The court refers with approval to the 1994 edition of Dugard's *International law: A South African perspective,* citing four exceptions to the general rule.[113] The court did not consider these exceptions because it was not contended that any of them applied. No reference is made by the court to section 231, reflecting the shift in treaty-making power from the executive to the legislature and amending the position held in the *Pan American Airways* case. As far as incorporation in domestic law is concerned, the court does refer to section 231(4) to illustrate that there is no need for statutory incorporation in the case of self-executing treaty provisions. The court, without referring to any authority, however, concluded (correctly!) that the international agreements relevant in this matter are not self-executing. In denial of South African constitutional changes and the trends regarding the act of state emerging in *Hugo* and *Harksen*,[114] the court concluded that there is no South African authority on the issue, that 'the principles set out above are derived from English law',[115] and continued to refer to English and American authority. This case again illustrates the difficulty of South African courts in coming to terms with the fundamental changes which the Constitution has wrought to South African law and the role of international law within the country.[116]

South Africa National Defence Union v Minister of Defence 1999 4 SA 469 (CC)

In a case challenging the right of members of the South African National Defence Force to engage in labour action, O'Regan J considered international law as directed by section 39 of the Constitution. She states that the meaning and scope of 'worker' as used in section 23 of the Constitution should be considered against the background of conventions and recommendations of the International Labour Organisation (ILO).[117] O'Regan concludes that if the approach of the ILO is adopted 'it would seem to follow that when section 23(2) speaks of 'worker', it should be interpreted to include members of armed forces, even though the relationship they have with the Defence Force is unusual and not identical to an ordinary employment relationship.[118]

Selected judgments reported during 2000

Director of Public Prosecutions: Cape of Good Hope v Bathgate 2000 2 SA 535 (C)

In a judgment by van Zyl J, the Cape Provincial Division of the High Court,

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[113]At 327. See discussion ch 4 par 2.1.
[114]See above.
[115]At 328C.
[116]The case is currently under appeal.
[117]Par 25 at 483. This is in contrast to the disregard of ILO sources in the *Certification* case above.
[118]Par 27 at 483-484.

correctly interpreted section 39 of the Constitution enjoining the court to consider international law and allowing it to consider foreign case law when interpreting the Bill of Rights. Against this background the court referred to the Vienna Convention of 1988, which South Africa has ratified and stated that the court is obliged to have regard to this Convention.[119] No reference is made to the status of the Convention in terms of section 231. This approach is consistent with the court's thinking in the *Makwanyane* case, where the fact that South Africa is a party to a treaty is not regarded as relevant for purposes of section 39, as courts are obliged to consider all international law as an interpretive aid, and where the status of a convention is not considered in terms of section 231. Van Zyl does venture in the direction of section 231 by saying that 'inasmuch as South Africa has obligations in terms of international law, they should not lightly be disregarded'.

Dawood v Minister of Home Affairs; Shabalani v Minister of Home Affairs; Tomas v Minister of Home Affairs 2000 1 SA 997 (C)

The Cape Provincial Division considered various aspects of the position of alien spouses of South African permanent residents. In interpreting the right to marriage and family life, the court turned to international instruments and the status accorded to such instruments by the Constitutional Court. The court referred to a number of international instruments identified by the Constitutional Court in the *Certification* case, to which South Africa is either a party, or has signed pending ratification, which protect the right to marriage and family life namely the ICCPR, ICESCR, CEDAW and the African Charter on Human and People's Rights.[120] On authority of *S v Makwanyane,* permitting the consideration of binding and non-binding law for purposes of interpretation, the court also referred to the recognition of such right by the European Convention for the Protection of Human Rights and Fundamental Freedoms and 'generally accepted principles and rules of current international law'.[121] Van Heerden J, delivering judgment, concluded that:[122]

> From a careful consideration of the abovementioned international law authorities, I am convinced that, if possible, the South African Bill of Rights must be interpreted so as to afford protection to, at the very least, what I would regard as one of the 'core elements' of the 'institution of marriage and family life', namely the right (and duty) of spouses '(t)o live together as spouses in community of life'.

WS v LS 2000 4 SA 104 (C)

The Cape Provincial Division again dealt with an application for return of children allegedly wrongfully removed from their habitual residence, this time in the

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[119] At 546E-F.
[120] For a discussion of this aspect of the *Certification* case, see Olivier n 6 above at 205.
[121] At 1034H-1035-D.
[122] At 1035G.

United Kingdom. In this case the removal took place after the coming into operation of the Hague Convention on Civil Aspects of International Child Abduction Act, therefore the Convention applied. It was argued by the mother, who brought the children from the United Kingdom to South Africa, that article 13 of the Hague Convention applied. Article 13 provides *inter alia,* that the judicial or administrative authority in the requested state is not bound to order the return of a child, if the person who opposes the return establishes that there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The court pointed out that since it could not establish on the papers that the youngest child in particular, might suffer any physical or psychological harm if removed from the mother, the question was whether the proposed return would otherwise place the children in an 'intolerable situation'. The court referred to a number of English cases in interpreting article 13 and held, against the background of the protection granted to children by the South African Bill of Rights and South African law, that the framers of the Act incorporating the Hague Convention into South African law, could not have intended to impose an onus any greater than that ordinarily applicable in civil proceedings. The court dealt with the matter on the basis of intolerability and found that there was a grave risk that the children would face an intolerable situation if removed from their mother.[123]

Fitzpatrick v Minister of Social Welfare and Pensions 2000 3 SA 139

In an application by two British citizens to adopt a South African child, the court was presented with a situation where South African legislation did not comply with the provisions of the Convention on the Rights of the Child (CRC) and the Bill of Rights. Section 18 (4)(f) of the Child Care Act,[124] does not permit inter-country adoptions. This is in conflict with article 21 of the CRC, which provides that:

> States parties shall ... recognise that inter-country adoption may be considered as an alternative means of a child's care if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.

The court was also informed that South Africa was considering accession to the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption, which provides for inter-country adoption. The court ordered that the Child Care Act be amended to allow for inter-country adoptions for children who cannot be placed in a foster or adoptive family, and cannot in any suitable manner be cared for in the child's country of origin.

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[123]The most recent consideration of the Convention was by Court of Appeal in the case of *Smith v Smith* 2001 3 SA 854.
[124]74 of 1983.

Buhrmann v Nkosi 2000 1 SA 1145 (T)

This case illustrates that while the High Court is well aware of the existence of international human rights treaties, it is not always sure of what to do with them The result is that while one often encounters reference to them, they are not used for any analytical or comparative purposes and do not contribute in any way to the decision reached by the court Here the court, in considering the content of the right to freedom of religion and belief in terms of the Extension of Security of Tenure Act,[125] remarked without any reference to sections 39 or 231 of the Constitution that 'brief reference to a few instruments of public international law may be useful ' [126] Ngoepe JP, in a dissenting judgment, proceeded to refer to the relevant provisions of the UDHR, ICCPR, the European Convention on Human Rights and the Namibian Constitution Apart from the statement that it is apparent that the international instruments entitle the holder of the rights to actually manifest them, these instruments do not impact on the judgment in any way

Jooste v Botha 2000 2 SA 215

In similar vein, the court in dealing with the rights of an illegitimate child to love, affection and attention, identified a number of international law instruments on children's rights, but disregard them as it felt they had only vertical application

Seton Co v Silveroak Industries Ltd 2000 2 SA 215 (T)

The court was referred to the New York Convention on the Recognition of Foreign Arbitration Awards to which South Africa is a party and which is incorporated into South African law by the Recognition and Enforcement of Foreign Arbitral Awards Act [127] The respondent contended that the court should refuse the enforcement of the award which was allegedly obtained through fraud, and that it would be contrary to public policy to recognise such an award [128] In dealing with the matter the court stated that the interpretation of the New York Convention by courts of other state parties has persuasive authority in our courts [129] Hartzenberg J proceeded to quote section 233 of the Constitution directing courts to interpret legislation in a manner that is consistent with international law, but went right on to consider British authority on international awards based on illegal contract This *modus operandi* leaves the impression that international law is to be found in foreign domestic legislation and court decisions on international law and is regrettable

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[125]Act 62 of 1997
[126]At 1159
[127]Act 40 of 1977
[128]Section 4(1)(a)(ii) of Act 40 of 1977 provides that a court may refuse to grant an application for an order of court if it finds that enforcement of such an award would be contrary to public policy in the Republic
[129]At 229E-F

in one of the first judgments to consider the application of section 233 of the Constitution.

Schlumberger Logelco Inc v Coflexip SA 2000 3 SA 861 (SCA)[130]

The Supreme Court of Appeal considered the question of whether a South African patent was capable of being infringed beyond territorial waters but within the exclusive economic zone. The court resorted to both international law writers and international conventions and accepted the authority of international law without, however, regarding it necessary to resort to the enabling provisions of the Constitution.

Government of the RSA v Grootboom 2000 1 SA 46 (CC)

The right of children to shelter was here before the Constitutional Court. Yacoob J quotes Chaskalson P's by now well known *dictum* from *Makwanyane* directing courts to consider both binding and non-binding international law under section 39.[131] Yacoob, however, adds to this statement the qualification that was lacking in *Makwanyane*:[132]

> The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa [ss 231-5], it will be directly applicable.

Yacoob's *dictum* offers a ray of hope for a turnaround in the neglect international law has suffered at the hands of the Constitutional Court since the *Makwanyane* case. Not only does Yacoob J acknowledge the varying weight to be attached to different sources of non-binding law, but he also recognises that the value of international law is not in all cases limited to an interpretive aid. Sources of international law binding on South Africa do form an integral part of South African law, and must be applied as such.

The judge proceeds to identify applicable provisions of the ICESCR and analyse the obligations of state parties thereto. He concludes that the difference between the relevant provisions of the Covenant and the Constitution are significant in determining the extent to which the provisions of the ICESCR may be a guide to an interpretation of the Constitution.[133] Comments of the committee responsible for monitoring implementation of the ICESCR by state

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[130] For a discussion of this case see Vrancken 'The application of the Patents Act 1978 in the South African exclusive economic zone (2002) 27 *SAYIL* 286 ff.

[131] Par 26 at 63.

[132] *Ibid.*

[133] The ICESCR provides for a *right to adequate housing* while the Constitution provides for the *right of access to adequate housing*.The ICESCR obliges states parties to take *appropriate steps* which must include legislation, while the Constitution obliges the South African state to take *reasonable* legislative and other measures. Par 28 at 64.

parties indicating that state parties are bound to fulfill a minimum core obligation by ensuring the satisfaction of a minimum essential level of socio-economic rights, including the right to housing, were considered. State parties dropping below the minimum core content of a right are not in compliance with their international law obligations. Yacoob concluded that sufficient information was lacking to determine what would comprise the minimum core obligation in the context of the South African Constitution.[134]

Minister of Welfare and Population Development v Fitzpatrick 2000 3 SA 422 (CC)

The Constitutional Court was approached by the minister for confirmation of a High Court order. The court held that the provisions of the Child Care Act proscribing the adoption of a South African child by a non-citizen, do not give paramountcy to the best interests of children and are therefore inconsistent with the provisions of section 28(2) of the South African Constitution. The provisions of the Child Care Act are therefore invalid. In commenting on 'the best interest of the child', the court stated that the concept has never been given an exhaustive content in either South African law or in comparative international or foreign law. It is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interest of a particular child.[135] The court refers to both the CRC and the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, in reaching its conclusion.

Harksen v President of the Republic of South Africa 2000 5 BCLR 478 (CC)[136]

In an unexceptionable, but also unexceptional judgment, the Constitutional Court was pulled into the Harksen-net. Of international law-interest is the court's consideration of the nature of extradition as a process and its interpretation of section 231 of the Constitution; both of which were decided along predictable lines given the earlier Harksen cases. The court also had an opportunity to analyse section 232 of the Constitution (customary international law – here in the context of the Vienna Convention on the Law of Treaties) but did so only superficially.

Abel v Minister of Justice 2000 4 All SA 63[137]

In yet another extradition case, the court was required, *inter alia*, to determine the meaning of 'under trial' occurring in the SA/USA extradition treaty in the

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[134]Par 33 at 66.

[135]Par 18 at 428-429

[136]For a full discussion of this case see Southwood 'Constitutionality of the extradition process' (2000) 25 *SAYIL* 260 ff and Botha n 92 above at 295 ff

[137]For a full discussion of this case see Botha 'Extradition on the basis of a treaty: Section 5 of the Extradition Act 67 of 1962 considered' (2000) 25 *SAYIL* 245 ff

context of municipal law. The question therefore resolves itself into an assessment of the interplay between South African and international law in the context of interpretation and provides the most detailed exposition of this aspect up to this point. This is also one of the few cases to specifically mention section 231(5) – basically a succession provision – of the Constitution.[138]

Selected judgments reported during 2001

Lombo v The African National Congress Durban & Coast Local Division case 9006/93 finalised on 20 April 2001[139]

A South African who left South Africa for Botswana to join the ANC armed wing in the liberation struggle against the then South African government was required to remain in 'custody' in Botswana while his credentials were vetted to ensure that he was not a South African agent infiltrating the movement. This detention in various detention camps outside of South Africa, lasted some five years before he was eventually repatriated after intervention from the International Committee of the Red Cross. He instituted action against the ANC for unlawful detention. Although the case raised a number of highly pertinent issues of international law – status of liberation movements, the internationalisation of non-sovereign conflicts, prisoner-of-war status, the position of governments 'hosting' liberation movements, conditions of detention, and torture by detaining forces, to name but a few – these were largely ignored by the court which appears to have decided the case on principles of conflict of laws and purely municipal law considerations. '[T]his judgment ... missed the opportunity to decide some fundamental issues concerning the application of certain basic international humanitarian law principles to wars of national liberation',[140] again illustrating the basic unease with which courts approach international law.

Portion 20 of Plot 15 Athol (Pty) LTD v Rodrigues 2001 1 SA 1285 (W)[141]

Where international agreements are incorporated into South African legislation, courts have no choice but to consider international law when applying the legislation. Here the court had to decide whether the Angolan ambassador to South Africa was entitled to diplomatic immunity with regard to the purchase of immovable property. The applicant company approached the

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[138]The case also considers section 5 of the Extradition Act – extradition based on a treaty – but as the arguments in this instance are basically the same as those for section 3(2) which have been canvassed fully in the various Harksen cases, they are not repeated here.

[139]For a discussion of this case see M Cowling 'International humanitarian law and the armed struggle in South Africa' (2001) 26 *SAYIL* 221.

[140]*Id* at 227.

[141]For a discussion of this case see Labuschagne 'Diplomatic immunity: A jurisdictional or substantive defence?' (2002) 27 *SAYIL* 291 ff.

court for an order evicting the Angolan ambassador (respondent) from immovable property owned by it after he failed to comply with his obligations under a contract of sale he had concluded with a trust in terms of which he had purchased the shareholders' equity in the applicant from the trust for the sum of R6,6 million. After the sheriff refused to serve the papers on the respondent, the applicant effected service in terms of section 13 of the Foreign States Immunities Act.[142] The respondent claimed immunity from civil jurisdiction in terms of the Diplomatic Immunities and Privileges Act.[143] The applicant contended that no immunity availed the respondent on the strength of section 6 of the Act and article 31(1)(a) of the Vienna Convention on Diplomatic Relations, which provided that immunity will not extend to a real action relating to private immovable property not held on behalf of the sending state.

Hussain J, who delivered judgment, showed a clear understanding of the international law at hand and its interplay with South African law. He traced the background and content of the Vienna Conventions on Diplomatic and Consular Relations and referred to work of the International Law Commission and international law writers.[144] He pointed out that the Diplomatic Immunities and Privileges Act, adopted to give effect to South Africa's obligations under the Vienna Conventions, does not incorporate the conventions *in toto*, by way of schedule, although section 2 (1) of the Act suggests that the conventions in their entirety form part of South African law. The court concluded on the facts that the matter had clearly been a private one between the respondent, the seller and the applicant, and that the respondent had not succeeded in rebutting the exclusion of immunity in section 6(1)(a) of the Act and article 31(1)(a) of the Convention.

Sonderup v Tondelli 2001 1 SA 1171 (CC)[145]

The Hague Convention on Civil Aspects of International Child Abduction was before the Constitutional Court in a case concerning the wrongful removal of a four year old girl by her mother from Canada to South Africa. The South-Eastern Cape High Court ordered the return of the child to Canada in terms of the Hague Convention on Civil Aspects of International Child Abduction Act. The mother appealed directly to the Constitutional Court on the ground that such an order would be against the child's best interests and therefore in conflict with section 28(2) of the Constitution. The court conceded that the best interests of the child in the determination of custody matters as required by the Convention might in certain circumstances require that the child's short term best interests be overridden in favour of the long term best interests in other juridical matters.

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[142] 87 of 1981.
[143] 74 of 1989
[144] At 1292-1293
[145] For a discussion of this case see JMT Labuschagne 'Application of the Hague Convention on Civil Aspects of International Child Abduction in South Africa' (2000) 25 *SAYIL* 255.

However, given the objectives of the Convention, the inconsistency was justifiable under section 36 of the Constitution. The Convention was classified as 'basically jurisdictional',[146] and aimed at encouraging comity between states which in turn ties in with the values of an open and democratic society.[147] Furthermore, in applying the Convention provisions local circumstances should guide the court in its interpretation.[148]

Kolbatschenko v King NO 2001 2 SACR 323 (C)[149]

The court was again called upon to decide whether the prerogative power to conduct foreign affairs has survived the Constitution. Whether or not to 'interfere' with the prerogative powers was held to depend on the 'nature and subject-matter of the decision or action concerned'. However, the courts will adopt a 'hands-off' approach only in 'highly exceptional' cases, and where the foreign affairs prerogative is concerned, only in cases of a 'high executive nature'.[150] The relationship involved must be between two states 'as states' and must be so political that the courts have no judicial or manageable standards by which to judge. In the instant case, which involved the justiciability of assistance in the investigation of crime between South Africa and Lichtenstein, the court found the matter justiciable holding that Lichtenstein had merely acted as a 'conduit' for the South African investigation.

Mohamed v President of the Republic of South Africa 2001 3 SA 893 (CC)[151]

The issue of the death penalty was again considered by the Constitutional Court when Mohamed, the first appellant, was handed over to the United States by the South African authorities to stand trial on charges relating to the 1998 bombing of the United States embassy in Tanzania. Mohamed sought leave to appeal against the judgment of a Provincial Division in which he was denied an order declaring that his arrest, detention, interrogation and handing over to United States agents was unlawful and unconstitutional, and that the respondents had breached his constitutional rights by not obtaining an assurance from the United States government that the death penalty would not be imposed or carried out in the event of his conviction. The government, on the other hand, alleged that Mohamed was an illegal immigrant whom the immigration authorities had

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[146]At par 30.
[147]At par 31.
[148]In South Africa, the prevalence of domestic violence against women was cited as a circumstance to be considered in the application of art 13 of the Convention.
[149]For a discussion of this case see Botha 'The post-Constitution " act of state": The need for further theoretical refinement' (2002) 27 *SAYIL* 295 ff.
[150]At 341A.
[151]For a full discussion of this case see Botha 'Deportation, extradition and the role of the state' (2001) 26 *SAYIL* 227 ff. In this discussion references are to the case as reported in 2001 7 BCLR 685 (CC).

properly decided to deport in terms of the provisions of the Immigration Control Act 96 of 1991. In its judgment, the court pointed out that there was a clear distinction between extradition and deportation. In terms of the Immigration Control Act, the destination for deportation is determined by regulation 23, promulgated under section 56 of the Act, leaving no discretion to the state. The court held that the South African authorities had not been empowered to deport Mohamed to the United States. Regarding the permissibility of the death penalty, the court endorsed the decision reached in the *Makwanyane* case and the international trend against the death penalty, through an extended examination of recent international authority notably that reflected in the documentation and jurisprudence of the international criminal tribunals established in Rwanda and Yugoslavia to try crimes against humanity.[152] The court held that the obligation to secure an assurance that the death penalty will not be imposed or carried out on a person whose removal to another country was caused by the government, cannot depend on whether the removal is by extradition or deportation: such obligation depends on the facts of the particular case and the provisions of the Constitution, not on the provisions of the empowering legislation or extradition treaty. By not seeking assurances that Mohamed would not be sentenced to death, the South African government acted contrary to the constitutional provisions protecting the right to life. The court, however, went further and held that even for South Africa to cooperate in the removal of an individual to a country with which he has no connection other than the possibility of the death sentence being imposed, is 'contrary to the values of our Constitution'.[153]

One of the most interesting aspects of the judgment is the court's interpretation of what it could do under the circumstances. Under siege from calls that the separation of powers would be violated and that the executive should not be forced to take orders from the judiciary, the court refused to be silenced and ordered that its judgment be brought to the urgent attention of the United States' court trying the accused. Although it is impossible to determine what effect this notification had, Mohamed was not sentenced to death.[154]

Carmichele v Minister of Safety and Security 2001 10 BCLR 995 (CC)[155]

As this case dealt with delictual liability on the part of the South African police, it represented new ground in international law terms in that the court was engaged with section 39(2) of the Constitution.[156] The court pointed out

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[152]*Id* at 232.

[153]At par 58. See to Botha n 151 above at 234-5.

[154]For an assessment of the international impact of this judgment on subsequent handings-over in such circumstances, see Botha *id* at 238-9.

[155]For a full discussion of the case see Botha 'The role of international law in the development of South African common law' (2001) 10 BCLR 995 (CC)

[156]Most of the cases discussed thus far have dealt with section 39(1), and most notably 39(1)(b), the duty to consider international law in the interpretation of the Bill of Rights Section 39(2)

that it is under a duty to develop the common law where this law does not promote the spirit etcetera of the bill of rights. It has no discretion in the matter and must raise it of its own accord where it perceives such a deficiency.[157] Having determined that the common law was out of step with the spirit of the Constitution, what is truly remarkable in this judgment – and all the more so when seen in the light of the statements in *Fose v Minister of Safety and Security*[158] – is that the court's determination is based virtually exclusively on international law sources, including soft law and international jurisprudence. It therefore clearly establishes that the interpretation of South African common law is to be informed by international law – a view unthinkable before the adoption of the constitutions.

Minister of Justice v Additional Magistrate Cape Town 2001 2 SACR 49 (C)[159]

Yet another episode in the 'Harksen saga',[160] this case comes as a review of a magistrate's (very strange) decision setting Harksen free for want of evidence justifying his committal. The decision is of theoretical interest in that it clarifies, among other issues, the nature of the extradition hearing. Its interest, however, lies principally in the municipal sphere although, of course, international law is inevitably involved.[161]

Selected judgments reported during 2002

MV Mbashi: Transnet Ltd v MV Mbashi 2002 3 SA 217 (D&C)[162]

There have not been many South African cases dealing with the Wreck and Salvage Act[163] which was enacted to give South African effect to the 1989 International Convention on Salvage. Notable in this Act is section 5 which specifically authorises South African courts to use 'the preparatory texts to the Convention, decisions of foreign courts and any publication' in the interpretation process. In particular, the court provided a detailed examination of articles 12 and 13 of the Convention.

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d most notably 39(1)(b), of Rights. Section 39(2)

provides 'When interpreting any legislation, *and when developing the common law* or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights' (emphasis added).

[157] At par 39 of the judgment.

[158] 1996 2 BCLR 232 (W), see in particular the text to n 83 above.

[159] For a discussion of the case see Botha 'Further questions and answers on extradition in the South African context' (2002) 27 *SAYIL* 311.

[160] For a general overview of the Harksen cases see Botha n 93 above.

[161] For the sequel to this case which is also largely of municipal interest, see *Harksen v Director of Public Prosecutions Cape* 2002 2 SA 563 (C) discussed in Botha n 159 above at 315-316.

[162] For further discussion of this case see Botha 'Air and Sea Law: Two recent decisions' (2003) 28 *SAYIL* 339 at 343 ff.

[163] Act 94 of 1996 in operation since 1 February 1997.

De Beers Marine (Pty) Ltd v Commissioner, South African Revenue Services 2002 5 SA 136 (SCA)[164]

In a case involving liability for customs duties for fuel bought in South Africa but delivered at sea beyond the Republic's territorial waters, it was argued that the fuel had been exported and therefore attracted no duty. The court found that export was the equivalent of foreign consumption entailing two elements: physical removal from the Republic, and consumption not in the Republic. As the vessels concerned were South African, they could not be regarded as 'foreign-going' and the appeal was dismissed.[165]

Geuking v President of the Republic of South Africa 2002 1 SA 204 (C)[166]

Again involving extradition, and again Germany – but not Harksen – the case re-iterates and brings together a number of aspects of extradition decided most notably in the Harksen decisions.. The interplay between international and municipal law in the extradition process is examined, the nature of the process being governed by the specific phase it is at. In considering the 'second international leg' of the process – the decision by the Minister of Justice to extradite – the court stated:

> Insofar as extradition works on the international plane and insofar as the relations between states are at play, extradition is a matter of foreign policy which falls within the competence of the Executive ... . Thus the requested state may for reasons of foreign policy wholly unrelated to the merits of the request in question refuse to entertain a request for extradition from the requesting state.[167]

The court also examined the basis of extradition in the absence of a treaty, which was found to lie in 'one of the most basic tenets of international law, namely comity',[168] and provided a thoughtful exposition of section 3(2) of the Extradition Act.

Selected judgments reported during 2003

Chief Family Advocate v G 2003 2 SA 599 (W)[169]

The Witwatersrand Local Division of the High Court took its turn in considering the Hague Convention on Civil Aspects of International Child Abduction in this case. The interest in this judgment lies, not so much in the

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[164]See Vrancken 'How foreign is the EEZ?' (2002) 27 *SAYIL* 305 ff.

[165]For a discussion of the implications for South African marine law see Vrancken n 164 above at 307-310.

[166]For a discussion of this case see Botha n 159 above at 317 ff.

[167]At 318 of the judgment. For a discussion of the problems arising from this statement as a general proposition see Botha n 159 above at 318.

[168]At 214B of the judgment.

[169]For a discussion of the case see Botha 'Interpreting the International Child Abduction Act 72 of 1996' (2003) 27 *SAYIL* 330 ff.

content, as in the court's approach to the interplay between municipal and international law within the court's interpretive function. The court acknowledged that the Child Abduction Convention is intended to have cross-country application. Its provisions can and must therefore be used, where necessary, to extend a member state's domestic law. In the case of a conflict between municipal legislation and a treaty to which the country is a party, the balance will tilt towards the international provision – municipal law will thus be 'amended' by international law and its interpretation.

Geuking v President of the Republic of South Africa 2003 3 SA 34 (CC)[170]

In an appeal from the Cape High Court decision[171] yet more nuances to section 3(2) of the Extradition Act 67 of 1962 were unravelled. Of interest in the present case is whether in consenting to the individual whose extradition is sought, being classified as a 'person liable to be extradited' where no treaty exists between the states involved, the President is acting as head of state or head of the executive? The court typified the President's decision as a foreign policy decision, but one which may be limited. These limitations were 'abuse of power' by the President, or action which was 'contrary to the provisions of the Constitution'[172] – a further development in the evolving status of the 'act of state' doctrine in South African law. Section 10(2) of the Extradition Act was tested against sections 34, 12(1), and 165 of the Constitution.[173]

Assessing the future

As pointed out in the Introduction and illustrated by the selection of cases above, international law has featured in a wide variety of scenarios during the first ten years of South Africa's democracy. In analysis, however, the most frequent demand for international law has, predictably, been within the context of sections 35 and 39 of the 1993 and 1996 Constitutions respectively. In other words, international law as an interpretive tool in the development of a South African human rights culture.

Within this context, the first case seriously to consider the question, *Makwanyane*, remains the most comprehensive and certainly the most cited authority, and rightly so. However, commenting on *Makwanyane* some years ago, Olivier observed[174] that, from a theoretical point of view, Chaskalson's view on the interaction between the international law to be considered under section 35 (now

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[170]For a discussion of the case see Botha 'Extradition again before the Constitutional Court' (2003) 28 *SAYIL* 318.
[171]See n 166 above.
[172]At par 27E.
[173]For a discussion of these aspects see Botha n 179 above at 325, 327 and 329 respectively. S 92 of the Extradition Act is also considered in the light of section 35(3) of the Constitution – *id* at 327.
[174]Note 6 above at 191-195.

s 39) and the role of the 'traditional' sources governed by section 231 of the 1993 Constitution and now sections 231 and 232 of the 1996 Constitution – namely incorporated or self-executing treaties and international customary law – is not particularly clear. Although he acknowledges the fact international agreements become binding on South Africa after ratification or accession in terms of article 231, he appears to classify them merely as a framework for the interpretation of the bill of rights under section 35/39. This is in contrast with the intention of the drafters that treaties to which South Africa is a party (and since 1996 self-executing treaties) and binding custom, should form part of the law of the land in so far as they are not in conflict with the Constitution. It would be equally problematic to claim that courts must consider South African legislation in order to interpret the bill of rights. Surely it is necessary to differentiate on a theoretical basis between binding and non-binding international law for purposes of the interpretation of chapter 3/2. Binding law is binding and non-binding is not binding but may be used for other purposes, such as an interpretative aid. It is suggested that section 35/39 should refer only to non-binding international law. International law binding on South Africa – in the form of incorporated treaties, self-executing treaties and customary international law – should be treated in terms of the provisions of section 231(1993) and 231 and 232 (1996 Constitution). Binding international law should, in other words, be treated no differently from any of the other non-constitutional components of South African law such as parliamentary legislation and common law. Although the South African international law discourse benefitted from the international law focus of Chaskalson's judgment, the judgment is not as progressive as initially appears and again underscores that international law is still not seen as an integral part of South African law. It would have been welcome had the judge acknowledged the broader function of international law.

Although this criticism has been addressed, or touched upon, in subsequent cases,[175] in the vast majority of cases, Chaskalson's basic statement with regard to section 39(1) that the courts must have regard to both binding and non-binding international law, together with the context within which it was made, is taken over verbatim with no further qualification or examination. This not only perpetuates the negation of the role of international law in terms of articles 231 and 232, but encourages a repetition of the same basic sources (the UDHR, the ICCPR, the European Convention, and, on occasion, the African Charter). It is feared that the '*Makwanyane mantra*', welcome though it was, and remains, for the use of international law in our municipal law, may encourage a static and formulaic approach. International law is, after all, a dynamic and developing force and in order to meet the precepts of the Constitution, the latest developments on the international plane must be reckoned with.

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[175] See, *eg* the progressive judgment by Yacoob J in *Government of the RSA v Grootboom* 2000 1 SA 46 (CC) above

The other leg of the interpretation equation – section 233 – has fared less well. Potentially one of the most powerful 'international tools' in the Constitution, virtually no reference has been made to the section. It is hoped that its full potential will be recognised and utilised both by the courts in reaching their decisions and by the practitioners in bringing their cases to court.

The second role of international law in terms of the Constitution, is the susbtantive application of treaties in terms of section 231 and of customary international law in terms of section 232. Surprisingly, outside of extradition, section 231 has received little attention. However, a number of troublesome aspects of the section have been settled in the *Harksen* and other extradition cases. One still, however, awaits a full exposition of the section. Potentially the most problematic provision is the rider to section 231(4) – the incorporation clause – which introduces the concept of self execution into South African law within the treaty context. There is considerable difference of opinion within South Africa as to the usefulness or practicality of the possibility of self-execution.[176]

Customary international law in section 232 (and s 231 of the 1993 Constitution) too, has received surprisingly little attention – as have the sources under article 38(1)(c) and (d) of the Statute of the ICJ. Again it is the extradition cases, and *Harksen* in particular, where some consideration has been given to customary international law. On the purely domestic level, the courts have not expanded on the difference, if any, between the customary provision in section 231 of the 1993 Constitution and that in section 232 of the 1996 Constitution.[177]

Another aspect of the courts' approach identified above, is where they are working with international conventions which have been incorporated into our law – issues such as immunity, sea and air law, child abduction. The difference between the smooth integration of international law approaches, concepts and decisions into the South African legislative context in these issues, and the superficial recourse to international law in the context of section 35/39 is notable. Could it be that the courts are more secure when dealing with specific South African legislation?

[176]See, for example, Olivier 'Exploring the doctrine of self-execution as enforcement mechanism of international obligations' (2002) 27 *SAYIL* 99 who favours the development; Botha "Treaty making in South Africa: A reassessment' (2000) 25 *SAYIL* 91 and CJR Dugard *International law: A South African perspective* (2000) 58 who are critical of the development; and JD Van der Vyver 'Universal jurisdiction in international criminal law' (1999) 24 *SAYIL* 197 who regards it as nonsencical.

[177]Briefly, the 1993 Constitution provides for customary international law *binding on the Republic*, (my emphasis), while the 1996 Constitution omits the italicised phrase so, to my mind, opening the ambit considerably – particularly in the light of South Africa's pre-Constitution approach to international law and customary international law in particular.

Lastly, although its status as part of international law is not unchallenged, one must commend the courts on their progressive approach to the so-called 'act of state' doctrine. With one notable 'slip' in the *Swissborough* case, even the foreign affairs prerogative is no longer non-justiciable – although one could wish for further clarification in this regard.

In summary therefore, a researcher skimming the South African Law Reports pre-1993, and then paging through the same publication during the past ten years, could not but be struck by the phenomenal growth in references to and use of international law by the South African courts. There is no reason to believe that this trend will be reversed, in fact it will in all likelihood grow. Where it was once largely ignored, or at least denigrated, international law is now a clear strand in the South African legal fabric. Theoreticists may call for closer definition of certain concepts, or for a more nuanced and sophisticated application of international principles – and this is supported – but all must acknowledge that over the past ten years South African society has been greatly enriched by the courts' use of international law principles and precepts. But more than this, the developments within South Africa hold the potential – in a comparative context – to be of benefit to international jurisprudence on the global level.