The Influence of Recent Constitutional Developments in South Africa on the Relationship Between International Law and Municipal Law

I. Introduction

The relationship between international law and South African municipal law was traditionally determined by common law rules originating from English law. Until the implementation of a new South African Constitution on April 27, 1994, there were no constitutional or legislative provisions in this regard. This traditional situation in South African law corresponds with a widely accepted international norm, namely that municipal law prevails over international legal rules. This situation stems from the fact that states jealously guard their sovereignty.

The relationship between international law and the domestic law of a state is important for several reasons. In view of the inadequate enforcement facilities at the disposal of international law, the effectiveness of the implementation of international legal rules depends greatly on the enforcement of such rules by domestic courts. The status that international law enjoys in domestic legal systems is largely determined by asking whether rules of international law are automatically incorporated into municipal law and, therefore, have direct effect on citizens and the courts, or whether an act of transformation must first take place. The

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2. See Schaffer, supra note 1, at 277.
reception of international legal developments and human rights norms into municipal law also depends largely on the relationship between international and municipal law systems.

This article will briefly examine the traditional situation regarding the application of international law in South African law and evaluate the changes effected to this traditional situation by the constitutional developments that took place in South Africa in recent years.

II. The Traditional Relationship Between International Law and South African Municipal Law

A. Customary International Law

South African courts have been following the British example of taking judicial notice of customary international law, in contrast to foreign law, which has to be proved by means of expert evidence. This rule of evidence is based on the assumption that international law forms part of South African municipal law. International law was applied by South African courts in a series of cases dating to the previous century. However, it was only in a number of recent judgments that the court stated explicitly that customary international law forms part of South African law. This has been confirmed by the Court of Appeals in Nduli and Another v. Minister of Justice, holding that “it is obvious that international law is to be regarded as part of our law.”

In line with English law, the following exceptions to this general rule have been identified by the courts:

1. Customary international law will not be applied if it is in conflict with South African legislation (a logical result of the doctrine of parliamentary sovereignty). However, the effect of this rule may be softened as a result of the likely existence in South African law of a rebuttable presumption that Parliament does not intend to legislate contrary to international law. In case of an ambiguous or vague statute, the courts will seek to apply a meaning harmonious with international legal rules.

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4. See Schaffer, supra note 1, at 297-308 (discussing a number of cases).
6. 1978 (1) SA 893 (A).
7. See id. at 906.
8. See Schaffer, supra note 1, at 388; Erasmus, supra note 1, at 84.
9. See A.J.G.M. Sanders, Our State Cannot Speak with Two Voices, 88 S. Afr. L.J. 413 (1971). The existence of such a presumption has never been mooted before the South African courts. However, this rule of construction has been firmly established in Commonwealth law, and it can be accepted that South African law is consistent with Commonwealth law in this regard. See Schaffer, supra note 1, at 285-86.
2. In terms of the *stare decisis* rule, or the doctrine of precedent, courts are bound by previous decisions of courts of final authority.\(^{10}\) This has resulted in courts sometimes applying international law not as it stood at that particular time, but rather the version enunciated by earlier judgments. However, the South African courts softened the effect of this rule by a flexible interpretation thereof. In the cases of *Interscience Research and Development Services (Pty) Ltd. v. Republica Popular de Mozambique*\(^ {11}\) and *Kaffraria Property Co (Pty) Ltd. v. Government of the Republic of Zambia*,\(^ {12}\) an approach was followed similar to that enunciated in the English case *Trendex Trading Corporation v. Central Bank of Nigeria*,\(^ {13}\) in which Lord Denning said the following about the *stare decisis* rule: "[it] does not prevent a court from applying a rule that did not exist when an earlier decision was made if the new rule has had the effect in international law of extinguishing the old rule."\(^ {14}\)

In terms of the common law Act of State doctrine, the conduct of foreign affairs is the prerogative of the executive branch of government, and the courts should not interfere in the execution of foreign policy.\(^ {15}\) In practice this means that the courts will accept a statement of the executive on a matter relating to the conduct of foreign relations as conclusive, instead of taking evidence. As a result, the application of rules of international law may be excluded. The courts will therefore accept as conclusive a statement of fact pertaining to a specific issue by the Department of Foreign Affairs—usually referred to as an "executive certificate."\(^ {16}\)

The above-mentioned judgments have clarified the traditional relationship between international law and South African law to a large degree and are cited as support for the theory that international law is automatically incorporated into

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10. See Erasmus, *supra* note 1, at 89.
11. 1980 (2) SA 111 (T).
12. 1980 (2) SA 709 (E).
13. 1977 QB 529 (CA).
14. *Id.* at 588.
15. The generally accepted meaning of the Act of State doctrine in the British common law tradition, which was inherited by South Africa, is that of the separation of powers between the executive and the judiciary: the courts accept the absolute discretion of the executive to declare upon factual situations relating to the conduct of foreign relations even if such declaration may contradict existing rules of international law. See J. G. Starke, *Introduction to International Law* 77 (4th ed. 1984). In the United States, three separate doctrines of Act of State can be distinguished: the doctrine of foreign sovereign immunity, the foreign sovereign compulsion doctrine, and what is called the Act of State doctrine that was defined as follows by the U.S. Supreme Court in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Int'l*, 493 U.S. 400, 490 (1990): "The act of state doctrine . . . merely requires that . . . the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *Id.*
16. See Erasmus, *supra* note 1, at 89.
17. In South Africa, executive certificates have been issued pertaining to the recognition of a state and of a government. See *S. v. Devoy*, 1971 (3) SA 899 (AD).
municipal law, as opposed to the theory of transformation. However, if the exceptions to the general rule of automatic incorporation of international law into South African law are taken into account, it appears that the theory of incorporation is applied in a somewhat diluted form in South African law.

Two additional qualifications for the incorporation of international law in South African law may have been set in the Nduli case: "according to our law only such rules of international law are to be recorded as part of our law as are either universally recognized or have received the assent of this country." Although these two additional qualifications were set in what was clearly an obiter remark, they may have served, through the application of the stare decisis doctrine, to introduce uncertainty as to the limits of application of international law in South African law. These qualifications are unique, and the court did not attempt to elucidate on them.

B. TREATIES

The position in South African law with regard to treaties was clear: the signing, ratification, and other stages of treaty-making constituted an executive act, while legislative intervention was required for the incorporation of treaties into municipal law. The philosophy of separation of powers underlies this position with the aim being to prevent the executive from legislating without the legislature.


After the unbanning of the African National Congress (ANC), the South African Communist Party (SACP), the Pan Africanist Congress (PAC), and other liberation movements in February 1990, a lengthy process of negotiations ensued among these liberation movements, the National Party (NP) government, and other organizations in order to draw up a new constitution for South Africa. The government and the organizations supporting it held the view that a final constitution should

18. The theory of transformation requires that each rule of international law has to be transformed by the municipal legal order before it can find application in municipal law. See Erasmus, supra note 1, at 89; A.J.G.M. Sanders, The Applicability of Customary International Law in South African Law—the Appeal Court Has Spoken, 11 COMP. & INT’L L. OF S. AFR. 198, 199 (1978).


20. 1978 (1) SA 893, 899 (A).

21. See Erasmus, supra note 1, at 81.


23. See Erasmus, supra note 1, at 91; Sanders, supra note 9, at 413; HERCULES BOOYSEN, VOLKREG EN SY VERHOUDING TOT SUID-AFRIKAANSE REG 68 (1989); Pan Am. World Airways Inc. v. S. Afr. Fire and Accident Ins. Co. Ltd., 1965 (3) SA 150 (A).
be negotiated and implemented before the country's first-ever free elections took place. The ANC and its allies, assured of the support of the majority of first time black voters, argued that the elections should take place first and that the Parliament so elected could then act as a Constitutional Assembly to negotiate and enact a final constitution. In the end, an historic compromise was made: it was agreed than an interim constitution, to be valid for a period of five years, would be negotiated and implemented at the time of the election. The newly elected Parliament, sitting as a Constitutional Assembly, could then negotiate a final constitution. The constitution for the interim period was approved by the South African Parliament on December 22, 1993, and came into force on April 27, 1994, the first day of the election. The Interim Constitution provided, inter alia, that the text of the Final Constitution had to comply with thirty-four Constitutional Principles, and that the Constitutional Court had to certify that all the provisions of the text of the Final Constitution complied with the Constitutional Principles.

Section 4(1) of the Interim Constitution provides that it shall be the supreme law of the country, and that any law or act, by any of the branches of government inconsistent with its provisions, shall be of no force and effect to the extent of the inconsistency. It further provides that the courts will have the power to test the validity of any act of government for legality and legitimacy. A Constitutional Court, the first in the history of the Republic, was established as the court of final instance over all matters relating to the interpretation, protection, and enforcement of the provisions of the Constitution.

Furthermore, a chapter on fundamental rights was enacted in the Interim Constitution. It included a number of traditional civil and political rights such as: (1) the right to equality before the law and non-discrimination, (2) the right to life; (3) freedom of religion; (4) freedom of belief, opinion, and expression; (5) freedom of assembly, demonstration, and petition; and (6) freedom of association, movement, and residence. Also, the rights of detainees are guaranteed, and a number of economic, social, and cultural rights are enunciated.

The implementation of the Interim Constitution opened a new chapter in the political and legal history of South Africa, turning it into a democratic, constitutional state. The supremacy of the Constitution is in direct contrast to the previous system of administration, which was based on the British

26. See S. Afr. Interim Const. § 7(2).
27. See S. Afr. Interim Const. § 98-103.
28. See S. Afr. Interim Const. § 98(1).
Westminster system of government in terms of which Parliament was sovereign and above the law.  

A Final Constitution for the Republic was negotiated by the Constitutional Assembly during 1995 and 1996, and was approved by Parliament sitting as the Constitutional Assembly on May 8, 1996. The Constitutional Court referred it back to the Constitutional Assembly as some provisions, notably those dealing with the powers of the provinces, did not meet the requirements set in the Constitutional Principles. After the Constitutional Assembly made the required amendments, the Constitutional Court duly certified it and it was enacted into law by Parliament on December 18, 1996 and implemented on February 4, 1997.

As far as the supremacy of the Constitution and the Constitutional protection of human rights are concerned, the same values underlie the Final Constitution as the Interim Constitution.

The Interim Constitution also broke new ground in that, for the first time, international law was incorporated into South African law by means of a statute. The Final Constitution also makes provision for such incorporation, although some provisions dealing with this matter differ substantially from those in the Interim Constitution. The following is a survey of the role accorded to international law in the South African municipal law system by the respective Constitutions. As litigation is still taking place in South African courts regarding terms of the Interim Constitution, its provisions will remain of relevance for some time to come.

A. Customary International Law

1. The Interim Constitution

Section 231(4) of the Interim Constitution deals with the status accorded to customary international law in South African law and reads as follows: "The rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic." It can be argued that the formulation "rules of customary international law" is somewhat narrower than "general rules of public international law," which is found in the Namibian Constitution and the German Constitution ("die allgem-
Erasmus, with reference to the Namibian Constitution, makes a convincing argument that the Namibian formulation is wider than "customary international law," and that it also includes regional and particular international law, while the formulation of "customary international law" will be limited to such rules as have received world-wide acceptance. A southern African or African custom would therefore not constitute an international legal obligation for South Africa in terms of the Interim Constitution. The formulation in the Interim Constitution would also exclude the "general principles of law recognized by civilized nations" that are referred to in article 38 of the Statute of the International Court of Justice, while the Namibian and German formulations would include such principles.

The phrase "binding on the Republic" is a somewhat unfortunate formulation. It is a clear principle of international law that a state is not bound by rules of international law against which it has persistently objected. Therefore, the reason for the inclusion of this phrase could hardly have been to make this principle applicable in South Africa. On the other hand, South Africa will be bound by rules of customary international law once the criteria set by international law itself have been satisfied, as no act of incorporation is required. This formulation thus cannot serve to exclude the applicability of such rules in South African municipal law. It may well be argued that this formulation only creates confusion and interpretation problems.

The provision that customary international law shall only form part of South African municipal law as far as it is not inconsistent with the Interim Constitution and Parliamentary acts corresponds with a similar provision in the Namibian constitution. The effect of this provision is that the common law doctrine, in terms of which the incorporation of international law into South Africa law could be excluded by legislation, was given constitutional status. It follows logically that the presumption that Parliament does not intend to legislate contrary to international law will still be the principle guiding the courts.

It may be argued that the provision that customary international law can be excluded from South African law by acts of Parliament will serve to perpetuate the doctrine of parliamentary sovereignty within the South African system of constitutional government and that the German approach in this regard should have been followed. Section 25 of the Grundgesetz provides that international

37. See Erasmus, supra note 1, at 98.
39. "General principles of law" refers to the application of general legal principles found in municipal jurisprudence and in international law insofar as such principles are applicable in the relations between states. See Von Münch, Grundgesetzkommentar 140 (1983).
law shall take precedence over statutes of the federal as well as Länder governments, but not over provisions of the Grundgesetz. Furthermore, it provides that international law will create rights and duties for inhabitants of the federal territory.

The German approach is more effective for guaranteeing human rights. The legislator is not able to exclude the application of international human rights norms that have achieved the status of customary international law from municipal law, while the direct applicability of international law on the individual will enhance the effective protection of human rights. However, it is a moot point whether such a formulation would in practice have resulted in a more effective human rights regime in South African law. As they stand, both the Interim and the Final Constitutions are virtual catalogues of rights based on internationally-accepted human rights norms. A detailed evaluation of the Bill of Rights contained in the Interim Constitution in the light of international human rights norms, led to the conclusion that the Interim Constitution not only comports with such norms, but in some formulations of human rights even surpasses international norms. It follows that the capacity of the legislator to exclude the application of international human rights norms in South African law will probably amount to virtually nothing. The same is true in view of the doctrines governing the interpretation of legislation as well.

2. The Final Constitution

Sections 231-233 of the Final Constitution deal with international law. Section 231 deals with international agreements and section 232 with customary international law, while section 233 has the title "Application of international law." Section 232 reads: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

It will be noticed that the formulation, "customary international law," was preferred instead of the Interim Constitution's formulation, "rules of customary international law." It is submitted that no change in meaning or scope of application have been brought about as a result of the omission of the word "rules."

For the reasons set out above, it is also to be welcomed that the formulation "binding on the Republic" has been omitted from the final version of the article dealing with customary international law. The Interim Constitution's qualifica-
tion on the automatic incorporation of customary international law, that it should not be inconsistent with the Constitution or a parliamentary act, has been retained in section 232 of the Final Constitution.

Section 233 provides that, in 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."46 The well-established common law presumption against Parliamentary intent to exclude the application of international law is given legislative status for the first time. The question remains whether the stare decisis rule and the Act of State doctrine, as well as the qualifications of "universal recognition" and "assent" that were set in Nduli,47 will still apply after the entering into force of the Interim and Final Constitutions.

3. **Stare Decisis**

The Interim Constitution48 provides that the Constitutional Court shall have jurisdiction as the court of final instance over all matters relating to the interpretation, protection, and enforcement of the constitution.49 In the Final Constitution the powers and jurisdiction of the Constitutional Court are elaborated upon in section 167. Section 167(3)(a) provides that the Constitutional Court is the highest court in constitutional matters.50 Other courts will therefore be bound by the interpretation of the Constitutional Court of the sections in both the Interim and Final Constitutions dealing with international law. The stare decisis rule will in this way find application in the new constitutional system.

However, no provision of either the Interim or Final Constitutions dealing with international law lends itself to an interpretation that will prevent the Constitutional Court from applying international law as it stands at that particular time. Rather, it will mitigate against an application of the stare decisis rule that would prevent the incorporation of contemporary international law.

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47. 1978 (1) SA 893(A).
48. S. Afr. Interim Const. § 98 (2).
49. For elucidation of the role of different courts to adjudicate in constitutional matters in terms of the Interim Constitution, see Sonnekus, supra note 30, at 670-74. To summarize, the Appellate Division of the Supreme Court was denied jurisdiction to adjudicate in any matter within the jurisdiction of the Constitutional Court. S. Afr. Interim Const. § 101(5). Provincial and local divisions of the Supreme Court, however, have jurisdiction over a number of constitutional matters elaborated in § 101(3)-(4). Lower courts have no jurisdiction in constitutional matters. S. Afr. Interim Const. § 101.
50. In the Final Constitution, the Supreme Court of Appeal was accorded jurisdiction over constitutional matters. Const. of the Rep. of S. Afr. (1996) § 168(2). High Courts (as the Supreme Courts have been renamed) will have jurisdiction in all constitutional matters except in cases where the Constitutional Court has exclusive jurisdiction, while lower courts remain without jurisdiction in constitutional matters. Const. of the Rep. of S. Afr. (1996) § 167(4).
4. The Act of State Doctrine

The clear demarcation of executive powers and the status of international law in both the Interim and Final Constitutions have resulted in the demise of prerogative powers and the Act of State doctrine. Any limitations on the applicability of international law in South African municipal law thus will result only from the provisions of the respective Constitutions.

5. The Nduli Requirements

As discussed earlier, the requirements of "universal recognition" and "assent" set obiter in Nduli have only complicated the question of applicability of international law in South African law. Regarding the continued applicability of South African case law prior to April 27, 1994 (the implementation date of the Interim Constitution), it is submitted that the same situation has applied in South Africa as was the case in Namibia after that country's constitution of 1990 came into force. In this regard, the following remark by Erasmus is also applicable to South Africa:

The problematical qualifications to the application of customary international law added by the Nduli judgment of the South African Appellate Division would best be ignored in Namibia. The Namibian Constitution is now the fons et origo for the rule that international law is part of Namibia's law. South African case law, together with that of other countries, is to be consulted only insofar as it is compatible with the Grundnorm of Namibian law which is the Constitution. The same philosophy will of course be applicable to the Final Constitution.

B. Treaties

1. The Interim Constitution

The provisions regarding treaties contained in sections 231(1)-(3) of the Interim Constitution substantially alter the pre-constitutional position, and unfortunately also create some uncertainties. Section 231(1) provides that all rights and

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51. See S. Afr. Interim Const. chs. 5-6.
52. See Dion Basson, South Africa's Interim Constitution 119 (Jo Goodwill ed., 1994). The prerogatives and "Act of State" doctrine resulted from the "separation of powers" doctrine. Concern has been expressed that, as the president has not been expressly empowered to recognise foreign states and governments in § 82(1) of the Interim Constitution (dealing with presidential powers), the courts will be put in a position to pass judgment on these matters—an undesirable situation. See John Dugard, International Law and the 'Final' Constitution, 11 S. Afr. J. on Hum. Rts. 241, 247 (1995). As no such powers were ascribed to the President in § 78(3) of the Final Constitution, the same concern is applicable. See also Hercules Booysen, Has the Act of State Doctrine Survived the 1993 Interim Constitution?, 20 S. Afr. Y.B. Int'L L. 189 (1995) (discussing a viewpoint that the Act of State doctrine has been curtailed by the Interim Constitution in the sense that it has become justifiable in terms of international law).
53. 1978 (1) SA 893(A).
54. See Erasmus, supra note 1, at 99-100.
55. These are referred to as "international agreements" in the text.
obligations under international agreements that were vested in or binding on the Republic in terms of its previous Constitution, shall remain vested in and binding on it in terms of the Interim Constitution, unless provided otherwise by an act of Parliament.

The formulation of section 231(1) is that of a classical succession provision, although the first democratic election in South Africa resulted only in a change of government and not the creation of a new state entity.56

The provision that Parliament can legislate to terminate treaties entered into by the previous government is problematical.57 Any termination of a treaty that is not effected in terms of specific termination clauses in such a treaty, or the procedures laid down in the Vienna Convention on the Law of Treaties of 1969, will in effect be a unilateral termination in breach of the Republic's obligations under international law.58

Sections 231(1) and (2) govern agreements entered into after the implementation of the Interim Constitution. Section 231(2) provides, as was the case before the implementation of the Interim Constitution, that international agreements are to be negotiated and signed by the executive branch of government in terms of section 82(1)(i),59 while Parliament is authorized to decide on the ratification of or accession to international agreements. While this section deals with the procedure by which South Africa becomes a party to international agreements, section 231(3) deals with the incorporation thereof into municipal law. It provides that "where Parliament agrees to the ratification of or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution."60 These two provisions not only bring about substantial changes to the pre-Interim Constitution position, but also create a number of uncertainties regarding the present position.

56. For a view that the 1994 elections introduced a "new" state through a process akin to a change from colonial rule, see Ziyad Motala, Under International Law, Does the New Order in South Africa Assume the Obligations and Responsibilities of the Apartheid Order? An Argument for Realism over Formalism, 30 COMP. & INT'L L. OF. S. AFR. 287 (1997).

57. A possible justification for the inclusion of this clause may be to enable the government elected in 1994, by means of its parliamentary majority, to abrogate treaties containing aspects of apartheid or having secret military agreements (such as with the Republic of China and Israel) that the new government may be opposed to on ideological grounds. See Olivier, supra note 38, at 4.


59. Section 82(1)(i) assigns these tasks to the president, but in practice negotiations are undertaken by officials of the Department of Foreign Affairs, while the task of signing international agreements is usually delegated to ambassadors or ministers.

60. S. AFR. INTERIM CONST. § 231(2). Dugard has termed the procedure envisaged in section 231(2) "international ratification" and the section 231(3) procedure in terms of which international agreements are incorporated into municipal law—"constitutional ratification." See John Dugard, International Law: A South African Perspective 350 (1994).
Before the Interim Constitution was implemented, the executive had the power to enter into and ratify international agreements, while legislation was needed to give such agreements municipal application. In terms of the Interim Constitution, the role of Parliament is augmented so that it is also involved in terms of section 231(2) in the ratification of or accession to international agreements. However, it is not clear whether Parliament is merely competent or obliged to agree to the ratification of or accession to all international agreements. Support has been expressed for the view that section 231(2) should not be interpreted as requiring that all international agreements should serve before Parliament before they can bind the Republic, especially in view of the heavy workload that will be placed on Parliament if pro forma agreements and agreements of a technical or informal nature also have to be subjected to this procedure. The view has been expressed that parliamentary agreement will be required only where an international agreement requires accession or ratification to bring it into force on the international plane ("international ratification"), or where incorporation thereof into municipal law is required ("constitutional ratification").

It is also not clear what procedure of incorporation of an international agreement into municipal law is envisaged, as section 231(3) only requires that Parliament must expressly provide that such incorporation is to take place. However, the general view is that an act of Parliament, which entails a cumbersome procedure, is not required. Rather, a resolution or endorsement to the effect that the treaty is incorporated into municipal law and adopted simultaneously with the resolution effecting the international ratification of the agreement will suffice.

2. The Final Constitution

The drafters of the Final Constitution have evidently attempted to improve the formulation of the section dealing with international agreements and to clear up the uncertainties that resulted from the formulation used in the Interim Constitution. Section 231 of the Final Constitution, consisting of five subsections, deals solely with this matter.

The succession provision is contained in section 231(5). It provides that the Republic is bound by international agreements binding on the Republic at the time when the Final Constitution comes into effect. No provision is made to enable Parliament to terminate such agreements.

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61. This development has been welcomed as a democratization of the treaty-making process. See Botha, supra note 58, at 255; Olivier, supra note 38, at 1.
62. These are usually referred to as "executive agreements."
63. See Olivier, supra note 38, at 8; Dugard, supra note 52, at 248.
64. See Olivier, supra note 38, at 8. This interpretation is based on the use of the word "competent" in the text and in subsequent practice.
65. See Dugard, supra note 52, at 250; Botha, supra note 58, at 255.
66. This is especially noticeable if the text of the Final Constitution is compared with that of the Working Draft of the New Constitution, published for comment by the Constitutional Assembly on November 22, 1995.
Section 231(1) clearly states that the negotiating and signing of all international agreements is the responsibility of the "national executive." 67

Section 231(2) deals with the ratification of international agreements on the international plane. It provides that an international agreement will be binding on the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces (respectively, the lower and upper houses of Parliament), unless it is one of the agreements referred to in section 231(3).

Section 231(3) then states that in cases of four kinds of international agreements—namely of a "technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive"—the Republic will be bound without the approval of the two houses of Parliament. However, such agreements must be tabled in the respective houses "within a reasonable time." 68

The clear formulation of sections 231(2) and 231(3) effectively eradicates uncertainties created by section 231(2) of the Interim Constitution regarding questions whether parliamentary agreement to ratification of or accession to international agreements is obligatory, and whether all agreements should be subjected to this procedure. Apart from clearly stipulating the procedures to be followed, the clear enunciation of the four classes of international agreements for which Parliamentary approval are not required, is also to be welcomed. 69

Section 231(4) deals with the incorporation of international agreements into South African law, and provides as a general rule that an agreement becomes law in the Republic when so enacted by national legislation. However, it further provides that a self-executing provision of an agreement that has been approved by Parliament 70 is incorporated automatically into South African law, unless it is inconsistent with the Constitution or an act of Parliament. Enabling legislation is therefore not needed in the case of self-executing agreements. This provision corresponds to the general international definition of a self-executing international agreement, namely that it is an agreement of which the provisions are automatically and without any formal or specific act of incorporation, part of the domestic law of a state and as such enforceable by the municipal courts. 71

While this definition may at first glance appear clear, it has not yet been established what characteristics identify a self-executing provision/agreement in

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67. This formulation, which makes no reference to the role of the President, is preferable to that of the Interim Constitution as it more accurately reflects practical realities.
69. On the other hand, it may be argued that the definition of the four classes of agreements for which Parliamentary approval is not required is inadequate and may create new uncertainties. A provisional Manual on Executive Acts, published by the Office of the President in February 1997, provides some guidelines as to the distinction between these categories.
70. S. Afr. Interim Const. § 231(2).
South African law.\textsuperscript{72} It has been suggested that the intent of an international agreement should be the determining factor in establishing whether it is self-executing.\textsuperscript{73} While the courts will have the final say in this matter in South Africa, it has been suggested that extradition agreements may form a category of self-executing agreements.\textsuperscript{74} The Extradition Act\textsuperscript{75} obliges the Minister of Justice to "as soon as practicable after Parliament has agreed to the ratification of, or accession to, or amendment or revocation of an agreement . . . [to] give notice thereof in the Government Gazette."\textsuperscript{76} It follows that once Parliament has ratified an extradition agreement in terms of section 231(2) of the Final Constitution, all that is required by the Act is that notification be given in the Government Gazette. As ratification and notification are not considered legislative acts in terms of South African law, it appears that the Extradition Act provides a non-legislative process of incorporation for extradition agreements. Consequently, according to this line of argument, extradition agreements will constitute an exception to the requirement of enactment into domestic law by legislation and can therefore be classified as self-executing in terms of section 231(4) of the Final Constitution.

In view of the clear conditions set in section 231(3) of the Interim Constitution for the incorporation of international agreements, it is clear that no provision is made therein for the automatic incorporation of self-executing provisions of agreements into South African law. Despite the present uncertainties regarding the nature of self-executing agreements, the express provision made in this regard in the Final Constitution is to be welcomed as it constitutes a speedier way of incorporating self-executing agreements and provisions of a self-executing nature into South African law.

Because the Republic can be bound by the four classes of agreements mentioned in section 231(3) without the need of parliamentary approval, and because the condition for a self-executing provision or agreement to be incorporated into South African law in terms of subsection 231(4) is parliamentary approval, it follows logically that agreements, or provisions thereof, of a technical, administrative, or executive nature, or an agreement which does not require ratification or accession, cannot be self-executing.

The clear and practical approach regarding international agreements followed in the Final Constitution is an improvement on that of the Interim Constitution. The objections that have been raised against the Interim Constitution's provisions have been addressed, while the continued parliamentary


\textsuperscript{73} See \textit{Parry et al.}, supra note 71, at 362.


\textsuperscript{75} Act No. 67 of 1962 [hereinafter Extradition Act].

\textsuperscript{76} Extradition Act § 2(3)(ter).
involvement in international and constitutional ratification confirms the democratic nature of the Constitution.

C. OTHER REFERENCES PERTAINING TO INTERNATIONAL LAW

1. The Interim Constitution

a. Section 35(1): The Interpretation Clause

The elevation of international law to a central position in the South African legal order is confirmed by several other provisions of the Interim Constitution. Section 35(1) of the Interim Constitution, which forms part of chapter 5 on fundamental rights, deals with the role of international law in the interpretation of such rights:

In interpreting the provisions of this chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter and may have regard to comparable foreign case law.

It is clear from this formulation that any court of law, not only the Constitutional Court, is empowered to interpret the fundamental rights enshrined in the Constitution, and the applicability of international law. The courts also have no option but to promote democratic values and apply the norms of public international law, on the condition that such norms are applicable. 77

The question thus arises as to the scope of the directive that a court of law shall, "where applicable," have regard to "public international law applicable to the protection of the rights entrenched in this Chapter." With regard to the situations where public international law will apply ("where applicable"), Dugard 78 adopts a very wide interpretation: as the fundamental rights enshrined in the Interim Constitution are all based on general principles of international law or provisions of international human rights conventions, "it is difficult to imagine situations where public international law will not be applicable under 35(1)." 79

With regard to which law will be "applicable" in such situations, he then argues convincingly that as the term "public international law" is used without qualification, all sources of international law identified in article 38(1) of the Statute of the International Court of Justice will fall within the scope of public international law that will be applicable to the protection of the fundamental rights identified in the Interim Constitution. This will include international law contained in general treaties, custom, general principles of law, the writings of jurists, and the decisions of international and municipal courts. The approach adopted in section 35(1) leads to the conclusion that the courts will also apply public international

77. Botha, supra note 58, at 246.
79. See also Steenkamp, supra note 30, at 125.
law contained in general or multilateral treaties to which South Africa may not be party. In effect, the wide scope of section 35(1) results in the courts being directed to apply what is generally known as international human rights law in the interpretation of the fundamental rights provisions of the Interim Constitution.

b. The Human Rights Commission

Two further references are made to public international law in the Interim Constitution. In chapter 8, dealing with the Human Rights Commission, section 116(2) empowers the Commission to make a report to the relevant national or provincial legislatures "if the Commission is of the opinion that any proposed legislation might be contrary to chapter 3 or to norms of international human rights law which form part of South African law or to other relevant norms of international law." The Human Rights Commission has as its primary goals the promotion and protection of fundamental rights among all citizens of the country. The formulation of subsection 116(2) supports the interpretation that subsection 35(1) provides for norms of international human rights law to be applied in the interpretation of the fundamental rights provided for in chapter 3 of the Interim Constitution.

c. International Humanitarian Law

Section 227 of the Interim Constitution, dealing with the functions of the National Defence Force, addresses both the jus ad bellum and the jus in bello. Section 227(2)(d) provides with regard to the jus ad bellum that the National Defence Force shall "not breach international customary law binding on the Republic relating to aggression."

It has been submitted that the formulation of "customary international law" is wide enough to include the prohibition on the use of force in article 2(4) of the Charter of the United Nations and the General Assembly's Resolution on the Definition of Aggression. It follows that provisions of treaties and resolutions of international organizations that became part of customary international humanitarian law by means of opinio iuris and state practice will be binding on the

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80. This interpretation is supported by the following remark by Judge Chaskalson in S. v. Makwanyane and Another, 1995 (6) BCLR 665 (CC), when the Constitutional Court had to pronounce whether or not the death penalty was constitutional: "In the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter 3 can be evaluated and understood." Id.

81. See Botha, supra note 58, at 246. An interesting and convincing argument is made that the scope of section 35(1) is wider than that of section 231, where a qualified approach to the application of international law norms is followed, and that the provisions of section 231 are subordinate to the specific provisions of section 35(1). See id.

82. S. Afr. Interim Const. § 116(2).
84. See Dugard, supra note 52, at 243-44.
Republic. From the provision contained in section 231(4) of the Interim Constitution, it is clear that to be binding on the Republic, such rules of international humanitarian law should also not be inconsistent with the Interim Constitution or a parliamentary act. However, in view of the strong emphasis on international human rights standards in the Interim Constitution, it is difficult to imagine a situation where customary international humanitarian law would not be binding on the Republic. No express reference is made to provisions of treaties that have not yet been accepted as part of customary international law, as is the case in section 227(2)(e).

Section 227(2)(e) deals with the *ius in bello*. It directs the National Defence Force to, in the case of armed conflict, "comply with its obligations under international customary law and treaties binding on the Republic." The reference to treaties in this section extends the scope of international humanitarian law applicable on armed conflicts both to treaties to which South Africa has already become a party, and to those which they may become a party in future.\(^8\)

Section 226(7) deals with the individual responsibilities of soldiers in terms of, *inter alia*, international law. It entitles a member of the National Defence Force to refuse to execute any order if the execution thereof would constitute an offence or would breach international law on armed conflict binding on the Republic.

This provision, which covers both customary international humanitarian law and obligations in terms of treaties, is to be welcomed. It is clearly aimed at denying Defence Force members accused of executing human rights abuses the opportunity to raise the defence that they were only following orders,\(^7\) while also serving as a warning to the authorities issuing orders in times of conflict.

2. *The Final Constitution*

a. Section 39(1) and Section 233: The Interpretation Clauses

Section 39(1), dealing with the interpretation of the Bill of Rights, is clearly the successor to section 35(1) of the Interim Constitution. It reads as follows:

When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

It is submitted that section 35(1)\(^8\) of the Interim Constitution has been retained in essence, save some improvements.

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86. See Dugard, *supra* note 52, at 244.
87. This is a defense often resorted to by past and present members of the defense establishment in the hearings of the Truth and Reconciliation Commission, which is investigating human rights abuses during the apartheid era. This was also the case in the trial of a number of former senior officers of the South African Defense Force (as it was known), including a former defense minister, for alleged human rights abuses.
In section 39(1), provision is made for interpretation of the Bill of Rights by a court of law, and also by a tribunal or a forum. This reformulation is to be welcomed. It will considerably widen the application of the Bill of Rights, and consequently international law, to bodies such as administrative and labour tribunals, and also courts presided over by traditional leaders. "Human dignity," a value that is promoted together with freedom and equality as guiding principles of the Bill of Rights, has been added as one of the values that must be promoted in the interpretation of fundamental rights.

The formulation "shall have regard to" has been changed to "must consider." The reason for this reformulation is not clear. The meaning of "consider" is given as "look attentively at; contemplate mentally; keep in mind," and that of "regard" as "take into account." It appears that "regard" is a stronger term than "consider," and in view of the obvious desire on the part of the constitution drafters to ensure the prominence of international law, it is difficult to explain this change of the text. However, as this directive is still of a peremptory nature, it is submitted that in practice, the reformulation will probably not make a significant difference.

Of more significance is the omission of the requirement set in section 35(1) of the Interim Constitution that international law must be "applicable to the protection of the rights entrenched in this Chapter," and the reference to "international law" in section 39(1) instead of "public international law," as was the case in section 35(1) of the Interim Constitution. This is clearly a much wider formulation that by definition also includes private international law.

It can be argued that this formulation will dispel any uncertainties about the applicability of any source of international law, and will provide for the applicability of regional international law. This interpretation is strengthened by the formulation of section 39(1)(c). This section provides for "foreign law" to be considered instead of "comparable foreign case law," as was the case in section 35(1) of the Interim Constitution. This reformulation has opened the way for the courts to consider sources such as foreign customary law, general legal principles, and the writings of jurists. As the new South African constitutional system is broadly based on those of the United States of America and Germany, one can imagine that the protection of human rights in these countries will be closely scrutinized by South Africa in the future.

Unlike the Interim Constitution, the Final Constitution also contains a section relating to the application of international law in the interpretation of legislation. Section 233 provides that "every court must prefer any reasonable interpretation

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91. See Raylene Keightley, Public International Law and the Final Constitution, 12 S. AFRI. J. HUM. RTS. 405, 413 (1996) for a viewpoint that supports this interpretation.
of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.\footnote{92}

This clear directive to the courts, as well as its wide formulation of international law, are to be welcomed. For the first time ever, international law rules will have an effect on legislative interpretation, which traditionally has been very strict and formalistic. This traditional approach has in the past been blamed for what was considered to be a judicial tendency to interpret legislation too narrowly, resulting in favoring the executive rather than the individual,\footnote{93} which may well be an explanation for the introduction of this measure. The formulation "any legislation" is sufficiently wide to include not only parliamentary legislation but also legislation by provincial authorities.\footnote{94} Section 233 also clearly limits the application of international law in the interpretation of legislation to courts of law.\footnote{95}

b. International Humanitarian Law

While the Interim Constitution makes specific provision for the application of international law to the National Defence Force, chapter 11 of the Final Constitution (dealing with the security services) directs that international law would apply to all the Republic's security services. Section 198 deals with the principles governing national security in the Republic; the third principle requires that the pursuance of national security be in compliance with the law, including international law. Section 199(5) requires that the security services "must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic." Section 199(1) identifies the security services as "a single defence force, a single police service and any intelligence services established in terms of the Constitution."\footnote{96}

In view of the past involvement of the security services in enforcing apartheid laws, this new direction is to be welcomed. It would ensure that the security

\footnote{94. That a clear distinction is made in the Final Constitution between provincial legislation and the by-laws of local authorities is clear from a comparison between section 104(1)(b), dealing with provincial legislative authority, and section 156(2), dealing with the powers and functions of municipalities, as local authorities are known in South Africa. The by-laws of municipalities are not considered legislation.}
\footnote{95. Section 167 defines courts of law as the following: the Constitutional Court, the Supreme Court of Appeal, the High Courts (including any High Court of Appeal that may be established by legislation) the Magistrates' Courts, and any other court of a status similar to either the High Courts or the Magistrates' Courts that may be established by legislation.}
\footnote{96. Apart from the police and military intelligence services, there are presently two intelligence services, the National Intelligence Agency (NIA) that deals with internal matters, and the South African Secret Service (SASS) that deals with foreign intelligence.}
services would not in the future be obliged to breach internationally recognized principles in the name of national security. The formulation of section 199(5) is similar to that of section 227(2)(c) of the Interim Constitution in terms of the scope of applicable international law. The directive that members of the security services should receive training in this regard is also to be welcomed.97

The defence force is the only institution in the Republic that has been assigned a military role.98 Although no mention of armed conflict is made in section 199(5), this section serves to make the rules and obligations of the ius in bello applicable to the conduct of the National Defence Force and its members.

Section 199(6) directs that no member of any security service may obey a manifestly illegal order. In view of the clear directive that members of the security forces are to be subjected to international law, it follows that they also may not obey orders that would be illegal in terms of international law. While it can be welcomed that this measure is being made applicable on members of all security services, it is not clear why no specific reference was made to international law in this section.

Section 200(2) deals with the ius ad bellum and provides that the primary object of the defence force is “to defend and protect the Republic, its territorial integrity and its people, in accordance with the Constitution and the principles of international law regulating the use of force.”100

A new provision relating to international law in the Final Constitution, which was not found in the Interim Constitution, deals with states of emergency. Section 37(4) provides that in case of the declaration of a state of emergency, any legislation enacted as a result thereof may derogate from the Bill of Rights only to the extent that it is consistent with the Republic’s obligations under international law applicable to states of emergency.

D. DIRECT APPLICATION OF INTERNATIONAL LAW ON INDIVIDUALS

Botha comes to the conclusion that the general provisions regarding the incorporation of international law that are contained in section 231 of the Interim Constitu-

98. While the Interim Constitution refers to the “National Defence Force,” and this term replaced the previous term “South African Defence Force,” the Final Constitution only makes mention of “the defence force.”
99. CONST. OF THE REP. OF S. AFR. (1996) § 199(2). The tasks of the South African National Police Service are identified in section 205(3) as the prevention, combating, and investigation of crime; the maintenance of public order; upholding and enforcing the law; and protecting and securing inhabitants of the Republic and their property.
100. It is not clear why the term “principles of international law” has been preferred instead of the term “international customary law,” as used elsewhere in the Final Constitution and in section 227(2)(d) of the Interim Constitution. While this formulation will probably not make much difference in practice, it is submitted that reference should also have been made to South Africa’s treaty obligations in this regard.
tion are subordinate to the specific provisions of section 35. 101 State sovereignty, a norm of general public international law that is usually applied as an excuse for the toleration of human rights abuses by states, is incorporated into South African municipal law by section 231. It follows that the doctrine of state sovereignty cannot be applied to exclude the application of the norms of international human rights law in terms of section 35(1). The same line of argument could be followed regarding sections 232 and 39(1) of the Final Constitution.

It has already been pointed out that the human rights provisions in both the Interim and Final Constitutions are largely based on universal human rights standards. The individual is enabled in this way to seek protection in terms of international human rights norms. 102 While international human rights law is aimed at the protection of the individual, the individual is not accorded the status of a subject of public international law; consequently, individual claims have to be made in terms of municipal law. 103

Regarding the extent to which individuals can rely directly on the provisions of international agreements, the general rule is that this will depend on a state’s constitutional provisions. 104 It follows that individuals will be able to claim protection before the South African courts in terms of the provisions of international agreements that have been incorporated into South African municipal law once the requirements set for constitutional ratification in the Interim and Final Constitutions have been met. Provisions of international agreements that have been accepted as international human rights law, and have been incorporated into South African law by means of the Bills of Rights of the respective constitutions, will also be available to individuals.

E. THE POSITION OF THE PROVINCES WITH RESPECT TO INTERNATIONAL LAW

Before the implementation of the Interim Constitution, the Republic of South Africa consisted of four provinces, two of which, the Transvaal and Orange Free State, were former Boer republics, while the other two, Natal and the Cape Province, were under British administration before the country’s unification in 1910. These provinces had no original powers and acted as mere administrative agents for the central government. During the negotiations for the Interim Constitution, the nature and scope of provincial powers were among the most contentious issues. The ANC, smelling victory at the polls, wished to centralize power, while the NP and Inkatha Freedom Party (IFP) and some other smaller parties took strong federalist lines. The eventual compromise gave rise to much debate on the level of provincial autonomy guaranteed by the Interim Constitution. During the negotiations for

101. See Botha, supra note 58, at 248.
102. See id. at 248-49 (for the international instruments that form the basis of modern international human rights law).
103. See id.
104. See Erasmus, supra note 1, at 105.
the Final Constitution, this issue was again the subject of intense negotiations and serious differences between the ANC and NP (the IFP did not take part in the negotiations) before a compromise text regarding provincial competence could be found. The Interim Constitution authorized the establishment of nine provinces, an arrangement that was confirmed in the Final Constitution.

Since the establishment of the new provinces, a practice has developed that provincial premiers enter into "international agreements" on behalf of the provinces with foreign states or federal units or regions of such states. These agreements are mainly aimed at attracting investment or development aid.

1. The Interim Constitution

Section 82(1)(i) provides that only the president, as head of state, has the power to negotiate and sign international agreements. This power may be delegated, but only to one or more cabinet ministers.

It is clear from section 231 that only the state, through the organs of central government, is entitled to take up rights and obligations in terms of international law. The power to agree to ratification or accession of international agreements, signed and negotiated in terms of section 82(1)(i), is conferred on Parliament by section 231(2). Section 231(3) provides that such agreements shall bind the Republic and, subject to express provision by Parliament, form part of South African law. Therefore, no provision is made for an entity other than the state as represented by the President to become party to international agreements.

Section 126(1) dealing with the legislative competence of provinces, provides that a provincial legislature has concurrent competence with Parliament to make laws for the province with regard to matters that fall within the functional areas specified in Schedule 6. The functional areas covered by Schedule 6 do not include the conduct of foreign affairs.

2. The Final Constitution

Section 104(1) of the Final Constitution confers on a provincial legislature the power to pass legislation with regard to matters within the functional areas listed in its Schedules 4 (areas of concurrent national and provincial legislative competence) and 5 (areas of exclusive provincial legislative competence), as well as with regard to any matter outside these functional areas that is expressly assigned to the province.

105. One of the reasons for the Constitutional Court's decision to refuse to certify the text of the Final Constitution, and to refer it back to the Constitutional Assembly, was its finding that the text did not meet the requirement set forth in Constitutional Principle 18, which required that the powers allotted to provincial governments in terms of the Interim Constitution should not be substantially diminished in the Final Constitution.

106. S. AFR. INTERIM CONST. § 124. The provinces are: Eastern Cape, Eastern Transvaal (renamed Mpumalanga), Kwazulu-Natal, Northern Cape, Northern Transvaal (renamed Northern Province), North-West, Orange Free State (renamed Free State), Pretoria-Witwatersrand-Vereeniging (renamed Gauteng), and Western Cape.

107. See S. AFR. INTERIM CONST. § 103.
by national legislation. As was the case with the Interim Constitution, no provision is made for the conduct of foreign relations by the provinces. Section 231(1) states unequivocally that the negotiating and signing of all international agreements is the responsibility of the national executive. Section 231(2) requires approval of an international agreement by both the National Assembly and the National Council of Provinces in order for it to bind the Republic, except for certain categories of agreements listed in subsection (3). These categories of international agreements are exempted from the requirement that approval is necessary for the Republic to be bound on the international plane, and the only requirement is that such agreements have to be tabled in the Assembly and Council within a reasonable time.

As previously noted, for international agreements to be incorporated into South African municipal law, enactment by national legislation is required in terms of section 231(4). An exception to this requirement exists in the case of self-executing provisions of agreements that have received parliamentary approval, which are directly incorporated without the need for enabling legislation unless they are inconsistent with the Constitution or a parliamentary act. It follows that, as in the case of the Interim Constitution, only the organs of central government are entitled to enter into international agreements and thereby create rights and obligations for the state. Thus, the provinces are not subjects of international law, and are not able to enter into agreements governed by international law. However, nothing prevents them from entering into contracts with foreign entities regarding matters falling within the ambit of the functional areas listed in the respective schedules. It should be kept in mind that in both the Interim and the Final Constitutions provision is made for the central government to delegate legislative and executive authority to the provinces in areas other than the functional areas listed in the respective schedules.\(^\text{108}\)

As pointed out, section 233 of the Final Constitution expressly provides that all legislation, including legislation by the provinces, has to be interpreted in a way consistent with international law. While no such provision is found in the Interim Constitution, the presumption that parliament did not intend to legislate contrary to international law will still be applicable to provincial legislation interpreted in terms of the Interim Constitution.

F. THE CONSTITUTIONAL COURT

The Constitutional Court is the linchpin of the new constitutional dispensation. It has unprecedented powers as the independent protector of the constitution and the rule of law. The Interim Constitution\(^\text{109}\) provides that it is the court of final instance over all matters relating to the interpretation, protection, and enforcement

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\(^{109}\) S. Afr. Interim Const. § 98(2).
of constitutional provisions, and the Final Constitution\textsuperscript{110} provides that it is the highest court in all constitutional matters.

Save for certain areas where the Constitutional Court has exclusive jurisdiction,\textsuperscript{111} other courts are also empowered to decide on constitutional matters.\textsuperscript{112} However, the Constitutional Court, as the highest authority on constitutional matters, is primarily responsible for the development of constitutional jurisprudence in South Africa. It has the task of interpreting the provisions of the Interim Constitution and the Final Constitution, as well as parliamentary legislation, in order to establish the scope of application of international law in South African municipal law. It must interpret the content and scope of the Bill of Rights provisions in the light of the international human rights instruments on which they are based. It has to set the guidelines for the interpretation of legislation consistent with the rules and norms of international law.

The Constitutional Court consists of a president and ten other judges.\textsuperscript{113} The procedure for appointing judges has been dealt with in some detail elsewhere.\textsuperscript{114} In short, the Interim Constitution provides that the (national) president appoints the president of the Constitutional Court\textsuperscript{115} as well as four judges from among judges serving on the Supreme Court bench, in consultation with the cabinet and the chief justice.\textsuperscript{116} The remaining six judges are appointed by the national president from among a list of recommendations made by the Judicial Services Commission.\textsuperscript{117} Four of these must be drawn from the pool of lawyers (including advocates, attorneys, and legal academicians),\textsuperscript{118} while the remaining two can be experts in constitutional law "by reason of his or her training and experience."\textsuperscript{119} They must be South African citizens\textsuperscript{120} and are appointed for a non-renewable term of seven years.\textsuperscript{121}

\textsuperscript{111} See S. Afr. Interim Const. § 98; Const. of the Rep. of S. Afr. § 167(4).
\textsuperscript{112} It falls outside the scope of this discussion to give a detailed account of the jurisdiction on constitutional matters of courts other than the Constitutional Court, or of the court structure in South Africa. For a discussion of this issue in terms of the Interim Constitution, see Sonnekus, supra note 30, at 670-80; see supra note 49 for a discussion in terms of the Final Constitution.
\textsuperscript{113} Section 167(1) of the Final Constitution makes provision for the position of Deputy President to be filled by one of the other judges.
\textsuperscript{114} See Sonnekus, supra note 30, at 672-74; Steenkamp, supra note 30, at 121-22.
\textsuperscript{115} S. Afr. Interim Const. § 97(2). In terms of section 99(2)(c)(i), such person has to be an advocate, attorney, or university law lecturer.
\textsuperscript{116} See S. Afr. Interim Const. § 99(3).
\textsuperscript{117} See S. Afr. Interim Const. § 99(5)(a).
\textsuperscript{118} See S. Afr. Interim Const. §§ 99(2), 99(4).
\textsuperscript{119} S. Afr. Interim Const. § 99(2)(c)(ii).
\textsuperscript{120} This qualification is probably aimed at securing the development of a "home grown" constitutional jurisprudence that will take note of developments in constitutional jurisprudence in foreign countries in line with the constitutional directions in this regard, but without being unduly influenced. The same qualification is not set for judicial officers of other courts in either the Interim or Final Constitution.
\textsuperscript{121} The present bench of the Constitutional Court was appointed in 1994 and will therefore serve until 2001. In the Final Constitution, the procedures for appointment have been somewhat amended. The (national) president appoints the president and deputy president of the court after consultation.
This procedure of appointment is a marked departure from established practice, whereby judges of the appellate division have been appointed exclusively from the ranks of Supreme Court judges who in turn have been appointed from the ranks of senior advocates. The new procedure has resulted in an infusion of "new blood," notably from the academic world, to the Constitutional Court. 122

G. IMPLICATIONS FOR THE LEGAL PROFESSION

The new constitutional dispensation introduced with the implementation of the Interim Constitution represents a fundamental break with the South African legal tradition. It will have an unprecedented impact on legal practice and legal training in the country. No sphere of law will be left untouched.

Fundamental rights are now part and parcel of the South African legal system. They do not form a separate compartment of the law that remains the domain of only specialist practitioners and academicians.

While customary international law was always in principle considered to be part of South African municipal law, it never had a prominent place in the legal tradition of South Africa while its application has also been curtailed by exceptions

122. The appointment as president of the Constitutional Court of Arthur Chaskalson, a senior advocate specializing in human rights law who has been involved in numerous political trials over the past three decades, has been widely welcomed. See A. Hadland, Chaskalson to Help Breathe Life into the Constitution, Bus. Day, June 8, 1994, at 10; M. Gevisser, Nothing but Praise for Chaskalson, Wkly. Mail & Guardian, June 10, 1994, at 3; M. Morris, Inspirational Lawyer, Sowetan, June 10, 1994, at 9. The other members of the Constitutional Court bench include four Supreme Court judges, a judge of appeal, three law lecturers, and two advocates. Four of the judges, including one of two women appointed, are black. However, the appointment of the eleven judges was not without controversy. Questions were raised about whether the Court could exercise the desired degree of independence because a number of the judges were known to be sympathizers of and advisors to the African National Congress (ANC). See Steven Friedman, Constitutional Court Looks Like an ANC Coup, Bus. Day, Nov. 14, 1994, at 10. Despite these initial misgivings, the court has subsequently proved its credibility and independence and is now enjoying a large measure of public acceptance. See H. Grange, Proving that It's Independent, The Star, Dec. 27, 1995, at 11. However, criticism that political bias has influenced the court has been made about the politically sensitive case, In re: The School Education Bill of 1995 (Gauteng) 1996 (4) BCLR 537 (SA), that dealt with the question of whether a right to education based on a common language, culture, or religion in a publicly-funded school exists in terms of the Interim Constitution. See P.J. Visser, Public Schools Based on a Common Language, Culture or Religion not Constitutionally Sanctioned, 1997 Tydskrif Vir Hedendaagse Romeins-Hollandse Reg (THRHR) 339.
to this general rule. Since the end of World War II, South Africa was increasingly at odds with international sentiment and the developing international human rights law due to implementation of its apartheid policy. As a result of increasing international opposition to this policy in which international fora like the United Nations played an important role, official attitudes towards international law became increasingly suspicious. South Africa's international isolation effected a siege mentality among the ruling white minority, which in turn resulted in a lack of interest in and understanding of international law.

As a result, public international law became a much-neglected branch of law in South Africa. It was rarely the subject of litigation and when it was, the judiciary often displayed a lack of comprehension of the principles of international law. The courts, under the influence of the prevailing doctrine of legal positivism, were also unwilling to apply international human rights principles in order to soften the impact of apartheid legislation.

Public international law has also been relegated to a secondary role in the field of legal training. It was a compulsory subject at only eight of South Africa's twenty-one law faculties, and an optional one at the other thirteen. As an optional subject, it has traditionally not been popular, probably because of a widespread belief that it is not a branch of law of real relevance to legal practice.

The unprecedented status that public international law has gained as a result of the constitutional changes in South Africa presents great challenges and opportunities to the legal fraternity. Judges, practitioners, and academicians will have to ground themselves in the principles of international law, especially international human rights law, and ensure that they keep up to date with developments in these fields in South Africa as well as in foreign jurisdictions.
Access to international sources and foreign material will therefore be essential. However, with a weakening South African currency, acquisition of foreign publications and travel abroad are becoming prohibitively expensive.

In this regard, recent donations by the Canadian and Norwegian governments to the Constitutional Court to develop its library and research facilities are of great value. The Department of Foreign Affairs, through its missions to the United Nations and its Multilateral Documentation Centre, can assist the legal profession in overcoming the problem of gaining access to primary international law sources such as United Nations documents and travaux preparatoires. The availability of sources on the Internet will also make research in international law much easier.

International law, being by definition the most international branch of law, cannot only be studied in the relative isolation of South Africa. Conscious efforts should be made to enable deserving South African students to do postgraduate studies in international law and human rights law at universities abroad. Foreign governments could enhance the development of a human rights culture in South Africa by providing bursaries to South African students for such studies.

On the positive side, interest in international law, and especially international human rights law, has markedly increased in South Africa in recent years. Several human rights institutes, which have been founded as part of law faculties, are funding research, hosting conferences and seminars, and running human rights awareness programmes. New publications like The South African Journal on Human Rights (1985) and South African Public Law (1986) have joined the South African Yearbook of International Law and Comparative and International Law of South Africa. Articles on international law and human rights law are now also appearing regularly in other law journals.

Several universities are now offering LL.M. degrees with a focus on international law, constitutional law, and human rights, and the majority of the universities are now offering international law as a compulsory subject for graduate studies. A welcome development is a new focus on human rights within an African context, with enhanced contact among South African and African universities.


130. To name some examples, the University of Pretoria is offering an LL.M. course in international law, as well as one focusing on constitutional practice and human rights. The University of South Africa is offering LL.M. courses on advanced public law, international economic law, human rights law, and constitutional law. The three universities in the Cape Town region—the University of Stellenbosch, the University of the Western Cape, and the University of Cape Town—have combined efforts and are offering an LL.M. focused on the impact that constitutional developments will have on all fields of law in the country. The University of the Witwatersrand has introduced a course to acquaint legal practitioners with the impact that the introduction of a constitutional system will have on legal practice. See also Hercules Booysen, International Law as a University Course, 1996 S. Afr. Y.B. Int’l L. 147.
as well as members of the legal profession. Being a leading country in Africa, South Africa should take due cognizance of African perspectives on international law and the continent’s problems in this field.

A further welcome development was the recent establishment of a South African branch of the International Law Association, which will host an annual conference on developments in the field of international law.

IV. Concluding Remarks

The introduction of the Interim Constitution in 1994 established a completely new legal order in the country. The principle of parliamentary sovereignty was abandoned in favor of a constitutional system.

Under parliamentary sovereignty, the courts had no choice but to interpret and enforce the laws of parliament, whether such laws were just or not. This system of supremacy of parliament enabled the National Party government, since coming to power in 1948, to systematically restrict the application of human rights norms, undermining the natural law philosophy of the country’s Roman-Dutch legal tradition. The government’s policy of racial discrimination resulted in international isolation of the country, and as a result it was effectively cut off from developments in the fields of international law and human rights law.

The introduction of a constitutional system has effected a clear break with the past. The Bills of Rights of both the Interim and Final Constitutions are virtual catalogues of universally accepted human rights norms and standards. By their conscious efforts, the drafters of the constitutions have assigned a central place to public international law. From being a relegated and neglected branch of law, public international law has become a pillar of the new constitutional system. The relationship between international law and South African municipal law is now more clearly defined than ever before. No field of law will be left untouched by the norms and standards of public international law and international human rights law.

The rightful place that the norms and standards of international law have been accorded in South African law ensure that it will play an important role in upholding and protecting South Africa’s fledgling democracy. Furthermore, its new constitutional system enables South Africa to make an important contribution to the development of international law, and play the leading and respected role in the international community that the country deserves.

131. The annual Southern African Moot Court Competition, held since 1992, has provided an excellent opportunity for contact between South African law students and their counterparts from other African countries. Students and lecturers from more than thirty universities in South Africa, Tanzania, Mozambique, Mauritius, Malawi, Kenya, Swaziland, Botswana, Zambia, and Zimbabwe take part in this event, which concentrates on human rights problems within a Southern African context.