

JUDICIAL IMMUNITY, COMPENSATION FOR UNLAWFUL DETENTION  
AND THE ELUSIVE SELF-EXECUTING TREATY PROVISION: *CLAASSEN*  
*v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT* 2010  
(6) SA 399 (WCC)

I INTRODUCTION

The issue in *Claassen v Minister of Justice and Constitutional Development*,<sup>1</sup> was ‘whether a remedy in damages should be extended in a case in which a person is detained unlawfully as a consequence of the negligently made order by a magistrate acting outside the authority of the law’.<sup>2</sup> The Court noted that the Constitutional Court in *Zealand* had held the minister vicariously liable for the inaction of a court registrar causing the detention of Mr Zealand ‘as a sentenced prisoner for some years’.<sup>3</sup> According to the High Court the *Claassen* case should be distinguished from *Zealand* in that the magistrate had judicial immunity.<sup>4</sup> The Court held that the common law doctrine of judicial immunity was not contrary to the Bill of Rights.<sup>5</sup>

After finding judicial immunity consistent with the Bill of Rights, the Court further held that art 9(5) of the International Covenant on Civil and Political Rights (ICCPR), which provides for a right to compensation for unlawful detention, ‘is not a self-executing legal instrument in the sense that this country’s formal adoption of its procedures did not, without more, amend our established national law’.<sup>6</sup>

In what follows I will argue that the outcome of the case was unfortunate as it violated the clear provision in art 9(5) of the ICCPR and that the Court should either have applied this provision directly or followed the precedent set by *Zealand* to the effect that a violation of s 12 of the Constitution can give rise to a claim for compensation under the common law.

II ARE PROVISIONS OF THE ICCPR SELF-EXECUTING?

(a) **Human rights treaties in the South African legal order**

(i) *Rights covered*

With regards to international human rights treaties it is clear that most rights recognised in international treaties ratified by South Africa have equivalents

1 2010 (2) SACR 451 (WCC); 2010 (6) SA 399 (WCC); [2010] 4 All SA 197 (WCC).

2 Ibid para 18. Mr Claassen had been remanded out of custody on warning. He did not appear in court as requested due to unforeseen difficulties. At the next hearing the magistrate summarily remanded Mr Claassen into custody ignoring the relevant provisions of the Criminal Procedure Act.

3 Ibid para 19. *Zealand v Minister for Justice and Constitutional Development* 2008 (2) SACR 1 (CC); 2008 (4) SA 458 (CC).

4 Ibid para 28.

5 Ibid paras 28–32. The examination of the doctrine in relation to the Bill of Rights follows from s 39(2) of the Constitution, which provides that ‘When ... developing the common law ... every court ... must promote the spirit, purport and objects of the Bill of Rights’.

6 *Claassen* para 36.

in the Bill of Rights or in national legislation. The ICCPR was ratified by South Africa on 10 December 1998 after having received parliamentary approval, as required by s 231 of the Constitution, by the National Council of Provinces on 4 November 1998 and by the National Assembly on 6 November 1998. Mr Surty noted when the National Council of Provinces approved the ICCPR that '[n]ot only does the Bill of Rights enshrine and entrench the rights that are set out in the Covenant for Civil and Political Rights, but it goes beyond that'.<sup>7</sup>

However, as the *Claassen* case illustrates there are provisions in the ICCPR that are not reflected in the Bill of Rights or in national legislation. Article 9(5) of the ICCPR provides that 'Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'. No such right is provided for in the Bill of Rights.

### (ii) *The constitutional framework*

Before the interim Constitution entered into force in April 1994, treaties could only be applied by the courts if they had been incorporated through national legislation.<sup>8</sup> Only a few treaties were incorporated in this way.<sup>9</sup>

In 1993 a new constitution for South Africa was negotiated. With regard to the position of treaties in the South African legal order the technical committee and negotiators were influenced by the 1990 Constitution of Namibia, which in art 144 provides:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

The Namibian constitution thus creates monism with regard to treaties in addition to the traditional monism in common law countries with regard to customary international law.

When drafting the interim South African Constitution, the Negotiating Council decided that treaties ratified by Parliament would be part of South African law unless contrary to the Constitution or 'excluded by express provision in an Act of Parliament'.<sup>10</sup> However after amendments by the State Law Advisors,<sup>11</sup> the final text of s 231(3) as adopted by Parliament read:

Where Parliament agrees to the ratification or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution.

7 *NA Debates* col 2854 (1998).

8 J Dugard *International Law – A South African Perspective* (2005) citing the Appellate Division in *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A).

9 For example the International Convention for Safe Containers Act 11 of 1985 provides in s 2(1) that the Convention 'shall ... apply in the Republic'.

10 J Dugard *International Law – A South African Perspective* (1994) 343. On how s 231 of the 1993 Constitution was drafted see M Olivier 'The Status of International Law in South African Municipal Law: Section 231 of the 1993 Constitution' (1994/1994) 19 *SAYLJ* 1, 2–3.

11 Olivier *ibid* 10.

It was unclear how Parliament would ‘expressly so provide’ to incorporate a treaty into national law.<sup>12</sup> The first use of this new form of incorporation was with regard to double-taxation agreements. The Income Tax Act provided since its adoption in 1962 that provisions in such agreements dealing with ‘immunity, exception or relief’ should have ‘effect as if enacted in this Act’.<sup>13</sup> From 1995 the notices in the *Gazette* read that Parliament ‘expressly provided in terms of section 231(3) of the Constitution that the Convention shall form part of the law of the Republic’. Thus all provisions of such agreements were directly applicable. In 1997 the Income Tax Act was amended to make the full text of a double-taxation agreement approved by Parliament and published in the *Gazette* law in the Republic.

No multi-lateral treaties were made law in the Republic under the ‘expressly so provide’ provision of the interim Constitution and only a few multi-lateral treaties were incorporated in their entirety through enactment before the entry into force of the final Constitution of the Republic of South Africa, 1996. The Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, adopted under the interim Constitution, provides in s 2 that ‘[t]he Convention shall, subject to the provisions of this Act, apply in the Republic’. International human rights treaties, such as the African Charter on Human and Peoples’ Rights, were approved by Parliament with no further action.

Not much attention was given to the status of international law in the negotiations on the final Constitution. The drafts reflect a return to the pre-1994 position but at the last moment an amendment was made to provide that ‘a self-executing provision of an agreement that has been approved by Parliament is law in the Republic’. Considering that this provision was introduced less than a week before the Constitution was adopted there was not much time for discussing the implications of the new provision and come up with a clearer formulation.<sup>14</sup>

12 N Botha ‘Incorporation of Treaties under the Interim Constitution: A Pattern Emerges?’ (1995) 20 *SAYL* 199.

13 Section 108 of the Income Tax Act 58 of 1962 prior to amendments through Act 28 of 1997.

14 Section 201(3) of the working draft of the final Constitution released on 22 November 1995 provided that ‘An international agreement becomes law in the Republic when it is enacted as law in terms of an Act of Parliament and published in the national Government Gazette’. When the first constitutional bill (Bill B-34 1996) was published on 23 April 1996 s 227(3) read: ‘Any international agreement becomes law in the Republic when it is enacted into law by national legislation’. This formulation was retained in the Working Document for Constitutional Committee Discussion of 29 April 1996. Had this formulation been retained South Africa would have returned to the pre-1994 position with regard to the direct application of treaties. At the meeting of the Constitutional Committee on 1–2 May 1996 a new draft of Chapter 14: General Provisions was tabled. Seemingly a new formulation of s 227 was included in the draft and agreed to by the Committee. The revised constitutional bill, published on 6 May 1996, included s 231(4) with the formulation which was then approved when the final Constitution was adopted by the Constitutional Assembly on 8 May 1996: ‘Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’. The information provided in this footnote is taken from the website of the Constitutional Assembly [www.constitution.org.za](http://www.constitution.org.za) as archived (11 December 1997) in [www.archive.org](http://www.archive.org).

Many South African scholars are unhappy with the inclusion of the concept of self-execution. They think the inclusion of self-execution is ‘nonsensical’ (Van der Vyver), ‘farcical’ (Strydom) and ‘without realistic purpose’ (Botha).<sup>15</sup> Dugard cites, with reference to the concept of self-execution as developed in the United States, McDougal’s comment that ‘this word self-executing is essentially meaningless’.<sup>16</sup> However, some of the same commentators were positive to making treaties directly applicable by courts in the South African legal order under the interim Constitution. Dugard thought that the requirement that Parliament ‘expressly so provides’ was an unnecessary addition to what had been agreed by the negotiators.<sup>17</sup> The positive attitude to constitutional incorporation of treaty provisions (monism) is difficult to reconcile with opposition to the concept of self-execution as a court in a monist country can only apply self-executing treaty provisions.<sup>18</sup>

### (b) South African courts and the question of self-execution

Much of the debate around the provision on self-execution has dealt with extradition. The Extradition Act of 1962 provides that ‘no [extradition] agreement ... shall be of any force or effect until the ratification of ... such agreement ... has been agreed to by Parliament’.<sup>19</sup> The Act thus incorporates an extradition treaty in a similar way to the Income Tax Act with regard to double-taxation agreements. The Constitutional Court recently confirmed this position. In *Quagliani* High Court Judge Preller held that the extradition agreement with the US was not self-executing in terms of s 231(4) of the Constitution, while in *Goodwin* High Court Judge Ebersohn held that the same agreement was self-executing.<sup>20</sup> The cases were heard together on appeal in the Constitutional Court which held that the Extradition Act provides for a ‘framework for giving domestic effect to the content of [extradition] treaties’ and it was thus not necessary to determine whether such a treaty was self-executing or not.<sup>21</sup>

The question may be asked whether with regard to international human rights treaties, the indirect application through the interpretation clauses in ss 39 and 233 of the Constitution is not sufficient. After all South African courts have an obligation under s 39 to ‘consider international law’ when inter-

15 N Botha ‘Extradition, Self-Execution and the South African Constitution: A Non-Event’ (2008) 33 *SAYIL* 253, 253–4, 265. See also W Scholtz ‘A Few Thoughts on Section 231 of the South African Constitution, Act 108 of 1996: Notes and Comments’ (2004) 29 *SAYIL* 202, 216.

16 Dugard (note 8 above) 62. For more constructive views, see for example M Olivier ‘Exploring the Doctrine of Self-Execution as Enforcement Mechanism of International Obligations’ (2002) 27 *SAYIL* 99; E Ngolele ‘The Content of the Doctrine of Self-Execution and its Limited Effect in South African Law’ (2006) 31 *SAYIL* 141.

17 See Dugard (note 10 above) 343.

18 See T Buergenthal ‘Self-Executing and Non-Self Executing Treaties’ 1992 IV *Recueil des Cours* 343. See also M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010).

19 Extradition Act 67 of 1962 (as amended through Act 77 of 1996).

20 For a discussion of these cases see Botha (note 15 above).

21 *President of the Republic of South Africa v Quagliani, President of the Republic of South Africa v Van Rooyen; Goodwin v Director-General, Department of Justice and Constitutional Development* 2009 (4) 345 BCLR (CC) para 37.

preting the Bill of Rights and under s 233 '[w]hen interpreting any legislation ... must prefer any reasonable interpretation ... that is consistent with international law'.<sup>22</sup> The courts have thus in many cases referred to international human rights instruments to reinforce their 'own position on a matter'.<sup>23</sup> This is how the Constitutional Court used the ICCPR in *Zealand* when it held:<sup>24</sup>

I can think of no reason why an unjustifiable breach of section 12(1)(a) of the Constitution should not be sufficient to establish unlawfulness for the purposes of the applicant's delictual action of unlawful or wrongful detention. Moreover, South Africa also bears an international obligation in this regard in terms of article 9(5) of the ICCPR.

In addition to this indirect application through the interpretation clauses courts could arguably, when needed, directly apply international human rights law. The Constitutional Court recognised this in *Grootboom* when it held that 'where the relevant principle of international law binds South Africa, it may be directly applicable'.<sup>25</sup> However, no South African court has ever explicitly held a provision of a multilateral treaty that has not been expressly incorporated by Parliament to be directly applicable or, by other words, self-executing. Direct application of international human rights law could be based on s 231(4) which is further reinforced by s 39(3) which provides that the Bill of Rights is not exhaustive in that other rights can be conferred by common law, customary law or legislation. A self-executing provision of a treaty is law in the Republic and should therefore be interpreted to form part of s 39(3).<sup>26</sup>

### (c) How to determine if a treaty provision is self-executing

A treaty provision is considered self-executing when it can be applied by courts 'without further legislative implementation'.<sup>27</sup> It is for the domestic court to decide if a treaty provision fulfils this requirement.<sup>28</sup> Precision is arguably the most important factor in deciding if a provision shall be considered as

22 Section 233 has rarely been applied by the courts, see L du Plessis 'International Law and the Evolution of Domestic Human-Rights Law' in J Nijman & A Nollkaemper (eds) *New Perspectives on the Divide between National & International Law* (2007) 334. Legislation includes the Constitution see *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para 33. It should also be noted that s 232 of the Constitution provides for customary international law as a source of law in South Africa.

23 E de Wet 'The "Friendly but Cautious" Reception of International Law in the Jurisprudence of the South African Constitutional Court: Some Critical Remarks' (2004–2005) 28 *Fordham Int Law J* 1529, 1534.

24 *Zealand* (note 3 above) para 52.

25 *Government of RSA v Grootboom* 2001 (1) SA 46 para 26.

26 Admittedly a provision such as the one found in art 45 of the 1995 Constitution of Uganda that '[t]he ... human rights specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned' would have been preferable as it more clearly invites the use of international law. The Ugandan Constitutional Court in *Uganda Law Society v The Attorney General* Constitutional Petitions No 2 & 8 of 2002 [2009] UGCC 1 applied a provision in the African Charter on Human and Peoples' Rights to fill a gap in the Bill of Rights.

27 V Leary *International Labour Conventions and National Law* (1982) 39.

28 Buergethal (note 18 above) 317. Too much of the (limited) debate on self-execution in South Africa has focused on the US, ignoring that this is an important concept in all monist countries even if the terminology used is sometimes different, see Buergethal (note 18 above) 382.

self-executing.<sup>29</sup> Many of the provisions in the ICCPR are certainly specific enough to be directly applied by domestic courts in countries that provide for this possibility.<sup>30</sup> This is shown by the direct application of articles of the ICCPR by domestic courts across the world.<sup>31</sup> Obviously there are provisions in the ICCPR that are not directly applicable. For example, a Dutch court held that it could not apply the right of a child ‘to such measures of protection as are required by his status as a minor’.<sup>32</sup> The court held that this provision is not specific enough to be directly applied.<sup>33</sup> Similarly, many provisions of the International Covenant on Economic, Social and Cultural Rights have been held by courts to be ‘programmatically’ and thus not directly applicable.<sup>34</sup>

It is clear that ‘it is not relevant from an international law perspective whether a treaty is self-executing’.<sup>35</sup> This is because under international law the question is one of result, whether a provision of a treaty has been complied with, not how this result has been achieved.<sup>36</sup> Thus whether a provision is directly applied (self-executing) or indirectly applied, through national legislation conformant with international law, is not relevant from an international law standpoint. However, it should be noted that the United Nations Human Rights Committee, which monitors implementation of the ICCPR, requires that Covenant rights are either directly applicable or codified.<sup>37</sup>

As noted above each provision of a treaty must be examined to determine whether it should be considered self-executing or not. Article 9(5) ICCPR provides ‘[a]nyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation’. Should this be seen as a self-executing provision? The *Classen* Court refers to the United Kingdom Human Rights Act of 1998 to illustrate that this is not the case. The Human Rights Act incorporates the European Convention on Human Rights as law in the

29 Buergenthal (note 18 above) 382–3.

30 Among South African commentators Ngolele and Olivier support this position and to some extent also Dugard. See Ngolele (note 16 above); Olivier (note 16 above); J Dugard ‘South Africa’ in D Sloss *The Role of Domestic Courts in Treaty Enforcement* (2009) 454–5.

31 Through an examination of state reports to the UN Human Rights Committee and summary records of the examination of these reports Harland found that arts 2(3), 6, 7, 9, 12, 13, 14, 15, 17, 18, 23 and 26 had been directly applied by national courts, see C Harland ‘The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey through UN Human Rights Committee Documents’ (2000) 22 *Human Rights Quarterly* 196. Harland’s study is ten years old and many new cases have been handed down covering additional articles of the ICCPR such as art 27 dealing with the rights of minorities. See *Boncheva and The Association for European Integration and Human Rights v The Council of Ministers*, final appeal judgment 11820; ILDC 607 (BG 2002); *Geological Survey of Finland v Ministry of Trade and Industry*, decision on annulment, 31.3.1999/692 KHO:1999:14; ILDC 930 (FI 1999).

32 ICCPR art 24(1).

33 Dutch Council of State judgment in *A v Minister of Immigration and Integration*, administrative appeal 200505825/1 (ALD); ILDC 550 (NL 2005).

34 See for example the Swiss case of *A and B v Government of the Canton of Zurich*, appeal judgment, case 2P.273/1999; ILDC 350 (CH 2000).

35 H Steiner, P Alston & R Goodman *International Human Rights in Context* (2008) 1122.

36 See Vienna Convention on the Law of Treaties art 27.

37 A Seibert-Fohr ‘Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its Article 2 para 2’ (2001) 5 *Max Planck Yearbook of UN Law* 431.

UK. The Convention is included as a schedule to the Act. The Convention in art 5(5) provides, similarly to art 9(5) of the ICCPR, that '[e]veryone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation'. The Human Rights Act sets out the procedure for enforcing the rights set out in the Convention but also sets out certain limitations for example with regard to judicial acts. Article 9(3) and (4) of the Act provides:

(3) In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention.

(4) An award of damages permitted by subsection (3) is to be made against the Crown; but no award may be made unless the appropriate person, if not a party to the proceedings, is joined.

According to *Claassen* this illustrates the need for implementing legislation to deal with the issue of compensation for unlawful detention ordered by a judicial officer. However, this reasoning is weak as it is clear that the UK Act says nothing about the general applicability of art 5(5), which operates without the need for implementing legislation apart from enforcement provisions provided in the Act. As illustrated by *Zealand* enforcement procedures are available in South African common law and no implementing legislation is needed for it to be applicable.

In my view the Court in *Claassen* could have directly applied art 9(5) of the ICCPR. Alternatively the Court could have followed the approach of the Constitutional Court in *Zealand* and implied a right to compensation in s 12 of the Constitution and developed the common law doctrine of judicial immunity and interpreted the State Liability Act to provide for vicarious liability of the state for unlawful detention as ordered by a judicial officer.<sup>38</sup>

The situation would admittedly be more complex if judicial immunity, in the context of this case, would be seen as forming an integral part of judicial independence as protected under the Constitution. However, as shown below, state liability for unlawful detention can be upheld without violating judicial independence.

38 'The spirit, purport and objects of the Bill of Rights' which should inform development of the common law (s 39(2)) should be interpreted to include consideration of international law. In terms of s 231(4) a self-executing treaty provision is law unless inconsistent with the Constitution or an Act of Parliament. Erasmus has held with regard to art 144 of the Namibian Constitution that '[a] clear, explicit, unambiguous indication by Parliament can be the only basis on which a statute repudiates binding international law'. G Erasmus 'The Namibian Constitution and the Application of International Law' (1989-90) 15 *SA Yearbook of Int Law* 94-5. See also the judgment of the Supreme Court of Namibia in *Government of the Republic of Namibia v Mwilima* SA 29/01; ILDC 162 (NA 2002), [2002] NASC 8. Courts in many other countries where the law provides that treaties have a lower status than national legislation have held that to violate a treaty obligation a statute must be clear, see Buergethal (note 18 above) 343.

### III JUDICIAL INDEPENDENCE AND STATE LIABILITY

The reason for judicial immunity is judicial independence.<sup>39</sup> Section 165(2) of the Constitution proclaims that '[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'. *Claassen* cites an Australian case to the effect that the 'public interest in maintaining the independence of the judiciary requires security ... against retaliation by persons or interests disappointed or displeased by judicial decisions'.<sup>40</sup>

It should be noted that judicial independence does not mean that a magistrate or judge can act in any way they want. Rules 25 and 26 of the regulations adopted under the Magistrates Act 90 of 1993 regulates what should be seen as misconduct and the procedure for investigation and misconduct hearing.<sup>41</sup> Misconduct proceedings might be sufficient to hold magistrates accountable. However, the fact that they are not civilly liable for their wrongdoings to protect their independence does not mean that the state could not be held vicariously liable. Section 1 of the State Liability Act provides that a claim arising 'out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant' can be brought against the state. *Claassen* held that the issue of vicarious liability does not arise because of the 'conclusion reached on the magistrate's immunity from liability'.<sup>42</sup> The State Liability Act requires that a 'ground of an action' has been established against the servant. If the only reason for lack of a ground of action is judicial immunity, then the issue of vicarious liability of the state could be solved by interpreting s 1 of the State Liability Act in light of the Bill of Rights as provided for in s 39(2) of the Constitution. As set out in s 233 of the Constitution, the Court 'must prefer any reasonable interpretation of the legislation that is consistent with international law'. The state could thus be vicariously liable even if judicial immunity was recognised in order to protect judicial independence.<sup>43</sup>

### IV CONCLUSION

Most of the rights found in the main international human rights treaties have been incorporated into the Bill of Rights, albeit sometimes in somewhat different form. It is clear, however, that there are also some gaps. Article 9(5) of the ICCPR is an example of this. Whether such gaps are filled by the direct application of the provision as is possible under s 231(4) or through the constitutional interpretation provisions are for the courts to decide. What

39 *Claassen* paras 30–1.

40 *Fingleton v R* [2005] HCA 34; (2005) 216 ALR 474 para 39 quoted in *Claassen* para 30.

41 GNR.361 of 11 March 1994: Regulations for Judicial Officers in the lower courts, 1993. See also *The Minister for Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA); 2009 (2) SACR 585 (SCA).

42 *Claassen* para 37.

43 See M Cappelletti "Who Watches the Watchmen?" A Comparative Study on Judicial Responsibility' (1983) 31 *The American J of Comparative Law* 1.



is important is that the international treaty, which has been approved by the South African Parliament, is complied with.

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