The “Friendly but Cautious” Reception of International Law in the Jurisprudence of the South African Constitutional Court: Some Critical Remarks

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Abstract

As the title indicates, the purpose of this Article is to reflect on the manner in which the South African Constitutional Court has dealt with the application of international law during its first decade. It attempts to add a critical note to the overwhelmingly positive attention the Court has thus far received internationally. There is no doubt that the inspiration that the Court has thus far drawn from international (human rights) law is impressive, and in many ways exemplary. Nonetheless, there is still room for improvement, as the subsequent analysis reveals. In analyzing the Court’s methodology, this article does not attempt to cover all the jurisprudence of the Court. Instead, it focuses on a number of selected decisions in different areas of law, which can be regarded as representative of the manner in which the Court has treated international law over the past decade.
ARTICLES

THE "FRIENDLY BUT CAUTIOUS" RECEPTION OF INTERNATIONAL LAW IN THE JURISPRUDENCE OF THE SOUTH AFRICAN CONSTITUTIONAL COURT: SOME CRITICAL REMARKS*

Erika de Wet**

INTRODUCTION

On April 27, 1994, a new day dawned in the constitutional history of South Africa with the enactment of the interim Constitution.¹ Unlike the earlier Constitutions of 1910, 1961, and 1983, the interim Constitution expressly recognized international law and the role it had to play in municipal law.² The provisions in the interim Constitution dealing specifically with

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international law covered the status of customary international law in South African domestic law, the signature and ratification of international agreements and their application in domestic law, and the interpretive role of international law. The final Constitution of 1996 envisaged only minor changes with respect to these provisions.

Since the time the Constitutional Court began hearing cases in early 1995, most of the decisions featuring international law have discussed human rights law. Less frequently, the Court has considered other areas of international law, including international humanitarian law, the law of extradition, and international private law. The strong emphasis on international human rights law is due to the fact that both the interim and final Constitutions contain a Bill of Rights that guarantees rights also protected by international human rights treaties. Whereas the interim Constitution was confined largely to civil and political rights, the final Constitution extends its protection to encompass not only civil and political rights but also economic and social rights.

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4. Id. ch. VI, § 82(1)(i); see also id. ch. XV, §§ 231(2), 231(3).
5. Id. ch. III, § 35(1). See also id. ch. VIII, § 116(2) (concerning the Human Rights Commission); id. ch. XIV, §§ 227(2)(d), 227(2)(e) (concerning the National Defence Force); see also Keightly, supra note 1, at 406.
8. See Botha, Role of International Law, supra note 7, at 255.
that the Bills of Rights complied with international norms,\textsuperscript{11} in particular the International Covenant on Civil and Political Rights ("ICCPR"),\textsuperscript{12} and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").\textsuperscript{13} Although the rights are formulated in simpler language than that found in most human rights conventions, they are broadly modeled on their international counterparts.\textsuperscript{14} These similarities facilitate reliance on international human rights standards when interpreting the Bill of Rights.

The strong presence of international human rights law in the interim and final Constitutions further reflects the historical context in which the South African Constitution was adopted, particularly South Africa's indebtedness to international law.\textsuperscript{15} Although the very creation of the country as a free, non-racial, democratic society was a consequence of internal struggles,\textsuperscript{16} this was motivated very much by universal notions of fundamental rights and democracy and by the huge support from the international community and international civil society.\textsuperscript{17} The International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 ("Apartheid Convention")\textsuperscript{18} was never an important document as an instrument of international accountability, but from a moral and symbolic point of view, it was exceptionally important.\textsuperscript{19} Together with the Universal Dec-

\textsuperscript{11} Dugard, \textit{South African Constitution}, supra note 1, at 84.
\textsuperscript{15} Albie Sachs, Lecture on the Reception of International Law in the Jurisprudence of the Constitutional Court of South Africa, Amsterdam (Mar. 7, 2003) [hereinafter Sachs lecture].
\textsuperscript{16} See Langa, \textit{supra} note 7, at 1259.
\textsuperscript{17} See Sachs lecture, \textit{supra} note 15.
\textsuperscript{19} See Dugard, \textit{International Human Rights}, supra note 1, at 181 ("No prosecutions have been instituted under [the International Convention on the Suppression and Punishment of the Crime of Apartheid]. In practice its effect has therefore been entirely symbolic.").
laration of Human Rights of 1948 ("UDHR"),\textsuperscript{20} it was always a standard to which those involved in the struggle aspired and in this fashion it played an important role in the creation of a country called South Africa.\textsuperscript{21}

It is fair to say that the national and international elements of the struggle against apartheid shared the notion of a common set of principles that were recognized by the international community and which were defied by apartheid, both by its very nature and in the methods it used for its perpetuation.\textsuperscript{22} International law was seen as the progressive "other" of Apartheid: the adequate, civilized, and principled response to all the illegalities and indignities that resulted from systematic racial discrimination.\textsuperscript{23} This historical perspective significantly affected the position of international law in the current South African constitutional order.\textsuperscript{24}

As indicated above, an examination of the text of the Bill of Rights reflects a number of provisions that show the significance of international law for the Constitution.\textsuperscript{25} Some of them deal very directly with the relationship between what one might call the legal regime of international law and the constitutional legal regime of South Africa as a sovereign State.\textsuperscript{26} These direct references include the clauses regulating the position of treaties, which only become part of South African law once they are ratiified and incorporated by means of legislation.\textsuperscript{27} Self-executing treaties pose an exception in this regard, as they become auto-

\textsuperscript{21} See Sachs lecture, supra note 15.
\textsuperscript{22} See id.
\textsuperscript{24} Sachs lecture, supra note 15.
\textsuperscript{25} See supra notes 9-14 and accompanying text.
\textsuperscript{26} See Sachs lecture, supra note 15.
matically operational once ratified. Customary international law is automatically part of South African law, unless it is incompatible with the Constitution or national legislation.

When the clauses referring to the status of treaty and custom in national law are read literally, they presuppose the possibility of a sharp conflict between the international and national legal orders if the legislature did not legislate to make treaties operative or the legislator legislated to overcome the terms of customary international law. That possibility is permitted by the current constitutional order. However, as will be illustrated below, this has not yet resulted in a head-on collision between the two legal regimes in practice and is unlikely to do so in the future. This is due to the mediating role of the two so-called interpretation clauses contained in the interim and final Constitutions, which have turned out to be of great practical importance.

The first of these provisions expressly states that in interpreting legislation, an interpretation consistent with international law is to be preferred. This gives the Court considerable scope in reducing a possible conflict between legislation and international law, whether it is customary international law or treaty law. It presupposes a mediating role rather than a decisional role based on defining limits. It does not depart from the premise that the two legal orders pull in different directions, as a result of which international law will be overruled by national law or vice versa. Instead, it presupposes that the way the Court looks at national law will be influenced by South Africa's international obligations. If it is possible to interpret the national obligations in a manner that is consistent with interna-

30. See Sachs lecture, supra note 15.
32. Sachs lecture, supra note 15.
34. See Sachs lecture, supra note 15.
tional law, then it will do so. It is only if the language of the Constitution or domestic legislation is so powerful as to be im-
pervious to any interpretation compatible with international law that the Court would have to opt for such an extreme interpre-
tation.\textsuperscript{35}

Second, the courts are required to pay regard to interna-
tional law when applying the Bill of Rights.\textsuperscript{36} In addition, when interpreting the Bill of Rights, the Court must promote the val-
ues of an open and democratic society based on human dignity,
equality and freedom.\textsuperscript{37} This has resulted in the Court regularly resorting to international instruments such as the UDHR, the
ICCPR, and the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 ("European Conven-
tion").\textsuperscript{38} The Court generally resorts to these instruments to re-
inforce its own position on a matter, as these instruments consti-
tute a source of profound values that are compatible with the
whole underlying core of the South African constitutional or-
der.\textsuperscript{39}

However, a closer look at the Court's practice reveals that its
methodology can be criticized in some respects. First, there are
questions about the Court's treatment of non-binding human
rights instruments, also known as "soft law." These questions
pertain to the inconsistent (less than thorough) manner in

\textsuperscript{35} See \textit{id.}

\textsuperscript{36} See \textit{S. Afr. Interim Const.} (Interim Constitution of the Republic of South Af-
rica Act 200, 1993), ch. III, § 35(1); \textit{S. Afr. Const.} (Constitution of the Republic of

\textsuperscript{37} See \textit{S. Afr. Const.} (Constitution of the Republic of South Africa Act 108,
1996), ch. XI, § 39(1). It is also worth noting that section 198 of the final Constitution
lists as one of its "governing principles" that national security must be pursued in com-
pliance with the law, including international law. \textit{See id.} ch. XI, § 198. Moreover, the
security services must act and must teach and require their members to act in ac-
cordance with the Constitution and the law, including customary international law and
international agreements binding on the Republic. \textit{See id.} ch. XI, § 199(5). The inter-
national law rule against the defense of superior orders is recognized in section 199(6),
which declares that no member of any security service may obey a manifestly illegal
order. \textit{Id.} ch. XI, § 199(6). Non-South African citizens detained in consequence of an
international armed conflict are to be treated in accordance with the standards of bind-
ing international law. The \textit{jus ad bellum} also receives constitutional recognition in sec-
tion 200(2), which provides that the defense force has to defend the republic in ac-
cordance with the Constitution and the principles of international law regulating the use
of force. \textit{See id.} ch. XI, § 200(2).

\textsuperscript{38} European Convention on Human Rights, Nov. 4, 1950, 312 U.N.T.S. 221.

\textsuperscript{39} See Sachs lecture, \textit{supra} note 15.
which the Court sometimes treats the non-binding human rights instruments, as well as the de facto hierarchy it attaches to non-binding human rights instruments at the (potential) expense of binding human rights instruments. In addition, the Court seems reluctant to consider international law norms other than those stemming from international human rights instruments as a guideline for interpretation in any extensive fashion. Because the constitutional obligation to interpret the Bill of Rights (and legislation in general) in accordance with international law implies the taking into consideration of all relevant international norms, the question arises why the Court would be so cautious when resorting to other international law norms as guidelines for interpretation.

As the title indicates, the purpose of this article is to reflect on the manner in which the Court has dealt with the application of international law during its first decade. It attempts to add a critical note to the overwhelmingly positive attention the Court has thus far received internationally. There is no doubt that the inspiration that the Court has thus far drawn from international (human rights) law is impressive, and in many ways exemplary. Nonetheless, there is still room for improvement, as the subsequent analysis reveals. In analyzing the Court's methodology, this article does not attempt to cover all the jurisprudence of the Court. Instead, it focuses on a number of selected decisions in different areas of law, which can be regarded as representative of the manner in which the Court has treated international law over the past decade.

The analysis first focuses on the Court's handling of international human rights instruments by analyzing two decisions pertaining to public education. Although this is but one of the
many areas in which the Court has applied international human rights instruments, the two cases in question are arguably very illuminating of the Court’s methodology pertaining to human rights questions in general.46 Thereafter, the Article turns to other areas of international law that have come before the Court.47 Since these areas are the most problematic in terms of “international law methodology,” the analysis covers the relevant case law more comprehensively and analyzes four cases ranging from international humanitarian law to child abduction and extradition.48

I. INTERPRETING THE CONSTITUTION IN ACCORDANCE WITH INTERNATIONAL HUMAN RIGHTS LAW

A. The Language Rights of Minorities

In April 1996, the Court had to decide whether an education bill proposed by the Provincial Government of Gauteng violated section 32(c) of the interim Constitution, according to which everyone had the right to establish, where practicable, educational institutions based on a common culture, language, or religion, provided there is no discrimination on the ground of race.49

Certain members of the Afrikaans speaking community disputed clause 19 of the Bill, which prohibited language competence testing as an admission requirement to a public school.50 They contended that it would violate section 32(c), because the latter created an obligation on the State to establish schools based on a common language and culture.51 Had the Court accepted this argument, it would have implied that black children who wanted to attend Afrikaans schools would have been ac-

46. See infra Part I(C).
47. See infra Part II.
48. Id.
50. Id. ¶ 3.
51. Id. ¶ 5.
cepted only if they were willing to be educated in Afrikaans.52

The case brought to the fore tensions in a society recognizing the growing support for (linguistic) diversity as a value in itself and the need for equal access to education.53 In South Africa, one had to balance the sustaining of Afrikaans as a linguistic treasure of significant importance to the society's identity, with the fact that well-resourced single medium schools established in the Apartheid era and controlled by whites for whites only, were seen as fortresses from which black children were excluded.54 In addition, the matter was complicated by the fact that the white minority government in South Africa had for many years asserted its claim for control by relying on minority rights and the increasing recognition of these rights throughout the world.55 To the majority of South Africans, this claim was deeply flawed, as it prevented them from exercising their fundamental rights, including equal access to education.56

The Court came to the conclusion that the wording of section 32(c) did not support a construction obliging the State to establish schools based on a common language and culture.57 It merely allowed for the founding of private schools for this purpose.58 The Court conceded that where a significant number of persons would demand instruction in their mother tongue, the State would be obliged to accommodate them.59 This resulted from section 32(b) of the interim Constitution, which guaranteed instruction in the language of the person's choice where this was reasonably practical.60 However, this guarantee would not imply an obligation to provide separate institutions to this effect.61 It could, for example, also be done by means of bilingual educational facilities within the same institution.

Although the majority of the Court found that a sufficient answer could be given simply in terms of a textual analysis of the Constitution, the separate opinion of Justice Sachs included a

52. See generally Gauteng Education Bill, supra note 49.
53. See id.
54. See Sachs lecture, supra note 15.
55. Id.
56. Id.
57. See Gauteng Education Bill, supra note 49, ¶¶ 7, 11.
58. Id. ¶ 11.
59. Id.
60. Id. ¶ 6.
61. Id. ¶¶ 7, 11.
survey of international instruments pertaining to minority rights. Justice Sachs submitted that the United Nations Charter and the Universal Declaration of Human Rights both focused on human rights for individuals and not on protection for minorities. He also referred to Article 27 of the ICCPR as the first international norm dealing specifically with rights for ethnic, religious, and linguistic groups that were capable of, and intended for, universal application. He regarded Article 27—at its strongest—as a framework measure with an incipient or embryonic State obligation to pay regard to the needs of cultural, linguistic, and religious minorities. It would not, however, support a reading implying a State duty to establish separate schools.

Justice Sachs argued that most human rights instruments on the subject limited the positive State obligation to provide educational institutions to groups that have been disadvantaged. Since Afrikaans community groups did not constitute such a disadvantaged group, but to the contrary had exclusive access to affluent schools, claims to have the State subsidize these privileges were weak. He referred especially to Articles 1(4) and 2 of the International Convention on the Elimination of All Forms of Racial Discrimination ("CEARD") of 1964. He further sub-

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62. Id. ¶ 69-89.
63. Id. ¶ 59.
64. Id. ¶ 60. See ICCPR, supra note 12, art. 27 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.").
65. See Gauteng Education Bill, supra note 49, ¶ 65.
66. Id. ¶ 59-65.
67. Id. ¶ 66.
68. Id. ¶ 83.
69. Id. ¶ 82-83. See also International Convention on the Elimination of All Forms of Racial Discrimination (CEARD), G.A. Res. 2106 (XX), Annex, 20 UN GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). Article 1(4) of CEARD reads as follows: "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved." Id. According to Article 2(2), "States parties shall, when the circumstances so warrant, take in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain
mitted that the United Nations Educational, Scientific and Cultural Organization ("UNESCO") Convention against Discrimination in Education of 1960 similarly did not impose any State obligation to establish separate minority schools. Finally he underpinned his argument by referring to the Belgian linguistic case of the European Court of Human Rights (the "European Court"). Justice Sachs concluded his survey of international law with a reference to the Framework Convention for the Protection of National Minorities ("Framework Convention"). He stated that this instrument, which he described as the most advanced international instrument on the subject available to him, also merely confirmed the freedom to set up educational institutions in a minority language.

In essence, the tenor of his separate opinion indicated that, if and to the extent that international law obliged States to provide for educational facilities for minorities, this obligation was aimed at groups that were marginalized, repressed, and underresourced, which was not the case with the Afrikaans speaking community.

B. The Abolition of Corporal Punishment in Public Education

The Christian Education case forms a more recent example in which the Court relied on international law in underpinning racial groups or individuals belonging to them for the purposes of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

70. See Gauteng Education Bill, supra note 49, ¶ 84.

71. Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium, 1 E.H.R.R. 252 (1979–80). In this case an obligation on the State to provide educational facilities in minority languages was denied. The decision concerned the first Protocol to the European Convention which provides in part that "no person shall be denied the right to education." Id. at 253. The European Court opined that in the light of the negative formulation of the right, children did not have the right to be educated in the language of their parents by the public authorities or with their aid. See id.; see also Gauteng Education Bill, supra note 49, ¶ 84.


73. Id.

74. See Sachs lecture, supra note 15.
its conclusion.\textsuperscript{75} In this particular case, the consultation of international human rights law was not limited to a separate opinion, but it provided a legal backdrop that was integral to the work of the Court as a whole.\textsuperscript{76}

In this instance, the Court considered an American-based church group that established schools in South Africa during the 1980s on the principle that the Bible deemed corporal punishment as a necessary form of discipline for children.\textsuperscript{77} The issue in question was whether the prohibition of corporal punishment in all schools, as prescribed by section 10 of the South African Schools Act of 1996, violated the constitutional right to religious freedom of parents who, in accordance with their religious convictions, had consented to the corporal punishment of their children by teachers.\textsuperscript{78}

The case highlighted the complexities involved in considering issues of religion and community organization that people willingly arrange for themselves. For example, the parents had a general interest in managing their lives in a community setting according to their religious beliefs and a more specific interest in directing the education of their children.\textsuperscript{79} Furthermore, the child that was at the center of the inquiry was a participant in a religious community that sought to enjoy such freedom.\textsuperscript{80} Nevertheless, that same child was entitled to constitutional protection.\textsuperscript{81} In addition, the broader community had an interest in reducing violence wherever possible and in protecting children from harm.\textsuperscript{82}

In concluding that the general prohibition of corporal punishment in all schools was a reasonable and proportionate limitation to the exercise of religious freedom, the Court referred to the obligation in the United Nations Convention on the Rights of the Child ("CRC") to undertake all appropriate measures to

\textsuperscript{76} See Sachs lecture, supra note 15; see also Christian Education, (4) SA 757 (CC).
\textsuperscript{77} See Christian Education, (4) SA at 757, ¶ 2.
\textsuperscript{79} See Christian Education, (4) SA at 768, ¶ 15.
\textsuperscript{80} See id.
\textsuperscript{81} See id. at 772, ¶ 21.
\textsuperscript{82} See id. at 768, ¶ 15.
protect a child from violence, injury, or abuse. \(^{83}\)

Furthermore, the Court made reference to Article 5(5) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief of 1981, which states that practices of a religion or belief in which a child is raised must not be injurious to his physical or mental health or to his full development. \(^{84}\) The Court also made extensive reference to a growing jurisprudence in neighboring countries, as well as in Europe, that outlaws the use of corporal punishment in schools. \(^{85}\)

C. Criticism Pertaining to the Court’s Methodology

The main criticism against the Court’s treatment of international human rights instruments relates to its treatment of non-binding international instruments. From the outset, the Court regarded the “interpretation clauses” to refer to binding as well as non-binding international instruments. \(^{86}\) These would include treaties which South Africa has not or cannot ratify, as well as so-called “soft law instruments,” which are declarations, codes of practice, or resolutions of the General Assembly which are not meant for ratification. \(^{87}\)

Although in principle this may be a welcome approach, there are concerns about the Court’s methodology when consulting non-binding instruments as part of its interpretational endeavor. \(^{88}\) As indicated in the Introduction of this piece, this methodological deficit relates to the lack of thoroughness with which the Court sometimes treats the non-binding instruments, as well as the de facto hierarchy it attaches to non-binding instru-

\(^{83}\) See id. at 787, ¶ 40. In essence, the Court determined that the Christian schools were, save for this one aspect of corporal punishment, not prevented from maintaining their specific Christian ethos. Id.


\(^{86}\) See S. v. Makwanyane, 1995 (3) SA 94 (CC).


\(^{88}\) See Botha, Role of International Law, supra note 7, at 259-60.
ments at the potential expense of binding instruments.\textsuperscript{89}

In the \textit{Gauteng Education Bill} decision, the Court's reference to the Framework Convention as the latest and most advanced international minority rights instrument at the time reflected a lack of awareness of several important developments in the field of minority rights, at least in the European context.\textsuperscript{90} The judgment did not reflect the momentum that the issue of minority rights has gained in Europe since the early 1990s, not in the least due to developments in the former Yugoslavia and other Eastern and Central European countries.\textsuperscript{91}

One of the most important unmentioned instruments was the European Charter for Regional or Minority Languages, which the Council of Europe adopted in 1992 ("the Regional or Minority Language Charter").\textsuperscript{92} This Charter contains detailed obligations for the promotion of minority languages.\textsuperscript{93} For example, under Article 8, the State parties must make minority language facilities ranging from pre-school education to tertiary education available within their respective territories.\textsuperscript{94} Paragraph 34 of the Document of the Copenhagen Meeting of the CSCE Conference on the Human Dimension of 1990 also contains a similar obligation.\textsuperscript{95}

One could argue that the Regional or Minority Language Charter was not yet in force and that the CSCE-Declaration had no binding force at the time of the Court's decision. This argument, however, could also apply to the Framework Convention, which was not in force at the time of the Court's decision ei-

\textsuperscript{89} See id.

\textsuperscript{90} See Gauteng Education Bill, \textit{supra} note 49.


\textsuperscript{93} See id.

\textsuperscript{94} See id.

\textsuperscript{95} See 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE [Part IV], June 24, 1990, 29 I.L.M. 1305, 1318 ("Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will. In particular, they have the right to use freely their mother tongue in private as well as in public.").
ther. Moreover, none of the European regional instruments—be they in force or not—could ever be binding on South Africa.

Therefore, if the Court is to use European instruments as a guideline, it should be done in a consistent and comprehensive manner. It is also important to note that the Gauteng Education Bill decision did not make any reference to the African Charter of Human and People’s Rights ("the African Charter"), which was already ratified by South Africa in 1996 and which guarantees individuals the right to education in Article 17.

Thus, inquiry into whether this right might include an obligation to provide educational facilities in minority languages would have been appropriate. Such an argument might have been construable with reference to Article 17(3) of the African Charter that requires the State to promote and protect the morals and traditional values recognized by the community.

This latter point underscores the second criticism of the Court’s methodology in dealing with soft law, namely the hierarchically superior position it places on non-binding instruments at the expense of binding instruments, most notably, the African Charter. The Gauteng Education Bill decision gives some indication of how European human rights instruments have claimed a de facto special status in the jurisprudence of the Court.

Because these European agreements constitute regional instruments to which South Africa cannot be a party, they should, strictly speaking, take second place to international and regional human rights instruments to which South Africa is a party. Nevertheless, the reality is that the Court’s decisions generally...
do not reflect an awareness of this distinction.\textsuperscript{103} While it regularly makes extensive references to the European Convention in particular, the Court only rarely mentions the African Charter or other relevant African soft-law instruments.\textsuperscript{104} This trend was reaffirmed by the \textit{Christian Education} decision.\textsuperscript{105} While referencing applicable jurisprudence pertaining to the European Convention, the Court made no mention of the African Charter on the Rights and Welfare of the Child of 1999.\textsuperscript{106} In the present context, Articles XI(4) and XI(5) of this unmentioned charter are of particular interest.\textsuperscript{107} Whereas the former guarantees the rights of parents to ensure the religious and moral education of the child in a manner consistent with the child’s evolving capacities, the latter requires the State to ensure that parental or educational disciplinary measures conform to notions of humanity and inherent dignity.\textsuperscript{108}

These two clauses would seem to illustrate finely the challenge which the Court confronted in the \textit{Christian Education} case, specifically, the reconciling of religious rights of parents and the protection of children against harm.\textsuperscript{109} By also referring to Articles XI(4) and XI(5) in its judgment, the Court would have contributed to the development of an African regional human rights instrument and also strengthened the notion of human rights as a true African value.\textsuperscript{110}

The Court’s affinity for the European Convention could be explained by the fact that the individual complaints procedure under it is elaborate and has produced an extensive jurispru-
dence to which common law-trained judges eagerly turn for guidance.\textsuperscript{111} Since the complaints procedure of the African Charter and other African human rights instruments are not yet as well developed and their decisions are not as readily available, the same judges tend to neglect these instruments.\textsuperscript{112}

Nonetheless, this should not lead to the neglect of regional human rights instruments to which South Africa can be, and in the meantime has become a party, nor of other African human rights instruments, which could serve as guidance for interpretation. By relying on the European Convention to the exclusion of applicable African instruments, the Court entrenches the image of human rights as being a set of primarily Western values that are being imposed on African societies.\textsuperscript{113} It could also give the impression that the African human rights instruments are considered inferior to the other mentioned instruments.\textsuperscript{114}

It should be emphasized that these critical remarks are not directed at the fact that the Court relies on non-binding international or European instruments when formulating its human rights jurisprudence, as the depth that this broad approach has contributed to the Court’s human rights jurisprudence is not disputed. For example, it is by now well-known that in the area of economic and social rights, the Court inter alia underpinned the enforceability of the constitutional rights to housing and health with extensive references to certain General Comments adopted by the United Nations Committee on Economic, Social and Cultural Rights.\textsuperscript{115} In addition, the criticism should not be understood as implying that the outcome of the Gauteng Education Bill decision or the Christian Education South Africa decision were wrong, or would necessarily have been different, had the Court indeed taken into consideration all the relevant international instruments.

Instead, the criticism voiced here is aimed at nurturing a jurisprudence that treats the compatible and overlapping values

\textsuperscript{112} See id. at 694-95.
\textsuperscript{113} See, e.g., Botha, Role of International Law, supra note 7, at 259-60.
\textsuperscript{114} See id.
to be found in international human rights law, on the one hand, and the South African Constitution, on the other hand, in an intellectually convincing fashion. In the absence of a methodology that reflects a uniform and consistent strategy as to which international instruments to consider as (hierarchically superior) interpretation guidelines, there is a distinct danger that the judges may be perceived as picking amongst those international human rights instruments which are closest to their own personal views and in accordance with the political mood of the day, as opposed to drawing from a value system that is entirely consonant with the South African constitutional order. In addition, there is the risk that African human rights instruments would be side-lined and the perception entrenched that human rights norms constitute a mere by-product of western imperialism.

II. INTERPRETATION IN ACCORDANCE WITH OTHER AREAS OF INTERNATIONAL LAW

A. International Humanitarian Law

One of the first cases the Court had to deal with after taking up its work in 1995 concerned the constitutionality of the Truth and Reconciliation Commission.\(^\text{116}\) This Commission was set up to deal with crimes committed during the era of Apartheid.\(^\text{117}\) In its terms of reference it was awarded the power to grant amnesty under certain conditions to individuals responsible for violations of human rights.\(^\text{118}\) Some of the members of families who had lost persons close to them to the death and torture squads of the Apartheid regime challenged the constitutionality of the law, which established the Truth and Reconciliation Commission.\(^\text{119}\) The case came to be known as the Azapo case, referring to an organization that was set up in the late period of the struggle against Apartheid.\(^\text{120}\) It claimed that the provision of


\(^{118}\) See id.

\(^{119}\) See Azapo, (4) SA 671 (CC), ¶ 6.

\(^{120}\) See generally id.
the law granting amnesty was inconsistent with a provision in the interim Constitution according to which everybody has the right to have disputes settled in a fair trial in an open court.\footnote{121}{See id. ¶ 8.}


In the alternative, they claimed that, at the very least, claims for civil damages should not be expunged by the amnesty regulation.\footnote{123}{Azapo, (4) SA 671 (CC), ¶ 25.}

The case attracted a lot of national and international attention and clearly was extremely important as far as the functioning of the Truth and Reconciliation Commission was concerned.\footnote{124}{See, e.g., Mathatha Tsedu, Questioning If Guilt Without Punishment Will Lead to Reconciliation, 53 NIEMAN REP. 220 (1999).} This placed the Court under significant time pressure, as its ruling would be determinative for the functioning of another body (the Truth and Reconciliation Commis-
sion) set up under constitutional provisions.\textsuperscript{125}

The Court essentially decided that the so-called post-amble to the interim Constitution required that amnesty be granted to persons who had violated the law in the course of the conflicts of the past and allowed for the modalities to be established by national legislation.\textsuperscript{126} Essentially, the Constitutional terms were conclusive of the matter to the extent that they presupposed full amnesty to be given.\textsuperscript{127} The Court doubted whether the Geneva Conventions of 1949 were relevant, since it regarded the obligation to prosecute those guilty of grave breaches of the Geneva Conventions applicable only to international armed conflict.\textsuperscript{128} The Court also submitted that neither of the two Additional Protocols to these Conventions was applicable, since they were never signed or ratified by South Africa.\textsuperscript{129} Consequently, there was nothing in the Reconciliation Act that constituted a breach of the obligations of South Africa in terms of the instruments of international law, as relied on by the applicants.\textsuperscript{130}

Implicit in the Court's decision was also the assumption that the potential customary status of international law norms relevant to the question before it was too imprecise to overcome the strong language of the amnesty.\textsuperscript{131} Language, which indicated that in order to reveal the truth, effect closure, and protect the new democratic government from huge economic liability for the crimes of the previous government, there should be indemnity both from civil and criminal liability for the perpetrators of Apartheid crimes.\textsuperscript{132}

\textbf{B. Child Abduction}

In the more recent case of Sonderup \textit{v. Tondelli},\textsuperscript{133} the Court was confronted with an apparent clash between the provisions of the Hague Convention on Civil Aspects of International Child

\textsuperscript{125} See Sachs lecture, \textit{supra} note 15.
\textsuperscript{126} Azapo, (4) SA 671 (CC), ¶ 7.
\textsuperscript{127} See id. ¶ 9.
\textsuperscript{128} Id. ¶ 30.
\textsuperscript{129} Id. ¶ 29.
\textsuperscript{130} See Sachs lecture, \textit{supra} note 15.
\textsuperscript{131} See Azapo, (4) SA 671 (CC), ¶ 34.
\textsuperscript{132} Sachs lecture, \textit{supra} note 15.
Abduction ("Hague Convention") and Article 28(2) of the final Constitution, which specifies that a child's best interests are of paramount importance in every matter concerning the child. The case concerned a custody dispute between a South African mother and her former Italian husband, who were both based in British Columbia, Canada. In accordance with a Canadian court order, the mother was not allowed to remove the child from Canada without the consent of the father. The court order did, however, permit her to take the child on a yearly month-long holiday to South Africa, with the understanding that the child would be returned to Canada after this period. When the mother refused to honor this commitment on the expiration of the holiday period, the Supreme Court of British Columbia issued a court order mandating that the child be returned to Canada, where any future custody questions would be determined. This court order was initiated under the terms of the Hague Convention, which provides a mandatory return procedure whenever a child has been removed or retained in breach of the rights of custody of any person or institution under the law of the State in which the child habitually resided. The court order was then transmitted to the Eastern Cape High Court, the South African court that had jurisdiction in the area where the mother and child resided at the time, which subsequently determined it to be consistent with the best interests of the child to be returned to Canada.

The constitutionality of this decision was then challenged by the mother on the basis that a return to Canada would not serve the best interests of the child, as demanded by Article 28(2) of the final Constitution. The Council for Ms. Sonderup claimed

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136. See Sonderup, 2001 (1) SA 1171 (CC), ¶ 1.
137. See id. ¶ 6.
138. See id. ¶¶ 6-7.
139. See id. ¶ 8.
140. See id. ¶ 2.
141. See id. ¶ 16.
142. See id. ¶ 17.
that the father was abusive toward the mother and that the interests of the child would be better served if she remained in South Africa.\textsuperscript{143} The question arose whether this constitutional provision conflicted with the mandatory provisions of the Hague Convention demanding respect for foreign court orders and the jurisdictional primacy of the foreign court in matters of custody.\textsuperscript{144} The question thus arose whether there was a conflict between the constitutional obligation to serve the best interests of the child at all times and international obligations aimed at guaranteeing respect for the rule of law and comity between nations in matters pertaining to child abduction.\textsuperscript{145}

In considering this matter, the Court paid particular attention to an exception to the mandatory return procedure provided for in Article 13(b) of the Hague Convention.\textsuperscript{146} In accordance with this clause, the judicial authority in the requested State was not bound to order the return of the child where there was a grave risk that the child would be exposed to physical or psychological harm on his or her return, or otherwise be placed in an intolerable situation.\textsuperscript{147} In interpreting this exception, the Court determined that evaluating the best interests of the child required considering situations where not only the child but also the mother would be threatened with abuse were she to accompany the child on his or her return to the foreign jurisdiction.\textsuperscript{148} It regarded this interpretation as necessary to find a balance between the essence of the obligations of the Hague Convention (i.e., rapid response to court orders of foreign courts) and core values of the final Constitution.\textsuperscript{149}

The Court was, however, unwilling to interpret the exception provided in Article 13(b) in a way that granted a fresh inquiry by a South African court into the question of whether the short-term interests of the child would be served best if he or she

\textsuperscript{143} See id. ¶ 38.

\textsuperscript{144} See id. ¶ 10, 33.

\textsuperscript{145} See id.; see also Sachs lecture, supra note 15.

\textsuperscript{146} See Sonderup, 2001 (1) SA 1171 (CC), ¶¶ 11-12.

\textsuperscript{147} See id. ¶ 38.

\textsuperscript{148} See id. ¶ 34.

\textsuperscript{149} The court did not find that, on the evidence of the case, there was any real physical threat towards the child or the mother. As far as the latter was concerned, there was no evidence indicating that she would have to have any contact with the father on her return. See id. ¶ 47.
remained in South Africa at that point in time. According to the Court, the long-term interests of having the custody questions decided by the court in which the child had his or her habitual residence overrode the short-term interests. Any other interpretation would undermine the purpose of the Hague Convention by effectively transferring jurisdiction in custody matters from the Canadian Court to the South African Eastern Cape High Court. While the overriding of the short-term interests resulted in a limitation of the rights of the child in Article 28(2) of the final Constitution, this limitation was reasonable and justifiable in an open and democratic society.

The Court thus reconciled the regime of the Hague Convention with the final Constitution by narrowly interpreting the exception provided in Article 13(b) as referring to physical and psychological harm of a serious nature only. While the Constitution demanded an interpretation that gave due consideration to the consequences of a threat of physical violence to both mother and child, it did not require a broader interpretation that placed strong emphasis on the short-term interests of the child.

C. Extradition and Deportation

On a number of occasions, the Court has been called on to deal with cross-frontier relationships in the form of extradition and deportation. This series of cases was triggered by the case of Jürgen Harksen, who was involved in extensive litigation before the South African courts in an attempt to prevent his extradition to Germany, where he was charged with fraud. One of the issues central to the dispute was whether ad hoc extradition in terms of Section 3(2) of the Extradition Act should also comply with the constitutional prerequisites for an international

150. See id. ¶ 29.
151. See id.
153. See Sonderup, (1) SA 1171 (CC), ¶ 44 (internal quotations omitted).
154. See id. ¶¶ 44-48.
agreement. The question arose, in particular, whether the signature of the South African president to a statement that permitted the extradition of Harksen to Germany constituted an international agreement.\(^\text{157}\) If this were the case, the extradition "agreement" would only become operative once it was ratified by Parliament.

In March 1994, the South African government received a request from Germany for Harksen's extradition. South Africa had not concluded an extradition agreement with Germany, and a series of diplomatic notes dealing with Harksen's extradition was exchanged between the German and South African governments through the Department of Foreign Affairs.\(^\text{158}\) The president subsequently granted his consent to extradite Harksen on the basis of Section 3(2) of the Extradition Act.\(^\text{159}\) Counsel for Harksen argued that this consent of the president constituted an international agreement, which contravened the provisions of Article 231 of the interim Constitution,\(^\text{160}\) as it bypassed the prescribed procedures requiring parliamentary involvement.\(^\text{161}\) The Court rejected this argument on the basis that although Section 3(2) might eventually have international resonance, the Extradition Act governed applications for extradition on the domestic plane.\(^\text{162}\) As a result, the decision to extradite in terms of Section 3(2) was never more than a domestic act implying that in accordance with South African domestic law, Harksen could be brought before a magistrate's court in order to initiate the extradition proceedings.\(^\text{163}\)

From the perspective of international law, it is interesting to note that Harksen further submitted an argument based on estoppel.\(^\text{164}\) It was argued on his behalf that by exercising consent

\(^{157}\) Harksen, (2) SA 825 (CC), ¶ 13.

\(^{158}\) For a summary of the facts, see JMT Laubschagne & Michèle Olivier, Extradi-

\(^{159}\) See Harksen, (2) SA 825 (CC), ¶ 7.

\(^{160}\) See id. ¶¶ 15-17.

\(^{161}\) See id. ¶ 15.

\(^{162}\) Id. ¶ 14.

\(^{163}\) See id. ¶ 21.

in terms of Section 3(2) of the Extradition Act, the president created the impression that he was entering into an international agreement.\textsuperscript{165} Once Germany had been informed of this, it was entitled to rely on such consent.\textsuperscript{166} The fact that the agreement was not binding in terms of the Constitution would be irrelevant from the German point of view.\textsuperscript{167} Counsel for Harksen supported this argument with reference to Article 46(1) of the Vienna Convention on the Law of Treaties of 1969 ("Vienna Convention"),\textsuperscript{168} which determines that a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its national law.\textsuperscript{169} The Court was reluctant to accept this argument, pointing to the fact that the extent to which the Vienna Convention reflects customary international law was by no means settled.\textsuperscript{170} It also noted \textit{obiter dictum} that Article 46(1) provided two exceptions to a State being bound by consent in violation of its national law, namely in cases of violations that were manifest and involved a domestic rule of fundamental importance.\textsuperscript{171} It noted that it was unlikely that an international agreement entered into in breach of the provisions of a national constitution that governed international agreements would constitute anything but a "manifest violation" concerning a law of "fundamental" importance.\textsuperscript{172} However, the Court also stressed that it preferred to leave open the interpretation and binding effect of Article 46(1), as this was not necessary to decide the case.\textsuperscript{173} The Court regarded as decisive the fact that the president's acts under Article 3(2) of the Extradition Act were domestic rather than international and that the South African and German authorities showed no evidence of an intention to enter into an international agreement.\textsuperscript{174}

\textsuperscript{165} See Harksen, (2) SA 825 (CC), ¶ 13.
\textsuperscript{166} See id. ¶ 24.
\textsuperscript{167} See id.
\textsuperscript{169} See id. art. 46(1) ("A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.").
\textsuperscript{170} See Harksen, (2) SA 825 (CC), ¶ 26.
\textsuperscript{171} Id.
\textsuperscript{172} Id. ¶ 27.
\textsuperscript{173} Id.
\textsuperscript{174} See id. ¶ 28; see also Botha, supra note 7, at 297.
A more dramatic extradition case was that of Mohamed, one of four men on trial in a United States federal court on various charges carrying the death penalty, stemming from the bombing of United States embassies in Nairobi and Dar-es-Salaam on August 7, 1998. Mohamed, a Tanzanian national, came to South Africa after the bombing and lived in Cape Town under a false name. In a collaborative act between South African and United States intelligence authorities, Mohamed was arrested in Cape Town in October 1999 and deported to New York where he subsequently stood trial for murder with the possibility of receiving the death penalty.

In South Africa, the constitutionality of Mohamed's removal to the United States was challenged on his behalf by his former employer, claiming that his rights to life, dignity and freedom from cruel, inhuman, or degrading punishment in Articles 10 through 12 of the final Constitution had been violated. When faced with the issue on appeal, the Court distinguished between extradition and deportation. It described the former as the request from one State to another for the delivery of a person, and the subsequent delivery of that person for trial or sentence to the requesting State.

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176. See id. ¶ 17.
177. See generally Sachs, War, Violence, Human Rights, supra note 43.
178. The protection of human rights during extradition proceedings also came under scrutiny in Geuking v. President of the Republic of South Africa and Others, 2003 (3) SA 34 (CC); 2003 (2) BCLR 128 (CC), available at http://www.concourt.gov.za/files/geuking/geuking.pdf (last visited March 11, 2005). The applicant, inter alia, questioned the constitutionality of Article 10(2) of the Extradition Act 67 of 1962, claiming an infringement of his constitutional right to a fair public hearing. In terms of Article 10(2), a magistrate’s court shall accept as conclusive proof a certificate issued by the appropriate authority in charge of prosecution in the State requesting extradition stating that it had sufficient evidence to warrant the prosecution of the person concerned. The Court rejected the applicant’s claim, stating that extradition proceedings did not determine the innocence or guilt of the person concerned, but merely whether there was reason to remove the person to a foreign State to stand trial. In determining whether a valid case for extradition existed, the South African Courts could rely on a statement of the foreign authorities pertaining to the substance of the respective foreign law, as the courts would otherwise have great difficulty in determining the substance of such law. See also JMT Laubschagne & Michèle Olivier, supra note 158, 154.
179. See Mohamed v. President of the Republic of South Africa, 2001 (3) SA 893 (CC), ¶ 29.
180. See id.
a unilateral act by which a State rid itself of an undesirable alien.\textsuperscript{181} The Court, however, also pointed out that deportation and extradition could coincide, which could lead to difficulties in determining the true purpose and nature of the act of delivery.\textsuperscript{182} It concluded that in the South African context, the rights to human dignity, life, and freedom from cruel, inhuman, or degrading treatment or punishment obliged the government not to participate in any way in the imposition of such punishment, even outside the borders of South Africa.\textsuperscript{183} These obligations were binding on the government regardless of whether the case concerned extradition or deportation.\textsuperscript{184} Therefore, even if the State were able to deport Mohamed to the United States, and even if he had given informed consent to such removal - a fact that was disputed - the State should have secured an undertaking that he would not be subjected to the imposition of the death penalty.\textsuperscript{185}

In reaching its conclusion, the Court drew its reasoning from both the \textit{Makwanyane} decision that outlawed the death penalty\textsuperscript{186} as well as international views as reflected in various international forums.\textsuperscript{187} In these bodies, a death penalty sentence is not possible.\textsuperscript{188} The Court made specific reference to Security Council Resolution 827 which, in adopting the Statute for the International Criminal Tribunal for the Former Yugoslavia ("ICTY"),\textsuperscript{189} expressly stated that the Tribunal should not be permitted to impose death sentences.\textsuperscript{190} The Statute of the

\begin{itemize}
  \item \textsuperscript{181} See id.
  \item \textsuperscript{182} See id.; see also JMT Laubschagne & Michéle Olivier, supra note 158, at 148.
  \item \textsuperscript{183} See Mohamed, (3) SA 893 (CC), ¶ 38.
  \item \textsuperscript{184} See id.
  \item \textsuperscript{185} See id. ¶ 43, 46; see also JMT Laubschagne & Michéle Olivier, supra note 148, at 148-149M; Botha, \textit{Role of International Law}, supra note 7, at 230.
  \item \textsuperscript{186} S. v. Makwanyane, 1995 (3) SA 391; 1995 (6) BCLR 665, construed in Mohamed, (3) SA 893 (CC), ¶¶ 39, 40, 48-49, 55.
  \item \textsuperscript{187} See generally Mohamed, (3) SA 893 (CC) (including in its analysis, \textit{inter alia}, discussions of Germany’s abolition of the death penalty, Canadian Supreme Court holdings, and the European Court of Human Rights).
  \item \textsuperscript{190} See Mohamed, (3) SA 893 (CC), ¶ 40 n.30 (stating that "in paragraph 1 of the
ICTY reaffirmed this obligation in Article 24, as the Statute of the International Criminal Tribunal for Rwanda had done in Article 23. These articles indicated that the international community rejected the death penalty, even when faced with the most horrendous crimes of a widespread nature. The Court also placed strong reliance on the United Nations Conventions against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 1984, as well as the jurisprudence of the European Court of Human Rights.

D. Criticism of the Court’s Methodology

The main methodological criticism regarding the Court’s modus operandi concerns the limited role the Court attributes to international law obligations other than those stemming from international human rights treaties as a guideline for interpretation. This is reflected by its reluctance to draw from international law sources others than those ratified by South Africa, as well as its hesitance to examine and apply customary interna-

resolution [the Security Council] approved the report of the Secretary-General of 3 May 1993 in which he recommended in paragraph 112 that ‘[t]he International Tribunal should not be empowered to impose the death penalty’.


193. See Mohamed, (3) SA 893 (CC), ¶ 40.


196. But see Margarita Burnham, Cultivating a Seedling Charter: South Africa’s Court Grows Its Constitution, 3 Mich. J. Race & L. 29, 34 (1997) (“The Constitution provides that, in interpreting its Bill of Rights clauses, the Court ‘must’ consider international law, and ‘may’ consider foreign case law. The new Constitutional Court has remained remarkably faithful to this injunction. In virtually every case it has decided, and on a wide variety of issues, ranging from jurisdictional matters to substantive law, it has referred both to international and to foreign law.”).
tional law. This is clearly illustrated by the above mentioned cases pertaining to extradition. In the *Harksen* case, the Court side-stepped questions pertaining to the scope of customary law as codified by Article 46(1) of the Vienna Convention and its implications for South African law, choosing instead to "leave open the interpretation and binding effect in [the] law of Article 46 of the Vienna Convention." At the same time, the Court extensively referred to international human rights law instruments in the *Mohamed* case, although this would, strictly speaking, not have been necessary either. Moreover, it is questionable whether the *obiter dictum* statement concerning Article 46(1) is correct. It seems that the Court defines a violation that is "manifest" and concerns "a rule of its internal law of fundamental importance" from the perspective of the *national* legal order. However, with regard to Article 46(1) of the Vienna Convention, which governs the relationship between States *inter se*, such a violation has to be determined from the perspective of the international legal order, which would not normally expect States to be familiar with other States' domestic rules governing treaty ratification.

Moreover, even in instances where South Africa has ratified international treaties, the willingness of the Court to assume that the principles underlying those treaties are consonant with constitutional values seems to be more limited than in the case of international human rights instruments. For example, the Court stated in the *Azapo* decision that the amnesty clause had to be measured against the interim Constitution and that international law would only be relevant for interpreting the interim Constitution itself. The Court nonetheless conceded that the

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198. *See generally Mohamed, (3) SA 893 (CC)* (discussing whether the arrest and extradition of an illegal immigrant to the United States violated international laws of extradition and deportation).

199. The Court has since given some consideration to customary international law relating to diplomatic protection. *See, e.g.*, Samuel Kaunda v. President of the Republic of South Africa, Case CCT 23/04 (Aug. 4, 2004); Sachs, *War, Violence, Human Rights*, *supra* note 43.

200. *Harksen, (2) SA 825, ¶ 27; see also Vienna Convention, supra* note 168, at art. 46(1).

interim Constitution and other legislation are presumed to be in accord with international law. Accordingly, this would require the Court to first ascertain the rule of international law in a thorough and proper manner and, thereafter, attempt to reconcile it with the interim Constitution or an act of parliament. Only when this had been done could the Court consider the question of consistency. However, the Court appears to have assumed that international law was irrelevant if it was inconsistent with the interim Constitution, instead of attempting first to reconcile the two before considering the question of inconsistency.

Furthermore, had the Court in the *Azapo* case engaged in a more extensive survey of the relevant international practice in the area, it would have found additional support for its conclusion. For example, according to the Appeals Chamber of the ICTY in the case against Dusko Tadic, the Geneva Conventions clearly indicate that acts which must be prosecuted by states under the rubric of “grave breaches” are only classified as such if such acts occur against persons or property protected by the Conventions. This is a restrictive definition and does not include persons participating in, or civilians affected by, an internal conflict. The Court could have backed its conclusion by

206. See Maresca, *supra* note 122, at 220; see also Watson, *supra* note 122, at 708; Christopher Greenwood, *International Humanitarian Law and the Tadic Case*, 7 EUR. J. INT’L L. 265, 275-76 (1996). The Appeals Chamber considered the concept of grave breaches under the Convention inseparable from the concept of protected persons and property, and believed that neither concept featured in Common Article 3, the only
the *Tadic* decision, but refrained from doing so.

In addition, the *Tadic* decision provided support for the fact that an obligation to prosecute for acts committed at the time in question could not easily be derived from customary law as codified by Common Article 3 of the Geneva Conventions.\(^2\) While the ICTY affirmed that Common Article 3 governed internal strife and had acquired customary law status,\(^2\) violations of Common Article 3 had, nonetheless, at that point in time, never been treated as crimes under international law.\(^2\) Although violations of Common Article 3 could exist as international offences subject to universal jurisdiction, they did not yet implicate the mandatory type of jurisdiction envisioned by the Geneva Conventions.\(^2\) The same consideration applied to Additional Protocol II to the Geneva Conventions.\(^2\) The ICTY further submitted that "many" of its provisions would also enjoy some degree of customary character.\(^2\) However, the ICTY's reference in this provision in the Conventions applicable to internal armed conflicts. See *Tadic*, Case No. IT-94-1-AR72, ¶ 81.

\(^{207}\) See Geneva I, art. 3; Geneva II, art. 3; Geneva III, art. 3; Geneva IV, art. 3 [hereinafter Common Article 3]. Common Article 3 determines, *inter alia*, that the following acts are and shall remain prohibited with respect to civilians:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

*Id.*


\(^{209}\) See Greenwood, *supra* note 209, at 279-80; *see also* Maresca, *supra* note 122, at 222. The Appeals Chamber also did not exclude the future classification of Common Article 3 violations as grave breaches, which could arise by the development of autonomous customary rule. See *Tadic*, Case No. IT-94-1-AR72, ¶ 83. *But see id.* ¶ 134 ("All of these factors confirm that customary international law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaches certain fundamental principles and rules regarding means and methods of combat in civil strife.").

\(^{210}\) *Tadic*, Case No. IT-94-1-AR72, ¶ 81.


regard is rather vague and Additional Protocol II has not generally been regarded as declaratory of customary international law.\(^{213}\)

A similar conclusion could have been drawn from an inquiry into whether other principles of customary international law relating to torture, war crimes, and particularly crimes against humanity, require prosecution of offenders. On the one hand, Apartheid has been labeled as a crime against humanity by the General Assembly\(^{214}\) and the Apartheid Convention.\(^{215}\) This may suggest a customary international law obligation to prosecute those who committed the crime of apartheid, particularly with respect to systematic murder, torture, and disappearances, which were all crimes under South African law before 1990.\(^{216}\) However, a survey of State practice at the time would probably have revealed that State practice was still too uncertain and unsettled to support such a rule.\(^{217}\)

In essence, therefore, a proper interpretation of the amnesty clause, i.e., its interpretation in light of South Africa’s international customary obligations, would have added authority

\(^{213}\) See Greenwood, supra note 209; see also Maresca, supra note 122. Although the Chamber presented declarations from the United States and El Salvador, few other States at the time had declarations supporting customary status. This lack of additional confirmations and the absence of Additional Protocol II in the military manuals of States undermined the Court’s implicit assertion that the Additional Protocol II exists as a customary source of penal rules. See Tadic, Case No. IT-94-1-AR72, ¶ 107, 110.


\(^{216}\) See Dugard, South African Constitution, supra note 1, at 190-91. A growing number of authors recognizing an emergence of a customary human rights obligation that would oblige States to prosecute human rights violations in internal conflicts. See supra note 1 and accompanying text.

\(^{217}\) See Dugard, South African Constitution, supra note 1, at 191. Relevant case law already available at the time of the Azapo decision included decisions of the Inter-American Commission of Human Rights involving Uruguay and Argentina. See Case No. 28/92, Inter-Am. C.H.R. 14 (1992); see also Case No. 29/92, Inter-Am. C.H.R. 25 (1992); Velasquez Rodriguez, 95 I.L.R. 259 (1988) (holding that a successor government was obliged to prosecute those members of the previous government responsible for human rights violations).
to the position the Court asserted. The Court's failure to engage in such a process was at least in part due to time constraints.\textsuperscript{218} Although several months had already passed since the establishment of the Truth and Reconciliation Commission,\textsuperscript{219} it could not start functioning until the Court had ruled on the legality of the amnesty.\textsuperscript{220} In addition, the language of the Constitution was explicit, resulting in the Court's inclination towards giving preference to the Constitution, even if this had led to a violation of international law obligations.\textsuperscript{221}

It will be interesting to see whether the Court will be willing to address the question of an obligation to prosecute certain violations of international humanitarian law in a more comprehensive manner in the \textit{Basson} case,\textsuperscript{222} currently pending before it. In this case, the Court will have to consider, \textit{inter alia}, whether international law places a duty on the State to prosecute acts including the development of toxic chemical and bacterial agents for purposes of eliminating opponents of the South African government in neighboring countries.\textsuperscript{223}

The willingness to place the Constitution above international law was also implied in the \textit{Sonderup} decision, where the Court once again reflected a reluctance to ascertain the scope of the rule of international law in a thorough and proper manner and then reconciles it with the Constitution.\textsuperscript{224} Instead, the Court effectively followed a reverse approach by emphasizing the supreme position of the Constitution and then measuring the relevant provisions of the Hague Convention against the limita-

\begin{itemize}
\item \textsuperscript{218} See Sachs lecture, \textit{supra} note 15.
\item \textsuperscript{219} The Commission was founded through the Promotion of National Unity and Reconciliation Act, No. 34 of 1995, \textit{available at} http://www.doj.gov.za/trc/legal/act9534.htm (last visited March 26, 2005).
\item \textsuperscript{220} See generally Azanian Peoples Organisation (Azapo) v. President of the Republic of South Africa, 1996 (4) SA 671 (CC).
\item \textsuperscript{221} See Sachs lecture, \textit{supra} note 15.
\item \textsuperscript{222} S. v. Wouter Basson, 2004 (3) SA 30 (CC).
\item \textsuperscript{223} In the preliminary judgment, on March 10, 2004, the Court decided that it had jurisdiction to hear the case, since the issues under consideration were of a constitutional nature. See \textit{Sonderup} v. Tondelli, 2001 (1) SA 1171 (CC), \textit{available at} http://www.concourt.gov.za/files/sonderup/sonderup.pdf (last visited March 26, 2005). In his separate opinion, Justice Sachs noticed that if the conduct in question constituted war crimes, this could impose a special constitutional responsibility on the State to prosecute the respondent. \textit{Id.} ¶ 116; \textit{see also} Sachs, \textit{War, Violence, Human Rights}, \textit{supra} note 46.
\item \textsuperscript{224} See \textit{Sonderup}, 2001 (1) SA 1171 (CC), ¶ 27.
\end{itemize}
tion clause. Moreover, had the Court in the Sonderup decision engaged in a more thorough analysis of State practice of the interpretation of Article 13(b) of the Hague Convention, it would have found significant support for its own interpretation of this clause.

For example, the German Constitutional Court, when confronted with the challenge of balancing its international obligations under the Hague Convention with the best interest of the child as guaranteed in the German Grundgesetz, determined that the Hague Convention achieved an unobjectionable balance between the legitimate interests of the parents and the constitutionally-protected best interest of the child, stressing that the latter must prevail in cases of conflict. As far as the interpretation of Article 13(b) is concerned, the German Constitutional Court, like its South African counterpart, emphasized that the defense provided by this clause should only be applied in exceptional cases that exceed the normal stress of returning a child.

A cursory survey of United States and Canadian court practices in relation to Article 13(b) at the time of the Sonderup decision also reflects some consistency with the South African Consti-

225. See id.
226. Note that the Hague Convention does not define what constitutes a grave risk of physical or psychological hardship or an intolerable situation. At the time the Sonderup judgement was rendered, none of the decisions of the European Court in Strasbourg pertaining to the Hague Convention concerned Article 13(b). See Karen Wolfe, A Tale of Two States: Successes and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany, 33 N.Y.U. J. INT'L L. & POL. 285, 325 (2001) ("The Child Abduction Convention does not define what constitutes a grave risk of physical or psychological harm or an intolerable situation.").
228. Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 79, 203 (210); see also Dagmar Coester-Waltjen, The Future of the Hague Child Abduction Convention: The Rise of Domestic and International Tensions – The European Perspective, 33 N.Y.U. J. INT'L L. & POL. 59, 60 (2000) ("In principle, the interests of the child will be served best when he or she is returned as soon as possible. This applies with regard to the best interests of the specific child concerned, as well as to the best interests of children in general, and also with regard to the rules of burden of proof.").
229. BverfGE 43, 405. See also BverfGE 46, 641; Wolfe, supra note 226, at 333 (noting that “the Federal Constitutional Court continues to emphasize that Article 13(b) defenses are only to be granted in exceptional cases that exceed the normal stress of returning a child,” while “the lower courts continue to give a broad interpretation to what could cause harm to the child — more in keeping with a best-interests analysis than a narrow exception to return”); Coester-Waltjen, supra note 228, at 64 (noting that the German Constitutional Court has found that return orders raised no constitutional questions even where the abducting parent was the primary caretaker and had to fear criminal proceedings on return).
tutional Court. According to some jurisdictions in the United States, the Article 13(b) exception can only be applied where the danger exists to the child itself (as opposed to the abducting or wrongfully retaining parent) and where the State of habitual residence is unable to provide adequate protection. Other jurisdictions, however, have regarded the risk of psychological damage to the child resulting from the physical abuse of the mother as sufficiently grave to prevent return. Canadian jurisdictions have also successfully invoked an Article 13(b) defense based on strong evidence of the risk of abuse of the abducting mother by the left-behind father on return and the resulting psychological damage to the child. These cases also reflect the importance of strong evidence of violent behavior on the part of the left-behind parent and an inability of the State of habitual residence to provide adequate protection.

These references to State practice in other jurisdictions thus reveal that a more thorough review of international practice by the South African Constitutional Court in Sonderup could have added depth to its decision. It would arguably have reflected that its own interpretation of Article 13(2), which succeeded in finding a balance between an overly conflated interpretation of this exception and real threats to the child's well-being, finds

230. See, e.g., Croll v. Croll, 66 F. Supp. 2d 554 (S.D.N.Y. 1999); Dalmasso v. Dalmasso, 269 Kan. 752 (2000); Wolfe, supra note 226, at 326 (noting that "the return itself must place the child in jeopardy of physical or psychological harm or of an intolerable situation . . . the danger to the child must somehow be inherent in that jurisdiction").

231. See, e.g., Krishna v. Krishna, No. C97-0021SC, 1997 U.S. Dist. LEXIS 4706, at *9-10 (N.D. Cal., Apr. 11, 1997) (holding that an abusive relationship between the child’s parents established “potential for serious psychological harm”); Walsh v. Walsh, 221 F.3d 204, 219 (2000) (holding that the District Court improperly found spousal abuse insufficient to pose a grave risk of psychological harm to the child). But see Wolfe, supra note 226, at 326-27 (“Throughout this analysis, the danger must be to the child and not the abducting or wrongfully retaining parent.”).


233. See Finizio v. Scoppio-Finizio [1999] 124 O.A.C. 308 (holding that Pollastro was an exceptional case and that 15(b) should be interpreted narrowly, with the presumption that the courts of another contracting State are competent to make arrangements for the child); Baily, supra note 292, at 37 (describing the holding in Finizio).
CONCLUSION

In conclusion, it is fair to say that the Court gives a friendly but cautious welcome to international law. As far as international human rights instruments are concerned, the Court’s willingness to regard international instruments as guidelines for interpretation has been predominantly friendly. It is fair to conclude that it consistently regards international human rights law as a guiding principle that provides a common substratum to both the national and international legal orders. In practice the Court draws heavily on international human rights law, including international “soft law,” when interpreting the Bill of Rights in the Constitution. The Court is not so much interested in the nature of the source as its underlying principles. These can also be found in “soft law” instruments, which are progressive and contemporary and which sometimes provide guidance in areas where very little hard law is available.

The above analysis has, however, also illustrated that a word of caution is called for insofar as non-binding international instruments are sometimes applied inconsistently, in what may come across as a pick and choose fashion. In addition, these instruments should not be relied upon at the expense of those instruments, which South Africa has ratified. This already seems to be happening, particularly in that the European Convention is strongly promoted, while the African Charter and other African instruments seem to be neglected. More conceptual clarity as to the relationship between international binding and non-binding law in the South African context is therefore necessary.

When it comes to the interpretation of international law instruments that move beyond the boundaries of international human rights law, the Court’s approach becomes much more cautious. This may relate to the fact that whereas most judges on
the Court have a strong knowledge of international human rights law, very few have extensive expertise in other areas of international law. It is arguably this unfamiliarity with a particular branch of law, rather than any deliberate disregard for international law as such, that would be responsible for the Court’s sometimes less-than-thorough surveys of relevant customary or treaty norms. It could be assumed that this unfamiliarity has its roots in South Africa’s years of isolation and that it will still take time for South African lawyers and judges to become fully conversant with the sources, rules and reasoning of international law. That some progress in this regard is gradually being achieved is evidenced by the recent Kaunda case. In determining whether the State had to prevent the extradition of South African nationals from Zimbabwe to Equatorial Guinea, the Court explicitly determined that neither customary international law nor the African Charter obliged the State to grant diplomatic protection to its citizens.

All things considered, the Court has laid important groundwork during the first decade of its existence for enhanced interaction between national and international law. In doing so, it has become an inspiration to many, both inside and outside of South Africa, and its vision of the relationship between the two legal orders continues to provide a welcome alternative to the predominantly anti-international behavior of its United States counterpart.

238. In Kaunda, the applicants (alleged mercenaries with South African nationality) wanted to avoid their extradition from Zimbabwe, where they were arrested, to Equatorial Guinea, where they would be tried for plotting a coup against the government. See id. In determining whether the South African government was obliged to take steps to prevent their extradition to Equatorial Guinea, the Court explicitly considered whether customary international law obliged the State to grant diplomatic protection to its citizens. See id. It concluded that it did not. The Court also explicitly mentioned that neither the African Charter nor any other human rights instrument granted an individual right to diplomatic protection. See id. ¶ 34.