent Law Review* 997

www.kentlaw.edu/perritt/publications/73_CHI_KENT_L_Rev_997.htm; Rosenthal E, and Sundram CJ ‘International Human Rights and Mental Health Legislation’ 2002 *New York Law School Journal of Comparative and International Law* (also at <http://www.bazelon.org/legal/resources/internationallaw.pdf>)

3 Yasuaki O ‘Is the International Court of Justice an Emperor Without Clothes’ *International Legal Theory* (2002) Vol 8 No1, p1 states that: “The failure to understand realistically the significance of the ICJ has influenced the attitude of international lawyers toward the question of the “sources” of international law. When discussing the problem of the “sources” of international law, most lawyers begin their argument by referring to Article 38 of the ICJ Statute. Even those who do not explicitly refer to Article 38 generally assume that discussion of the categories of international law should start with, the list of “sources” provided in Article 38(1). Although many leading international lawyers such as Jennings, Cheng, McDougal, Higgins, Falk and Abi-Saab have recognized that using Article 38 for the purpose of explaining the categories of contemporary international law has “an element of absurdity”, a tacit reliance on Article 38 still prevails. This fact suggests that most international lawyers tacitly and unconsciously equate the norms of conduct among states with the norms of adjudication to be applied by the ICJ. This further suggests that most international lawyers tacitly accept a domestic analogy and base their argument on this analogy when arguing about the sources of international law.” http://law.ubalt.edu/oicj/ilt/8_1_2002.pdf

4 Rosenthal E, and Sundram CJ (fn 2 *supra*) state that: “International human rights law creates direct legal obligation only on governments and not on private actors although governments can be required to adopt legislation that protects vulnerable populations in the private sphere. They refer in footnote 171 to Ramoharan “Equality and Non-Discrimination”, *The International Bill of Rights*, Henkin, ed., and note that one member of the Human Rights Committee observed that “article 26

states are the only subjects of international law is not an accurate statement of the actual legal position⁵. International law is capable of creating legal requirements for relationships between nation states, between states and persons and between persons. There is a view that international human rights law is a separate branch of international law completely⁶.

Clearly international law is a subject that, as a whole, is far from crisp in terms of both content and theory. It is also in a very real sense far less robust than systems of domestic

could not be interpreted as referring only to public acts. It must cover the internal system of a country and the authorities who decide who could work, occupy land, and so forth. If the state owned all housing and was the sole employer then its provisions applied to the state. In a different system, however, with private housing and numerous private employers, it was the latter who must be prevented from practicing discrimination. They observe further than in General Comment 14 on the right to health, "the Committee stresses the need to ensure that not only the public health sector but also private providers of health services and facilities comply with the principle of non-discrimination in relation to persons with disabilities."

5 Lauterpacht H "The Subjects of the Law of Nations" *Law Quarterly Review* (1947) at 438-439, 451, 452 and (1949) at 97, 112-113. He states that there is no principle in international law which prevents states, if they so wish, from securing to individuals access to international courts and tribunals and goes on to show that there is no rule of international law which precludes individuals from acquiring directly rights under customary international law and that similar considerations apply to the question of subjects of duties imposed by international law, in particular the field of international criminal liability. (Referred to in Savanelli "Necessity of Transformation of International Law into Universal Human Rights Law in the Framework of Pure Theory of Law After September 11", www.istp.org.ge).

See Savanelli B fn 1 *supra* who observes that: "The system of universal human rights provides for the monitoring of the implementation of human rights worldwide. But it does not confer a legal capacity upon individuals to enforce these rights. Hence, in most instances, individuals are still 'objects', not subjects of international law. On the other hand, international criminal tribunals attempt to render individuals personally accountable at a global level. Neither should we discard developments towards an 'international civil society', in which non-governmental actors increasingly influence international decisions."

6 Savanelli B (fn 1 *supra*) comments that "International Human Rights Law already have (sic) been separated from international law and by the (sic) its universal feature should be called as (sic) Universal Human Rights Law. The process of separation of Universal Human Rights Law from international law originated from Nuremberg (1945) and has been completed with the adoption of the Vienna Declaration and program of action on the World Conference of Human Rights (1993)." Savanelli draws a number of distinctions between what he calls 'Universal Human Rights Law' and other forms of international law. One of these distinctions is on the basis of sources. He says that the sources of international law are basically collections of rules which govern the relations among states whereas the sources of universal human rights law consists of rules which directly govern relations between individuals and states. He points out that obligations of states to each other is the subject of international law but the obligations of states to individuals is the subject of human rights law. He also observes that there is a distinction in terms of mechanisms of protection. Protection of human rights says Savanelli, consists of two stages: internal and international, the latter being a continuation of the former. Palmer observes in an article entitled 'Human Rights and Treaty Obligations' (<http://www.kennett.co.nz/law/indigenous/2000/33.htm>)- that "Human rights became legally recognised at international law. And international law, which had previously been the concern of states alone, has gradually provided a framework for the delivery of human rights to individuals and in some cases to peoples... The Universal Declaration of Human Rights was a declaration and not a treaty, and did not give rise to binding international obligations except to the extent that its provisions entered the realm of customary international law, as arguably, some of the articles of the Declaration have... There is little doubt that that body of international law known as human rights law is, as Her Excellency Judge Rosalyn Higgins has pointed out in an essay: 'strikingly different from the rest of international law in that it stipulates that obligations are owed directly to individuals (and not to the national government of an individual); and it provides, increasingly, for individuals to have access to tribunals and for the effective guarantees of those obligations' (footnotes omitted). Kantsin I 'No Rights Without Remedy: in Search of an ICHR' (<http://www.eumap.org/articles/content/40/401/index.htm?print=1>) notes that from one perspective it is surprising that human rights ever even entered international law. He states that in contrast with other international legal affairs such as territorial integrity, fishing rights, trade relations, or diplomatic immunity, violations of human rights norms do not have direct consequences at the international level. He observes that "Curiously, the body of international treaties covering putative human rights violations with an explicit *international* dimension, such as those addressing war crimes or the treatment of refugees - the humanitarian laws of war and the Geneva Conventions - are not treated as integral to the core of human rights machinery embodied in the UDHR and the subsequent UN Covenants. At the heart of this differentiation is that human rights treaties explicitly protect persons, not as citizens or representatives of a given state but as human beings *regardless* of state affiliation."



law⁷. There is considerable debate as to where one area of international law leaves off and the other begins. To complicate matters the content of one area, such as public international law, can by a process of seepage become the content of another, for example, customary international law, depending upon the theory of customary international law to which one subscribes. The steps of this process of seepage and the question of when it is complete are also unclear. For a principle of international law to become customary international law there must be a certain critical mass of support in terms of domestic and international judicial decisions and practice. However, the notion of what that mass should be remains vague. It also does not help that there is an apparently wide variety of types of international law instruments and their relative importance and significance is not always obvious. As the International Labour Organisation (ILO) points out in its definition of key terms used in the UN Treaty Collection, over the past centuries, state practice has developed a variety of terms to refer to international instruments by which states establish rights and obligations among themselves⁸. Commonly used names for these various instruments are “statutes”, “covenants”, “accords”, “treaties”, “conventions”, “declarations” etc. The ILO observes that in spite of this diversity, no precise nomenclature exists and that the meaning of the terms used is variable, changing from state to state, region to region and instrument to instrument. The title of the instrument should not therefore be used as a guide to its relative weight and significance compared to other instruments. The two Vienna

⁷ This is evident from a number of different sources. See for instance Yasuaki fn 3 *supra* who has noted that: “The ICJ [International Court of Justice] is a refined and extremely fragile construction based on a delicate balance among sovereign states. Once this delicate balance is lost, its power will fall into pieces.” According to him the ICJ is nonetheless, “the most important of the various agents that can settle international conflicts by means of law. It is the only agent that can give authoritative interpretations of international law in an international society made up of sovereign states holding fast to their own conceptions of international law... The ICJ has the image of being the most important judicial organ in international society.” Yet elsewhere he states: “Domestic lawyers can study the law applied by the judiciary (norms of adjudication) with some confidence that it will determine actual disputes. The situation in international society is very different from this domestic model. The ICJ does not have compulsory jurisdiction. The number of states that accept the jurisdiction of the ICJ under Article 38 is only 63 out of some 190 states as of July 1999. Even those states that do accept the Court’s jurisdiction do so with various qualifications. States are generally reluctant to settle international conflicts by means of the ICJ. This is especially the case with politically important issues. Moreover, there is no guarantee of enforcement of the judgment, once given. There have been conspicuous cases in which the losing party has not complied with the judgments. Therefore, the shadow of the court can influence the bargaining process between states much less in international society than it would in domestic disputes. States cannot expect to influence others very much by threatening recourse to the ICJ. Under such circumstances, one can hardly presume to equate norms of conduct with norms of adjudication. States, especially those concerned with their reputation of compliance with international law, may generally seek to behave in accordance with norms of international law, without considering how their conduct will be judged by the ICJ.” Savaneli (fn 1 *supra*) points out that: “More than a dozen years after the signature of the Vienna Convention on the Law of Treaties, the theory of *jus cogens* has not yet been put to any practical test. Some scholars are arguing the applicability of principles of ‘*jus cogens*’ and ‘*ergo omnes*’ to the Human Rights category.” Alston P observes that the enforcement mechanism for human rights at the international level is seriously flawed (referred to in Kantain fn 6 *supra*).

⁸ International Labour Organisation (ILO) <http://www.ilo.org/english/astrav/telearn/global/ilo/law/keyterm.htm>

Conventions⁹ contain rules for treaties concluded between nation states but neither of them distinguishes between different types of instruments on the basis of their nomenclature. As the ILO points out, although the General Assembly of the United Nations has never laid down a precise definition for the terms “treaty” and “international agreement” and has never clarified their mutual relationship, Article 1 of the General Assembly Regulations to give effect to article 102 of the Charter of the United Nations provides that the obligation¹⁰ to register treaties and international agreements applies to every treaty or international agreement whatever its form and descriptive name. It would seem that there is no absolute truth in international law – only past experience and present perception¹¹.

To add another layer of complexity to international law, treaties and other international law instruments can be the subject of a number of different actions by states. It is necessary to clarify the nature of these actions in view of subsequent discussions of the various international legal instruments in which South Africa has some involvement. Treaties and international agreements can be adopted, accepted or approved, acceded to, signed or ratified. These various actions do not all mean the same thing. According to the ILO’s Glossary of terms relating to Treaty Actions¹²:

“adoption” is the formal act by which the form and content of a proposed treaty text are established. Treaties can be adopted *inter alia* by an international conference which has specifically been convened with the purpose of setting up the treaty – usually by a vote of

⁹ The 1969 Vienna Convention on the Law of Treaties which came into force on 27 January 1980 and the 1986 Vienna Convention which, at the time of writing has not yet come into force.

¹⁰ Article 102 of the Charter of the United Nations requires that “every treaty and every international agreement entered into by any Member State of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.”

¹¹ D’Amato A, ‘Customary International Law: A Reformulation’ 4 *International Legal Theory* 1-6 (1998) suggests that the governing rules that result from international controversy are the birth of rules of customary international law. A rule of customary international law joins the body of customary international law precisely because it has led to the resolution of a controversy. He also suggests that the international system adopts controversy-resolving rules because with each adoption, the chances of further interstate controversy and war are reduced. He states that there are two qualifications to the principle that a rule expressed in a treaty can generate customary international law. The first is that the rule must be generalizable. The second is that any provision in a multilateral convention that is subject to reservation cannot generate customary law by virtue of the fact that customary law binds all states and thus there cannot, in principle, be any exceptions. In conclusion he notes that customary law is formed in much the same way that common law is formed – through dispute resolution - but that the difference between the domestic case and the international controversy is that in the latter there is normally no authoritative decision-maker.

¹² ILO <http://www.ilo.org/it/english/actrav/learn/global/ilo/law/glossary.htm>

two thirds of the states present and voting unless they have agreed to apply a different rule;

“acceptance” or “approval” usually means that the state is expressly consenting to be bound by the treaty and have the same legal effect as ratification. Where national constitutional law does not require a treaty to be ratified by the head of state, states have used acceptance and approval instead of ratification;

“accession” is an act whereby the state accepts an offer or opportunity to become a party to a treaty already negotiated and signed by other states and has the same legal effect as ratification. The provisions of the treaty dictate the conditions under which accession may occur and the necessary procedures for it to take place.

“ratification is an act whereby a state indicates its consent to be bound by a treaty if the parties intended to show their consent by such an act. Ratification grants states time to seek approval for the treaty in terms of their domestic law and to enact domestic legislation to give effect to the treaty;

“signature” can be subject to ratification, acceptance or approval in which case mere signature of a treaty by a nation state does not mean that the state is bound by it. In such circumstances signature reflects a willingness on the part of the state signatory to continue the treaty-making process and qualifies the state to proceed to ratification, acceptance or approval. It also creates a good faith obligation to refrain from actions that would defeat the object and purposes of the treaty.

Rosenthal and Sundram¹³ point out that there are a number of important legal differences between international human rights conventions such as the International Convention of Civil and Political Rights (ICCPR), the International Convention on Economic, Social and Cultural Rights (ICESCR), and the General Assembly Resolutions of the United Nations Assembly such as the “Principles for the Protection of Persons with Mental

¹³ Rosenthal and Sundram in 2 *supra*

Illness and for the Improvement of Mental Health Care” (the MI Principles)¹⁴ and the resolution on “The Standard Rules on Equalization of Opportunities for Persons with Disabilities” (Standard Rules)¹⁵. They observe that Conventions fall into the category of “hard” international law whereas General Assembly resolutions fall into the category of “soft” international law and note that the latter in the human rights field are also referred to as international human rights “standards”. Soft law is “non-binding” and hard law is “binding”.

The distinctions between the various areas of international law are also important for constitutional purposes. The Constitution¹⁶ distinguishes between public international law, in the sense of treaty law, customary international law, and international law as a whole, in terms of sections 231, 232 and 233 respectively. There is also a difference between section 35(1) of the interim Constitution and section 39(1) of the final Constitution in that the former uses the term ‘public international law’ whereas the latter refers to ‘international law’. In terms of section 39(1), when interpreting the Bill of Rights a court, tribunal or forum must consider ‘international law’. Private international law, although it is of specific relevance to a right to health care in that it includes international intellectual property law and therefore has a significant impact on access to medicines, is not as directly concerned with universal issues as is public international law. It is thus of less general significance in the context of section 39(1) of the Constitution than is public international law which is directly involved in matters of human rights. This said, it must be borne in mind that the values which underlie both public international law and private international law must be the same¹⁷. In the context

¹⁴ The MI Principles are a UN General Assembly resolution that can be used as a guide to the interpretation of related provisions of international human rights conventions (Rosenthal E, and Rubenstein LS, *International Human Rights Advocacy Under the “Principles of the Protection of Persons with Mental Illness* 16 *International Journal of Law and Psychiatry* 257 (1993). According to Rosenthal and Sundram (fn 2 *supra*), the Inter-American Commission on Human Rights adopted this analysis in *The Case of Victor Rosario Congo*, (Inter-American Commission on Human Rights Report 29/99, Case 11, 427, Ecuador, adopted in Session 1424, OEA/Ser/L.V/II) Doc.26, March 9, 1999, para 54) the first case on the rights of a person with mental illness under the American Convention.

¹⁵ The Standard Rules are according to Rosenthal and Sundram (fn 2 *supra*) a revolutionary new international instrument because they establish citizen participation by people with disabilities as an internationally recognised human right. Governments are thus under an obligation to provide opportunities for people with disabilities, and representative organisations to be involved in drafting new legislation on matters that affect them. The Standard Rules call on every country to engage in a national planning process to bring legislation, policies and programs into conformity with international human rights standards.

¹⁶ Act No 108 of 1996

¹⁷ See Maier HG ‘Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law’, *American Journal of International Law*, No2 v76 1982 where he states that “Public international law regulates activity among

of access to medicines this has been recently highlighted with regard to the interpretation of the World Trade Organisation (WTO) agreement on Trade Related Aspects of Intellectual Property Rights¹⁸.

It is therefore not without significance that it has been noted that the relationship between human rights and trade is one of the central issues confronting international lawyers at the beginning of the twenty-first century and that any proposal which purports to marry, almost symbiotically, the two concerns warrants careful consideration¹⁹. In the field of health care in particular there has always been, and there is likely to always be, conflict between commercial interests and health service delivery issues due to the fact that health care goods and services are usually fundamental to survival and the capacity to be human in the fullest sense. The international community is unlikely to want to recognise that the right to health in international law must take precedence over the right to trade since it is driven by powerful global commercial interests. International human rights law and

human beings operating in groups called nation-states while private international law regulates the activities of smaller subgroups or of individuals as they interact with each other. Since the public international legal system co-ordinates the interaction of collective human interests through decentralized mechanisms and private international law coordinates the interaction of individual or subgroup interests primarily through centralized mechanisms, those coordinating functions are usually carried out in different forums, each appropriate to the task. The differences between the processes by which sanctions for violation of community norms are applied in the two systems and the differences in the nature of the units making up the communities that establish those norms tend to obscure the fact that both the public and private international systems coordinate human behaviour, and that the values that inform both systems must necessarily be the same."

¹⁸ Elliott R 'TRIPS and Rights: International Human Rights Law, Access to Medicines and the Interpretation of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights' November 2001, www.aidslaw.ca, in which the author concludes that states' binding obligations to realize human rights have primacy in international law; that the TRIPS Agreement must therefore be interpreted in a fashion consistent with states' superseding obligations under international law to respect, protect and fulfil human rights; and where this is not possible, states' obligations under the TRIPS Agreement must be recognized as not binding to the extent that there is a conflict with their human rights obligations under international law. At the WTO Ministerial Conference in Doha in November 2001 a Declaration on the TRIPS Agreement and Public Health was issued which did not go quite as far but did include an agreement that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health (www.globaltreatmentaccess.org/content/press_releases).

¹⁹ Alston P 'Resisting the Merger and Acquisition of Human Rights By Trade Law: A Reply to Petersmann' 1990-2004 *European Journal of International Law* www.ejil.org/journal/VolNo13/No4/art2 notes that George Soros has recently written: "The WTO opened up a Pandora's box when it became involved in intellectual property rights. If intellectual property rights are a fit subject for the WTO, why not labour rights, or human rights?" and that while Soros opposes such a development there is an increasing number of authors who have called for the 'constitutionalization' of the WTO and who consider that the inclusion of human rights within its mandate would help to overcome the democratic deficit from which it currently suffers. Alston states that: "In philosophical terms it is often difficult to distinguish means from ends and the same applies to abstract or scholarly discussions of human rights theory. But the international law of human rights - the most prominent, positivistic manifestation of which is contained in the UDHR and the two International Covenants - is clearly premised on the recognition of certain specific rights and the consequent downgrading of other values which can then be seen as means by which to attain certain rights but not as ends in themselves. It is true that this distinction has been blurred by governments which are more concerned to promote their ideological objectives than to protect the integrity of the corpus of human rights. This has been the case most notably in the context of the debates over the right to development, in which the right of individuals to an adequate standard of living has often been conflated with the 'right' of states both to limit the enjoyment of other human rights in the name of development and to receive development aid from richer states. But, far from justifying distortions of the concept of human rights in the name of higher ends, these largely unsuccessful and essentially unnecessary sorties have instead served to reinforce the need to respect the distinction between ends and means. Empirically, it is clear that human beings have been able to enjoy a full range of human rights in societies which do not recognize a human right to free trade as such. Indeed, given the rarity of such formal recognition and the constant threats to free trade in practice, it might not be an exaggeration to say that a list of countries respecting human rights including a right to free trade could be counted on the fingers of one hand."

international trade law would seem thus to be eternally bound on a collision course on a number of fronts.

Since international law is contained in a number of different instruments and doctrines it is necessary to examine these in greater detail in order to appreciate the implications at international law of a right to health care. Before an examination of the international law relating to the right to health care can be undertaken, the meaning of the term 'international law', particularly in the context of the Constitution, must be ascertained in order to understand the relationship between international law and domestic law as envisaged by the Constitution. More specifically, the concept of international law must be explored in view of the provisions of sections 39(1), 231, 232 and 233 of the Constitution.²⁰ The relationship between international law and domestic law is a complex one that depends largely upon the manner in which the particular domestic legal system concerned approaches international law.²¹ International law is a question of domestic legal perspective. With few exceptions there is no geographic area in the world in which international law exists independently of national or domestic law or where it is the only prevailing system of law. Even in those countries whose legal systems espouse automatic

²⁰ In terms of section 39(1), when interpreting the Bill of Rights, a court, tribunal or forum '(b) must consider international law'. In terms of section 231, only the national executive may negotiate and sign international agreements. An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the Council of Provinces unless it is an agreement of a technical, administrative or executive nature or which does not require ratification or accession. According to section 231(4) any international agreement becomes law in the Republic when it is enacted into law by national legislation provided that 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. Section 232 provides that: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'. In terms of section 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'.

²¹ Opekin BR 'Constitutional Modelling - A Case Study of the Relationship between Domestic Law and International Law' <http://www.eur.nl/frg/jaol/papers/opekin.htm> highlights some of the significant questions that arise in this regard as follows:

- Do the rules of public international law have direct effect as part of the domestic legal system? Different answers may be given to this question in relation to different sources of international law, namely, treaties, customary international law, general principles of law or any combination of these.
- If rules of public international law do have direct effect, do they take precedence over domestic law?
- Whether or not there is general provision for rules of public international law to have direct effect as part of the domestic legal system, are some particular rules (for example, human rights norms) given that effect?
- Which institutions of government are recognised as competent to negotiate, sign and ratify treaties, and specifically, do these include the legislative organs of government?
- Which institutions of government have power to implement treaties in domestic law?
- Does the constitution permit or require consideration to be given to rules of public international law when interpreting domestic laws?
- In federal states, how is power allocated between central and regional authorities in respect of the negotiation, signature or ratification of treaties, on the one hand or the implementation of treaties on the other?



incorporation, as opposed to legislative incorporation, of international law into their domestic legal systems, this incorporation is by virtue of domestic, often constitutional, legal provisions rather than any stipulation within international law itself. Consensus of nation states is a key ingredient for the viability as law of international legal principles. An exploration of the approach of the South African Constitution to questions of international law is thus key to an examination of the extent to which international legal norms and standards concerning a right to health care are applicable in South Africa.

1. It has been proposed,²² for purposes of section 39(1) of the Constitution, that the term 'international law' should be interpreted with regard to Article 38(1) of the Statute of the International Court of Justice²³. The acceptability of this proposal depends upon one's location upon the spectrum of monism and dualism²⁴ - whether one is prepared to allow international law to define itself with regard to a domestic system of law or whether one looks to the domestic law's view of international law for the meaning of the term 'international law'. A further question is whether the description of international law in Article 38(1) of the Statute of the International Court of Justice may also be used with regard to the term 'international law' as used in section 233 of the Constitution. The context in which the term is used in the Constitution is relevant to the extent that 'international law' could be interpreted as including all forms of international law such as customary international law and *jus cogens* or it could be regarded as meaning only *public* international law. The term 'international law', in its Article 38(1) sense, may not be suitable for purposes of section 233 of the Constitution as further discussion will reveal. With regard

²² By Dugard J (see fn 23 *infra*) with reference to the equivalent provision in the Interim Constitution (section 35(1)) which, in contrast to the Constitution, uses the term 'public international law'. Section 35(1) states that: "In interpreting the provisions of this Chapter 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 this Chapter, and may have regard to comparable foreign case law."

²³ Article 38(1) states as follows:
"The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."
The court in *S v Makwanyane and Another*, 1995 (3) SA 391 (CC) in footnote 46, referred to Dugard J in van Wyk D *et al* (eds) *Rights and Constitutionalism: The New South African Legal Order* at 192-5 in which Dugard suggested that s35 of the interim Constitution [the equivalent of section 39 of the current Constitution] requires regard to be had to "all the sources of international law recognized by Article 38(1) of the Statute of the International Court of Justice".

²⁴ See discussion at section 1.2 of the text below.

specifically to the right of access to health care services²⁵, the right to emergency medical treatment²⁶, the rights of the child to basic health care services²⁷ and the rights of prisoners to medical treatment at state expense²⁸, a meaningful consideration of international law must seek to ascertain –

1. Whether there is any customary international law relating to such rights and the extent to which it is law in South Africa in terms of section 232 of the Constitution;
2. Whether there is any public international law, for example international treaties and conventions, on the subject of such rights, which is binding upon South Africa in terms of section 231 of the Constitution, or which must be taken into consideration by a court, tribunal or forum in terms of section 39 of the Constitution when interpreting the Bill of Rights;
3. Whether there are any peremptory norms in terms of *jus cogens* regarding such rights and if so what these are and whether they are applicable in South Africa;
4. Whether there is scope for the application of legal principles embodied in private international legal instruments in terms of sections 39(1) and 233 of the Constitution.

It is the object of this chapter to explore these and related questions.

1.2 Monism and Dualism

²⁵ Section 27(1) of Act 108 of 1996

²⁶ Section 27(3) of Act 108 of 1996

²⁷ Section 28(1)(e) of Act 108 of 1996

²⁸ Section 35(2)(e) of Act 108 of 1996



There are two opposing views of international law, described as ‘monistic’²⁹ and ‘dualistic’³⁰ respectively³¹. According to the former, international law and national law comprise a single integrated legal system whereas according to the latter, international law and domestic law are two discrete legal systems. Permutations of these extremes complicate matters. Thus monism may be relevant within a domestic legal system with regard to one area of international law, for example, customary international law, and dualism to another, for example treaty law. Dualism at its most extreme proposes that international law exists only as manifested in domestic courts and that the only real law is the law of any given nation³². Hans Kelsen, on the other hand, expresses the opposite “monistic view” that international law is supreme over the domestic law of all nations. Whenever there is a rule of international law, it supersedes any domestic rule that is inconsistent with it. In terms of Kelsen’s theory, if a nation enacts domestic law that is inconsistent with a rule of international law, and if that nation’s courts proceed to apply the domestic rule instead of the international rule, then - as far as international law is concerned – that nation has violated international law³³.

From an international law perspective, irrespective of the provisions of the Constitution, states cannot invoke their domestic law as a justification for not adhering to international legal norms³⁴. The observation of basic human rights, it has been argued, is an international legal norm³⁵. In fact, it has been argued that observation of human rights

²⁹ See for example *S v Makwanyane and Another* (fn 23 *supra*) cited by Motale Z and Ramaphosa C *Constitutional Law: Analysis and Cases* as an example of monism. See, however the further discussion of *Manyane’s* case below in which it is questioned that the court’s approach is in fact monistic.

³⁰ See for example *Azanian People’s Organisation (Azapo) and Others v The President of the Republic of South Africa* (fn 2 *supra*) cited by Motale and Ramaphosa (fn 29 *supra*) as an example of dualism.

³¹ “The monistic tradition derives from natural law theories which see all law as the product of reason. On this view no conflict can arise between international law and domestic law because both are derived from the same source. International law is thus seen to be automatically a part of the domestic legal order, as it is in many civil law systems. The decline of natural law thinking and the rise of legal positivism led, however, to the development of dualism. Dualism sees international law and domestic law as operating on separate planes – the former stipulates norms governing the relations between national states, the latter those governing the relationship between individuals within the state or between individuals and the state. Under the dualist conception, international law plays no roles in the domestic legal order except in so far as domestic law adopts an international rule.” Opekin BR fn 21 *supra*

³² Chapter Eleven: International Law in US Courts p261 <http://anthonydamato.law.northwestern.edu/ILC-2001/INTLAW11-2001-edited.pdf>

³³ See Anthony D’Amato fn 11 *supra* p261

³⁴ According to the Vienna Declaration and Program of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc A/CONF.157/24, while ‘national and regional particularities and various historical, cultural and other religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.’

³⁵ Dugard J ‘Public International Law’, Chaskalson M, Kentridge J, Klaaren J, Marous G, Spitz D, Woolman S *Constitutional Law of South Africa* 13-7

forms part of the peremptory norms of the *jus cogens* from which no state can lawfully deviate. This aspect of international law will be dealt with in more detail below. South Africa is a party to the United Nations Charter and is therefore obliged to respect human rights³⁶. The validity and applicability of international law within a domestic legal system is dependent upon which theoretical view is supported. The dualist view has been criticised as anachronistic³⁷ and contrary to the principles of international law itself³⁸. It is, however, very much alive and from a practical viewpoint seems to be the norm rather than the exception³⁹. The sovereignty of states is a key factor in dualist arguments and it has been frequently invoked by even developed countries in international conferences and forums to ground an essentially dualist approach to the relationship between international and domestic legal systems⁴⁰. Some scholars dispute the existence of *jus cogens*⁴¹. Others observe that in international law the existence of a body of *jus cogens*, peremptory norms from which no state can derogate, has been evidenced by over forty years of thought and debate within the relevant scholarly and political communities⁴².

If one regards international human rights law as a separate, specialised branch of international law then the question of whether or not it operates monistically or dualistically in relation to domestic law cannot be answered with reference to the more general categories of international law such as public international law or customary international law. As noted previously there is quite a strong argument in favour of this view. It might be possible to argue that even if monism is not the state of affairs between

³⁶ Dugard 'Public International Law', Chaskalson Kentridge Klaaren Marous Spitz Woolman fn 35 *supra* at 13-8

³⁷ See Motale and Ramaphosa *supra* fn 29 at 38

³⁸ Article 53 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S states that "A treaty is void if, at the time of its conclusion it conflicts with a peremptory norm of general international law. For the purposes of the Convention, a peremptory norm of general international law is a norm 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."

³⁹ Countries that subscribe to dualism include: South Africa, the United Kingdom of Great Britain and Northern Ireland, Sweden, Mali, Lesotho, New Zealand, Nigeria, Senegal, Ireland, Japan, Italy, India, France, Belgium, the United States of America, Australia, Denmark, Canada, Norway and Thailand. (See International Humanitarian Law: National Implementation <http://www.help.icrc.org>)

⁴⁰ For example, it was used by France, the United States of America and Belgium in the course of proceedings concerning the United Nations Convention on the Law of the Sea (UNCLOS). See further discussion below.

⁴¹ Peritt Jr, 'Symposium on the internet and legal theory: The Internet is Changing International Law (fn 2 *supra*)

⁴² Kahgan C 'Jus Cogens and the Inherent Right to Self-Defense' www.nsulaw.nova.edu. See also Danilenko GM 'International Jus Cogens: Issues of Law-Making' *European Journal of International Law* 1990-2002 where he observes that: "The idea of international *jus cogens* as a body of 'higher law' of overriding importance for the international community is steadily gaining ground. First embodied in the 1969 Vienna Convention on the Law of Treaties, it was recently confirmed by the 1986 Vienna Convention on the Law of Treaties. In its judgement in the *Nicaragua Case* [ICJ Reports (1986) 100] the International Court of Justice (ICJ) clearly affirmed *jus cogens* as an accepted doctrine in international law."

the domestic legal system and other branches of international law, it could still be said to prevail in the relationship between the domestic legal system and international human rights law. In the case of customary international law one is beset with evidentiary problems as to its existence before even beginning to consider whether or not it is applicable and the nature of its relationship to a domestic legal system⁴³. To make matters worse customary rules are not static. They change in content depending upon the amplitude of new vectors (state interests)⁴⁴. Whilst public international law does not have the same evidentiary problems one can argue that unless a state is a party to the relevant treaty or international agreement, it is difficult to argue that it has accepted that particular law as being seamlessly integrated into its domestic legal system⁴⁵.

The problem with international human rights as law is that there is apparently no mechanism at international law for dealing with human rights violations. There is no international court of human rights⁴⁶. If states cannot be held responsible for human rights violations and they are not signatories to the relevant international human rights instruments, it is difficult to see how an argument for monism can be made except at the

⁴³ In 'General Principles and Sources of the Law' (<http://lawofwar.org/principles.htm>) it is noted that: "Custom is an important source of international law but proving its existence may be problematical. In determining whether a valid and binding custom exists the parties must consider not only the amount of usage, but also its weight; that is, whether the custom asserted is practiced by nations with an interest in the matter, and just how much of an interest they really have." In the case of *West Rand Central Gold Mining Company v The King* (2 K.B. 391 [1905]) the court observed that: "There is an essential difference, as to certainty and definiteness, between municipal law and a system or body of rules in regard to international conduct, which, so far as it exists at all (and its existence is assumed by the phrase 'international law') rests upon a consensus of civilized states, not expressed in any code or pact, nor possessing, in case of dispute, any authoritative interpreter; and capable, indeed, of proof, in the absence of some express international agreement, only by evidence of usage to be obtained from the action of nations in similar cases in the course of their history."

⁴⁴ D'Amato A 'Trashing Customary International Law' 81 *American Journal of International Law* 101 (1987). He points out that human rights interests, for example, have worked a revolutionary change upon many of the classic rules of international law as a result of the realization by states in their international practice that they have a deep interest in the way other states treat their own citizens.

⁴⁵ Mansson J 'EC Law vs National Law? A Brief Theoretical Examination' *Juridisk Tidskrift*, 1994-95 p 659 observes that "...pure monism is hard to defend since it fails to take into consideration the realities of political power relations." He states "Carefully analysing Kelsen's Stufenbau theory (by which states derive their powers from, and within the limits of, the superior system of international law, so that a states exercise of power rests on the Grundnorm provided by international law), Bleckman concludes that it runs into insurmountable problems when confronted with the realities of international law and power politics. An examination of the practices of states would, at the very most, leave Kelsen with a situation in which international law is recognized by, and sets some limits on, the legal systems of basically sovereign states."

⁴⁶ Kantsin (fn 6 *supra*) asks "How are victims of violations to seek remedy? Or more cogently, can remedy be sought at the international level at all?" He points to the observation of Cassese A, that: "The arrival of human rights on the international scene is, indeed a remarkable event because it is a subversive theory destined to foster tension and conflict among states" and goes on to remark that human rights treaties, like other international treaties, in the words of Fitzmaurice G, "are a source of obligation rather than a source of law. In their contractual aspect, they are no more a source of law than an ordinary private law contract." In keeping with this, states are not themselves criminally liable for breaching human rights treaties, not even in cases of crimes against humanity, according to the recently adopted Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), elaborated by the International Law Commission (ILC)."

most academic and abstract level⁴⁷. It has been pointed out that the most commonly held rationale for the relevance of international law, and especially treaties, to national conduct is based on the notion of consent. This argument begins with the claim that sovereign states are not subject to any obligation unless they have consented to it⁴⁸. If this theory holds then monism cannot. The applicability of international human rights law is then subject to the consent of individual nation states and does not exist independently of their goodwill and co-operation.

It is submitted that evidence in support of monism is scant to say the least even with regard to international human rights law. Savaneli⁴⁹ points out that the legal personality of the individual in the contemporary international law still remains controversial and that it seems still difficult to formulate one doctrine which reflects both a general consensus between scholars as well as lawyers of different legal systems. If the legal personality of the individual at international law is still the subject of such debate it is difficult to argue that the rights of the individual at international law are automatically the same as those within domestic legal systems.

1.3 The Constitutional Approach To International Law

Sections 232 and 233 of the Constitution do not lend complete support to the monistic view of international law⁵⁰. The fact that section 232 of the Constitution expressly singles out customary international law as being law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament, means that other forms of international law do

⁴⁷ Moghalu KC 'Justice as a Global Commons: Global Responses to Judicial Challenges in Africa' (paper presented in 2002 at the African Dialogue II Conference Convened by the Office of the United Nations High Commissioner for Human Rights on the theme 'Promoting Justice and Reconciliation in Africa') points out that "the very idea of international criminal justice for violations of international humanitarian law is predicated for its workability on the cooperation of states with the international criminal tribunals." He asks "If decisions of the Security Council ought to be automatically binding on states, why does Article 2 of Resolution 955 request states to take any measures necessary under their domestic law to implement the provisions of the resolution and the Tribunals Statute?" and notes that in making it mandatory for states to take necessary measures under their domestic law, the Council, intentionally or not, makes a practical recognition of the theories of monism and dualism in the relation between international law and municipal law. According to monism, international law and state laws are mutually reinforcing aspects of one system – law in general...Dualists believe that the juridical origins of state law and international law are fundamentally different... Thus in the dualist view, for international law to apply within the domestic sphere, it needs to be enabled, empowered or validated by domestic legislation."

⁴⁸ Guzman AT 'A Compliance Based Theory of International Law' (<http://www.berkeley.edu>)

⁴⁹ Savaneli, (fn 1 *supra*)

⁵⁰ Dugard, 'Public International Law', Chaskalson Kentridge Klaaren Marous Spitz Woolman (fn 35 *supra*) 13-4

not necessarily enjoy the same status⁵¹. The provisions of section 232 also mean that domestic statutory law and the Constitution take precedence over customary international law⁵² - an essentially dualist approach. Under section 231(4) of the Constitution an

⁵¹ It has been observed that the provisions of section 232 may have little substantive effect because the codification of international law in the post-war era has significantly reduced the practical relevance of customary international law to the domestic legal system. (Opekin in 21 *supra*). This view may be overly simplistic. See, for instance, Kinney D "The International Human Right To Health: What Does This Mean For Our Nation and Our World?" *Indiana Law Review* 2001, 34, 1457 where she observes that under the principles for the development of customary international law, widespread ratification of UN and regional treaties and other instruments recognizing international human rights establishes an international customary law of human rights. She notes that specifically treaties, declarations and other instruments become evidence of a general state practice in which states engage out of a sense of legal obligation. As evidence of general practice followed out of a sense of legal obligation, they establish human rights obligations in the instrument as customary international law. Thus, for example, the International Convention on Economic, Social, and Cultural Rights (ICESCR) is arguably customary international law due to its widespread acceptance internationally. Kinney's approach would have the effect in many instances of bypassing the provisions of section 231 of the Constitution effectively implementing by way of customary international law, the provisions of international agreements which have not been negotiated, signed or ratified in terms of section 231. Her argument is an intriguing example of the lemniscate discussions that seem to characterise international law. It seeks to effect or promote a monistic outcome apparently by accepting and using an essentially dualist rationale.

⁵² The question is whether the same applies to provincial constitutions and legislation which does not technically constitute "the Constitution or an Act of Parliament". The Constitution refers to "Acts of Parliament and provincial Acts" in section 27 of Schedule 6. In terms of section 104(3) a provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution, and must act in accordance with the limits of the Constitution and that provincial constitution. The question is of particular relevance in the health care context due to the fact that health services are a functional area listed in Schedule 4 over which provinces have legislative competence. The Constitution itself does not define the term "Act of Parliament". In *Zantzi v the Council of State (Ciskei) and Others*, 1995 (4) SA 613 (CC) the constitutional court held that the term "Act of Parliament: as used in the sections of the Constitution relating to the jurisdiction of the supreme court included Acts of the Parliament of the Republic of South Africa passed before and after the coming into effect of the Constitution but excluded laws passed by the legislatures of the four nominally independent homelands. The Interpretation Act 33 of 1957 defines "law" as "any law proclamation ordinance, Act of Parliament or other enactment having the force of law" and "parliament" as the Parliament of the Republic". Many provinces currently have their own substantial health legislation in place. Municipal health services are listed in Part B of Schedule 4 and both the national and provincial governments have legislative competence over such health services subject to the conditions laid down in the Constitution. If there is a conflict between international customary law and a provincial Act or constitution what would be the legal position? Logic dictates that such a situation could be resolved with regard to sections 146 and 147 of the Constitution except that these sections deal only with conflicts between national and provincial legislation as opposed to national and provincial law. Customary international law is not legislation in the sense of codified law. If customary international law has the same status as national law then it should apply within the provinces to the exclusion of contradictory provincial law except under circumstances similar to those contemplated within sections 146 and 147 of the Constitution. For example, there prior to the National Health Act which was just recently enacted, there was no national legislation dealing with the right to health care services as expressed in the Constitution. However, the KwaZulu Natal Health Act conferred certain rights pertaining to health care upon residents of KwaZulu-Natal. One of these is that "A health care user is entitled to the progressive realisation within the Province's available resources, to the right of access to primary health care services" (Section 29(2)(b) of the KwaZulu-Natal Health Act, No 4 of 2000). The International Convention on Economic, Social and Cultural Rights, however, states that everyone has the right to the enjoyment of the highest attainable standard of physical and mental health. If one assumes, for purposes of illustration, that in terms of customary international law this has been consistently interpreted to mean a right of access to the full range of health care services available in a particular region as opposed to just primary health care services, how would the courts approach this provision in the KwaZulu-Natal Health Act in the absence of the national legislation? It is not an Act of Parliament. There would be no national legislation against which it could be measured except the Constitution. The Constitution states that customary international law is law in South Africa unless it is in conflict with the Constitution or an Act of Parliament. It might be possible to invoke the available resources argument to show that the KwaZulu-Natal Health Act is in fact consistent with the ICESCR but the fact of the matter is that more than just primary health care services are available in KwaZulu-Natal although the other services are probably not as widely available as the primary health care services. The KwaZulu-Natal Act has clearly adopted a 'lowest common denominator' approach to the subject of the right to health care services which, as discussion in later chapters will reveal, is not necessarily constitutional neither is it the best approach to adopt when dealing with human rights issues in which the interests of the individual as opposed to that of the group are often emphasised. The converse question is whether provinces can enact the terms of international agreements and other instruments of international law into provincial legislation which have not been enacted into national legislation. Strictly speaking, provided that a province has legislative competence (which it does in the case of health care services) in a particular area, there appears to be no legal obstacle to the enactment of legislation in terms that reflect those of an international agreement or other instrument of international law. It will probably not be possible to incorporate the treaty or covenant in question into provincial law by direct reference due to the provisions of section 231 but it is difficult to see how a province could be prevented from enacting the terms and provisions similar to those of an international covenant or treaty into provincial law - especially in the absence of national framework legislation on the

international agreement is not law in the Republic unless it is enacted into law by national legislation. The Constitution's support of the right of the South African people as a whole to self-determination⁵³ serves to underline the fact that the approach of the South African legal system to international law is dualist. In terms of section 2 of the Constitution, it is the 'supreme law' of the Republic and law or conduct inconsistent with the Constitution is invalid. The Bill of Rights applies 'to all law and binds the legislature, the executive, the judiciary and all organs of state'⁵⁴. However, the Constitution does require consistency with international law where this is reasonable since, when interpreting any legislation, every court must prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law⁵⁵. The relationship of international law to South African common and customary law is not directly expressed in the Constitution. In terms of section 39(2) when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. Since in terms of section 39(1) when interpreting the Bill, courts must consider international law, this will result in an indirect influence by international law on customary and common law. The Bill of Rights, in terms of section 39(3) does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill. The provisions of section 231 explain in some detail at what point other forms of international law, such as international agreements⁵⁶ become law in South Africa. In view of the Constitution's largely dualistic approach it is therefore necessary to consider from a constitutional perspective, rather than an international law perspective, questions of 'international law' and 'customary law'.

1.3.1 Section 39(1)

subject. The existence of the National Health Act No 61 of 2003 now renders this discussion somewhat academic but it does illustrate the importance of being alive to these technical legal issues.

⁵³ Section 235 of Act 108 of 1996

⁵⁴ Section 8 of Act 108 of 1996

⁵⁵ Section 233 of Act 108 of 1996

⁵⁶ These include treaties, conventions, declarations, charters, covenants, pacts, protocols and exchanges of notes (see Dugard *fn* 35 *supra* at 13-1)

The primary difference between section 39(1) of the Constitution and the other sections that deal with international law is that the former requires the use of international law as an interpretational tool whereas the latter indicates the legal status of various areas of international law within the Republic⁵⁷. From the point of view of the interpretation of the rights relating to health care services in the Constitution, this is an important distinction because it means that a court can have regard to the numerous treaties, covenants, conventions and other international legal instruments on the subject whether or not they have been enacted into law in South Africa. How then does one use international law as an interpretational tool in understanding the rights in the Bill of Rights? A consideration of existing case law on the interpretation and application of section 35(1) of the interim Constitution⁵⁸ and section 39(1) of the Constitution would be beneficial to an understanding of the approach of the courts to the injunction to consider international law when interpreting the Bill of Rights. In *S v Makwanyane*⁵⁹ the court held with reference to section 35(1) of the interim Constitution that:

“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 chapter 3 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 on Human Rights, the European Commission on Human Rights, 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 chapter 3.”

Analysis of this statement reveals that the court is advocating a very wide definition of the term ‘public international law’. It must be seen as inclusive of international agreements, customary international law and decisions of international tribunals dealing with comparable instruments. The reference in the judgment to reports of “specialised agencies” such as the International Labour Organisation even suggest that for the purposes of section 39(1) in appropriate cases, private international law may be of relevance in the interpretation of particular provisions of chapter 3 of the Constitution. The court is thus effectively construing ‘public international law’ as ‘international law’ in

⁵⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001(1) SA 46 (CC) at 63

⁵⁸ Interim Constitution, Act No 200 of 1993

⁵⁹ *Makwanyane* fn 23 *supra*

the fullest sense⁶⁰. A further point deserving of attention is the fact that the section is being interpreted by the court to mean that the consideration of international law does not mean the application of international law but rather the application of national law interpreted in a manner that is consistent with international law if more than one interpretation of a particular right in the Bill of Rights exists. This would be in keeping with the provisions of section 233 which require the courts to prefer any reasonable interpretation of any national legislation that is consistent with international law. It should also be noted that the court did not regard the use of an interpretation of a similar right at international law to evaluate and understand a right in the Bill of Rights as mandatory but rather as a guideline. The injunction in section 35(1) to consider international law was not interpreted by the court to mean that international law interpretations of rights appearing in the Bill of Rights must be exclusively applied. In *Grootboom*⁶¹, the court held that:

“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 law binds South Africa, it may be directly applicable.”

The court then went on to consider the question of minimum core content.⁶²

The statement of the court in *Grootboom* highlights the two different roles of international law. The one is that of interpretational tool. The other is its application as law where it satisfies the provisions of sections 231 and 232 of the Constitution. Where the rule of international law under consideration is customary international law which is not in conflict with the provisions of the Constitution or an Act of Parliament, the rule of customary international law may be used as an interpretational tool in terms of section 39 but, where applicable, it must also be applied as law in South Africa. Where the rule of international law is in conflict with the provisions of the Constitution or an Act of Parliament, it may only be used as an interpretational tool⁶³. Similarly where a rule of public international law has been enacted into law as contemplated by section 231(4), the

⁶⁰ This may explain the substitution of the latter term for the former in the final Constitution.

⁶¹ *Grootboom* fn 57 *supra*

⁶² See later for further discussion

⁶³ But see later the further discussion concerning the use of law that is in conflict with the Constitution or an Act of Parliament as an interpretational tool.

rule can be used as an interpretational tool and, where it is directly applicable as law, it must be applied as such. If the approach in *S v Makwanyane*⁶⁴ is adopted then all relevant international law must be considered whether or not it is binding since it is being used as an interpretational tool. Whether or not it is binding within South Africa and upon whom is a separate issue.

The question of the applicability of international law was also raised in the case of *Azanian Peoples Organisation (Azapo) and Others v The President of the Republic of South Africa*⁶⁵. The court observed with regard to the provisions of section 231(1) and 231(4)⁶⁶ of the interim Constitution:

“These subsections of the Constitution would, it would seem, enable Parliament to pass a law even if such law is contrary to the *jus cogens*. The intention to legislate contrary to the *jus cogens* would, however, have to be clearly indicated by Parliament in the legislation in question because of the *prima facie* presumption that Parliament does not intend to act in breach of international law.”

The idea that a nation state may legitimately enact law that is contrary to a principle of *jus cogens* is anathema to protagonists of the concept of *jus cogens* at international law⁶⁷. The interrelationship between section 35(1) and the other provisions of the Constitution dealing with international law was discussed in the same case by the constitutional court. Mahomed DP held in the *Azapo*⁶⁸ case that:

“It is clear from this section [section 231(1)]⁶⁹ that an Act of Parliament can override any contrary rights or obligations under international agreements entered into before the commencement of the Constitution. The same temper is evident in s 231(4) of the Constitution, which provides that: ‘(t)he 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’. Section 35(1) of the Constitution is also perfectly consistent with these conclusions. It reads as follows:

⁶⁴ *Makwanyane* fn 23 *supra*. As to the post interim Constitution relevance of *Makwanyane*, the constitutional court has stated in *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC): “There is nothing in the final Constitution of the Republic of South Africa Act 108 of 1996 to suggest that *Makwanyane* has ceased to be applicable - on the contrary, the values and provisions of the interim Constitution relied upon in *Makwanyane* are repeated in the 1996 Constitution.”

⁶⁵ *Azanian Peoples Organisation (Azapo) and Others v The President of the Republic of South Africa* (fn 2 *supra*)

⁶⁶ “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.”

⁶⁷ See below for further discussion.

⁶⁸ *Azapo* see fn 2 *supra*

⁶⁹ In the final Constitution this situation was remedied by section 231(5) according to which the Republic is bound by international agreements which were binding on the Republic when the Constitution took effect.

‘In interpreting the provisions of this chapter 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 this chapter, and may have regard to comparable foreign case law. The Court is directed only to ‘have regard’ to public international law if it is applicable to the protection of the rights entrenched in the chapter.’⁷⁰

The final Constitution is not as restrictive in that it does not specifically require that only public international law that is applicable to the protection of the rights entrenched in the chapter must be considered. It simply requires that international law be considered. This view of the constitutional court, as expressed in *Azapo*⁷¹ that domestic law takes precedence over international law has been criticised as being contrary to international law⁷². It is submitted that particularly in the context of section 39(1), this is not a valid criticism since the most that the courts are required to do is ‘consider’ international law. The Constitution adopts a dualist approach⁷³. Courts that seek to apply a monistic

⁷⁰ See *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (1) SA 997 (C) at 1034 in which the Cape Provincial Division observed that: Section 39(1) of the “Constitution provides that a court, when interpreting the Bill of Rights, ‘(b) must consider international law; and (c) may consider foreign law’. As pointed out by Chaskalson P in *S v Makwanyane and Another* (fn 23 *supra*) at para [39] “[i]n 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. It must, however, also be borne in mind that ‘the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law’ (per Mahomed DP in *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC) (1996 (8) BCLR 1015) at para [26], read together with paras [27] and [28]; see also *Prince v President of the Law Society, Cape of Good Hope and Others* 1998 (8) BCLR 976 (C) at 985C - H and 989A - 990A).”

⁷¹ *Azapo* fn 2 *supra*

⁷² Motale Z and Ramaphosa C (fn 29 *supra*) who state at 38: “The Court erroneously adopted the position in *Azapo* that international human rights protections are not part of the South African Constitution unless they are adopted by the legislature. In the *Azapo* decision the Court should have interpreted s35(1) of the Constitution as Mokgoro J did in *Makwanyane*, as an obligation that requires ‘courts to proceed to public international law and foreign case law for guidance in constitutional interpretation, thereby promoting the ideal and internationally accepted values in the cultivation of a human rights jurisprudence for South Africa.’”

⁷³ Dugard J, ‘International Law and the South African Constitution’ *European Journal of International Law* argues that the South African 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.” He observes that as a species of common law, customary international law is subordinate to all forms of legislation. He then goes on to state that 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.” In saying that the Constitution has endorsed the common law position of international customary law in South Africa, Dugard is apparently saying that the Constitution is monist in its approach. If one looks closely at his discussion of the wording of section 231(4) of the Interim Constitution which 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” [writer’s italics] the matter is not that out and dried. He points out that the omission of the word ‘binding’ from the final 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. In a neat bit of sophistry that fully exploits the looseness of the concept of customary international law, Dugard avoids this argument by saying that 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. As far as South Africa is concerned, a practise to which it has persistently objected is simply not a customary rule.” He then goes on to concede that on the other hand there can be little doubt that the omission of the word ‘binding’ will facilitate the proof of customary international law. It is submitted that the sophistry lies in saying that South African law follows a monist approach only in terms of its own definition of customary international law. Thus where

approach therefore run the risk of acting unconstitutionally. International law must therefore be considered from the perspective of domestic law generally and the Constitution specifically. As stated previously, they are not obliged to apply international law unless it has become law in South Africa as contemplated in sections 231 and 232 of the Constitution. The courts have stressed the need to take cognisance of South Africa's legal system, its history and circumstances and the structure and language of its Constitution⁷⁴. It is clear from the various *dicta* of the courts on this subject that a cautious and rational approach to the consideration of international law when interpreting the Bill of Rights, which takes into account the unique identity of South Africa as a

South Africa has persistently objected to a rule of customary international law that other nation states regard as customary international law, it does not constitute customary international law for the purposes of the Constitution. This is despite the fact that Dugard goes on to recognize that while 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, later decisions hold that *general* acceptance is sufficient. Dugard's argument is also in conflict with the decision in *S v Petane* 1988 (3) SA 51 (C) in which the court observed that in *Nduli and Another v Minister of Justice and Others* 1978 (1) SA 893 (A), the Appellate Division accepted that customary international law was, subject to its not being in conflict with any statutory or common municipal law, directly operative in the national sphere. The Appellate Division described the attributes of a rule of customary international law which would make it applicable in South Africa. It would have to be either universally recognised or it would have to have received the assent of this country. In holding this, the court referred to a passage in Oppenheim *International Law (Lauterpacht)* 8th ed vol 1 at 39 which states the conditions concerning universal acceptance or state assent for recognition of a rule of customary international law as part of the law of England saying that: "Our law and English law in this respect is therefore the same. It is not clear to me whether Rumpff CJ in giving the judgment 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. Margo J, in giving the judgment of the Full Transvaal Court in *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (T) did not think that the word 'universal', despite its ordinary meaning, was really intended to mean universal. I do not think so either. In the present case, however, the distinction between universal and general recognition makes no difference. I am prepared to accept that where a rule of customary international law is recognised as such by international law it will be so recognised by our law [writer's italics]. Monism, it is submitted, contains the seeds of its own destruction in the sense that it is an all or nothing theory. Either international law applies equally within all domestic jurisdictions or it does not. How can it apply in some jurisdictions but not others if monism is a characteristic of international law itself rather than a concession of a sovereign state? Either it is binding at an objective level of certainty across all nation states or it fails as an argument. The moment that considerations of relativity come into play – one state subscribes to monism but another to dualism; one area of international law, eg *jus cogens*, applies within all states but another applies only with the consent of nation states; a single state, at its discretion, regards certain international legal provisions as binding but not others – monism is defeated. As such it is a concept of extremely limited value. It is clear from discussions elsewhere in this chapter that there are many powerful nation states that subscribe to dualism. This factor alone defies arguments in favour of the universal applicability of international law in all countries i.e. monism. Dugard's comment that the South African common law adopts the monist approach and the subsequent implication that the Constitution does as well because it endorses the common law is misleading in the sense that customary international law is only binding, in terms of both the common law and the Constitution, if it does not conflict with legislation. To the extent that its domestic legislation has the capacity to oust a rule of customary international law, it is submitted that to assert that a legal system follows a monistic approach is to hold an extremely weak view of monism – so weak in fact, that it approaches dualism. Dugard points out that as far as treaties are concerned before 1994, South Africa followed the English dualist approach to the incorporation of treaties and that 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.

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S v Makwanyane and Another (fn 23 *supra*) at para [39] quoted with approval in *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* (fn 70 *supra*). See also *Park-Ross and Another v Director: Offices for Serious Economic Offences* 1995 (2) SA 148 (C) in which the court observed with regard to the interim Constitution: "While it is indeed so that s 35(1) of the Constitution provides that, in interpreting the provisions of chap 3 thereof, the Court may 'have regard to comparable foreign case law', this should be done with circumspection because of the different contexts within which other constitutions were drafted, the different social structures and milieu existing in those countries as compared with those in this country, and the different historical backgrounds against which the various constitutions came into being. I agree with Froneman J in *Qozlani v Minister of Law and Order and Another* 1994 (3) SA 625 (E) at 633F-G that one must be wary of the danger of unnecessarily importing doctrines associated with those constitutions into an inappropriate South African setting. The South African Constitution must be interpreted within the context and historical background of the South African setting' cited with approval in *Govender v Minister of Safety and Security* 2000 (1) SA 959 (D)."

nation, rather than a headlong rush to absorb willy-nilly every fashionable international legal principle into the South African legal system, is the correct one⁷⁵. *S v Makwanyane*⁷⁶ has been cited as an example of a monistic approach to international law⁷⁷ but closer examination of the judgment in this case reveals that this is not a necessary conclusion. The court in *Makwanyane* emphasised a value-based interpretation of the Constitution with specific reference to South African conditions and faithfulness to the Constitution⁷⁸.

1.3.2 Sections 231, 232 and 233

There is the question as to what extent if any the interpretation provisions of the Constitution in sections 231, 232 and 233 modify the meaning of section 39(1). In other words, should the fact that the drafters of the Constitution saw fit to write a separate section relating to the interpretation of the Bill of Rights be construed to mean that sections 232 and 233, do not apply to interpretations of the Bill of Rights or should the two sets of provisions be read in conjunction with each other? If the latter, then how does

⁷⁵ The court in *Park-Ross* (fn 74 *supra*) quoted with approval these words of Mahomed AJ as he then was in *S v Acheson* 1991 (2) SA 805 (Nm) at 813A-B: "The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion."

⁷⁶ *Makwanyane* fn 23 *supra*

⁷⁷ *Motala and Ramaphosa* fn 29 *supra* at p37

⁷⁸ The court in *Makwanyane* (fn 23 *supra* at p415) said that: "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". See also the observations of Sachs J in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) 631 (CC) who states at p 656: "If I might put a personal gloss on these words, the actual manner in which they were applied in *Makwanyane* (the Capital Punishment case) shows that the two phases are strongly interlinked in several respects: firstly, by overt proportionality with regard to means, secondly, by underlying philosophy relating to values, and, thirdly, by a general contextual sensitivity in respect of the circumstances in which the legal issues present themselves. I make these points because of what I regard as a tendency by counsel, manifested in this case, to argue the two-stage process in a rather mechanical and sequentially divided way without paying sufficient attention to the commonalities that run through the two stages. In my view, faithfulness to the Constitution is best achieved by locating the two-stage balancing process within a holistic, value-based and case-oriented framework. The values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality, several times referred to in the Constitution. The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct. If I may be forgiven the excursion, it seems to me that it also follows from the principles laid down in *Makwanyane* that we should not engage in purely formal or academic analysis, nor simply restrict ourselves to *ad hoc* technicism, but rather focus on what has been called the synergetic relation between the values underlying the guarantees of fundamental rights and the circumstances of the particular case. There is no legal yardstick for achieving this. In the end, we will frequently be unable to escape making difficult value judgments, where, in the words of McLachlin J, logic and precedent are of limited assistance. As she points out, what must be determinative in the end is the court's judgment, based on an understanding of the values our society is being built on and the interests at stake in the particular case; this is a judgment that cannot be made in the abstract, and, rather than speak of values as Platonic ideals, the Judge must situate the analysis in the facts of the particular case, weighing the different values represented in that context." [footnotes omitted].

one reconcile the two. Kentridge and Spitz⁷⁹ ask whether there is any difference of principle between the interpretation of the Constitution as a whole and the interpretation of the Bill of Rights in particular and note that there is such a difference⁸⁰. They observe however, that:

“the differences between the interpretation of the Bill of Rights and the Constitution as a whole is a difference of degree rather than a difference in kind and that because the Bill of Rights is more widely worded, there is more room for explicit value judgments in interpreting the Bill. Where other chapters of the Constitution are being interpreted the words themselves tend to provide a clearer indication of what is required.”⁸¹

Despite these observations, it is submitted that this is a significant basis for an argument that sections 231, 232 and 233 in particular are not applicable to the Bill of Rights. The Bill of Rights must be interpreted, with reference to international human rights law generally as opposed to only those aspects of international law that are binding within the Republic because international human rights law is relevant to South Africa as a nation state insofar as it acknowledges and upholds the underlying values contained in the Constitution, irrespective of the provisions of other South African domestic law which is still in the process of reform. This would also explain why the constitutional court, in considering the rights in the Bill of Rights has not done so with specific reference to sections 231, 232 or 233 of the Constitution.

If the Bill of Rights must be interpreted in the same way as the remainder of the Constitution then one has to attempt a reconciliation of sections 39(1) and 232 to 233. In the light of the wording of section 232, it could be argued that it is superfluous to read the term ‘international law’ in section 39(1) of the final Constitution as inclusive of ‘customary international law’ that is binding in South Africa. The provisions of section 232 imply that a court must *apply* customary international law that is not in conflict with

⁷⁹ Chaskalson, Kentridge, Klaaren, Marcus, Spitz and Woolman, (fn 35 *supra*) at para 11.5.

⁸⁰ Chaskalson *et al* fn 35 *supra*. This difference is expressed at 11-12 where they observe: “understanding the character of the Constitution as a whole and the Bill of Rights in particular is necessary in order to comprehend the essential difference between statutory and constitutional interpretation. A statute is an instrument by means of which a legislature elected by a majority of citizens governs those citizens. It is a set of instructions from the legislature to the officials who enforce the statute and to the citizens who are required to comply with its provisions... Judges interpreting the Constitution are engaged in a different task altogether. They are attempting to understand and to clarify the way in which government itself is required to function. In doing so they are trying to establish a scheme or pattern of government which comports with the values which the Constitution claims to uphold. More particularly, in interpreting the Bill of Rights, the courts are attempting to establish those values which allow individuals to make claims against the majority.”

⁸¹ Chaskalson *et al* fn 35 *supra* at p11-15



the Constitution or an Act of Parliament since customary international law is law in South Africa⁸². Consideration is a subset of application. Must the inference then be drawn that the injunction in section 39(1) to *consider* customary international law must apply to customary international law that is in conflict with the Constitution or an Act of Parliament? Should section 39(1) be interpreted to mean that a court must consider those rules of customary international law that are in conflict with the Constitution or an Act of Parliament or should it be interpreted to mean that the term 'international law' in section 39(1) does not include customary international law at all because this is dealt with in section 232 of the Constitution? If one takes into account that the injunction in section 39(1) is to 'consider', as opposed to 'apply', international law and the fact that the Constitution itself leans towards dualism in terms not only of section 232 but also section 231, the latter interpretation is the most logical option from a domestic law viewpoint on the basis that the law that does not apply in South Africa and which is in conflict with an Act of Parliament is not relevant. A consideration of a rule of customary law which is directly in conflict with the declared intention of the legislature as expressed in an Act of Parliament seems more than a little subversive especially if such consideration would lead to an interpretation of a right in the Bill of Rights which is also in conflict with that particular Act of Parliament. However, many would argue that, at least to the extent that the customary international law in question contains a peremptory norm and is therefore a part of the *jus cogens*, such an approach cannot be valid⁸³. The rule stated in section 8 of the Constitution that the Bill of Rights is binding upon the legislature could also be invoked in support of the argument that an Act of Parliament cannot be validly contrary to a principle of *jus cogens*. If this argument holds then the next logical step would be that a court, taking into account a principle of customary international law that conflicts

⁸² Sarkin J 'The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions' www.law.upenn.edu/oonlaw/issues/vol11/num2/sarkin/sarkin_of.html referring to section 231(4) of the interim Constitution which provides: "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" observes: "Thus a particular human rights standard, which has become accepted as a rule of customary international law, must be implemented by a South African court in a decision, unless this rule is incompatible with the Constitution or an Act of Parliament. The proviso sets an important limit, permitting parliamentary supremacy in this area as in the past."

⁸³ See for instance Dugard, fn 73 *supra*, who states that: "Peremptory norms include the prohibitions on aggression, genocide, racial discrimination, slavery, the denial of self-determination, and the suppression of basic human rights. It is inconceivable that Parliament, as constituted under the interim or final Constitution, would violate a peremptory norm." He points out that the *obiter dictum* of the Cape Provincial Division in *Azanian Peoples Organisation (AZAPO) and Others v Truth and Reconciliation Commission & Others* 1996(4) SA 562 (C) that the interim Constitution would "enable Parliament to pass a law, even if such law is contrary to the *jus cogens*", "was both unnecessary and unwise as it seriously undermines the Constitution's clear intention of establishing harmony between international law and municipal law."

with the Act of Parliament in question, declares the Act to be unconstitutional to the extent that it conflicts with the court's interpretation of the rights in the Bill of Rights. The dualist principle expressed in section 232 of the Constitution would thus be avoided in favour of the more monistic vista of legal possibility.

The considerable differences in scope between a right to health as expressed at international law, and this right as expressed in the Constitution create a real possibility that courts could potentially read into the expression of the right in the Constitution a much wider interpretation than was initially intended and use it to overturn a statute dealing with the right to health care services which is based on the narrower interpretation. In this way, customary international law that is in conflict with an Act of Parliament could be introduced into the South African legal system via the backdoor of the constitutionally mandated manner in which the Bill of Rights could be interpreted. Admittedly it would take a court that was either ignorant of the implications of considering section 39(1) in isolation from section 232 or one that was determined to incorporate a principle of customary international law into the domestic legal system such as might happen where a principle of *jus cogens* is involved. So far, however, the constitutional court has sensibly adopted a fairly conservative approach which has meant that international law concepts such as minimum core content of socio-economic rights, have been rejected on the grounds of pragmatism. It is submitted that when faced with a conflict between a principle of *jus cogens* and an Act of Parliament, a court is likely to take into account the stipulation in section 39(1)(a) which requires it to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom" to resolve such conflict. The values that underlie an open and democratic society are more likely to be consistent than inconsistent with the *jus cogens*. In practice such conflicts are seldom likely to arise given the spirit of the Constitution generally and the fact that Parliament is, as has been pointed out, unlikely to intentionally violate a peremptory norm. In the context of health care, however, a conflict between domestic law and the *jus cogens* could conceivably in future arise in the context of euthanasia⁸⁴ where a

⁸⁴ Proponents of euthanasia would find their arguments strengthened if a right to euthanasia based on fundamental human rights was more widely recognized internationally than at present. In *Pretty v United Kingdom* (application no 2346/02) the European Court of Human Rights held that there had been no violation of Article 2 (right to life) of the European Convention

law prohibiting assisted suicide is challenged on the basis that it constitutes a violation of the fundamental human rights of human dignity and the right to bodily and psychological integrity. While such rights in general may be part of the *jus cogens*, however, it is unlikely that they would be well received as specifically supportive of the idea of euthanasia given the decision of the European Court of Human Rights in the case of *Pretty v The United Kingdom*⁸⁵. It would be extremely difficult to argue that a right to euthanasia is presently a principle of *jus cogens*. Another potential area of conflict is in the rationing of health services⁸⁶. An example of this would be a domestic rule which allows health authorities to avoid the supply of anti-retroviral drugs to HIV/AIDS patients contrary to a principle of *jus cogens* which requires that states give their citizens access to life-saving drugs as part of the right to health⁸⁷.

If one sees section 39(1) as ousting the relevance of sections 232 and 233 of the Constitution to the Bill of Rights then the courts would still be engaged in a dual exercise concerning customary international law in that they would be considering and applying customary international law which is law in South Africa and merely considering customary international law which is not. A wide interpretation of section 39(1) carries the further implication that all international agreements, whether formal or informal,⁸⁸ must be taken into account in interpreting the Bill of Rights. The question is to what extent informal agreements and arrangements between states, which do not necessarily form part of international law for the purposes of section 231 of the Constitution⁸⁹, must be taken into account for purposes of section 39(1)? Do they form part of international law for the purposes of section 39(1) or not? Longstanding and widely supported informal agreements or arrangements between states can approximate customary international law and can serve as evidence that a practice has become a rule of

of Human Rights, no violation of Article 3 (prohibition of inhuman or degrading treatment or punishment); no violation of Article 8 (right to respect for private life); no violation of article 9 (freedom of conscience) and no violation of Article 14 (prohibition of discrimination). Mrs Pretty wished to be assisted by her husband to commit suicide but the Director of Public Prosecutions of the United Kingdom refused her request to guarantee her husband freedom from prosecution if he did so. Her appeals against this decision in the British courts were unsuccessful.

⁸⁵ *Pretty* fn 84 *supra*.

⁸⁶ See further the discussion of *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) in chapter 2.

⁸⁷ This example is very close to the bone given the provisions of General Comment No 14 by the United Nations Committee on the ICESCR to the effect that a core obligation of States Parties is "to provide essential drugs, as from time to time identified under the WHO Action Programme on Essential Drugs". See the discussion on minimum core obligations *infra*.

⁸⁸ See discussion of informal international agreements under section 231 *infra*.

⁸⁹ See the discussion of *S v Harksen* *infra*.

customary international law. It is submitted, however, that in view of the fact that informal agreements and arrangements between states that do not constitute international agreements, as envisaged by section 231, are unlikely to constitute public international law or customary international law unless they have been recognised as such in terms of a treaty, convention or similar instrument or by an international forum such as the International Court of Justice, these should not as a rule be considered by a court, tribunal or forum as international law for the purposes of section 39(1). This would appear also to be in keeping with Article 38(1)(f) of the Statute of the International Court of Justice⁹⁰.

1.3.3 Section 231 – International Agreements

In terms of section 231(1) of the Constitution all international agreements must be negotiated and signed by the National Executive. 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) of section 231.

According to subsection (3) of section 231 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. The question of whether an international agreement is of a “technical, administrative or executive nature” is likely to prove problematic for South African courts until such time as they have built up a reasonable level of jurisprudence on the subject. There is a tendency for complex international agreements to be structured so that the principal agreement sets out the general framework and principles for the various activities or projects to be undertaken by the parties and then provides for subordinate agreements between various organs of state and the international partner in order to spell out the details of and implement in practical terms, those various projects or activities envisaged by the main agreement. It is

⁹⁰ Article 38 of the Statute of the ICJ in 23 *supra*

possible that the Constitution envisages subordinate agreements of this nature in referring to agreements of a technical administrative or executive nature. It is important to emphasise in this regard, however, that international agreements bind only the Republic vis-à-vis other nations. Generally speaking, they are not binding upon South Africans or inhabitants of South Africa since they are not law in the country until enacted as such by national legislation.

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 Parliament⁹¹. The power of a province to effectively, if not directly, enact into provincial legislation the provisions of an international agreement has already been discussed⁹². The absence of framework legislation in an area in which both the national and provincial spheres of government have legislative competence, such as health services, is likely to increase the possibility that provinces would exercise such a power. Whether such legislation would survive a challenge of unconstitutionality on the basis that it is effectively in violation of the provisions of section 231 is an interesting question.

In the context of health care currently, the only international agreement that has so far been expressly enacted into law is contained in the International Health Regulations Act⁹³. The object of this legislation is to apply the International Health Regulations, adopted by the World Health Assembly, in South Africa. The International Health Regulations are focused mainly on the control of malaria, yellow fever, cholera and small pox, and their hosts and (where applicable) insect vectors, across international borders. They also provide for notification of the World Health Organization by states of the occurrence within their territory of a disease that is the subject of the regulations.

The term “international agreement” in the context of section 231 refers to all kinds of international agreements which, in international law are known by many different names

⁹¹ Section 231(4) of Act No 108 of 1996

⁹² See discussion of provincial legislation at fn 52 *supra*

⁹³ Act No 28 of 1974

such as treaty, convention, charter etc. It must be observed that not all international agreements are such for the purposes of section 231 of the Constitution. The question as to what is meant by the term “international agreement” was considered by the court in *S v Harksen*⁹⁴. In that case the President of South Africa consented to Harksen’s extradition to Germany in terms of the Extradition Act⁹⁵. There was no extradition agreement or treaty between Germany and South Africa and it was argued that the President’s consent to the extradition brought into existence a bilateral international agreement in conflict with section 231 of the Constitution. The court held that in order to establish whether or not the relevant documentation gave rise to an international agreement, it must be carefully considered and that it must indicate that the parties intended to conclude an internationally binding agreement with reciprocal rights and duties or obligations⁹⁶. The court emphasised the importance of consensus between the parties and their intentions and held that although the Vienna Convention does not, in its definition of ‘treaty’, refer to the consensual aspect or intention underlying any international agreement, it clearly cannot be an agreement without the requisite intention or *consensus*⁹⁷. The court observed that it is this intention and consent which distinguishes treaties from informal or *ad hoc* agreements or arrangements.

The phrase ‘international agreements’ as used in section 231 must, it seems, therefore be given the narrow meaning of legally binding agreements. Informal agreements or arrangements of an international nature do not fall within the phrase ‘international agreements’ in section 231 which means that they would probably fall into the general category of international law as contemplated in section 233 of the Constitution and may fall within the scope of customary international law as contemplated in section 232 depending upon the circumstances.

⁹⁴ *S v Harksen; Harksen v President of the Republic of South Africa and Others; Harksen v Wagner No and Another* 2000 (1) SA 1185 (C)

⁹⁵ Act No 67 of 1962

⁹⁶ *Harksen* fn 94 *supra* at 1200 D-E.

⁹⁷ *Harksen* fn 94 *supra* at 1201 A-B. The court held that: “This appears unequivocally from the definitions (in art 2.1 (f) and (g) respectively of the Vienna Convention) of ‘contracting state’ and ‘party’. They are said to be a state or party which has ‘consented to be bound by the treaty.’ The means of expressing this consent is dealt with in art 11, which provides that ‘(t)he consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means so agreed.” The court quoted from Reuter P *Introduction to the Law of Treaties* (translation of Mico and Haggemacher) at 30. A treaty is defined as ‘an expression of concurring wills attributable to two or more subjects of international law and intended to have legal effect under the rules of international law’.

The distinction between international agreements as contemplated in section 231 and informal international agreements or arrangements is important for the provinces because only the national executive may, in terms of section 231(1) negotiate and sign international agreements. Provinces have an obligation to respect, protect, promote and fulfil the rights in the Bill of Rights as much as does the national government. In the case of health care services in particular, the national department of health seldom if ever delivers these services itself. The provinces are responsible, in practical terms, for such service delivery. They own the various hospitals and health facilities and employ the various health professionals necessary to deliver health care services. The national department of health does, however, play a key role in issues of policy co-ordination and support of provinces in health service delivery and certain functions such as the procurement of pharmaceuticals are centralised. The national department has control over certain funding which it allocates to provinces in the form of conditional grants which are over and above the equitable share allocated directly to the provinces by the National Treasury.

When it comes to health care services which are the subject of international agreements, it is the role of the national department of health to enter into these agreements even if it only concerns a single province. There is no indication in the Constitution that provinces have the power to enter into such agreements in their own right. From a contractual point of view this can create problems for the national department of health which, in the absence of a back-to-back agreement between itself and the province, does not have direct legal authority to ensure performance by the province. It may also not have the resources to itself fulfil the obligations imposed by the contract. The legislation envisaged by the Constitution on the subject of co-operative government has not yet materialised and while the Constitution does require the different spheres of government in South Africa to govern co-operatively, the politics of the situation are such that it is not inconceivable for a rogue province to flout the terms of an international agreement, entered into by the national executive, which requires certain actions on the part of that province. The provisions of section 100 of the Constitution, may, depending on the

circumstances, be invoked to deal with the situation but it will not necessarily always be appropriate to do so.

The dynamic between the provinces and the national government on health care issues is complex and can be exploited by unscrupulous international agencies to further their own ends or simply to favour one province over another for various reasons. The fact of the matter is that if health care services in one province are superior to those in neighbouring provinces, for instance because a particular province is the beneficiary of substantial international donor funding, the more affluent province might find itself providing health care services to inhabitants of a neighbouring provinces at an unprecedented and unsustainable level or, alternatively, failing in its constitutional obligations to respect, protect, promote and fulfil the right of South African residents to health care services. The interface between the national government and nine provincial governments concerning the delivery of health care services rests upon a delicate balancing act in the distribution of health care resources and policy relating to the delivery of health care, which if disrupted, could lead to serious financial and other difficulties for a province.

A good example is the question of health tourism. A wealthier province which has health facilities of a generally higher standard, possibly even some of an international standard, compared to those of other provinces, may decide to embark on an active campaign to attract health tourists and may even wish to enter into an agreement with for example the British National Health System (NHS) for the treatment of British patients in provincial facilities. The agreement between the British National Health System and the province in question may not necessarily be an international agreement due to the fact that the NHS has an existence independent of the British government. The utilisation of public health facilities in this province by foreign nationals will affect the availability of those facilities to South African residents who may in turn be forced to seek certain levels of health care services in neighbouring provinces. The province that is servicing the health tourists could find itself faced with legal action for violation of constitutional rights. The power of the national executive to impose policy upon the provinces was discussed to a limited

extent in *Minister of Education v Harris*⁹⁸. In that case a statute gave the Minister of Education the power to determine national policy for the planning, provision, financing, co-ordination, management, governance, programmes, monitoring, evaluation and well-being of the education system. The constitutional court nevertheless observed that:

“Policy made by the Minister in terms of the National Policy Act does not create obligations of law that bind provinces, or for that matter parents or independent schools... In the light of the division of powers contemplated by the Constitution and the relationship between the Schools Act and the National Policy Act, the Minister's powers under s 3(4) are limited to making a policy determination and he has no power to issue an edict enforceable against schools and learners... Complex constitutional questions arise as to whether the Minister is permitted at all to oblige MECs to enforce national policy in this way. It is not necessary to decide such questions in this case, for s 3 of the National Policy Act does not accord the Minister such power. It follows that the notice purports to impose legally binding obligations upon independent schools and upon MECs, and is ultra vires the powers granted to the Minister by s 3 of the National Policy Act.”

Health services are in much the same constitutional position as education in that they are a Schedule 4 competency over which both the national and provincial spheres of government have jurisdiction.

1.3.4 Section 232 – Customary International Law

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

As stated previously, for the purposes of the interpretation of the Bill of Rights, a tribunal or forum must apply customary international law since it is law within the Republic. The only ground for not doing so is that it would be inconsistent with the Constitution or an Act of Parliament. Customary international law, unlike other international law, is thus more than just a tool of interpretation in relation to the Bill of Rights. It is national law, applicable to the interpretation of the Bill of Rights, as law in its own right.

Does the provision in section 232 of the Constitution effect an increase or diminution in the status of customary international law within South Africa? According to the monist

⁹⁸ *Harris* 2001 (4) SA 1297 (CC)



view of international law, customary international law has a higher status than national or domestic law and in the event of a conflict customary international law prevails. However, if it is reduced to the status of national law within the Republic, then it cannot have a status higher than other national law. In fact it is only law in South Africa to the extent that it does not conflict with domestic law. One ends up with the tautology that certain customary international law is in fact not international law at all but domestic law by virtue of the Constitution. The alternative is a dual role for customary international law as both domestic and international law. Logically speaking the alternative is more appealing since it recognizes that South Africa as a nation state and also its inhabitants are both bound by the customary international law in question. However the boundaries of customary international law that binds South Africa as a subject of international law may not necessarily be coterminous with those of the body of customary international law that binds its inhabitants due to the requirement of consistency with Acts of Parliament and the Constitution.

The pertinent question, with regard to the provisions of section 39(1) as read with section 232, is what is the position of a court where a rule of customary international law is in conflict with the provisions of the Constitution or an Act of Parliament? Should the court still take into account the rule of customary international law in interpreting a right in the Bill of Rights or should it avoid it on the basis that Parliament has signified a rejection of it in another law or the Constitution itself? It is submitted that the answer is to be found in the judgement of the Cape Provincial Division in *Dawood*⁹⁹. It took the approach that although in dealing with comparative law one is 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 the domestic legal system, national history and circumstances, and the structure and language of the South African Constitution, it must also be borne in mind that 'the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law'.

⁹⁹ *Dawood* fn 70 *supra*



The view has been expressed that section 39(1) requires that binding and non-binding international law must be considered when interpreting the Bill of Rights¹⁰⁰. However, the Constitution itself provides for a situation in which statutory domestic law overrides international law in the event of a conflict. There is a significant difference between a rule of law that is merely 'non-binding' as opposed to a rule of law that has been quite clearly contradicted by an Act of Parliament. The approach of the court in *Dawood* suggests that one must adopt a cautious approach in concluding that the lawmakers would have intentionally breached an obligation of the state in international law does not detract from the requirement to construe the South African Constitution with due regard to the domestic legal system. If the lawmakers have in fact written a law that is contrary to a principle of *jus cogens* as contained in customary international law, the principle of *jus cogens* does not form part of the domestic law and should not be applied. The fact that principles of *jus cogens* seem in the main to be devoid of meaningful content renders it very unlikely that there will be such a conflict in practice. In the field of health care the closest one can perhaps come to an alleged principle of *jus cogens* is the concept of minimum core obligations but this concept does not seem to have been recognised as *jus cogens* largely because there are no clear criteria for identification of exactly when a rule becomes part of the *jus cogens*. A vague and indeterminate right to health can and does mean different things to different people as evidenced by the various approaches to this right in countries around the world. It could hardly be argued that such a right is a rule of *jus cogens* if the minimum content of the right cannot be convincingly identified by way of international consensus¹⁰¹. The criticism levelled against the judgment in the *Azapo* case is apparently based at least in part upon the notion that the customary international law in question formed part of the *jus cogens*. The cardinal question is whether this is in fact the case. There is apparently no agreement as to the point at which a principle of international law becomes part of the *jus cogens*. The apparent supremacy¹⁰² of *jus cogens* over even the Constitution raises some fairly tautologous arguments.

¹⁰⁰ *Motala et al* fn 7 *supra*

¹⁰¹ See further discussion of *jus cogens* *infra*

¹⁰² The manner and mechanisms for the creation of *jus cogens* norms, and therefore the question as to whether a particular rule constitutes *jus cogens*, are by no means clear. So too is the approach to *jus cogens* by various states. There is no consensus amongst states that their rights under international law can be altered without their consent. The United States for instance, has said that it could not accept the suggestion that, without its consent, other states would be able, by resolutions or statements to deny or alter its rights under international law. (IX UNCTLOS at 106) France has made it clear that 'no

1.3.5 Section 233 – International Law

International law, other than customary international law, is not law in South Africa unless it meets the requirements of section 231 i.e. it has been approved by resolution in the National Assembly and the Council of Provinces or it is a section 231(3) agreement¹⁰³. South Africa is asserting its sovereignty in such a provision. However, in terms of the view expressed by the court in *Makwanyane*¹⁰⁴, international law must be considered when interpreting the Bill of Rights irrespective of whether or not it is law in South Africa or binding upon South Africa.

In terms of section 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.”

The Bill of Rights and the Constitution logically both fall into the category of ‘any legislation’. The rationale behind the inclusion within section 39(1) of a specific injunction to consider international law when interpreting the Bill of Rights when such an injunction, and more, is also effectively contained in section 233 of the Constitution is

government could be bound under international law unless it agreed to be so bound in a treaty, and that in no case could a government be bound by a legal rule which others sought to impose on it.’ Belgium has said that ‘no state could be bound by international law without its consent’. “There are serious doubts as to whether an instrument which at best can lay down rules vaguely described as ‘soft law’ (meaning still not hard genuine law) may by some ‘alchemy’ become a legitimate vehicle for the creation of ‘higher law’. ‘In reality, only treaties of a truly universal nature establishing general international law may produce peremptory rules.... The existing experience clearly demonstrates that opposition by an important element of the international community, even if it constitutes a small minority, can effectively prevent the emergence of new norms of *jus cogens*’ See for further details concerning the above ‘International Jus Cogens: Issues of Law Making’ 1990-2002 *European Journal of International Law*. Mere majority support of a particular norm as *jus cogens* is not sufficient to make it so. There is also by no means consensus as to exactly when a particular rule or norm becomes part of the *jus cogens*.” The author points out that “An analysis of the negotiations at both UNCLOS and the 1983 Vienna Conference on Succession of States indicates that many states once again confirmed their traditional and widely shared view according to which the UN General Assembly resolutions are not even capable of producing ordinary legally binding obligations, let alone the norms of *jus cogens*.”

¹⁰³ The extent to which the terms ‘international agreement’ and ‘international law’ are synonymous is problematic given that there is no precise nomenclature for international instruments. It was concluded by the court in *S v Harksen; Harksen v President of the Republic of South Africa; Harksen v Wagner and Another*, (fn 94 *supra*) that informal or *ad hoc* agreements or arrangements between states do not constitute international agreements as contemplated in section 231 of the Constitution. The court quoted Olivier M, ‘Informal International Agreements under the 1996 Constitution’ (1997) *SAYL* 63 at 75 who states: “(T)he term ‘international agreement’ as it appears in s231 is used in the narrow sense of the word to refer only to legally binding documents. Informal or legally non-binding international agreements fall outside the ambit of section 231, although they can, strictly speaking, also be regarded as agreements of an international nature.” Olivier distinguishes between informal international agreements and treaties as follows: “The basic criterion for distinguishing between treaties and informal international agreements lies in the intention of the parties – in other words, whether or not the parties intended creating a legally binding document. Certain criteria have been developed to assist in ascertaining the intention of the parties. These criteria are, however, not always easy to apply and may lead to conflicting inferences.” Among the criteria she suggests are: language, designation, subject-matter, surrounding circumstances, whether or not the agreement has been internationally registered and the way in which municipal law describes and deals with the agreement.

¹⁰⁴ *Makwanyane* fn 23 *supra*

not entirely clear unless one adopts the view that the Bill of Rights must be interpreted differently to other legislation, including the remainder of the Constitution. The injunction in section 233 is more favourably inclined towards international law than that in section 39(1) in that it requires a court to *prefer* any reasonable interpretation that is consistent with international law over one that is not. Does this oblige a court¹⁰⁵ considering international law in the context of section 39(1), to prefer any interpretation of the Bill of Rights which is consistent with international law over one that is not? It is submitted that the answer is a qualified ‘yes’, the qualification being based upon the word ‘reasonable’ in section 233. Both sections 39(1) and 233 use the phrase ‘international law’ but the courts have held that for the purposes of section 39(1) both binding and non-binding international law must be considered whereas they have not yet expressed a view of what is meant by ‘international law in the context of section 233. Dugard¹⁰⁶ has observed that:

“it is inconceivable that Parliament as constituted under the interim or a final constitution would violate a peremptory norm. The *obiter dictum* of the *Cape Provincial Division in Azanian People’s Organization (AZAPO) & Others v Truth and Reconciliation Commission & Others* that the interim Constitution would enable Parliament to pass a law, even if such law is contrary to the *ius cogens*, was both unnecessary and unwise as it seriously undermines the Constitution’s clear intention of establishing harmony between international law and municipal law.”

But what of non-binding international law? In *Grootboom*¹⁰⁷ the court stated that the weight to be attached to any particular principle or rule of international law will vary. In *Makwanyane*¹⁰⁸, Chaskalson P emphasised the need to construe the Constitution with due regard to the South African legal system, South African history, and circumstances and the structure and language of the South African Constitution. He said that assistance can be derived from public international law but the courts were in no way bound to follow it. The courts have adopted a conservative approach to the absorption or alignment of international legal principles into or with domestic law. In terms of the ordinary rules of statutory interpretation, the phrase ‘international law’ should not be interpreted differently between the two sections unless there is a very clear intention to the contrary.

¹⁰⁵ This is despite the fact that Section 233 refers specifically to a court unlike section 39(1) which refers to a court, tribunal or forum.

¹⁰⁶ Chaskalson, Kentridge, Klaaren, Marous, Spitz and Woolman (fn 35 *supra*) para 13.4 at 13-7

¹⁰⁷ *Grootboom* fn 57 *supra*

¹⁰⁸ *Makwanyane* fn 23 *supra*

The court in *Makwanyane*¹⁰⁹ has indicated that the term ‘international law’ as used in section 39(1) should be given a wide interpretation rather than a narrow one. It follows that, in terms of this rule of statutory interpretation, the same term as it appears in section 233 should be given the same interpretation. The question has, however, been raised as to whether the Bill of Rights and the remainder of the Constitution must be interpreted differently¹¹⁰. The commentators and courts, in their discussions of section 39(1) (or section 35(1) of the interim Constitution) have tended to focus on the provisions of section 39(1) exclusively, without reference to section 233. If the Bill of Rights is to be interpreted differently to the remainder of the Constitution then the meaning of the term “international law’ in sections 39(1) and section 233 need not be the same.

It is possible that the phrase ‘any legislation’ used in section 233 was not intended to include the Constitution, and therefore the Bill of Rights, in view of the fact that the Constitution, including the Bill of Rights, is not just ‘any legislation’ but rather the grundnorm for the South African legal system and therefore has supremacy over every other law in South Africa and in view of the fact that there is express provision for the ‘consideration’ of international law in section 39(1). The difference between constitutional interpretation and the interpretation of other legislation has been recognised in cases on constitutional interpretation throughout the world¹¹¹. The courts have espoused a purposive approach to interpretation of the Constitution¹¹². It is submitted that this approach, particularly in terms of the dynamic expounded by O’Regan J in *Makwanyane*¹¹³, would create considerable uncertainty if applied to legislation other than the Constitution. The message behind the purposive approach is that it is not static and that reliance upon judicial precedent in interpreting the Constitution and especially the

¹⁰⁹ *Makwanyane* fn 23 *supra*

¹¹⁰ *Chaskalson et al* fn 35 *supra*

¹¹¹ *Chaskalson et al* fn 35 *supra*. See para 11.4, pp 11-10 to 11-14 and the cases there cited, in particular *Matiso v Commanding Officer, Port Elizabeth Prison, & Another* 1994(4) SA 592 (SE)

¹¹² See for example, *Minister of Land Affairs and Another v Slandien and Others* 1999 (4) BCLR 421 (LCC) at 421B-C; *S v Mhlungu & Others* 1995 (3) SA 867 (CC); *Ferreira v Levin No & Others* 1996(1) SA 984 (CC); *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 at 359-60 cited with approval in *S v Zuma* 1995 (2) SA 642 (CC). In *S v Makwanyane*, (fn 23 *supra*) O’Regan J states that: “This purposive or teleological approach to the interpretation of rights may at times require a generous meaning to be given to the provisions of Chapter 3 of the Constitution and at other times a narrower, specific meaning. It is the responsibility of the courts, and ultimately this court, to develop fully the rights entrenched in the Constitution. But this will take time. Consequently any minimum content which is attributed to a right may in subsequent cases be expanded and developed.”

¹¹³ *Makwanyane* fn 23 *supra*

Bill of Rights will not necessarily provide the same safeguards as reliance on judicial precedent regarding other legislation.

The requirement to prefer any reasonable interpretation consistent with international law over one that is inconsistent therewith does not contain the same qualification as does section 232 – the proviso that it is not inconsistent with the Constitution or an Act of Parliament. It is possible that an interpretation, consistent with international law, of a particular statute could be inconsistent with another statute or the Constitution itself. What would be the position in this event? It is submitted that one must look to the requirement of reasonableness in section 233 to resolve such situations. It is submitted that an interpretation which is inconsistent with the Constitution could not be considered reasonable, neither could an interpretation which clearly flew in the face of an Act of Parliament. Section 232 (3) of the interim Constitution provided that ‘no law shall be constitutionally invalid solely by reason of the fact that the wording used is *prima facie* capable of an interpretation which is inconsistent with a provision of this Constitution, provided that such a law is reasonably capable of a more restricted interpretation which is not inconsistent with any such provision, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation’.

The constitutional court in particular does not seem to have taken specific cognisance of the provisions of section 233 when interpreting the Bill of Rights in two leading cases involving socio-economic rights¹¹⁴. In fact the court has expressly avoided the direct application of an international law interpretation of these rights which seems to have been favoured elsewhere. The interpretation in question relates to the concept in international law of minimum core obligations.¹¹⁵ In the case of *Mzeku and Others v Volkswagen SA (Pty) Ltd and Others*¹¹⁶, the court rejected an argument that the provisions of ILO Convention 87 on Freedom of Association and the Right to Organise and ILO Convention 98 on the Right to Organise and Collective Bargaining are part of South

¹¹⁴ *Government of the Republic of South Africa and others v Grootboom and Others*, (fn 57 *supra*) and *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC).

¹¹⁵ See further discussion of minimum core *infra*

¹¹⁶ *Mzeku* 2001 (4) SA 1009 (LAC)

African law on the basis of the provisions of sections 231(5) and 233 of the Constitution. Counsel in that case submitted that the result of these conventions being part of South African law is that an employer has no right to dismiss employees for participating in a strike of any nature. The effect of this submission was that employees can go on strike without having to follow the procedures prescribed by the Labour Relations Act 66 of 1995 and when they do that an employer has no right to dismiss them. The court said, “In our judgment it is a misrepresentation of the position to suggest that the ILO Conventions inevitably preclude national legislation from prescribing the type of conditions contained in the Act before there can be an exercise of the right to strike.”

1.4 Customary International Law and the Right To Health

Like many concepts in international law, customary international law is not easy to define. Although writers speak glibly of state practice and *opinio juris* as being the two elements of customary international law, when one makes any attempt to explore these two concepts in any depths, their ethereal nature becomes apparent.¹¹⁷ According to section 102 of the Restatement (Third) of Foreign Relations Law of the United States, international customary law is described as follows:

“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation”¹¹⁸.

The distinction between international customary law and other types of international law is neither clear nor simple. It would seem that sufficiently widespread recognition of a principle within public international law, such that it amounts to general practice followed out of a sense of legal obligation, can bring that principle within the ambit of

¹¹⁷ “State practice refers to general and consistent practice while *opinio juris* means that the practice is followed out of a belief of legal obligation. This distinction is problematic because it is difficult to determine what states believe as opposed to what they say.” Roberts fn 118 *infra* at p757

¹¹⁸ Kinney ‘The International Human Rights To Health: What Does This Mean For Our Nation and World?’ (fn 51 *supra*). See also Dugard *International Law: A South African Perspective* 24-32 and *S v Petane* (fn 73 *supra*). According to Kinney the two major elements of customary international law are state practice and *opinio juris*. Dugard refers to them as “settled practice (*usus*)” and “the acceptance of an obligation to be bound (*opinio juris*)”.

customary international law¹¹⁹. According to this view, modern customary international law is therefore likely to be fed by and derived largely from international treaties and conventions although this is not without controversy¹²⁰. Traditional customary international law results from general and consistent practice followed by states from a sense of legal obligation whereas modern custom is derived by a deductive process that begins with general statements of rules rather than particular instances of practice.¹²¹ According to some views, the difference between customary international law and public international law is that whereas the latter is strictly speaking binding only upon the states parties, the former can bind states regardless of treaty ratification¹²². Some claim that customary international law is dying¹²³ whilst others speak of its growing importance¹²⁴. It has been claimed specifically with reference to global health governance that customary international law is ‘an awkward instrument’ in connection with dealing with global public health concerns and that it is ‘currently under attack as a source of international law for various theoretical and practical reasons’¹²⁵.

Despite these conflicting views, it would seem that the importance of customary international law should not be underestimated. Depending upon which view is held of international customary law, it may have the potential even to supersede the importance

119 Torres (fn 130 *infra*) and Kinney (fn 51 *supra*).

120 Roberts AE ‘Traditional and Modern Approaches To Customary International Law: A Reconciliation’ *American Journal of International Law* v 95 757

121 See fn 120 *supra*. Roberts points out that ‘Modern custom can develop quickly because it is deduced from multilateral treaties and declarations by international fora such as the General Assembly, which can declare existing customs, crystallize emerging customs and generate new customs.’

122 Kinney (fn 51 *supra*) and also Roberts fn 120 at p765 -766 who observes that “By contrast [to declarations and treaties], custom is generally binding except for the limited and contentious persistent objector rule. Transforming declarations and treaties into custom changes their nature because customs can bind non-parties to treaties and declarations and are not affected by reservations or denunciation...Modern custom evinces a desire to create general international laws that can bind all states on important moral issues”. See however, Perritt Jr Symposium on the Internet and Legal Theory: The Internet Is Changing International Law’ (fn 2 *supra*) who observes that “A sovereign state can opt out by refusing to sign a treaty or by manifesting its lack of consent for a norm of customary international law...Because customary international law is consensual, states can exempt themselves from a norm of customary international law by manifesting an intent not to be bound by it... The growing importance of customary law, along with treaty based law has spawned a lively debate in American legal literature as to whether federal courts should incorporate customary international law into federal common law”

123 Roberts fn 120 *supra* p757

124 Perritt (fn 2 *supra*) and Roberts fn 120 *supra* where she observes that “At the same time custom has become an increasingly significant source of law in important areas such as human rights obligations. Codification conventions, academic commentary and the case law of the International Court of Justice...have also contributed to the contemporary resurrection of custom”.

125 Fidler D ‘Global Health Governance: Overview of the Role of International Law in Protecting and Promoting Global Public Health’, May 2002 Discussion Paper No 3 of the Centre on Global Change and Health London School of Hygiene & Tropical Medicine and the Department of Health & Development of the World Health Organization at p41. Fidler says that while arguments from customary international law are made in many international legal contexts, ‘the real action takes place in treaty law’.



of the instrument of international law from whence it originated¹²⁶. Modern international customary law has been criticised for ‘normative chauvinism’¹²⁷. For example it has been stated that human rights obligations reflect a Western tendency to give primacy to individual rights over communal or group needs¹²⁸. The fact that section 232 of the Constitution stipulates that customary international law is law in South Africa creates an obligation to establish the content of the customary international law on the legal topic at issue.

It must be observed in passing that to the extent that the phrase ‘international custom, as evidence of a general practice accepted as law’ in paragraph b of Article 38(1) of the Statute of the International Court of Justice coincides with the term ‘customary international law’ in section 232 of the Constitution, such international custom is law in South Africa and the courts do not have a discretion as to whether to apply it¹²⁹. A failure on the part of a South African court to apply customary international law, except where it is inconsistent with the Constitution or an Act of Parliament, may therefore not only be a violation of international law but would also be unconstitutional in terms of section 232.

In view of the fact that section 39(1) deals with international law generally as an interpretational tool rather than as hard law, a court might well be able to use even conflicting customary international law as such a tool to arrive at an interpretation of a right in the Bill of Rights which is not itself necessarily in conflict with the Constitution

¹²⁶ This can become something of a chicken-and-egg debate if one takes into account the probability that for a legal principle to be expressed in an international treaty or convention it would very likely have gained widespread or significant international acceptance before being reduced to writing in such treaty or convention. In this sense, therefore customary law precedes the more formal international law instruments. Possibly the best term to describe the relationship between customary international law and other types of international law is ‘symbiotic’. See Roberts fn 120 *supra* p763 who gives the example that some rights set out in the Universal Declaration of Human Rights of 1948 are expressed in mandatory terms and have achieved customary status even though infringements are “widespread, often gross and generally tolerated by the international community”. As a result modern custom often represents progressive development of the law masked as codification by *lex feranda* [what the law should be] as *lex lata* [what the law is].

¹²⁷ Simma B and Alston P ‘The Sources of Human Rights Law: Custom, Jus Cogens and General Principles’, 1988-89 *Australian Year Book of International Law* 82.

¹²⁸ Roberts fn 120 *supra* at 769.

¹²⁹ The legal principle expressed in section 232 of the Constitution is not new to South African law. See *Nduli and Another v Minister of Justice and others* (fn 73 *supra*) and *S v Petane* (fn 73 *supra*) in which the court stated that: “In *Nduli and Another v Minister of Justice and Others* 1978 (1) SA 893 (A), the Appellate Division accepted that customary international law was, subject to its being in conflict with any statutory or municipal law, directly operative in the national sphere. The Appellate Division described the attributes of a rule of customary international law which would make it applicable in South Africa. It would have to be either universally recognised or it would have to have received the assent of this country. In holding this the court referred to a passage in Oppenheim *International Law* 8th ed v1 at 39 which states the conditions concerning universal acceptance or state assent for recognition of a rule of customary international law as part of the law of England. Our law and English law in this respect is therefore the same.”



or an Act of Parliament and which promotes 'the values that underlie an open and democratic society based on human dignity, equality and freedom'. The content of customary international law on the issue of a right to health or health care depends upon which view of international customary law is espoused. In terms of so-called modern customary international law, the various treaties and conventions dealing with human rights and socio-economic rights would be of relevance in establishing the content of a customary international law right to health or health care. However, in view of the fact that these instruments will be discussed in detail in the section on public international law, they will not be canvassed here. In the context of the right to health it has been observed that the absence of international case law on the right to health heightens the international legal importance of national cases brought pursuant to the right to health¹³⁰. Even if it may not constitute customary international law at this stage, the Venezuelan case of *Cruz Bermudez, et al v Ministerio de Sanidad y Asistencia Social*¹³¹ is of interest in this context because of certain similarities and contrasts with the leading South African case on access to health care, *Minister of Health and others v Treatment Action Campaign and Others*¹³².

It is a useful illustration of the need to ground the implementation of the human right to health care in the realities of the economic and sociological situation since law in the abstract is of no value outside of the world of ideas. In *Cruz Bermudez*, heard by the Venezuelan Supreme Court in 1999, the plaintiffs argued that the Venezuelan government had violated their rights to life, health and access to scientific advances under Venezuelan law by failing to provide them with antiretroviral (ARV) medication. They asked that the Venezuelan court order the Ministry of Health to remedy these violations by:

¹³⁰ Torres MA 'The Human Right To Health National Courts and Access To HIV/AIDS Treatment: A Case Study from Venezuela' *Chicago Journal of International Law* Spring 2002 105 who observes that "National court decisions can inform international legal analysis in a number of ways. First, national court decisions involving treaty obligations could be said to constitute subsequent state practice under those treaties for the purpose of treaty interpretation. Second, national court decisions can be considered evidence of state practice and *opinio juris* for purposes of determining rules of customary international law. Third, as Article 38(1)(d) of the Statute of the International Court of Justice provides, national court decisions are subsidiary means for interpreting rules of international law." Torres states that the cases being brought by people living with HIV/AIDS against various governments for failing to provide access to ARV therapies and thus violating the right to health constitute an important set of materials for international legal analysis of the right to health.

¹³¹ See the report on this case by Torres (fn 130 *supra*)

¹³² *TAC* (fn 113 *supra*)

- providing periodically and regularly all medicines necessary, including ARV therapies and drugs for opportunistic infections, to persons living with HIV/AIDS in Venezuela,
- covering the expenses of persons living with HIV/AIDS for blood tests needed to monitor the disease and the effect of the medication; and
- developing and funding policies and programs to provide medical treatment and assistance for persons living with HIV/AIDS in Venezuela¹³³.

The Ministry of Health argued that the government could not pay for ARV therapy and related medicines for all persons living with HIV/AIDS in Venezuela because such expenses would be impossible to sustain. The Ministry in its defence pointed to its programs on HIV/AIDS prevention involving the distribution of informational booklets and condoms and the implementation of a safe sex initiative as evidence of its fulfilment of its obligations under Venezuelan law concerning health. It argued that it was progressively achieving improvements in connection with HIV/AIDS given the budgetary constraints it was facing as a health ministry in a developing country.

The Venezuelan court focused its opinion on the right to health. Under Venezuelan law there are strong expressions of the right to health in terms of Venezuela's constitution and its international law obligations. Venezuela is a party to the International Convention on Economic Social and Cultural Rights (ICESCR). Venezuela apparently has a monistically inclined view of international law in that treaty duties such as those in the ICESCR create obligations for the state of Venezuela that are directly enforceable by citizens against the government. Furthermore, Venezuela's constitution contains a constitutional right to health.

The Venezuelan court noted that:

- HIV positive people and people with AIDS are protected by the Venezuelan constitution and also by international law.

¹³³ Torres (fn 130 *supra*)

- that on the basis of the evidence presented by the parties, the Ministry of Health was not complying with its duty under the right to health, the immediate consequence of which was to place the lives of the plaintiffs at risk.
- that the Ministry's non-compliance was not intentional but resulted from its lack of financial resources.
- that despite the serious financial constraints the government had violated the plaintiff's right to health and that the Ministry had available mechanisms under Venezuelan law through which it could seek additional funds for the purpose of dealing with the medical requirements of persons living with HIV/AIDS.
- that the Ministry's failure to utilize these mechanisms contributed to the court's view that the Ministry had violated the right to health.
- that its ruling applied to all persons living with HIV/AIDS in Venezuela and not only the plaintiffs.

The court ordered the Ministry *inter alia* to:

- request immediately from the President the funds needed for HIV/AIDS prevention and control for the remaining fiscal year and an increase in budgetary allocations for future needs and
- provide ARV therapies and associated medicines to any persons living with HIV/AIDS in Venezuela¹³⁴.

Despite the court's ruling, the Venezuelan government has done 'little or nothing to improve the access to ARV therapies for persons living with HIV/AIDS.'¹³⁵

¹³⁴ Source: Torres (fn 128 *supra*)

The case is of interest because the court chose to ignore the Health Ministry's plea of poverty even though it acknowledged that Venezuela was facing an economic crisis. It chose to make an order which the Venezuelan government was apparently unable to fulfil. The Venezuelan situation highlights a number of practical problems relating to the right to health care and the monistic approach to international law. International law is as much an ideology as it is a system of law. In some cases, much like the South African Constitution, it is a postulation of what should be rather than what is. It is an instrument to indicate the direction in which nations should move rather than a map of where they currently find themselves¹³⁵. Practically speaking, unless the international community is prepared to rally support for international law as perceived by a domestic court in order to facilitate implementation of a court order supporting that international law, such orders are meaningless and so is the monistic approach to international law. If the international community had made funding available to the Venezuelan government such that it could reasonably implement the court order, the judgment of the Venezuelan Supreme Court would have been of more legal and practical significance. As things stand, however, it is apparently nothing more than a juristic white elephant, reflecting in Venezuelan domestic law, the ideological and abstract nature of much of the international law which informed it.

It is submitted that whilst such a situation may be acceptable in terms of international law, it is not acceptable in terms of domestic law because it not only calls into question the credibility and enforceability of all domestic law, elevating it in the process above the level of law to a lofty, but abstract, ideal, but also the power of domestic courts to uphold domestic law in any meaningful way. To a large extent, the manner of development of international law is very different to that of domestic legal systems. Enforcement is a

¹³⁵ Torres (fn 130 *supra*) She observes that the reality that the Venezuelan government ignores the court's ruling in the *Bermudez* case with impunity only contributes to the widespread perception that the right to health is symbolic rather than vital to the life of the nation and that the active and intelligent participation of the government is critical to improving a population's health, especially in the face of disease threats such as HIV/AIDS.

¹³⁶ *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) quoted with approval Dickson J, as he then was, in *Hunter et al v Southam Inc* (1985) 11 DLR (4th) 641 (SCC) ((1985) 14 CCC (3d) 97 SCC) at 649 (a case dealing with the Canadian Charter, which also incorporates a Bill of Rights) "A constitution . . . is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a [Bill or] Charter of Rights, for the unremitting protection of individual rights and liberties... The judiciary is the guardian of the Constitution and must in interpreting its provisions, bear these considerations in mind."

major feature of the latter and its practical implementation is a question not of possibility but of fact. Very often domestic legal systems are reactive rather than proactive within their economic and social environments. They reactively reflect developments in trade practices, technology and societal beliefs and values that have usually preceded them by a number of years.

Legal certainty is a prerequisite for the fairness and credibility of a domestic legal system. Such certainty is necessary not only in relation to what the law is on any given topic but also on the reliability of the legal remedy upheld by the courts. Contrary to international law, domestic law, generally speaking, is not a plea for utopia but rather a periodically updated street map indicating the highways and byways of current commercial and cultural practices, social values and beliefs. Socioeconomic rights in particular are inextricably linked with social and, most importantly, economic realities. By definition, any attempt to divorce them from the economic realities of a given situation renders them empty of meaning and value. The judgment of the Venezuelan court directed the Ministry of Health to request more funding from the President for ARV therapies and related medication, despite the fact that Venezuela was facing an economic crisis. There does not appear to have been a concurrent obligation imposed upon the President to make such funds available, even assuming that they existed. If such funds did not in fact exist, any order imposing upon the President a duty to make them available would in any event have been pointless. Without the additional funding, the Ministry of Health could not implement the remaining injunctions to make ARV therapies available not only to the plaintiffs but to all Venezuelans. The Venezuelan court effectively wrote a prescription that the Ministry of Health could not fill. The value of such a prescription to the patient is severely limited.

The ethereal quality of the judgment of the Venezuelan court is in marked contrast to the groundedness of the judgment of the South African constitutional court in the *TAC* case¹³⁷. The South African constitutional court judgment not only recognised expressly the need for government to be able to set policy and determine the allocation of scarce

¹³⁷ *TAC* fn 113 *infra*

resources but also *'that the corresponding rights themselves are limited by reason of the lack of resources'*¹³⁸. It observed that 'Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community.' The court acknowledged that the Constitution 'contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation'¹³⁹. The result was an order far more capable of implementation which carefully balanced the power of the executive branch of government to make policy against the rights of the poor to access to medical treatment whilst maintaining the credibility of the court¹⁴⁰. The government was ordered without delay to –

- Remove the restrictions that prevented Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that were not research training sites.
- Permit and facilitate the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics when in the judgment of the attending medical practitioner acting in consultation with the medical superintendent of the facility concerned this was medically indicated, which would if necessary include that the mother concerned has been appropriately tested and counselled.
- Make provision if necessary for counsellors based at public hospitals and clinics other than the research and training sites to be trained for the counselling necessary for the use of Nevirapine to reduce the risk of mother-to-child transmission of HIV.

¹³⁸ *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* (fn 113 *supra*) quoting with emphasis *Soobramoney v Minister of Health, KwaZulu-Natal* (fn 86 *supra*).

¹³⁹ *TAC* fn 113 *supra* at 1047 E-F

¹⁴⁰ See chapter 2 for a full discussion of the case.

- Take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.

The court expressly stated that the abovementioned orders did not preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods became available to it for the prevention of mother-to-child transmission of HIV. The drug, Nevirapine, was at the time of the judgment available to the government free of charge.

The efficacy and usefulness of customary international law with regard to enforcement of the right to health has been questioned by more than one writer¹⁴¹ despite the fact that customary international law has been identified as one of two major sources of international human rights law that are relevant to the right to health¹⁴².

Kinney points out that under the principles for the development of customary international law, widespread ratification of UN and regional treaties and other instruments recognizing international human rights can establish an international customary law of human rights. She says that specifically treaties, declarations and other instruments become evidence of a general state practice in which states engage out of a sense of legal obligation. As evidence of general practice followed out of a sense of legal obligation, they establish the human rights obligations on states, including the United States, that have not ratified treaties. She gives as an example the possibility that the International Convention on Economic Social and Cultural Rights (ICESCR) is arguably customary international law due to its widespread acceptance internationally. As a consequence it may be binding on all countries regardless of ratification¹⁴³. This said, Kinney concedes that recognition of an international right to health as a matter of

¹⁴¹ Fidler, (fn 125 *supra*) and Kinney (fn 51 *supra*)

¹⁴² Kinney 'The International Human Right To Health: What Does This Mean for Our Nation and our World?' (fn 51 *supra*) at p 1459.

¹⁴³ Kinney (fn 51 *supra*) at p1465. This view is not without its opponents both with regard to this method of derivation of customary international law and to the fact that customary international law can bind states without their consent.

international customary law ‘has some problems’¹⁴⁴, observing that ‘there is a circularity in the rationale for international customary law that is problematic’. She goes on to say that ‘Realistically, implementation and enforcement of the international right to health is difficult particularly if predicated on customary international law’ and that the United States and other nations would probably not tolerate excessive interference in their domestic affairs if they have not ratified the ICESCR¹⁴⁵.

Depending upon which approach one adopts to customary international law, and despite the claims of Kinney, it may well be that there is in fact no real customary international law right to health or health care and that the relevant international law is not customary international law at all but rather public international law in the form of written conventions and treaties. The reason for such a conclusion relates in part to the difficulty of establishing the content of a right to health or health care at customary international law. Kinney herself acknowledges that there are significant economic, social and cultural differences among the nations of the world which render it difficult to specify the content of a universal international right to health in a meaningful way¹⁴⁶.

1.5 Public International Law and the Right To Health

The right to health is expressed in different ways in a number of different international instruments. The preamble to the constitution of the World Health Organisation, adopted in 1946, states that:

“The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social conditions.”

¹⁴⁴ Kinney (fn 51 *supra*) at p 1467

¹⁴⁵ Kinney (fn 51 *supra*) at p 1472

¹⁴⁶ Kinney (fn 51 *supra*) proposes as a solution to these economic social and cultural differences that a first step would be to define universal outcome measures that measure compliance with the core state obligations of the human right to health. Unfortunately this begs the question. How does one go about establishing a set of core obligations given the diversity of the economic social and cultural circumstances in which different states find themselves? The very idea of a core assumes a certain common denominator in terms of economic, social and cultural factors. The South African constitutional court has rejected the direct application of the concept of minimum core in both the *Grootboom* (fn 57 *supra*) and the *TAC* (fn 113 *supra*) cases. The imposition upon a state of minimum core obligations which it cannot possibly fulfil for economic, social or cultural reasons simply invalidates the minimum core concept as a realistic method of ascertaining the contents of the right.

The variety of the language used in the various international instruments whose scope includes rights impacting on health illustrates the need for a detailed focus on the content of the rights that are recognised. There is also the question of whether the international instrument concerned should be interpreted using a textual approach so that the rights contained therein are interpreted purely with regard to the wording of the instrument itself or whether regard must also be had to other international legal instruments containing similar provisions. Put differently, are the various rights to health expressed in international treaties and conventions all expressions of different rights or different expressions of the same global right? If the latter, then what is the content and implications of such right? If it could be shown that there was such a single right, the arguments for the existence of such a right as part of customary international law and even *jus cogens* might be stronger than if there existed a number of different rights which were not widely supported or recognised by significant numbers of nation states. If the right is fragmented then it could be argued that certain fragments have passed into customary international law or *jus cogens* but not others. It is all very well to ardently allege that human rights are principles of *jus cogens* and that socio-economic rights as a sub-category of such human rights are thus also part of the *jus cogens* but if there is no significant agreement as to the content of such rights then their categorisation as *jus cogens* is academic.

South Africa is a signatory of the International Convention on Economic, Social and Cultural Rights (ICESCR) and has ratified the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). It has not, however, expressly enacted every provision of these international agreements into domestic law as contemplated by section 231(4) of the Constitution. The Constitution for instance contains a general prohibition on unfair discrimination, including discrimination on the basis of gender but this is not in the express terms of CEDAW. Whilst the Bill of Rights reflects the rights of children to certain essentials, it certainly does not reflect the sweeping language of the CRC. The

Promotion of Equality and Prevention of Unfair Discrimination Act¹⁴⁷ deals with issues of discrimination but does not expressly enact CEDAW. The constitutional obligation of the state to achieve the progressive realisation of certain socio-economic rights echoes the ICESCR obligation to achieve progressively the full realisation of the rights but the constitutional right of access to health care services does not contain the specific provisions of Article 12 of the ICESCR relating to reduction of stillbirths and infant mortality, the prevention and control of diseases and the improvement of all aspects of industrial and environmental hygiene. Thus, whilst these conventions are binding upon the Republic as a nation state at international law, they are not necessarily binding upon inhabitants of the Republic as domestic law.

There are a number of international commentaries upon the ICESCR which have attempted to add flesh to the bare bones of the rights expressed in the instrument itself. General comment number 14 of the United Nations Committee on Economic, Social and Cultural Rights is one such document. This comment observes that the ICESCR ‘provides the most comprehensive article on the right to health in international human rights law’. It is not clear whether this is a claim to supremacy over other international instruments referring to a right to health. However, it is of interest that the statement implies that there is a single right to health in international human rights law and that there may be different statements of this single right in other international law instruments. A further point of interest possibly in contrast to the implication that there is a single right to health in international law is that the Committee states expressly that in drafting article 12 of the ICESCR the Third Committee of the United Nations General Assembly did not adopt the definition of health contained in the preamble to the constitution of the WHO. The Committee is thus distancing the right as expressed in the ICESCR from that expressed in the WHO constitution. It observes that the reference in article 12.1 of the Covenant to “the highest attainable standard of physical and mental health” is not confined to the right to health care and that the drafting history and express wording of article 12.2 acknowledge that the right to health embraces a wide range of

¹⁴⁷ Act No 4 of 2000. See also the Domestic Violence Act 116 of 1998 and the Criminal Law (Sexual Offences) Amendment Bill (B50-2003), which is not yet law. They both acknowledge CEDAW in their preambles. The latter makes provision for sexual offences such as rape and compelled or induced indecent acts while the former provides for the issuing of protection orders with regard to domestic violence. They seek to give effect to CEDAW without necessarily enacting its express provisions.

socio-economic factors that promote conditions in which people can lead a healthy life. The Committee points out that this extends to the underlying determinants of health such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions and a healthy environment.

Significantly, the Committee refers to the right to health as a goal and observes that in many cases, especially for those living in poverty, this goal is becoming increasingly remote. The nature of the right to health contemplated in the ICESCR is thus an ideal rather than a practical reality.¹⁴⁸ The idea of using the law to attain ideals is in many respects peculiar to international law. Constitutions aside, domestic legal systems still tend to approach the question of rights from the perspective of what is presently reasonably attainable. Generally speaking, in domestic law terms a right which cannot be enforced or protected in a practical way is hardly worth the name. Furthermore, ideals of this nature, at least in the South African context, are very much the province of the executive and legislative branches of government as opposed to the judiciary, given the role of the judiciary as expressed by Chaskalson P in the *TAC* case¹⁴⁹. The progressive realisation of the right to health care services in South Africa, it is submitted, is rather more the task of the national executive than it is of the courts who by their own admission are ill-suited to make decisions which could have multiple social and economic consequences for the community. It is further submitted that an overly idealistic interpretation by the judiciary of the socio-economic rights granted in the Bill of Rights would diminish the effective value of the right in question by elevating it beyond the realms of what is practical and achievable. One ends up with judgments which, although laudable in their intentions and limitless in their scope, are not realistically capable of implementation. The right, when interpreted by the judiciary in such a manner, becomes hollow and the practical ends that the right is designed to achieve are thus defeated. A more limited and pragmatic judgment that can be put into

¹⁴⁸ This nicety appears to have escaped the Venezuelan court in the *Cruz Bermúdez* case (fn 130 *supra*)

¹⁴⁹ *TAC* fn 113 *supra*

effect is of considerably greater value as indicated by the outcomes for the holders of the rights in the *Grootboom*¹⁵⁰ and *TAC* cases.

When one comes to an examination of the right to health care services in terms of section 27 of the Constitution in the light of international law, it is submitted that one must bear in mind that direct comparisons, and inferences of direct relationships, between domestic rights and international ones may not always be appropriate due to the fact that the domestic rights must be considered for the most part in the light of present realities rather than that of dreams of the future.¹⁵¹ This precept has been clearly recognised by the South African constitutional court with regard to the concept of the minimum core content of socio-economic rights in both *Grootboom*'s and the *TAC* cases. It also illustrates the fact that whilst a nation state may recognise the basic principle of a right as stated in an instrument of public international law, the content of the right is subject to interpretation with regard to domestic legal and other circumstances. The relationship between international and domestic law is not as simple or direct as certain *amici curiae* have argued¹⁵². Comparisons of rights in international law with rights expressed in the

¹⁵⁰ *Grootboom* fn 57 *supra*

¹⁵¹ The Constitutional court in *TAC* (fn 113 *supra*) pointed to the statement in *Grootboom* (fn 57 *supra*) that "millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted..." as the relevant context in which socio-economic rights need to be interpreted. While it is true that Madala J in *Scoobramoney* stated that "Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise in some cases, and an indication of what a democratic society aiming to salvage loss, dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide nurture and protect for a future South Africa" and so some of the rights in the Constitution are also ideals, they must have some degree of substance within the present in order to be meaningful. The fact that the test used by the courts to ascertain whether or not the state is fulfilling its constitutional obligations is one of reasonableness supports this assertion since it implies that the present circumstances in which the right is sought to be upheld are the relevant context for such test. Madala J in *Scoobramoney* acknowledges this need for present value in pointing out that "In its language, the Constitution accepts that it cannot solve all our society's woes overnight, but must go on trying to resolve these problems." The Constitutional Court pointed out in *Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa 1996* (1996 (4) SA 744 (CC) at para 78) in dealing with an objection that socio-economic rights are not justiciable, that "At the very minimum, socio-economic rights can be negatively protected from improper invasion." The content of the right may change as circumstances change, but it must have some degree of content in the present. In the *TAC* case the court, referring to *Scoobramoney*, explicitly recognised the fact that "the corresponding rights themselves are limited by reason of the lack of resources". This observation, coupled with the fact that the test is one of reasonableness, leads to the inevitable conclusion that the content of the right may be subject to fluctuation, depending upon changing circumstances and the availability of resources. This is why, as Yacob J stated in *Grootboom* (fn 57 *supra* at 61) "The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis." The concept of a minimum core is rigid and as such does not sit comfortably with the flexibility of the test of reasonableness in the prevailing circumstances. What is reasonable for today may not be reasonable for tomorrow if there has been a change in the available resources.

¹⁵² *In Government of the Republic of South Africa and Others v Grootboom and Others* (fn 57 *supra*) and *Minister of Health and Others v Treatment Action Campaign and Others* (fn 113 *supra*)

Constitution are further complicated by the postulate of international law that all human rights are indivisible and interdependent¹⁵³.

Whilst this postulate is not disputed within South African domestic law¹⁵⁴, the body of rights granted by the Bill of rights is not expressed in exactly the same terms as the body of similar rights at international law. One is therefore not engaging upon a simple comparison of a single right at international law with a single right at domestic constitutional law but rather a comparison at various levels of complex matrices of rights (one of which is openly recognised as an expression of ideals whilst the other also seeks to achieve tangible and practical legal realities) often beset with their own internal conflicts. Where there is an internal conflict between constitutional rights, a balancing of the rights must take place. Where there is an internal conflict between human rights at international law and an internal conflict between similar rights in domestic law, it is submitted that the internal conflict between the domestic rights¹⁵⁵ must first be resolved before any consideration of international law can fruitfully take place¹⁵⁶. Consistency is a prerequisite of a rational and clearly principled domestic legal system. Considerations of international law which do not promote such consistency are likely to lead ultimately to an internally fragmented and chaotic domestic legal order with diminution of the value of the body of rights it seeks to confer. Once a balance between the domestic rights has been

¹⁵³ Fact Sheet No 16 (Rev.1) The Committee on Economic, Social and Cultural Rights www.unhcr.org/html/menu6/2/fs16.htm and General Comment No 14: The Right to the Highest Attainable Standard of Health of the United Nations Committee on Economic, Social and Cultural Rights E/C.12/2000/4 where it is stated that: "The right to health is closely related to and dependent upon the realization of other human rights as contained in the International Bill of Rights, including the right to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health."

¹⁵⁴ See for instance the observations of the court in *S v Makwanyane and Another* (fn 23 *supra*) concerning the centrality of the rights to dignity and life and their interrelationship with other rights. See also *Government of the Republic of South Africa and Others v Grootboom and Others* (fn 57 *supra*) where the court stated that: "The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them."

¹⁵⁵ Sachs J in *Soobramoney v Minister of Health, Kwazulu-Natal*, (fn 86 *supra*) at 783 observes that: "Traditional rights analyses accordingly have to be adapted so as to take account of the special problems created by the need to provide a broad framework of constitutional principles governing the right of access to scarce resources and to adjudicate between competing rights bearers. When rights by their very nature are shared and inter-dependent, striking appropriate balances between the equally valid entitlements or expectations of a multitude of claimants should not be seen as imposing limits on those rights (which would then have to be justified in terms of s 36), but as defining the circumstances in which the rights may most fairly and effectively be enjoyed." See also *Qozalet v Minister of Law and Order and Another* 1994 (3) SA 625 (E) which states that when rights clash a balancing of the rights must take place.

¹⁵⁶ Obviously if such conflicts have been encountered and resolved at international law this may serve as a useful guide for resolving similar conflicts within domestic law.

achieved, a balancing of the conflicting rights at international law should be undertaken and the result should then be considered with regard to the balance achieved with regard to the conflicting rights at domestic law. In view of the foregoing, the processes of legal reasoning envisaged by section 39(1) of the Constitution require at first, a wide angled, global consideration of both the relevant international and domestic law as *systems* of law, before the convergent, analytical approach of Lord Simon of Glaisdale¹⁵⁷ may successfully be applied to individual principles within those systems. Synthesis is thus as much a necessity as analysis in this particular area of law.

1.6 Minimum Core

Minimum core content has been described as the non-negotiable foundation of a right to which all individuals, in all contexts under all circumstances are entitled. The term 'core content' refers to the entitlements which make up the right. Minimum core content is not the same as the core content of a right¹⁵⁸. The question of availability of resources, although recognised by the ICESCR, is played down to some extent by the United

¹⁵⁷ *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 ([1975] 3 All ER 801 (HL)) at 481-2 (AC) and 834h-824a (All ER) in which Lord Simon of Glaisdale observed that: "(T)he training and qualification of a Judge is to elucidate the problem immediately before him, so that its features stand out in stereoscopic clarity. But the beam of light which so illuminates the immediate scene seems to throw surrounding areas into greater obscurity; the whole landscape is distorted to the view. A penumbra can be apprehended, but not much beyond; so that when the searchlight shifts a quite unexpected scene may be disclosed. The very qualifications for the judicial process thus impose limitations on its use. This is why judicial advance should be gradual. I am not trained to see the distant scene: one step is enough for me should be the motto on the wall opposite the Judge's desk. It is, I concede, a less spectacular method of progression than somersaults and cartwheels; but it is the one best suited to the capacity and resources of a Judge. We are likely to perform better the duties society imposed on us if we recognise our limitations. Within the proper limits there is more than enough to be done which is of value to society" as cited with approval by Brand J in *Van Biljon and Others v Minister of Correctional Services and Others* 1997 (4) SA 441 (C) at 451.

¹⁵⁸ Provea (a South American non-governmental organisation) 'Health as a Right: Framework for the National and International Protection of the Human Right to Health', Caracas, 1996 at 39. Provea states that: "We consider that by establishing a minimum, uniform "floor" below which a state may not descend does not weaken the right in question, provided that the content is understood as a starting point and not as the arrival point. Furthermore, establishing a framework assures a uniform basis to be respected, even by the states with insufficient economic resources or subjected to critical economic situations." See paragraph 10 of General Comment 3 of the United Nations Committee on the ICESCR referred to in *Grootboom* where it is said: '10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining states Parties' reports the Committee is of the view that minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a state has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each state party to take the necessary steps "to the maximum of its available resources". In order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.' See also the reference in *Minister of Health and Others v Treatment Action Campaign and Others* [fn 113 *supra*] to General Comment 3 "The nature of states parties obligations (Art 2, par.1)" 12/12/90

Nations Committee in its General Comment No 3¹⁵⁹ possibly because this concept has been criticised as being a loophole for states parties to use in order to escape their obligations in terms of the Convention. The exact nature of the minimum core of the right to health care is not expressly stated in any instrument of international law¹⁶⁰.

In their arguments concerning the minimum core concept the *amici* in *Grootboom* referred firstly to Article 11.1 of the Covenant on Economic Social and Cultural Rights which provides that:

“The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family including adequate food, clothing and housing and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right recognising to this effect the essential importance of international co-operation based on free consent.”

They then referred to the relevant general comments issued by the United Nations Committee on Economic, Social and Cultural Rights concerning the interpretation and

¹⁵⁹ In General Comment 3 on the ICESCR at paragraph 11, the United Nations Committee on the ICESCR notes that: “The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a state party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover the obligations to monitor the extent of the realization, or more especially the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.”

¹⁶⁰ There appears to be considerable controversy surrounding the definition of minimum core at international level. Some are of the view that it is too difficult to establish universally approved standards. The United Nations Committee on Economic, Social and Cultural Rights (CESCR) appears to support such a view. It has stated that: “As the ideal of the human being is to attain the highest possible standard of living, it is not possible to fix a uniform minimum limit below which a given state is considered to be in breach of its health-related obligations” (Juan Alvarez Vita, “Discussion note” in CESCR. Report on the ninth session, E/C.12/1993/19, p63. Vita is a former member of the CESCR) By contrast, Provea, a Venezuelan Non-Governmental Organisation (NGO), undertook a systematic research project on the right to health. An intensive bibliographical search revealed that most of the sources consulted either addressed specific aspects of the right to health, or treated it in an introductory or general manner. When it discovered that there was insufficient material defining the right to health, Provea attempted to delineate a conceptual framework for protecting the right to health. Some of the principles that informed the work of Provea were:

- Defining minimum core content is a relatively unexplored area, but it is necessary to arrive at an objective definition of each right;
- The minimum core content of a right establishes the minimal conditions that each individual should enjoy, in the absence of which the right is understood to be absent;
- Having a definition of content is a valuable instrument for enforcement, as it makes it possible to have a minimum standard for evaluating the observance of a right;
- Defining minimum contents needs to be understood as a dynamic process;
- The principle of universality is assumed, i.e. all human beings by nature are entitled to all human rights. The fact that different legal orders may establish different levels of protection does not mean that some have more of a right than others do;
- In a world of constant change and diverse scenarios, it is possible to identify common elements that constitute a core aspect of the right, independent of available resources or political, economic, social or cultural context;
- For health the starting point for arriving at a definition is to be found in the standards established in treaties that provide for the protection of the right, which are a necessary frame of reference but which always need to be improved;
- A secondary source is a comprehensive view of health emanating from the international doctrine as to what constitutes health that has been developed by the World Health Organization, among others.

See further www.hrusa.org/hrmaterials/THRIP/cirole/modules/module8.htm

application of the Covenant and argued that these general comments constitute a significant guide to the interpretation of section 26 of the Constitution. Paragraph 10 of general comment 3, issued by the Committee in 1990 states:

“10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States Parties’ reports the Committee is of the view that minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps ‘to the maximum of its available resources’. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”¹⁶¹

Yacoob J observed that it was clear from this extract that the committee considered that every state party is bound to fulfil a minimum core obligation by ensuring the satisfaction of a minimum essential level of the socio-economic rights, including the right to adequate housing and that a state in which a significant number of individuals is deprived of basic shelter and housing is regarded as *prima facie* in breach of its obligations under the Covenant. He also observed that it was to be noted that the general comment does not specify precisely what minimum core is although a guideline is given in that it is

¹⁶¹ Yacoob J in *Grootboom* (fn 57 *supra*) at 64-65. General Comment No 14: The Right to the Highest Attainable Standard of Health Document Number E/C.12/2000/4 of the United Nations Committee on Economic, Social and Cultural Rights identifies core obligations of the right to health as:

- (a) to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- (b) to ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- (c) to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- (d) to provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- (e) to ensure equitable distribution of all health facilities, goods and services;
- (f) to adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.

The Committee also confirmed that the following obligations are of comparable priority:

- (a) to ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;
- (b) to provide immunization against the major infectious diseases occurring in the community;
- (c) to take measures to prevent, treat and control epidemic and endemic diseases;
- (d) to provide appropriate training for health personnel, including education on health and human rights.

determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question¹⁶².

Yacoob J rejected the principle of minimum core with the following logic:

“It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right. The committee developed the concept of minimum core over many years of examining reports by reporting states. This Court does not have comparable information. The determination of a minimum core in the context of ‘the right to have access to adequate housing’ presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people. As will appear from the discussion below, the real question in terms of our Constitution is whether the measures taken by the State to realise the right afforded by s 26 are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a Court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not in any event necessary to decide whether it is appropriate for a Court to determine in the first instance the minimum core content of a right.”

The court appeared to regard even the concept of minimum core as being variable in content depending upon the given context. Despite this reasoned and clear rejection by the constitutional court of the general concept of a minimum core obligation as expressed in international law, the *amici* in the *TAC* case renewed attempts to have it introduced into South African law. The constitutional court in this case referred to the judgements in both *Grootboom*¹⁶³ and *Soobramoney*¹⁶⁴ and stated bluntly that, “It is impossible to give everyone access even to a “core” service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-

¹⁶² *Grootboom* (fn 57 *supra*) at p65

¹⁶³ *Grootboom* (fn 57 *supra*)

¹⁶⁴ *Soobramoney* (fn 86 *supra*)

economic rights identified in sections 26 and 27 on a progressive basis.”¹⁶⁵ The constitutional court in the *TAC* case concluded that “section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations of the state to ‘respect, protect, promote and fulfil’ such rights.

It is submitted that the nomenclature ‘minimum core’ or “core obligations’ is in any event a misnomer when the extent of the enunciation of the United Nations Committee on the International Covenant on Economic, Social and Cultural Rights of what it considers to be core obligations in General Comment No. 14 is considered. The ‘core’ obligations listed in the Comment are so comprehensive that it is difficult to conceive of any obligations that might be on the periphery concerning the right to health¹⁶⁶.

1.7 International Legal Principles Applied Locally

The constitutional court’s rejection of the minimum core principle is indicative not only of the manner in which the constitutional court is implementing section 39(1) but also of the fact that international law interpretations of rights contained in instruments such as the International Convention on Economic, Social and Cultural Rights will not be applied without question to situations involving similar rights in domestic law. International legal principles are applicable within the South African legal system only to the extent that they are consistent with the principles of the Constitution and South Africa’s unique historical and social context¹⁶⁷. Arguments which attempt to import piecemeal international legal principles and doctrines into the South African legal system not only indicate an overly simplistic view of the South African legal system but are also distinctly

¹⁶⁵ *TAC* fn 113 *supra* at 1046 G

¹⁶⁶ General Comment of ICESCR Committee see fn 161 *supra*

¹⁶⁷ Yacoob J in *Grootboom* (fn 57 *supra* at p 62) stated: “Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of chap 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context. Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting.”

inadvisable given the holistic and teleological approach of the South African courts to questions of interpretation of constitutional rights and the consideration of international law. Yacoob J in *Grootboom* expressly detailed the differences between the right to housing expressed in the ICESCR and the right to housing expressed in the Constitution. He pointed out that the Covenant provides for a right to adequate housing while section 26 provides for right of access to adequate housing, that the Covenant obliges states parties to take appropriate steps which must include legislation while the Constitution obliges the South African state to take *reasonable* legislative and other measures. If one performs the same exercise with regard to Article 12 of the ICESCR and section 27 of the Constitution the differences that emerge are as follows:

1. The ICESCR recognizes the right of everyone to the enjoyment of the “highest attainable standard of physical and mental health” while section 27(1) of the Constitution refers explicitly to a right of *access* to health care services, including reproductive health care. The South African Constitution thus does not even recognise a right to health *per se* but rather a right to health care services in particular. This right is defined in terms of access which implies *inter alia* that the health services in question will not necessarily be free of charge. A standard of health, attainable or not, is not a feature of section 27(1).
2. The right to health in the ICESCR makes no specific mention of emergency medical treatment as does section 27(3) of the Constitution.
3. The right to health in the ICESCR details certain specific steps to be taken by states parties in order to achieve the full realization of the right to health such as the provision for the reduction of the stillbirth-rate and of infant mortality and for the development of the healthy child; the improvement of all aspects of environmental and industrial hygiene; the prevention, treatment and control of epidemic, endemic, occupational and other diseases; the creation of conditions which would assure to all medical service and medical attention in the event of sickness. Section 27 contains no such detailed prescriptions. Instead, section 27(2) provides that the state must take

reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of these rights.

These differences are clearly considerable and even greater than those elucidated by Yacoob J with regard to the right to housing in *Grootboom*¹⁶⁸. Yacoob J stated in that case that “The differences between the relevant provisions of the Covenant and our Constitution are significant in determining the extent to which the provisions of the Covenant may be a guide to interpretation of section 26”.¹⁶⁹ The ICESCR is thus of limited value as an interpretational tool when considering the right to health care services under section 27 of the Constitution.

This said, a study of the judgments of the Constitutional Court relating to socio-economic rights reveals that the court is indeed developing its own jurisprudence on human rights generally and socio-economic rights in particular, many of which are not inconsistent, in broad terms, with international legal principles relating to such rights. From the judgments in *Soobramoney vs Minister of Health (Kwazulu-Natal)*¹⁷⁰, *Government of the Republic of South Africa and others v Grootboom and Others*¹⁷¹, and *Minister of Health and Others v Treatment Action Campaign and Others*¹⁷² it is clear that certain legal principles are gradually coalescing to flesh out the bare bones of the constitutional provisions relating to these rights. These principles are as follows:

1. There must be provision by the state within legislative and policy frameworks for mechanisms to address ‘hard cases’ or, as the constitutional court has put it, the situation of people “in desperate need”¹⁷³.

¹⁶⁸ *Grootboom* (fn 57 *supra*)

¹⁶⁹ *Grootboom* (fn 57 *supra*) at p64

¹⁷⁰ *Soobramoney* (fn 86 *supra*)

¹⁷¹ *Grootboom* fn 57 *supra*

¹⁷² *TAC* fn 113 *supra*

¹⁷³ *Government Of The Republic Of South Africa And Others v Grootboom And Others* (fn 57 *supra*): “The nationwide housing program falls short of obligations imposed upon national government to the extent that it fails to recognise that the state must provide for relief for those in desperate need. They are not to be ignored in the interests of an overall program focussed on medium and long-term objectives. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance” and also “The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.”

2. There must be flexibility in state policies and programmes to address changing situations and needs¹⁷⁴.
3. The state is responsible for the creation of circumstances in which the rights of the individual may be realized and must take positive action¹⁷⁵.
4. Socio-economic rights and the corresponding obligations of the state must be interpreted within their social and historical context¹⁷⁶.
5. The test of reasonableness will be applied. State policies and programmes must be reasonable both in their conception and their implementation¹⁷⁷.
6. Urgency of the need is an important factor. Of relevance here is the degree of discrepancy between the “haves” and the “have-nots” with regard to the right in question¹⁷⁸.

¹⁷⁴ *Government Of The Republic Of South Africa And Others v Grootboom And Others* (fn 57 *supra*) “The program must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A program that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the program will require continuous review.” Also *Minister of Health and Others v TAC and Others* (fn 113 *supra*) “The rigidity of government’s approach has affected its policy as a whole... A factor that needs to be kept in mind is that policy is and should be flexible.”

¹⁷⁵ *Government Of The Republic Of South Africa And Others v Grootboom And Others* (fn 57 *supra*): “A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society” and also “to be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise.” Also *Minister of Health and Others v TAC and Others* (fn 113 *supra*): “The state is obliged to take reasonable measures progressively to eliminate or reduce large areas of severe deprivation that afflict our society”.

¹⁷⁶ *Minister of Health and Others v TAC and Others* (fn 113 *supra*) at 1043; *Soobramoney v Minister of Health, KwaZulu-Natal* (fn 86 *supra*); *Government Of The Republic Of South Africa And Others v Grootboom And Others* (fn 57 *supra*).

¹⁷⁷ *Government Of The Republic Of South Africa And Others v Grootboom And Others* (fn 57 *supra*) “The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the state’s obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the state’s obligations.” Also *Minister of Health and Others v TAC and Others* (fn 113 *supra*): “This does not mean, however, that until the best programme has been formulated and the necessary funds and infrastructure provided for the implementation of that programme, Nevirapine must be withheld from mothers and children who do not have access to the research and training sites. Nor can it reasonably be withheld until medical research has been completed.”

¹⁷⁸ *Government Of The Republic Of South Africa And Others v Grootboom And Others* (fn 57 *supra*) “In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the state’s primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between ss 26 and 27 and the other socio-economic rights is most apparent. If under s 27 the state has in place programs to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state’s obligations in respect of other socio-

7. The exclusionary effects of a policy or programme are constitutionally significant, especially exclusion of a significant segment of society. A programme for the realisation of socio-economic rights must be balanced and flexible¹⁷⁹.
8. Transparency and proper communication is an important aspect of programmes for the realisation of socio-economic rights¹⁸⁰.

Principles 1 to 8 listed above are in the spirit, if not the form, of the ICESCR and General Comment No 14. Principles 1, 2, 3,7 and 8 above are entirely consistent with core obligation (f) in General Comment No 14 to the effect that states must:

“adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to vulnerable or marginalized groups.”

The statement in General Comment No 14 that:

“States parties are referred to the Alma-Ata Declaration which proclaims that the existing gross inequality in the health status of the people, particularly between developed and developing countries, as well as within countries, is politically, socially and economically unacceptable and is, therefore, of common concern to all countries” may be aligned with principle 6 above. Part (a) of the core obligations identified by the United Nations Committee on the ICESCR states that states must “ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups.”

economic rights” and (as cited with approval in *Minister of Health and Others v TAC and Others*) “Those whose needs are most urgent and whose ability to enjoy all rights therefore is most in peril must not be ignored by the measures aimed at achieving the realisation of the right.”

¹⁷⁹ *Government Of The Republic Of South Africa And Others v Grootboom And Others* (fn 57 *supra*) “A program that excludes a significant segment of society cannot be said to be reasonable.” (quoted with approval in *Minister of Health and Others v TAC and Others* (fn 113 *supra*)).

¹⁸⁰ *Minister of Health and Others v TAC and Others* (fn 113 *supra*) “In order for it to be implemented optimally, a public health programme must be made known effectively to all concerned... Indeed, for a public programme such as this to meet the constitutional requirements of reasonableness, its contents must be made known appropriately.”

Principle 7 above can be readily equated with core obligation (c) enunciated in General Comment No. 14 to the effect that states must “ensure equitable distribution of all health facilities, goods and services”.

Principle 8 above relates to the additional core obligations (d) and (e) of General Comment No 14 which stipulates that states must provide education and access to information concerning the main health problems in the community including methods of preventing and controlling them” and “provide appropriate training for health personnel including education on health and human rights”. The need for communication of this nature was a notable feature of the judgment in the *TAC* case¹⁸¹.

The significance of this is that the constitutional court has not rejected many of the basic principles to be found in public international law concerning minimum core obligations so much as it has rejected the idea that they constitute a minimum core. The content of a socio-economic right is defined *inter alia* by the resources that are available and since the availability of resources is not a constant in any given situation, there can be no hard and fast minimum core. The only constant against which the state’s performance can be measured is reasonableness viewed in the particular circumstances of each case. It is submitted with respect, that given the apparent inability of international legal forums to define minimum core content of the right to health, or even to agree that such definition is necessary, the rejection of the South African constitutional court of the concept of minimum core content was fully justified. The concept of minimum core content in relation to socio-economic rights is in any event a moving target since one cannot justify the implementation of only the barest legal necessities in the face of a greater than minimal supply of relevant resources. The court’s approach to the definition and determination of the content of the constitutional right of access to health care services and other socio-economic rights in South Africa is far more beneficial and pragmatic in terms of both its flexibility and its capacity to afford efficient, effective and appropriate relief to those the need it. For as long as the content of a right cannot be substantively defined at international level, the relevance and applicability of public international law

¹⁸¹ *TAC* (fn 113 *supra*)

within domestic legal systems will be limited. Perhaps that is as it should be. The South African judiciary has demonstrated its ability to effectively resolve key issues relating to the content of human rights using domestic constitutional precepts and legal principles as opposed to the direct application of rules of international law. Questions of the application or implementation of human rights must inevitably lead at some point to a discussion of the rights of vulnerable groups and the ranking of rights. In the context of the delivery of health care services this is of particular importance since resource allocation decisions have to be rational and justifiable. If there is some ranking or ordering of rights that is internationally recognised then this may have a bearing on such decisions. Furthermore it is evident from the foregoing discussions that the South African judiciary has expressly recognised a requirement to consider those who are in most desperate need. This clearly indicates that certain groups must receive some special attention. It is important, however, to justify the basis on which a particular group is given such special attention in the context of resource allocation decision. For the purposes of this chapter, it is thus necessary to explore the international law position in more detail on this issue. At the outset, however, it must be stressed that this is a topic worthy of a doctoral thesis in its own right and that it cannot possibly be canvassed in all its complexity in this thesis.

1.8 Rights of Vulnerable Groups

The question of whether the rights of vulnerable groups should take preference in health resource allocation decisions must be considered at two different levels. At the first level there is the nature of their rights as opposed to those of others and the question of whether there is a difference in terms of the legal status or weight of these rights relative to the rights of others. At the second level is the priority or preference, if any, that must be given to the implementation or enforcement of the rights of vulnerable groups over those of others, even if the rights themselves are of equal weight or status. This question of the prioritisation of rights will be considered in the context of South African constitutional law in the next chapter but it is necessary to look at relevant international law instruments and guidelines in order to establish the international position in this

regard. As stated previously, it is of considerable importance in the context of resource allocation decisions.

1.8.1 The Status of One Right Relative to Another

On the subject of a hierarchy of human rights generally there appears, as one has by now come to expect from international law, to be no agreement. The rights 'cake' can be sliced in a number of different ways in terms of hierarchies which makes for a number of different types of hierarchies and this, it is submitted, is part of the reason why there are such differing reactions to the issue of the ranking of rights. There is the hierarchy of one right over another for instance in terms of the balancing of rights in individual cases. Where one right cuts across another, which one must take precedence? An example of this in South African law is the power of a woman to terminate a pregnancy based on the right to freedom and security of the person in section 12 of the Constitution as opposed to the right of a health care worker to freedom of religion and conscience under section of the Constitution where the worker's religious beliefs condemn abortion. Can the worker be compelled to assist the woman to terminate her pregnancy? Then there is the concept of derogable as opposed to non-derogable rights such as is found in the South African Constitution but to which it is by no means unique¹⁸². Although non-derogable rights are usually referred to in the context of states of emergency, the concept certainly lends weight to the general idea that there are certain rights which are so fundamentally important that they may not be disregarded, even in the direst circumstances, and that there are others that do not enjoy the same status.

¹⁸²

The International Covenant on Civil and Political Rights (ICCPR) names seven non-derogable rights. These are the right to life, freedom from torture or degrading treatment, freedom from slavery, freedom from imprisonment for breach of contract, freedom from retrospective criminality, recognition as a person before the law and freedom of thought, conscience and religion. It is interesting that Prasopa-Plaizier N in 'Life and Death Decisions' <http://cas.org/au/horizons/h26/life.html> should comment on this in the context of triage as practised by humanitarian agencies and workers in war zones. He points out that while "Agencies like Community Aid Abroad are committed to all of the rights housed in the Universal Declaration of Rights and the two associated Covenants: Economic and Social Rights; and Civil and Political Rights"... "trade-offs are becoming increasingly necessary between 'core' and 'long term' rights." He notes that in practice the recognition of certain non-derogable rights means "concentrating on survival and the protection and improvement of health." The United Nations Commission on Human Rights (53rd Session Agenda Item 16) in its statement of International Educational Development/Humanitarian Law Project states that "Because the non-derogable rights are *jus cogens*, they apply to any state at all times."

There is the other hierarchy of so-called first generation, second generation and third generation rights. Advanced by French jurist Karel Vasak and inspired by the three themes of the French Revolution, Vasak identified these as the first generation of civil and political rights (*liberté*), the second generation of economic, social and cultural rights (*égalité*) and the third generation of solidarity rights (*fraternité*)¹⁸³. This distinction has fallen into a measure of disfavour in some quarters¹⁸⁴. First generation rights are often perceived as individual rights whereas second generation rights are more likely to be perceived as group or collective rights¹⁸⁵.

The views of the international community on the subject of ranking of rights seem to be divided.

¹⁸³ Weston BH 'Encyclopaedia Britannica: Human Rights' <http://uihr.uiowa.edu/features/eb/weston4.shtml>. The author states that Vasak's mode is a simplified expression of an extremely complex historical record and it is not intended to suggest a linear process in which each generation gives birth to the next and then dies away. Nor is it to imply that one generation is more important than the other. He notes that the three generations are understood to be cumulative, overlapping and interdependent and interpenetrating. See also Lynoh OJ and Chaudhry S 'Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society' <http://www.siel.org/Publications/olp3v.html> who state that: Third Generation or "solidarity" rights is the most recently recognized category of human rights. This grouping has been distinguished from the other two categories of human rights in that its realization is predicated not only upon both the affirmative and negative duties of the state, but also upon the behaviour of each individual: "[Third Generation Rights]...may be both invoked against the state and demanded of it; but above all (and herein lies their essential characteristic) they can be realized only through the concerted efforts of all actors on the social scene: the individual, the state, public and private bodies and the international community." Rights in this category include self-determination, as well as a host of normative expressions whose status as human rights is controversial at present. These include the right to development, the right to peace, and a right to a healthy environment. Some texts such as the Final Report of the United Nations Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities appear to take it as given that there is already an existing right to environment recognized in international instruments.

¹⁸⁴ See Stanley RH 'Human Rights in a New Era' Thirty-Eighth Strategy for Peace Conference Airlie Center, Warrenton, Virginia October 23, 1997: "That distinction can now be seen as artificial. The demise of the Cold War and an emerging global economic justice movement have blurred the lines between first-generation and second-generation rights and sparked debate over categories and priorities. Social, economic, and cultural issues are increasingly understood to be root causes of conflict."

¹⁸⁵ See Lynoh and Chaudhry (fn 183 *supra*) who note that: "Second generation rights have generally been considered as rights which require affirmative government action for their realization. Second generation rights are often styled as 'group rights' or 'collective rights', in that they pertain to the well-being of whole societies. They contrast with first generation rights which have been perceived as "individual entitlements," particularly the prerogatives of individuals contrary to those of collectivities. Principle advocates of collective rights have been developing countries and formerly the Socialist Bloc countries. Some countries supporting second-generation rights have argued for their realization first, as a pre-condition for the eventual realization of civil and political rights. Additionally, some advocates for the pre-eminence of second generation collective or group rights have postulated that contrary to Western conceptions, the substance of human rights is not universal and that economic, social and cultural factors determine the applicability of particular rights in different countries. This has been used as a justification for denying civil and political rights or delaying their protection until group rights have been realized. Religious, cultural or socio-economic factors in a state therefore might be relied upon to preclude recognition of "alien" western ideas such as freedom of conscience or press freedom. Human rights advocates such as Higgins disagree with this line of reasoning: "It is sometimes suggested that there can be no fully universal concept of human rights, for it is necessary to take into account the diverse cultures and political systems of the world. It is rarely advanced by the oppressed, who are only too anxious to benefit from perceived universal standards. The non-universal, relativist view of human rights is in fact a very state-centered view and loses sight of the fact that human rights are human rights and not dependent on the fact that states, or groupings of states, may behave differently from each other so far as their politics, economic policy, and culture are concerned." They point out that: The Vienna Declaration of 1993 disclaimed any priority of rights. It declared that "[w]hile development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights."

Article 5 of the Vienna Declaration states that:

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equitable manner and on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems to promote and protect all human rights and fundamental freedoms.”

The concept of a hierarchy of rights has been criticised and even denied by some¹⁸⁶.

It has been argued that:

“The danger in establishing a hierarchy of rights is that it reinforces the tendency to relegate the ‘ordinary’ rights that affect the majority of the world’s people to the sphere of international neglect... This narrow focus, this *de facto* establishment of a small category of fundamental rights, ultimately undermines the potential event to prevent future atrocities of the kind international criminal justice concerns itself with. It is likely to diminish the importance of the wide web of rights and the culture of rights that the idea of a ‘web’ signifies.”¹⁸⁷

Hathaway¹⁸⁸ refers to a hierarchy of human rights set out in the international human rights instruments based in order of importance as:

- those that are non-derogable in terms of the ICCPR. He says that the failure to ensure these rights under any circumstances is appropriately considered to be tantamount to persecution;

¹⁸⁶ Whelan ‘Women, Human Rights and Vulnerability to HIV: Findings From the Women and AIDS Research Program’ Oral Presentation delivered at the XI International Conference on AIDS, July 1996
<http://www.hsph.harvard.edu/Organizations/healthnet/HIV/docs/sea-aids/hrgt/hrgt11.txt>; See also Matas D ‘The Universal Declaration of Human Rights: Fifty Years Later’ (2000) 46 McGill L. J. 203 at 208 who states that: “The Universal Declaration of Human Rights does not rank rights, and quite properly so.” Robinson ‘Human Rights and Global Civilisation’ in the BP Annual Lecture of November 2001 states that: “The truth is that divisions and ranking of rights is artificial. When President Roosevelt spoke of the famous ‘four freedoms’, freedom from want stood equally alongside freedom from fear. Human rights will not be truly achieved until all accept economic, social and cultural rights as rights that deserve and require equal attention to civil and political rights and freedoms.” (http://www.bp.com/centres/press/a_detail.asp?id=142; Sidoti C in ‘Introducing Human Rights Law’ a speech delivered in May 1997 in Hanoi Vietnam, states that “Some states give priority to some rights over other rights or even accept some categories of human rights while rejecting other categories... The United States for example has ratified the ICCPR but not the ICESCR and China has clearly argued for a hierarchy of human rights. Its White Paper on Human Rights says “it is a simple truth that, for any country or nation, the right to subsistence is the most important of all human rights, without which all other rights are out of the question”... But this argument is now closed.... Virtually all nations now accept human rights law as indivisible and equally binding on nations.” (http://www.hreco.gov.au/speeches/human_rights/intro_hr_law.html)

¹⁸⁷ Silk ‘International Criminal Justice and the Protection of Human Rights: The Rule of Law or the Hubris of Law?’ www.yale.edu/lawweb/lawfac/fiss/csilk.pdf

¹⁸⁸ Hathaway JC *The Law of Refugee Status* p104-105

- those that are in the UDHR and concretised in binding and enforceable form in the ICCPR but which are derogable in times of public emergency. These rights include protection of personal and family privacy and integrity;
- those that are contained in the UDHR and carried forward in the ICESCR. With regard to this category Hathaway points out that in contrast to the ICCPR, the ICESCR does not impose absolute immediately binding standards of attainment but rather requires states to take steps to the maximum of their available resources to progressively realise the rights;
- those rights in the UDHR that were not codified in either the ICCPR or the ICESCR and which may thus be outside the scope of the state's basic duty of protection. Such rights are the right to own and to be free of arbitrary deprivation of property and the right to be protected against unemployment.

This hierarchy is apparently based on the relative immediacy of the rights coupled with the strength of the state's obligation to observe them in all circumstances.

The Council of Europe¹⁸⁹ has recognized the right to life as "supreme value in the international hierarchy of human rights". In a Background Paper¹⁹⁰ delivered by Fabra and Arnal at a joint UNEP-OHCHR in January 2002, the authors refer to the fact that the courts are moving the right to a healthy environment "up the hierarchy of human rights by recognising it as a fundamental right."

Koji¹⁹¹ notes that considerable confusion has surrounded the question of whether there exists a hierarchy of human rights in contemporary international law and that most human rights studies do not recognise such a hierarchy mainly because of their emphasis

¹⁸⁹ 'Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances' (ETS No 187) <http://conventions.coe.int/treaty/en/reports/htm/187.htm>

¹⁹⁰ Background Paper No 6 available at <http://www.unhcr.org/environment/bp6.html>

¹⁹¹ Koji T 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights' *European Journal of International Law* Vol 12 (2001), No 5 at p917 onwards.

on the indivisibility of human rights. His paper claims to provide a coherent understanding of this issue from the perspective of non-derogable rights which demonstrate the existence of a hierarchy of human rights most clearly in international law concepts. He observes that it is a serious mistake to regard non-derogable rights as a unitary concept and that such rights can be identified in at least three different ways i.e. by means of value-oriented, function-oriented and consent-oriented criteria and states that within this analytical framework, and particularly with respect to the first two criteria, non-derogable rights need to be distinguished from similar concepts such as core human rights, *jus cogens* and obligations *erga omnes*.

Arguments around cultural relativism and allegations that human rights law is fundamentally a Western concept further complicate questions of hierarchies of human rights.

It has been suggested that the right to life ‘stands head and shoulders above all the others’ but that even the right to life is preceded by the right to freedom from incitement to discrimination without which the right to life cannot be assured¹⁹². Whilst this is a view which sees the right to life relatively narrowly in the context of war and genocide¹⁹³ it illustrates the polycentric nature of human rights generally¹⁹⁴. The right to life is dependent upon the observation of many other rights, for example the right to bodily integrity, and cannot be seen in isolation from them. Killing a person is after all a fundamental invasion of his right to bodily integrity. All human rights are in this sense indivisible, interrelated and interdependent. This is why arguments about the importance of an individual right relative to those of others tend to be circular in nature. This does not, however, necessarily defeat the question of hierarchies of rights.

¹⁹² Matas (fn 186 *supra*) at 209

¹⁹³ Matas points out that the Holocaust began with hate speech.

¹⁹⁴ Matas (fn 186 *supra*) after observing that the UDHR does not rank rights and correctly so, goes on to state that ranking of rights nonetheless occurs. He refers by way of example to a statement by the editor of *The Globe and Mail* claiming that freedom of expression is the superior core human right – “a seminal, germinal, essential, necessary, prior right in the pantheon of rights”. After some debate about how and why people prioritise their ‘favourite’ right, however, he comes to the conclusion that “because human rights are an interconnected whole, it is easy to link one right to another. Free expression is important to other rights, as other rights are important to respect for freedom of expression. Take any thread out of the quilt of rights and the quilt unravels. To choose only one thread and proclaim ‘This is the thread that counts!’ is arbitrary.”



It is submitted that there is a sense in which both camps are correct. This is due in part to the oversimplification of these arguments in terms of polarisation i.e. the idea that rights hierarchies are either permissible or not with no room for debate. It is submitted that a hierarchy is simply a conceptual tool with many uses. Its primary function is to express relativities. If one accepts the polycentric nature of the human rights system then hierarchies remain useful tools with which to analyse the particular factual situation with which one is confronted in order to arrive at meaningful decisions since in a polycentric system one can only speak in terms of relativities. The concern of this thesis, in keeping with its exploration of the law relating to the delivery of health services, is pragmatism¹⁹⁵. Whilst there may be room for argument in the lofty world of ideals and human rights in the abstract that there can be no hierarchy of rights on the basis that the Universal Declaration of Human Rights (UDHR) does not recognise any hierarchy, it is submitted that when it comes down to the practical implementation of human rights, hierarchies play a useful role. The fact is that the UDHR has been fleshed out or concretized by two major instruments of international law, the ICCPR and the ICESCR, and the former, to the extent that it recognises that certain rights are derogable in times of emergency whilst others are not, implicitly accepts the broad concept of rights hierarchies. In human rights law there are apparently no absolute truths – only past experience and present perspectives. It is submitted that the real answer to whether or not there is a legitimate hierarchy of human rights depends on the circumstances of the particular situation in which the hierarchy is formulated and applied. The truth of this argument can be seen in the different contexts in which hierarchies of rights are in fact recognised as in the situation of a court having to balance competing rights against each other in a particular case and in the situation of national emergencies in which certain rights take superiority over others. It is submitted that the validity of hierarchies is as much dependent upon the purpose for which distinctions between the various types of rights are drawn as it is upon the circumstances in which the hierarchy is constructed.

¹⁹⁵ Matsuda M 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice', *Feminist Legal Theory: Foundations* note 84 at 476, 477, argues that political philosopher John Rawls' (Rawls, *A Theory of Justice*) construction of an imaginary "original position" from which rights can be deduced cannot adequately justify protecting rights that are particularly important to women, claiming that abstraction: "as a methodology [in law] encompasses the belief that visions of social life can be constructed without reference to the concrete realities of social life. The choice of abstraction is a key move that allows Rawls to ignore powerful alternative constructions and give his theory an attractive internal logic" as quoted by Splittgerber S in 'The Need for Greater Protection For the Human Rights Of Women: The Cases of Rape in Bosnia and Guatemala' 15 (1996) *Wisconsin International Law Journal* at p 185

It is submitted that a hierarchy such as the one postulated by Hathaway referred to previously is legitimate for the purpose of attempting to categorise the various rights in terms of the relative immediacy of the obligations they impose upon nation states. To contend otherwise would be to deny the manner in which the various rights have been conceptualised in the relevant international legal instruments themselves. The ICCPR is explicit that certain rights are non-derogable even in states of national emergency and the ICESCR is just as explicit that certain rights are subject to progressive realisation based on the availability of resources. Such a hierarchy does not diminish the value of the rights in question. It simply recognises them as being different from a particular perspective. There can be no valid objection to a hierarchy that classifies human rights into first, second and third generation rights in order to illustrate the history of their evolution or their type whilst stressing that such a classification does not illustrate their relative importance.

Apart from debates about the legitimacy of hierarchies of rights one cannot ignore the larger debates about the various types of international law and their relative or hierarchical status. The argument that *jus cogens* takes precedence over public and customary international law, that public international law takes precedence over customary international law etc and that certain rights form part of the *jus cogens* whilst others do not, renders nonsensical bald denials of the existence of hierarchies of rights in international law. Elsewhere in this chapter it has been pointed out that the fact that there is a number of significantly sized and powerful countries who do not accept that *jus cogens* is binding upon them without their consent cannot be ignored. It is all very well to make bold assertions in principle but if they do not reflect reality then it is submitted that they are of little value. A problem with international law at the broadest possible level is its enforceability and the power dynamics involved. The concept of the sovereignty of nations has a tendency to stick in the craw of international law at many different levels.

If the legitimacy in broad terms of a hierarchy of human rights can be tested against the purpose of the hierarchy and its context then there is nothing to fear from the idea of

hierarchies of human rights. To the extent that a hierarchy is used to defeat the objects of an international law instrument such as the ICESCR by a nation state that is bound by it, such a hierarchy is not legitimate. However, in a situation in which a nation state has expressly signified its intention not to be bound by an instrument of international law and uses a hierarchy to justify its decision, questions of a hierarchy of rights are largely irrelevant since any number of different reasons can be put forward by a powerful nation state as to why it chooses not to be bound. The real question in such a situation is the extent to which other nation states have the power to challenge such a choice.

1.8.2 Preference of the Rights of Certain Groups

Irrespective of whether all rights are of the same weight and standing and everyone's rights are essentially the same, there still seems to be a very strong view in international law that the rights of some groups should be given special attention. This view must be regarded at the level of implementation of human rights. On the basis that it is not possible to give effect to the rights of everyone at once – especially in the context of those rights which require extensive resources – and that one has to start somewhere, it is necessary to find and justify particular areas of focus. Enter the vulnerable groups. It is submitted that it is both logical and justifiable, even assuming that all human rights are equal, to give special attention to the rights of vulnerable groups. This is due to the fact that while at an abstract level all human beings are equal in their entitlement to the observation of their rights, such equality is not reflected at a practical level. Less powerful members of society are often victimised, oppressed and otherwise abused by the more powerful members of society. Most societies in the world are male dominated which means that women and children are often marginalized and abused. Ironically, the problem of rectifying this situation often becomes one of ranking if not of rights then of vulnerable groups themselves.

There is the question of children's rights versus women's rights (often in relation to questions of terminations of pregnancy and reproductive rights); the rights of future generations versus the rights of present generations in environmental issues; the rights of

the disabled child versus the rights of the non-disabled child; the rights of children as opposed to those of disabled adults; the rights of female victims of crime as opposed to those of prisoners; the rights of prisoners as opposed to those of refugees. International human rights instruments are divided along many different planes so that one has the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) on the one hand and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights on the other. The latter tend to deal more with the rights of everyone to various 'goods' while the former deal with those rights as they relate to vulnerable groupings¹⁹⁶.

When one starts ascribing rights to specific groups of people it is easy to see how the logic that says that all rights are equal and indivisible can become clouded. If the rights of men and women are equally important and fundamentally the same then what is the significance of CEDAW in relation to the ICESCR? What is the purpose of specifically recognising the rights of children in a separate document if their rights are no greater or no different to those of all people as expressed in the Universal Declaration of Human Rights or the ICESCR? It could be, and in fact has been, argued that the rights of vulnerable groups are deserving of special attention and that this is why they have been singled out. But if the rights of these groups are given special attention, or are prioritised at the expense of others, is this not tantamount to adding a gloss on their rights to say that they are superior in some way to the rights of others?

To misquote George Orwell, it would seem that although all rights are equal some are more equal than others.

Vulnerable groups that have been identified in international law are women, children, prisoners, refugees, the disabled and people living with HIV/AIDS. In many countries,

¹⁹⁶ Note that this is just an example. There are others such as the International Guidelines on HIV/AIDS, and Human Rights res. 1997/33, U. N. Doc. E.CN.4/1997/150 (1997); the Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; the Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care, G. A. res 46/119, 46 U.N. GAOR Supp. (No. 49) at 189, U.N. Doc. A/46/49 (1991); the Refugee Convention.

especially developing countries, these groups taken together make up the vast majority of the population. Even individually, they in some instances comprise majority groups rather than minority groups. This creates problems in the allocation of resources across vulnerable groups. In the context of HIV and AIDS this problem is highlighted by the question of whether one treats only the children of parents with HIV and AIDS when the growing numbers of AIDS orphans are creating problems of a different kind for governments of developing countries. This concern has been misconstrued by HIV and AIDS activists to imply that one should not treat the children but rather allow them to die than become yet another problem for society. In fact it has been used to support the logic that one cannot only treat the children. One must treat their parents as well. It is important to preserve the family unit and not just individuals. In practical terms, however, in the context of limited resources this implies that some adults and children must die whereas other adults and children can be saved. This logic says that children should not get preference simply because they are children. In such a scenario, in international law terms one is in effect weighing up the ICESCR against the CRC.

The choices involved in the allocation of resources to particular vulnerable groups in preference to others are often based on the values of the society that makes them but there is a certain utilitarian logic that comes into play in certain circumstances. Can a relatively youthful society where the number of economically active and productive adults is declining exponentially afford to devote all of its resources to saving children? Can an ageing society, in which laws significantly limit the number of children a couple can have, afford not to devote a significant percentage of its resources to protecting and saving its children? It is necessary to canvass in more detail the various international instruments and guidelines that deal with the rights to health care of vulnerable groups as opposed to others not only in order to lay the groundwork for the some of the discussion in chapter 2 of these rights in terms of the Constitution, but also to ascertain the nature and extent of the rights afforded to these groups in terms of international law.

1.9 Rights of Children

It is necessary to consider the rights of children in particular because of the specific recognition of the rights and interests of children in international law and in order to ascertain the substantial differences if any between the international law approach and the South African approach. *Grootboom*¹⁹⁷ and *TAC*¹⁹⁸ involved the rights of children and in both these cases, as has been noted previously, the constitutional court expressly rejected the application of the international law concept of minimum core. In this area South African law differs from international law. These two cases will be discussed in further detail in chapter two which deals with the constitutional aspects of rights involving health care services, including those of children. However the Convention on the Rights of the Child (CRC)¹⁹⁹ is a significant international law instrument relating specifically to children and in view of the fact that the Constitution also makes specific mention in section 28 of children's rights it is necessary to explore the rights of children as contemplated in the CRC in relation to the delivery of health care services. With regard to emotive issues such as treatment of HIV/AIDS and the preference of one group, e.g. children, over another, eg adults with a view to the allocation of scarce resources, for the purpose of antiretroviral treatment for instance, the question of whether the rights of vulnerable groups take precedence over those of other groups is of importance.

1.9.1 The Convention on the Rights of the Child

The CRC defines a child as every person under the age of 18 unless under a particular law, the age of majority is attained earlier²⁰⁰.

The question is whether the CRC contains any recognition that the rights of children are of greater force or deserving of more stringent recognition than those of others. In the preamble to the CRC there are acknowledgements of general human rights and there is

¹⁹⁷ *Grootboom* (fn 57 *supra*)

¹⁹⁸ *TAC* (fn 113 *supra*)

¹⁹⁹ On November 20, 1989, the United Nations General Assembly unanimously adopted the Convention on the Rights of the Child (CRC). It has been described as the most comprehensive treaty for the protection and support of children in existence today (Canadian Coalition for the Rights of Children 2002 <http://www.rightsofchildren.ca> and Rosenthal and Sundram (fn 2 *supra* at p34) who point out that the CRC has been ratified even more widely than has the ICESCR.) The USA and Somalia are the only countries that have not ratified the CRC.

²⁰⁰ CRC article 1

express reference to the Charter of the United Nations, and the Universal Declaration of Human Rights. Thereafter are the following statements:

“Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance”

and

“Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration”.

At first glance these statements would seem to suggest that the rights of children should take precedence over those of others but if the wording is considered more carefully it is submitted that they are simply saying that children and the rights of children are deserving of special attention and should be the subject of a conscious focus in international law. It is submitted that the reason that childhood is entitled to special care and assistance is due to the fact that the circumstances of children, their power to cope with the world and to obtain benefits are different to those of adults. The rights themselves are not necessarily superior to the rights of adults or higher in terms of ranking. This reasoning is supported by statements such as that contained in General Comment No 14 (2000) of the United Nations Committee On Economic, Social And Cultural Rights (CESCR) which states in article 1 that:

“Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.”

It is difficult to conceive of a higher standard of health than “the highest attainable standard of health conducive to living a life in dignity”. Moreover it is an entitlement of ‘every human being’ and not just that of children. The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides the most comprehensive article on the right to health in international human rights law. In accordance with article 12.1 of the ICESCR, states parties recognize “the right of *everyone* to the enjoyment of the highest attainable standard of physical and mental health” (writer’s italics). It is submitted that there is no higher standard than the “highest attainable standard”. At a

more practical level therefore, it is submitted that it would be difficult to justify in terms of international law the medical treatment of children at the expense of the treatment of adults in terms of resource allocation decisions. Furthermore such a decision may even run counter to the importance placed by the CRC on the child's rights to family relationships and family life. Children are generally recognised as more vulnerable than adults and therefore deserving of special efforts and attention but it is in the implementation of their rights rather than in the legal content of those rights that the difference becomes real.

In this context it is significant that the language of the CRC in article 24, which relates specifically to health rights, does not differ materially from the language of the other human rights instruments cited previously relating to the right to health. In terms of this Article:

"1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services."

The second paragraph of article 24 fleshes out some of the practical implications of this right as follows:

"2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

- (a) To diminish infant and child mortality;**
- (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;**
- (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;**
- (d) To ensure appropriate pre-natal and post-natal health care for mothers;**
- (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;**
- (f) To develop preventive health care, guidance for parents and family planning education and services."**

Article 24, at paragraph 3, requires states parties to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

In wording that is reminiscent of section 27(2) of the South African Constitution, paragraph 4 of article 24 stipulates that:

“States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.”

In terms of Article 3 of the CRC:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

This article sets the tone for the general obligations of states towards children. It is the best interests of the child which must be of primary consideration. The measures that must be taken by states parties are both legislative and administrative - similar to the legislative and other measures required of the state by section 27(2) of the South African Constitution in the progressive realisation of the right of access to health care services. The CRC recognises that parents have the primary responsibility to secure the health and wellbeing of their children but also clearly imposes certain obligations upon the state in article 24(2) and (3).

The CRC acknowledges the very wide right of children to health as well as the narrower right to health care services. It is a comprehensive international instrument that is concerned with the wellbeing of children on all fronts rather than just that of health care. In chapter 2 there is a discussion of the right to health as opposed to a right of access to health care services.

Geißler²⁰¹ observes that children were not completely unprotected from a legal point of view before the CRC came into force because there were other general human rights agreements in force prior to the CRC such as the International Pact on Civil and Political Rights (IPCPR) of 1966 and the Anti Torture Agreement of 1984 which applies equally to adults and children. He reflects that the CRC is part of a multi-layered complex of international and regional agreements on human rights which were mainly inspired by the Universal Declaration of Human Rights in 1948.

1.9.2 WMA Declaration of Ottawa

The World Medical Association Declaration of Ottawa on the Rights of the Child to Health Care was adopted at the 50th World Medical Assembly in Ottawa, Canada on October 1998. Whilst it is not necessarily of the same status and legal standing as the CRC it may nonetheless provide some useful guidelines on the rights of children to health care. In the Preamble it is stated that:

1. The health care of a child, whether at home or in hospital, includes medical, emotional, social and financial aspects which interact in the healing process and which require special attention to the rights of the child as a patient.
2. Article 24 of the 1989 United Nations Convention on the Rights of the Child recognises the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health, and States that nations shall strive to ensure that no child is deprived of his or her right of access to such health care services.
3. In the context of this Declaration a child signifies a human being between the time of birth and the end of her/his seventeenth year, unless under the law applicable in the country concerned children are legally recognized as adults at some other age.

²⁰¹ Geißler N "Creating a Procedure for submitting Individual Complaints pursuant to the Convention on the Rights of the Child" *Asserting the Rights of the Child* Documentation of conference in Berlin in April 2001 Kindemotilffe, Joint Conference Church and Development (GKKE)

Article 4 of the Declaration acknowledges that every child has an inherent right to life, as well as the right of access to the appropriate facilities for health promotion, the prevention and treatment of illness and the rehabilitation of health and stipulates that physicians and other health care providers have a responsibility to acknowledge and promote these rights, and to urge that the material and human resources be provided to uphold and fulfil them. The Declaration states as general principles that every effort should be made:

- I. to protect to the maximum extent possible the survival and development of the child, and to recognise that parents (or legally entitled representatives) have primary responsibility for the development of the child and that both parents have common responsibilities in this respect;
- II. to ensure that the best interests of the child shall be the primary consideration in health care;
- III. to resist any discrimination in the provision of medical assistance and health care from considerations of age, gender, disease or disability, creed, ethnic origin, nationality, political affiliation, race, sexual orientation, or the social standing of the child or her/his parents or legally entitled representatives;
- IV. to attain suitable pre-natal and post-natal health care for the mother and child;
- V. to secure for every child the provision of adequate medical assistance and health care, with emphasis on primary health care, pertinent psychiatric care for those children with such needs, pain management and care relevant to the special needs of disabled children;
- VI. to protect every child from unnecessary diagnostic procedures, treatment and research;
- VII. to combat disease and malnutrition;
- VIII. to develop preventive health care;
- IX. to eradicate child abuse in its various forms; and
- X. to eradicate traditional practices prejudicial to the health of the child.

To a significant extent it is simply a restatement of the principles contained in the CRC but it does add a few details that are more specific to health care services such as pain management, preventive health care and psychiatric care.

1.9.3 African Charter on the Rights and Welfare of the Child

This document has a comprehensive approach to the protection of disabled children.

Article 13 reads as follows:

‘Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.’

The states parties are required, subject to available resources, to ensure a disabled child, and to those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition.

1.12.4 Comparison With The Constitution

In section 28(1)(b) and (c), the Constitution states that

“every child has the right-

- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services”.

The Convention on the Rights of the Child (CRC) contains much more comprehensive provisions in its Article 24 (1) alone:

“States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.”

Part 2 of Article 24 elaborates even further as follows:

“States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

- (a) to diminish infant and child mortality;
- (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
- (c) to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
- (d) to ensure appropriate pre-natal and post-natal health care for mothers;
- (e) to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
- (f) to develop preventive health care, guidance for parents and family planning education services.”

The Constitution does not expressly provide for such measures. The constitutional court in the *TAC* case²⁰² did not refer to the Convention on the Rights of the Child in its judgement although it did discuss the interpretation of section 28(1) and did refer to the fact that children are a highly vulnerable group²⁰³.

General Comment No 14 of the United Nations Committee on the ICESCR states that States parties should provide a safe and supportive environment for adolescents, that ensures the opportunity to participate in decisions affecting their health, to build life-skills, to acquire appropriate information, to receive counselling and to negotiate the health behaviour choices they make. Article 12.2 (a) of the ICESCR outlines the need to reduce infant mortality and promote the healthy development of infants and children.

The constitutional court in the *TAC* case has supported the view first expressed in *Grootboom* that while the primary obligation to provide basic health services rests on those parents who can afford to pay for such services, this does not mean that the state incurs no obligation in relation to children who are being cared for by their parents and families.

In *Grootboom*²⁰⁴ the court expressly referred to the Convention on the Rights of the Child as being ratified by South Africa in 1995 and observed that it-

“seeks to impose obligations upon State parties to ensure that the rights of children in their countries are properly protected. Section 28 is one of the mechanisms to meet these obligations. It requires the State to take steps to ensure that children's rights are observed. In the first instance, the State does so by ensuring that there are legal obligations to compel parents to fulfil their responsibilities in relation to their children. Hence, legislation and the common law impose obligations upon parents to care for their children. The State reinforces the observance of these obligations by the use of civil and criminal law as well as social welfare programs.”²⁰⁵

²⁰² *TAC* (fn 113 *supra*)

²⁰³ See *TAC* (fn 113 *supra*) at 1056 G where the court stated: “Their needs are ‘most urgent’ and their inability to have access to Nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are ‘most in peril’ as a result of the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to Nevirapine.”

²⁰⁴ *Grootboom* (fn 57 *supra*)

²⁰⁵ The court went on to state that: “In the first place, the state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28. This obligation would normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, 50 and the prevention of other forms of abuse of children mentioned in s 28. In addition, the state is required to fulfil its obligations to provide families with access to land in terms of s 25, access to adequate housing in

The court in *Grootboom* was more preoccupied with the interpretation of the constitutional rights of children with regard to housing and other basic necessities than it was with a critical analysis of the manner in which the Convention on the Rights of the Child has been implemented in South Africa. It did not use the CRC as an interpretational tool for the purposes of deriving the meaning of section 28 of the Constitution but rather referred to it as one of the international legal obligations of South Africa. This is possibly due to the fact that the court did not find any conflict between domestic legal provisions concerning the rights of the child and those of the CRC. The court did refer, however, to the overlap between a child's right to basic health care services in terms of section 28(1)(c) and the right to health care services created in terms of section 27(1). It observed that this overlap is not consistent with the notion that s 28(1)(c) creates separate and independent rights for children and their parents.

In constitutional terms, therefore, the right of a child to basic health services in terms of section 28 is a subset of the broader right of everyone in terms of section 27(1) rather than a separate and independent right. This supports the argument that the Constitution, at least, envisages a single right to health care services rather than multiple, fragmented rights. It remains to be seen whether this conceptualisation can be extended to other areas of South African law but the Constitutional support it enjoys is an important positive indicator at this stage.

1.10 Rights of Women

It has been said that "So pervasive and systematic are the human rights abuses against women that they are regarded as part of the natural order"²⁰⁶ and that to adequately address structural biases, theories of international law and human rights must take

terms of s 26 as well as access to health care, food, water and social security in terms of s 27. It follows from this judgment that ss 25 and 27 require the state to provide access on a programmatic and coordinated basis, subject to available resources. One of the ways in which the state would meet its s 27 obligations would be through a social welfare program providing maintenance grants and other material assistance to families in need in defined circumstances."

²⁰⁶ Kerr J "The Context and the Goal", *Ours By Rights: Women's Rights as Human Rights* 1, 3 as cited by Splittgerber (fn 195 *supra*).



account of the reality of women's lives²⁰⁷. The reality of women's lives is a justification for special consideration of women's rights. A denial that there can be hierarchies of rights on the basis that all rights are universal and all people equal in relation to all rights is a denial of the reality of people's lives and is more likely to hinder rather than help people in the exercise or realisation of their rights.

The rights of women to health or health care at international law are recognised in a number of different instruments²⁰⁸ the most notable being the Convention Against All forms of Discrimination Against Women (CEDAW).

Article 12 provides that:

- 12.1 States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
- 12.2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

In its preamble, the states parties note their concern that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs.

²⁰⁷ See Splitzgerber (fn 195 *supra*) at p 8. He notes that international legal organizations must articulate program goals within legal discourse that acknowledge gendered disparities of power rather than assuming all people are equal in relation to all rights..." and that without greater female representation in international legal institutions, these goals will not be met.

²⁰⁸ In 'The right to the highest attainable standard of health': 11/08/2000.E/C.12/2000/4, CESCR General Comment 14. (General Comments) there is a paragraph (21) entitled "Women and the Right to Health". It states that: "To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights." Other instruments that deal with the health of women are the Declaration on the Elimination of Violence Against Women 193 U.N.T.S. 135; Beijing Declaration and Platform of Action A/CONF.177/20(1995) and A/CONF 177/20/Add.1 (1995). Article 17 of the Beijing Declaration states that the governments who participated in the Declaration are convinced that: "The explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment". Included in the Platform of action is the statement the participants are determined *inter alia* to: "30. Ensure equal access to and equal treatment of women and men in education and health care and enhance women's sexual and reproductive health as well as education."

The Constitution does not expressly recognise the rights of women in the Bill of Rights. However, it could be said that in its prohibition of unfair discrimination on the grounds of *inter alia*, gender, it does recognise that the rights of women are equal to those of men. It is significant that the most prominent international law instrument dealing with the rights of women is CEDAW which is addressed specifically at the elimination of discrimination against women. In the context of access to health care services both CEDAW and the Constitution reflect the need to ensure that women's health needs are met and that they have at least as much access to health care services as do men. The implications of the specific reference in section 27(1) of the Constitution to reproductive health care are discussed in detail in chapter two.

The fact that the so-called 'women's Bill of Rights' is a document premised on discrimination against women indicates that although women enjoy equal rights to men generally, in terms of implementation they are not given the same recognition as men. It is thus at the level of implementation, rather than conceptualisation, that the rights of women are perceived as being in need of special attention²⁰⁹.

1.11 Rights of Refugees

The Convention relating to the Status of Refugees was adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429(v) of 14 December 1950. It came into force on 22 April 1954 in accordance with article 43. The Convention defines a 'refugee' as any person who:

²⁰⁹

"In its 1995 Human Development Report, the United Nations plainly states that "in no society today do women enjoy the same opportunities as men. Similarly the U.S Department of State, in its 1995 annual report on human rights practice, left no doubt that as the global community approaches the turn of the century, the condition and status of women world-wide is one of social, political, educational, legal and economic inequality. Although the early human rights documents promised women a standard of non-discrimination on the basis of sex, that pledge, as the 1995 Country Reports and the U.N.'s Development Report indicates, is still, today, not a reality." (Hernandez-Truyol BE 'Sex, Culture and Rights: A Re-Conceptualization of Violence for the Twenty First Century' 60 (1997) *Albany Law Review* 607 - footnotes omitted)

- (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;...
- (2) As a result of events occurring before January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable of, owing to such fear, is unwilling to return to it...

The Convention stipulates in article 20 that where a rationing system exists which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals. In article 23 the Convention states that the contracting states shall accord to refugees lawfully staying in their territory the same treatment with respect of public relief and assistance as is accorded their nationals. Article 24 deals with social security and states that states must accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of *inter alia* social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingent which, according to national law or regulations is covered by a social security scheme) subject to the following limitations:

- (i) There may be appropriate arrangements for the maintenance of acquired rights and rights in the course of acquisition;
- (ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

The Constitution does not recognise specifically the rights of refugees. However, its use of the word 'everyone' in connection with socio-economic rights is of considerable significance in this context and is canvassed in detail in chapter 2. The Refugees Act No 130 of 1998 has as its objects to give effect within the Republic of South Africa to the

relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; and to provide for the rights and obligations flowing from such status. In the Preamble to this Act it is observed that the Republic of South Africa has acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law. This is the background against which this legislation has been enacted.

1.12 Rights of Prisoners

It is obviously important from a human rights perspective to ensure that people who are vulnerable to infringement of their rights because they have been incarcerated should have some special attention devoted to their rights in order to preclude human rights abuses in penal institutions. This view is obviously based on the premise that even though people have been incarcerated and one of the rights, the right to freedom of movement, has thus been restricted, they are still human beings for the purposes of the remaining human rights.

The Standard Minimum Rules for the Treatment of Prisoners²¹⁰ (Standard Minimum Rules) were adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 633 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Under the preliminary observations it is noted that the rules seek only on the basis of contemporary thought and the essential elements of the most adequate systems of today to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions. It is acknowledged that in

²¹⁰ Standard Minimum Rules http://193.194.138.190/html/menu3/b/h_comp34.htm

view of the great variety of legal, social, economic and geographical conditions of the world, not all of the rules are capable of application in all places and at all times. Under the heading 'Medical Services' the Rules of General Application stipulate various conditions that must be created or maintained in penal institutions in order to ensure that medical services are available to prisoners. Included in these conditions are the availability of at least one qualified medical officer who has some knowledge of psychiatry and the availability of the services of a qualified dental officer to every prisoner. In women's institutions there must be special accommodation for all necessary pre-natal and post-natal care and treatment and arrangements must be made wherever possible for children to be born in a hospital outside the institution.

The medical officer must see and examine every prisoner as soon as possible after admission to prison and thereafter as necessary with a view to discovery of physical or mental illness and "the taking of all necessary measures". The medical officer must have the care of the physical and mental health of the prisoners and must daily see all sick prisoners, all who complain of illness and any prisoner to whom his attention is especially directed. Whenever a medical officer considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment he is required to report this to the director. Upon the death or serious illness of or serious injury to a prisoner, or his removal to an institution for the treatment of mental illness the director is required to immediately inform the spouse of the prisoner or the nearest relative and must in any event inform any other person previously designated by the prisoner.

There are specific rules applicable to special categories such as "Prisoners Under Sentence", "Insane and Mentally Abnormal Prisoners" and "Prisoners Under Arrest or Awaiting Trial". In the case of "insane and mentally abnormal" prisoners, persons who are found to be insane must be detained in mental institutions and not prisons. Prisoners who suffer from 'other mental diseases or abnormalities' must be observed and treated in 'specialized institutions' under medical management. During their stay in a prison, such prisoners must be placed under the special supervision of a medical officer.

The Constitution in section 35(2) recognises the right of prisoners to adequate medical treatment and to communicate with, and be visited by, their chosen medical practitioner. This right is discussed in more detail in chapter 2. It is of interest that in South African law a prisoner has a right to be visited by his or her chosen medical practitioner. This implies a right to choose a particular medical practitioner to attend to him whilst a prisoner which means that the right is wider than the Standard Minimum Rules allow. The latter refers to an obligation on the part of the authorities to have available at least one medical officer to take care of the health needs of the prisoners.

Sections 4 to 35 of the Correctional Services Act²¹¹ are grouped in Chapter III under the heading 'Custody Of All Prisoners Under Conditions Of Human Dignity'. Section 4 stipulates that the minimum rights of prisoners entrenched in this Act must not be violated or restricted for disciplinary or any other purpose, but the Commissioner may restrict, suspend or revise amenities for prisoners of different categories.

The term, 'medical treatment' is defined in this Act as treatment, regimen or intervention prescribed by a medical practitioner, dentist or psychologist as defined in section 1 of the Medical, Dental and Supplementary Health Service Professions Act²¹² while 'medical practitioner means a medical practitioner as defined in section 1 of the Health Professions Act. Section 12 of the Correctional Services Act deals with health care. It provides that:

- (1) The Department must provide, within its available resources, adequate health care services, based on the principles of primary health care, in order to allow every prisoner to lead a healthy life.
- (2) (a) Every prisoner has the right to adequate medical treatment but no prisoner is entitled to cosmetic medical treatment at State expense.
 - (b) Medical treatment must be provided by a medical officer, medical practitioners or by a specialist or health care institution or person or institution identified by such medical officer except where the medical treatment is provided by a medical practitioner in terms of subsection (3).

²¹¹ Act No 111 of 1998

²¹² Act No 56 of 1974. Its name was subsequently changed to "Health Professions Act".



- (3) Every prisoner may be visited and examined by a medical practitioner of his or her choice and, subject to the permission of the Head of Prison, may be treated by such practitioner, in which event the prisoner is personally liable for the costs of any such consultation, examination, service or treatment.
- (4) (a) Every prisoner should be encouraged to undergo medical treatment necessary for the maintenance or recovery of his or her health.
- (b) No prisoner may be compelled to undergo medical intervention or treatment without informed consent unless failure to submit to such medical intervention or treatment will pose a threat to the health of other persons.
- (c) Except as provided in paragraph (d), no surgery may be performed on a prisoner without his or her informed consent, or, in the case of a minor, with the written consent of his or her legal guardian.
- (d) Consent to surgery is not required if, in the opinion of the medical practitioner who is treating the prisoner, the intervention is in the interests of the prisoner's health and the prisoner is unable to give such consent, or, in the case of a minor, if it is not possible or practical to delay it in order to obtain the consent of his or her legal guardian.

There appears to be no inconsistency between these provisions and the requirements of international law concerning the delivery of health care services to prisoners.

1.13 Jus Cogens and the Right To Health

In light of foregoing discussions one must ask whether a right to health has become a principle of *jus cogens*. Would an international instrument that was in conflict with a right to health be unlawful under international law? The general idea behind *jus cogens*, as stated previously, is that it represents a body of non-derogable, peremptory norms from which no domestic legal system or government may legitimately depart. Article 53 of the Vienna Convention States that a peremptory norm of general international law is a norm accepted and recognised 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. It specifies that a treaty conflicting with *jus cogens* at the time of its conclusion is void. In terms of article 64, a treaty also becomes void if it is in contradiction with a peremptory norm of international law which has newly emerged (*jus cogens superveniens*). The International Law Commission observed in 1969 in its commentary on the draft articles for the

international law of treaties that there is no simple criterion which would allow one to determine whether a rule belongs to *jus cogens*. This is unfortunate as it does not take the concept of *jus cogens* very far in practical terms.

Although few would, in the abstract, dispute a right to health, inextricably linked as it is with those most fundamental of all human rights – the right to life and the right to dignity, the content of such a right is another matter. A right to health does not necessarily mean a right to health care services and *vice versa*. Furthermore, it seems that no two international instruments can express the concept of a right to health or even health care in the same language. Should health care services be provided as a matter of state obligation? Should they be free of charge or is it more a question of access? Are there special groups deserving of particular benefits or consideration? What level of care should be provided? Should only primary health care be provided or should all levels of care be provided? Should health care be both curative and preventive or only preventive or curative? What kinds of services must be made available? Does health mean a minimum standard sufficient that people are able to work or does it mean the highest level of health attainable? Should the public health care system carry the burden alone or should there be some reliance on private health care services? Should there be access to the highest levels of health technology or only certain minimum levels? Should there be access to the latest patented expensive drugs or only generics? Public international law is not particularly homogenous when it comes to establishing the content of a putative peremptory norm concerning a right to health or health care.

In terms of Article 25 of the Universal Declaration of Human Rights, each person has “... the right to security in the event of ...sickness...”.

Article 10 of the Additional Protocol to the American Convention on Human Rights in the Field of Economic, Social and Cultural Rights advises states to satisfy the health needs of the highest risk groups and of those whose poverty makes them most vulnerable.

In the African Charter on People's Rights, Article 18(4) stipulates that the disabled should have the right to special measures of protection in keeping with their physical needs whilst in terms of Article 13 of the European Social Charter, states are required to ensure that any person who is without adequate resources and who is unable to secure such resources be granted adequate assistance and the care necessary in the case of sickness.

In the Declaration of Alma-Ata, Article V states that governments are responsible for the health of their people which can be attained by the provision of adequate health and social measures whilst Article VII (6) states that those in need should have priority in health care and Article VIII advises governments, in co-ordination with other sectors, to formulate national policies, strategies and plans of action to launch and sustain primary health care as part of a comprehensive national health system.

Article 12 of the International Covenant on Economic, Social and Cultural Rights recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and requires states to create conditions which will assure to all medical service and attention in the event of sickness.

In the Declaration on Social Progress and Development, Article 10(d) states that social progress and development should aim at the achievement of the highest standards of health and the provision of health protection for the entire population whilst Article 19 points out that free health services, adequate preventive and curative facilities and welfare medical services are the means to be used.

Article 7 of the Convention on the Rights of the Child states that whenever possible, the disabled child should be provided with health care services free of charge.

Article 7 of the Convention concerning Medical Care and Sickness Benefits states that the contingencies covered by the Convention should include:

- (a) need for medical care of a curative and preventive nature and

- (b) incapacity for work resulting from sickness and involving suspension of earnings, as defined by national legislation.

Article 8 states that medical care should comprise of at least:

- (a) general practitioner care;
- (b) specialist care at hospitals;
- (c) the necessary pharmaceutical supplies;
- (d) hospitalisation and
- (e) medical rehabilitation.

Article 18 states that sickness benefits are periodical benefits and that sickness means any morbid condition, whatever its cause. Articles 22 and 23 provide that a periodical payment shall be such as to attain at least 60 percent of the total previous earning of the beneficiary or 60 percent of the total wage of an ordinary adult male labourer. Article 29 states that every claimant shall have a right of appeal in the case of refusal of benefit or complaint as to its quality or quantity.

Article 7 of the Convention concerning Employment Promotion and Protection against Unemployment requires states to secure persons the benefit in respect of a condition requiring medical care of treatment of a preventive or curative nature which, according to Article 10, must include at least:

- (a) general practitioner care;
- (b) specialist care at hospitals;
- (c) the necessary pharmaceutical supplies; and
- (d) hospitalisation.

Article 13 advises states to secure persons the provision of sickness benefit whilst Article 16 requires the sickness benefit to be a periodical payment.

Article 5(4) (g) advises states to ensure the provision of medical care to persons in receipt of unemployment benefit as well as their dependents.

Paragraph 118 of the World Programme concerning Disabled Persons encourages the establishment and development of a public system of social care and health protection whilst paragraph 96 advises states to co-ordinate programmes for the prevention of disability which include community-based primary health care systems that reach all segments of the population, and for public health activities that will assist people in attaining lifestyles that will provide the maximum defence against causes of impairment.

The Preamble to the Constitution of the World Health Organisation states that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being.

Article 12(1) of the Convention on the Elimination of all forms of Discrimination Against Women requires states parties to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those relating to family planning while Article 12(2) requires states parties to ensure to women appropriate services in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

It is submitted that it is not possible to discern within the foregoing, a golden thread of commonality of content which could prove the universal acceptance of a right to health at some level. Some of them single out specific groups whilst others refer to specific levels of services. Others do not speak of services at all but rather a state of being. One could adopt the lowest common denominator approach²¹³ or alternatively, an approach which takes the widest expression of the right as being the overarching one of which all the others are simply subsets expressed at different levels and for various elements of the general population. Rights without content are a menu without a meal²¹⁴. It is possibly for

²¹³ This would effectively be the minimum core approach.

²¹⁴ Kinney (fn 51 *supra*) observes that "When all is said and done, legal rights should be enforceable."

this reason that the concept of minimum core obligations has been argued so strenuously by some protagonists of socio-economic rights.

The concept of minimum core, if recognised sufficiently widely, may go some way towards establishing a commonality of content for a right to health care although this would not in itself necessarily establish it as a rule of *jus cogens*.²¹⁵ However, despite reference to it in various international legal commentaries²¹⁶, it does not appear to have sufficient levels of acceptance amongst nation states and has certainly been rejected in South Africa as a key aspect of fundamental human rights both with regard to the right to housing and with regard to the right to health care services. The fact that the South African Constitution recognises not a right to health but a right to health care services is highly significant in an international law context. The court in *Grootboom*, which involved a right to housing, was at pains to point out the differences in the wording between the ICESCR on the subject of the right to housing and the expression of a similar right in the Constitution²¹⁷. The variance between the wording in section 27 of the right of access to health care services and article 12 of the ICESCR of the right to physical and mental health is even greater than that relating to rights to housing between the two documents. The South African Constitution does not expressly recognise a right to health – only a right of access to health care services.

All socio-economic rights are dependent upon the availability of resources. To imply otherwise is to lose touch with reality and to demote socio-economic rights to the world of academia. The public international law instruments dealing with socio-economic rights do recognise this limitation to some extent but there is a disturbing tendency amongst

²¹⁵ The language of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (see fn 216 below) comes very close to implying that the minimum core obligations alleged to be inherent in the socio-economic rights are a part of the *jus cogens*.

²¹⁶ For example, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, January 22-26, 1997 (www.edu/humanrts/instree/Maastrichtguidelines.html) which state at paragraph 9 that violations of the Covenant occur when a state fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [...]. Thus for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, violating the Covenant.” Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.

²¹⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* (fn 57 *supra*). The Court observed at 66: “The right delineated in s 26(1) is a right of ‘access to adequate housing’ as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant.”

some writers to view this as a loophole – an escape route for states not wishing to ensure the fulfilment of the right²¹⁸. This argument, in the mouths of those who would argue that a right to health, including a right of access to health care services, is part of *jus cogens* appears to be something of a contradiction in terms since in order for a rule of international law to become part of the *jus cogens*, it should be a norm accepted and recognised by the international community of states *as a whole*. In theory therefore, states who plead poverty should at least be given the benefit of the doubt. The Committee on the ICESCR recognised the legitimacy of the phrase ‘progressive realisation’²¹⁹. If the concept of minimum core does not meet with general acceptance, if the concept of progressive realisation within available resources is legally valid, then it is submitted that it is difficult indeed to conceive of a right to health or even to health care services as being part of the *jus cogens*. What would be the content of such peremptory norm? To say that the peremptory norm incorporates the concept of progressive realisation within available resources allows for a great deal of variation in the scope of the right. How then, would one establish whether or not a state is acting in violation of the norm? Admittedly activities which deprive people of services they already have would be more obvious than those which fail to ensure the provision of services within available resources but this only advances the concept of a right to health services as *jus cogens* in a negative way. The obligations to respect and protect may be covered but not those to promote and fulfil. The availability of resources is an extremely complex issue since it goes to the heart of national resource allocation decisions and the right to self-determination which itself has been alleged to be a rule of *jus cogens*²²⁰.

A more general difficulty is how does one establish the point at which a rule becomes a norm, let alone a peremptory norm recognised by the community of states as a whole as

²¹⁸ See for example Torres (fn 130 *supra*).

²¹⁹ In paragraph 9 of general comment 3 of 1990, the Committee observed: ‘Nevertheless, the fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for state parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.’

²²⁰ Dugard fn 35, para 13.5 at p13-7



being non-derogable. A norm that enjoys general international acceptance is not necessarily a part of the *jus cogens*. It may be customary international law but *jus cogens* must, by definition, be something more than the customary international law. Similarly a norm of *jus cogens* must be more than mere public international law. It is after all the gold standard against which instruments of public international law must be measured. Kagan²²¹ tries to argue that the phrase “states as a whole” means that for a norm to be recognized by the international community as a whole, “it would suffice if all the essential components of the international community recognize it” and that “a considerable majority of those who have commented upon this seemed to accept the views of Yasseen”²²². Unfortunately when one is dealing with concepts as fundamental as *jus cogens*, the views of a majority of a majority are not necessarily convincing and the agreement of “most” that the “lack of acceptance or even the expression of opposition on the part of one of a few states is no obstacle to a norm having peremptory status”²²³ would have a hollow ring in the face of defiance of such a norm by a powerful nation such as the United States of America²²⁴.

In view of the fact that writers such as Kinney and Torres²²⁵ still try to argue the existence of a right to health at customary international law and, in the case of Kinney, observe that, “Realistically, implementation and enforcement of the international right to health is difficult, particularly if predicated on customary international law”, one cannot help but

²²¹ Kagan *C Jus Cogens and the Inherent Right To Self Defence* fn 42 *supra*

²²² Yasseen MK, chairman of the Drafting Committee of the Vienna Convention has observed that “By inserting the words ‘as a whole’ in article 30 the Drafting Committee had wished to stress that there was no question of requiring a rule to be accepted and recognized as a peremptory norm by all states. It would be enough if a very large majority did so; that would mean that, if one state in isolation refused to accept the peremptory character of a rule, or if that state was supported by a very small number of states, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected.” Hannikainen L *Peremptory Norms (Jus Cogens) in International Law* (1988). Unfortunately it is still not clear what exactly is a “large majority” and whether the dissent of powerful nation states such as the USA, France and Belgium can be legitimately ignored in *jus cogens* debates. McManus (fn 2 *supra*) points out that: “Customary international law, to a greater extent than the treaty, favors powerful states, as their behavior is more likely to be unopposed and so evolve through general practice into customary law. Despite this, various principles of customary international law [transform] applications of raw power into legitimate power, thereby creating rights to apply power within certain structures using certain means.”

²²³ Torres fn 130 *supra*

²²⁴ Kinney (fn 51 *supra*) states at p 1457 that: “Throughout my career I have searched for ways to compel access to needed health services of all types for all people in need. My search would be simple if there were a legal mandate in some source of law that required societies to assure adequate and affordable health care services. Unfortunately, at least in the United States, the right to health is not generally a legal right. Thus, whether one recognizes a right to health depends on one’s political persuasion and moral values. In other words “right to health” is an option.”

²²⁵ Kinney “The International Human Right To Health: What Does This Mean for Our National and Our World?” (fn 51 *supra*) and Torres “The Human Right To Health, National Courts and Access to HIV/AIDS Treatment: A Case Study from Venezuela”, (fn 130 *supra*)

feel that if an international right to health cannot even be successfully argued at customary international law, it is even more difficult to argue such a right as part of the *jus cogens*.

The concept of *jus cogens* as non-derogable almost flies in the face of a principle that every lawyer comes to recognise intuitively as fundamental to the dynamics of any living system of law – for every rule there is an exception. Legal systems are not closed circles. They are spiralling reflections of the ever-changing communities which recognise and uphold them. The fact that the Vienna Convention on the Law of Treaties provides that a norm of *jus cogens* can be modified only by a subsequent norm of general international law having the same character simply begs the question. D’Amato²²⁶ points out that someone has yet to explain how a purported norm of *jus cogens* arises. However much the concept of *jus cogens* may be gaining acceptance and winning the support and approval of international lawyers, it is submitted that it remains of extremely limited practical efficacy in the area of a right to health. The principles of public international law in this area are more useful and are likely to remain so for some time to come.

1.14 Private International Law and the Right To Health

The question of *jus cogens* and the right to health is especially interesting in the context of the World Trade Organisation’s (WTO) activities and instruments. In the Report of the In-Depth Study Session on the WTO for Human Rights Professionals held in Morges, Switzerland in July 2001²²⁷, the first speaker in the session on the introduction to the international human rights regime and WTO dispute settlement considered the relationship between trade and human rights law and asked whether there was any legal obligation on WTO member states to help developing countries or to promote economic, social and cultural rights. Reference was made to Articles 55 and 56 of the UN Charter which state that UN Members shall cooperate in the UN’s promotion of *inter alia* higher

²²⁶ D’Amato A ‘It’s a Bird, It’s A Plane, It’s Jus Cogens! 6 *Connecticut Journal of International Law* 1 (1991). D’Amato argues that norms of *jus cogens*, when considered logically, serve only, illogically, to protect against the terms of treaties between states that are so senseless that no state is likely to incorporate them into a treaty anyway. He states that “What we require – like the third bowl of soup in the story of the three bears – is a theory of *jus cogens* that is Just Right. I do not know if such a theory is possible. I don’t even know if one is conceivable.”

²²⁷ Morges www.business-humanrights.org/Report-WTO-Human-rights-July-2001.htm



standards of living, full employment, solutions for international economic, social, health and related problems and universal respect of human rights. He also referred to the ICESCR and the CRC. The speaker identified different methods of approaching a conflict between WTO law and activities and human rights law. One of these was to resort to Article 103 of the United Nations Charter which gives the Charter priority over other conflicting international obligations. However, he observed that trade law might be considered a *lex specialis* and thus escape the article 103 presumption. Another identified approach was to qualify human rights as *erga omnes*, peremptory norms which would trump WTO law but this argument was discarded as weak *because there was little consensus as to the content of such erga omnes norms*. The view is thus that *jus cogens* norms are not even strong enough to trump WTO law due to their fundamental weakness-lack of content. The preferred solution was, in the view of the speaker, that of Article 41 of the CRC according to which nothing in the CRC shall affect any national or international provisions which are more conducive to the realization of the rights of the child.

Article 23 of the WTO Dispute Settlement Understanding (DSU) is of crucial importance for a dispute that involves WTO law and human rights law in that it specifies that if a dispute involves an allegation of a violation of WTO law, recourse to the WTO dispute settlement mechanism is compulsory and exclusive. It excludes the possibility of recourse to any other jurisdiction when WTO rules are at stake, even if other rules such as human rights are also affected²²⁸.

The WTO's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) was the subject of some discussion at the WTO's Ministerial Conference at Doha in 2001²²⁹. The TRIPS Agreement has the potential to interfere with access to medicines, affording as it does, international protection of intellectual property rights. The Declaration on the TRIPS Agreement and Public Health was issued in November

²²⁸ Second speaker in Morges (in 227 *supra*)

²²⁹ See further Abbott F M 'The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO' 2002 *Journal of International Economic Law* Vol 5 p469-505; Matthews D 'WTO Decision On Implementation of Paragraph 6 of the Doha Declaration On The TRIPS Agreement and Public Health: A Solution to the Access to Essential Medicines Problem' 2004 *Journal of International Economic Law* Vol 7 p73-107

2001 pursuant to the discussions at the Ministerial Conference. The states parties *inter alia* recognized that intellectual property protection is important for the development of new medicines and the concerns about the effects of intellectual property protection on prices. They also recognized the gravity of the public health problems afflicting many developing and least developed countries especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics and agreed that the TRIPS Agreement does not prevent Members of the WTO from taking measures to protect public health. They affirmed that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and in particular, to promote access to medicines for all. One of the details upon which the Members agreed was that "The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge..."²³⁰

Private international law has the potential to impact significantly upon the right of access to health care services in general and medicines in particular unless there is conscious cognisance of human rights law in the formulation of instruments of international trade. The rapidly increasing globalisation of markets renders the penetration of private international law by human rights principles even more urgent. The legal aspects of access to medicines will be covered in more detail in another chapter. It should be noted, however that activists have observed that wealthy countries and drug companies refuse to compromise patent monopolies in poor countries that have no domestic capacity. The Doha declaration was criticised as being watered down in its language as a result of opposition by rich countries²³¹. It may be that in practice there is still much to be done in the area of private international law to ensure the proper observation of human rights.

1.15 Summary and Conclusions

²³⁰ www.globaltreatmentaccess.org/content/press-releases/01/111401_WTO-TRIPS

²³¹ www.globaltreatmentaccess.org.za



International law is fragmented and internally inconsistent between its different branches. It is a much more abstract and imprecise concept than domestic law. This makes it difficult to interpret and apply without reference to the relevant domestic legal system²³². It also contributes to the potentially large number of various interpretations and practical consequences of its application. It is debatable whether there is any kind of hierarchy within the different branches of international law or across international law governing different aspects of international relations²³³. Whilst a lack of a rights hierarchy may not necessarily be a bad thing²³⁴ there is no indication at international law as to how balancing exercises must be undertaken when there is a conflict of rights or how the different rights interrelate. Within public international law there is still a lack of harmony between human rights law and international trade law. In some instances, at a practical level, there can even be conflict between these two in the health care arena since the one seeks to promote access to health care services on the basis that it is a public good which everyone should have whether they can pay for it or not while the other seeks to obtain the greatest commercial benefit from health products and services through international agreements such as TRIPS and GATS²³⁵. There are no clear jurisdictions within international law and there is no real hierarchy of jurisdiction either. It is possible that a single dispute or

²³² Benvenisti E 'Margin of Appreciation, Consensus, and Universal Standards' *International Law and Politics* Vol 31 p 843, writes: "Judgments of the European Court of Human Rights (ECHR) and of the Inter-American Court of Human Rights (IACHR) and views of the Human Rights Committee (HRC) resonate in numerous national decisions concerning human rights issues. Their jurisprudence has become an indelible source of inspiration for judges in courts around the globe. Prominent among these international human rights organs is the ECHR, whose jurisprudence enlightens not only national judges but also judges and committee members of the other international human rights organs. The judicial output of the ECHR and other international bodies carries the promise of setting universal standards for the protection and promotion of human rights. These universal aspirations are to a large extent, compromised by the doctrine of margin of appreciation. This doctrine, based on the notion that each society is entitled to certain latitude is resolved in the inherent conflicts between individual rights and national interests or among different moral convictions."

²³³ In 'Three Interacting Human Rights Systems: UN, OSCE, Council of Europe' it is stated that: "There is not a hierarchy of rights nor priorities among rights... The effectiveness of international law in general depends upon the willingness of states to surrender some of their sovereign powers to wider international control, or on reciprocity, the understanding that each party will act in a certain way because the other will. International human rights law is largely based on a system of multilateral treaties that establish objective standards for state conduct, rather than reciprocal rights and obligations. And these treaties place duties on states in relation to individuals within their jurisdiction rather than to the other state parties. Perhaps because of their characteristics, most international human rights instruments are entitled charters or covenants, rather than treaties or conventions." <http://usinfo.state.gov/products/pubs/archives/humrts/three.htm>

²³⁴ See for instance Koskeniemi M "Hierarchy in International Law: A Sketch" *European Journal of International Law* Vol 8 No 4 www.ejil.org/journal/Vol18/No4/art2.pdf. See also the discussion by Weiler JHH and Paulus AL 'The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law' Symposium: The Changing Structure of International Law Revisited (Part 2), essay published in *European Journal of International Law* Vol 8 No 4

²³⁵ Alston P (fn 19 *supra*) states that trade and competition rules, far from acting as a complement to human rights guarantees are the exact opposite. "A very limited and narrow range of economic freedoms, many of which are not per se recognized as economic rights within the framework of international human rights law, has assumed principal importance. As Besselink has recently observed in examining the relationship between these two sets of rights, 'it is not difficult to analyse the case law of the ECJ on human rights in terms of the predominance of economic (fundamental) rights over the classic human rights [Besselink 'Case Note' 38 CMLR (2001) 1307, at 1308 and 1335]...The EU is struggling even today, to determine the appropriate role for human rights in its future constitutional order."

related aspects of the same dispute may be adjudicated before different fora such as the Human Rights Committee, a national court, a regional court and a WTO panel or the Appellate Body. Different jurisdictions may reach different or inconsistent conclusions²³⁶. There is no clear hierarchy either of rights in international law or within the different branches of international law. Too frequently there is no certainty as to what exactly is international law as opposed to an international policy or viewpoint²³⁷. It is by no means clear that the international community regards international human rights law as paramount.²³⁸ International law at most tells nation states how they should behave and is binding upon them but it seldom gives guidance at the level of the individual citizen.

The other problem is that wealth is increasingly being held not by national states but by multinational corporations whose turnover in many cases far exceeds the Gross Domestic Product of many countries.²³⁹ It is becoming a legal challenge as to how to apply principles of international law to, and enforce them against, such entities.

²³⁶ Marceau G, 'WTO Dispute Settlement and Human Rights' *European Journal of International Law* Vol 13 No 4. She notes that at present international jurisdictions are multiplying. So far, however, co-ordination rules have not yet been agreed upon to limit states in their decision to choose between two jurisdictions. Marceau points out that: "A call for order was made by the President of the International Court of Justice, Judge Schwebel, and again by the present President, Judge Guillaume against the dangers of forum-shopping and the development of a fragmented and contradictory international law. Principles of international commercial law such as *forum non conveniens*, *res judicata* and, *lis pendens*, abuse of process, and procedural rights etc, cannot find application in the overlap of jurisdictions between public international law tribunals. States' choices seem based on economic, political and legal opportunities. Moreover, some treaties contain prescriptive jurisdiction clauses that can easily clash with other jurisdictions." She cites by way of example "NAFTA and the WTO, which both contain an exclusive jurisdiction clause for matters relating to SPS measures"

²³⁷ Alston P, fn 19 *supra*, states that: "There are, in fact relatively few rights which have achieved *jus cogens* status and it would be extremely difficult to argue that those that have, such as the prohibition against genocide and slavery, may be implemented in different ways depending on the state concerned or the treaty involved. All the more so since no particular treaty is involved, at least not in the sense of providing the foundation for, or the formulation of, a *jus cogens* norm."

²³⁸ Alston P fn 19 *supra* observes that human rights were, on virtually all accounts of the evolution of European integration through the common market, an afterthought. He writes: "They were not mentioned in the Treaty of Rome of 1957, which specifically eschewed the strategy of its failed forerunner, the proposed European Political Community, that would have incorporated the ECHR. Even when limited human rights provisions were included in the Treaty on European Union they were far from reflecting an integrated human rights vision for the Community. Instead, they were grafted on to a set of Treaties which, despite the broad range of powers and policies covered, were for a long time very largely focused on economic aims and objectives with very little reference to other values. The EEC Treaty was essentially a blueprint which sought to promote integration through a functional economic approach. The second reason is that when human rights in the form of fundamental rights began to make their way into the jurisprudence of the European Court of Justice it was in relation to a narrow range of rights, such as the right to property and the freedom to pursue a trade or profession, rather than to any balanced conception of human rights."

²³⁹ McCorquodale R 'Feeling the Heat of Human Rights Branding: Bringing Transnational Corporations Within the International Human Rights Fence' in Addo MK (ed) *A Review of Human Rights Standards and the Responsibility of Transnational Corporations* The Hague: Kluwer Law International, 1999 starts with two quotes: "The social responsibility of business is to increase its profits" - Milton Friedman and "Markets...cannot fairly allocate public goods, or foster social accountability in the use of resources or democracy at the workplace, or meet social and individual needs that cannot be expressed in the form or purchasing power, or balance the needs of present and future generations - Steven Lukes. He states that the tension evidenced in these two statements between the roles of corporations to increase profits for the benefit of shareholders or to act in a way that is beneficial to the community generally - and whether these are alternative roles - is a feature of the debates about the effects of globalization. He states: "In a world where more than half of the top economies are corporations and where an increasing amount of investment is private, including in areas formerly in public ownership, it is vital that

If one returns to the questions posed at the beginning of this chapter they may be answered as follows.

1. Depending upon which theory of customary international law one adopts, it may be possible to say that a right to health has passed into customary international law. However even those proponents of the more positive view that widespread observation of rules in public international law can give rise to rules of customary international law and who hope to use such customary international law as a tool for compelling nations that do not recognise a right to health to do so, concede that customary international law is not without its problems. At the other end of the spectrum is the view that customary international law is of little or no value with regard to a right to health and that the real action in respect of this right is in public international law. Certainly it has not been possible to establish any rules of customary international law relating to a right to health which could be said to be law in South Africa in terms of section 232 of the Constitution.
2. There is a considerable body of public international law on the subject of the right to health but much of it is not binding upon South Africa or its subjects. South Africa has not ratified the International Covenant on Economic, Social and Cultural Rights which contains the most comprehensive statement of the right to health in public international law according to its drafters. It is merely a signatory of this instrument. South Africa has ratified the Convention on the Rights of the Child and the Convention on the Elimination of all forms of Discrimination Against Women. However, it has not expressly enacted the provisions of these instruments into its domestic law. Section 231 of the Constitution adopts a distinctly dualist approach to international agreements in that they must be enacted into law by way of national legislation before they can become law in the Republic. The constitutional court has expressly and repeatedly refused to apply the public international law concept of minimum core obligations to socio-economic rights as expressed in the South

investigations occur into the giving effect of the activities of transnational corporations on individuals, and communities, particularly on their human rights".

African Constitution. This does not mean, however, that the approach of the constitutional court is entirely at odds with principles of international law. At a macro-level it is possible to conclude that there is a measure of consistency with the broad principles of international law in the area of socio-economic rights. Such consistency is more subtle, however, than a simple one-on-one comparison of domestic constitutional and international law rights.

3. There are at this stage no peremptory norms, or principles of *jus cogens*, concerning a right to health or even health care services. This may be as much because of procedural problems in identifying principles of *jus cogens* as it is due to lack of acceptance of a right to health or health care services by a majority of states.
4. Private international law presents more of a hindrance than a help with regard to the right to health at present in that it is only relatively recently that the need to reconcile the values of private international law and public international law has been openly recognized. Instruments such as the World Trade Organisation's Agreement on Trade Related Aspects of Intellectual Property Rights have proved to be problematic for the South African government in its attempts to respect, protect, promote and fulfil the right of access to health care services conferred by section 27(1) of the Constitution. In 1997, the Pharmaceutical Manufacturers Association of South Africa challenged on the basis of the TRIPS Agreement, legislation²⁴⁰ which was passed with the express intention of improving the access of medicines to South Africans. The challenge, although ultimately unsuccessful and settled out of court, served to effectively delay the implementation of the legislation in question for a period of five years.

In general it must be observed that the constitutional court has adopted a cautious and conservative approach to the application of international legal principles within South

²⁴⁰ The Medicines and Related Substances Control Amendment Act No 90 of 1997. Although the out of court settlement was effected some three years after commencement of the litigation, the government thereafter adopted a cautious approach to the development of the regulations which serve as the mechanism whereby the legislation is to be implemented with the result that it has taken a significant amount of time after the settlement to bring the law into effect. It was deemed further necessary to fine-tune certain aspects of Act 90 of 1997 relating implementation in the form of another amendment - Act 59 of 2002.

Africa. The essentially dualist approach of the Constitution itself is no doubt largely responsible for this. However, it is submitted with respect that it this sensible and pragmatic approach which renders the Constitution and the decisions of the courts in South Africa so effective in dealing with socio-economic and other constitutional rights.

The role of international law in interpreting the provisions of the Bill of Rights, whilst it is acknowledged as being important, has not been overplayed by South African courts and the need to consider international legal principles in the South African context, taking into account local conditions and the country's history has been repeatedly emphasised. It is submitted with respect that as long as South African courts continue in this vein, both domestic and international lawyers can look forward to a meaningful and significant body of South African jurisprudence on the subject of human rights generally which will enrich the culture of human rights within South African and international law.

Since the focus of this thesis is not international law and the right to health, a subject which undoubtedly deserves a thesis of its own, but rather an assessment of how international law and the right to health care interfaces with the South African legal system, it is not appropriate to consider the subject further. However there are a number of other references which are relevant to the subject of health and human rights which bear mention and for this reason are listed below²⁴¹. Although in general terms it can be said that international law has significantly influenced the South African legal system, more particularly the Constitution and many of the principles it endorses, it cannot be said that the Constitution is the result or product of international law. It is a product of the history and culture of South Africa and the values and aspirations of its people. The right to health is not expressly contained in the Constitution but the rights that are the essential

²⁴¹ Cosmas, C and Schmidt-Ehry B 'Human Rights and Health in Developing Countries: Barriers to Community Participation in Public Health In Cameroon' *Health and Human Rights* 1(3) p 244; Dworkin R *Life's Dominion: An Argument About Abortion, Euthanasia and Individual Freedom*; Giesen D 'A right to health care? A Comparative Perspective' *Health Matrix* 4 (2) p 277-95; Goldsmith M 'Health and Human Rights Inseparable' *Journal of the American Medical Association* 270 (5) p 553; Gostin L and Mann J 'Towards the Development of a Human Rights Impact Assessment for the Formulation and Evaluation of Health Policies' *Health and Human Rights* 1(6) p 58; Haslam MT, 'Human Rights: The Right To Receive Treatment and Care' *Medicine and Law* 12 (3-5) p 291-5; Hayes JA 'Health care as a Natural Right' *Medicine and Law* 11(506) p 405-16; Leary, V 'The Right to Health in International Human Rights Law' *Health and Human Rights* p 24; Mann J Human Rights and the New Public Health' *Health and Human Rights* 1 p 29; Otto, D 'Linking Health and Human Rights: A Critical Legal Perspective' *Health and Human Rights* 1(3) p 272; Roemer, R 'The Right to Health Care' in *The Right to Health in the Americas* Fuenzalida-Puelma, H and Scholle Connor, S (eds); Fidler, D P 'SARS and International Law' *American Society of International Law* April 2003 <http://www.asil.org/insights/insigh101.htm>; Frost L 'Mental Disability Rights in International Law' http://www.ilppp.virginia.edu/Research_Initiatives/mental_disability_rights_in_in.htm

building blocks for health are very much in evidence. The right to health care services in the Constitution has been recognised as justiciable and applied by the constitutional court on more than one occasion as the following chapter will demonstrate. The courts have not, however, treated the right to health care services in the light of international law principles. They have, for instance, expressly rejected the minimum core approach espoused by international law with regard to socio-economic rights. In South African law, the right to health care services has yet to fully permeate the law of contract and to a lesser extent, the law of delict as will be demonstrated in subsequent chapters. It can also not be said that the influence of international law is greater on the domestic legal system than it was prior to the Constitution. South African courts have long taken cognisance of international law where they felt the need. The Constitution has simply focused this practice and made it mandatory. Whilst international law will always be a guide to the domestic legal system, it is dependent for its authority and status on its recognition by the Constitution in its various aspects. As such, it is of limited value in defining, interpreting and applying the constitutional rights that relate to health care services in the South African context.

It is clear from the discussion in this chapter that the Constitution is the legal lodestone that guides the interpretation and understanding of the law of health service delivery in South Africa. It is the uniquely South African lens through which principles of international law must pass in order to acquire legal weight and validity within the domestic legal system. The importance to the people of South Africa of their past, their culture, and their values is such that it cannot be otherwise. Whilst the principles enshrined in the Constitution may well be consistent with those of international law in a general way, it is still to the Constitution that one must turn when seeking to apply those principles to particular circumstances in the South African context. International law does not override the Constitution for the purposes of the South African legal system. Section 2 of the Constitution clearly states that:

“This Constitution is the supreme law of the Republic; law *or conduct* inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” [writer’s italics]

International law, whether it is at the level of public international law, customary international law or even *jus cogens* (the latter two depend heavily upon ‘conduct’ for their legal status) that is inconsistent with the Constitution is invalid in South Africa. It is therefore necessary to consider issues of health service delivery in the context of the Constitution.