

# THE INTERPRETATION AND IDENTIFICATION OF INTERNATIONAL LAW IN SOUTH AFRICAN COURTS

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*South Africa has a constitution that has been described, correctly, as an ‘international law-friendly’ constitution. In the landmark decision in S v Makwanyane, the Constitutional Court went to great lengths to show the court’s openness to international law by, inter alia, declaring that the Constitution’s reference to international law included both binding and non-binding international law. Yet the use of, and openness to, international law by South African courts does not tell us about the approach to the identification and interpretation of international law. In other words, the Constitution’s openness to international law presupposes an ascertainment of the content of international law, either through identification or interpretation. But are South African courts able to use techniques, tools and methodology of international law to give content to it? The purpose of this article is to consider this question. It considers this question through an analysis of the decisions of South African courts relying on international law, particularly those of the Constitutional Court. It looks at both old and new cases to make a determination about the extent to which South African courts are faithful to the techniques, tools and methodologies to identify and interpret international law.*

## I INTRODUCTION

It is no surprise that international law has pride of place in the post-1994 South African constitutional order and that our constitutional framework has been described as ‘international law-friendly’.<sup>1</sup> This pride of place arises from the history of South Africa and the role of international law in the fight against apartheid and the adoption of the South African Constitution<sup>2</sup> (hereinafter the ‘Constitution’), which has been described as both a transformative (also ‘post-apartheid’ and ‘post-authoritarian’)<sup>3</sup> and a pluralist

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<sup>1</sup> See N Botha ‘Justice Sachs and the interpretation of international law by the Constitutional Court: Equity or expediency?’ (2010) 25 *SA Public Law* 235. See Dire Tladi ‘Interpretation of treaties in an international law-friendly framework: The case of South Africa’ in Helmut Aust & Georg Nolte (eds) *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (2016).

<sup>2</sup> The Constitution of the Republic of South Africa, 1996. See also Lourens du Plessis ‘Interpretation’ in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* vol 2 2 ed (2013) at 32–176.

<sup>3</sup> Dikgang Moseneke ‘Transformative constitutionalism: Its implications for the law of contract’ (2009) 20 *Stellenbosch LR* 1; Marius Pieterse ‘What do we mean when we talk about transformative constitutionalism?’ (2005) 20 *SA Public Law* 155. See also Wessel le Roux ‘Bridges, clearings, labyrinths: The architectural framing of post-apartheid constitutionalism’ (2004) 19 *SA Public Law* 629; Danie Brand ‘Introduction to socio-economic rights in the South African Constitution’ in Danie Brand &

constitution (also ‘tolerant’ and ‘inclusive’).<sup>4</sup>

In the early years of our democracy, the intersection of international law and South African law was the subject of a significant amount of scholarly discourse in South African journals and by South African scholars.<sup>5</sup> In more recent writing, however, authors have tended to focus less on broader (or ‘framework’) constitutional issues, and more on the application of specific rules of international law in domestic law.<sup>6</sup> Nevertheless, recent cases on

Christof Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 2. See A J van der Walt ‘Tentative urgency: Sensitivity for the paradoxes of stability and change in social transformation decisions of the Constitutional Court’ (2001) 16 *SA Public Law* 1 at 3, who describes the South African Constitution as a ‘transformation-oriented constitution’. See also generally D Tladi ‘One step forward, Two steps back for constitutionalising the common law: *Afrox Health Care v Strydom*’ (2002) 17 *SA Public Law* 473.

<sup>4</sup> Justice Sachs, in his separate opinion in *S v Makwanyane & another* 1995 (3) SA 391 (CC) para 370 declared that when interpreting the Constitution, due regard had to be paid ‘to the values of all sections of society, and [not] the values of one portion only, however exalted or subordinate it might have been in the past’. Compare Hennie Strydom ‘South African constitutionalism between unity and diversity: Lessons from the new Europe’ (1997) 12 *SA Public Law* 373, especially at 398, where the South African Constitution is described as covering ‘a certain amount of ground, albeit reluctantly, in accommodating diversity’. See also the separate opinion of Justice Sachs in *Democratic Alliance v Maseko* NO 2003 (2) SA 413 (CC) para 42, where he stated that the Constitution ‘contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. The dialogic nature of deliberative democracy has its roots both in international democratic practice and indigenous African tradition.’

<sup>5</sup> See, for example, Neville Botha ‘International law and the South Africa Interim Constitution’ (1994) 9 *SA Public Law* 245; Michelle Olivier ‘The status of international law in South African municipal law: Section 231 of the 1993 Constitution’ (1993–4) 19 *South African Yearbook of International Law* 1; Tiyanjana Maluwa ‘International human rights law and the South African Constitution’ (1993–4) 19 *South African Yearbook of International Law* 14; Neville Botha ‘Interpreting a treaty endorsed under the 1993 Constitution’ (1993–4) 19 *South African Yearbook of International Law* 148; Neville Botha ‘Incorporation of treaties under the Interim Constitution: A pattern emerges?’ (1995) 20 *South African Yearbook of International Law* 1; John Dugard ‘International law and the Final Constitution’ (1995) 11 *SAJHR* 241; Erika de Wet ‘The place of public international law in the new South African Constitutional order’ (1998) 1 *Recht in Afrika* 207; Derry Devine ‘The relationship between international law and municipal law in the light of the Interim South African Constitution 1993’ (1995) 44 *International and Comparative Law Quarterly* 1; Richard Blake ‘The world’s law in one country: The South African Constitutional Court’s use of public international law’ (1998) 115 *SALJ* 668; Michelle Olivier ‘Exploring the doctrine of self-execution as enforcement of mechanism of international obligations’ (2002) 27 *South African Yearbook of International Law* 99.

<sup>6</sup> See e.g. Jamil Ddamulira Mujuzi ‘Evidence obtained through violating the right to freedom from torture and other cruel, inhuman or degrading treatment in South Africa’ (2015) 15 *African Human Rights Law Journal* 89. See also various contributions in Erika de Wet, Holder Hestermeyer & Rüdiger Wolfrum (eds) *The Implementation of International Law in Germany and South Africa* (2015); Dire Tladi ‘Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga’ (2016) 16 *African Human Rights LJ* 310; Max du Plessis ‘Omar Al-Bashir case: Exploring efforts to resolve the tension between the African Union

more specific areas of international law, such as criminal law,<sup>7</sup> maritime matters,<sup>8</sup> immigration<sup>9</sup> and energy,<sup>10</sup> have found it necessary to touch on these framework constitutional issues. This trend necessitates a casting back of the eye to determine whether there has been an evolution in the South African jurisprudence on the nuts and bolts of the intersection between international law and domestic law — what I call the framework constitutional issues.

The constitutional framework for international law is broad. It concerns both rules for international law-making as well as the interpretation and application of international law in the domestic context.<sup>11</sup> The former is, in many ways, pure constitutional law and addresses itself to questions of, for example, the separation of powers. That is not to say that international law plays no role therein, for surely it does. The recent North Gauteng High

and the International Criminal Court' in Tiyanjana Maluwa, Max du Plessis & Dire Tladi (eds) *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard* (2017); Patrick Vrancken & Frans Marx 'Birth, marriage and death at sea in South African law' (2015) 40 *South African Yearbook of International Law* 58; Neville Botha 'Further questions and answers on extradition in the South African context' (2002) 27 *South African Yearbook of International Law* 306; Lilian Chenwi 'Revisiting South Africa's reporting obligations under human rights treaties and peer review mechanisms: Baby strides grinding to a halt?' (2012) 37 *South African Yearbook of International Law* 186; Lilian Chenwi 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46 *De Jure* 742.

<sup>7</sup> *Minister of Justice & others v South African Litigation Centre & others* 2016 (3) SA 317 (SCA).

<sup>8</sup> See *Windrush Intercontinental SA & another v UACC Bergshav Tankers AS* 2017 (3) SA 1 (SCA).

<sup>9</sup> *Minister of Home Affairs v Saidi* 2017 (4) SA 435 (SCA).

<sup>10</sup> *Earthlife Africa v Minister of Energy* 2017 (5) SA 227 (WCC).

<sup>11</sup> See on the distinction between the two main constitutional provisions concerning international law as 'law-making' and 'interpretative', H A Strydom & K Hopkins 'International law' in Woolman, Bishop & Brickhill (eds) op cit note 2 at 30–6. Botha makes a distinction between 'hard law' and 'softer law' provisions, the latter referring to interpretative provisions. See Neville Botha 'Justice Sachs and the interpretation of international law by the Constitutional Court: Equity or expediency?' (2010) 25 *SA Public Law* 235 at 236. While this typology is consistent with the one suggested here, I am uncomfortable with the description of one type as 'hard' and the other type as 'soft' law because even the interpretative role of international law involves the search for hard law. I admit that the term 'law-making' can equally apply to interpretative provisions, but I am comforted that the words I employ are more value-neutral than 'hard' and 'soft' and am prepared to use them, while noting their imperfection as a classification. Moseneke DCJ and Cameron J, writing for the majority in *Glenister v President of the Republic of South Africa & others* 2011 (3) SA 347 (CC) para 179, categorised the provisions of the Constitution relating to international law as follows: 'One concerns the impact of international law on the interpretation of the Bill of Rights. A second concerns the status of international agreements. A third concerns the customary international law ... . A fourth concerns the application of international law.' Categories one, two and three in the *Glenister* typology can be collectively described as the interpretative category, while category four concerns 'law-making'.

Court decision concerning the power of the executive to withdraw from a treaty — the Rome Statute of the International Criminal Court — is a case in point.<sup>12</sup> In this case, the court was called upon, inter alia, to establish the meaning of ‘ratification’ in the context of international law, as well as to interpret art 127 of the Rome Statute.<sup>13</sup> But important though those aspects were, what the case really concerned was the constitutional distribution of powers between the executive and legislature. The case was thus, in the main, a constitutional matter. This aspect of the intersection between international law and domestic law — the law-making aspect — falls outside the scope of this article.

The article will focus specifically on provisions that call for the interpretation and/or application of international law. While previous contributions on the role of international law have addressed *how* international law is used (ie whether it is considered or applied and the content of particular rules of international law — eg the content of the Rome Statute), this article will focus on more methodological questions. It will assess the jurisprudence of South African courts on the interpretation and application of international law. In particular, the article will assess South African courts’ adherence to the recognised methodology for the identification and interpretation of international law.

## II CONSTITUTIONAL PROVISIONS REQUIRING THE INTERPRETATION OF INTERNATIONAL LAW

The main provisions that call for the interpretation and identification of international law are ss 39 and 233 of the Constitution, which concern the interpretation of legislation and the Bill of Rights respectively. While these provisions concern the interpretation of domestic law in the form of the Bill of Rights and legislation, they provide a significant role for international law, and call for its interpretation and identification.

Section 39(1)(b) provides that ‘[w]hen interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law’, while s 39(1)(c) provides that such a court, tribunal or forum ‘may consider foreign law’. These provisions reflect the Constitution’s ‘international law-friendly’ context or, perhaps even more broadly, its ‘transnational’ context.<sup>14</sup> Two fairly self-evident, and by now well-known aspects of s 39(1) are worth pointing out.<sup>15</sup> First, s 39 calls for the consideration of international law, and not its application. Secondly, it lays down an obligation, not a choice, to consider

<sup>12</sup> *Democratic Alliance v Minister of International Relations and Cooperation & others (Council for the Advancement of the South African Constitution Intervening)* 2017 (3) SA 212 (GP).

<sup>13</sup> For discussion see Hendrik Johannes Lubbe ‘*Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP)’ (2016) 41 *South African Yearbook of International Law* 242.

<sup>14</sup> See Du Plessis in Woolman, Bishop & Brickhill (eds) op cit note 2 at 32–171.

<sup>15</sup> See for discussion Iain Currie & Johan de Waal *The Bill of Rights Handbook* 5 ed (2005) 159.

international law. The language is rather reminiscent of art 31(3) of the Vienna Convention on the Law of Treaties ('Vienna Convention'), which provides that in the interpretation of treaties subsequent agreements, subsequent practice and any relevant rules of international law 'shall' be taken into account.<sup>16</sup> It has been argued in this regard that there has, in the application of s 39 of the Constitution, been more reference to, than actual consideration of, international law.<sup>17</sup>

The second interpretative provision of the Constitution, s 233, provides that '[w]hen 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'.<sup>18</sup> Section 233 reflects an interpretative presumption under the common law of South Africa, and predates the Constitution.<sup>19</sup> It has been suggested, however, that s 233 of the Constitution goes beyond the common-law interpretative presumption. Botha, for example, argues that while the provision does embody elements of the presumption 'it is far more insidious and far reaching' and implies 'the *application* of the "international interpretation" in the application of all South African legislation'.<sup>20</sup> Similarly, Du Plessis notes that unlike the common-law presumption, s 233 applies 'even where there is no ambiguity'.<sup>21</sup>

In a way, s 232 of the Constitution, which provides that customary international law is law in the Republic, is also a law-making provision since it establishes the status of a category of international law as part of domestic law. However, the application of s 232 of the Constitution is also relevant for this article because any reliance on customary international law, whether for interpretative purposes under ss 39 and 233, or directly as law under s 232, requires the identification and interpretation of international law. How (and if) courts have done this is thus a relevant enquiry for this article. Similarly, s 231(4), which concerns the incorporation of treaties into domestic law, is a law-making provision since it relates to pathways for treaties to have the force of law in South Africa. Section 231(4) provides two possible

<sup>16</sup> See art 31(3) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331. Although the verb 'shall' is often seen as more obligatory, it is clear from an analysis of the South African Constitution that the drafters intended to give the word 'must' as strong an obligatory import as 'shall'.

<sup>17</sup> See in this regard, Strydom & Hopkins in Woolman, Bishop & Brickhill (eds) op cit note 11 at 30–11, where the authors make the following observation: while 'there has been significant *reference* to international human rights' law, there is little evidence of 'real *consideration*' (emphasis in the original).

<sup>18</sup> For discussion, see L M du Plessis *Re-Interpretation of Statutes* (2002) 173. See also Du Plessis in Woolman, Bishop & Brickhill (eds) op cit note 2 at 32–182. See also J R de Ville *Constitutional and Statutory Interpretation* (2000) 191ff.

<sup>19</sup> See G E Devenish, *Interpretation of Statutes* (1992) 212, referring to *Harjee v Ismail* 1905 TS 451 at 456.

<sup>20</sup> Botha op cit note 11 at 236n13 (emphasis supplied).

<sup>21</sup> Du Plessis in Woolman, Bishop & Brickhill (eds) op cit note 2 at 32–182.

routes for the domestication of treaty law. The first route, consistent with South Africa's dualistic tradition, entails domestication by means of enactment, while the second, nuancing the dualistic tradition, provides for automatic applicability of self-executing provisions in treaties. The first route, as with treaty making, is a purely constitutional matter not requiring the interpretation of international law — at least not by the courts — and will thus not be considered further. The second route, which provides for self-executing treaties to be directly applicable, could raise questions of interpretation of international law. This is because determining whether a provision is self-executing *could* be seen as a matter of interpretation of that provision and, to the extent that this is true, the practice of South African courts in the identification of self-executing provisions might potentially require the interpretation and application of international law.<sup>22</sup>

Thus, the constitutional provisions which call for the identification and interpretation of international law are ss 39, 233, 232 and, to a limited extent, 231(4).

### III THE APPLICATION OF INTERNATIONAL LAW IN SOUTH AFRICAN COURTS

As described above, the two provisions that expressly provide a role for international law in the interpretation of domestic law are ss 39(1) and 233 of the Constitution. So far the majority of references to international law in South African jurisprudence have been in the context of the interpretation of the Bill of Rights, ie in the application of s 39(1) of the Constitution. I begin in this part of the article by considering the preliminary methodological question of how to identify and establish rules of international law. I then consider the jurisprudence of South African courts on the identification and interpretation of international law in the context of ss 39, 233 and other provisions respectively.

#### (a) *Methodological questions*

One key question that arises in the context of the application of international law in domestic law is whether the South African courts are able to identify and interpret international law. It is true to say that the provisions in the Constitution do not, themselves, require the interpretation and identification of international law. However, if international law is to be relied upon for the interpretation of the Constitution and legislation, or in the application of s 232 of the Constitution, it is reasonable to expect that international law itself would be interpreted and identified. This raises the question of how international law can be relied upon without first its meaning and content being ascertained. Finding the meaning and content of international law

<sup>22</sup> See Helmut Aust, Alejandro Rodiles & Peter Staubach 'Unity or uniformity? Domestic courts and treaty and interpretation' (2014) 27 *Leiden Journal of International Law* 75 at 104ff.

requires its identification and interpretation through the application of the methodological rules of international law.

As a doctrinal matter, the rules for the identification of international law by domestic courts are to be determined with reference to the domestic legal system. In relation to interpretation of treaties, the rules for interpretation are to be found in the Vienna Convention. Article 31(1) of the Vienna Convention provides that treaties are to be interpreted in good faith, in accordance with the ordinary meaning of the terms of the treaty, in their context and in the light of the objective and purpose of the treaty.<sup>23</sup> The interpretation of treaties according to the ordinary meaning of the words, in their context and in light of the object and purpose of the treaty is the principal rule of international law.<sup>24</sup>

In addition to the principal rule of interpretation in art 31(1), the Vienna Convention also provides for other means that 'shall' be taken into account.<sup>25</sup> These include subsequent agreements and subsequent practice,<sup>26</sup> and other relevant rules of international law that may be applicable.<sup>27</sup> Not all subsequent agreements and subsequent practice qualify under art 31(3) of the Vienna Convention. To qualify, the subsequent agreements or practice must be in connection with the interpretation of the treaty concerned, and must establish the agreement of all the parties to the treaty concerning that interpretation.<sup>28</sup> In addition to art 31, art 32 of the Vienna Convention provides for supplementary means of interpretation. These include preparatory works emanating from the negotiation of the treaty. Supplementary means of interpretation under art 32 are applicable only to confirm an interpretation established under art 31, or to establish an alternative interpretation where the interpretation arrived at under art 31 leads to absurd results.<sup>29</sup>

<sup>23</sup> Article 31 of the Vienna Convention.

<sup>24</sup> See Tladi op cit note 1 at 145. See *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, *Preliminary Objections*, ICJ Judgment of 6 June 2018 (not yet reported) para 91: 'Pursuant to customary international law, reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, the provisions of the Palermo Convention must be interpreted in good faith in accordance with ordinary meaning to be given to the their [sic] terms in their context and in light of the object and purpose of the Convention.'

<sup>25</sup> Article 31(3) of the Vienna Convention.

<sup>26</sup> Article 31(3)(a) and (b) of the Vienna Convention. See the 'ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation as well as Commentaries Thereto' *Report of the International Law Commission, Seventieth Session (30 April–1 June and 2 July–10 August 2018)* (A/73/10) ('ILC Draft Conclusions').

<sup>27</sup> Article 31(3)(c) of the Vienna Convention.

<sup>28</sup> See for the requirements the ILC Draft Conclusions op cit note 26.

<sup>29</sup> Article 32 of the Vienna Convention provides as follows: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty ... in order to confirm the meaning resulting from the application of the article 31, or to determine the meaning when the interpretation according to article 31:

The Vienna rules form part of international law, whether on the basis of the Vienna Convention or customary international law, and therefore their application in national law depends on the domestic rules relating to the application of international law. As noted above, the Constitution provides that customary international law is law in South Africa. This includes customary international-law rules relevant to the interpretation of treaties, namely the Vienna rules.<sup>30</sup> The Vienna rules are, therefore, applicable as a matter of domestic law when South African courts interpret treaties. For the same reason, it can be argued that the methodology under international law for the identification of customary international law is part of South African law, and that South African courts are therefore bound to apply them in the search for customary international law.<sup>31</sup> Thus, to identify a rule of customary international law in South African courts, it is necessary to show the practice of states and to provide evidence that the practice is accepted as law (*opinio iuris*).

These rules of interpretation of treaties and the identification of a rule of customary international law serve to ensure that the true and objectively correct meaning and content is given to rules of international law.<sup>32</sup> This does not mean that the application of the rules will always lead to one, objectively correct interpretation of a treaty rule, or to the accurate circumscription of a rule of customary international law. It does, however, facilitate this objective.

*(b) International law in the interpretation of the Bill of Rights*

There is no doubt that the starting point to understanding the courts' approach to s 39(1) of the Constitution, and indeed our courts' approach to international law in general, is *S v Makwanyane*, in which the Constitutional Court decided that the death penalty was unconstitutional.<sup>33</sup> Although the court in *Makwanyane* was interpreting s 35(1) of the interim Constitution, the text of s 35(1) of the interim Constitution is sufficiently similar to that of s 39(1) of the Constitution that the court's pronouncements still apply.<sup>34</sup> Writing for the court, Chaskalson P, said the following of s 35(1):

*(a)* Leaves the meaning ambiguous or obscure; or *(b)* Leads to a result which is manifestly absurd or obscure.'

<sup>30</sup> See generally on the domestic application of the Vienna rules under different national systems, R Gardiner *Treaty Interpretation* (2008). On the customary status of the Vienna rules see ILC Draft Conclusions *op cit* note 26 para 4.

<sup>31</sup> See in particular *S v Petane* 1988 (3) SA 51 (C) at 57, where the court, before 1994, seems to accept that the methodology to be employed by South African courts for establishing the rules of customary international law is that generally applicable for international law.

<sup>32</sup> *R v Secretary of State for the Home Department, ex parte Adan* [2001] AC 477 at 515–17 (Lord Steyn).

<sup>33</sup> *S v Makwanyane* *supra* note 4.

<sup>34</sup> Section 35(1) of the Constitution of the Republic of South Africa, Act 200 of 1993 provided as follows: 'In interpreting the provisions of this Chapter [the Bill of Rights] a court of law shall [...] where applicable, have regard to public international



‘Customary international law and the ratification and accession to international agreements is dealt with in section 231 of the Constitution which sets out the requirements for such law to be binding in South Africa. 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 Three can be evaluated and understood and for that purpose, decisions of tribunals with comparable instruments ... may provide guidance as to the correct interpretation of particular provisions of Chapter Three.’<sup>35</sup>

It is necessary to quote *Makwanyane* at such length because it laid down important criteria for how international law was to be approached by the courts in future cases relating to the interpretation of the Bill of Rights — criteria that continue to guide the courts in South Africa today. The most relevant of these criteria for the purposes of this article is the determination that ‘international law’ for the purposes of s 39(1) refers to both binding and non-binding sources. While this appears initially to be a generous conception of international law, in keeping with the theme of an international law-friendly framework, the rest of the description appears to be rather narrow. From the determination that international law includes both binding and non-binding sources, the court concludes that ‘[i]nternational agreements and customary international law *accordingly* provide a framework’ for the interpretation of the Bill of Rights.<sup>36</sup> From this perspective non-binding international law appears to be limited to treaties that have not been ratified by South Africa or that have not entered into force, and does not appear to include ‘soft law’ instruments.<sup>37</sup> The illustrative list of sources provided by the court, namely the decisions from treaty bodies, seems to confirm this apparently restrictive interpretation.<sup>38</sup> This would seem to suggest that soft law is irrelevant for the purposes of interpreting the Bill of Rights. Yet, in practice, South African courts have relied heavily on soft-law instruments in the interpretation of the Bill of Rights.<sup>39</sup>

law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.’

<sup>35</sup> *S v Makwanyane* supra note 4 para 35.

<sup>36</sup> *Ibid* (emphasis supplied).

<sup>37</sup> Strydom & Hopkins in Woolman, Bishop & Brickhill (eds) op cit note 4 at 30–12.

<sup>38</sup> Chaskalson listed the UN Human Rights Committee, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights as examples of bodies whose decisions can be consulted under this scheme.

<sup>39</sup> In *S v Williams & others* 1995 (2) SACR 251 (CC), for example, the court referred to art 5 of the Universal Declaration of Human Rights. See also *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, & others* 2007 (6) SA 4 (CC) where the court referred, inter alia, to the 1986 Declaration on the Right to Development adopted by General Assembly A/RES/41/128, the *Report of the World Commission on Environment: Our Common Future* (1987), the 1972 Stockholm Decla-

What is not so clear from the court's description of the interpretative value of international law under s 39 of the Constitution is how international law itself is to be interpreted. It is one thing to identify the international-law sources that may be used in the interpretation of the Bill of Rights; it is quite another to interpret those international-law sources. In relation to treaties in particular, the court does not explain its approach to treaty interpretation, including whether it will apply the Vienna rules of interpretation. It is not clear whether the court will use all, or some, of the elements of the Vienna rules of interpretation. Thus, while the court provides an elaborate explanation of the role of international law in the interpretation of the Bill of Rights, the interpretation of international law itself receives scant attention. As we shall see further in this article, with some notable exceptions, this trend has continued more than twenty years after *Makwanyane*.

It is in the court's stated conclusion that '[c]apital punishment is not prohibited by international law' that we are given a glimpse of the court's (possible) approach to the interpretation of treaties.<sup>40</sup> The court relied principally on two treaties, namely the International Covenant on Civil and Political Rights ('the ICCPR') and the European Convention on Human Rights ('the ECHR') for its conclusion that international law does not prohibit the death penalty.<sup>41</sup> Although the court did not explicitly invoke the rules in the Vienna Convention, it *appears* that the court was guided by the ordinary meaning of the words in the treaties, both of which provide for the right to life in qualified terms, for its conclusion that international law does not prohibit capital punishment.<sup>42</sup> The court relied heavily on the decisions of the Human Rights Committee and the jurisprudence of the European Court of Human Rights as a means of interpretation, without explaining what role they play.<sup>43</sup> Are they being relied upon on as a source of international law in their own right? Are they means for the interpretation of the respective treaties, and if so what kind of means are they? Are they

ration on the Human Environment, the 1992 Rio Declaration on Environment and Development, and the Johannesburg Declaration on Sustainable Development. See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 928 (CC), where the court relied on the 1990 United Nations Guidelines on the Role of Prosecutors in para 72.

<sup>40</sup> *S v Makwanyane* op cit note 4 para 36.

<sup>41</sup> *Ibid*.

<sup>42</sup> *Ibid*; art 6 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 provides that the death penalty 'may be imposed only for the most serious crimes'. The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) provides that 'no one may be arbitrarily deprived of the right to life.'

<sup>43</sup> In particular the court relied on the decisions of the Human Rights Committee in *Joseph Kindler v Canada*, UN Human Rights Committee (30 July 1993) Communication No/470/1991 and *Ng v Canada*, UN Human Rights Committee (5 November 1993) Communication No/469/1991 as well decision of the European Court of Human Rights in *Soering v the United Kingdom* (1989) Series A no 161. See especially *S v Makwanyane* op cit note 4 paras 64–7.

subsequent practice, or some other tool of interpretation of the respective treaties? Reliance on the text of treaties (without regard to the other means of interpretation, such as context, object and purpose and subsequent practice) and the jurisprudence of international tribunals appears to be the primary tool that the court has used for interpreting and identifying international law.<sup>44</sup> The reliance by the Constitutional Court on the jurisprudence of the European Court has been consistent. In *Mohamed v the President of South Africa*,<sup>45</sup> for example — a case concerning the rendition of a Tanzanian man by South African authorities to the United States without securing assurances that the death penalty would not be imposed or carried out — the Constitutional Court relied on *Soering v United Kingdom*,<sup>46</sup> *Hilal v United Kingdom*<sup>47</sup> and *Chahal v United Kingdom*.<sup>48</sup> In *Mohamed*, the court said these cases were ‘consistent with the weight that our Constitution gives to the spirit, purport and object of the Bill of Rights’.<sup>49</sup> Much like in *Makwanyane*,

<sup>44</sup> See for example *National Coalition for Gay and Lesbian Equality & another v The Minister of Justice & others* 1999 (1) SA 6 (CC) para 39ff, where the court, in particular, relied on *Dudgeon v United Kingdom* (1982) Series A no 45 and *Norris v Republic of Ireland* (1991) Series A no 142. The court also relied on *Toonen v Australia*, UN Human Rights Committee (31 March 1994) Communication No/488/1992 to find that South African laws outlawing homosexuality were unconstitutional. See also *Mohamed v The President of the Republic of South Africa* 2013 (3) SA 893 (CC) para 60, where the court relied on the European Court jurisprudence and the text of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) UNGA Res 39/46 en route to finding that there was an obligation under the Constitution to seek assurance from a third state that the death penalty would not be imposed on an individual before transferring the said individual to that third state. See also *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC) para 28, where the court considers the right to housing under international law in the context of the text of the 1966 International Covenant on Economic, Social and Cultural Rights. Although in the context of the development of the common law, *Carmichele v Minister of Safety and Security* supra note 39 is also illustrative of the court’s tendency to specific sources. The court relied on decisions of the European Court of Human Rights such as *Osman v United Kingdom* ECHR 1998–VIII 3124, para 45 and *Z & others v the United Kingdom* ECHR 2001–V 1, para 48 and the Convention on the Elimination of all Forms of Racial Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) para 62. A textual approach to the interpretation is also evident in *Glenister v President of the Republic of South Africa* supra note 11, where the court relied on the text of corruption conventions. This approach is also reflected in the Constitutional Court decision in *Ferreira v Levin NO & others* 1996 (1) SA 984 (CC) para 170, where the court refers to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the African Charter on Human and Peoples’ Rights.

<sup>45</sup> *Mohamed v President of the Republic of South Africa* supra note 44.

<sup>46</sup> *Soering* supra note 43.

<sup>47</sup> *Hilal v United Kingdom*, Application no 45276/99, Judgment of 6 March 2001.

<sup>48</sup> *Chahal v United Kingdom*, Application no 22414/93, (1996) 23 EHRR 413.

<sup>49</sup> *Mohamed v President of the Republic of South Africa* supra note 44 para 59.

the court in *Mohamed* also relied on international human rights treaties, in particular the Convention against Torture.<sup>50</sup>

While the court in *Makwanyane* relied on the literal meaning of the words in the European Convention on Human Rights and ICCPR for its conclusion that these treaties, and consequently international law, do not prohibit the death penalty, the Vienna rules are not ever invoked as the inspiration for this reliance. The use of the text appears to be more of an intuitive, rather than a conscious, application of the Vienna rules. Moreover, apart from the reliance on the text of the treaties, there appears to be little evidence of the use, explicit or otherwise, of the other elements of the Vienna rules of interpretation, in particular context and object and purpose.<sup>51</sup> The court does, in what may be an implicit invocation of context, juxtapose the clear meaning of the terms of the treaties — which suggest that the death penalty is permissible under those treaties, on the one hand, and the conclusion that, at least under the ICCPR, the death penalty constitutes ‘cruel and inhuman punishment within the ordinary meaning of those words’ — to come to the conclusion that while the ICCPR ‘tolerates’ the death penalty, it does not condone it.<sup>52</sup>

Subsequent agreements, practice and relevant rules of international law (eg art 31(3) of the Vienna Convention) were not invoked by the court as elements of interpretation when considering the meaning of the right to life in the European Convention, the ICCPR or the Torture Convention, in either *Makwanyane* or *Mohamed*.<sup>53</sup> Although the court referred extensively to the jurisprudence of other domestic courts — e.g. Canada, the United States and Germany — these are hardly used as examples of subsequent practice in the application of the treaties, but rather as an application of s 39(1)(c) of the Constitution, which permits the consideration of foreign law, independent of its relationship to treaty interpretation.<sup>54</sup> The reluctance by the court in

<sup>50</sup> Ibid para 60.

<sup>51</sup> The general rule of treaty interpretation, as reflected in art 31 of the VCLT op cit note 16, is that a treaty should be interpreted in ‘good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

<sup>52</sup> *S v Makwanyane* supra note 4 para 67.

<sup>53</sup> Under the Vienna rules, subsequent agreements regarding the interpretation of a treaty, subsequent practice establishing the agreement of the parties as to its interpretation and relevant rules of international law applicable to the parties are elements which, in terms of art 31(3) of the Vienna Convention, must be considered in treaty interpretation. The International Law Commission treats art 31(3) of the Vienna Convention as forming part of the general rule. See ILC Draft Conclusions op cit note 26, especially para 1 of the Commentary to Draft Conclusion 1 which sets out that ‘Article 31 of the Vienna Convention, as a whole, is the “general rule of interpretation”’ (emphasis in the original). See however authorities in note 24.

<sup>54</sup> The court considers, for example, the US Supreme Court decisions of *Furman v Georgia* 408 US 238 (1972), and *Gregg v Georgia* 428 US 153 (1976), the German Constitutional Court case in the *Life Imprisonment* case [1977] 45 BVerfGE 187, 228 and the Canadian Constitutional Supreme Court decision in *Kindler v Canada* (1992) 6 CCR (2d) 193 SC. See *S v Makwanyane* supra note 4 paras 43–62.

*Makwanyane* and *Mohamed* to employ the language of the Vienna rules or to explain its methodological approach to the interpretation of international law — as opposed to the methodological approach to constitutional interpretation, on which the court has regularly been at pains to elaborate — is a trend that weaves its way through the jurisprudence of South African courts since *Makwanyane*. In *National Coalition for Gay and Lesbian Equality v the Minister of Justice*, for example, where the court invalidated the law prohibiting sodomy, the court made fleeting references to the European Convention and the ICCPR without any efforts to give any interpretation of the respective rights in those treaties.<sup>55</sup> This trend appears to buttress Strydom & Hopkins' view that while there have been many references to international law, there has hardly been a *consideration* of it, at least in the context of s 39(1)(b) of the Constitution.<sup>56</sup>

Although *Makwanyane* represents a general trend of South African courts to steer clear of explicit reliance on the Vienna rules in the interpretation of international-law instruments, this is certainly not because of a lack of awareness of the rules. South African courts have, albeit infrequently and fleetingly, made explicit references to the Vienna rules. In *Makwanyane*, the court decided that the interpretation of the Constitution can benefit from reports of technical committees on the drafts of the Constitution which, it stated, are 'the equivalent of *travaux préparatoires*, relied upon by international tribunals'.<sup>57</sup> The court, in coming to the conclusion that it may rely upon these 'background materials' that are 'the equivalent of *travaux préparatoires*', cited the Vienna Convention explicitly in support of this finding.<sup>58</sup> Although the court does not apply the use of the *travaux* to the treaties it relies on, nor does it recognise the subsidiary nature of the rule permitting the use of *travaux*, the reliance on the *travaux* of the Constitution, as well as the recognition of the Vienna Convention as the inspiration for this reliance, illustrates an awareness of the Vienna rules.

Subsequent practice played an important role in *Glenister v President of the Republic of South Africa*, indicating the Constitutional Court's awareness of the customary rules of interpretation.<sup>59</sup> In a judgment written by Moseneke DCJ and Cameron J, a slim majority of the court<sup>60</sup> interpreted the provisions of

<sup>55</sup> See *National Coalition for Gay and Lesbian Equality v the Minister of Justice* supra note 44, especially paras 40–6, where the court is more interested in the jurisprudence of the European Court of Human Rights and the decisions of the Human Rights Committee with only brief references to the provisions forming the basis of the decision of the European Court of Human Rights and the Human Rights Committee.

<sup>56</sup> Strydom & Hopkins in Woolman, Bishop & Brickhill (eds) op cit note 2 at 30–11.

<sup>57</sup> In *S v Makwanyane* supra note 4 para 16.

<sup>58</sup> Ibid.

<sup>59</sup> *Glenister v President of South Africa* supra note 11 para 187.

<sup>60</sup> Strangely, the main judgment of the Constitutional Court in this case, is written by the Ngcobo CJ (with three other judges concurring), while the majority judgment is written by Moseneke DCJ and Cameron J (with three other judges concurring). So, uncharacteristically, the main judgment is the minority judgment.

the UN, AU and SADC conventions on corruption,<sup>61</sup> and relied on an OECD report.<sup>62</sup> According to the court, the OECD report, though not binding, ‘can be used to interpret and give content to the Conventions’ referred to by the court.<sup>63</sup> The decision to rely on the OECD report was purportedly based on art 31(3)(b) of the Vienna Convention, which provides for taking into account ‘subsequent practice’ as a means of interpretation.<sup>64</sup> The court did not explore whether this report met the requirements of art 31(3)(b): ie whether it constitutes practice by the parties to the respective conventions in the interpretation of those conventions, and whether the report establishes the agreement of the parties regarding this interpretation. Clearly the report does not meet the requirements for subsequent practice under art 31(3)(b) of the Vienna Convention.<sup>65</sup> It is not an instrument of the parties to the Convention, nor does it establish the agreement of the parties as to the interpretation of the Convention. This is the case especially for the AU and SADC Conventions, since not a single member of the OECD is a party to those Conventions. Nonetheless, the very reference to subsequent practice as a means of interpretation, and what is more, the reliance on the Vienna Convention as a basis for its invocation, illustrates that the court is aware of the Vienna rules of interpretation, and accepts them as applicable when South African courts have to interpret treaties. The dearth of the court’s reflection on the methodology for treaty interpretation probably lies in the fact that the court is more concerned with the *impact* of international law on interpretation of the Bill of Rights, rather than with the interpretation of international law itself. To the extent that the court’s focus is on the interpretation of domestic law and not the interpretation of international law, the court may deem it sufficient to undertake only a superficial exposition of the rules of international law, or more appropriately instruments of international law. This approach does not, unfortunately, reveal clearly or explicitly the court’s methodology of interpretation.

While the *Makwanyane* judgment held that international law, in s 39, referred to both binding and non-binding instruments, by and large South African courts have referred to written rules or norms of international law —

<sup>61</sup> United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41, African Union Convention on Preventing and Combating Corruption (adopted 11 July 2003, entry into force 5 August 2006) (2004) 43 ILM 5 and Southern African Development Community Protocol against Corruption (adopted 14 August 2001, entered into force 6 July 2005).

<sup>62</sup> *Glenister v President of the Republic of South Africa* supra note 11 para 187. The report referred to is the OECD ‘Specialised Anti-Corruption Institutions: Review of Models’ of 2011.

<sup>63</sup> *Glenister v President of the Republic of South Africa* *ibid*.

<sup>64</sup> *Ibid*.

<sup>65</sup> See for discussion ILC Draft Conclusions *op cit* note 26. See for an excellent application and exposition in the case law of the International Court of Justice, *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, *ICJ Reports* 1999, p 1045, paras 47–87.

treaties, declarations, recommendations and suchlike — in the application of s 39, rather than non-written rules, for example customary international law or general principles of law. A rare example of a South African court peering over the fence beyond written rules and norms of international law in the context of interpreting the Bill of Rights is the Supreme Court of Appeal's decision in *S v Mthembu*.<sup>66</sup> Interpreting ss 35 and 12 of the Constitution, the court, without expressly invoking s 39, determined that the prohibition of torture is a peremptory norm of international law.<sup>67</sup> This conclusion is undoubtedly correct.<sup>68</sup> Yet the court appears oblivious to the appropriate methodology for determining the peremptory character of rules of international law.<sup>69</sup> The court seems to have assumed that the peremptory nature of the prohibition of torture flows from the fact that the Torture Convention 'prohibits torture in absolute terms and no derogation from it is permissible, even in the event of a public emergency'.<sup>70</sup> Yet it is well known that the fact that a treaty provides that its provisions are non-derogable is not sufficient to indicate the peremptory character of those provisions. Furthermore, the court determined that the 'absolute prohibition on the use of torture in both our law and in international law *therefore* demands that "any evidence" which is obtained as a result of torture must be excluded in "any proceeding"'.<sup>71</sup> Again, this conclusion seems reasonable, and is certainly not objectionable. Yet it is not at all clear that this is a natural consequence of the absolute prohibition of torture. The International Court of Justice may have decided that the mere fact that crimes against humanity were *jus cogens* did not mean that immunity did not apply, since the prohibition was a substantive rule while the immunity rule was procedural in nature.<sup>72</sup> Nevertheless, it does not follow that the absolute prohibition of torture meant the exclusion of all evidence, since rules of evidence were procedural while the prohibition of torture was substantive. Again, the point is not to suggest that the Supreme Court of Appeal was wrong, because I think the court was in fact correct. Rather, there is a methodology for determining the consequences of peremptoriness, and the court was either oblivious of this methodology, or simply ignored it.<sup>73</sup>

<sup>66</sup> *S v Mthembu* 2008 (2) SACR 407 (SCA).

<sup>67</sup> *Ibid* para 31.

<sup>68</sup> See *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, *ICJ Reports* 2012, p 422, para 99.

<sup>69</sup> On the methodology see *Second Report on Jus Cogens by Dire Tladi, Special Rapporteur* (A/CN.4/706). See also Statement of the Chairman of the Drafting Committee on Peremptory Norms of General International Law (*Jus Cogens*), 26 July 2017, Annex.

<sup>70</sup> *S v Mthembu* *supra* note 66 para 31.

<sup>71</sup> *Ibid* (emphasis supplied).

<sup>72</sup> *Jurisdictional Immunities of the State*, Judgment of 3 February 2012, *ICJ Reports* 2012, p 99, para 270.

<sup>73</sup> *Third Report on Peremptory Norms of General International Law (Jus Cogens)*, by Dire Tladi, *Special Rapporteur* (A/CN.4/714).

*(c) Interpretation of legislation under s 233 of the Constitution*

While the role of international law in South African courts has been more acutely felt in the application of s 39(1) of the Constitution, the courts have also occasionally had to consider international law in other contexts, and in particular the interpretation of legislation.

The *AZAPO* case provides a good transition from s 39(1) to other uses of international law, for while it concerned the protection of human rights, it was a case that was also just as much about the application of international law in relation to legislation.<sup>74</sup> It thus provided an opportunity for the court to rely on s 233 of the Constitution. The case concerned the constitutionality of s 20(7) of the Truth and Reconciliation Act 34 of 1995, which granted civil and criminal amnesty to perpetrators of offences, including gross human-rights abuses, in the apartheid era.<sup>75</sup> The applicants in this case argued that s 20(7) of the Act was inconsistent with international law and should accordingly be struck down.<sup>76</sup> In responding to the applicants, the court made the following remarks, which have drawn sharp criticism<sup>77</sup> for their departure from the openness of *Makwanyane*:

‘The issue which falls to be determined in this Court is whether section 20(7) of the Act is consistent with the Constitution. If it is, the enquiry as to whether or not international law prescribes a different duty *is irrelevant to that determination*. International law and the contents of international treaties ... are ... relevant only in the interpretation of the Constitution itself, on the grounds that law makers 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.

<sup>74</sup> *Azanian Peoples Organisation (AZAPO) v The President of the Republic of South Africa* 1996 (4) SA 672 (CC); See also Botha op cit note 11 at 242, who describes the *AZAPO* case as the ‘quintessential “South African rights” case’.

<sup>75</sup> Section 20(7) of the Truth and Reconciliation Act provides as follows: ‘No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the state shall be liable vicariously, for an such act, omission or offence.’

<sup>76</sup> See *AZAPO v President of the Republic of South Africa* supra note 74 para 25. The applicants relied on art 49 of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, art 50 of the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85, art 129 of the Third Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 and art 146 of the fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287. The relevant identical provisions read as follows: ‘The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches...’.

<sup>77</sup> See e.g. Botha op cit note 11 at 243. See also Du Plessis in Woolman, Bishop & Brickhill (eds) op cit note 2 at 32-176.



International conventions and treaties do not become part of the municipal law of our country ... until and unless they are incorporated into the municipal law by legislative enactment.<sup>78</sup>

These dicta have been criticised for suggesting that international law could be *irrelevant* to the process of determining the constitutionality of the amnesty law.<sup>79</sup> They may appear to go against the openness to international law that was embraced in *Makwanyane*. The criticisms against the *AZAPO* judgment, valid though they may be, are somewhat overstated, and the court's remarks may amount to nothing more than an unfortunate choice of words. After all, while the court did say that international law was irrelevant to the question, it went on to say that international law is 'relevant only in the interpretation of the Constitution itself'. In particular, the court contextualises its remarks later in the judgment by stating that international law would be irrelevant 'if, on a proper interpretation of the Constitution, section 20(7) of the Act is indeed authorised by the Constitution'.<sup>80</sup> As I read this extract, in its context, the court seemed only to be stating that international law cannot override the Constitution — the essence of Constitutional supremacy. More importantly, while the court's remarks on the relevance of international law appear unfortunately to be dismissive, the court went on to explain that, in its view, s 20(7) of the Truth and Reconciliation Act was consistent with international law, and it was at this point that we saw the court putting forward an interpretation of international law, in particular in relation to amnesty.<sup>81</sup>

The court's brief consideration of the international-law rules on amnesty sheds some light on the court's approach to the interpretation of treaties. First, much like the apartheid-era cases, which were known for hostility to international law, and in clear contrast to the *Makwanyane* doctrine of considering both binding and non-binding international law, the court seemed to minimise the importance of Protocol I to the Geneva Conventions<sup>82</sup> on the ground that, at the time of the conflict, South Africa was not a party thereto.<sup>83</sup> The implication here appears to be that, unlike in the context

<sup>78</sup> *AZAPO v President of the Republic of South Africa* supra note 74 para 25 (emphasis supplied).

<sup>79</sup> John Dugard *International Law: A South African Perspective* 4 ed (2011); see also Botha op cit note 11 at 243 and Du Plessis in Woolman, Bishop & Brickhill (eds) op cit note 2 at 32–176.

<sup>80</sup> *AZAPO v President of the Republic of South Africa* supra note 74 para 28 (emphasis supplied).

<sup>81</sup> Ibid para 28ff, especially at para 32 where the court states as follows: 'Considered in this context, I am not persuaded that there is anything in the Act and more particularly in the impugned section 20(7) thereof, which can properly be said to be a breach of the obligations of this country in terms of the instruments of public international law.'

<sup>82</sup> Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

<sup>83</sup> *AZAPO v President of the Republic of South Africa* supra note 74 para 29n29. At para 32, the court concluded that s 20(7) is not 'in breach of the obligations of this

of s 39(1)(b), ‘international law’ in so far as s 233 is concerned means ‘international law binding on South Africa’. While at first blush it may seem surprising to make a distinction between ‘international law’ in the context of s 39(1)(b) and ‘international law’ in the context of s 233 of the Constitution, the distinction may be justified. International law in s 39(1)(b) is only ‘to be considered’, while the implication of s 233 ‘is far more insidious and far reaching’ and implies ‘the *application* of the “international interpretation” in the interpretation of all South African legislation’.<sup>84</sup> This might necessitate a more narrow reading of the phrase ‘international law’ since international law, in the context of s 233, has more far-reaching implications.

Secondly, the court draws a distinction between armed conflict not of an international character, on the one hand, and international conflict, on the other hand, and states that for the former type of conflict there is no obligation to ensure prosecution. Quite to the contrary, the court asserted, international law in fact encourages the practice of indemnity in conflicts not of an international character.<sup>85</sup> The court arrived at this conclusion on the basis of what appears to be a literal meaning interpretation of Protocol II to the Geneva Conventions.<sup>86</sup> Article 6(5) of Protocol II to the Geneva Conventions of 1949 provides for the authorities in power to ‘endeavour to grant the broadest possible amnesty to persons who participated in the conflict’. Again, the court did not make any explicit reference to the Vienna rules of interpretation in conducting its interpretive analysis.

This literal interpretation does not take into account, as a part of context, the distinction between grave breaches under the Geneva Conventions, and other violations. Under the Geneva Conventions there is an obligation on parties to punish those who commit grave breaches.<sup>87</sup> Similarly, while Protocol II, applicable to non-international conflicts, does not contain the

country in terms of the instruments of public international law’. This proposition misses the fact that the enquiry was not whether s 20(7) was in violation of South Africa’s international-law obligations, but rather whether s 20(7) was in violation of the Constitution, with international law being relevant for the interpretation of the Constitution and s 20(7).

<sup>84</sup> Botha *op cit* note 11 at 237n13 (emphasis supplied).

<sup>85</sup> *AZAPO v President of the Republic of South Africa* *supra* note 74 para 30.

<sup>86</sup> *Ibid*; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

<sup>87</sup> See art 49 of the First Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field *op cit* note 76; art 50 of the Second Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea *op cit* note 76; art 129 of the Third Geneva Relative to the Treatment of Prisoners of War *op cit* note 76; and art 146 of the Fourth Geneva Convention Relative to the Protection of Persons in Times of War *op cit* note 76. These provisions provide for an obligation to ‘enact legislation to provide for effective penal sanctions for persons alleged to have committed [...] grave breaches’, ‘to bring such persons, regardless of nationality, before its own courts’, or to extradite them. The provisions further provide parties to take necessary measures for the suppression of grave breaches.

obligation to punish perpetrators of grave violations, the first Protocol to the Geneva Conventions includes within its scope situations of armed conflict in which ‘peoples are fighting against colonial domination, ... and racist regimes’.<sup>88</sup> Moreover, Protocol I includes the ‘practices of “apartheid”’ as a grave breach to which the obligations to punish applies.<sup>89</sup> It is difficult to reconcile the absolute nature of the obligations to punish grave breaches with the conclusion reached by the court based on the language of art 6(5) of Protocol II of the Geneva Conventions, which is not concerned with grave breaches. Recourse to the Vienna rules, in particular context, purpose and other applicable rules of international law, could have allowed the court to consider the special character of grave breaches under the Convention.<sup>90</sup> Of course, this is not to say that the ultimate decision, namely that s 20(7) of the Truth and Reconciliation Act was constitutional, was incorrect. The assessment here is restricted to the question whether the court applied the proper *methodology* for the interpretation of international law.

The case concerning the non-arrest of the Sudanese President Omar al-Bashir<sup>91</sup> involved the interpretation of two pieces of legislation, namely the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 and the Diplomatic Immunities and Privileges Act 37 of 2001, thus requiring the application of s 233 of the Constitution. However, the Bashir case involved the application of international law in other ways, including the direct application of customary international law.<sup>92</sup> Since the Bashir case involved many areas of the constitutional framework for international law, it is dealt with separately below.

*(d) The interpretation of international law in other contexts*

In addition to the application of treaties in the context of interpreting the Bill of Rights and legislation, South African courts have also had to apply the

<sup>88</sup> See art 1(4) of the Protocol Additional to the Geneva Conventions (Protocol I) op cit note 82.

<sup>89</sup> Art 85(4) of Protocol I op cit note 82.

<sup>90</sup> Art 31 of the Vienna Convention.

<sup>91</sup> *Minister of Justice v SALC* supra note 7. The high court judgment in *Southern African Litigation Centre v Minister of Justice and Constitutional Development & others* 2015 (5) SA 1 (GP) will not be considered, although it also discusses international law, since the Supreme Court of Appeal judgment provides the current position in South African law. The high court decision concerning the South Africa’s withdrawal from the ICC, *Democratic Alliance v Minister of International Relations and Co-operation* supra note 12, will also not be considered, since it pertains more to law-making and does not raise issues of the identification and interpretation of international law.

<sup>92</sup> See for the author’s view on the Bashir saga see the discussion in Tladi ‘Al-Bashir saga’ op cit note 6; Dire Tladi ‘The duty on South Africa to arrest and surrender President Al-Bashir under South African and international law: A perspective from international law’ (2015) 13 *Journal of International Criminal Justice* 1027. On the South Africa non-co-operation case before the ICC Pre-Trial Chamber, see Dire Tladi ‘Of heroes and villains, angels and demons: The ICC-AU tension revisited’ (2017) 60 *German Yearbook of International Law* (forthcoming).

rules of international law in other contexts necessitating the identification and interpretation of international law. These other contexts have included the direct application of customary international law under s 232 of the Constitution. In some cases, the courts appear to have considered international law in its own right, almost independently of any constitutional provision.

I begin with two cases in the Constitutional Court in which the court sought to identify the rules of customary international law under s 232, namely *Kaunda v President of the Republic of South Africa*<sup>93</sup> and *Minister of Justice v SALC*.<sup>94</sup> The *Kaunda* case concerned the question whether there was a duty on the government to provide diplomatic protection to South African nationals. The court began its consideration of the question by recalling the content of s 232 of the Constitution, which provides that customary international law is law in South Africa, without the need for incorporation, subject to any oppositional Acts of Parliament and the Constitution. The court traced its search for the position in customary international law in the International Court of Justice judgment in the *Barcelona Traction* case,<sup>95</sup> the work of the International Law Commission on the topic of diplomatic protection (which was at the time incomplete),<sup>96</sup> and the Report of the International Law Commission's Special Rapporteur on diplomatic protection (the Special Rapporteur being prominent South African international-law expert, John Dugard).<sup>97</sup> Although the court did not itself consider state practice, it based its decision on 'subsidiary means' for the determination of rules of customary international law.<sup>98</sup> The court also 'applied' other rules of customary international law, such as the rule that 'the laws of a state are applicable to nationals beyond the state's borders, but only if the application of the law does not interfere with sovereignty of other states'.<sup>99</sup> The *Kaunda* case does not tell us much about the court's methodological approach to the identification of customary international law, since it relied on (acceptable) secondary materials in the form of the work of the International Law Commission and the judgments of the International Court of Justice. I pause only to mention that it is not clear from a reading of the *Kaunda* judgment whether the court is aware that these materials are only subsidiary.

The Bashir-related cases provided an opportunity for the Supreme Court of Appeal to put forward a coherent approach to the identification of rules of

<sup>93</sup> 2004 (10) BCLR 1009 (C).

<sup>94</sup> *Supra* note 7.

<sup>95</sup> *Case Concerning the Barcelona Traction, Light and Power Company Limited (New Application: 1962 Belgium v Spain), Second Phase*, Judgment of 5 February 1970 ICJ Reports 1970, p 3.

<sup>96</sup> *Report of the International Law Commission on the Work of Its Fifty-Second Session* (1 May to 9 June and 10 July to 18 August 2000) (A/55/10).

<sup>97</sup> *First Report on Diplomatic Protection, by Mr John R Dugard, Special Rapporteur* (Doc A/CN.4/506 and Add.1).

<sup>98</sup> See art 38(1)(d) of the Statute of the International Court of Justice.

<sup>99</sup> *Kaunda v President of the Republic of South Africa* *supra* note 93 para 44.

customary international law and the interpretation of treaties. To summarise, the duty to arrest and surrender President Al-Bashir in the Rome Statute<sup>100</sup> is subject to an exception in art 98 of the Rome Statute that such co-operation should not result in the state party breaching its duties to a third state relating to immunities. These immunities are found, potentially, in customary international law and, in the specific case of Bashir's attendance of the 2015 Summit, the Host Country Agreement between South Africa and the AU. The court thus had to determine whether either customary international law or the Host Country Agreement provided an exception to South Africa's duty to co-operate.

The Supreme Court of Appeal's approach to the assessment of rules of customary international law on immunity was, in my view, both comprehensive and correct.<sup>101</sup> The court considered state practice in the form of domestic court cases, decisions of international courts, and scholarly writings, and came to the conclusion that, under customary international law, there is no exception to the rule that heads of state are inviolable in third states.<sup>102</sup> This conclusion has since been confirmed by the International Law Commission in its work on the immunities of state officials from foreign criminal jurisdiction, where it has found that while there were exceptions to immunity *ratione materiae*, there were no exceptions to immunity *ratione personae* (the immunity for heads of state, heads of government and ministers for foreign affairs).<sup>103</sup>

If there is one methodological flaw in the court's approach to the identification of customary international law, it would be the underestimation of the court's own role in the *making* of international law. The court, having come to the conclusion that customary international law does not provide any exceptions to heads of states' immunity, made clear its regret over this position.<sup>104</sup> The court stated, however, that while in other areas of the law it has the mandate to develop the law, when it comes to customary international law 'its task is one of discerning the existing state of the law, not developing it'.<sup>105</sup> The court went on to state that the '[d]evelopment of customary international law occurs in international courts and tribunals', and that it would be impermissible to do so 'by domestic judicial decision'.<sup>106</sup> For non-international lawyers, whose reverence for the International Court of Justice may be limitless, this statement seems very reasonable, perhaps even

<sup>100</sup> Article 92 of the Rome Statute.

<sup>101</sup> See *Minister of Justice v SALC* supra note 7, especially paras 66–85.

<sup>102</sup> *Ibid* para 84.

<sup>103</sup> Draft art 7 of the Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, provisionally adopted by the International Law Commission, *Report of the International Law Commission on the Work of its Sixty-Ninth Session*, General Assembly Official Records, Seventy-Second Session, Supplement No 10 (A/72/10).

<sup>104</sup> See e.g. *Minister of Justice v SALC* supra note 7, especially para 84.

<sup>105</sup> *Ibid* para 74.

<sup>106</sup> *Ibid*.

obvious. But, in fact, the court has it the wrong way around.<sup>107</sup> International courts are — perhaps ‘should be’ is more accurate — restricted to determining the content of the rules of law and applying them. This is what is meant by ‘subsidiary means for the determination of the rules of law’ in art 38(1)(d) of the Statute of the International Court of Justice. Domestic courts, however, are not only relevant as a subsidiary means for determining the rules of law; they also directly contribute to state practice, and thus do play a role in the development of customary international law.<sup>108</sup>

While the Supreme Court of Appeal’s approach to the identification of customary international law in the *SALC v Minister of Justice* case was near flawless, its application of the rules of interpretation of treaties was less so. The court had been called upon to interpret two treaties, namely the Rome Statute of the International Criminal Court and the Host Country Agreement between South Africa and the African Union for the hosting of the AU Summit. Article VIII of the Host Country Agreement provided:

‘Government shall accord the members of the Commission and staff members, the delegates and other representatives of inter-governmental organisations attending the meetings the privileges and immunities set forth in Section C and D, articles V and VI of the General Convention on the Privileges and Immunities of the OAU.’

In my view, the Host Country Agreement could not help the government, but for reasons different to those proffered by the court. The Host Country Agreement could not help the government as an exception to the duty to co-operate under art 98 of the Rome Statute, because it was concluded after the duty to co-operate arose. However, since this consideration does not relate to the interpretation of the Host Country Agreement, I leave it aside for now and focus rather on the approach of the court to the interpretation of the Host Country Agreement. The court determined that the Host Country Agreement did not apply to Bashir for a number of reasons. First, the court determined that art VIII applies to the ‘delegates’, and that Bashir was not a delegate but ‘an embodiment of the state itself’.<sup>109</sup> Secondly, in the view of the Supreme Court of Appeal, the phrase ‘delegates and other representatives of inter-governmental organisations’ in art VIII applies only to ‘persons who are there because of their entitlement to be there on behalf of one or other intergovernmental organisation, not to those who are there on behalf of a member state’.<sup>110</sup>

The court arrived at these two conclusions without an explicit reference or recourse to any rules of interpretation contained in the Vienna Conven-

<sup>107</sup> Draft Conclusions 5, 6, 10 and 13 of the Draft Conclusions on the Identification of Customary International Law, adopted on first reading, as well as commentaries thereto, *Report of the International Law Commission, Sixty-Eighth Session* (2 May–10 June and 4 Jul–12 August 2016) (A/71/10).

<sup>108</sup> *Ibid.*

<sup>109</sup> See e.g. *Minister of Justice v SALC* supra note 7 para 44.

<sup>110</sup> *Ibid* para 46.

tion. The first ground for excluding Bashir from the scope of art VIII — i.e. that the heads of state are not delegates — is simply wrong.<sup>111</sup> It is difficult to find a means of interpretation — whether through the lens of ordinary meaning of the words, context, or object and purpose of the treaty — that accords with that interpretation. More importantly it ignores standard practice not only of the AU but of other summit level-meetings, where heads of state are, as a rule, included in lists of delegation as the head of the delegation, an accreditation given to the most senior representative of a state at a meeting.

The second ground for excluding Bashir from the scope of art VIII, namely that the article applied to representatives of intergovernmental organisations, is interesting because it is based on the ordinary meaning of the words in art VIII. Although the court did not invoke the rules in the Vienna Convention, the court's interpretation appears to be based on the notion that the word 'delegates' in art VIII is qualified by 'of inter-governmental organisations'. This is certainly a plausible 'ordinary meaning' reading of art VIII, which would mean that immunities are granted to 'delegates' 'of inter-governmental organisations' and 'representatives of inter-governmental organisations'. Nonetheless, there are two methodological reasons why this interpretation must also fail. First, there is an equally plausible 'ordinary meaning' reading of these words, namely that immunities are granted to two classes of persons — 'delegates', on the one hand, and 'representatives of inter-governmental organisations', on the other hand. Indeed, the latter interpretation is more plausible because delegates are not normally delegates to an inter-governmental organisation but are, rather, delegates to a meeting, such as the AU Summit. At any rate, it would be incumbent upon the court to explain why it selects the former (plausible) interpretation over the latter (equally plausible) interpretation. The second, and more important, reason that the court's approach to the interpretation of the Host Country Agreement is insufficient from the perspective of the methodology of treaty interpretation, is that it ignores the fact that the rules of interpretation of treaties go beyond ordinary meaning. They include context, object and purpose, subsequent agreements and subsequent practice, as well as other applicable rules of international law. Since this article is not concerned with the content of the rules but only with methodology, it is unnecessary to consider all of these. It is sufficient only to point out that a consideration of these elements of interpretation would have either yielded a different interpretation, or provided a more solid basis for the court's own interpretation. From a methodological perspective, regardless of whether the court's

<sup>111</sup> In developing this argument, the court stated that the AU Summit is composed of heads of state, therefore the AU itself is composed of heads of state. *Ibid.* With respect this is ill-conceived since the AU is composed of more than just the Summit (heads of state). The Summit is an organ amongst many other organs — the most important organ, but still just an organ.

conclusion about the applicability of art VIII is correct or not, the court did not properly apply the rules of interpretation of treaties.

In addition to the methodological approach of the court in the identification of the rules of customary international law and the interpretation of treaties, the Bashir judgment is also important because it reflects the limits of the international law-friendly framework adopted by South African courts. Having considered that there is no exception to immunity *ratione personae* under customary international law, the court then made the following observation:

‘Ordinarily that would mean that President Al Bashir was entitled to inviolability while in South Africa last June. But SALC argued that the position was different as a result of the enactment of the Implementation Act. I turn to consider that contention.’<sup>112</sup>

It is now well known that, while the court found that there were no exceptions to immunity *ratione personae* under customary international law, the court accepted the SALC’s contention that domestic legislation in the form of the Rome Statute Implementation Act did provide an exception to the rule of inviolability. Thus, applying the court’s dictum above, this exception trumped the customary international law rule that there was no exception. Assuming that the interpretation of the South African legislation by the court was correct — an issue that falls well beyond the scope of this article — the approach of the court to the relationship between customary international law and domestic legislation is correct. The text of the Constitution is definitive that customary international law is law in South Africa ‘unless it is inconsistent with the Constitution or an Act of Parliament’. Thus if, as the court found, the customary international-law rule that there is no exception, even in relation to genocide, to the inviolability of a head of state, is inconsistent with the Rome Statute Implementation Act,<sup>113</sup> the court was correct not to apply the customary international-law rule.

It is worth noting, however, and without getting into the merits of whether the court’s interpretation of the Rome Statute Implementation Act was correct, that even if customary international law is not law in South Africa (by virtue of the s 232 qualifier ‘unless it is inconsistent with the Constitution or an Act of Parliament’), it remains part of international law, which the court is duty-bound to integrate into its interpretation of the Rome Statute Implementation Act in terms of s 233. Thus, if there is *any* reasonable interpretation of the Rome Statute Implementation that is consistent with the customary international-law rule permitting no exceptions, the court ought to consider it, and to prefer it over any other interpretation (perhaps even the better interpretation) that is inconsistent with international law. There is no evidence in the judgment that the court undertook this assessment. If there is a criticism of the use of customary

<sup>112</sup> *Minister of Justice v SALC* supra note 7 para 85.

<sup>113</sup> The domestic Implementation of the Statute of the International Criminal Court Act 27 of 2002.



international law in the Supreme Court of Appeal decision in the Bashir matter, it is the court's failure to consider customary international law in the process of interpreting the Implementation Act as required by s 233 of the Constitution. To be fair, the court was clearly aware of the duty to integrate international law in its interpretation of the Rome Statute Implementation Act, because it made the following observation:

'In the present case [the relevant principles] are strongly influenced by the fact that we are dealing with a statute that incorporated an international agreement ... and are required by section 233 of the Constitution to construe it in a manner consistent with international law. As international law requires state parties to international agreements to comply with obligations assumed under those agreements, an interpretation of the Implementation Act that results in South Africa not complying with the obligations under the Rome Statute is to be avoided if possible.'<sup>114</sup>

What the court does not seem to account for in this quote are the customary international-law rules that it has elaborately described. In as much as an interpretation of the Implementation Act that is inconsistent with the Rome Statute must be avoided, so too an interpretation of the Implementation Act that is inconsistent with the customary international-law rule that there is no exception to the inviolability of a head of state, must be avoided. In some sense, this calls for an assessment of the relationship between arts 27 and 98, the rules of customary international law, and the UN Security Council resolution that referred the situation in Darfur to the ICC. This is *the* real issue, and point of contention amongst international lawyers and courts.<sup>115</sup> This was *the only way* that a position in international law could be determined, since international-law experts now agree that the legal position concerning the duty to arrest Bashir depended on the effects of resolution 1593, which referred the matter. Thus, the position in international law, to enable the application of s 233 of the Constitution, cannot be arrived at without addressing the contentious issue.

The court, in a strange decision for a court of law, decided that it did not have the confidence to address the relationship between the two conflicting Rome Statute provisions (arts 27 and 98), the Security Council resolution, and customary international law, stating that this matter was too difficult for it.<sup>116</sup> While it is strange for a court to confess lack of confidence to address a

<sup>114</sup> *Minister of Justice v SALC* supra note 7 para 86.

<sup>115</sup> Dapo Akande 'The legal nature of the Security Council referrals to the ICC and its impact on Bashir's immunity' (2009) 7 *Journal of International Criminal Justice* 333; Paolo Gaeta 'Does President Al Bashir enjoy immunity from arrest?' (2009) 7 *Journal of International Criminal Justice* 315; Dire Tladi 'The ICC decisions on Chad and Malawi: On cooperation, immunities and article 98' (2013) 11 *Journal of International Criminal Justice* 199; Dire Tladi 'Immunity in the era of "criminalisation": The African Union, the ICC and international law' (2015) 58 *Japanese Yearbook of International Law* 17.

<sup>116</sup> *Minister of Justice v SALC* supra note 7 para 106, where the court stated that the 'position under the Security Council is hotly contested by the commentators and the

legal issue before it and one that, in my view, would be dispositive of the dispute, in hindsight the court's posture may have been a wise one. In July 2017, in response to South Africa's legal argument attacking the correctness of the ICC's jurisprudence on the arrest of Bashir, the ICC abandoned its previous reasoning in favour of a new one.<sup>117</sup> Moreover, one judge out of the three on Pre-Trial Chamber II criticised the court's previous and new reasoning and concluded that the appropriate basis for the duty to arrest Bashir was not the UN Security Council resolution but the Genocide Convention.<sup>118</sup> The abandonment by the Pre-Trial Chamber of its previous position, plus the criticism by the minority judgment of the current position of the Pre-Trial Chamber, illustrates that the question whether there exists, under the Rome Statute, a duty to arrest Bashir, is a complicated one.<sup>119</sup> Yet — and this goes to the interpretation of the Rome Statute itself — without resolving this no-doubt complicated question, it is not clear how the court could come to the conclusion about either the position in international law, or the existence of a duty under the Rome Statute to arrest Bashir. Consequently, it is unclear how there can be a duty under the domestic statute, since the Rome Statute Implementation Act provides for arrest and surrender if there is a duty to arrest under the Rome Statute. Closer attention to methodological questions of international law, including not shying away from the difficult question of the impact of UN Security Council resolution 1593, would have enabled a more methodologically coherent judgment from the court, whatever the outcome.

Moving on from the Bashir saga, the Constitutional Court decision in *Zimbabwe v Fick*<sup>120</sup> was interesting because the court applied international law, in particular SADC treaties, not as a tool of interpretation of either legislation or the Bill of Rights. The judgment, therefore, appears not to represent either the application of s 39(1)(b) or s 233 of the Constitution, but rather concerned the application of treaties in a more direct way than in previous cases. Although the court did consider the possibility of applying the Enforcement of Foreign Civil Judgments Act 32 of 1988 (a legislative enactment concerning the enforcement of foreign judgments), it decided, for various reasons, that the Enforcement Act was inapplicable to the case.<sup>121</sup> The court eventually decided to apply the relevant international law for the

limited argument we received on the Genocide Convention does not give me confidence that we should express a view on it'.

<sup>117</sup> *The Prosecutor v. Omar Hassan Ahmad Al-Bashir: Decision under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the court of the Arrest and Surrender of Omar Al-Bashir*, (ICC-02/05-01/09-302) 6 July 2017.

<sup>118</sup> *Ibid*, minority judgment of Judge Marc Perrin de Brichambuat.

<sup>119</sup> For discussion see Tladi *German Yearbook of International Law* op cit note 92.

<sup>120</sup> *The Government of the Republic of Zimbabwe v Fick* [2012] ZASCA 122 ('*Zimbabwe v Fick I*'); *The Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) ('*Zimbabwe v Fick II*').

<sup>121</sup> *Zimbabwe v Fick II* *ibid* paras 36–7.

purposes of applying the common law, namely the common law concerning the enforcement of foreign judgments.<sup>122</sup>

Briefly, the case concerned the enforcement of a judgment of the now defunct SADC Tribunal, an international tribunal created by a Protocol to the SADC Treaty ('the Protocol'<sup>123</sup>) arising from Zimbabwe's infamous land redistribution policy.<sup>124</sup> Zimbabwe argued before South African courts, first, that the judgment could not be enforced on the ground of foreign sovereign immunity, and secondly, that the tribunal had no jurisdiction over Zimbabwe as the Protocol never entered into force for Zimbabwe. Both of these contentions required the interpretation of the Protocol and the SADC Treaty. With respect to the first contention, Zimbabwe had argued before the courts that under South African legislation that it was immune from process and that it had not waived its immunity. Both the Supreme Court of Appeal and the Constitutional Court interpreted art 3(2) of the Protocol, which obliges members of SADC to 'take forthwith all measures necessary to ensure the execution of decisions of the Tribunal', and art 32(3), which provides that the decisions of the Tribunal 'shall be enforceable within the territories of the member states concerned', as a clear waiver of any immunities that Zimbabwe may have enjoyed.<sup>125</sup> Consistent with the trend identified above, however, the courts do not reveal the methodology and the rules of interpretation that it employed to come to the conclusion that there had been a waiver of immunity. The conclusion that the two provisions constitute a waiver is presented by both courts as a self-evident fact.

With respect to the contention that the Tribunal had no jurisdiction over it, Zimbabwe pointed to art 22 of the SADC Treaty, which provided that each SADC Protocol would be subject to 'signature and ratification', and that since Zimbabwe had not ratified the Protocol, the Tribunal could not have jurisdiction over it.<sup>126</sup> In considering this contention, the Supreme Court of Appeal, without referring to the Vienna rules, invokes 'context' as a means of interpreting art 22.<sup>127</sup> The Supreme Court of Appeal noted that art 22 appears in chap 7 of the SADC Treaty on co-operation, and that the protocols referred to therein are those concerned with co-operation, and not with all protocols. In other words, the Protocol on the Tribunal is not covered by the requirements of art 22. In any event, the court noted that art 16 of the SADC Treaty was subsequently amended expressly to exclude the

<sup>122</sup> Ibid para 40ff.

<sup>123</sup> Article 16 of the Treaty of the Southern African Development Community (SADC) (1993) 32 ILM 116 (adopted 17 August 1992, entered into force 30 September 1993) provides for the establishment of a Protocol by the Summit of the SADC. The Protocol on the Tribunal to the SADC Treaty, adopted 14 August 2001.

<sup>124</sup> *Campbell & others v The Republic of Zimbabwe* [2008] SADC Tribunal 2.

<sup>125</sup> *Zimbabwe v Fick I* supra note 120 para 44; *Zimbabwe v Fick II* supra note 120 paras 34 and 35.

<sup>126</sup> See art 22(3) of the SADC Protocol op cit note 123.

<sup>127</sup> *Zimbabwe v Fick I* supra note 120 para 38.

application of art 22 on the Protocol to the Tribunal.<sup>128</sup> In its judgment, therefore, the Supreme Court of Appeal relied both on the text (ie the amendment to art 16) and context (ie the limited scope of art 22), without invoking the Vienna rules of interpretation. The Constitutional Court, for its part, dismissed Zimbabwe's claim principally on the procedural ground that before the SADC Tribunal, Zimbabwe did not raise the issue of the jurisdiction of the Tribunal over Zimbabwe, and that its jurisdictional arguments were based on the subject-matter jurisdiction, namely whether the Tribunal could consider matters of human rights.<sup>129</sup> As a result, Zimbabwe was barred from raising the substantively different ground of lack of jurisdiction over Zimbabwe. We were therefore again deprived of the Constitutional Court's wisdom on treaty interpretation and, in particular, the application of the Vienna rules of interpretation.

#### IV CONCLUSION

South Africa's Constitution, on its own terms, is an international law-friendly constitution that invites the court to adopt an attitude of openness to international law. The openness of the courts to international law has largely been reflected in the decisions of the South African courts, in particular the Constitutional Court. The Constitutional Court in *S v Makwanyane* famously expressed this openness, in particular by adopting a broad understanding of what is meant by 'international law'. *Makwanyane*, however, also laid out the constraints or limits to the openness of the Constitution to international law. Specifically, the court emphasised that the consideration of international law does not equate to its application. What the courts ought to apply is South African law, and international law is a tool for determining the content of South African law.

What has generally been missing in the approach of South African courts to international law has been an appreciation of the proper methodology for the identification of international law and its interpretation. In most cases, the court has either not applied the methodological rules for the identification and interpretation of international law — rules of treaty interpretation and the methodology for identification of customary international law — or, where it has done so, it has misunderstood and thus misapplied these. In *Makwanyane* itself, for example, the court referred to a number of treaty provisions and jurisprudence, but did not ever explain what interpretation it gave to those treaty provisions, or how it arrived at its chosen interpretation. In *Glenister*, the court sought to rely on subsequent practice within the meaning of art 31(3) of the Vienna Convention, but relied on an instrument that clearly does not meet the requirements for subsequent practice within the meaning of that Convention. In *Minister of Justice v SALC*, the Supreme

<sup>128</sup> *Zimbabwe v Fick I* supra note 120 para 39. The amendment provided that, 'notwithstanding the provisions of Article 22', the Protocol 'shall form an integral part of the Treaty'.

<sup>129</sup> *Zimbabwe v Fick II* supra note 120 para 44.

Court of Appeal did not refer to any rule of interpretation in its assessment of the Host Country Agreement.

Nevertheless, there are examples of solid methodological approaches to the identification of rules of international law. South African courts appear particularly able and willing to apply the methodology for the identification of customary international law, for example in *Kaunda* and *Minister of Justice v SALC*. The same attention should be given to the application of the rules of interpretation of treaties.