

The implementation of international law in Germany and South Africa

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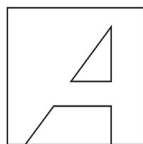
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INTRODUCTION

Erika de Wet, Holger Hestermeyer & Rüdiger Wolfrum

Both the developed and developing world are striving to create an effective and just international order. That order is directed at facilitating peaceful co-existence of nations and at cooperation to find and implement solutions to challenges that know no boundaries, including issues as diverse as international peace and security, climate change and economic cooperation to name but a few. Given the scope of these challenges and the need for international cooperation, compliance with international law has become a vital component of the rule of law.

Non-compliance with international law can have grave consequences, not only because of the risk of countermeasures by other states, but also and more importantly because of its impact on global cooperation, as well as the message it sends concerning the role of law as a framework for ordering society. As integral players of the world community as well as of regional organisations, South Africa, the power house of the African continent, as well as Germany, Europe's largest economic power, are faced with an intricate maze of international obligations, whether related to the United Nations (UN), the World Trade Organization (WTO), the African Union (AU) or the European Union (EU), international human rights law, international humanitarian law, or any other sub-regime of international law.

The challenges involved in implementing international law in South Africa are revealed, for example, by the fact that a number of important international treaties which South Africa has ratified have remained unimplemented. For example, despite the fact that South Africa was a founding member of the UN, no statute has ever been adopted to facilitate domestic implementation of UN Security Council decisions in South Africa. As a result, South Africa has to implement every Security Council decision on an ad hoc basis, which can lead to great delays in implementation or even non-implementation. Moreover, the absence of a domestic regulatory framework that guides the government on the

execution of Security Council resolutions aggravates the lack of clear direction in South Africa's foreign policy, reflected in its ambivalent relationship towards the economic and military measures that were taken recently against Libya.

This discrepancy between South Africa's formal commitment to international law and the implementation of that law is a direct result of scarce capacity in the field of international law and the manner in which it interacts with regional and domestic legal orders. South African universities after the adoption of the Constitution of the Republic of South Africa, 1996 have emphasised – for understandable reasons in the light of its history – the development of capacity in the area of human rights. An unintended but nonetheless very real result of this development was a neglect of other sub-areas of international law, as well as the inter-action between these sub-regimes and the domestic legal order – despite the prominent role attributed to international law in the Constitution.

The current German experience differs significantly from the South African one. When the Max Planck Institute for Comparative Public Law and International Law, one of the project partners of this proposal, was founded in 1924 (at the time, of course, as a Kaiser Wilhelm Institute), it was meant to compensate a perceived lack of knowledge in the field of international law in the German research community. Nowadays, comparatively well-funded institutes of international law and a well-trained academic community have ensured successful implementation of much of international law. But some difficulties remain. Thus, from the point of view of legal education, the fact that to this day international law is merely optional in German law schools is out of touch with the increasing impact of international law on almost all fields of law.

The European experience, ranging from a string of decisions of the *Bundesverfassungsgericht* related to the European Union (EU), to a number of cases clarifying the relationship of the European human rights system to German law, has led to an intense discussion of how to implement the relevant regional obligations, a discussion that will become more complex when the EU accedes to the European human rights system. While the German case is not without its own complexities and pitfalls, it can serve as a valuable example for South Africa in trying to improve its record of implementation of international obligations. This in turn could also serve as a useful point of departure for other countries in the region that face similar challenges in relation to implementation. German scholars, on the other hand, should be aware of the recent developments particularly in South African constitutional law, making the South African Constitution one of the most internationally 'open' in the world.

The current book is the result of a workshop held on 16 and 17 May 2014, which was aimed at identifying suitable techniques of implementation of international law, by comparing South Africa with

Germany. The workshop was organised in the context of a three year collaborative partnership between the Institute for International and Comparative Law in Africa in the Faculty of Law of the University of Pretoria and the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany. This collaborative partnership was sponsored by the Alexander von Humboldt-Foundation and the workshop and book were also sponsored by the Konrad-Adenauer-Stiftung.

The book commences with a general introduction regarding the status of international law within Germany and South Africa respectively. The overviews introduce issues such as the status of treaties and customary international law in the domestic legal order; the procedure for the ratification and incorporation of treaties; the relevance of soft law for the domestic order (for example, as guidelines for interpretation of domestic law by courts/the executive); as well as the role of courts in applying and enforcing international law.

The thematic sections focus in more depth on the status and implementation of international instruments pertaining to key sub-areas of international law in Germany and South Africa. These include the United Nations Charter (peace and security); the international law of the sea, international economic law, international environmental law, international human rights law and international criminal law; regional integration; and the status of international judicial decisions before domestic courts.

Each of these thematic sections consists of chapters devoted to the situation in Germany and South Africa respectively. In order to strengthen coherence between sections, all authors were encouraged to focus on similar questions in relation to their specific sub-areas. These include an identification of the relevant international law obligations (such as treaty, custom or soft law), as well as their development on a more general and regional specific level. Thereafter the chapters address the manner of incorporation, which is *inter alia* determined by the constitutional dispensation of the two countries. In Germany the manner of incorporation is often also affected by the fact that certain international obligations enter the national legal order via the EU. Subsequently, the chapters devote attention to the role of national courts in applying and developing international law. The chapters conclude by assessing the main achievements by and challenges for Germany and South Africa in relation to the implementation of the international obligations in question. The editors have deliberately refrained from drawing any conclusions in a concluding chapter. Given the diversity of the sub-areas addressed and the complexity of each of the issues at stake, the drawing of conclusion at this stage seems premature. Instead the volume is intended to engender further debate and reflection on a topic which remains highly relevant and challenging in modern international law.

The bibliography at the end of each chapter includes the publication details of books cited in the respective chapter, while detailed information on all other references are provided in the relevant footnotes. Cross-references between chapters are undertaken by an arrow (→) in the body of the text.

A: General overview

CHAPTER 1

THE RECEPTION OF INTERNATIONAL LAW IN THE GERMAN LEGAL ORDER: AN INTRODUCTION

Rüdiger Wolfrum, Holger Hestermeyer** & Silja Vöneky****

1 Background¹

1.1 International law

International law – treaty law as well as customary international law – regulates or at least influences national regulations of an increasing number of issues that were traditionally considered to belong to the internal affairs of states. Accordingly, the number of international treaties that states conclude, bilateral as well as multilateral ones, has increased significantly: For example, Germany is a party to more than 3000 (bilateral and multilateral) international treaties.² Indubitably, the international legal order has reached a density and complexity not anticipated in the middle of the 20th century.³

In light of these developments it is particularly important to assess the relationship between international law and national law. In this regard, it is mandatory to clearly distinguish between, on the one hand, the binding

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1 We are grateful to Mrs Mirka Möldner, Mr Daniel Wischart and Mr Jakob Jürgensen for their support and valuable input.

2 See S Vöneky 'Verfassungsrecht und völkerrechtliche Verträge' in J Isensee & P Kirchhof (eds) *Handbuch des Staatsrechts* vol XI (3rd edn 2013) sec 236 para 2.

3 R Wolfrum 'Kontrolle der auswärtigen Gewalt' (1997) 56 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 38 42; W Fiedler 'Quantitative und qualitative Aspekte der Einordnung der Bundesrepublik Deutschland in völkerrechtliche Verträge' in R Geiger (ed) *Völkerrechtlicher Vertrag und staatliches Recht vor dem Hintergrund zunehmender Verdichtung der internationalen Beziehungen* (2000) 11ff.

force of commitments on the international level, whether they derive from international treaties, customary international law, binding decisions of international organisations or general principles of law, and, on the other hand, the legal applicability of such international commitments at the national law level. It is quite possible that the two – for one reason or another – do not match, that is, that even though a state is bound by a rule of international law, that same rule cannot be applied as binding law by organs of that state. Since a state, in general, cannot invoke national law as a justification for its failure to implement an international commitment,⁴ it violates international law in such a situation unless it changes its national law.

As a rule – and with the exception in particular of some treaties – international law does not establish how states are to implement their international obligations at the national level. The applicable mechanism is determined by the approach towards the relationship between national law and international law of the respective national system. Traditionally, one distinguishes between two different approaches – monism and dualism. The former assumes that there is only one body of law and, accordingly, international law is ‘the law of the land’.⁵ Dualism, in contrast, assumes that international law and national law are entirely separate branches of law and that, accordingly, a mechanism must exist through which international law may be invoked and made applicable at the national level.⁶ Such a view avoids any question of supremacy of one legal system over the other. There are several variations to these two basic approaches.⁷ The practical relevance of these theories is disputable. The practice of states differs widely in this respect and does not follow either of the theories in its pure form.

1.2 The German legal system

The German State can trace its ancestry back to the Holy Roman Empire that grew out of the Eastern part of the empire of Charlemagne, divided in the treaty of Verdun in 843, and that was dissolved in 1806. Even though in the decades after the dissolution there was no German state, it was during this time – in 1849 – that Germany’s first modern constitution was drafted as a brainchild of the revolutionary movement of 1848 (*Paulskirchenverfassung*). While tremendously influential in later times, the

4 This principle is well established in international law and codified by the Vienna Convention on the Law of Treaties (23 May 1969, 1155 UNTS 331) art 27.

5 US Constitution art VI clause 2 (‘This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land ...’).

6 O Oppenheim, R Jennings & A Watts (eds) *Oppenheim’s international law* (9th edn 1992) 53.

7 Compare eg J Crawford *Brownlie’s principles of public international law* (8th edn 2012) 48ff.

constitution never came into force. It was not until the proclamation of the German Empire in 1871 that Germany was reunited as a state. 1871 also saw the entry into force of the constitution of the German Empire, on which Bismarck exercised a significant influence. After World War I Germany obtained a democratic constitution with the foundation of the Weimar Republic in 1919. That constitution proved unable to prevent the rise to power of the national socialists in 1933, under which Germany not only brought a disastrous war upon the world, but also committed some of the worst atrocities in history. Germany's post World War II constitution – the *Grundgesetz* (Basic Law) from 1949 – is heavily influenced by the failure of the Weimar Republic and the crimes committed by Germany during the Third Reich.

Germany's legal system is, in principle, a civil law one with its roots both in Germanic law and in the reception of Roman law.⁸

Today, the Federal Republic of Germany is a federal country composed of 16 states referred to as '*Länder*'. As a general principle the Federation is only competent where it says so in the Basic Law. In practice, though, the Federation is exercising the most significant powers with the exception of the cultural field. The federal structure also has repercussions for the German Parliament. It consists of two houses that participate in legislative affairs: the *Bundestag*, directly elected by the German population and responsible for electing the Chancellor who is the head of the Government and proposes the ministers, and the *Bundesrat*, which consists of members of the governments of the *Länder* and through which the *Länder* participate in the legislation and administration of the Federation and in matters concerning the European Union (article 50 of the Basic Law).

1.3 The Basic Law and international law

One of the consequences that the drafters of the German Basic Law drew from German history was a conscious decision for what has been referred to as an 'internationally open' constitution.⁹ This principle of openness can already be identified in the Preamble of the Basic Law¹⁰ and has been used by the Federal Constitutional Court (*Bundesverfassungsgericht*) also when dealing with the relationships between German national law and

⁸ See eg G Köbler *Deutsche Rechtsgeschichte* (6th edn 2005).

⁹ The term goes back to K Vogel *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit* (1964). See in depth also C Tomuschat 'Staatsrechtliche Entscheidung für die internationale Offenheit' in J Isensee & P Kirchhof (eds) *Handbuch des Staatsrechts* vol XI (3rd edn 2013) 3.

¹⁰ It reads: 'Conscious of their responsibility before God and man, inspired by the determination to promote world peace as an equal partner in a united Europe, the German people in the exercise of their constituent power, have adopted this Basic Law ...'.

international law (applied to that context it is known as *Völkerrechtsfreundlichkeit*).¹¹ It should be noted, however, that while the German Constitution was, for the time in which it was drafted, maybe exceptionally open towards international law, that openness is perhaps not as pronounced as in some more recent constitutions such as South Africa's.

The openness of the Basic Law towards the international system is reflected in numerous of its provisions. Two pillars of this openness should be mentioned in this contribution: first of all the Basic Law envisages international cooperation. We have already mentioned the Preamble of the Basic Law, which states that the *pouvoir constituant* was 'inspired by the determination to promote world peace as an equal partner in a united Europe'. The desire for cooperation is further expressed in articles 23 and 24 of the Basic Law. The former addresses cooperation in the context of establishing a united Europe (→ Hestermeyer). The latter concerns cooperation in the context of international organisations, to which the Federation may transfer sovereign powers according to article 24(1) of the Basic Law, in the context of systems of mutual collective security (article 24(2)) and of compulsory international arbitration (article 24(3)). It should be mentioned that the Basic Law does not – and in this respect it differs from the examples of several other states – entrust the conduct of foreign relations only to the executive. Instead the executive and the legislature have to co-operate in this respect.¹²

The second pillar of openness of the Constitution that deserves mention – and which is the main topic of this contribution – is the role that the Basic Law ascribes to international law. The German Constitution does not impose either monism or dualism in its pure form. Whereas in respect of international treaties article 59 of the Basic Law¹³ follows dualism, general rules of international law (which includes customary international law and general principles of law) are, according to article 25 of the Basic Law, considered to be part of the German legal system.¹⁴ Binding decisions of international organisations, courts and tribunals do not fit easily into this dichotomy. As many other constitutions the Basic Law does not contain provisions concerning the national implementation of binding decisions of international organisations or of international

11 See on this M Herdegen 'Article 25' in M Herdegen et al (eds) (2013) *Maunz & Dürig, Grundgesetz Kommentar*, paras 6ff with further reference to the jurisprudence of the Federal Constitutional Court and doctrinal works.

12 M Nettesheim 'Article 59' in Herdegen et al (n 11 above) para 7.

13 Art 59(2) of the Basic Law reads: 'Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply *mutatis mutandis*.'

14 Art 25 of the Basic Law reads: 'The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for inhabitants of the federal territory.'

courts and tribunals (→ Herdegen). As far as binding decisions of the Security Council are concerned – this is particularly important for individual sanctions – they are implemented on the national level either through a governmental decree, a regulation of the European Union, or both (→ Payandeh).¹⁵

In light of Germany's past the drafters of the Constitution could not and did not content themselves with merely making customary international law part of German law when it came to the law governing the waging of a war of aggression.¹⁶ According to article 26 of the Basic Law:

- (1) Acts tendering to and undertaken with the intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offence.
- (2) Weapons designed for warfare may be manufactured, transported or marketed only with the permission of the Federal Government. Details shall be regulated by a federal law.

This provision, too, is given meaning by its historical background.¹⁷ It does not exclude Germany from participating in international efforts under Chapter VII of the UN Charter to preserve or restore international peace or security or to participate in activities under the mandate of NATO. Equally it does not restrict Germany in respect to self-defence as provided for by the UN Charter (→ Schmalenbach).

Finally, after the horrible crimes committed by Germany during the Nazi era, human rights was another area that the framers of the Basic Law paid much attention to. Even though international human rights law was still in its infancy when the Basic Law was drafted, article 1(2) of the Basic Law already shows signs of constitutional 'openness' by providing: 'The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.' According to the Constitutional Court the provision grants special protection to core international human rights standards, entailing an obligation (which is also based on article 59(2) of the Basic Law) to take

15 See also the German *Außenwirtschaftsgesetz* sec 4 (Foreign Trade and Payments Act, a working translation is available at <http://www.bmwi.de/BMWi/Redaktion/PDF/A/awg-englisch,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf> (accessed 8 June 2015).

16 See in this respect the Charter of the United Nations (the UN Charter) (26 June 1945, 1 UNTS XVI) art 2(4) and the Rome Statute of the International Criminal Court (the Rome Statute) (17 July 1998) art 8 *bis* as amended in Kampala. At the time of writing this article the amendment has been ratified by 23 States including Germany but excluding South Africa.

17 R Streinz 'Article 26' in M Sachs (ed) *Grundgesetz Kommentar* (6th edn 2011) para 1.

the European Convention on Human Rights into account when applying the fundamental rights of the Basic Law (→ Wenzel).¹⁸

However, the role of international treaties or customary law in German national law does not fully describe the role that the Basic Law ascribes to international law. Account also has to be taken of the law of the European Union that is to some extent part of the national legal system and to some extent heavily influences that system. European Union law may equally transport international legal standards into national law (→ Hestermeyer). This is particularly true for international environmental law and international economic law (→ Durner, Hensgen), but partially true for many if not most fields of law, as can be seen, for example, in the field of the law of the sea (→ Proelss).

Finally, it is appropriate to mention that there are more informal forms of receiving international law. For example, the human rights chapter of the Basic Law was developed with an early draft of the Universal Declaration of Human Rights in mind (→ Wenzel).¹⁹ This is only one of many examples of how national law may be influenced by international law. The interrelationship works both ways, however. International law is also being influenced by national law. The prime example since the 1970s has been international environmental law.

The following sections will explain in more detail how international law is implemented into national law in Germany. It will start by setting out the status of international treaties in the German legal order and will then describe the role of rules of general international law, before arriving at a short conclusion. It should be mentioned that this chapter will *not* describe how treaties signed by the European Union become part of German law. That aspect of the complex puzzle piece of the German and European multi-level system will be discussed in this volume in the chapter on regional integration (→ Hestermeyer).

2 The status of treaties in the domestic legal order

Firstly, we will discuss the reception of international treaties in the German legal system. The Basic Law does not specify what it regards as an international treaty. The Federal Constitutional Court has held that for the definition of the notion of ‘international treaty’ in article 59 of the Basic Law the definition of the term under international law is decisive: all agreements between two or more subjects of international law which are

18 BVerfG Case 2 BvR 1481/04 (14 October 2004) (2005) 111 *Entscheidungen des Bundesverfassungsgerichts* 307.

19 See D Eberhardt ‘Der Einfluss der Allgemeinen Erklärung der Menschenrechte auf die Grundrechtsberatungen des Grundgesetzes im Parlamentarischen Rat’ (2009) 14 *Menschenrechtsmagazin* 162; H Dreier ‘Kontexte des Grundgesetzes’ (1999) 114 *Deutsches Verwaltungsblatt* 667 772ff.

meant to change the legal situation between the parties.²⁰ Although article 32(1) mentions only relations with foreign states and article 59 only speaks of foreign states, it is generally accepted that treaties with international organisations are also covered, however, treaties with the Holy See are not.

Before we can address the issue of how treaties concluded by the German Federation are transposed into national law, however, we will have to discuss two preliminary issues, namely – firstly – the *competence* of the Federation to conclude treaties, given that Germany is both a federal state and a member state of the European Union and that hence there are three entities that can theoretically conclude treaties: the EU, the Federal Republic of Germany and the German *Länder*, and – secondly – the procedure for concluding treaties by the Federation.

2.1 Competence for the conclusion of treaties in a multi-level system

The first question one has to ask when discussing the implementation of international agreements in Germany is the question who concludes such international agreements. All three state entities of the multi-level system of governance of Germany may, in principle, conclude treaties: the European Union, the Federal Republic of Germany and the *Länder*.

The power of the European Union to conclude treaties is defined in the Treaty on the Functioning of the European Union (TFEU), which provides in its article 216(1) that the

Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve ... one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

In the areas listed in article 3 of the TFEU that competence for the conclusion of international agreements is exclusive. These areas include the common commercial policy, instances in which the conclusion of an international agreement is provided for in a legislative act of the Union, or is necessary to enable the Union to exercise its internal competence, or in so far as the conclusion may affect common rules or alter their scope. In other fields EU member states retain the capacity to conclude treaties. In light of the division of competences it is possible that both the European Union and Germany become parties to the same treaty. Even where the European Union alone acts, however, German institutions, including the German Parliament, remain involved.²¹ More details on treaties of the

20 BVerfG Case 2 BvE 3/92 *inter alia* (12 July 1994) (1994) 90 *Entscheidungen des Bundesverfassungsgerichts* 286 359.

21 See the Basic Law art 23.

European Union are provided in the chapter on regional integration in this volume.

The division of competences to conclude treaties between the federal level and the *Länder* is the topic of article 32 of the Basic Law, which provides:

- (1) Relations with foreign states shall be conducted by the Federation.
- (2) Before the conclusion of a treaty affecting the special circumstances of a Land, that Land shall be consulted in timely fashion.
- (3) Insofar as the *Länder* have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government.

It is, thus, in principle the Federation that concludes treaties, even though there is an obligation of consultation with a *Land* where treaties affect the special circumstances of that *Land*. The *Länder* may also conclude treaties, but only insofar as they have power to legislate and only with the consent of the Federal Government.

If taken literally, the general competence of the Federation to conclude treaties creates problems in particular where the *Länder* have an exclusive power to legislate. We have already pointed out (and will discuss in more detail in this section) that Germany follows a dualistic model with respect to treaties, that treaties thus have to be transposed into national law to become applicable law. If the Federation can conclude treaties in matters of exclusive competence of the *Länder*, however, it would have to be the *Länder* that have to pass laws transposing the treaty. The resulting problems have led to much debate whether the Federation really can conclude treaties in such cases. In practice, the Federation and the *Länder* have reached an agreement about the matter,²² which provides, amongst others, that the Federation shall reach agreement with the *Länder* before concluding agreements in areas of exclusive competence of the *Länder*.²³

2.2 Treaty conclusion by the Federation

While article 32 of the Basic Law determines which entity – Federation or *Länder* – may conclude treaties, it is article 59 that stipulates which organ is competent to conclude international treaties or, in other words, has the competence to represent Germany externally. Article 59 of the Basic Law reads:

- (1) The Federal President shall represent the Federation for the purposes of international law. He shall conclude treaties with foreign states on behalf of the Federation. He shall accredit and receive envoys.

22 The so-called 'Lindauer Absprache' dated 14 November 1957.

23 For details see R Geiger *Grundgesetz und Völkerrecht* (5th edn 2010) 117 - 113.

(2) Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning federal administration shall apply *mutatis mutandis*.

Article 59(1) of the Basic Law thus establishes that the competence to formally represent Germany in international relations rests, in principle, with the Federal President. It is worth noting that the government is not even mentioned in this context. However, this does not mean that the Federal President has the power to take the necessary decisions. This is the prerogative of the government and predominantly the Chancellor and the minister of Foreign Affairs.²⁴ It is thus the government that directs the foreign policy.

Article 59(2) of the Basic Law goes on to require, for certain categories of treaties, the ‘consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law’, that is, the approval of Parliament, which means, as indicated above, that for those categories the executive and the legislature have to co-operate.²⁵ Article 59(2) of the Basic Law thus requires a distinction between international treaties requiring parliamentary approval and treaties not requiring such approval and, for the latter, sets up a two-step process distinguishing between the negotiation of an international treaty and its approval by Parliament. In both cases, the negotiation of international treaties is the prerogative of the executive. The preparation of such negotiations takes place on the level of the executive. The delegation undertaking the negotiations is composed of members of various ministries. However, on several occasions members of Parliament have been included in the delegation of Germany. It is – in principle – also the prerogative of the executive to decide whether the approval by Parliament of a particular treaty is to be sought. However, approval by Parliament is a right of the Parliament and if the executive does not seek approval where it is required by the Constitution, the Government can be sued in the Federal Constitutional Court.²⁶ We will address the two categories of treaties requiring and treaties not requiring approval by Parliament in turn.

2.2.1 International treaties requiring approval by Parliament

Article 59(2) of the Basic Law refers to two different categories of international treaties, whose conclusion requires the consent of

²⁴ Nettesheim (n 12 above) paras 34 & 53.

²⁵ C Calliess in Isensee & Kirchhof (n 9 above) sec 83 para 52.

²⁶ See the admissible claims in BVerfG Case 2 BvE 2/07 (3 July 2007) (2008) 118 *Entscheidungen des Bundesverfassungsgerichts* 244, even though the Court held no rights to be violated in that case.

Parliament: those that 'regulate the political relations of the Federation' and those that 'relate to subjects of federal legislation'.

As far as the first category is concerned, it is evident that the notion of 'regulate the political relations' is open to interpretation. It is clear from the wording that all highly political treaties are included in this category, such as treaties concerning the territorial integrity of Germany, treaties dealing with its independence or treaties through which Germany accepts significant financial commitments. However, the category also includes international treaties whose primary objective is not as far reaching but which have a significant political side effect.²⁷ The Federal Constitutional Court decided that whether an international treaty regulates political relations does not only depend upon the subject area to which the international treaty concerned belongs, but also upon the circumstances of the particular case at hand. The Court came to the conclusion that even a traditional commercial treaty could be considered as regulating political relations depending on those circumstances.²⁸ It is to be noted in this context that the Federal Constitutional Court does not accept a political question doctrine.²⁹ Also, human rights treaties may be considered as international treaties affecting political relations,³⁰ although they may also be considered as belonging to the second category of treaties referred to in article 59 of the Basic Law. The objective of requiring consent by Parliament for treaties belonging to the first category of treaties mentioned in article 59(2) of the Basic Law is to ensure that the executive does not take actions that are of significant relevance for the international relations of Germany without having involved Parliament previously.

The second category of international treaties that requires consent by Parliament, according to article 59(2) of the Basic Law, is treaties that 'relate to subjects of federal legislation'. This category covers all treaties that have to be implemented through legislation.³¹ The objective of this clause is quite evident. It constitutes a guarantee that the executive does not enter into international commitments which might be contrary to existing legislation or which might infringe upon future legislation. In fact, the necessity to seek approval by Parliament for this type of international treaty reflects a significant principle in German constitutional law, namely that important decisions require such approval (so-called *Wesentlichkeitstheorie*).³²

27 Vöneky (n 2 above) para 16.

28 BVerfG Case 2 BvE 2/51 (29 July 1952) (1952) 1 *Entscheidungen des Bundesverfassungsgerichts* 372 382ff.

29 Compare eg N Achterberg 'Deutschland 30 Jahre nach dem Grundgesetz' in (1980) 38 *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer* 78.

30 Vöneky (n 2 above) para 17.

31 BVerfG Case 2 BvE 2/51 (n 28 above) 388ff.

32 See on this fundamental principle BVerfG Case 2 BvL 8/77 (8 August 1978) (1979) 49 *Entscheidungen des Bundesverfassungsgerichts* 89 126; compare also HH Klein 'Stellung und Aufgaben des Bundestags' in *Handbuch des Staatsrechts* vol III (3rd edn 2005) sec 50 paras 23ff.

As a consequence of a progressive interpretation of the two clauses, the number of international treaties requiring Parliament's consent has increased. Whereas, for example, in the beginning the executive alone accepted the statutes of international organisations, at least for universal ones, now this is being done with the consent of Parliament.

But it is not only the conclusion of the treaty itself that requires approval by Parliament. Where a treaty was the subject of approval by Parliament, amendments to the treaty, too, need such approval. Only under certain circumstances is such approval not necessary for amendments, namely if the previous act of Parliament already embraced the amendments or if the amendments are purely of a drafting nature, such as correcting typos.

Despite Parliament's power to accept or refuse the approval of international agreements falling into the two mentioned categories, the influence of Parliament on the content of international treaties is, in reality, limited. Certainly there may be a discussion in Parliament, but Parliament considers a treaty only after the international negotiations have concluded. Thus, the only options that remain for Parliament are to approve or not to approve an international treaty. Where a treaty permits its ratification only in parts or where public international law allows the formulation of a reservation Parliament may also grant approval only for relevant parts of the agreement or on condition of the formulation of a reservation.³³ But it is not only these limited options that restrict the impact of Parliament. Parliament also has a rather limited impact on the content of treaties for practical political reasons: As we stated, the German Chancellor, who proposes the ministers and is the head of government, is elected by the *Bundestag* and hence government is based upon the majority of the *Bundestag*. The rejection of an international treaty by Parliament that the government wants to be accepted is hence rather unlikely.

One *caveat* has to be made in this respect, however. There is the possibility that the *Bundesrat*, which, as the house representing the *Länder*, may have a different majority than the *Bundestag*, may take a more critical position on a treaty proposed by the Government. However, only a limited number of international treaties require the approval of the *Bundesrat*.

Reflecting on the procedure set up for treaties requiring approval by Parliament, one may critically say that the material scope of international treaties and in particular the relevance they have for individuals and the reality of their democratic legitimisation does not match. This is even truer if one takes into account that international treaties, particularly the ones establishing international organisations, may change gradually through

33 Geiger (n 23 above) 118.

practice.³⁴ The German Parliament is not necessarily aware of such developments and, in particular, has no means to influence them. The Federal Constitutional Court has considered this phenomenon in respect to NATO, for example,³⁵ without in practice really strengthening the position of Parliament too much.³⁶ It may be said, in this regard, that international law has an increasing problem concerning its national democratic legitimisation.

2.2.2 International treaties not requiring approval by Parliament

All international treaties that do not require approval by Parliament are, according to article 59(2) of the Basic Law, so-called 'executive agreements'. Such treaties mostly refer to administrative issues within the competence of the Federal Government as compared to the competence of the *Länder*.

2.2.3 Unilateral acts

Another category of acts of international law should be mentioned in this context: unilateral acts. Unilateral acts are declarations by a state or international organisation causing legal consequences under international law – without the need for a second act as would be the case for a treaty requiring reciprocal declarations by at least two states.³⁷ Examples of such acts are protests, waivers, renunciations or withdrawal. The German Government does not need approval by Parliament to undertake such acts.

2.3 Incorporation of treaties into national law

The main issue concerning the relationship between international treaties and national law is to make sure that an international treaty internationally in force becomes effectively applicable at the national level. This includes that it may be invoked before national courts.

In a legal system such as the one of Germany, which follows the dualistic approach as far as international treaties are concerned, such applicability requires a decision under national law ordering the international treaty in question to be applicable nationally. Again, we have to distinguish between the two categories of treaties created by article 59(2)

34 See E Klein & S Schmahl 'Die Internationalen und die Supranationalen Organisationen' in W Graf Vitzthum & A Proelß (eds) *Völkerrecht* (6th edn 2013) 237 256ff.

35 BVerfG Case 2 BvE 6/99 (22 November 2001) (2002) 104 *Entscheidungen des Bundesverfassungsgerichts* 151; BVerfG Case 2 BvE 2/07 (n 26 above).

36 Strengthening the role of Parliament see BVerfG Case 2 BvR 2194/92 *inter alia* (12 October 1993) (1994) 89 *Entscheidungen des Bundesverfassungsgerichts* 155 188; BVerfG Case 2 BvE 6/99 (n 35 above) 195.

37 See G Dahm et al *Völkerrecht* vol I/3 (2nd edn 2002) 764.

of the Basic Law, namely treaties requiring approval by Parliament and treaties not requiring such approval.

2.3.1 *International treaties requiring approval by Parliament*

As we have shown, all treaties that require a law for their implementation (as well as treaties that regulate the political relations of the Federation) need to be approved by Parliament before they can be concluded by the executive. The consent by Parliament provided for in article 59(2) of the Basic Law, which needs to be given ‘in the form of a federal law’, has a triple function: It mandates the executive to ratify the international treaty in question as already indicated, it orders the applicability of that treaty on the national level in Germany and it establishes the rank of that treaty in the German legal system. These functions also explain why the consent has to be expressed in the form of a federal law. Treaties requiring approval by Parliament are thus (with a *caveat* that we will come to later) introduced into the national legal system by the law expressing the approval.

It is a matter of dispute, however, what the ‘order of applicability’ of the international treaty actually means. According to one line of thought, the law passed by Parliament incorporates the international treaty in question in the national legal system as German law; it is ‘transformed’ into national law.³⁸ Other authors take the position that the law ordering the national applicability of an international treaty is exactly that, namely an order to apply the treaty, which leaves its status as an international treaty unchanged.³⁹ This is not a purely academic question. If the word ‘transformation’ is taken literally it would mean that the national legislature could change the international treaty later (which none of the authors proposing a ‘transformation’ actually suggest), that the national rules on interpretation rather than those of public international law apply and that the German translation of the treaty in question rather than the authentic languages would be decisive. It appears that even most proponents of the theory shy away from its consequences, and rightly so, as they seem to be contrary to articles 31 to 33 of the Vienna Convention on the Law of Treaties. This also no longer reflects the reality of the German jurisprudence. At least the federal courts, when interpreting international treaties, have clearly respected the relevant international rules on interpretation and have pointed out discrepancies between

38 H Triepel *Völkerrecht und Landesrecht* (1899) 112, 258; compare also the critical assessment by W Rudolf *Völkerrecht und Deutsches Recht: Theoretische und dogmatische Untersuchungen* (1967) 158ff & 205ff.

39 KJ Partsch ‘Die Anwendung des Völkerrechts im innerstaatlichen Recht’ (1964) 6 *Berichte der Deutschen Gesellschaft für Völkerrecht* 20ff; B Kempen ‘Article 59’ in H von Mangoldt et al (eds) *Kommentar zum Grundgesetz* vol 2 (6th edn 2010) paras 89ff.

authentic and merely translated texts.⁴⁰ Thus, the theory suggesting that the statute approving the treaty merely orders its application is preferable.

The introduction of the treaty into German law by a statute expressing the consent of Parliament does not mean that all provisions can equally be applied in proceedings. To be directly applicable in proceedings a treaty provision not only has to be part of German law (which it becomes through approval by Parliament), it also has to be self-executing, that is, sufficiently precise and not requiring a further implementing act.⁴¹ Whether the provision is self-executing and whether it grants individual rights is, ultimately, a matter of interpretation.⁴²

Finally, we should address the *caveat* we made at the beginning of the section when we stated that treaties requiring approval by Parliament are – with a *caveat* – introduced into the national legal system by the law expressing the approval. The one exception concerns treaties concluded by the federation in areas for which the *Länder* have exclusive legislative competence. In those cases it is not clear to what extent the approval by (federal) Parliament can order the applicability of the treaty, as under the Basic Law any normal law in the area would have to be passed by the *Länder*, not by the Federation. In practice this does not seem to have caused significant problems, as the *Länder* are included in the treaty-making process according to the Agreement between them and the Federation described above and have either passed the relevant laws or applied the relevant Conventions. However, recently some courts held that the federal statute expressing consent to the UN Convention on the Rights of Persons with Disabilities cannot order the applicability of the Convention in areas of exclusive legislative competence of the states and they accordingly did not apply the Convention.⁴³ The ruling surprised many as none of the major human rights conventions appear to have been implemented by state law (→ Wenzel).⁴⁴

Another salient question concerns the status or rank of international treaties in the German legal system. Since the treaties that are the topic of this section have been adopted by Parliament in form of a federal law, their status is that of a federal act of Parliament. Due to their origin in public

40 BVerwG Case 2 C 38/81 (25 November 1982) (1983) 98 *Deutsches Verwaltungsblatt* 507 508; BGH Case II ZR 94/74 (7 November 1974) 63 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 228 230.

41 BVerfG Case 2 BvR 2115/01 *inter alia* (19 September 2006) (2007) 60 *Neue Juristische Wochenschrift* 499.

42 Geiger (n 23 above) 158f.

43 See in detail Hessischer VGH Case 7 B 2763/09 (12 November 2009); Niedersächsisches OVG Case 2 ME 278/10 (16 September 2010); see also BVerfG Case 6 B 52.09 (18 January 2010).

44 See *Stellungnahme der Monitoring-Stelle zur UN-Behindertenrechtskonvention zur Stellung der UN-Behindertenrechtskonvention innerhalb der deutschen Rechtsordnung* <http://www.institut-fuer-menschenrechte.de/presse/stellungnahmen/stellungnahme-der-monitoring-stelle-zur-un-behindertenrechtskonvention.html> (accessed 3 March 2015).

international law, however, some particularities apply. The interpretation of prior or subsequent national law has to take the relevant international treaty into account, which has become part of national law; there is an obligation to interpret German national law with a view to harmonising it with the international commitments Germany has entered into.⁴⁵ However, the *lex-posterior* principle applies and later legislation can hence contradict the treaty, even though this case – in which Germany violates international law and is under an obligation to change the law – is limited to instances where an interpretation of the later law in conformity with the treaty is not possible and the treaty cannot be regarded as *lex specialis*.⁴⁶

Given the rank of treaties as federal law, they have to conform to the Basic Law. If they do not, they do, of course, remain internationally valid, but cannot be applied internally without an amendment to the Constitution. It is for the Federal Government to resolve the legal conflict. In application of the regular courses of action, the Federal Constitutional Court may review whether an international treaty or the act of Parliament approving it is in violation of the Constitution. It may do so even before Parliament's approval of the treaty by a provisional measure.⁴⁷

2.3.2 *International treaties not requiring approval by Parliament*

Administrative agreements do not require approval by Parliament and hence are not integrated into national law through such approval. According to their very definition, they do not require implementation by legislation either. They are instead integrated into national law by acts of the executive such as regulations by ministers⁴⁸ and enjoy the rank of the relevant act in the German legal order.

International treaties increasingly set up international organisations that themselves take binding decisions requiring implementation in national law.⁴⁹ These can be implemented under already existing laws, or require an act of implementation by the organs that are competent.⁵⁰ At times, much like administrative agreements, they are rendered applicable by regulation of the competent federal minister. Whether this will be done under article 59 of the Basic Law currently remains open to discussion.

45 Compare on this issue C Tomuschat 'Die staatsrechtliche Entscheidung für die internationale Offenheit' in J Isensee & P Kirchhoff (eds) *Handbuch des Staatsrechts* vol VII (1st edn 1992) sec 172 paras 27ff.

46 Vöneky (n 2 above) para 26.

47 Compare in that regard the jurisprudence of the Federal Constitutional Court on the European Stability Mechanism (ESM), order of 12 September 2012, 2 BvR 1390/12, an English translation can be accessed at: https://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012en.html (accessed 3 March 2015).

48 See Geiger (n 23 above) 160.

49 Eg resolutions under Chapter VII of the UN Charter or the Rules issued by the International Seabed Authority.

50 Geiger (n 23 above) 161.

2.4 Denunciation and withdrawal from a treaty

The denunciation of or withdrawal from an international treaty is a prerogative of the executive even if the international treaty in question has received parliamentary approval.⁵¹

3 The status of general rules of international law in the domestic legal order

As already indicated, general rules of international law benefit from a different regime of incorporation. Article 25 of the Basic Law provides:

The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for inhabitants of the federal territory.

The Basic Law does not specify what is meant by ‘general rules of international law’. However, it is evident that these words only include those rules that are applicable universally, excluding regional international law.

The majority view is that article 25 of the Basic Law refers to customary international law as well as to general principles of law as referred to in article 38 of the Statute of the International Court of Justice, but not to international treaties.⁵² The latter is due to the fact that international treaties are dealt with specifically in article 59 of the Basic Law and that they cannot be qualified as ‘general rules’. To the extent that an international treaty codifies customary international law, the rule is covered by article 25 – in spite of the fact that it is also contained in an international treaty. For example, the rules of interpretation of the Vienna Convention on the Law of Treaties have attained the status of customary international law and hence are covered by article 25 of the Basic Law. Important principles such as the principle of *pacta sunt servanda*, large parts of the Draft Articles on State Responsibility⁵³ as well as – and this is evident – *ius cogens* are covered by article 25 of the Basic Law, too.⁵⁴

It is to be noted that customary international law as well as general principles of law are developing progressively. In that respect the reference in article 25 is a dynamic one. In the case of a legal dispute, those general rules of international law are applicable that were in force at the time the relevant activity giving rise to the dispute was undertaken.

51 Critical R Wolfrum ‘Kontrolle der auswärtigen Gewalt’ in (1997) 56 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 38ff & 50.

52 Herdegen (n 11 above) para 1.

53 GAOR 56th Sess Suppl 10, Doc A/56/10 43ff.

54 Herdegen (n 11 above) paras 23ff only speaks of universal customary law.

As far as the customary international law covered by article 25 of the Basic Law is concerned, its applicability does not depend on Germany belonging to the promoters of such customary international law. It is sufficient that Germany did not object thereto.

Where a rule falls under article 25 of the Basic Law, all German institutions have to protect and uphold it. Article 25 makes it quite clear that individuals may directly invoke such general rules of international law before courts. If courts have doubts about whether or not such a general rule of international law exists, they are obliged to submit that question to the Federal Constitutional Court (see article 100(2) of the Basic Law). Failure to have recourse to the Federal Constitutional Court is considered a violation of due process.⁵⁵ The case law of the Federal Constitutional Court that stems from this procedure shows that general rules of international law do indeed have practical relevance in the German system. Practice focuses on several areas, such as sovereignty, powers of the state and immunity (including state immunity), state responsibility, rights of aliens and the prohibition of the use of force.⁵⁶

As to the rank of the general rules of international law article 25 states that '[t]hey shall take precedence over the laws'. The precise rank is in dispute. Some authors argue that general rules hold the same rank as the Basic Law or even that they rank above it. However, the majority view – and the view of the Federal Constitutional Court – is that they rank between federal law and the Basic Law.⁵⁷

Article 25 of the Basic Law is maybe the clearest expression of the international openness of the German Constitution. It was designed against the background of the total rejection and the gross and comprehensive violation of international law under the Nazi-regime. The idea of the drafters of the Basic Law was to establish an open door allowing general principles of international law to automatically influence German law. As we have stated that open door is, indeed, relevant. However, maybe it proved to be less relevant in practice than originally expected and is losing further relevance. This is due to several developments. International treaty law has developed rapidly after World War II and Germany has become a party to most universal international treaties. When international treaties are applied, especially after having been approved by the German Parliament, recourse to the – far less explicit and more difficult to determine – general rules of international law is less attractive. Nevertheless, article 25 still occupies a central role in respect of

55 G Sturm & S Detterbeck 'Article 100' in M Sachs (ed) *Grundgesetz Kommentar* (6th edn 2011) para 27.

56 For an overview see H-J Cremer 'Allgemeine Regeln des Völkerrechts' in Isensee & Kirchhof (n 9 above) sec 235 paras 34 - 40.

57 See Herdegen (n 11 above) para 42; BVerfG Case 2 BvL 52/71 (29 May 1974) (1975) 37 *Entscheidungen des Bundesverfassungsgerichts* 271.

the relationship between international law and German national law, demonstrating the openness of the Basic Law.

4 The role of the judiciary in the interpretation and application of international law

The role of the German judiciary in interpreting and applying international law is largely determined by the German Constitutional Court, which has – since the very beginning of its jurisprudence – granted a considerable role to international law, thus implementing the Basic Law’s ‘openness’ to international law.⁵⁸

Thus, the Court has read the Basic Law as containing an obligation to interpret municipal law in accordance with international law – a principle reminiscent of the US ‘Charming Betsy’ doctrine,⁵⁹ that is referred to in German as *völkerrechtsfreundliche Auslegung*. The obligation is not imposed explicitly in the Basic Law, but results from a comprehensive reading of its provisions relating to international law.⁶⁰ To further reinforce this doctrine the Court has adopted a generous reading of its own competences in constitutional complaints. In these proceedings the Court is limited to enforcing constitutional law, but has read its competences to include the prevention of a violation of international law:

as part of its jurisdiction the Constitutional Court has to pay special attention to preventing or remedying, to the extent possible, violations of international law, which result from the erroneous application or inobservance of provisions of international law by German courts and cause the responsibility of the Federal Republic of Germany under international law. In individual cases this can require comprehensive scrutiny.⁶¹

The scope of the obligation to interpret municipal law in conformity with international law is defined by the concepts of municipal and international law.

With regard to municipal law the obligation of interpretation in conformity with international law clearly relates to legislation: to the extent possible, legislation has to be interpreted in conformity with international law. Where such an interpretation is not possible, that is, where legislation explicitly contradicts international law, the normative hierarchy of the German system imposes different solutions depending on

58 See F Schorkopf ‘Völkerrechtsfreundlichkeit und Völkerrechtsskepsis in der Rechtsprechung des Bundesverfassungsgerichts’ in T Giegerich (ed) *Der ‘offene Verfassungsstaat’ des Grundgesetzes nach 60 Jahren* (2010) 131ff.

59 *Murray v The Schooner Charming Betsy* 6 US 64.

60 Tomuschat (n 9 above) paras 36ff.

61 BVerfG Case 2 BvR 1107/77 *inter alia* (23 June 1981) (1982) 58 *Entscheidungen des Bundesverfassungsgerichts* 1 34 (translation by the authors, internal citations deleted).

the nature of the rule of international law. General rules of international law prevail over national legislation according to article 25 of the Basic Law. Where the pertinent rule of international law is one of treaty law, however, the principle of *lex posterior* applies (unless the treaty rule can be regarded as *lex specialis*) and later municipal law prevails, resulting in a violation of international law. However, such cases are exceedingly rare. Only the field of tax law seems to have given rise to a statistically relevant number of cases in which courts have assumed a conflict between international and municipal law that could not be resolved by interpretation.⁶² In contrast, when it comes to interpreting the Basic Law the Constitutional Court has been much more reluctant to proceed with an interpretation that is in accordance with international law. While such an interpretation is possible with respect to general rules of international law under article 25 of the Basic Law, treaties in general do not have an impact on the interpretation of the Constitution. The European Convention is an exception to this rule. The Court has explicitly held that

as to constitutional law the text of the Convention and the case law of the European Court of Human Rights serve as aids for the determination of content and scope of the fundamental rights and the principles of the rule of law of the Basic Law, to the extent that this does not limit the protection of fundamental rights of the Basic Law ...⁶³ (→ Wenzel).

With regard to international law the previous paragraph shows that the scope of the obligation of interpretation in conformity with international law depends on whether the provision of international law falls under article 25 of the Basic Law or is one of treaty law. In some instances German courts have even used non-binding international documents as an aid to the interpretation of municipal law. Thus, the highest German civil court (*Bundesgerichtshof*) regarded a contract concerning the sale of cultural property as contrary to public policy and hence void under the German civil code as it violated the interest of mankind in the protection of cultural property, even though a relevant convention at the time was not yet in force for Germany and customary international law did not prohibit the sale either.⁶⁴ However, the relevance of such non-binding documents often referred to as ‘soft law’ has to be established on a case-by-case basis. Finally, it should be mentioned that provisions of European Union law benefit from what has developed into a *sui generis* regime. In particular, the supremacy of European Union law has largely been recognised by the German legal system (→ Hestermeyer).

⁶² Tomuschat (n 9 above) para 44.

⁶³ BVerfG Case 2 BvR 1481/04 (n 18 above) (translation by the authors). See Tomuschat (n 9 above) paras 37ff.

⁶⁴ BGH Case II ZR 113/70 (22 June 1972) 59 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 82. See A Bleckmann ‘Sittenwidrigkeit wegen Verstoßes gegen ordre public international’ (1974) 34 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 112.

5 Conclusion

With respect to international treaties the German system seems, at first sight, to be complex, which could be considered a disadvantage. As demonstrated, the Basic Law provides for an intricate system of competences concerning the conduct of foreign relations and the implementation of obligations incurred. It distinguishes between the competence to represent Germany internationally and the competence to decide on the foreign policy. Furthermore, article 59 of the Basic Law provides for the co-operation of the executive and the legislature with respect to the conclusion of more significant treaties. Certain international treaties may also be concluded by the *Länder*, which means that the system foresees a horizontal as well as a vertical distribution of competences. Finally, with respect to the implementation, the legislative competences of the Federation and *Länder* also have to be born in mind. However, what appears at first sight to be complex demands, in practice boils down to the establishment of cooperative relationships between the relevant entities in the conclusion of treaties, which enhances the chance of their effective implementation. With respect to general rules of international law, article 25 of the Basic Law demonstrates the openness of the German legal system with respect to international law.

The rules of the Basic Law are not complete; gaps have had to be filled for example by the jurisprudence of the Federal Constitutional Court. Whether the rules are still adequate considering the changes in international law is an open question; alternatives are, however, difficult to develop.

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CHAPTER 2

THE RECEPTION OF INTERNATIONAL LAW IN THE SOUTH AFRICAN LEGAL ORDER: AN INTRODUCTION

Erika de Wet*

1 Background

The Republic of South Africa is a unitary state with a common law tradition. Its common law is a blend of Anglo-American and Roman-Dutch Law. The latter refers to the legal system that applied in Holland during the seventeenth and eighteenth centuries. It comprised a mixture of medieval Dutch law and the Roman law of Justinian as received in Holland.¹ Roman-Dutch law was transported to the Cape when the Dutch settled there in 1652. Subsequently the principles of Roman-Dutch law were strongly influenced by English law, following the British occupation of South Africa in the early nineteenth century.²

Although South Africa became a republic (thereby rejecting the British Queen as head of state) only in 1961, it has been self-governing since 1910. Moreover, it was recognised as a sovereign state under international law already during the 1930s, a fact formalised *inter alia* by the Status of the Union Act 69 of 1934. Apartheid became the official state policy after the victory of the National Party in 1948. Between 1948 and the country's first democratic elections in 1994, the country's apartheid policies lead to its international isolation. During this time South Africa refused to become a party to many multilateral treaties, particularly in the field of African organisation, human rights, and humanitarian law.³ However, this position changed significantly after the first multi-racial elections on

* The contribution is based on E de Wet 'South Africa' in D Shelton (ed) *International law and domestic legal systems: Incorporation, transformation and persuasion* (2011) 567 - 593. The research undertaken for this chapter constituted part of a research sojourn as fellow of the Stellenbosch Institute for Advanced Study (STIAS) in September 2013.

1 J Dugard 'South Africa' in D Sloss (ed) *The role of domestic courts in treaty enforcement* (2009) 449.

2 As above.

3 J Dugard 'South Africa' in D Sloss (n 1 above) 448.

27 April 1994 and the subsequent enactments of the interim Constitution in 1994 and the so-called final Constitution of 1996.⁴

Under the final Constitution, executive power is vested in a President, who is both the chief of state and head of government. Legislative authority is granted to a bicameral legislature consisting of the National Assembly, which elects the President; and the National Council of Provinces, which has special powers to protect regional interests, including the cultural and linguistic traditions of ethnic minorities. The judicial system is based on a combination of Roman-Dutch law and English common law. The Constitutional Court is the highest court for interpreting and deciding constitutional issues, while the Supreme Court of Appeal is the highest court for non-constitutional matters.

Following the 1994 elections, most sanctions imposed by the international community in opposition to the system of apartheid were lifted. South Africa rejoined the Commonwealth (which it left in 1961) on 1 June 1994 and was accepted by the UN General Assembly on 23 June 1994. South Africa also subsequently became a member of the Southern African Development Community (SADC) and served as the African Union's (AU) first president from July 2003 to July 2004.

The subsequent sections will illuminate in more detail the relationship between international law and domestic law since the introduction of the new constitutional dispensation. The analysis will first introduce the constitutional provisions and statutory references pertaining to international law. Thereafter it will explore the status of treaties in the domestic legal order, with references *inter alia* to the different categories of treaties and the extent to which they need to be incorporated by Parliament in order to have effect within the Republic. Subsequently, the chapter examines the limited role that customary international law has thus far played in the domestic order, before outlining the role of the judiciary in interpreting and applying international law.

As subsequent chapters will give an in-depth analysis of the current status of various sub-areas of international law in the Republic, the aim of this chapter is limited to introducing the general principles governing the

4 For the text of the Constitution of the Republic of South Africa, 1996, see <http://www.gov.za/documents/constitution-republic-south-africa-1996> (accessed 20 April 2015). For the Interim Constitution of the Republic of South Africa, 1993 see <http://www.constitutionalcourt.org.za/site/constitution/english-web/interim/> (accessed 20 April 2015). See also T Maluwa 'International human rights norms and the South African Interim Constitution' (1994) 19 *South African Yearbook of Human Rights* 29; DJ Devine 'The relationship between international law and municipal law in the light of the Interim South African Constitution 1993' (1995) 44 *International and Comparative Law Quarterly* 1; R Keightly 'Public international law and the final Constitution' (1996) 12 *South African Journal on Human Rights* 406; J Dugard 'International law and the South African Constitution' (1997) 8 *European Journal of International Law* 77.

relationship between international and domestic law, thereby providing a contextual background for the subsequent chapters.

1.1 Constitutional provisions pertaining to international law

Unlike the earlier constitutions of 1910, 1961, and 1983, the interim Constitution expressly recognised international law and the role it had to play in municipal law. The provisions in the interim Constitution that specifically dealt with international law covered the signature and ratification of international agreements and their application in domestic law,⁵ the status of customary international law in South African domestic law,⁶ as well as the interpretive role of international law.⁷ The final Constitution of 1996 envisaged only minor changes with respect to these provisions.⁸ Of particular importance are sections 231-233 of the Constitution, as well as section 39, which constitutes a part of the Bill of Rights.

Section 231 regulates the signing, ratification, and implementation of international agreements (treaties):

- (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
- (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
- (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

Section 232 concerns customary international law and determines that 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.

5 Interim Constitution (n 4 above) chapter VI sec 82(1)(i), chapter XV sections 231(2) & (3).

6 Interim Constitution (n 4 above) chapter XV sec 231(4).

7 Interim Constitution (n 4 above) chapter III sec 35(1), chapter XIV sec 227(2)(d), (e) (concerning the National Defence Force). Keightly (n 4 above) 406.

8 n 4 above, chapter XIV secs 231 - 233.

Section 233 requires an international law friendly interpretation of legislation: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

Of particular importance in the practice of courts is section 39 concerning the interpretation of the constitutional Bill of Rights:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum:
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) 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.

Reference should also be made to section 200(2) of the Constitution, which regulates the Defence Force:

The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.

These provisions marked a formal turning point in the country's approach towards international law, especially regarding the use of international human rights law as a guideline for interpreting the Constitution. Although South Africa's common law tradition implies that decisions of foreign courts have been influential since its inception, until 1994 this influence was largely restricted to areas of private and commercial law.⁹ Before 1994 no reference was made to decisions of international monitoring bodies in the human rights field because South Africa was not party to any human rights treaties and many of its policies were directly at odds with the principles embodied in international human rights law. However, since the adoption of the interim and final Constitutions, decisions of international human rights bodies and of foreign courts pertaining to international law are frequently invoked (→ 4).¹⁰

1.2 Statutory references to international law

It is also worth noting that various statutes refer expressly to international law, in accordance with section 233 of the Constitution, which requires

⁹ Dugard (n 1 above) 466.

¹⁰ As above.

ordinary legislation to be interpreted in accordance with international law.¹¹ In some instances the legislation makes clear that it is to be interpreted in accordance with international law. In other instances the statute incorporates language that resembles that contained in international instruments, including ones that are not binding on South Africa. This enhances the ability of the executive and the courts to interpret the legislation in accordance with present and future developments in relation to the relevant area of international law.¹²

An example of a statute that explicitly requires interpretation consistent with international law is the Promotion of Equality and Prevention of Unfair Discrimination Act. This provides that any person interpreting the Act may be mindful of international law.¹³ Similarly, the Implementation of the Rome Statute of the International Criminal Court Act provides that a court applying the Act must consider conventional and customary international law.¹⁴ In addition, the Labour Relations Act states that one of the primary objects of the Act is to give effect to obligations incurred by the Republic as a member state of the International Labour Organization (ILO) and requires the Act to be interpreted in compliance with the public international law obligations of the Republic.¹⁵

2 The status of treaties in the domestic legal order

2.1 The definition and classification of treaties

The term 'international agreement' in the Constitution is synonymous with the term 'treaty' as defined in article 2(1) in the Vienna Convention on the Law of Treaties 1969 (Vienna Convention).¹⁶ This meaning has developed in the practice of the Office of the Chief State Legal Adviser in the absence of a definition of 'international agreement' in the Constitution and despite the fact that South Africa is not a party to the Vienna Convention. The term 'international agreement' in section 231 is therefore to be understood as referring to written agreements between subjects of international law that embody legally enforceable rights and obligations.¹⁷

11 Dugard (n 1 above) 463.

12 E Couzens 'The incorporation of international environmental law (and multilateral environmental agreements) into South African domestic law' (2005) 30 *South African Yearbook of International Law* 138.

13 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 sec 3(2)(a).

14 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 sec 2.

15 Labour Relations Act 66 of 1995 secs 1 & 3. Dugard (n 1 above) 463.

16 Vienna Convention of the Law of Treaties (the Vienna Convention) (23 May 1969, 1155 UNTS 331).

17 Vienna Convention (n 16 above) art 2(1) determines that: 'a "treaty" means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related

This view also seems to have been endorsed by the Constitutional Court in *Harksen v President of South Africa*,¹⁸ which concerned the attempt by Jürgen Harksen to prevent his extradition to Germany where he was charged with fraud.¹⁹ One of the issues central to the dispute was whether ad hoc extradition under section 3(2) of the Extradition Act 67 of 1962²⁰ (where South Africa had not concluded an extradition agreement with the requesting state) should also comply with the constitutional prerequisites for an international agreement. The question was whether the signature (consent) of the South African President to a statement that permitted the extradition of Harksen to Germany constituted an international agreement.²¹ The Constitutional Court determined that presidential consent in terms of section 3(2) of the Extradition Act was 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.²² It did not amount to an 'international agreement' in terms of section 231 of the Constitution, as it was not an instrument that intended to create international legal rights and obligations between state parties.²³

No provision is made for oral agreements or for unilateral acts in either the Constitution or in the Manual on Executive Acts of the Office of the President of South Africa (Manual), which serves as a guide to the practice of the Office of the Chief State Legal Advisor.²⁴ As far as the written agreements are concerned, section 231 of the Constitution distinguishes between two types of agreements. The first requires parliamentary approval in terms of section 231(2), meaning that both houses of Parliament (the National Assembly and the National Council of Provinces) sitting separately have to give approval, before the Executive may give its consent to bind the Republic on the international level.²⁵

instruments and whatever its particular designation.' See also J Schneeberger 'A labyrinth of tautology: The meaning of the term 'international agreement' and its significance for South African law and treaty making practice' (2001) 26 *South African Yearbook of International Law* 3; Dugard (n 1 above) 457.

18 *Harksen v President of South Africa & Others* 2000 (2) SA 825 (CC).

19 As above.

20 Extradition Act 67 of 1962 sec 3(2) deals with extradition to countries with which South Africa has not concluded an extradition agreement.

21 *Harksen* (n 18 above) para 13.

22 *Harksen* (n 18 above) para 21.

23 Schneeberger (n 17 above) 30.

24 N Botha 'Treaty making in South Africa: A reassessment' (2000) 25 *South African Yearbook of International Law* 72; 2006 *Manual on Executive Acts of the Office of the President of South Africa* (hereinafter the Manual), chapter 5 www.dfa.gov.za/foreign/bilateral/conclusion_agreement0316.pdf (accessed 15 April 2015); Schneeberger (n 17 above) 38. The Constitutional Court did not elaborate on the criteria to be considered when determining the intention of the parties where this was not stated clearly. In practice the Office of the Chief State Legal Adviser has developed guidelines similar to those of the US Department of State. These include the significance of the arrangement and the substantive provisions used; the specificity or generality of the language used; the form of the arrangement; the absence of familiar treaty clauses such as entry into force; amendment and termination provisions; and the name of the agreement.

25 Botha (n 24 above) 79.

The second concerns technical, administrative or executive agreements that can, in accordance with section 231(3), be concluded by the national executive alone.²⁶ Although Parliament has to be notified about these agreements, they are exempt from the sometimes lengthy parliamentary approval procedure. The Constitution does not give any indication of which agreements would qualify as technical, administrative or executive.²⁷ The internal practice that has developed within the Office of the Chief State Legal Adviser is to consider as 'technical' those agreements that do not have major political significance; do not require additional budgetary allocation from Parliament over and above the budget provided by a particular government department; and agreements that do not impact domestic law.²⁸ They are often of a bilateral nature and concern routine agreements for which a single government department is responsible for implementation. This encompasses the vast majority of agreements that South Africa has concluded since 1994.²⁹

The procedure foreseen for 'technical' agreements in section 231(3) requires an average of three months. Despite being of an expedited nature, the procedure is not always fast enough to accommodate the requirements of modern-day international relations. In such circumstances the executive prefers informal agreements because of their simplicity, swiftness, flexibility, and confidentiality. However, they do not create reciprocal rights and duties under international law, even though they are almost always honoured in practice.³⁰ Since they are of a non-binding nature, they are also exempt from the procedures prescribed in section 231 of the Constitution.³¹

The frequent use of technical agreements and informal agreements implies that a large number of agreements are excluded from the democratic verification process. The situation is particularly acute in relation to informal agreements. Whereas Parliament is at least notified about the conclusion of technical agreements in accordance with section 231(3), no such notification occurs in relation to informal agreements.³² Although these expedited procedures are necessary for the conduct of efficient international relations in the twenty-first century, it can be problematic from the perspective of democratic accountability that lies at

26 In practice only ministers sign international agreements. The Manual (n 24 above) 5.1.5; Schneeberger (n 17 above) 3. See also *Hugh Glenister v the President of the RSA*, 2011 (3) SA 347 (CC) para 89.

27 In practice the terms 'technical, administrative and executive agreements' in sec 231(3) of the Constitution form a single category and are interchangeable; The Manual (n 24 above) 5.5; Botha (n 24 above) 76.

28 The Manual (n 24 above) 5.5; Schneeberger (n 17 above) 4.

29 Schneeberger (n 17 above) 4 - 5; Botha (n 24 above) 76.

30 Schneeberger (n 17 above) 7.

31 Schneeberger (n 17 above) 28.

32 Schneeberger (n 17 above) 7.

the heart of section 231(2).³³ However, at the time of writing there has not yet been any case before a South African court challenging a particular classification of an agreement by the executive as ‘technical’, nor of the validity of informal agreements.

The role of Parliament in the ratification process also has implications for reservations to treaties. In those instances where treaties are subject to the parliamentary process foreseen in section 231(2), Parliament will have the opportunity to scrutinise the reservation attached by the executive.³⁴ In addition, Parliament may also insist on additional reservations. The issue of reservations does not, however, seem to play a prominent role in South African treaty-making and the domestic courts have not yet been confronted with interpretation issues pertaining to reservations, such as their legality or scope.

2.2 Treaty conclusion and implementation

2.2.1 *The need for incorporation*

In accordance with section 231(1) of the Constitution the negotiation and signature of treaties is the exclusive competence of the executive; Parliament has no role to play at this level. Moreover, the Manual indicates that the provinces may not enter into agreements governed by international law, except as agents of the national executive. The individual concerned would therefore have to require specific authorisation to this effect by way of Presidential Minute together with credentials issued by the Department of International Relations and Co-operation.³⁵

Section 231(2) and (3) of the Constitution exclusively regulates the conditions under which the Republic would be bound by international agreements on the international level. In order for treaties to apply domestically, section 231(4) prescribes that these agreements must first be enacted into domestic law by means of legislation, unless their provisions

33 The democratisation of the treaty-making process as foreseen in section 231(2) of the Constitution does not encompass the negotiation and signature of treaties. In accordance with section 231(1) of the Constitution, those functions vest solely in the hand of the executive. See Botha (n 24 above) 77, 80.

34 The Manual (n 24 above) 5.11; Botha (n 24 above) 84.

35 The Manual (n 24 above) 5.25; *Glenister* case (n 26 above) para 89; Botha (n 24 above) 956. Theoretically the possibility also exists that unauthorised agreements concluded between the provinces and foreign entities enjoying treaty-making capacity could receive the subsequent approval of the national executive in accordance with article 8 of the VCLT. Such an agreement would still be subject to parliamentary approval in terms of section 231(2) of the Constitution, unless it qualifies as a section 231(3) agreement.

are self-executing. This approach was confirmed by the Constitutional Court in the *AZAPO* and *Glenister* cases,³⁶ as well as the Supreme Court of Appeal in the *Progress Office Machines* case.³⁷ The *Azapo* case concerned the 1949 Geneva Conventions on the Laws of War, while the *Glenister* case pertained to various international and regional treaties combating corruption. The *Progress Office Machines* case for its part concerned the World Trade Organization (WTO) Agreement and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade. The *Progress Office Machines* and *Azapo* cases will be explored in more detail in (→ 2.2.2 and → 3). Although the issue of self-executing treaties will also be illuminated below, this concept has thus far remained a dead letter in the practice of South African courts.³⁸

Four principle methods are employed to transform treaties into municipal law. The first and most simple technique of incorporation is considering the pre-existing legislation sufficient to give effect to subsequent treaty obligations. An example is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973, which South Africa ratified in 1975.³⁹ Second, the provisions of a treaty may be embodied in the text of an Act of Parliament. This, for example, was the case with the Implementation of the Rome Statute of the International Criminal Court Act, which implemented South Africa's obligations under the Rome Statute of the International Criminal Court 1998, which South Africa ratified in 2000.⁴⁰ Third, the treaty may be included as a schedule to a statute. One example of such wholesale importation is the World Heritage Convention Act 49 of 1999. By way of a schedule, the Act incorporates into South African law the entire Convention concerning the Protection of the World Cultural and Natural Heritage of 1972.⁴¹

Sometimes incorporations of this kind delegate particular powers related to the enforcement of the international agreement to the relevant cabinet minister. For example, the Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986 (MARPOL Act) incorporates the International Convention for the Prevention of Pollution from Ships 1973 through a schedule. Section 3 of the MARPOL Act provides that the

36 *Azanian Peoples Organisation (AZAPO) v President of the RSA* 1996 (4) SA 671 (CC). On 17 March 2011 the Constitutional Court once again confirmed this approach in the *Glenister* case (n 26 above) para 92.

37 *Progress Office Machines CC v SARS* 2008 (2) SA 13 (SCA). In essence, this reaffirms the dualist approach which was also endorsed by the highest court (the Appellate Division of the Supreme Court) in South Africa before 1994. *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A).

38 Dugard (n 1 above) 455.

39 Couzens (n 12 above) 143.

40 M du Plessis, 'International criminal courts, the International Criminal Court, and South Africa's implementation of the Rome Statute' in J Dugard *International Law: A South African perspective* (2011) 197.

41 Couzens (n 12 above) 130.

Minister of Transport may make regulations relating to carrying out the provisions of the Convention.⁴²

Finally, an enabling Act of Parliament may grant the executive the power to bring a treaty into effect in municipal law by means of proclamation or notice in the Government Gazette.⁴³ A pertinent example in this regard is the Extradition Act (last amended in 1996). It constitutes a framework Act that deals with a specific class of international agreements, namely those pertaining to extradition. Section 2(1)(a) of the Act provides that the President may enter into agreements with foreign states to provide for the surrender, on a reciprocal basis, of persons accused or convicted of the commission of extraditable offences.⁴⁴ Once ratified by Parliament,⁴⁵ the Minister gives notice of the agreement in the Government Gazette.⁴⁶ This proclamation effectively amounts to a simplified incorporation procedure for a large number of similar agreements. The Constitutional Court in the *Quagliani* case unfortunately overlooked the role of the proclamation in the Government Gazette as an element of the incorporation process. The case concerned the validity and enforceability of an extradition agreement concluded in 1999 between the United States and South Africa. Sachs J, on behalf of the Court, correctly noted that the nature and number of the extradition agreements makes it desirable that they be implemented in an effective manner.⁴⁷ However, he then confused matters by stating:

[The Agreement] either became law in South Africa as a result of the prior existence of the Act which constitutes the anticipatory enactment of the Agreement for the purpose of section 231(4) of the Constitution. Or the Agreement has not become law in the Republic as contemplated by section 231(4) but the provisions of the Act are all that is required to give domestic effects to the international obligation that the Agreement creates.⁴⁸

Not only is it difficult to follow the meaning of this contradictory statement,⁴⁹ but it would seem to overlook the fact that one is in fact dealing with a simplified incorporation procedure. The Extradition Act is indeed anticipatory in as far as it provides a simplified procedure for a class of agreements that still have to be concluded. However, that does not change the fact that they are dependent on incorporation into municipal

42 Couzens (n 12 above) 133.

43 Dugard (n 1 above) 453; *Glenister* case (n 26 above) para 99.

44 n 20 above, sec 2(1)(a). *President of the RSA v Nello Quagliani*; *President of the RSA v Stephen Mark van Rooyen*; and *Steven William Goodwin v D-G, Department of Justice and Constitutional Development* 2009 (4) 345 (CC) para 42.

45 Ratification is explicitly required in the Extradition Act (n 20 above) sec 3(a).

46 Extradition Act (n 20 above) sec 3(a).

47 *Quagliani* (n 44 above) para 45.

48 *Quagliani* (n 44 above) para 47.

49 For criticism, see N Botha 'Rewriting the Constitution: the "strange alchemy" of Justice Sachs indeed!' (2009) 34 *South African Yearbook of International Law* 253.

law, in the form of ministerial proclamation, as foreseen by Parliament in the Extradition Act.

Another area where the issue of expedited implementation through secondary legislation is of significance concerns the implementation of Security Council decisions adopted under Chapter VII of the United Nations Charter 1945. As it stands, South Africa has no general legislation in place that would facilitate expedited implementation of such decisions. Instead, it relies on issue specific legislation, which can result in a fragmented (or even conflicting) approach to enforcement. It also carries the risk that in areas where no issue specific legislation exists, Security Council decisions will not be implemented on the domestic level or only implemented with great delay (→ Tladi).⁵⁰

Once implemented, it seems that the courts broadly follow the international law rules of treaty interpretation contained in article 32 of the Vienna Convention, when interpreting the incorporated version.⁵¹ Although this is not directed by the Constitution or statute, it follows from the fact that the South African rules of statutory interpretation conform to a large extent with those contained in the Vienna Convention. South African law also recognises the textual, intent, and purposive approaches to statutory interpretation that constitute the core principles of interpretation in the Vienna Convention.⁵²

Finally, it is important to underscore that a treaty enacted into law will have the same status in domestic law as the Act through which it is incorporated.⁵³ This implies that enacted treaties do not merely rank below the Constitution which is the supreme law of South Africa,⁵⁴ but can also rank below a Parliamentary Act – depending on the manner of its incorporation. While a treaty enacted into law by an Act of Parliament will enjoy the same status as other Parliamentary Acts, a treaty enacted into law through subordinate legislation (for example, a ministerial proclamation in the Government Gazette), will be on par with other subordinate legislation.⁵⁵

50 See also H Strydom & T Huarka 'South Africa' in V Gowlland-Debbas (ed) *National implementation of United Nations sanctions: A comparative study* (2004) 430 432.

51 Dugard (n 1 above) 464.

52 Courts have also on occasion invoked the preparatory works of incorporated treaties in their process of interpretation, as permitted by article 32 of the Vienna Convention (n 16 above). In *Portion 20 of Plot 15 Athol (Pty) Ltd v Rodriguez* 2001 (1) SA 1285 (W) 1293, the High Court considered the preparatory works of the International Law Commission when interpreting the Vienna Convention of Diplomatic Relations 1961, which is incorporated into South African Law. Dugard (n 1 above) 464 - 665.

53 *Glenister* case (n 26 above) para 100; Dugard (n 1 above) 463.

54 As above.

55 An example would be the extradition agreements referred to above in connection with *Quagliani* (n 44 above); Dugard (n 1 above) 463.

2.2.2 Self-executing treaties

As has been indicated above, the second part of section 231(4) provides that a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. At first sight this phrase seems to imply that a clause in a treaty will only be self-executing when the language of the treaty so indicates and when existing municipal law, either common law or statute, is adequate in the sense that it fails to place any obstacle in the way of treaty application.⁵⁶ In concrete terms this would mean that the nature and content of the relevant treaty provision is such that it is capable of judicial enforcement in the absence of any further measures for implementation (that is, self-executing).⁵⁷ In addition, the direct enforcement should not result in a conflict with existing domestic law.

However, whether this interpretation will persevere in practice remains to be seen. No South African court has thus far been willing to engage in the meaning of self-execution, let alone hold a provision of a multilateral treaty, which has not been expressly incorporated by Parliament, to be self-executing.⁵⁸ In the *Grootboom* case (concerning the constitutional right to housing), the Constitutional Court merely noted in passing that where a relevant principle of international law binds South Africa, it may be directly applicable.⁵⁹ In the *Quagliani* case the Constitutional Court skirted the issue by stating that it was not necessary to consider the question of the self-executing nature of the agreement.⁶⁰

More recently the Western Cape High Court rejected the self-execution of the International Covenant on Civil and Political Rights 1966 (ICCPR) as a whole in the *Claassen* case.⁶¹ Although the ICCPR was

⁵⁶ Dugard (n 1 above) 455.

⁵⁷ This is the practice that has been followed by courts in the Netherlands, where all substantive rights in the European Convention of Human Rights have over time been recognized as self-executing. E de Wet 'The reception process in The Netherlands and Belgium' in H Keller & A Stone Sweet (eds) *A Europe of rights: The impact of the ECHR on national legal systems* (2008) 229.

⁵⁸ M Killander 'Judicial immunity, compensation for unlawful detention and the elusive self-executing treaty provision: *Claassen v Minister of Justice and Constitutional Development* 2010 (6) SA 399 (WCC)' (2010) 26 *South African Journal on Human Rights* 386. *Claassen v Minister of Justice and Constitutional Development* 2010 (6) SA 399 (WCC).

⁵⁹ *The Government of the Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC) para 26.

⁶⁰ n 44 above, para 36. Given the fact that the Extradition Act provided for simplified incorporation of extradition agreements, it was indeed not necessary to decide on the issue of their self-execution. However, the Court's convoluted reasoning reignited the doctrinal debate. See G Ferreira & W Scholz, 'Has the Constitutional Court found the lost ball in the high weeds? The interpretation of section 231 of the South African Constitution' (2009) XLII *Comparative & International Law Journal of Southern Africa* 269 271. They argued that the Court's judgment amounted to an implicit acceptance of the self-executing nature of the extradition agreement. In reaching this conclusion they overlooked the incorporating effect of the ministerial proclamation in the Government Gazette.

⁶¹ n 58 above, para 36.

ratified by South Africa in 1998, it has not yet been incorporated into domestic law.⁶² In this instance the appellant claimed damages, based on delict, arising out of alleged unlawful detention. The action was brought, *inter alia*, against the magistrate in his personal capacity. Of particular relevance was whether the unlawful committal of the appellant to prison in breach of the right to freedom and security of the person in section 12(1) of the Constitution,⁶³ or of the breach of the right to compensation for unlawful detention in article 9(5) of the ICCPR,⁶⁴ affected the judicial immunity that would otherwise protect the magistrate from liability under domestic law.⁶⁵ In reaching the conclusion that this was not the case, the Court noted that the ICCPR is not a self-executing legal instrument. The formal adoption of its provisions did not, of itself, amend the established domestic law.⁶⁶

Not only does this statement seem to be based on the (highly inaccurate) assumption that the ICCPR as a whole is in conflict with existing domestic law, but it also ignores the fact that the Constitution requires a 'provision-by-provision' approach to self-execution. Section 231(4) of the Constitution refers to a 'self-executing provision of an agreement' and not 'self-executing agreement'. The Court should therefore first have examined whether article 9(5) of the ICCPR is clear and precise enough to be directly applicable (self-executing), whereafter it should have considered whether it indeed conflicts with existing domestic law.

The flipside of the de facto irrelevance of self-execution in South African treaty law is that treaties do generally serve as a direct basis for litigation between private parties. The basis for legal standing is to be sought in domestic law on the basis of constitutional, statutory, or common law.

However, it is important to note that an unincorporated treaty can be used to challenge and invalidate subordinate legislation. This was confirmed by the Supreme Court of Appeal, in the *Progress Office Machines* case.⁶⁷ The question concerned whether an anti-dumping duty period, contained in secondary legislation issued by the Ministry of Finance, violated article 11(3) of the World Trade Organization Agreement on the

62 Dugard (n 1 above) 454.

63 Section 12(1) of the Constitution determines that: (1) Everyone has the right to freedom and security of the person, which includes the right - (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way.

64 International Covenant on Civil and Political Rights (ICCPR) (16 December 1966, UNTS 999 171) art 9(5) determines that: 'Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.' <http://www2.ohchr.org/english/law/ccpr.htm> (accessed 20 September 2013).

65 Claassen (n 58 above) para 5, 24.

66 Claassen (n 58 above) para 36.

67 *Progress Office Machines* (n 37 above) para 11.

Implementation of Article VI of the General Agreement on Tariffs and Trade. The Supreme Court of Appeal stated that although South Africa has ratified the WTO Agreement in 1995 it has not yet been enacted into municipal law, nor has the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade. No rights are therefore derived from these international agreements. However, the International Trade Administration Act 71 of 2002 had to be interpreted in accordance with international law, where reasonable, as required by section 233 of the Constitution.⁶⁸

The Supreme Court of Appeal continued by stating that subordinate legislation (such as the notice by the Minister of Finance imposing an anti-dumping duty) must be reasonable and that a court may insist that the subordinate legislation be in compliance with a state's international obligations in order to be valid.⁶⁹ This meant that subordinate legislation that violated international obligations would as such be unreasonable and to that extent invalid.⁷⁰ In line with this reasoning the Supreme Court of Appeal invalidated an anti-dumping duty that exceeded the period provided for by the international agreements.⁷¹

2.2.3 Treaty termination

The issue of treaty termination is not regulated in the Constitution or by statute. However, in practice it seems that where a decision to terminate a treaty is taken, this will be done in accordance with international law practice, including the provisions of the VCLT.⁷² Although the decision to terminate a treaty vests in the executive, it is arguable that the spirit of section 231(2) would require parliamentary involvement in the same manner as foreseen for ratification. This would imply the consent to termination of both Houses of Parliament in relation to all 'non-technical' treaties.⁷³ Where a treaty has been incorporated into municipal law in terms of section 231(4) of the Constitution, the implementing will also have to be repealed by the legislature. As long as the legislation is in place, the treaty obligations will de facto still be in force in the Republic, despite the fact that South Africa would not be bound formally by them on the international level.⁷⁴

68 *Progress Office Machines* (n 37 above) para 6.

69 *Progress Office Machines* (n 37 above) para 12, 6.

70 *Progress Office Machines* (n 37 above) para 12.

71 *Progress Office Machines* (n 37 above) para 12, 20.

72 n 16 above, art 3. The general principle concerning termination is contained in article 54 VCLT, 'The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States.'

73 Botha (n 24 above) 85.

74 As above.

It is also noteworthy that treaties are not published systematically on paper in South Africa.⁷⁵ However, interested parties can obtain information, including copies of the treaty in question, from the Treaty Section of the Office of the Chief State Legal Adviser. This section serves as the national record-keeping authority and also makes available treaties online.⁷⁶

3 The status of customary international law in the domestic legal order

As indicated at the outset, section 232 of the Constitution determines that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. This means that South Africa has a monist approach towards customary international law and that in the domestic legal order it constitutes a particular species of the common law.⁷⁷

However, customary international law does not feature prominently in court practice. Where reference is made, it tends to be short and to inform the reasoning or interpretation already decided on by the court, rather than being the basis of the decision. This scant treatment of customary international law in court practice forms a strong contrast with the extensive references to international human rights instruments in court practice, as will be illuminated (→ 4.1). This is most likely a result of the fact that most litigators and judges are not yet well versed in public international law beyond the area of human rights, despite the fact that 20 years have gone by since the adoption of the new constitutional dispensation. Also, the vague nature of many customary international law obligations reduces their utility as a guideline for interpretation.

The references to customary law have however featured in cases pertaining to treaty law, international humanitarian law and jurisdiction. In the *Harksen* decision the Cape High Court accepted that the definition of a treaty in article 2(1)(a) of the Vienna Convention was a codification of customary international law.⁷⁸ Subsequently on appeal the Constitutional Court was reluctant to accept the customary law status of article 46 of the Vienna Convention, according to which a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of

⁷⁵ Botha (n 24 above) 87.

⁷⁶ See Department of International Relations and Cooperation; Office of the Chief State Legal Advisor Treaty Section <http://www.dfa.gov.za/chiefstatelawadviser/treatysection.html> (accessed 20 April 2015).

⁷⁷ Dugard (n 1 above) 474.

⁷⁸ *Harksen v President of the RSA* 1998 (2) SA 1011 (C); N Botha 'Extradition on the basis of a treaty: section 5 of the Extradition Act 67 of 1962 considered' (2000) 25 *South African Yearbook of International Law* 249.

a provision of its national law.⁷⁹ The Court noted that the extent to which the Vienna Convention reflects customary international law was by no means settled. However, it did not attempt to draw a distinction between those obligations in the Vienna Convention that were generally accepted as customary international law and those that were more contentious.⁸⁰

The customary international law status of international humanitarian law has thus far also received only superficial attention. The most prominent example remains the *AZAPO* case, which was one of the very first cases that the Constitutional Court had to decide when taking up its work in 1995.⁸¹ In addition to its historic importance in the South African context, it also reflects the Constitutional Court's willingness to give precedence to the clear language of the Constitution, if such language were to result in a conflict with customary international law. The *AZAPO* case concerned the constitutionality of the Truth and Reconciliation Commission, which was set up to deal with crimes committed during the era of apartheid. In its terms of reference it was awarded the power to grant amnesty under certain conditions to individuals responsible for violations of human rights.⁸² Some of the members of families who had lost persons close to them as a result of the death and torture squads of the apartheid regime challenged the constitutionality of the so-called Reconciliation Act, which established the Truth and Reconciliation Commission.⁸³

The Constitutional Court essentially decided that the so-called post-amble to the interim Constitution (which was in force at the time), 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.⁸⁴ Essentially, the constitutional terms were conclusive of the matter to the extent that they presupposed full amnesty to be given.⁸⁵ The Constitutional Court doubted whether the Geneva Conventions 1949 were relevant, since the Court regarded the obligation to prosecute those guilty of grave breaches of the Geneva Conventions applicable only to international armed conflict.⁸⁶ The Court also submitted that neither of the two Additional Protocols 1977 to these Conventions were applicable, since they were not signed or ratified by

79 Vienna Convention (n 16 above) art 46(1) 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 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.'

80 *Harksen* (n 18 above) para 26.

81 n 36 above; AM Gross 'The Constitution, reconciliation and transitional justice: Lessons from South Africa and Israel' (2004) 40 *Stanford Journal of International Law* 47, 69 - 77.

82 The Promotion of National Unity and Reconciliation Amendment Act 87 of 1995.

83 *AZAPO* (n 36 above) para 6.

84 *AZAPO* (n 36 above) para 7.

85 *AZAPO* (n 36 above) para 9.

86 *AZAPO* (n 36 above) para 30.

South Africa at the relevant time.⁸⁷ Consequently, there was nothing in the Promotion of National Unity and 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.⁸⁸

Implicit in the Court's decision was also the assumption that the potential customary international law norms relevant to the question before it were too imprecise to overcome the strong language of the amnesty.⁸⁹ The language of amnesty 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.⁹⁰

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 and not (as was implicitly feared), opposition to its views. For example, according to the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* case,⁹¹ the Geneva Conventions clearly indicate that acts that 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 (that is, in international armed conflicts).⁹² This is a restrictive definition and does not include persons participating in, or civilians affected by, an internal conflict.⁹³ The Court could have backed its conclusion by the *Tadić* decision, but refrained from doing so.

87 *AZAPO* (n 36 above) para 29. The Geneva Conventions and two additional protocols were finally enacted into South African domestic law by the Implementation of the Geneva Conventions Act 8 of 2012 which entered into force on 1 December 2012.

88 Presentation by former Justice of the Constitutional Court of South Africa, A Sachs, at a seminar in Amsterdam on 7 March 2003 (speaking notes at seminar; on file with the author).

89 *AZAPO* (n 36 above) para 34.

90 Sachs (n 88 above).

91 *Prosecutor v Tadić (Jurisdiction)* (1996) 35 International Legal Materials 32.

92 n 91 above, para 81; eg, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I) (12 August 1949, 75 UNTS 31) art 50 ('Grave breaches to which the [Convention] relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'). Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces (Geneva II) (12 August 1949, 75 UNTS 85) art 51; Geneva Convention relative to the Treatment of Prisoners of War (Geneva III) (12 August 1949, 75 UNTS 135) art 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV) (12 August 1949, 75 UNTS 287) art 147.

93 C Greenwood 'International humanitarian law and the *Tadić* case' (1996) 7 *European Journal of International Law* 265, 275 - 276. The Appeals Chamber considered the concept of grave breaches under the Convention inseparable from the concept of

In addition, the *Tadić* 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.⁹⁴ While the ICTY affirmed that Common Article 3 governed internal strife and had acquired customary law status,⁹⁵ violations of Common Article 3 had, nonetheless, at that point in time, never been treated as crimes under international law.⁹⁶ 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.⁹⁷ The same consideration applied to Additional Protocol II to the Geneva Conventions.⁹⁸ The ICTY further submitted that ‘many’ of Additional Protocol II’s provisions would also enjoy some degree of customary character.⁹⁹ However, the ICTY’s reference in this regard is rather vague and Additional Protocol II has not generally been regarded as declaratory of customary international law.¹⁰⁰

A similar conclusion could have been drawn from an inquiry into whether other principles of customary international law relating to torture, war crimes, and crimes against humanity required prosecution of offenders. On the one hand, apartheid has been labelled as a crime against

protected persons and property, and believed that neither concept featured in Common Article 3, the only provision in the Conventions applicable to internal armed conflicts. *Tadić* decision (n 91 above) para 81.

94 n 92 above, art 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.

95 *Tadić* decision (n 91 above) paras 98, 103, 109, 116, 134; UN Security Council, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993) S/25704 [Contains text of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991]; UNSC Resolution 820 (1993) Adopted by the Security Council at its 3200th meeting, on 17 April 1993, S/RES/820 (1993).

96 Greenwood (n 93 above) 279 - 280; *Tadić* decision (n 91 above) paras 83, 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 breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.’)

97 *Tadić* decision (n 91 above) para 81.

98 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977, 1125 UNTS 609).

99 *Tadić* decision (n 91 above) para 117.

100 Greenwood (n 93 above) 278; *Tadić* decision (n 91 above) paras 107, 110.

humanity by the General Assembly¹⁰¹ and the Apartheid Convention.¹⁰² 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. 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.¹⁰³

In essence, therefore, a proper interpretation of the amnesty clause in light of South Africa's international customary obligations would have added authority to the position asserted by the Constitutional Court. In addition to the unfamiliarity of the judges with international humanitarian law, the Constitutional Court's failure to engage in such a process was also due to time constraints.¹⁰⁴ Although several months had already passed since the establishment of the Truth and Reconciliation Commission,¹⁰⁵ it could not start functioning until there was a ruling on the legality of the amnesty. Moreover, the language of the interim Constitution was explicit, resulting in the Constitutional Court's inclination towards giving preference to it, even if this could potentially lead to a violation of customary international law obligations.¹⁰⁶

The *Basson* case also concerned the issue of extra-judicial killings committed during the apartheid era, but in this instance on Namibian soil, at a time when the country was still de facto administered by South Africa.¹⁰⁷ In this case the Court had to determine whether South African courts had jurisdiction to try the case of Wouter Basson, who was allegedly involved in acts of chemical and biological warfare. Although the case turned on domestic law, the Constitutional Court did refer to the customary nature of fundamental principles of international humanitarian law with reference to International Court of Justice (ICJ) and ICTY decisions. It described the apartheid government's extra-judicial killing of captives during the liberation struggle in Namibia as violating the minimal

101 UNGA Res 39 (1972) GAOR 39th Session, UN Doc A/RES/39/72 (1984) (confirming that apartheid is a threat to international peace and security).

102 International Convention on the Suppression and Punishment of the Crime of Apartheid (30 November 1973, UNGA Res 3068 (1973) GAOR 28th Session Supp30, UN Doc A/9030).

103 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; *Consuelo et al v Argentina* IAm Comm of HR (2 October 1992) Case 28/92 and; *Mendoza et al v Uruguay* IAm Comm of HR (4 October 1991) Case 29/92. *Velasquez Rodriguez v Honduras (Judgment)* IACHR (29 July 1988) Series C 4. and reported in 95 *International Law Reports* 259 (holding that a successor government was obliged to prosecute those members of the previous government responsible for human rights violations).

104 Sachs (n 88 above).

105 The Commission was founded through the Promotion of National Unity and Reconciliation Act 34 of 1995 <http://www.justice.gov.za/legislation/acts/1995-034.pdf> (accessed 20 September 2014).

106 Sachs (n 88 above).

107 *South Africa v Basson* 2005 (12) BCLR 1192 (CC).

standards of international humanitarian law which, according to the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,¹⁰⁸ constituted intransgressible principles of customary international law.¹⁰⁹ The Court further referred to the *Nicaragua*¹¹⁰ and *Tadić* decisions¹¹¹ when underscoring that obligations under Common Article 3 of the 1949 Geneva Conventions have obtained customary status.¹¹² However, the Constitutional Court stopped short of determining the concrete implications of these obligations for South Africa in the particular case.

The most prominent reliance on customary law up to date was in a case decided by the South African Competition Appeals Court in 2002. In the *American Soda Ash* case,¹¹³ the appellant faced a complaint of predatory conduct that contravened section 8 of the Competition Act 89 of 1998. The appellant, relying on a restrictive interpretation of section 3(1) of the Competition Act, argued that the dispute fell outside of the purview of the Act. Section 3(1) provided that the 'Act applies to all economic activity within, or having an effect within, the Republic'. According to the appellant, the word 'effect' in section 3(1) should be read to mean 'negative or deleterious effect' in as far as it concerned foreign based acts. The appellant based his argument on a customary international law argument pertaining to extra-territorial jurisdiction, according to which harm is an essential element of the 'effects doctrine'.

When deciding the issue, the Competition Appeals Court addressed the status of customary international law in the Republic explicitly. It first noted that section 1(2)(a) of the Competition Act provided that the Act must be interpreted in 'compliance with the international law obligations of the Republic'. Thereafter it confirmed that customary international law constituted municipal law in the domestic legal system, unless conflicting with legislation in accordance with section 232 of the Constitution. It further underscored that domestic legislation should be interpreted in accordance with international law where reasonable, in accordance with section 233 of the Constitution.¹¹⁴

Subsequently the Competition Appeals Court relied on ICJ practice and foreign case-law and legislation for clarifying the scope of the 'effects doctrine' in customary international law. This in turn was then used as a

108 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (8 July 1996) (1996) ICJ Reports 226.

109 *Basson* (n 107 above) para 174.

110 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (27 June 1986) (1986) ICJ Reports 14.

111 n 91 above.

112 *Dugard* (n 1 above) 466.

113 *American Soda Ash Corp CHC Global (Pty) Ltd v Competition Commission of South Africa* 2003 ZACAC 6, ILDC 493 (ZA 2002).

114 *American Soda Ash* (n 113 above) para 15.

guideline for interpreting the ‘effects doctrine’ in section 3(1) of the Competition Act, in accordance with section 233 of the Constitution.¹¹⁵ The Competition Appeals Court cited the reference to the Permanent Court of International Justice (PCIJ) in the *Lotus* case¹¹⁶ on the power of states to exercise jurisdiction over foreign acts having effects in their territory.¹¹⁷ It also considered several US cases,¹¹⁸ which the appellant relied on, as well as article 81 of the Treaty Establishing the European Community (EC Treaty),¹¹⁹ which prohibited practices that might affect competition within the European common market. However, the Competition Appeals Court found that none of these sources supported the view that harm is an essential element of the ‘effects doctrine’.

4 The role of the judiciary in the interpretation and application of international law

4.1 International (human rights) instruments guiding interpretation

Since its inception the Constitutional Court in particular has played a prominent role in the interpretation and application of international law within the domestic legal order. The Court has become known for its recourse to international human rights law as a guideline for interpretation when interpreting the Constitution, legislation and the common law. This development has its origin in section 39(1) of the Constitution, which determines that courts must consider international law when interpreting the Bill of Rights. Similarly, section 39(2) of the Constitution requires courts to promote the spirit of the Bill of Rights when interpreting the common law or legislation, while section 233 of the Constitution further requires an interpretation of legislation that is in conformity with international law, where reasonable.

Due to this mediating role of sections 39 and 233 of the Constitution, it is unlikely that any head-on collision between municipal and international law (whether treaty or custom) will occur.¹²⁰ The courts are

¹¹⁵ *American Soda Ash* (n 113 above) paras 18 - 21; D Tladi (2002) ILDC 493 (ZA).

¹¹⁶ *The Case of the SS Lotus (France v Turkey)* [1927] PCIJ Rep Series A No 10.

¹¹⁷ *American Soda Ash* (n 113 above) para 17.

¹¹⁸ *Lotus* (n 116 above); *American Banana Co v United Fruit Co* 213 US 347 (1909); *United States v Aluminium Co of America (Alcoa)* 148 F 2d 416 (1945); *Continental Co v Union Carbide* 370 US 690 (1962); *Timberlane Lumber Co v Bank of America* 549 F 2d 597 (1976); *Mannington Mills Inc v Congoleum Corp* 595 F2d 1287 (1979); *Matsushita v Zenith Radio* 475 US 574 (1986); *Hartford Fire Insurance Co v California* 509 US 764 (1993); *Metro Industries Inc v Sammi Corp* 82 F 3d 893 (1996); *United States v Nippon Paper Industries Co Ltd* 109 F 3d 1 (1997).

¹¹⁹ Treaty Establishing the European Community (Rome Treaty) (25 March 1957, 298 UNTS 11) art 81 (previously art 85).

¹²⁰ *Sachs* (n 88 above); *Glenister* case (n 26 above) para 179.

therefore unlikely to be placed in a position in which they have to retreat behind the dualist veil (which the Constitutional dispensation formally provides for), in accordance with which the Constitution or a domestic statute trumps international law.

As far as international human rights law is concerned, the approach of the Constitutional Court has been very progressive. It draws on binding but as of yet unincorporated treaties, as well as on non-binding instruments as interpretive guidelines. However, the reliance on international treaties and other instruments in areas other than human rights occur less frequently. This was already illustrated (see 3 above) in connection with the limited impact that customary international law thus far has had as a guideline for interpretation. As indicated, this is mainly the result of the limited experience of South African litigators and judges with public international law outside the area of human rights law. A recent example where the Constitutional Court was guided by a decision of an international Tribunal in order to develop the common law concerns that of the *Government of the Republic of Zimbabwe v Louis Karel Fick*.¹²¹ The implications of this case will be discussed in the chapter devoted to the status of decisions of international courts and tribunals in the domestic legal order (→ De Wet/International Decisions).

When resorting to international instruments in accordance with section 39(1) of the Constitution, the Constitutional Court reinforces its own position on a matter, as these instruments constitute a source of profound values that are compatible with the whole underlying core of the South African constitutional order.¹²² However, a closer look at the Constitutional Court's practice reveals that the manner in which it resorts to non-binding international instruments is open to criticism. From the outset, the Constitutional Court regarded the interpretation clauses to refer to binding as well as non-binding international instruments.¹²³ These would include treaties that South Africa has not or cannot ratify (notably the Convention for the Protection of Human Rights and Fundamental Freedoms 1950¹²⁴), as well as instruments that are by nature non-binding such as the Universal Declaration of Human Rights (UDHR); General Comments of United Nations Human Rights bodies; and resolutions of the General Assembly that are not meant for ratification.

121 *Government of the Republic of Zimbabwe v Louis Karel Fick and Others* 2013 (5) SA 325. For an earlier case in which the Constitutional Court used international law as a tool for interpreting the common law, *Carmichele v Minister of Safety and Security* 2001 (4) SA 938. Relying *inter alia* on the Convention on the Elimination of All forms of Discrimination against Women, the Court developed the law of delict to include a duty on the state to prohibit and prevent all gender-based discrimination that impairs the fundamental rights of women. N Botha 'The role of international law in the development of South African common law' (2001) 26 *South African Yearbook of International Law* 253, 259; Dugard (n 1 above) 46.

122 Sachs (n 88 above); *Glenister* case (n 26 above) para 192.

123 *S v Makwanyane* 1995 (3) SA 391 (CC).

124 European Convention on Human Rights (4 November 1950, 312 UNTS 221).

The choice of non-binding instruments sometimes appears inconsistent, with a tendency to rely on non-binding European instruments while excluding instruments that South Africa has ratified. This was particularly the case in the early years after the Constitutional Court's inception, as can be illustrated by the *Christian Education* decision.¹²⁵ It concerned the complaint of 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.¹²⁶ 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 84 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.¹²⁷

While referencing applicable jurisprudence pertaining to the European Convention on Human Rights, the Constitutional Court made no mention of the African Charter on the Rights and Welfare of the Child 1999 (African Charter).¹²⁸ In the present context, articles XI(4) and XI(5) of this unmentioned Charter are of particular interest. 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. These two clauses would seem to illustrate the challenge that the Constitutional Court confronted in the *Christian Education* case, specifically, the reconciling of religious rights of parents and the protection of children against harm. 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 an African value.¹²⁹

The Court's affinity for the European Convention on Human Rights could be explained by the fact that the individual complaints procedure under it is elaborate and has produced an extensive jurisprudence to which common law-trained judges eagerly turn for guidance.¹³⁰ Since the complaints procedure of the African Charter and other African human rights instruments are not yet as well developed, the same judges (and litigators) tend to neglect these instruments.¹³¹ Nonetheless, this should

125 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757.

126 *Christian Education* (n 125 above) para 2.

127 Interim Constitution (n 4 above) chapter XV [1] and chapter XXX [1].

128 *Christian Education* (n 125 above) paras 43 - 45; African Charter on the Rights and Welfare of the Child (African Children's Charter) (11 July 1990, OAU Doc CAB/LEG/24.9/49) arts XI(4) and XI(5).

129 Declaration on the Rights and Welfare of the African Child (20 July 1979, AHG/St. 4 (XVI) Rev. 1).

130 C Heyns, 'The African regional human rights system: The African Charter' (2004) 108 *Pennsylvania State Law Review* 679.

131 Heyns (n 131 above) 694 - 695.

not lead to the neglect of regional human rights instruments to which South Africa is a party, nor of other African human rights instruments that could serve as guidance for interpretation. By relying on the European Convention on Human Rights to the exclusion of applicable African instruments, the Court can entrench the image of human rights as being a set of primarily Western values that are being imposed on African societies. It could also give the impression that the African human rights instruments are inferior to the other mentioned instruments.

These critical remarks are not directed at the fact that the Constitutional 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 its human rights jurisprudence is not disputed.¹³²

However, the courts can benefit from a more rigid methodology that reflects a uniform and consistent strategy as to which international instruments to consider as guidelines for interpretation. Otherwise judges may be perceived as picking amongst those international human rights instruments that are closest to their own personal views and in accordance with the political mood of the day, as opposed to drawing from an international value system that is consonant with the South African constitutional order. In addition, there is the risk that African human rights instruments would be sidelined and the perception that human rights norms constitute a mere by-product of western imperialism would be (further) entrenched.

4.2 Deference to the Executive

Since the adoption of the new constitutional order in 1994, the courts have indicated on several occasions that the conduct of foreign relations is not – in principle – beyond judicial scrutiny. This is notably the case where such conduct has a direct impact on the fundamental rights of individuals with standing before the South African court in question.¹³³ However, the courts nonetheless grant significant deference to the executive in matters of

132 Some examples of decisions enriched by reference to international human rights instruments include *Government of South Africa v Grootboom* 2001 (1) SA 46; *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721; *Mazibuko v City of Johannesburg* 2008 (4) All SA 471, *Fourie & Bonthuys, Lesbian and Gay Equality Project v Minister of Home Affairs* 2005 ZACC 19 ILDC.

133 *Kolbatschenko v King NO* 2001 (4) SA 336 (C); *Geuking v President of the RSA* 2003 (3) SA 34 (CC) para 27E. In this instance, no extradition treaty existed between South Africa and the state involved. The Court determined that that the President's consent to classify a particular individual as a 'person liable to be extradited' was a foreign policy decision, but one which was subject to limitations. These limitations were abuse of power by the President, or action which was contrary to the provisions of the Constitution. N Botha & M Oliver, 'Ten years of international law in the South African courts: Reviewing the past and assessing the future' (2004) 29 *South African Yearbook of International Law* 356 - 357; Dugard (n 1 above) 471.

foreign relations. This has been particularly visible in the area of diplomatic protection, where disagreement erupted in relation to the level of scrutiny that a court can apply in such instances.

The *Kaunda* case laid the foundation for a series of diplomatic protection cases and thus far the only one to have appeared before the Constitutional Court.¹³⁴ The case acknowledged a role for courts in issues of diplomatic protection, but with considerable deference toward the executive in relation to the type of action to be undertaken. The Constitutional Court was confronted with whether South Africa had to prevent the extradition of South African nationals from Zimbabwe to Equatorial Guinea, where they would face the death penalty for plotting a coup against the government. In answering this question in the negative, the Constitutional Court determined that no right to diplomatic protection existed under international law. South African citizens facing adverse state action in foreign countries were nonetheless entitled under section 3 of the Constitution to request protection from the government against acts that violated obligations. Similarly, the government had to consider such a request and its decisions in these matters were subject to constitutional control.¹³⁵

However, courts had to acknowledge that diplomatic protection concerned an area with that the executive was better placed to deal with than the courts. Where, for example, the government refused to consider a legitimate request for diplomatic protection, or dealt with it irrationally or in bad faith, a court could require the government to deal with the matter properly. But in doing so a court had to respect the broad discretion of the executive, which was essentially responsible for determining the nature of the protection as an aspect of foreign policy.¹³⁶ The nature of the reaction called for government expertise and it would be inappropriate for a court to propose a different course of action.¹³⁷

This position was subsequently followed by the Supreme Court of Appeal in the *Von Abo* case.¹³⁸ The case was marked by a long history of dismissive behaviour on the part of the government towards Von Abo's request for diplomatic protection, following the expropriation without compensation of his property by the Zimbabwean government. The

134 *Kaunda v President of the RSA* 2005 (4) SA 235 (CC) para 67.

135 *Kaunda* (n 134 above) para 67.

136 *Kaunda* (n 134 above) para 77, 80, 81. The principle that a court could not prescribe to government how to conduct foreign affairs and make diplomatic interventions was also applied by the SCA in *Van Zyl & Others v Government of the RSA & Others* 2008 (3) SA 294 (SCA). This case concerned the expropriation of property of a South African citizen by the Lesotho Government.

137 *Kaunda* (n 134 above) para 144. In this particular instance the South African High Commissioner had made representations to the Zimbabwean government and it was not established that the South African government had violated either international law or the Constitution.

138 *The Government of the Republic of South Africa v Von Abo* 2011(5) SA 262 (SCA).

undisputed reluctance of the government to respond to Mr Von Abo's request was rebuked by the Supreme Court of Appeal. It underscored that the government's response was inappropriate in as far as it did not provide Mr Von Abo or the courts with an honest and open disclosure of its policy, approach and action in relation to Mr Von Abo's request.¹³⁹ At the same time, however, the Court underscored that a right to have a request for diplomatic protection considered does not amount to a right to diplomatic protection as such, nor to a duty of government to provide a particular type of diplomatic protection.¹⁴⁰ The need for deference to the Executive in matters that involve relations with other states was therefore duly considered.

5 Assessment

In conclusion, it is fair to say that South Africa's track-record of receiving international law into the domestic legal order since the introduction of the new constitutional order in 1994 is mixed. On one hand, the Constitution of 1996 is very receptive to international law, notably as a guideline for interpretation. Also, the courts are keen to use international human rights instruments as a guideline for interpreting the Constitution, even though their methodology in this regard is open to criticism. Similarly, the executive follows the basic principles of the Vienna Convention when negotiating and executing treaties, despite the fact that South Africa is not a party to the Vienna Convention.

On the other hand, the courts remain reluctant to resort to international law as an instrument of interpretation in areas outside human rights law. Parliament's track-record in implementing non-self-executing and non-technical treaties is inconsistent. While the Rome Statute of the International Criminal Court was implemented within four years of its conclusion, the ICCPR and the WTO Agreement have still not been implemented, despite the fact that they have been ratified for more than a decade – to name but a few examples.

South Africa's inconsistent approach may relate to the fact that expertise in the field of public international law – in contrast to expertise pertaining to international human rights law – is limited across the country. Most judges, litigators and law-makers are not well versed in public international law, partly due to the fact the subject matter has traditionally been neglected at universities. This in turn is a remnant of the country's years of isolation and hostile attitude towards international law before 1994. Although some progress has been made in overcoming this attitude, the capacity deficit at universities in this area of law is still significant.

¹³⁹ *Von Abo* (n 138 above) paras 39 - 40.

¹⁴⁰ *Von Abo* (n 138 above) para 22.

The new constitutional order, notably through the work of the Constitutional Court, has laid important groundwork during the first decade of its existence for enhanced interaction between national and international human rights law. However, much work still needs to be done before this trend also becomes visible in the area of public international law proper. This reality poses a challenge to various sectors of the judicial profession, including the judiciary, the bar, legislature, and in particular the law faculties who produce the international lawyers of the future.

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B: The Charter of the United Nations

CHAPTER 3

THE UNITED NATIONS CHARTER AND THE GERMAN LEGAL ORDER

*Mehrdad Payandeh**

1 Introduction: Implementing obligations, ensuring compliance and enabling participation

When Germany became a member state of the United Nations in 1973,¹ it entered into a set of international legal obligations under the United Nations Charter. Germany's membership in the United Nations, however, also raises questions under domestic law: First, there is the implementation of Germany's obligations under the United Nations Charter into domestic law. While most provisions of the Charter do not require such a transfer in the strict sense, implementation may be necessary – for example with regard to some Security Council resolutions – or may at least be desirable – for example with regard to the prohibition of the use of force – in order to effectively enforce the Charter provisions. Second, while many Charter provisions do not aim at domestic implementation, the domestic legal order needs to ensure that Germany can and does comply with its international obligations under the Charter. Third, the German legal order must enable Germany and the German state organs to actively participate in the work of the United Nations. Accordingly, the German constitutional order must, first of all, provide for the possibility of

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1 Gesetz zum Beitritt der Bundesrepublik Deutschland zur Charta der Vereinten Nationen of 6 June 1973 (Bundesgesetzblatt 1973 II 430); Bekanntmachung über das Inkrafttreten der Charta der Vereinten Nationen (Bundesgesetzblatt 1974 II 1397). The Federal Republic of Germany and the German Democratic Republic were accepted as the 133rd and 134th members of the United Nations on the same day. With the reunification of Germany, the German Democratic Republic ceased to exist, while the membership of the Federal Republic of Germany in international organisations remained untouched, see JA Frowein 'The reunification of Germany' (1992) 86 *American Journal of International Law* 152 157. For an overview over Germany's UN policy, see R Wolfrum 'Deutschland in den Vereinten Nationen' in J Isensee & P Kirchhof (eds) *Handbuch des Staatsrechts der Bundesrepublik Deutschland* vol X (3rd edn 2012) 555 paras 13 - 62.

Germany's accession to the United Nations Charter and integration into the UN system. Germany is, furthermore, required to participate in collective measures for the prevention and removal of threats to the peace,² and to engage in international cooperation.³ While these obligations are framed in rather broad terms and do not oblige the member states to take any particular measures, they nevertheless demand that states are generally able and willing to cooperate and that they engage in the activities of the United Nations. The domestic legal order must ensure that such an engagement is possible.

2 Obligations under the United Nations Charter

Germany's membership in the United Nations entails a variety of international legal obligations.⁴ They stem directly from the UN Charter as well as from measures taken by organs of the UN (→ 2.1). They are embodied in the Charter but may, at the same time, be recognised as customary international law or *jus cogens* (→ 2.2). They can be differentiated according to their content (→ 2.3) and with regard to their addressees (→ 2.4).

2.1 The Charter, resolutions and decisions of the International Court of Justice

As an international treaty the UN Charter is legally binding on its member states.⁵ Beyond the obligations that are directly embodied in the UN Charter, member states may be bound by resolutions or decisions issued by the organs of the UN. However, with regard to the political organs of the UN, the UN Charter provides only for the binding nature of decisions of the Security Council.⁶ By contrast, resolutions issued by the General Assembly are not legally binding, since the UN Charter only establishes a competence of the Assembly to make recommendations.⁷ General

² Charter of the United Nations (UN Charter) (26 June 1945, 1 UNTS XVI) art 1(1).

³ UN Charter (n 2 above) art 1(2) & (3).

⁴ Already before its formal accession to the UN in 1973, Germany had pledged to comply with the principles of the UN Charter. Against the background of its accession to NATO Germany declared on 3 October 1954: 'The German Federal Republic has agreed to conduct its policy in accordance with the principles of the Charter of the United Nations and accepts the obligations set forth in article 2 of the Charter', Bundestags-Drucksache 2/1061 (1954) 67.

⁵ UN Charter (n 2 above) art 2(2) reiterates and substantiates this obligation, providing that all member states 'shall fulfill in good faith the obligations assumed by them in accordance with the present Charter'.

⁶ According to UN Charter (n 2 above) art 25, the UN member states agree to accept and carry out the decisions of the Security Council in accordance with the Charter. Art 48 reaffirms this obligation with regard to decisions taken under Chapter VII of the Charter. On the binding nature of Security Council resolutions see A Peters 'Article 25' in B Simma et al (eds) *The Charter of the United Nations: A commentary*, vol I (3rd edn 2012) 787 paras 8 - 19; A Orakhelashvili *Collective security* (2011) 33 - 39.

⁷ See UN Charter (n 2 above) art 10 & Ch IV in general.

Assembly resolutions may, however, reflect existing rules of customary international law or contribute to the formation of new rules of customary international law.⁸ Member states furthermore have to comply with decisions of the International Court of Justice in any case to which they are a party.⁹

2.2 Treaty law, customary international law and *jus cogens*

Notwithstanding its constitutional character,¹⁰ the UN Charter is an international treaty. Accordingly, the general domestic implementation mechanisms designed to incorporate treaties apply to the UN Charter. At the same time, however, numerous substantive provisions of the UN Charter are recognised as customary international law,¹¹ in particular the prohibition of the use of force (article 2(4) of the UN Charter),¹² the right to self-defense (article 51 of the UN Charter),¹³ the principle of non-intervention,¹⁴ and the right to self-determination (article 1 of the UN Charter).¹⁵ Moreover, many rules that can be derived from the principle of sovereign equality (article 2(1) of the UN Charter) are of a customary nature.¹⁶

While the content of these norms of customary international law might, as a matter of principle, differ from the content of the Charter norms, the Charter norms and their interpretation in the practice of states and UN organs will have an effect on the respective rule of customary international law.¹⁷ From the perspective of international law such a parallel existence of a rule of international law, both as treaty law and customary international law, is primarily relevant with regard to states that

8 See eg M Shaw *International law* (6th edn 2008) 1212.

9 UN Charter (n 2 above) art 94(1); ICJ Statute (26 June 1945) art 59.

10 For a constitutionalist reading of the UN Charter, see B Fassbender *The United Nations Charter as the constitution of the international community* (2009); for a general analysis of constitutionalist approaches to international law see T Kleinlein *Konstitutionalisierung im Völkerrecht* (2012).

11 This possibility is explicitly envisaged in Vienna Convention on the Law of Treaties (23 May 1969, 1155 UNTS 331) art 38.

12 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) Merits Judgment ICJ (27 June 1986) (1986) ICJ Reports 14 paras 187 - 190.

13 *Nicaragua case* (n 12 above) paras 193 - 195.

14 *Nicaragua case* (n 12 above) para 202. While UN Charter (n 2 above) art 2(7) applies only to the organs of the UN, the general non-intervention principle as it is addressed to states can be derived from UN Charter art 2(1). See P Kunig 'Intervention, Prohibition of' in R Wolfrum (ed) *Max Planck encyclopedia of public international law* (2008) para 9.

15 R Wolfrum 'Article 1' in Simma et al (n 6 above) 107 para 4; for a more extensive discussion, see S Oeter 'Self-determination' in Simma et al (n 6 above) 313.

16 S Besson 'Sovereignty' in R Wolfrum (ed) *Max Planck encyclopedia of public international law* (2011) paras 86 - 89; see also *Jurisdictional Immunities of the State* (*Germany v Italy*) ICJ (3 February 2012) (2012) ICJ Reports 99 para 57.

17 See M Herdegen 'Article 25' in T Maunz & G Dürig (eds) *Grundgesetz, Kommentar* vol IV (2000) para 26; *Nicaragua* (n 12 above) para 181.

are not party to the UN Charter.¹⁸ With the almost universal status of the UN Charter, the customary nature of Charter provisions has lost its significance.¹⁹ However, since the German legal order provides for different rules regarding the domestic implementation of international treaties on the one hand and norms of customary international law on the other hand,²⁰ (→ Wolfrum, Hestermeyer & Vöneky) the distinction may be relevant from the perspective of domestic law.

It is furthermore maintained that some of the substantive principles laid down in the UN Charter constitute peremptory norms of international law (*jus cogens*).²¹ The peremptory nature of, for example, the prohibition of the use of force²² and the right to self-determination²³ are widely recognised. There is, however, no general consensus with regard to the legal consequences entailed by the qualification of an international rule as *jus cogens*.²⁴ While some authors hold the view that peremptory norms automatically unfold specific consequences within the domestic legal order,²⁵ this proposition is subject to serious challenges and has not yet found significant confirmation within legal practice.²⁶

In light of the general indifference of international law towards its effects within the legal orders of the members states²⁷ as well as of the general reluctance in particular of the International Court of Justice to

18 On the relationship between the UN and non-member states see UN Charter (n 2 above) art 2(6); S Talmon 'Article 2(6)' in B Simma et al (n 6 above) 252.

19 The famous and controversial *Nicaragua* decision of the ICJ, however, shows that the customary nature of Charter rules can also be of relevance regarding the legal relationship between UN member states: Due to the so-called 'multilateral treaty reservation' of the United States, the ICJ was barred from deciding the case on the basis of the UN Charter. The Court held, however, that due to the customary nature of certain Charter provisions (in particular the prohibition of the use of force and the right to self-defense), it could decide the case on the basis of identical norms of customary international law. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Jurisdiction and Admissibility, Judgment, ICJ (26 November 1984) (1984) ICJ Reports 392 paras 67 - 73; *Nicaragua case* (n 12 above) paras 42 - 43 & 172 - 182.

20 While Basic Law art 59(2) is concerned with treaty law, customary international law is encompassed by Basic Law art 25.

21 See eg AL Paulus 'Article 2' in Simma et al (n 6 above) 121 para 24, holding that '[s]ome, if not most of the principles of Art. 2 may constitute *jus cogens*'.

22 C Gray 'The use of force and the international legal order' in MD Evans (ed) *International law* (3rd edn 2010) 615 617.

23 *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970) Advisory Opinion, Separate Opinion Ammoun* ICJ (21 June 1971) (1971) ICJ Reports 16 67 & 89 - 90; A Orakhelashvili *Peremptory Norms in International Law* (2006) 51.

24 For an overview over the practice of international and domestic courts, see D Shelton 'International law and relative normativity' in Evans (n 22 above) 141 146ff.

25 See eg AA Cançado Trindade 'International law for humankind: Towards a new jus gentium (I)' (2006) 316 *Recueil des Cours* 9 341.

26 See E de Wet 'The prohibition of torture as an international norm of *jus cogens* and its implications for national and customary law' (2004) 15 *European Journal of International Law* 97 120f.; AL Paulus 'Jus cogens in a time of hegemony and fragmentation' (2005) 74 *Nordic Journal of International Law* 297 319ff.

27 K Kaiser 'Treaties, direct applicability' in R Wolfrum (ed) *Max Planck encyclopedia of public international law* (2013) para 6.

acknowledge far reaching legal consequences attributed to the concept of *jus cogens*,²⁸ a direct effect of peremptory norms within the domestic legal order cannot be assumed. It is therefore left to the domestic legal orders to determine whether the peremptory character of an international norm should lead to specific consequences under domestic law.²⁹ Accordingly, the German constitutional order does not have to but may attribute specific domestic consequences to *jus cogens* rules.

2.3 Obligations, rights and organisational provisions

The domestic implementation of international norms may also depend on the content of the respective rules. While some international norms are intended for domestic implementation and, for example, establish an obligation to enact legislation,³⁰ other international norms do not need to be transferred into the domestic legal order. The prohibition of the use of force, for example, requires states to abstain from threats and aggressive acts but does not necessarily require domestic implementation.

The UN Charter basically contains three different kinds of legal rules. First, many provisions provide for obligations of the member states. Amongst those rules are the general duty to fulfil their Charter obligations in good faith,³¹ the obligation to settle disputes through peaceful means,³² the prohibition of the use of force,³³ and the obligation to accept and carry out decisions of the Security Council³⁴ and to comply with the decisions of the International Court of Justice.³⁵ Second, the Charter provides for rights of its member states. The obligation to refrain from the threat or use of force is not only an obligation of states, but states also have a right against the threat or use of force by other states.³⁶ Similarly, the principle of sovereignty establishes different rights of states, for example, the rights

28 See *Jurisdictional Immunities case* (n 16 above) paras 89 & 92 - 97; GI Hernández *The International Court of Justice and the judicial function* (2014) 224ff.

29 Under the Federal Constitution of the Swiss Confederation (18 April 1999), for example, the violation of peremptory rules of international law is grounds for the Federal Assembly to declare a popular initiative to be void (art 139(3)), and revisions of the Constitution may not violate peremptory norms of international law (art 193(4) & art 194(2)).

30 See eg Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948, 78 UNTS 177) art 5; International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965, 660 UNTS 195) art 2(1)(d).

31 UN Charter (n 2 above) art 2(2).

32 UN Charter (n 2 above) arts 2(3) & 33(1).

33 UN Charter (n 2 above) art 2(4).

34 UN Charter (n 2 above) arts 25 & 48.

35 UN Charter (n 2 above) art 94(1).

36 Accordingly, the International Court of Justice held in its *Nicaragua* judgment that the United States had acted, 'against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State', see *Nicaragua case* (n 12 above) para 292.

under state immunity.³⁷ Moreover, states also have rights against the United Nations, such as the right of non-intervention into their domestic affairs³⁸ or the right to participate in the decision-making processes of the UN organs as provided for in the Charter. Third, the predominant number of Charter provisions is dedicated to the constitution and organisation of the organs of the United Nations, regulating their composition, decision-making processes and competences.³⁹ Other organisational provisions of the Charter encompass rules for membership in the United Nations⁴⁰ or regulate the relationship between the Charter and other rules of international law,⁴¹ amendments to the Charter or its entry into force.⁴²

While states are under an obligation to comply with every provision of the UN Charter, many Charter provisions are not suitable for domestic implementation. The numerous organisational provisions, for example, cannot be implemented domestically. Even with regard to the substantive obligations established under the Charter, there is no general duty to implement them into the domestic legal order⁴³ or to grant the Charter a specific status within the domestic hierarchy of norms.

2.4 States and individuals as addressees of United Nations law

Different rules for domestic implementation may also apply depending on the addressees of the Charter rules. The main addressees of the UN Charter are the member states and the organs of the United Nations. As far as the obligations under the UN Charter are suitable for domestic implementation, states can transfer their obligations into domestic law in order to ensure that their international obligations as subjects of international law are complied with by all state organs.

Different rules of implementation may apply when international legal obligations are addressed to individuals and private entities. While the UN Charter itself does not contain any direct obligations of individuals, individuals have come into the focus of the UN Security Council: The international criminal tribunals established by the Security Council operate under the assumption that the individual is responsible for crimes punishable under international criminal law.⁴⁴ However, since the

37 Accordingly, in its decision in the *Jurisdictional Immunities case* (n 16 above), the ICJ mentions the 'right to immunity' (paras 55, 56, 81, 106, 113) and holds that Italy 'violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law' (para 139).

38 UN Charter (n 2 above) art 2(7).

39 See in particular UN Charter (n 2 above) Chs IV, V, VI, VII, X, XII, XIII, XIV & XV.

40 UN Charter (n 2 above) Ch II.

41 UN Charter (n 2 above) art 103.

42 UN Charter (n 2 above) Chs XVIII & XIX.

43 On the exception of UN Charter (n 2 above) arts 104 & 105 see below 3.2.1.

44 See Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute) (25 May 1993, UNSC 808/1993) art 6; Statute of the International Criminal Tribunal for Rwanda (ICTR Statute) (8 November 1994, UNSC S/RES/955) art 6.

criminal proceedings take place on the international plane and in front of international tribunals, those international rules addressing the individual do not need to be implemented into domestic law (→ Schmalenbach). Conversely the practice of the Security Council to target not only states but also individuals does not create individual obligations. The resolutions are addressed to the member states of the UN which are responsible for implementing the sanctions imposed by the Security Council. Individual obligations under international law are thereby not established. The domestic implementation of sanctions may, however, require addressing individuals and private entities, for example private banks that are capable of freezing the assets of blacklisted persons and entities.

3 Implementation of obligations under the United Nations Charter

3.1 The constitutional basis for Germany's participation in the United Nations

3.1.1 *Application of general rules and absence of special rules*

The German legal order does not only address the question of whether and how specific obligations under the UN Charter are implemented into the domestic legal order. It also provides a constitutional framework for Germany's participation in the United Nations. The Basic Law, however, does not contain any specific provisions that deal explicitly with the participation of Germany in the United Nations. Hence, the general constitutional provisions regarding Germany's involvement in international institutions and the relationship between the German legal order and international law apply: While article 59(2) of the Basic Law regulates the conclusion of international treaties in general, article 24 of the Basic Law contains provisions regarding Germany's participation in international organisations.⁴⁵ Article 24(2) of the Basic Law stipulates:

With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.

⁴⁵ Although Basic Law art 24 seems to be *lex specialis* with regard to the more general Basic Law art 59(2), the latter provision nevertheless finds application since the former does not contain any specific regulations regarding the conclusion of international treaties, see BVerfG Case 2 BvR 197/83 (22 October 1986) (1987) 73 *Entscheidungen des Bundesverfassungsgerichts* 339 367 & 375; BVerfG Case 2 BvE 6/99 (22 November 2001) (2002) 104 *Entscheidungen des Bundesverfassungsgerichts* 151 195; I Pernice 'Article 24' in H Dreier (ed) *Grundgesetz, Kommentar* vol II (2nd edn 2006) para 69; S Oeter 'Systeme kollektiver Sicherheit' in J Isensee & P Kirchhof (eds) *Handbuch des Staatsrechts der Bundesrepublik Deutschland* vol XI (3rd edn 2013) 619 631.

This constitutional provision was included in the Basic Law with a specific view towards the United Nations as the 'prototype' of a system of collective security.⁴⁶ It provides the constitutional foundation for Germany's participation in the United Nations.

Article 24(1) of the Basic Law, on the other hand, which allows for the transfer of sovereign powers to an international organisation, does not apply to the United Nations. The United Nations are not authorised to exercise sovereign power with direct effect in the domestic legal order of its member states as is envisaged in article 24(1) of the Basic Law.⁴⁷ Through its membership in the United Nations, the Federal Republic of Germany has rather entered into a framework of international legal obligations and thereby consented to limitations of its sovereign powers as provided for in article 24(2) of the Basic Law.

Since the Charter of the United Nations is a treaty regulating the political relations of the Federal Republic of Germany, the ratification of the Charter required the consent of the German Federal Parliament (Bundestag) and the Federal Assembly (Bundesrat) in the form of a federal law, according to article 59(2) of the Basic Law. With the law concerning the accession of Germany to the United Nations, the Bundestag and the Bundesrat have fulfilled the constitutional requirement for Germany's membership in the United Nations.

3.1.2 Allowing for dynamic development of the United Nations Charter

Just like the accession of Germany to the United Nations Charter required a federal law, any formal amendment of the Charter requires a renewal of parliamentary consent in the form of a federal law.⁴⁸ Due to the high requirements of articles 108 and 109 of the UN Charter, however, formal amendments or revisions of the UN Charter are rare.⁴⁹ In order to adapt the Charter regime to a global landscape that has undergone fundamental changes since the end of the Second World War and to meet global

46 BVerfG Case 2 BvE 3/92 et al (12 July 1994) (1994) 90 *Entscheidungen des Bundesverfassungsgerichts* 286 347ff; BVerfG Case 2 BvE 6/99 (n 45 above) 195; Pernice (n 45 above) para 54.

47 BVerfG Case 2 BvE 3/92 et al (n 46 above) 346 - 347; HD Jarass 'Article 24' in HD Jarass & B Pieroth (eds) *Grundgesetz, Kommentar* (12th edn 2012) para 5; Pernice (n 45 above) para 20; A Funke *Umsetzungsrecht* (2010) 44; JA Frowein 'Implementation of Security Council resolutions taken under Chapter VII in Germany' in V Gowlland-Debbas (ed) *United Nations sanctions and international law* (2001) 253 258; but see M Herdegen *Die Befugnisse des UN-Sicherheitsrates* (1998) 33 - 34; Herdegen (n 17 above) para 21 who argues in favour of the application of Basic Law art 24(1); see also Wolfrum (n 1 above) para 19.

48 See BVerfG Case 2 BvE 6/99 (n 45 above) 200.

49 The UN Charter has been formally amended three times, in order to increase the size of the Security Council and of the Economic and Social Council respectively. See T Rensmann 'Reform' in Simma et al (n 6 above) 25 para 14.

challenges that had not been envisaged by the Founders of the UN in 1945, the UN organs have therefore interpreted and applied the Charter provisions in a rather dynamic and flexible manner: The Security Council, most prominently, has expanded its range of action through an extensive interpretation of the term 'threat to the peace' in article 39 of the UN Charter, applying it increasingly to internal conflicts.⁵⁰ The Council has also resorted to a variety of measures under article 41 of the UN Charter, such as the creation of international criminal tribunals,⁵¹ legislative action,⁵² peacekeeping operations,⁵³ and the authorisation of the use of force in a manner not explicitly provided for in the Charter.⁵⁴

While the legality of these developments has at times been cast into doubt,⁵⁵ they have generally been accepted by the UN member states. Furthermore, this dynamic and flexible interpretation of the UN Charter has been justified with reference to the role of the subsequent practice of the UN organs in interpreting the Charter,⁵⁶ as well as to systematic and functional methods of interpretation and to the principle of effectiveness (*effet utile*).⁵⁷ From the perspective of the domestic legal order, however, the question arises, whether this dynamic development of the United Nations is still covered by the parliamentary consent given to the UN Charter in 1973. In other words: does article 59(2) of the Basic Law require parliamentary consent only with regard to the conclusion and amendment of treaties or does it also apply to significant developments within a treaty regime that occur through interpretative development without formal amendment?

In the jurisprudence of the Constitutional Court of Germany, this question has been dealt with in the context of the integration of Germany in the European Union and with regard to Germany's membership in NATO. In the context of European integration, the Constitutional Court demands that the integration programme of the European Union must be sufficiently precise and that significant developments on the European level require parliamentary consent even when the EU treaties are not

50 C Gray 'The use of force and the international legal order' in MD Evans (ed) *International Law* (3rd edn 2010) 615 623.

51 W Sandholtz 'Creating authority by the council: The international criminal tribunals' in B Cronin & I Hurd (eds) *The UN Security Council and the politics of international authority* (2008) 131.

52 S Talmon 'The Security Council as world legislator' (2005) 99 *American Journal of International Law* 175.

53 M Bothe 'Peacekeeping' in Simma et al (n 6 above) 1171.

54 E de Wet *The Chapter VII powers of the United Nations Security Council* (2004) 256; M Payandeh 'The United Nations, military intervention, and regime change in Libya' (2012) 53 *Virginia Journal of International Law* 355 366ff.

55 See eg M Koskeniemi 'The police in the temple, order, justice and the UN: A dialectical view' (1995) 6 *European Journal of International Law* 325.

56 *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970) Advisory Opinion* ICJ (21 June 1971) (1971) ICJ Reports 16, para 22; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict Advisory Opinion* ICJ (8 July 1996) (1996) ICJ Reports 66, para 19.

57 S Kadelbach 'Interpretation' in Simma et al (n 6 above) 71 para 18.

formally amended.⁵⁸ However, this jurisprudence has to be seen against the background of the 'supranational' nature of EU law,⁵⁹ namely the competence of the EU to create legally binding law by way of majority vote that has direct effect⁶⁰ within the German legal order and takes priority over German law.⁶¹ The constitutional standards developed by the Court in the context of European integration can therefore not be applied to the United Nations.

More insightful guidelines for the constitutional requirements for Germany's participation in the dynamic UN legal framework can be derived from the Constitutional Court's line of jurisprudence developed against the background of the significant changes in the security architecture of NATO.⁶² When the German Parliament consented to the accession of Germany to the North Atlantic Treaty in 1955,⁶³ NATO was construed as a military alliance, determined to defend its member states against threats and attacks from the outside.⁶⁴ After the end of the Cold War, NATO significantly broadened its approach towards cooperation and security. Without formally amending the North Atlantic Treaty, the Heads of State and Government adopted the new Strategic Concepts of 1991⁶⁵ and 1999⁶⁶ respectively, thereby laying the ground for NATO's military involvement in the enforcement of UN Security Council resolutions, for example with regard to the embargo imposed on the Federal Republic of Yugoslavia,⁶⁷ the ban on military flights over Bosnia and Herzegovina,⁶⁸ and NATO's involvement in Kosovo and Afghanistan.

When the Constitutional Court was confronted with the question whether these developments were still covered by the parliamentary

58 BVerfG Case 2 BvE 2/08 et al (30 June 2009) (2010) 123 *Entscheidungen des Bundesverfassungsgerichts* 267 351 - 356 & 384 - 395; see already BVerfG Case 2 BvR 2194/92 et al (12 October 1993) (1994) 89 *Entscheidungen des Bundesverfassungsgerichts* 155 187f.

59 On the concept of supranational law see A Skordas 'Supranational law' in Wolfrum (n 16 above) paras 1 - 5.

60 See Treaty on the Functioning of the European Union (TFEU) (13 December 2007, 2008/C 115/01) art 288(2); ECJ Case 26/62 *Van Gend en Loos* [1963] ECR I.

61 Case 6/64 *Costa v ENEL* [1964] ECR 585.

62 On the changing role of NATO see T Marauhn 'North Atlantic Treaty Organization' in Wolfrum (n 16 above) paras 1 - 13, 51 - 61.

63 Gesetz betreffend den Beitritt der Bundesrepublik Deutschland zum Brüsseler Vertrag und zum Nordatlantikvertrag of 24 March 1955 (*Bundesgesetzblatt* 1955 II 256).

64 See in particular North Atlantic Treaty (4 April 1949) arts 5 & 6.

65 NATO *New Strategic Concept* (7 and 8 November 1991) http://www.nato.int/cps/en/natolive/official_texts_23847.htm (accessed 2 March 2015).

66 NATO *The Alliance's Strategic Concept* (24 April 1999), http://www.nato.int/cps/en/natolive/official_texts_27433.htm (accessed 2 March 2015).

67 UNSC Res 713 (25 September 1991) UN Doc S/RES/713; UNSC Res 757 (30 May 1992) UN Doc S/RES/757.

68 UNSC Res 781 (9 October 1992) UN Doc S/RES/781; UNSC Res 816 (31 March 1993) UN Doc S/RES/816.

consent given to the NATO Treaty in 1955, the Court answered with a resounding yes. Building on its previous line of jurisprudence,⁶⁹ the Court adopted a formalist approach and held that article 59(2) of the Basic Law required parliamentary consent only with regard to the conclusion or formal amendment of an international treaty.⁷⁰ According to the Court, the constitutional requirement of parliamentary consent could not be extended to substantive modifications of a treaty brought along through dynamic interpretation or through subsequent state practice, as long as those developments took place – according to the intention of the parties to the treaty – within the already established treaty regime. The scope of consent given by Parliament would only be exceeded, when the subsequent development went beyond the ‘programme of integration’⁷¹ of the treaty, in the sense that it would be incompatible with ‘fundamental structural decisions’ embodied in the treaty.⁷²

The Court did not only develop rather restrictive standards. It also applied these standards in a restrictive manner: The Court held that the expansion of NATO’s range of action to crisis response operations of potentially global reach did not exceed the programme of integration as it was embodied in the NATO Treaty.⁷³ The Court upheld this conclusion with regard to the NATO-led ISAF operation in Afghanistan.⁷⁴

Against the background of the Constitutional Court’s line of jurisprudence with regard to NATO, there can hardly be any doubt that the parliamentary consent given to the UN Charter in 1973 encompasses the developments that took place in the United Nations, in particular after the end of the Cold War. The UN Charter is even more open for dynamic interpretation and for adaptation to change without formal amendment than the NATO Treaty. With regard to the United Nations’ broad commitment to the maintenance of international peace and security and in

69 BVerfG Case 2 BvR 1107/77 et al (23 June 1981) (1982) 58 *Entscheidungen des Bundesverfassungsgerichts* 1; BVerfG Case 2 BvE 13/83 (18 December 1984) (1985) 68 *Entscheidungen des Bundesverfassungsgerichts* 1.

70 BVerfG Case 2 BvE 3/92 et al (n 46 above) 361ff. The decision was taken with the smallest margin possible (4:4). It was, however, confirmed in BVerfG Case 2 BvE 6/99 (n 45 above) 199 - 206; BVerfG Case 2 BvE 2/07 (3 July 2007) (2008) 118 *Entscheidungen des Bundesverfassungsgerichts* 244 263 - 270; BVerfG Case 2 BvE 1/03 (07 May 2008) (2009) 121 *Entscheidungen des Bundesverfassungsgerichts* 135 157 - 158.

71 Critical with regard to the conception of a ‘programme’ embodied in a treaty M Nettesheim ‘Article 59’ in Maunz & Dürig (n 17 above) para 135.

72 BVerfG Case 2 BvR 1107/77 et al (n 69 above) 37 - 38; BVerfG Case 2 BvE 13/83 (n 69 above) 98 - 99; BVerfG Case 2 BvE 6/99 (n 45 above) 209 - 210.

73 BVerfG Case 2 BvE 6/99 (n 45 above) 210 - 212. In light of NATO’s construction as a defensive alliance with a regional focus on the European and transatlantic region, it seems, however, highly doubtful whether this expansion of NATO’s field of action to out of area operations is still covered by the North Atlantic Treaty’s programme of integration and compatible with its fundamental structural decisions. For a critical assessment of this holding, see H Sauer ‘Die NATO und das Verfassungsrecht: neues Konzept – alte Fragen’ (2002) 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 317 333f & 339ff.

74 BVerfG Case 2 BvE 2/07 (3 July 2007) (2008) 118 *Entscheidungen des Bundesverfassungsgerichts* 244 263 - 270.

light of the open-textured character of the Security Council's powers under Chapter VII, innovative developments such as peacekeeping,⁷⁵ the establishment of ad hoc criminal tribunals,⁷⁶ or the authorisation of the use of force through the Security Council do not go beyond the integration programme of the UN Charter or run counter to fundamental structural decisions embodied in the Charter. Moreover, Germany ratified the UN Charter only in 1973, when the general tendency to apply the Charter in a dynamic and functional way was already apparent and, for example, peacekeeping operations were already a well-established part of UN practice.⁷⁷ In conclusion, the jurisprudence of the Constitutional Court allows that dynamic developments within the United Nations system are encompassed by the consent given by the German Parliament to the UN Charter and hence constitutionally legitimised.

3.2 Implementation of specific provisions of the United Nations Charter

3.2.1 Implementation in general

Through the ratification of the UN Charter on the basis of a federal law according to article 59(2) of the Basic Law, the UN Charter has become part of the German legal order (→ Wolfrum, Hestermeyer & Vöneky).⁷⁸ Within the hierarchy of the domestic legal order, the Charter is therefore attributed the rank of a federal law. All German state organs are thereby bound by the provisions of the Charter and prohibited from violating it. Nevertheless, the question arises whether specific provisions of the Charter require domestic implementation in the sense of an incorporation of international rules into domestic law. Such an incorporation is required when international norms are intended to have a specific effect within the domestic legal order but cannot be regarded as self-executing. The UN Charter, however, does not contain many obligations that require such a transfer: The organisational rules of the Charter are not suitable for domestic regulation. And the Charter's obligations on member states regulate primarily their international conduct with regard to other states and to the UN and are therefore also not intended to have any domestic effect.

75 See S Vöneky & R Wolfrum 'Die Reform der Friedensmissionen der Vereinten Nationen und ihre Umsetzung nach deutschem Verfassungsrecht' (2002) 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 569 600f.

76 Herdegen (n 47 above) 34 - 35. The German legislature has, furthermore, passed federal laws with regard to its obligations towards the tribunals, thereby explicitly consenting to these obligations, see below 3.3.2.

77 This is also emphasised by the Constitutional Court, see BVerfG Case 2 BvE 3/92 et al (n 46 above) 379.

78 Funke (n 47 above) 270 - 271. The formal law required under Basic Law art 59(2) has a dual function: It allows the Federal Government to enter into treaty obligations and grants the Federal President the power to ratify the treaty and it transfers the treaty provisions into the German legal order.

Articles 104 and 105 of the Charter are an exception to this rule and require domestic implementation. According to article 104 of the UN Charter, the UN shall enjoy legal capacity within the territory of its member states as far as this may be necessary for the exercise of its functions and the fulfilment of its purposes.⁷⁹ Article 105 of the UN Charter furthermore holds that the UN shall enjoy privileges and immunities within the member states. The Convention on the Privileges and Immunities of the United Nations of 1946⁸⁰ and the Convention on the Privileges and Immunities of the Specialized Agencies of 1947⁸¹ substantiate these provisions of the Charter (→ Tladi).⁸²

In accordance with the general indifference of international law towards the modalities of its domestic implementation, the UN Charter as well as the conventions leave the question of how these obligations are implemented in the domestic legal orders to the discretion of the member states.⁸³ In Germany, the ratification of the UN Charter and of the conventions have implemented these provisions into domestic law in the status of a federal law. No further act of implementation by the German parliament, for example, in the form of a specific federal act, is required. Within the German legal order, the UN therefore enjoys legal capacity, and privileges and immunities are granted.⁸⁴ As a result, the UN can rely directly on these rights and privileges in front of German courts and agencies.

3.2.2 Implementation of the prohibition of the use of force

Through the ratification of the UN Charter, the prohibition of the use of force under article 2(4) of the Charter has become part of the domestic law

79 On the legal personality of the UN under international law, see *Reparation for injuries suffered in the service of the United Nations* Advisory Opinion ICJ (11 April 1949) (1949) ICJ Reports 174.

80 Convention on the Privileges and Immunities of the United Nations (13 February 1946, 1 UNTS 15). Germany has signed and ratified this Convention, see Gesetz zu dem Übereinkommen vom 13. Februar 1946 über die Vorrechte und Immunitäten der Vereinten Nationen of 16 August 1980 (Bundesgesetzblatt 1980 II 941). Even before its membership in the United Nations, Germany had enacted a decree recognising the juridical personality of the UN, see AR Ziegler 'Article 104' in B Simma et al (n 6 above) 2138 para 6.

81 Convention on the Privileges and Immunities of the Specialized Agencies (21 November 1947, 33 UNTS 261). See Gesetz über den Beitritt der Bundesrepublik Deutschland zum Abkommen über die Vorrechte und Befreiungen der Sonderorganisationen der Vereinten Nationen of 22 June 1954 (Bundesgesetzblatt 1954 II 639).

82 UN Charter (n 2 above) arts 104 & 105.

83 According to sec 34 of the Final Article of the 1946 Convention, however, every member state has to be in a position under its own law to give effect to the terms of the Convention.

84 The German Courts Constitution Act of 27 January 1877 (Reichsgesetzblatt 1877 41) sec 20(2) affirms, in a declaratory manner, that German courts are without jurisdiction insofar as exemptions on the basis of international agreements apply. See W Zimmermann 'Section 20 GVG' in W Krüger & T Rauscher (eds) *Münchener Kommentar zur Zivilprozessordnung* vol 3 (4th edn 2013) para 16.

of Germany in the rank of a federal law (→ Wolfrum, Hestermeyer & Vöneky).⁸⁵ A higher rank is, however, attributed to the prohibition of the use of force through the recognition of its customary nature, due to article 25 of the Basic Law.⁸⁶ According to article 25 of the Basic Law, the prohibition of the use of force thereby has a rank higher than other federal laws but lower than the federal Constitution (→ Wolfrum, Hestermeyer & Vöneky). While technically it is not the Charter provision but a norm of customary international law that is incorporated through article 25 of the Basic Law, this differentiation is without practical relevance due to the identical content of article 2(4) of the UN Charter and the customary prohibition of the use of force.

The recognition of the *jus cogens* character of the prohibition of the use of force, on the other hand, does not influence the domestic status of article 2(4) UN Charter. Since *jus cogens* norms are generally also norms of customary international law,⁸⁷ there is no added value in the generally accepted proposition⁸⁸ that article 25 of the Basic Law also encompasses *jus cogens* norms.⁸⁹ While some authors maintain the view that *jus cogens* norms are endowed with constitutional rank or even with a rank higher than the Constitution,⁹⁰ there is no indication in the Basic Law to support this position.⁹¹

In the context of the prohibition of the use of force, however, the German Constitution encompasses a specific provision in article 26(1) which reads:

Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offence.

Article 26(1) of the Basic Law is but one expression of the general commitment of Germany to peace as it is recognised as a fundamental constitutional principle underlying the Basic Law.⁹² While the provision does not explicitly refer to international concepts of peace and the prohibition of the use of force, it is intended to synchronise the

85 See Basic Law art 59(2).

86 See BVerfG Case 2 BvE 6/99 (n 45 above) 212; BVerfG Case 2 BvE 2/07 (n 74 above) 270 - 271.

87 H Thirlway 'The sources of international law' in MD Evans (ed) *International law* (3rd edn 2010) 95 119.

88 See eg BVerfG Case 2 BvR 955/00 et al (26 October 2004) (2005) 112 *Entscheidungen des Bundesverfassungsgerichts* 1 27.

89 C Hillgruber 'Article 25' in B Schmidt-Bleibtreu, H Hofmann & A Hopfau (eds) *Grundgesetz, Kommentar* (12th edn 2011) para 11; M Herdegen 'Review of the Security Council by National Courts: A Constitutional Perspective' in E de Wet & A Nollkaemper (eds) *Review of the Security Council by member states* (2003) 77 82f.

90 See I Pernice 'Article 25' in Dreier (n 45 above) para 25.

91 See Herdegen (n 17 above) para 42.

92 See BVerfG Case 2 BvE 2/08 et al (n 58 above) 346; A Proelß 'Das Friedensgebot des Grundgesetzes' in J Isensee & P Kirchhof (eds) *Handbuch des Staatsrechts der Bundesrepublik Deutschland* vol XI (3rd edn 2013) 63.

constitutional prohibition with the international rules on the use of force. All violations of the prohibition of the use of force under article 2(4) of the UN Charter therefore fall within the scope of article 26(1) Basic Law.⁹³ The wording 'war of aggression' was explicitly chosen in order to distinguish internationally prohibited military acts from legitimate acts of self-defense permitted under international law. Accordingly, all other constitutional provisions that refer to the concept of defense, such as article 115a(1) and article 87a of the Basic Law in particular, have to be read within their international context: The German Constitution does not allow the use of military force contrary to the international legal framework established by the UN Charter.⁹⁴

While article 26(1) of the Basic Law has to be seen and interpreted in the context of the prohibition of the use of force, it goes beyond Germany's obligations under international law. While article 2(4) of the UN Charter outlaws only the actual threat or use of force, the constitutional prohibition applies to acts undertaken in preparation of illegal uses of force, provided they are carried out with the intention to disturb the peaceful relations between nations.⁹⁵ Article 26(1) therefore encompasses, for example, armament measures taken with a view to the illegal use of force or pro-war propaganda.⁹⁶ While the prohibition of the use of force under international law applies only to states,⁹⁷ article 26(1) of the Basic Law addresses state organs as well as individuals and private entities.⁹⁸ The provision therefore bans all acts that could potentially disturb the peaceful relations between nations, regardless of whether Germany would be responsible for those acts under international law.⁹⁹

According to article 26(1) of the Basic Law the acts encompassed shall be made a criminal offence. The provision thereby establishes a constitutional obligation of the legislature to enact criminal laws, an obligation which the German legislature has only partially fulfilled through sections 80 and 80a of the Criminal Code, which encompass the preparation of and the incitement to wars of aggression, provided that

93 M Herdegen 'Article 26' in Maunz & Dürig (n 17 above) paras 4 & 14; Proelß (n 92 above) para 25; for a more restrictive reading see C Hillgruber 'Article 26' in Schmidt-Bleibtreu et al (n 89 above) para 4.

94 C Tomuschat 'Staatsrechtliche Entscheidung für die internationale Offenheit' in J Isensee & P Kirchhof (eds) *Handbuch des Staatsrechts der Bundesrepublik Deutschland* vol XI (3rd edn 2013) 3 para 41.

95 I Pernice 'Article 26' in Dreier (n 45 above) para 17; Federal Administrative Court Case 2 WD 12/04 (21 June 2005) (2006) 59 *Neue Juristische Wochenschrift* 77 81.

96 R Streinz 'Article 26' in M Sachs (ed) *Grundgesetz, Kommentar* (7th edn 2014) para 21; U Fink 'Article 26' in H von Mangoldt, F Klein & C Starck (eds) *Grundgesetz, Kommentar* vol II (6th edn 2010) para 40.

97 A Randelzhofer & O Dörr 'Article 2(4)' in Simma (n 6 above) 200 para 29.

98 Federal Administrative Court Case 1 C 61/76 (23 June 1981) (1982) 35 *Neue Juristische Wochenschrift* 194 - 195; Streinz (n 96 above) para 22.

99 Beyond the symbolic nature of art 26 its legal implications are rather limited and do not go beyond the legal consequences the German legal order attributes to illegal acts in general, see Hillgruber (n 93 above) para 9.

Germany is meant to participate and that the danger of German participation is created.¹⁰⁰

The German constitutional order does not only provide for the possibility of Germany's participation in the United Nations, but also for its membership in NATO. However, even with regard to the membership in NATO, the German constitutional order ensures that the international legal framework for the use of force as it is established under the UN Charter may not be violated. According to the Constitutional Court, article 24(2) of the Basic Law provides the constitutional basis for Germany's membership in NATO.¹⁰¹ This constitutional provision allows for the integration of Germany into a system of collective security only 'with a view to maintaining peace'. As a result, the Constitutional Court emphasises that NATO can only be considered to fall within the scope of article 24(2) of the Basic Law if and as long as it is strictly committed to maintaining peace.¹⁰²

In subsequent decisions, the Constitutional Court has further substantiated this holding and brought the rather vague constitutional requirement of 'maintaining peace' in close alignment with the UN Charter: With regard to NATO's new Strategic Concept of 1999, the Court held that the organisation's continuous commitment to maintaining peace was beyond question, in particular because the Concept allowed for military involvement only in accordance with international law, thereby subjecting NATO to the requirements for the use of force under the UN Charter.¹⁰³ Against the background of the NATO-led ISAF operation in Afghanistan, the Constitutional Court confirmed NATO's commitment to maintaining peace, *inter alia* referring to the authorisation of the ISAF operation through the Security Council under Chapter VII of the UN Charter.¹⁰⁴ Although the Constitutional Court emphasises that it will not generally scrutinise whether every NATO operation is in accordance with international law, since only a general and systemic deviation from the parliamentary approved programme of integration is constitutionally relevant, the Court's line of jurisprudence nevertheless contributes to aligning NATO's activities with the UN system of collective security.

100 See Proelß (n 92 above) para 28. The Criminal Code's phrasing that only wars of aggression that involve German participation are encompassed is more restrictive than the constitutional provision. Other criminal laws, such as the Code of Crimes against International Law, supplement the Criminal Code. Basic Law art 26(2) further supplements the prohibition of art 26(1), stipulating that weapons designed for warfare may be manufactured, transported or marketed only with the permission of the Federal Government.

101 BVerfG Case 2 BvE 3/92 et al (n 46 above) 350 - 351; BVerfG Case 2 BvE 6/99 (n 45 above) 209.

102 BVerfG Case 2 BvE 3/92 et al (n 46 above) 349. In BVerfG Case 2 BvE 6/99 (n 45 above) 212 the Court explicitly confirmed its competence to review whether NATO fulfills this requirement and acts within the scope of the parliamentary authorisation.

103 BVerfG Case 2 BvE 6/99 (n 45 above) 212 - 213.

104 BVerfG Case 2 BvE 2/07 (n 74 above) 270 - 276.

In conclusion, the international prohibition of the use of force is fully implemented in German constitutional law through article 59(2) and article 25 of the Basic Law. Article 26 of the Basic Law aims at effectively preventing acts of aggression and other acts that could disturb the peaceful relations between nations. Also, article 24(2) of the Basic Law, in the interpretation of the Constitutional Court, ensures that Germany participates in regional systems of collective security such as NATO only as long as they generally operate within the legal framework of the UN Charter.

3.3 Implementation of Security Council resolutions

3.3.1 *The need for implementation*

Unlike most provisions of the UN Charter, resolutions of the Security Council may require implementation within the domestic legal orders of the member states, depending on their regulatory content: Resolutions that authorise the use of force, for example, do not entail the need for such implementation, since they are only meant to have a legal effect on the international level, regarding the relationship between states.¹⁰⁵ Other resolutions explicitly aim at evoking legal effects within the domestic legal orders:¹⁰⁶ The Security Council explicitly demanded domestic measures of the member states in order to comply with their obligation to cooperate with the International Criminal Tribunal for the Former Yugoslavia,¹⁰⁷ and required member states to criminalise and prohibit the financing of terrorist acts.¹⁰⁸ Moreover, domestic implementation is required in order to give effect to resolutions through which the Security Council imposes sanctions on states or individuals.¹⁰⁹

In general, however, resolutions of the Security Council are deemed to not unfold direct effect within the German legal order.¹¹⁰ Therefore, resolutions need to be implemented into domestic law through legislative

¹⁰⁵ They may, however, raise the question whether the domestic legal order provides a sufficient legal framework for the participation of Germany in UN mandated or authorised operations, see below 3.5.

¹⁰⁶ See Funke (n 47 above) 246 - 258.

¹⁰⁷ UNSC Res 827 (25 May 1993) UN Doc S/RES/827 para 4.

¹⁰⁸ UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 para 1.

¹⁰⁹ On the binding nature of sanctions imposed by the Security Council under UN Charter art 41 see N Krisch 'Article 41' in Simma et al (n 6 above) 1305 paras 9 - 10.

¹¹⁰ See the statement of the German government with regard to the draft of the German Foreign Trade Law (Außenwirtschaftsgesetz) Bundestags-Drucksache 3/1285 (1959) 237; BGH Case 1 Str 700/94 (21 April 1995) 41 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 127 129; B Fassbender 'Art. 19 Abs. 4 GG als Garantie innerstaatlichen Rechtsschutzes gegen Individualsanktionen des UN-Sicherheitsrates' (2007) 132 *Archiv des öffentlichen Rechts* 257 265; Frowein (n 47 above) 259; but see also Herdegen (n 47 above) 32 - 37.

or administrative measures before domestic bodies, such as administrative agencies or courts, can apply them.¹¹¹ This prevailing view, which is in accordance with the general practice of most states,¹¹² is based on the general premise that – unlike the law of the European Union – international law does not regulate its effects within the states' legal orders.¹¹³ Resolutions of the Security Council are not of a supranational nature. Neither the UN Charter, nor the Security Council demand that resolutions are attributed direct effect within the domestic legal order.¹¹⁴

Whether resolutions have direct effect within the domestic legal order is therefore left to the decision of the member states. Against this background, it is argued that Security Council resolutions are not directly applicable since the member states have not transferred sovereign rights to the Security Council in a manner that would enable the Council to pass resolutions with such a direct effect.¹¹⁵ This reasoning, however, confuses the question of whether the Security Council has the power to make decisions with direct effect with the question of whether the domestic legal order attributes direct effect to resolutions. While the UN Charter does not contain any indication that the Security Council would possess such a supranational competence, this does not preclude that resolutions can be granted direct effect under domestic law, in accordance with the general requirements the German legal order establishes for the direct effect of international legal norms, namely that the norm is suitable and sufficiently precise for direct applicability.¹¹⁶

Against this background, it seems, in general, possible to attribute direct effect to at least some Security Council resolutions.¹¹⁷ Regularly, however, significant reasons will argue against the direct applicability of Security Council resolutions. Firstly, Security Council resolutions are

111 On the concept of direct applicability see Peters (n 6 above) para 45; H Sauer *Staatsrecht III* (2nd edn 2013) 82 - 91.

112 J Polakiewicz 'International Law and Domestic (Municipal) Law, Law and Decisions of International Organizations and Courts' in Wolfrum (n 16 above) para 18; HK Ress *Das Handelsembargo* (2000) 78; V Gowlland-Debbas 'Concluding Remarks' in V Gowlland-Debbas (ed) *National implementation of United Nations Sanctions* (2004) 643 644.

113 Kaiser (n 27 above) para 6.

114 Nettesheim (n 71 above) para 194; Funke (n 47 above) 270; C Portela 'National Implementation of United Nations sanctions' (Winter 2009-10) *International Journal* 13 18; A Pellet & A Miron 'Sanctions' in Wolfrum (n 16 above) para 45. See also Joined Cases C-402/05 P & C-415/05 *Kadi and Al Barakat v Council and Commission* [2008] ECR I-6351, para 298; *Nada v Switzerland* App No 10593/08 (ECtHR, 12 September 2012) para 176.

115 Frowein (n 47 above) 258; N Weiß *Kompetenzlehre internationaler Organisationen* (2009) 185; O Rojahn 'Article 24' in I v Münch & P Kunig (eds) *Grundgesetz, Kommentar* vol 1 (6th edn 2012) para 55.

116 On these requirements see Kaiser (n 27 above) paras 9 - 20; for a modification of these requirements in light of the special nature of Security Council resolutions see Peters (n 6 above) para 47.

117 See Peters (n 6 above) para 53; but see also Nettesheim (n 71 above) para 195 (arguing that the German legal order does not attribute direct effect to secondary acts of international organisations).

generally addressed to states only, thereby excluding their direct application with regard to individuals and private entities.¹¹⁸ Effective implementation of Security Council resolutions may, however, also require obligating private entities to comply with resolutions, for example, private banks to freeze the accounts of alleged terrorists, or private companies to respect the terms of a trade embargo. Secondly, numerous Security Council resolutions explicitly require their domestic implementation through legislative or administrative measures, as is, for example, the case with regard to the obligations established under Resolution 1373 (2001) or, more recently Resolution 2178 (2014). Thirdly, resolutions that are intended to have an effect within the domestic legal order will regularly restrict the rights of individuals or private entities. Under domestic law, such restrictions require a sufficiently clear legal basis, and it is doubtful whether the resolution itself – in conjunction with the law concerning the accession of Germany to the United Nations – can be regarded as fulfilling this requirement.¹¹⁹

In conclusion, resolutions of the Security Council therefore need to be implemented under German law, provided that their regulatory content or their effective enforcement requires them to unfold legal effects within the domestic legal order. Germany has taken different legislative measures in order to comply with this obligation.

3.3.2 *Implementation of resolutions establishing ad hoc tribunals*

The international criminal tribunals established by the Security Council with regard to the former Yugoslavia¹²⁰ and Rwanda¹²¹ depend on the effective cooperation with states, for example, with regard to the arrest of suspects and their surrender to the tribunals, measures of investigation and prosecution in general, or the execution of judgments.¹²² The Security Council therefore established a general obligation of member states to cooperate with the tribunals.¹²³ The statutes of the tribunals substantiate this obligation, providing for an obligation of states to comply with requests for assistance and orders of the tribunals¹²⁴ and to respect the primacy of the tribunals' jurisdiction.¹²⁵

118 Even individual-oriented sanctions of the Security Council are, in general, addressed to states. Only exceptionally has the Security Council directly addressed non-state entities, see eg the address to the 'Afghan faction known as the Taliban' in UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267 paras 1f.

119 See Peters (n 6 above) para 51.

120 UNSC Res 827 (n 107 above).

121 UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

122 See in general MC Bassiouni *Introduction to International Criminal Law* (2nd edn 2003) 22 - 26.

123 UNSC Res 827 (n 107 above) para 4; UNSC Res 955 (n 121 above) para 2.

124 See ICTY Statute (n 44 above) art 29; ICTR Statute (n 44 above) art 28. Moreover, the Prosecutor may seek the assistance of state organs, see ICTY Statute (n 44 above) art 18(2); ICTR Statute (n 44 above) art 17(2).

125 ICTY Statute (n 44 above) art 9; ICTR Statute (n 44 above) art 8.

Germany has implemented these obligations and created the legal framework for cooperation with the tribunals through two almost identical federal laws which were passed to fulfil Germany's obligations under the Security Council resolutions and to ensure that state organs comply with those obligations (→ Schmalenbach).¹²⁶ At the request of the tribunals, criminal proceedings in Germany have to be transferred to the tribunals,¹²⁷ German state organs are required to arrest and transfer suspects to the tribunals upon request,¹²⁸ and are obliged to cooperate in general.¹²⁹ Moreover, a constitutional amendment of article 16(2) of the Basic Law provides for the possibility to extradite German nationals to the international tribunals.¹³⁰

3.3.3 Implementation of legislative resolutions

The most obvious requirement for domestic implementation is established through the legislative resolutions of the Security Council, Resolution 1373 (2001) regarding the prevention and suppression of the financing of terrorist acts,¹³¹ as well as Resolution 1540 (2004) regarding the non-proliferation of weapons of mass destruction¹³² and the most recent Resolution 2178 (2014) on foreign terrorist fighters.¹³³ While Germany could, in part, rely on previously enacted legislation, the resolutions also obliged Germany to amend or change established legislation.¹³⁴

Security Council Resolution 1373 (2001) obliges member states to criminalise and prohibit the financing of terrorist acts and explicitly demands that member states establish terrorist acts as serious criminal offences in their domestic law.¹³⁵ The German legal order already encompassed criminal offences as required by the resolution, in particular

126 Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof für das ehemalige Jugoslawien of 10 April 1995 (Bundesgesetzblatt 1995 I 485) sec 1; Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof für Ruanda of 4 May 1998 (Bundesgesetzblatt 1998 I 843) sec 1. For an overview see JA Frowein & N Krisch 'Germany' in Gowlland-Debbas (n 112 above) 233 239 & 258ff for a comprehensive analysis, see K Ambos *Internationales Strafrecht* (3rd edn 2011) paras 62 - 102.

127 Sec 2 of the respective laws.

128 Sec 3 of the respective laws.

129 Secs 4 & 5 of the respective laws.

130 While the Constitution was amended with a view to the German ratification of the Rome Statute establishing the International Criminal Court, it applies also with regard to the tribunals established by the Security Council, see A Zimmermann 'Die Auslieferung Deutscher an Staaten der Europäischen Union und internationale Strafgerichtshöfe' (2001) *Juristenzeitung* 233.

131 UNSC Res 1373 (n 108 above).

132 UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540.

133 UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178.

134 On the legality of the legislative practice of the Security Council see eg M Happold 'Security Council Resolution 1373 and the constitution of the United Nations' (2003) 16 *Leiden Journal of International Law* 593 (arguing that the Security Council acted ultra vires); Talmon (n 52 above) 175 (arguing that legislative measures are within the scope of the competences of the Council).

135 UNSC Res 1373 (n 108 above) paras 1(b) & 2(e).

Section 89a of the German Criminal Code on the preparation of a serious violent offence endangering the state, Section 129a of the German Criminal Code on the formation of terrorist organisations, but also the criminal offence of participation in terrorist acts that are criminal offences by themselves.¹³⁶ In order to fully comply with its obligations under Resolution 1373, the German legislature furthermore enacted numerous legislative changes focusing on combatting international terrorism.¹³⁷

Similarly, Security Council Resolution 1540 (2004) requires member states to enact legislation in order to prohibit non-state actors 'to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery'.¹³⁸ Again, Germany did not implement this obligation through a separate law, but could rely on already existing legal acts, such as the War Weapons Control Act of 1961.¹³⁹

Passed against the background of the Islamic State's growing influence, in particular in Syria and in Iraq, Security Council Resolution 2178 (2014) obliges member states to prevent the movement of terrorists across borders and to criminalise the travel or attempt to travel as well as aiding or abetting such actions.¹⁴⁰ In light of the already far-reaching anti-terrorism laws in Germany, it is subject to debate whether this resolution actually required further implementing legislation.¹⁴¹ In April 2015, the German Parliament nevertheless passed a law further criminalising the travel or attempt to travel of potential terrorists as well as the financing of terrorism.¹⁴²

136 See Germany *Report to the Security Council Committee established pursuant to Resolution 1373 (2001) concerning Counter-Terrorism* UN Doc S/2002/11, 5.

137 Gesetz zur Bekämpfung des internationalen Terrorismus of 9 January 2002 (Bundesgesetzblatt 2002 I 361). While the governmental explanatory statement to the draft legislation refers to the implementation of Resolution 1373 (2001) in numerous instances (see Entwurf eines Gesetzes zur Bekämpfung des internationalen Terrorismus (8 November 2001) Bundestags-Drucksache 14/7386 (2001) 35), the law goes beyond what was required under the Resolution, see Frowein & Krisch (n 126 above) 239 & 254 - 255.

138 UNSC Res 1540 (n 132 above) para 2.

139 See Note verbale dated 26 October 2004 from the Permanent Mission of Germany to the United Nations addressed to the Chairman of the Committee (2 November 2004) UN Doc S/AC.44/2004/(02)/20; and the list provided by Germany in its response to the Secretariat of the 1540 Committee by the Permanent Mission of the Federal Republic of Germany to the United Nations in New York (26 May 2010) Pol 555.33, Note No 210/2010 <http://www.un.org/en/sc/1540> (accessed 2 March 2015).

140 UNSC Res 2178 (n 133 above) para 6.

141 See M Payandeh 'Globale Anti-Terrorgesetzgebung: Die deutsche Rechtsordnung im Sog des UN-Sicherheitsrats?' (2014) *Zeitschrift für Rechtspolitik* 241.

142 See Entwurf eines Gesetzes zur Änderung der Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten of 24 February 2015 (Bundestags-Drucksache 18/4087).

3.3.4 Implementation of resolutions imposing sanctions

Since the end of the Cold War, the Security Council has made increasing use of its power to impose sanctions under article 41 of the UN Charter.¹⁴³ Sanctions against states can encompass a variety of measures, including arms embargos, comprehensive trade restrictions, or restraints on air traffic. Moreover, the Council has enacted 'targeted sanctions' against individuals and private entities, in the form of asset freezes and travel bans.¹⁴⁴ The effective implementation of these sanctions regularly requires member states to take action under their domestic legal regimes.

With regard to different mechanisms of implementation, three kinds of sanctions imposed by the Security Council can be distinguished: First, the Security Council can impose sanctions against states. After the Iraqi invasion of Kuwait in 1990, for example, the Security Council enacted comprehensive sanctions against Iraq, including a trade and weapons embargo as well as the freezing of Iraqi financial assets.¹⁴⁵ Second, the Security Council can impose sanctions on individuals and private entities, listing the targeted persons directly or through a sanctions committee established by the Council. This approach has been taken, most prominently, against Osama bin Laden, the Taliban and members of Al-Qaida, initially imposed through Security Council Resolution 1267 (1999) and further developed through subsequent resolutions.¹⁴⁶ Third, the Security Council can impose sanctions against individuals without identifying the targeted persons, leaving it to the member states to determine which persons or entities fall within the scope of the sanctions. The Council has resorted to this approach through Resolution 1373 (2001), according to which the member states have to freeze the assets of persons suspected to be involved in terrorist acts.¹⁴⁷

As a member state of the United Nations, Germany has an obligation to implement resolutions of the Security Council under article 25 of the UN Charter and, with regard to resolutions adopted under Chapter VII, article 48 of the UN Charter. Within the context of the European Union, however, sanctions are primarily implemented through the EU and not directly through the German legal order.

143 See V Gowlland-Debbas 'Sanctions regimes under article 41 of the United Nations Charter' in Gowlland-Debbas (n 112 above) 3 6ff.

144 See Krisch (n 109 above) paras 15 - 18.

145 UNSC Res 661 (6 August 1990) UN Doc S/RES/661 paras 2 - 4.

146 UNSC Res 1267 (n 118 above) also established the so-called Al-Qaida and Taliban Sanctions Committee, which in 2011 was divided into one committee concerned with Al-Qaida (UNSC Res 1989 (17 June 2011) UN Doc S/RES/1989) and one committee dealing with the Taliban (UNSC Res 1988 (17 June 2011) UN Doc S/RES/1988).

147 UNSC Res 1373 (n 108 above) para 1(c).

Implementation through the European Union

The European Union is not a member of the United Nations. It is therefore not directly bound by the UN Charter and does not have an obligation to implement Security Council resolutions.¹⁴⁸ The Court of Justice of the European Union, nevertheless, recognises a general obligation of the EU to respect international law and the United Nations in particular¹⁴⁹ and emphasises that the EU may generally not impede the performance of the obligations of the member states under the UN Charter.¹⁵⁰

Against this background, the Treaty of Lisbon contains rather comprehensive competences of the EU with regard to the implementation of sanctions imposed by the Security Council. Article 215(1) of the TFEU constitutes the key provision, dealing with economic sanctions (restrictive measures) imposed against third states. Article 215(2) of the TFEU, moreover, explicitly provides a competence of the EU for sanctions against individuals and private entities.¹⁵¹ Under article 215 of the TFEU, Security Council resolutions are implemented in a two-step process. Action under article 215 of the TFEU first requires a unanimously adopted decision by the Council of the European Union within the context of the Common Foreign and Security Policy (CFSP). The Council can then take the necessary measures with a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission. The Council regularly implements the CFSP decision through a regulation which, according to its nature as a binding legal act that is directly applicable in the member states,¹⁵² serves as the domestic legal basis for the implementation of the sanctions imposed by the Security Council.¹⁵³

The sanctions regime established by the Security Council with regard to Osama bin Laden, the Taliban and members of Al-Qaida, for example, has been implemented by the EU through a Council Common Position that referred to the Security Council Resolution, stipulated that action was necessary, and that financial assets of the individuals and entities as envisaged by the Security Council will be frozen.¹⁵⁴ This Common

148 Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649 para 192; HJ Cremer 'Article 215' in C Calliess & M Ruffert (eds) *EUV/AEUV, Kommentar* (4th edn 2011) para 9; M Payandeh & H Sauer 'European Union: UN sanctions and EU fundamental rights' (2009) 7 *International Journal of Constitutional Law* 306 311.

149 *Kadi case* (n 114 above) paras 291 - 297.

150 *Kadi case (CFI)* (n 148 above) para 197.

151 Before the Treaty of Lisbon entered into force, sanctions against individuals were enacted on the basis of arts 60, 301 & 308 of the Treaty establishing the European Community, an approach that was upheld by the Court of Justice of the European Union, see *Kadi case* (n 114 above) paras 158 - 236.

152 TFEU (n 60 above) art 288(2).

153 See Funke (n 47 above) 264 & 266 - 267.

154 Common Position 1999/727/CFSP of 16 November 1999 OJ L294/1; later replaced by Common Position 2002/402/CFSP of 29 May 2002 OJ L139/4; amended by

Position was then implemented through a Council regulation that substantiated these obligations and included, as an annex, a list of persons and entities that the sanctions regime should apply to, in accordance with the determinations made by the Security Council sanctions committee.¹⁵⁵ Amendments to the list of targeted persons and entities made by the Security Council sanctions committee are transposed into the EU legal order through regulations adopted by the European Commission.¹⁵⁶ In general, the EU legal order therefore provides for an almost automatic adoption of the listings undertaken by the Security Council and its sanctions committee into EU law and thereby into the legal orders of the EU member states.¹⁵⁷

Implementation through German law

As long as Security Council sanctions are implemented through the European Union, no additional implementation measures are required under German law. EU regulations are directly applicable within the domestic legal order, thereby providing a sufficient legal basis to directly bind state organs, individuals, and private entities. However, even in light of its far-reaching competences, the EU may not be competent with regard to every measure envisioned by the Security Council. When the Security Council in 2003, for example, ordered member states to not only freeze Iraqi funds but to transfer them to the Development Fund for Iraq,¹⁵⁸ this obligation was not implemented through the EU but through the member states.¹⁵⁹ In the field covered by article 215 of the TFEU, however, the European Union has an exclusive competence,¹⁶⁰ thereby generally barring independent measures by the member states.¹⁶¹ German

Common Position 2003/140/CFSP of 28 February 2003 OJ L53/62 and Council Decision 2011/487/CFSP of 2 August 2011 OJ L199/73.

155 Council Regulation (EC) No 337/2000 of 16 February 2000 OJ L43/1; later replaced by Council Regulation (EC) No 467/2001 of 9 March 2001 OJ L67/1; and then Council Regulation (EC) No 881/2002 of 29 May 2002 OJ L139/9.

156 See Council Regulation (EC) No 881/2002 of 29 May 2002 OJ L139/9 art 7.

157 Apart from TFEU (n 60 above) art 215, TFEU art 75 contains a specific EU competence with regard to preventing and combatting terrorism. Unlike TFEU art 215, TFEU art 75 does not require a unanimously adopted decision by the Council as a prerequisite for further action but provides for the application of the ordinary legislative procedure, thereby requiring that measures are adopted jointly by the European Parliament and the Council (TFEU art 289(1)) whereas under TFEU art 215 the European Parliament is merely informed of the measures adopted by the Council. According to the Court of Justice of the European Union, TFEU art 75 does, however, not exclude the application of TFEU art 215, see Case C-130/10 *European Parliament v Council* [19 July 2012] paras 50 - 66. Therefore TFEU art 215 will continue to provide the most important legal basis for EU measures implementing sanctions imposed by the UN Security Council, even with regard to terrorism.

158 UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483 para 23.

159 See Council Regulation (EC) No 1210/2003 of 8 July 2003 OJ L 169/6, para 5; Funke (n 47 above) 275.

160 Cremer (n 148 above) para 29; J Kokott 'Article 215 TFEU' in R Streinz (ed) *EUV/AEU, Kommentar* (2nd edn 2012) para 7.

161 TFEU (n 60 above) art 2(1).

implementing measures may, however, be required and admissible in case the EU does not take action.¹⁶²

Under German law, sanctions imposed by the Security Council are implemented through the Foreign Trade Act¹⁶³ and the Foreign Trade Regulation.¹⁶⁴ Section 4(2) of the Foreign Trade Act provides for the possibility of restricting foreign trade if Germany is required to implement such restrictions under EU law or under a Security Council resolution. The specific restrictions are enumerated in the Foreign Trade Regulation, adopted by the Federal Government.¹⁶⁵ In case immediate action is required, the Federal Minister of Economics can impose provisional restrictions through an executive order.¹⁶⁶

Specific forms of sanctions can, furthermore, be implemented through different means. With regard to restrictions on arms trade, for example, the general rules of the law concerning military arms trade apply.¹⁶⁷ According to this law, the trade of military arms requires specific authorisation. The German authorities can therefore implement an arms embargo imposed by the Security Council through denying such authorisation.¹⁶⁸ Similarly, travel restrictions can be implemented through denying visas to persons listed by the Security Council.¹⁶⁹

Administratively, sanctions imposed by the Security Council are implemented and enforced through different governmental agencies. With regard to restrictions on foreign trade the Federal Office of Economics and Export Control (BAFA) is tasked with overseeing and enforcing the rules of export control. With regard to financial sanctions, the central bank of Germany (Deutsche Bundesbank) is the competent domestic authority, providing information on existing sanctions or granting exceptions to the restrictions, as provided for in the decisions of the Security Council.

162 Funke (n 47 above) 268; Fassbender (n 110 above) 273; for a skeptical view, see PJ Kuijper, 'Implementation of Binding Security Council Resolutions by the EU/EC' in E de Wet & A Nollkaemper (eds) *Review of the Security Council by Member States* (2003) 39 40ff. On the applicability of TFEU art 347, see Cremer (n 148 above) para 29; R Arnold & E Meindl 'Außenhandelsrecht' in M Dausen (ed) *Handbuch des EU-Wirtschaftsrechts* (2013) para 119. On the applicability of TFEU art 351 to Germany's obligations under the UN Charter, see *Kadi case (CFI)* (n 148 above) para 187.

163 Außenwirtschaftsgesetz of 6 June 2013 (Bundesgesetzblatt 2013 I 1482).

164 Außenwirtschaftsverordnung of 2 August 2013 (Bundesgesetzblatt 2013 I 2865).

165 See Foreign Trade Regulation secs 74 - 77. Violations of these restrictions may be punishable offenses, see Foreign Trade Act secs 17 - 19; Foreign Trade Regulation secs 80 - 82.

166 Foreign Trade Act secs 6 & 13(2)(2)(2).

167 Gesetz über die Kontrolle von Kriegswaffen of 22 November 1990 (Bundesgesetzblatt 1990 I 2506).

168 Frowein & Krisch (n 126 above) 237.

169 Frowein & Krisch (n 126 above) 237.

Fundamental rights and implementation

The most significant and controversial obstacle to implementing Security Council resolutions that impose individual sanctions against alleged terrorists is the question of whether – in the absence of effective means of judicial or administrative review on the international level – domestic or regional courts may review the compatibility of these sanctions with human rights guarantees. With regard to the implementation of sanctions in Germany, the question has most prominently been dealt with by the Court of Justice of the European Union in the *Kadi* case.¹⁷⁰ In 2005, the General Court (then called the Court of First Instance) held that EU regulations which implement Security Council resolutions could, in general, not be subject to judicial review.¹⁷¹ Upon appeal, the Court of Justice (ECJ) rejected this proposition and emphasised its responsibility to review the lawfulness of all EU legal acts.¹⁷² Since the listing procedure of the UN Sanctions Committee provided neither for a communication of the reasons for listing a person, nor for any means of administrative or judicial review, the ECJ found a violation of the right to be heard, of the right to an effective remedy and of the right to property.¹⁷³ This approach of the ECJ has been confirmed in subsequent decisions.¹⁷⁴ And in the most recent *Kadi* decision, the ECJ held that while the listed suspect had received sufficient information on the grounds of his listing in order to satisfy his rights of defense and his right to judicial review, there had not been produced sufficient information or evidence with regard to his involvement in terrorist activities that would justify the adoption of restrictive measures against him.¹⁷⁵

While the ECJ therefore recognises improvements within the UN Sanctions Committee's listing procedure, it nevertheless continues to review whether EU legal acts that implement Security Council resolutions are in accordance with the fundamental rights guarantees of the EU legal order. However, the ECJ also indicated, already in the first *Kadi* decision, its willingness to refrain from such a review, provided that a sufficient level of rights protection is guaranteed within the UN system.¹⁷⁶

170 For a current overview over the proceedings see CA Feinäugle 'Case note' (2013) 107 *American Journal of International Law* 878 - 881. In October 2012 the Sanctions Committee removed Mr Kadi from its list, see UN Press Release (5 October 2012) UN Doc SC/10785.

171 *Kadi case (CFI)* (n 148 above). The Court held, however, that it could review indirectly whether Security Council resolutions are in accordance with peremptory norms of international law (*jus cogens*) but found that the sanctions practice did not violate any of these 'higher rules of public international law'.

172 *Kadi case* (n 114 above) paras 278 - 326.

173 *Kadi case* (n 114 above) paras 333 - 371.

174 Case T-85/09 *Kadi v Commission* [2010] ECR II-5177; Joined Cases C-399/06 P & C-403/06 P, *Hassan v Council* [2009] ECR I-11393.

175 Joined Cases C-548/10 P, C-539/10 P & C-595/10 P *Commission v Kadi* [18 July 2013].

176 For this reading of the decision see Payandeh & Sauer (n 148 above) 314; see also J Kokott and C Sobotta 'The Kadi Case – Constitutional core values and international law – Finding the balance?' (2012) 23 *European Journal of International Law* 1015.

German courts have, until now, not yet had the chance or seized the opportunity to rule on the legality of the UN sanctions regime.¹⁷⁷ Nevertheless, a preliminary and cautious assessment of how the German Constitutional Court would decide a case involving the UN sanctions regime is possible in light of the Court's jurisprudence with regard to the European Union and international law in general. In its jurisprudence, the Court routinely refers to the openness of the German constitutional order towards international law (*Völkerrechtsfreundlichkeit*)¹⁷⁸ and towards European Union law (*Europarechtsfreundlichkeit*)¹⁷⁹ – constitutional principles the Court operationalises in order to avoid conflicts with international law and EU law. At the same time, however, the Court emphasises the limits of these principles: According to the well known *Solange* jurisprudence, the Constitutional Court will refrain from reviewing whether legal acts of the EU are compatible with the fundamental rights guarantees of the German Constitution only as long as the EU and the ECJ in particular protect fundamental rights to a degree essentially equivalent to the level of fundamental rights protection under the Basic Law.¹⁸⁰ Against this background, the Constitutional Court will, on the one hand, take Germany's obligations under the UN Charter and the importance of the UN system and its functioning for the international community seriously. On the other hand, the Court will only be willing to refrain from reviewing whether UN mandated sanctions are compatible with the fundamental rights of the German Constitution if and as long as a sufficient level of individual rights protection is guaranteed either within the EU system or within the United Nations.¹⁸¹ Notwithstanding some improvements and positive developments (→ Tladi), the UN system of targeted sanctions does, at this point, lack such a sufficient level of fundamental rights protection against the listing of terrorist suspects.¹⁸² On the basis of its previous jurisprudence, it can therefore be assumed, that the Constitutional Court would not refrain from reviewing whether UN mandated sanctions are in conformity with the fundamental rights guarantees of the German Constitution. As soon as sufficient means of

177 In one of the few pertinent cases before German courts, the Administrative Court of Munich rejected the petition of the applicant to suspend the proceedings and to refer the case to the Constitutional Court for a ruling on the constitutionality of the sanctions regime. The Administrative Court rather emphasised that the applicant had to seek legal remedies against the listing primarily within the EU system of judicial protection and that the EU courts had demonstrated that they ensure a sufficient level of fundamental rights protection against the listing procedure. See Administrative Court of Munich Case M 17 K 07.452 (13 December 2007).

178 See in particular BVerfG Case 2 BvR 1481/04 (14 October 2004) (2005) 111 *Entscheidungen des Bundesverfassungsgerichts* 307 317f.

179 See in particular BVerfG Case 2 BvE 2/08 et al (n 58 above) 346 - 347.

180 BVerfG Case 2 BvR 197/83 (n 45 above) 387; for a summary and evaluation of this line of jurisprudence see M Payandeh 'Constitutional review of EU law after Honeywell: Contextualising the relationship between the German Constitutional Court and the EU Court of Justice' (2011) 48 *Common Market Law Review* 9 13f.

181 For a similar assessment, see Fassbender (n 110 above) 257.

182 See eg A Ciampi 'Security Council targeted sanctions and human rights' in B Fassbender (ed) *Securing human rights? Achievements and challenges of the UN Security Council* (2011) 98.

legal protection are established at the UN level, however, the Court would be more willing to defer to the UN organs.

This general approach of the Constitutional Court is, moreover, in accordance with the position of the European Court of Human Rights with regard to the obligations of the member states of the European Convention on Human Rights under international law and under the UN Charter in particular: In the *Bosphorus* case, the Strasbourg Court held that when states implement obligations flowing from their membership in an international organisation, the compatibility of these implementing measures with the European Convention can be presumed, as long as the organisation protects fundamental rights in a manner which can be considered to be at least equivalent to that of the Convention.¹⁸³ In a recent decision¹⁸⁴ regarding the Iraq sanctions regime established by the Security Council,¹⁸⁵ the European Court of Human Rights, however, held that due to the lack of legal protection within the UN sanctions regime, the *Bosphorus* presumption did not apply and concluded that Switzerland had violated its obligations under the European Convention on Human Rights.¹⁸⁶

In conclusion, European courts have challenged the compatibility of UN imposed sanctions on individuals with fundamental rights guarantees, and it can be presumed that the German Constitutional Court would adopt a similar approach. As long as the United Nations do not guarantee a sufficient level of human rights protection against the listing of individuals, a comprehensive implementation of these sanctions within the European Union and Germany cannot be guaranteed.

3.4 Consideration of United Nations soft law

Resolutions adopted by the UN General Assembly are not legally binding, they can therefore not be implemented into the German legal order in a strict sense. General Assembly resolutions can, nevertheless, be regarded

183 *Bosphorus Hava Yollari v Ireland* App no 45036/98 (ECtHR, 30 June 2005) paras 154 - 155.

184 Previously, the European Court of Human Rights had avoided ruling on the relationship between Security Council resolutions and the European Convention on Human Rights: In the 2011 *Al-Jedda* decision, the Court resorted to the presumption that 'the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights', see *Al-Jedda v United Kingdom* App no 27021/08 (ECtHR, 7 July 2011) para 102. And in the 2012 *Nada* decision the Court found that Switzerland, when implementing a Security Council resolution, had not used all the latitude it enjoyed under the resolution, see *Nada case* (n 114 above) para 180.

185 UNSC Res 1483 (n 158 above).

186 *Al-Dulimi et Montana v Switzerland* App no 5809/08 (ECtHR, 26 November 2013) paras 114 - 121. While the case does not deal with the sanctions regime established under UNSC Res 1267 (n 118 above), the Court explicitly holds that the 1267 sanctions regime does not guarantee the minimum standard of human rights protection, see para 119.

as authoritative statements of existing customary international law, indicate customary international law in the making, or even ‘crystallize’ emerging customary international law.¹⁸⁷ Against this background, and in light of the contribution of domestic legal orders and domestic courts to the formation and identification of customary international law in general,¹⁸⁸ the question whether and how domestic legal orders recognise the normative significance of General Assembly resolutions gains importance.

The German legal order does not explicitly attribute significance to resolutions of the General Assembly or other kinds of United Nations soft law. The jurisprudence of German courts, and of the Constitutional Court in particular, nevertheless exhibits considerable openness towards General Assembly resolutions. The Constitutional Court, for example, repeatedly and routinely refers to the Universal Declaration of Human Rights as a subsidiary means of interpretation with regard to the open-textured constitutional rights of the Basic Law.¹⁸⁹ The Court furthermore refers to the International Law Commission’s Draft Articles on State Responsibility as they were adopted by the General Assembly, thereby confirming and reinforcing the claim that the draft embodies existing customary international law.¹⁹⁰ In a similar vein, the Court has relied on the Friendly Relations Declaration,¹⁹¹ on resolutions interpreting the term genocide,¹⁹² or on principles adopted by the General Assembly with regard to mental health issues.¹⁹³ While these references to resolutions of the General Assembly may not have far-reaching legal significance in the particular cases, the continuous affirmative reference to the resolutions can be understood as a recognition of the authoritative voice of the General Assembly within the international community.

187 E Klein & S Schmahl ‘Article 10’ in Simma et al (n 6 above) para 51.

188 See eg A Tzanakopoulos ‘Domestic courts in international law: the international judicial function of national courts’ (2011) 34 *Loyola of Los Angeles International & Comparative Law Review* 133 154ff.

189 See eg BVerfG Case 2 BvR 61/96 (12 May 1998) (1998) 51 *Neue Juristische Wochenschrift* 2587 2589; BVerfG Case 2 BvR 2560/95 (7 April 1998) (1998) 51 *Neue Juristische Wochenschrift* 2585; BVerfG Case 1 BvL 4/54 (17 January 1957) (1957) 6 *Entscheidungen des Bundesverfassungsgerichts* 55 73; on the reception of the Universal Declaration through the German constitutional order in general see T Rensmann *Wertordnung und Verfassung* (2007).

190 See eg BVerfG Case 2 BvR 2660/06 (13 August 2013) para 43; BVerfG, Case 2 BvM 1/03 et al (8 May 2007) (2008) 118 *Entscheidungen des Bundesverfassungsgerichts* 124 136 - 137; BVerfG Case 2 BvR 955/00 (26 October 2004) (2005) 24 *Neue Zeitschrift für Verwaltungsrecht* 560 563f - 564; BVerfG Case 2 BvR 1379/01 (28 June 2004) (2004) 57 *Neue Juristische Wochenschrift* 3257 3258.

191 BVerfG Case 2 BvR 955/00 et al (n 88 above) 36.

192 BVerfG Case 2 BvR 1290/99 (12 December 2000) (2001) 51 *Neue Juristische Wochenschrift* 1848 1852.

193 BVerfG Case 2 BvR 882/09 (23 March 2011) (2012) 128 *Entscheidungen des Bundesverfassungsgerichts* 282 308, 310, 313 - 315.

3.5 Enabling participation in the United Nations system of collective security

The UN system of collective security, as it is established by the UN Charter and substantiated and further developed through the practice of the Security Council, envisions different mechanisms in order to maintain peace and security: the institutionally safeguarded obligation of member states to settle their disputes peacefully, the Security Council's enforcement mechanisms under Chapter VII of the Charter, as well as the multi-faceted peacekeeping practice. All these measures require that the member states not only comply with but actively support actions taken by the United Nations. While the UN Charter does not establish obligations of member states to participate in any particular measure,¹⁹⁴ article 2(5) UN Charter establishes a general obligation to support the UN. And although the obligation to provide forces depends on the conclusion of special agreements between the member states and the Security Council,¹⁹⁵ member states are under a general, albeit weak, obligation to participate in carrying out measures decided upon by the Security Council and to mutually assist each other while doing so.¹⁹⁶

While the UN Charter therefore does not establish any concrete obligations that would require domestic implementation, effective participation in undertakings mandated by the UN nevertheless necessitates a domestic legal framework that enables a member state to contribute to the activities of the United Nations. The German legal order, however, does not provide for any concrete procedures or substantive standards with regard to Germany's participation in the UN. The decision of whether and how Germany participates in and contributes to the activities of the United Nations is rather left to the political discretion of the Federal Government in cooperation with Parliament.¹⁹⁷

Of specific concern is, however, the question of whether and how Germany can participate militarily in the context of the United Nations system of collective security. While the German Constitution prohibits any action that would violate the UN Charter's prohibition against the use of force (→ 3.2.2), it is potentially open towards military involvement in accordance with the UN Charter: military participation in UN

¹⁹⁴ Vöneky & Wolfrum (n 75 above) 595.

¹⁹⁵ UN Charter (n 2 above) art 43. On the lack of implementation of the mechanism envisioned by UN Charter arts 43 & 47, see N Krisch 'Article 43' in Simma et al (n 6 above) paras 9 - 13.

¹⁹⁶ UN Charter (n 2 above) arts 48 & 49.

¹⁹⁷ Basic Law art 32(1) establishes a federal competence with regard to foreign relations. And while foreign relations traditionally fall within the scope of the competences of the executive, the Constitutional Court emphasises that under the German Constitution the executive and parliament are required to work together in the field of foreign relations, see BVerfG Case 2 BvE 6/99 (n 45 above) 210; BVerfG Case 2 BvE 1/03 (n 70 above) 162.

peacekeeping operations, UN Security Council mandated use of force, as well as acts of individual or collective self-defense under article 51 of the UN Charter.

According to article 87a(2) of the Basic Law, the primary constitutional provision with regard to the use of military force, '[a]part from defense, the Armed Forces may be employed only to the extent expressly permitted by the Basic Law'. While the first part of this provision generally allows for military measures in accordance with article 51 of the UN Charter,¹⁹⁸ the second part requires an explicit constitutional authorisation for military engagement beyond measures of self-defense. Accepted at face value, this constitutional provision could be interpreted as excluding involvement of German armed forces in Security Council mandated military measures and peacekeeping operations, since such measures cannot be understood as defense¹⁹⁹ and the German Constitution does not contain any explicit authorisation for participation in Chapter VII measures. Accordingly, it was, for a long time, subject to controversial debate whether such involvement of Germany would only be admissible after a constitutional amendment.²⁰⁰ In 1994 the Constitutional Court held in a landmark decision that article 24(2) of the Basic Law, which allows for Germany's integration into the collective security system of the United Nations, constitutes the constitutional authorisation for the deployment of armed forces in the context of and in accordance with the rules of the UN.²⁰¹ According to the Constitutional Court, however, the deployment of armed forces in a particular case requires the prior consent of Parliament.²⁰²

This line of jurisprudence of the Constitutional Court enables Germany to effectively participate in Security Council mandated operations. The Court recognises a general constitutional authorisation for Germany's participation in military measures under the auspices of the Security Council, both, with regard to peacekeeping operations as well as with regard to military engagement on the basis of an authorisation of the Council under Chapter VII.²⁰³ Moreover, this jurisprudence ensures that German armed forces are deployed only in accordance with the rules of the UN Charter: The participation of the German military in a manner incompatible with the UN Charter is therefore not only prohibited due to

198 V Epping 'Article 87a' in V Epping & C Hillgruber (eds) *Grundgesetz, Kommentar* (2nd edn 2013) para 6.

199 B Pieroth 'Article 87a' in Jarass & Pieroth (n 47 above) para 9a.

200 See Tomuschat (n 94 above) para 40.

201 BVerfG Case 2 BvE 3/92 et al (n 46 above) 345 - 357. Accordingly, the Constitutional Court regarded Germany's participation in the peacekeeping operation UNOSOM II to be in accordance with the Constitution, see BVerfG (as above) 351 - 353. The Court has confirmed this holding subsequently, see BVerfG Case 2 BvE 1/03 (n 70 above) 157.

202 BVerfG Case 2 BvE 3/92 et al (n 46 above) 381 - 390; BVerfG Case 2 BvE 1/03 (n 70 above) 153 - 170.

203 Vöneky & Wolfrum (n 75 above) 595.

the constitutional implementation of the prohibition of the use of force,²⁰⁴ but also because such a deployment would not be authorised under article 87a(2) of the Basic Law (→ 3.2.2).

3.6 Germany and the International Court of Justice

The German legal order, furthermore, allows for effective participation in the dispute-settlement mechanism of the International Court of Justice (→ Herdegen). According to article 24(3) of the Basic Law, 'the Federation shall accede to agreements providing for general, comprehensive and compulsory international arbitration'. While this provision does not establish a concrete obligation of Germany to recognise the compulsory jurisdiction of the ICJ,²⁰⁵ it nevertheless reflects the significance the German legal order attributes to the international judiciary and international dispute-settlement mechanisms. In accordance with this constitutional commitment to the international judiciary, Germany has accepted the compulsory jurisdiction of the ICJ with a declaration of 1 May 2008.²⁰⁶

This positive openness of the German legal order towards the international judiciary also applies to the implementation of ICJ decisions. Since the obligation of Germany to comply with decisions of the ICJ in any case to which Germany is a party is established in the Charter and the ICJ Statute,²⁰⁷ it is transformed into the domestic legal order through the federal law with which Germany acceded to the UN. Going beyond the obligation to implement decisions of the ICJ in cases to which Germany is a party, the Constitutional Court furthermore recognises an obligation of all state organs to take into consideration the jurisprudence of the ICJ in general when applying international law.²⁰⁸

The German constitutional order, as it is interpreted and applied by the Constitutional Court, thereby enables and encourages the participation of Germany within the United Nations judiciary and provides a legal framework for state organs to comply with and to implement the decisions and jurisprudence of the Court.

204 Basic Law arts 25 & 26.

205 Jarass (n 47 above) para 25; for the opposing view, see CD Classen 'Article 24' in von Mangoldt et al (n 96 above) para 100.

206 See CJ Tams & A Zimmermann '[T]he federation shall accede to agreements providing for general, comprehensive and compulsory international arbitration' (2009) 52 *German Yearbook of International Law* 391.

207 UN Charter (n 2 above) art 94(1); ICJ Statute (n 9 above) art 59.

208 BVerfG Case 2 BvR 2115/01 et al (19 September 2006) (2007) 60 *Neue Juristische Wochenschrift* 499; for a critical view, see KF Gärditz 'The Vienna Convention on Consular Relations case – German Federal Constitutional Court decision on failure to provide consular notification' (2007) 101 *American Journal of International Law* 627; for an affirmative view, see M Payandeh 'Die verfassungsrechtliche Stärkung der internationalen Gerichtsbarkeit: Zur Bindung deutscher Gerichte an Entscheidungen des Internationalen Gerichtshofs' (2007) 45 *Archiv des Völkerrechts* 244.

4 Conclusion

At first glance, the German legal order does not exhibit a particular sensitivity with regard to the United Nations and the obligations of Germany under the UN Charter: The constitutional order does not contain any provisions explicitly mentioning the United Nations. UN law is not automatically implemented into the domestic legal order, nor is it, in general, considered to have direct effect. Within the hierarchy of norms, UN law ranks below the Constitution. The domestic legal order does not stipulate any obligations of Germany to participate in UN peacekeeping or peace enforcement measures, but leaves participation to the discretion of the political organs. On close inspection, however, the German legal order provides for the comprehensive implementation of Germany's obligations under the UN Charter. The Charter provisions are part of the German legal order and, as far as required, transferred into German law. The constitutional order pays specific attention to the prohibition of the use of force, implementing it with a rank between the Constitution and other federal law, establishing rules that aim at the effective enforcement of the provision, and ensuring that military measures of Germany comply with the Charter framework on the use of force, even when German forces are deployed within the regional context of NATO. Furthermore, the Constitutional Court's jurisprudence constitutionally legitimises the dynamic practice of the UN organs and of the Security Council in particular, and allows for the participation of Germany within Security Council mandated or authorised operations. Sanctions that are imposed by the Security Council are effectively implemented either through the European Union or through the German legal order. While the German legal order therefore lacks specific constitutional or statutory provisions particularly dedicated to the United Nations, it nevertheless provides a legal framework which enables Germany's full participation in the activities of the UN and ensures that all state organs comply with Germany's obligations under the UN Charter.

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CHAPTER 4

THE UNITED NATIONS CHARTER AND THE SOUTH AFRICAN LEGAL ORDER

*Dire Tladi**

1 Introduction

While both South Africa and Germany have played prominent roles in the foundational years of the United Nations (hereinafter the UN), these roles have been sharply divergent. South Africa is a founding member of the UN, having signed the Declaration by United Nations of 1942.¹ However, South Africa has had a sharply unsettled relationship with the world body, which has often affected the manner and extent of South Africa's implementation of obligations flowing from the UN Charter.

South Africa was not only a passive participant in the creation of the United Nations. Its Prime Minister at the time, Jan Smuts, was an instrumental participant in the creation of the United Nations and seen by some as one of the architects of the United Nations Charter.² He presided over the Commission on the General Assembly in the elaboration of the Charter and is credited with drafting its preamble.³ However, for fifty years of the UN's existence after the initial honeymoon period, this relationship

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1 Article 3 of the Charter of the United Nations (The UN Charter) (26 June 1945, 1 UNTS XVI) provides that the 'original members of the United Nations shall be the States which, having participated in the United Nations Conference on International Organization at San Francisco, or having signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with article 110.' South Africa signed the Declaration by United Nations and participated in the San Francisco Conference. See generally J Shearer *Against the world: South Africa and human rights at the United Nations 1945-1961* (2011) especially at 7ff.

2 See eg J Barber & J Barret *South Africa's foreign policy: The search for status and security, 1945-1988* (1990) 17.

3 Barber & Barret (n 2 above) 17. See also C Heyns 'The Preamble of the United Nations Charter: The contribution of Jan Smuts' (1995) 7 *African Journal of International and Comparative Law* 329.

has been tumultuous and controversial.⁴ From South Africa's perspective during those years, the United Nations had sought to interfere in its domestic affairs and had 'made concerted efforts to isolate South Africa in practically every field of human endeavour from the rest of the international community'.⁵ The other perspective, however, is that it was successive South African governments, through their racist policies that stigmatised South Africa, that turned it into a pariah state and led to its isolation by the UN.⁶ Ironically, it was, *inter alia*, Smuts' preamble, and its reaffirmation of 'faith in fundamental human rights, in the dignity and worth of the human person' which were used to champion the fight against apartheid in the United Nations.⁷ The first UN action against the apartheid policies of South Africa was a General Assembly resolution in 1946.⁸ UN actions against South Africa, which lasted until the end of apartheid in the early 1990s, are too numerous to recount but include General Assembly resolutions,⁹ Security Council resolutions,¹⁰ an unsuccessful International Court of Justice (hereinafter the ICJ) application,¹¹ an Advisory Opinion by the ICJ¹² and even the adoption of

4 See J Cassette 'United Nations observer mission in South Africa – A significant event' (1992) 18 *South African Yearbook of International Law* 1 3.

5 JC Heunis *United Nations versus South Africa: A legal assessment of United Nations – and United Nations related activities in respect of South Africa* (1986) 1. See also eg the statement by the then Minister of Defence, Mr PW Botha, before the House of Assembly on 24 January 1977 in which he said, describing the isolationist UN policy: 'Surely we are dealing with extreme hypocrisy here' cited in DJ van Vuuren 'South Africa's foreign policy and international practice during 1997 as reflected mainly in speeches, statements and replies by the Government in Parliament' (1977) 3 *South African Yearbook of International Law* 258.

6 Cassette (n 4 above) 3.

7 Barber & Barret (n 2 above) 17.

8 See GA Res. 44(I), initiated by India, on the treatment by South Africa of Indians. See for discussion Shearer (n 1 above) 24 - 27.

9 In addition to the example listed above see GA Resolution 616(VII), titled 'The question of race conflict in South Africa resulting from the policies of *Apartheid* of the Government of the Union of South Africa', which was the first General Assembly resolution on the broader question of apartheid. The focus on the General Assembly on South Africa and its apartheid policies is reflected in Heunis's lament: 'In 1981 South Africa was attacked during the course of 62 of the 109 plenary meetings, whereas 353 plenary speeches dealt with South Africa ... The 36th session adopted 45 resolutions which attacked South Africa directly ... Among these were 16 core resolutions on *apartheid* ... In addition more than 20 other resolutions adopted on recommendation of the Main Committees [were adopted]'. See Heunis (n 5 above) 2ff.

10 In the first UN Security Council resolution on South Africa and Apartheid, UNSC Resolution 134 (1960), adopted in 1960 after the Sharpeville Massacre, the Council deplored 'the policies and actions of the Government of the Union of South Africa' and called upon the Government of the Union of South Africa to initiate measures aimed at bringing about racial harmony based on equality.' Subsequent to Resolution 134 (1960) the Council adopted several other resolutions including the first mandatory sanctions resolution, UN Security Council resolution 418 (1977). See for discussion of UN Security Council resolutions on South Africa Cassette (n 4 above) at 5ff.

11 *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) Second Phase* (18 July 1966) (1996) ICJ Reports 6.

12 *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 Advisory Opinion* (21 June 1971) (1971) ICJ Reports 16.

the Apartheid Convention directed against South Africa and its policies.¹³

In recent years, after the end of apartheid, South Africa has taken on an ever-increasing role at the United Nations, although even this has not been without its controversies.¹⁴ During this period, South Africa has served twice as a non-permanent member of the Security Council, three times on the Human Rights Council, is at the forefront of the UN Security Council reform discussions and is seen as a front-runner for a permanent seat on the Security Council in the improbable event that Security Council reform were to take place – incidentally on the latter issue, South Africa and Germany find themselves on similar side of the United Nations isle and very often as partners. During this same period, however, South Africa has often been severely criticised for some of its positions in the UN, particularly during its stints on the Security Council.¹⁵ Particular criticism has been reserved for South Africa's vote (and explanation of vote) in the situation in Myanmar as well as its criticism of the manner in which Security Council resolution 1973, which led to the demise of Gaddafi and his regime, was implemented.¹⁶

The relationship between South Africa and the United Nations over the years has influenced both the willingness and the ability of South Africa to implement its UN obligations. In the past, given the acrimonious relationship between South Africa and the United Nations, South Africa often chose not to implement its obligations under the UN Charter. However, the re-emergence of South Africa as a respected member of the international community has created an incentive for and an expectation on South Africa to implement fully its international obligations, in particular those under the Charter. In this chapter, I assess the extent to which South Africa has been successful in the implementation of its UN obligations, focusing on the challenges and opportunities. Whether the legal environment is conducive for implementation is, of course, a key indicator in such an assessment. The assessment is undertaken with a dual

13 International Convention on the Suppression and Punishment of the Crime of Apartheid (30 November 1973, A/RES/3068(XXVIII)) See for a discussion of the Convention, in defence of South Africa's policies, H Booysen 'Convention on the Crime of Apartheid' (1976) 2 *South African Yearbook of International Law* 56.

14 See for a discussion of South Africa's foreign policy under the spotlight N Valji & D Tladi 'South Africa's foreign policy: Between idealism and the realpolitik of being an emerging power' *OpenDemocracy* 19 June 2013 <http://www.opendemocracy.net> (on file with author).

15 See Valji & Tladi (n 14 above). See also for example, J Dugard 'The future of international law: A human rights perspective – with some comments on the Leiden School of International Law' (2007) 20 *Leiden Journal of International Law* 729. See for appraisals of the criticism D Tladi 'South African lawyers, values and the new vision of international law: The road to perdition is paved with laudable goals' (2008) 33 *South African Yearbook of International Law* 167; D Tladi 'Strict positivism, moral arguments, human rights and the Security Council: South Africa and the Myanmar vote' (2008) 1 *African Human Rights Law Journal* 23.

16 See Valji & Tladi (n 14 above). See also C Petré 'South Africa's Janus-faced foreign policy' *ThinkAfricaPress* 8 December 2011 <http://thinkafricapress.com/south-africa/janus-faced-foreign-policy> (accessed on 9 May 2015).

purpose in mind. First, to test the assumption that South Africa's record of implementation of international law is 'at times meagre'. The second purpose is to provide, to the extent that there are gaps in South Africa's implementation of its obligation under the UN Charter, recommendations on improving the record. I begin in the next section by providing a descriptive overview of the obligations under the UN Charter. Having provided an overview of the UN obligations, I move to an assessment of the implementation of these obligations in the South African legal system before offering some concluding remarks.

2 Obligations under the Charter of the UN

2.1 General

The UN Charter is a treaty, and comprises of a myriad of rights and obligations. In the accompanying chapter on German implementation of UN obligations, Payandeh observes that the Charter contains different rules, and that not all of them are obligations, for example, the rights of states against non-intervention by the United Nations and the constitutional arrangements such as the decision-making processes of the organisation (→ Payandeh). Moreover, even where obligations can be identified, not all of them are susceptible to domestic implementation strictly speaking. Some of the obligations in the Charter, for example, are purely interstate obligations, that is, enforceable only, or principally, between states on the international plane and not subject to domestic implementation. The prohibition on the threat or use of force, arguably a norm of *jus cogens* under the Charter, is one such obligation.¹⁷ Similarly, the obligation to settle disputes peacefully, provided in article 2(3) and article 33 of the Charter, is applicable between states on the international plane. These obligations are not, by their nature, susceptible to domestic implementation. This is not to say that domestic law cannot provide for them, for surely it can, particularly in order to empower the executive to perform. The South African Constitution, for example, provides that the primary objective of the South African defence is 'to defend and protect the Republic of South Africa ... in accordance with the Constitution and the principles of international law regulating the use of force'.¹⁸ The 'principles of international law' regulating the use of force include article 2(4) of the Charter.¹⁹ While it would also be possible to argue that the

17 n 1 above, art 2(4). On its status as a norm of *jus cogens*, see *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* ICJ (27 June 1986) (1986) ICJ Reports 14 para 190 where the Court referred to the fact that the prohibition on the use of force is often referred to by states as being 'a fundamental or cardinal principle of [customary international] law' and that the International Law Commission has identified it as a 'conspicuous example of a rule of customary international law having the character of *jus cogens*'.

18 The Constitution of the Republic of South Africa, 1996, sec 200(2).

19 *Military and Paramilitary Activities case* (n 17 above) at paras 175ff.

prohibition on the use of force is implemented by virtue of section 232 of the Constitution which provides that customary international law is law in South Africa, this would not, strictly speaking be an implementation of UN obligations but rather a co-existing obligations flowing from a separate source of international law.²⁰ More importantly, neither the application of section 232 of the Constitution to the use of force or even the constitutional provision providing for the defence of South Africa in accordance with international law principles on the use of force are really 'domestic implementation'. Rather, they affirm the existence of the obligation to be complied with on the international plane. These obligations, and other similarly interstate obligations, are therefore not addressed in this chapter.

Chapter IX of the UN Charter, on the other hand, contains obligations which are, by their nature, susceptible to domestic implementation. Article 55 of the Charter provides that the United Nations shall promote, *inter alia*, higher living standards, full employment, conditions of economic and social development and universal respect for human rights and fundamental freedoms for all. Member states also themselves pledge to 'take joint and separate action' to achieve these objectives.²¹ While these obligations, on a purely literal reading, do not impose any clear obligations, a purposive and evolutive interpretation reveals concrete obligations.²² Moreover, these obligations have, over time, been fleshed out through various other international instruments, particularly as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. While these obligations of the Charter, and the international instruments giving them flesh, are intended for domestic implementation, they are more appropriately covered elsewhere in this volume and will also not be discussed further in this chapter (→ Chenwi).

The Charter also has obligations on compliance with the decisions of some of its principal organs, in particular the Security Council and the International Court of Justice. Binding decisions of the Security Council, currently the basis of the most important and topical UN obligations for domestic implementation, are discussed in some detail in paragraph 2.3 below. With regards to International Court of Justice, member states are obliged to 'comply with the decisions of the International Court of Justice *in any case to which it is party*'.²³ While it is conceivable that some judgments of the International Court of Justice, in cases to which South Africa is a party, could require domestic implementation, this would be no different than for any other case of domestic implementation brought on by the

20 As above.

21 UN Charter (n 1 above) art 56

22 Vienna Convention on the Law of Treaties (The Vienna Convention) (23 May 1969, 1155 UNTS 331) art 31 provides the general rule of interpretation, which includes not only the ordinary meaning of the text, but also context, object and purpose as well subsequent agreements and subsequent practice.

23 UN Charter (n 1 above) art 94(1).

necessity of complying with decisions of another judicial or quasi-judicial body, for example, the African Court of Human and Peoples' Rights. Moreover, South Africa's reticence for judicial settlement of disputes, preferring amicable solutions even where it has a strong legal case, makes the possibility of the need for implementation of decisions of the International Court of Justice remote. Speaking on the occasion of the commemoration of the hundredth anniversary of the Peace Palace, on the subject of peace and justice, the then Deputy Minister of International Relations and Cooperation, Mr Ebrahim Ebrahim, asserted South Africa's support for peaceful settlement of disputes.²⁴ In direct response to South Africa's reluctance to accept the compulsory jurisdiction of the International Court of Justice, the Deputy Minister then made the following observation:

South Africa is committed to [the idea of peaceful settlement of disputes] and whether through the judicial settlement of disputes or through other equally peaceful means such as consultations, we will ensure that our disputes are resolved [peacefully] ... it is important to emphasise that the acceptance of the compulsory jurisdiction of the International Court ... should not be equated with support for justice, the respect for the rule of law and the promotion of justice as it as possible to achieve justice, the rule of law through means other contentious proceedings.²⁵

It is also worth pointing out that non-binding instruments emanating from the United Nations, such as General Assembly resolutions, are not binding. As such they do not create obligations to be implemented. While General Assembly resolutions may be legally significant through, for example, their role as reflecting customary international law or even contributing to its formation, they themselves cannot be implemented. Their relevance in domestic law is largely for interpretative purposes (→ *De Wet/Introduction*).²⁶ Since they are not, as such, subject to implementation, non-binding instruments of the United Nations are not considered.

24 Speech by Mr Ebrahim Ismail Ebrahim, Deputy Minister of International Relations and Cooperation, South Africa, 'On peace and justice: commemorating 100 years of the Peace Palace' 29 August 2013, the University of Pretoria.

25 As above.

26 See also E de Wet 'South Africa' in D Shelton (ed) *International law and domestic legal systems: incorporation, transformation and persuasion* (2011) 588. For examples of South African case law relying on UN non-binding instruments see also *S v Williams and Others* 1995 (2) SACR 251 (CC). See also *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC) where the Court refers, *inter alia*, to the 1986 Declaration on the Right to Development adopted by General Assembly Resolution 41/128, the 1972 Stockholm Declaration on the Human Rights, the 1992 Rio Declaration on Environment and Development and the Johannesburg Declaration on Sustainable Development. See also *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 928 (CC) para 72, where the Court relied on the *United Nations Guidelines on the Role of Prosecutors*.

2.2 Immunities of the United Nations

Members of the United Nations have several obligations towards the United Nations intended to allow the organisation to perform its functions. Some of these are obligations that require domestic application while others do not require domestic application. An example of the latter type of obligation is the obligation to pay assessed contributions.²⁷ An example of an organisational obligation requiring domestic implementation includes the obligation to ensure legal capacity of the organisation 'for the necessary exercise of its functions'.²⁸ The obligation to provide immunities to the organisation is perhaps the most important organisational obligation towards the UN requiring domestic implementation. The Charter provides that the UN 'shall enjoy in the territory of its Members such privileges and immunities as are necessary for the fulfilment of its purposes'.²⁹ Additionally the Charter provides that representatives of the members of the UN and the UN's officials 'shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions' related to the United Nations.³⁰

Although the obligations seem sufficiently clear, the Charter makes provision for the conclusion of further conventions 'with a view to determining the details of the' immunities provided for in the Charter.³¹ The creation of various Specialised Agencies of the United Nations, programmes and other entities related to the UN, so-called UN-family, has also resulted in the need for further UN immunities-related rules. Examples of UN Agencies, autonomous international organisations linked to the United Nations through special agreements and created to achieve UN objectives, include the International Monetary Fund, the World Bank Group, the World Health Organisation and the World Tourism Organisation amongst many others. Examples of UN entities that are not Specialised Agencies include United Nation Environment Programme (hereinafter the UNEP), United Nations Development Programme (hereinafter the UNDP) and the United Nations Populations Fund (hereinafter UNFPA). In recognition of the various types of entities that fall within the UN family and which require immunities and pursuant to the call for the further convention, the United Nations adopted two separate conventions, namely the 1946 Convention on the Privileges and Immunities of the United Nations (hereinafter the 1946 Convention) and the 1947 Convention on the Privileges and Immunities of Specialised Agencies (hereinafter the 1947 Convention).

27 UN Charter (n 1 above) art 17(2).

28 UN Charter (n 1 above) art 104.

29 n 1 above, art 105(1).

30 n 1 above, art 105(2).

31 n 1 above, art 105(3).

The 1946 Convention provides for the legal personality (termed juridical personality) of the United Nations and its programmes and identifies its specific competencies.³² It applies to the United Nations and its constituent organs such as the UNDP, UNEP and UNFPA. It provides, in elaborate detail, for the immunity of the United Nations, its property and assets 'from every form of legal process'.³³ The 1946 Convention also provides for the inviolability of UN premises and its documents.³⁴ In addition to immunity, the 1946 Convention provides for privileges in the form of exemption from taxes and custom duties for the United Nations.³⁵ In addition to the immunities of the organisation itself, the 1946 Convention also provides for the immunities and privileges of the officials of the United Nations³⁶ and experts on mission being persons not employed by the UN but performing missions for the UN.³⁷ With respect to officials of the UN, whether the immunity to be provided is 'absolute' or 'functional' depends on the rank of the officials, with 'the Secretary-General and all Assistant Secretaries-General' having immunity similar to those of 'diplomatic envoys', that is, absolute immunity.³⁸ Experts on mission are only accorded such immunities 'as are necessary for the independent exercise of their functions', that is, functional immunity.³⁹ The 1947 Convention follows closely the 1946 Convention, applying its provisions to Specialised Agencies.

Immunities serve as exceptions to domestic jurisdiction and, for that reason, require domestic implementation. In a dualist country such as South Africa, the international law obligations to respect the immunity of the United Nations and its officials could not be complied with in the absence of implementing legislation. Similarly, privileges, particularly the tax exemption, serve as exceptions to the applicability of domestic tax laws and must accordingly also be implemented domestically. Thus, in addition to the conventional rules as contained in the Charter, the 1946 Convention and the 1947 Convention, domestic implementation is required to give effect to the immunities and privileges. How South Africa implements the obligations to provide for immunities and privileges of the United Nations and its officials, is considered in section 3.1 below.

32 Convention on the Privileges and Immunities of the United Nations (The 1946 Convention) (13 February 1946, 1 UNTS 15) art 1.

33 1946 Convention (n 32 above) art II sec 2.

34 n 32 above, art II secs 3 & 4.

35 1946 Convention (n 32 above) art II sec 7.

36 n 32 above, art V.

37 See the 1946 Convention (n 32 above) art VI.

38 See the 1946 Convention (n 32 above) sec 18. Presumably, the Deputy Secretary-General and all Under-Secretary-Generals, being of higher rank than the Assistant Secretary-General, will have similar immunity under the 1946 Convention.

39 1946 Convention (n 32 above) art VI sec 22.

2.3 Obligation to comply with UN Security Council decisions

The extensive powers bestowed on the Security Council by the UN Charter in relation to its 'primary responsibility for the maintenance of international peace and security' have generated significant debate.⁴⁰ The Council, in carrying out its responsibilities, does so on behalf of the members of the UN.⁴¹ The members of the UN in turn 'agree to accept and carry out the decisions of the Security Council in accordance with the ... Charter'.⁴² There is thus a positive obligation on South Africa to carry out the decisions of the UN Security Council. Whether the duty to carry out the decisions of the Security Council requires domestic implementation is dependent on number of factors, including whether the particular resolution is a binding resolution and, if it is a binding resolution, what type of obligations are imposed by the resolution. These questions determine not only whether domestic implementation is required, but also the nature of the domestic implementation. It is apposite to point out that under South Africa law, Security Council resolutions requiring domestic implementation cannot have direct effect.⁴³

As to the first question, that is, whether the particular resolution is a binding resolution, there has been some debate as to whether the injunction to 'accept and carry out the decisions of the Security Council' applies to all decisions of the Security Council or only to decisions of the Security Council adopted under Chapter VII of the Charter.⁴⁴ This is a key question because, depending on the answer, the duty to implement obligations could be applied to a narrower or wider range of decisions. In addition to resolutions, whether Chapter VII or not, the Council also adopts other decisions notably Presidential Statements and Press Statements. There is also the less formal 'elements of the press' which are not recorded. All of these are, without question, 'decisions' of the Council requiring agreement of the members of the Security – indeed, in terms of

40 See generally E de Wet *The Chapter VII powers of the Security Council* (2004). See also S Talmon 'The Security Council as world legislature' (2005) 99 *American Journal of International Law* 175.

41 UN Charter (n 1 above) art 24.

42 n 1 above, art 25.

43 See E de Wet 'South Africa' in D Shelton (ed) (n 26 above). Compare A Peters 'Article 25' in B Simma et al (eds) *The Charter of the United Nations: A commentary: Volume I* (3rd edn 2012) 804.

44 Peters (n 43 above) 793ff; R Higgins 'The Advisory Opinion on Namibia: Which UN Resolutions are binding under article 25 of the Charter?' (1972) 21 *Comparative and International Law Quarterly* 273, 275. See also De Wet (n 40 above) 37ff. It is interesting to note that on the UN's website, the question whether all Security Council resolutions are binding is raised as a 'Frequently Asked Question', but no answer is provided. Instead, the website ambivalently states that how 'this issue has been addressed in the Council can be found in the Repertoire [of Practice of the Security Council]'.

the practice of the Security Council decisions other than resolutions require unanimity.⁴⁵

The injunction for members of the United Nations to comply with the decisions of the Security Council in article 25 refers to 'decisions of the Security' and not 'Chapter VII decisions of the Security Council', suggesting perhaps that the obligation to 'accept and carry out', and hence to implement domestically where necessary, persists whether the decision is contained in a Chapter VII resolution, other resolution, a Presidential Statement or Statement of the Press.⁴⁶ However, it should be noted that Chapter VI, the other chapter under which the Council acts,⁴⁷ does not make provision for binding decisions but only for recommendations.⁴⁸ Moreover, an overview of the documents of the Security Council suggests that the Security Council itself deems Chapter VII as binding resolutions while other outcomes are not binding. The Council does not, as a practice, make decisions which, by their language, bind member states in resolutions or decisions not categorised as Chapter VII.⁴⁹ For example, while 16th Supplement of the Repertoire of the Practice of the Security Council notes that a President Statement 'explicitly invoked article 25', nothing in the Presidential Statement itself creates an obligation on member states.⁵⁰ The Presidential Statement in question, for example,

45 Although the UN Charter (n 1 above) art 27(3) provides that '*Decisions of the Security Council ... shall be by an affirmative vote of nine members*', in practice this has only been applied to resolutions with other decisions adopted strictly by consensus.

46 See eg A Peters (n 43 above) 793ff; Higgins (n 44 above) 275. These views are often based on a dicta from the International Court of Justice Advisory Opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (21 June 1971) (1971) ICJ Reports where the Court, at para 113, stated that the view that article 25 applies only to Chapter VII has finds does not find support in the Charter since *inter alia* it is not placed in Chapter VII.

47 Technically the Council can also make decisions under Chapter VIII. However, resolutions that could potentially fall under Chapter VIII, have to date been institutional resolutions related to the relationship between Security Council and regional organisations and not purporting to create obligations on Member States.

48 See the UN Charter (n 1 above) arts 36, 37 and 38. The theoretical possibility of a decision to investigate a dispute leading to a duty to 'accept and carry' on the part of member states, particularly in relation to access, is discussed in several works, including Peters (n 43 above) at 794. However, a 'decision' to institute a an investigate cannot itself carry an substantive obligations and to attempts to salvage binding character of Chapter VI on the basis of article 34 seems awkward at best. See De Wet (n 40 above) 40, who refers to the 'practical unimportance of article 34 resolutions'.

49 This conclusion is consistent with the *Namibia Opinion* (n 46 above) para 114, where the Court cautioned that the 'language of a resolution should be careful analysed before a conclusion can be made as to its binding nature' noting that the question whether the power to issue a decision under article 25 has been exercised should is a matter of interpretation. Although Jost Delbrück, in the first and second editions of Simma's Commentary to the Charter, also rejects the view that article 25 applies only to Chapter VII resolutions, he does conclude that it is necessary to determine the binding nature of the resolution from an interpretation of the language. Thus resolutions that are couched in non-mandatory terms would not create the duty to 'accept and carry out'. See J Delbrück 'Article 25' in B Simma (ed) *The Charter of the United Nations: A commentary* (1994) 410, 411 & 413.

50 Part V of the Repertoire of the practice of the Security Council, 16th Supplement (2008-2009) 12.

'calls upon' members to 'make efforts' towards cooperation in the areas concerned, 'recalls' obligations, stresses certain things, emphasises others but never decides on any obligations for member states.⁵¹ The legal duty to 'accept and carry out' the decisions of the Security Council, and the legal duty to implement them when necessary, consequently arises only in practice in relation to Chapter VII resolutions.

Even if a decision of the Security Council is binding, whether there is duty 'accept and carry out' such a decision will also be dependent upon whether such a decision is lawful or not – the famous legal limits debate.⁵² The basic premise around which the debate is centred proceeds from article 103 of the Charter, which creates supremacy for UN Charter obligations over other treaty obligations. From this premise, since UN Charter obligations, including binding decisions of the Security Council, are superior to the other rules of international law, binding the decisions of the Council do not have to be consistent with such other international law rules.⁵³ The generally accepted view, however, is that while Council decisions do not have to be consistent with general international law, the Council is bound by *jus cogens* and the purposes and principles of the UN as contained in Chapter I of the Charter.⁵⁴ However, given the amorphous nature of both principles and purposes and *jus cogens*, these doctrinal limits may be of limited practical effect.⁵⁵ What is likely to serve as a constraining factor on Security Council decisions-making is 'national level repudiation', that is, the national system failing to implement a Security Council resolution not on account of the decision being contrary to international law but rather due to inconsistency with domestic constitutional requirements (or in the case of the EU, regional requirements).⁵⁶ Nonetheless, a determination by a state (whether the judiciary or the executive), that a decision of the Security Council is invalid, because it is inconsistent with *jus cogens* or the purposes and principles of the Charter, may well lead to national level repudiation in the form of unwillingness or even legal inability to implement such decisions domestically. The identification of the limits on the powers of the Security Council, and whether a particular decision to be implemented is consistent with such limits, is therefore important from the perspective of implementation.

51 See S/PRST/2008/43 on the 'Maintenance of international peace and security' adopted on 19 November 2008. See for similar discussion Chapter VII of the Repertoire of Practice of the Security Council, 15th Supplement 63.

52 See generally De Wet (n 40 above) and Peters (n 43 above).

53 In the *Namibia Opinion* (n 46 above) the Court certainly appears to adopt the approach that there is only a duty to 'accept and carry out' decisions of the Council if they are taken in 'accordance with the' Charter (para 115).

54 See D Tladi 'Reflections on the rule of law in international law: The Security Council, international law and the limits of power' (2006) 31 *South African Yearbook of International Law* 231.

55 D Tladi & G Taylor 'On the Al Qaida/Taliban sanctions regime: Due process and sunseting' (2011) 10 *Chinese Journal of International Law* 771, 776.

56 Tladi & Taylor (n 55 above) 777. See C Forcees & K Roach 'Limping into the future: The UN 1267 terrorism listing at the crossroads' (2010) 42 *George Washington International Law Review* 217 261.

The other factor identified as relevant in determining the scope of the legal obligation to implement is the nature of the decision. The nature of measures that the Council can adopt are numerous, ranging from the authorisation to engage in acts which would, but for the authorisation, be inconsistent with rules,⁵⁷ to authorising the deployment of peacekeepers and the creation of international tribunals,⁵⁸ to less intrusive measures such as calling upon a party to a conflict to cooperate with international bodies.⁵⁹ However, the measure most resorted to, and coincidentally, the measure most requiring domestic implementation, is the imposition of sanctions. The Security Council has, in recent times, preferred targeted sanctions over country sanctions. There are two main types of sanctions regimes employed by the Security Council, namely country-specific sanctions regimes and counter terrorism regimes. The main counter terrorism sanctions regimes are contained in resolutions 1373 and 1267/1989. Examples of country specific regimes include the Liberia sanctions regime,⁶⁰ Libya sanctions regime,⁶¹ the Sudan sanctions regime,⁶² and the Afghanistan sanctions.⁶³ In addition, the Security Council has also established regimes to counter the proliferation of weapons of mass destruction. These include the 1540 regime, which requires states to prevent the attainment of weapons of mass destruction by non-state actors.⁶⁴

Typically, Security Council sanctions regimes, whether country specific or counter- terrorism, have three elements. The first element typically contained in such resolutions is an arms embargo, that is, there is an obligation on member states of the UN to prevent the sale of arms to listed individuals and entities. The second element typically found in sanctions regimes is a travel ban, that is, an obligation to ensure that listed individuals do not travel. Finally, and perhaps most intrusively, Security Council sanctions regimes typically require member states to freeze the assets of the listed individuals or entities. In addition, Security Council resolution 1373, a more general terrorism-related resolution, provides an obligation on states to prevent, suppress and criminalise the wilful financing of terrorism.⁶⁵ In recent years, the UN sanctions regime has come under pressure from academic literature and domestic and regional

57 These include the authorisation to use of force eg UN SC Res 1973 (2011) authorising the use of force in Libya and the authorisation to enter Somali territorial waters in the fight against piracy off the coast of Somalia in UN SC Res 1816 (2008).

58 ICTY, ICTR and RM resolutions.

59 See eg UN SC Res 2131 (2013) on the situation in Middle East (Syria) para 4.

60 Established by UN SC Res 1521 (2003).

61 Established by UN SC Res 1970 (2011).

62 Established by UN SC Res 1591 (2005).

63 Established by UN SC Res 1988 (2011). Originally the Afghanistan sanctions regime was part of the Al Qaida regime.

64 See eg UN SC Res 1540 (2004) paras 1 - 3.

65 UN SC Res 1373 (2001) para 1.

courts for lack of due process, in particular the listing and delisting procedures.⁶⁶ In summary the concerns relate to the lack of information relating to the reasons for listing as well as the lack of an effective remedy in cases of alleged unjustified listing. While these concerns have been raised with respect to the Al Qaida (1267) sanctions regime, the issues raised can apply equally to other sanctions regimes.

To the extent that the concerns can be expressed in terms of the inconsistency of the decisions with the constraints placed by international law, then the duty to 'accept and carry out' would theoretically fall away. If such a determination were to be made by the judiciary of the state in which implementation should take place, national-level repudiation may take place through a legal inability to implement domestically. The *Kadi* saga, discussed by Payandeh, is perhaps the best example of a national, or in that case regional, level repudiation with the potential for non-implementation (→ Payandeh).⁶⁷ *Kadi*, however, was not about the consistency of Security Council decisions with *jus cogens* or the principles and purposes of the Charter, but rather the consistency of the decisions with fundamental rights under EU Law. Thus, national-level repudiation becomes possible even for decisions taken 'in accordance with the' Charter and for which there is duty to 'accept and carry out'.

In response to the spectre of national level repudiation, the Council has sought to improve the due process standards of the sanctions regime, in particular the Al Qaida regime with a view to promoting implementation in domestic law. The first element for improving the Al Qaida listing process was the requirement that a 'statement of case' be provided before an individual or entity can be listed.⁶⁸ A second element, which applied to all sanctions regime and not only the Al Qaida sanctions, relates to the institution of the Focal Point, mandated to receive the delisting requirements.⁶⁹ Without a doubt, the most far-reaching changes to the Al Qaida sanctions regime have related to the creation of the Office of the Ombudsperson and subsequent expansion of the role of the Ombudsperson.⁷⁰ The Office of the Ombudsperson was created in 2009 to replace, for the purposes of the 1267 regime, the focal point.⁷¹ While the Ombudsperson has the power to receive requests for de-listing, evaluate the case for de-listing and make recommendations (referred to as observations) to the Sanctions Committee on the de-listing of an entity or individual, this was still not seen as sufficient to address the due process concerns because the process remained essentially diplomatic and not a

66 Tladi & Taylor (n 55 above) 775 - 780.

67 ECJ Case C-584/10 P, C-593/10 P and C-595/10 P *Kadi v Commission and joined cases* [2013].

68 UN SC Res 1617 (2005) para 5. The 'statement of case', however, remains vague and would not satisfy an evidentiary burden.

69 See UN SC Res 1730 (2006).

70 Tladi & Taylor (n 55 above) para 36.

71 UN SC Res 1904 (2009).

judicial (or quasi-judicial), that is, because the Ombudsperson did not have decision-making powers, process could not be said to include an independent arbiter to determine the validity or not of the continued listing. Under the 'sun-set clause' of Resolution 1989, the recommendations of the Ombudsperson can only be reversed by a unanimous decision of the sanctions committee.⁷² Even with these attempts at placating those arguing for greater due process, this author has questioned whether the introduction of the sun-set clauses is sufficient to address the due process concerns associated with the 1267/1989 regime.⁷³

3 The implementation of UN obligations in South Africa: Challenges and prospects

3.1 Implementation of the UN immunities-related obligations

As a member of the UN and party to the UN Charter and agreements on immunities in respect of the UN and its Specialised Agencies, South Africa is under an international law obligation to grant immunities to the UN and its officials as well as entities related to the UN and their personnel. This international law obligation, stemming as it does from treaty law, requires implementing legislation in terms of section 231(4) of the Constitution of the Republic of South Africa, 1996 (→ De Wet/Introduction). South African courts have, to date, avoided the vexed question of what, in the context of the Constitution, is meant by 'self-executing'.⁷⁴ It is fortunately unnecessary to consider whether any the provisions on immunities in the Charter or any of the provisions in the various agreements are self-executing because the obligations on immunities have been incorporated into domestic law.

The Diplomatic Immunities and Privileges Act (hereinafter the Act),⁷⁵ explicitly incorporates the 1946 and 1947 Conventions into South African law. The Act provides that the 1946 and 1947 Conventions, the Vienna Convention on Diplomatic Relations and the Vienna Convention on

72 For a detailed discussion of the Resolution 1989 see Tladi & Taylor (n 55 above) paras 32 - 43. It is important to emphasise, however, that any member of the sanctions committee could escalate an issue of delisting to the Security Council, where any recommendation of the Ombudsperson can be overturned by a veto of a Permanent member of the Security Council.

73 See Tladi & Taylor (n 55 above) 788. Similarly, the *Kadi Grand Chamber* (n 67 above) held at para 133, 'despite the improvements added, in particular after the adoption of the contested regulation, the procedure for delisting and *ex officio* re-examination at UN level they do not provide the person ... the guarantee of effective judicial protection.'

74 See N Botha 'Justice Sachs and the Use of International Law by the Constitutional Court: Equity or Expediency?' (2010) 25 *SA Public Law* 235 246ff.

75 Diplomatic and Privileges Act 37 of 2001 (as amended) ('The Act').

Consular Relations, all of which are reproduced in Schedules to the Act, 'have the force of law in the Republic'.⁷⁶ Although, the provisions of the Charter on immunities are themselves not incorporated into domestic law, since the 1946 and 1947 Conventions respectively give effect to the provisions of the Charter on immunities, the substance of the Charter provisions can be deemed to be incorporated and are part of South African law. Although the law relating to immunities has been incorporated into South Africa, conflicts between domestic law and immunities and privileges sometimes create complications.

Under the 1946 and 1947 Conventions, officials of the United Nations and its Specialised Agencies respectively, are 'exempt from taxation on the salaries and emoluments paid' by the UN and its Specialised Agencies.⁷⁷ It is the UN or the Specialised Agencies that determine the categories of persons entitled to the enumerated immunities and privileges.⁷⁸ The practice of the UN is to categorise all professional staff members, that is, P1 to P5, Directors and above, as 'officials' for the purposes of immunities irrespective of nationality. Under South African legislation, however, South African nationals serving in South Africa are not exempt from taxation even if employed by the UN or one of its Specialised Agencies.⁷⁹ While the Income Tax Act makes provision for exemption from income tax for persons serving in missions, this exemption does not extend to nationals.⁸⁰ South Africa is therefore prevented under the Income Tax Act to provide tax exemption to South African nationals serving as officials of the United Nations or its Specialised Agencies. This contradiction is resolved through a cumbersome administrative off-set arrangement. Under this system, South African officials employed by a UN entity have an amount deducted from their salary (referred to as a United Nations fee) in lieu of tax, which amount is paid over to the treasury but then off-set against South Africa's assessed contribution to the organisation. In short, the system, in a round-about way, provides *de facto* exemption from taxation for South African nationals employed by UN entities. While the system in place seems to work, it is rather cumbersome and much easier ways exist to ensure implementation. It is not clear for example, since the

76 n 75 above, sec 2. See also sec 5 of the Act which deals with immunities of the United Nations and its Specialised Agencies. Sec 5(1) provides simply that the 1946 Convention 'applies to the United Nations and its officials in the Republic' while Section 5(2) provides similarly that the Convention on the Privileges and Immunities of the Specialized Agencies (the 1947 Convention) (21 November 1947) 'applies to the specialised and its officials in the Republic.'

77 n 32 above, art V section 18(b); & n 76 above, art VI sec 19(b).

78 See the 1946 Convention (n 32 above) art V section 17 and the 1947 Convention (n 76 above) art VI sec 18.

79 The Value-Added Tax Act 89 of 1991 sec 68(2) and the Income Tax Act 58 of 1962 sec 10.

80 Income Tax Act (n 79 above) sec 10(1)(c)(iii). It is noteworthy that the Vienna Convention on Diplomatic Relations, while providing for exemption from taxation, excludes from the scope of the exemption persons who are 'nationals of or permanent resident in the receiving state'. See the Vienna Convention on Diplomatic Relations (18 April 1961, 500 UNTS 95) art 33(2)(a).

1946 and 1947 are law in South Africa, why the various rules of the interpretation of statutes are not applied in a way in a way to ensure consistency. An even more definitive solution would be to amend the Income Tax Act to create necessary exemption.

In addition to issues of compatibility between the obligation to provide for immunities and privileges, on the one hand, and domestic law, on the other, interpretative questions concerning the scope of the obligations have also arisen. In 2011, a dismissed employee of the UNFPA filed a complaint against the Commission for Conciliation Mediation and Arbitration (hereinafter the CCMA), a statutory body created to conciliate, mediate and arbitrate labour disputes, for unfair labour practice after she was dismissed, allegedly in violation of the South African labour requirements. The UN requested the Government of the Republic of South Africa to 'take steps' to prevent what would amount to a violation of the immunities under the 1946 Convention. These steps, the UN argued, should include providing legal representation for the UN.⁸¹ However, it is not the practice of South Africa, nor did South Africa accept it as a legal obligation under the 1946 Convention, to provide legal representation in the case of suit against a person or entity entitled to immunities. Rather the Act requires the Director-General of the Foreign Ministry to issue an executive certificate to the relevant court or tribunal confirming that the relevant entity or person enjoys immunity.⁸² Moreover, the Act provides for criminal sanctions punishable by three years or a fine against anyone for any person, including a party, the attorney, or officer of the court, who initiates or executes legal process against anyone with immunity. This, South Africa argued, was sufficient to implement its legal obligations. After lengthy diplomatic debate, it was agreed that the Foreign Ministry would send a communication to the CCMA informing it of the status of the UNFPA and making the CCMA aware of the criminal sanctions that could be imposed for continuation of the legal process against the UNFPA.

It appears therefore, at least with respect to the immunities, that South Africa has been able to implement its UN obligations. The few challenges that have arisen, whether as a result of conflict of domestic law and the immunities and privileges or differing interpretation of the South Africa's obligation by the South African and UN authorities have, to date, been resolved amicably.

81 This particular assertion, according to the United Nations Legal Office, was based on the advisory opinion on the *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights* (29 April 1999) (1999) ICJ Reports 62, 4; where the International Court of Justice held that there was an obligation 'to convey that finding [concerning the immunities] to the national courts concerned'.

82 n 75 above, sec 9(3). In response to the UN's legal argument, South Africa argued that the provision of an executive certificate is sufficient to meet the requirement in the Advisory opinion *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights* (n 81 above).

3.2 Implementation of UNSC obligations

While the obligations of South Africa to provide for immunities and privileges of the UN are implemented domestically by means of a single piece of legislation, there is no equivalent comprehensive legislation on the implementation of Security Council obligations. Although Parliament passed legislation on the application of Security Council resolutions, the Act never entered into force.⁸³ Thus, UN Security Council decisions are currently implemented through different, theme specific, legislative enactments.

The primary legislative tool for the implementation of the terrorism-related Security Council resolutions is the Protection of Constitutional Democracy Against Terrorism and Related Activities Act (hereinafter the POCDATARA).⁸⁴ The POCDATARA was adopted to give effect to the obligations of South Africa under, *inter alia*, UN Security Council resolutions. The purpose of the POCDATARA, for example, is defined as, *inter alia*, 'to provide for a mechanism to comply with United Nations Security Council Resolutions, which are binding on member States'.⁸⁵ The POCDATARA makes it a criminal offence to engage in terrorist or related activities, including activities related to the financing of terrorism as is required by Security Council resolution 1373.⁸⁶ The jurisdiction by South African courts over terrorism-related offences is broad and includes acts not perpetrated in the territory of South Africa.⁸⁷

The POCDATARA also makes provision for the freezing of assets as required by UN Security Council sanctions regimes.⁸⁸ The assets freeze

83 Application of Resolutions of the Security Council of the United Nations Act 172 of 1993. Under section 5 the Act would 'come into operation on a date fixed by the State President by proclamation in the Gazette.' The President never made the required proclamation because it was felt that the Act would not pass constitutional muster. According to H Strydom 'South Africa and Namibia: Part I: South Africa' in V Gowlland-Debbas (ed) *National implementation of United Nations sanctions: A comparative study* (2004) 433, an act 'in which legislative measures [could be achieved through] executive sleight of hand [was] unlikely to pass constitutional muster.'

84 Protection of Constitutional Democracy against Terrorism and Related Activities Act 33 of 2004 (POCDATARA). See for discussion De Wet (n 26 above) 576.

85 The preamble specifically refers to UN SC Res 1373 as well as other 'resolutions under Chapter VII of the United Nations Charter, requiring Member States to combat terrorist and related activities, including taking effective measures to prevent and combat the financing of terrorist and related activities, and the freezing of funds, assets or economic resources of persons who commit terrorist and related activities.'

86 n 84 above, sec 1 & 2. In addition POCDATARA enumerates other terrorist related activities, including hijacking-related offences (sec 9 and sec 10), hostage taking (sec 7) and explosives-related offences.

87 See POCDATARA (n 84 above) sec 15. The first basis of jurisdiction, in sec 15(1), is where a person accused of terrorism-related is 'arrested in the territory of the Republic' irrespective of where the offence was allegedly committed. The second basis of jurisdiction, in sec 15(2), is where there is a connection between, on the one hand, the place where the offence was allegedly committed, the person allegedly committing the offence, the place where the damage was caused or the persons who were harmed by the activities and, on the other hand, the Republic of South Africa.

88 n 84 above, sec 25.

provisions under the POCDATARA, however, can only be invoked in relation to terrorism sanctions regime and not country specific regimes. The assets freeze under the Libya or the DRC sanctions regime, for example, cannot be implemented in terms of the POCDATARA. The POCDATARA permits a High Court to make an order freezing the assets of a person or entity where such a person or entity 'has committed, attempted to commit, or participated' in the commission of acts of terror,⁸⁹ or where such a person or entity is 'identified in a notice issued by the President under section 25'.⁹⁰ Section 25 in turn, provides that the President must give 'notice that the Security Council of the United Nations, under Chapter VII of the Charter of the United Nations, has identified a specific entity as being' involved in terrorist activities or as an entity or person against whom members of the United Nations are obliged to take measures specified in terrorism-related resolutions.⁹¹ The provisions of the POCDATARA with respect to freezing are complemented by the surveillance provisions of the Financial Intelligence Centre Act.⁹² It is important to note, however, that any notice by the President, does not, in and of itself, have legal consequences. Rather the notice must be tabled before Parliament which must consider the notice and make any decision that it deems it necessary.⁹³ Moreover, the freezing of assets takes place on the basis of an order by a High Court in terms of section 23. Because the freezing order takes place by means of a court order, which is subject to the normal court processes, including challenge by affected persons, the criticisms surrounding due process that have been directed at the Al Qaida regime are less likely to arise.⁹⁴

POCDATARA is an exemplary implementation of the terrorism resolutions of the Security Council, especially as pertains to the obligations to freeze assets and to criminalise. In its report on South Africa, subsequent to its country visit in 2011, the Analytical Support and Sanctions Monitoring Team of the Al Qaida sanctions regime (hereinafter the Monitoring Team) concluded that 'the South African authorities have made commendable effort to fulfil their obligations'.⁹⁵ Similarly, while a survey conducted by the Counter-Terrorism Executive Directorate, the entity charged with the monitoring the implementation of resolution 1373, found areas of concern, notably with regards to the potential vulnerabilities in regulating non-profit organisations in South Africa,⁹⁶ on specific questions relating to the adequacy of the legal framework, the analysis

89 n 84 above, sec 23(1)(a).

90 n 84 above, sec 23(1)(b).

91 POCDATARA (n 84 above) sec 25.

92 See Financial Intelligence Centre Act 39 of 2001, especially sec 28A.

93 POCDATARA (n 84 above) sec 26.

94 In this regard, De Wet (n 26 above) 576 states that the implementation of the measures under POCDATARA are made subject to 'domestic control'.

95 Analytical Support and Sanctions Monitoring Team *Report on visit to Pretoria, South Africa, 11-12 May 2011* MT/TRAVEL/2011/16a (on file with the author) para 2.

96 UN Counter-Terrorism Executive Directorate *Overview of implementation assessment: South Africa, April 2013* (on file with the author).

consistently found that POCDATARA either fully complied with the obligations or largely complied.⁹⁷ This does not mean that there are no legal gaps with the implementation of the sanctions regime. To date, South Africa has had to implement 1267 sanctions against only one individual, Ali Bakr Tantoush, a Libyan national residing in South Africa, who appears not to have any assets that can be frozen and so is largely unaffected by the sanctions imposed. If Tantoush were to challenge the asset freeze, given the basis of his listing, namely mere association with groups suspected of being terrorist, it is possible that a South African court could overturn the freezing order. This could result in the inability to continue implementing the obligations under the 1267 and the potential for national-level repudiation. On the other hand, given the improvement to the Al Qaida Sanctions, it is *possible* that South African courts may require the exhaustion of the procedures under the UNSC Resolution 1989, before considering there to be violation of due process rights.

While POCDATARA makes provision for an assets freeze it does have two limitations. The first limitation, as already mentioned, is that POCDATARA only applies to measures in respect of terrorism-related resolutions. Country-specific obligations flowing from other Security Council resolutions are thus dealt with under a catalogue of unrelated pieces of legislation. Secondly, POCDATARA makes provision for an assets freeze and criminal sanctions for terrorism-related offences but does not cover other measures such as arms embargos and travel bans, even with respect to terrorism-related obligations.⁹⁸ For these other measures, implementation has to take place through the same fragmented legislative framework that is applicable to non-terrorism-related resolutions. An arms embargo, for example, *could* be implemented through the National Conventional Arms Control⁹⁹ and the Firearms Control Act.¹⁰⁰ The Firearms Control Act provides that a person may not possess a firearm unless they are in possession of a license.¹⁰¹ Although section 9 of the Firearms Control Act provides the National Police Commissioner with the power to decline an application for a certificate of competence, which is a

97 UN Counter-Terrorism Executive Directorate *Detailed Implementation Survey: South Africa, April 2013* (on file with the author). For example, on whether there has been sufficient criminalisation, the survey responds 'yes'; on whether every aspect of terrorist financing is covered, the survey responds 'yes'; on whether the collection of funds is criminalised independently of the provision of funds, the survey responds 'yes'; and on whether the state has sufficient legal measures to freeze assets the survey responds 'yes'. Indeed of the first eleven questions, the survey responds 'no' to only one question, namely whether the state has to date frozen any assets. Needless to say that question is not a normative that goes to the legal framework but rather empirical question.

98 Although the Financial Intelligence Centre Act 38 of 2001 sec 34 provides that the Financial Intelligence Centre 'may direct [an] institution ... not to proceed with the carrying out of ... [certain] proposed transactions', such an order is limited to five days. In any event, it is not contemplated that this provision could be applied to a person merely by virtue of being listed in, for example, a country specific sanctions list.

99 National Conventional Arms Control Act 41 of 2002.

100 Firearms Arms Control Act 60 of 2000.

101 Firearms Control Act (n 100 above) sec 4.

condition for obtaining a license, listing by a sanctions committee of the Security Council is not ground for refusal.¹⁰² Similarly, travel bans *could* be enforced through the Immigration Act.¹⁰³ In the application of the power to grant or refuse entry into South Africa,¹⁰⁴ South African authorities check against the Security Council sanctions lists.¹⁰⁵ The Passports and Travel Documents Act also provides an avenue for implementation of travel bans, particularly in relation to South Africans.¹⁰⁶

It appears from the above, that through a network of unrelated legislation, South Africa *could* be in a position to implement the various obligations flowing from UN Security Council resolution. Nonetheless, the status quo is also unsatisfactory for a number of reasons. First, as already mentioned, there is no provision for assets freeze outside of the terrorism context.¹⁰⁷ Second, in most instances there are gaps in the legislation that could be applied to implement the Security Council obligations. Third, the implementation of many of the obligations, because it is not expressly provided, is dependent on strained interpretation which is susceptible to legal challenge. Finally, even apart from the legal gaps, it is desirable to have a comprehensive piece of legislation to deal with the implementation of Security Council obligations. For all these reasons, the South African government has been actively engaged in a process to elaborate legislation to comprehensively provide for the implementation of Security Council obligations.

Since the 1993 Act, which never entered into force, was adopted there have been various drafts of a bill to implement Security Council obligations with the most recent attempt beginning in 2012. Perhaps the

102 The grounds in section 9 generally relate to the commission of crimes or the mental state of a person. Since listing does not depend on commission of a crime, most of the grounds would be inapplicable. There is, however, a broad requirement of being 'fit and proper' which could potentially be used to decline a certificate on the basis of listing. Whether such a generous interpretation of 'fit and proper person' would be met constitutional muster remains to be seen.

103 Immigration Act 13 of 2002.

104 The Immigration Act (n 103 above) sec 9(4) read with sec 11.

105 See Analytical Support and Sanctions Monitoring Team (n 95 above) para 11.

106 See especially sec 4(1) of the South African Passports and Travel Documents Act 4 of 1994 which permits the Minister of Home Affairs to make regulations on a number of issues including 'endorsements on South African passports', 'restrictions' and 'the circumstances under which the issue of a South African passport or travel document may be refused'.

107 While provisions of the Financial Intelligence Centre Act (n 98 above) this is probably not sufficient to effect a freeze on the assets. The recent high profile case concerning Libyan assets in South Africa is reflective of this difficulty. See The Sunday Independent 'UN, SA row over Gaddafi assets' available at <http://www.safpi.org/news/article/2013/un-sa-row-over-gaddafi-assets> (last accessed 6 January 2013). See also Annex IV Final report of the Panel of Experts established pursuant to Resolution 1973 (2011) concerning Libya S/2013/99 where the South Africa is red-listed for non-responsiveness to questions about the freezing of Libyan assets under UN SC Res 1970.

most controversial aspect that the drafters of any legislation will need to address is the question of the judicial review of any listing. It is foreseen that the Bill will provide for the taking of measures (arms embargo, travel ban and assets freeze) on the decision of the court on the application of the Directorate of Public Prosecutions. The primary question is whether an individual can challenge the taking of measures on the grounds that there is no evidence of wrongdoing. An affirmative answer could place South Africa at odds with Security Council sanctions regime, which are deemed by the Security Council to be 'preventative and not putative' and thus should not require proof of wrongdoing.¹⁰⁸ An answer in the negative, however, could be challenged as unconstitutional as it would imply the violation of rights, including the rights to property and dignity, without justification. To date South Africa has not had to deal with the fallout from the lack of comprehensive legislation¹⁰⁹ largely because no South African and only one person living in South Africa finds themselves on a sanctions list. This, however, may change in the future¹¹⁰ and the sooner South Africa adopts the comprehensive sanctions list the better.

The implementation of the 1540 regime, however, does not suffer from similar deficiency. The implementation of 1540 regime is done principally through the Non-Proliferation of Weapons of Mass Destruction Act, with the criminal sanctions being imposed through POCDATARA.¹¹¹ The Act provides for the Minister of Trade to provide, by notice in Government Gazette, the overall policy of South Africa with respect to, *inter alia*, the prevention of the proliferation of weapons of mass destruction.¹¹² By its own account, South Africa appears to be successfully implementing the obligations under Resolution 1540.¹¹³

108 Preamble of UNSC Resolution 1989 (2011).

109 Except perhaps with regards to Libya.

110 In late 2012 the 1970 Committee made enquiries about a South Africa citizen, a Daleen Sanders, in connection with assistance offered to Saif Gaddafi. She was subsequently listed by the US Government. See <http://www.treasury.gov/press-center/press-releases/Pages/tg1742.aspx> (last accessed 13 May 2015).

111 See especially the Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993 sec 2.

112 The Non-Proliferation of Weapons of Mass Destruction Act (n 111 above) sec 2(1)(d) - (g). The specific prohibitions are detailed in Government Notice No 712 of 8 June 2004.

113 Letter from South Africa to the Chair of the 1540 Committee, dated 14 December 2007, responding to the 1540 Matrix for compliance. In its comprehensive overview of implementation, the Group of Experts of the 1540 Committee stated that while compliance in Africa was poor, the 'notable exceptions are performance by one State in Southern Africa, rated very high, and the Northern African states, rated average.' See *Comprehensive Review on the State of Implementation of Resolution 1540* (2004), Background Paper Prepared by the 1540 Committee of Experts According to the Document for Modalities for the Conduct of a Comprehensive Review (S/2009/170): Specific Element C (Conduct of Regional Analysis of Implementation, with Some Examples of National and Regional Experience) <http://www.un.org/en/sc/1540/comprehensive-review/open-meetings.shtml> (last accessed 13 May 2015).

4 Conclusion

In general South Africa's legislative framework for implementing UN obligations is commendable. The obligations to provide for and respect the immunities of the United Nations, its officials, its Specialised Agencies and their officials have been implemented in accordance with the Diplomatic Immunities Act and Privileges Act which incorporates, in full, the relevant treaties detailing the obligations of the UN and its Specialised Agencies.

Where there are some challenges, although even these ought not to be overstated, is with respect to the implementation of Security Council obligations. The primary challenge is the lack of a comprehensive statute to implement binding UN Security Council decisions. Although to date this has not resulted in many cases of non-compliance, this state of affairs could change if more South Africans or persons with connections to South Africa are listed on Security Council sanctions lists. The current endeavour to elaborate legislation to implement the obligations of South Africa under Security Council resolutions is therefore to welcome. However, in elaborating this legislation, it should be recalled that the Constitution is the supreme law of the land, and any legislation must be consistent with it, even if this requires it to fall short of the Security Council requirements.

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C: The international law of the sea

CHAPTER 5

THE INTERNATIONAL LAW OF THE SEA IN GERMANY

Alexander Proelss*

1 Development and sources of the international law of the sea

1.1 Development of the international law of the sea

The international law of the sea is one of the oldest areas of public international law. It is composed of international legal norms that address the allocation, use and protection of coastal and ocean spaces.¹ Its origins can be traced back to antiquity, when different governing entities emerged in the Mediterranean area and other regions in the world.² These entities did not only co-exist but started to interact by means of trade and navigation – a development that, on the one hand, resulted in the delineation of spheres of influence that served to exclude other entities from using the maritime areas concerned (such as, for example, on the field of fisheries), and at the same time contributed to the rise of the doctrine of freedom of navigation. This dichotomy, which culminated in the early 17th century in the famous ‘battle of the books’ (*de mare libero v mare clausum*), has since then influenced the development of the international law of the sea.

Even from today’s perspective, it is impossible to answer which of the two conceptions has ultimately gained the victory in that battle. Marine areas located nearby the coast, that is, the internal waters, the territorial sea and the archipelagic waters, are subject to the sovereignty of the coastal

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1 For an introduction see T Treves ‘Law of the sea’ in R Wolfrum (ed) *The Max Planck encyclopedia of public international law* vol VI (2012) 708.

2 For an historic overview on the origins and development of the international law of the sea see W Graf Vitzthum ‘Begriff, Geschichte und Rechtsquellen des Seerechts’ in W Graf Vitzthum (ed) *Handbuch des Seerechts* (2006) 1 9ff.

state; within certain legal limits represented by the right of other states of innocent, transit and archipelagic sea lanes passage they constitute *maria clausa*. In contrast, the high seas and the deep seabed are principally open to all states. Therefore, the legal status of these international ocean spaces, over which no state may validly purport to subject any part of to its sovereignty, reflects the doctrine of freedom of the seas. A more recent trend has resulted in the recognition of a third category of ocean spaces, namely marine areas over which the coastal state exercises exclusive but limited functional jurisdiction. In terms of law, this category is embodied in the concepts of the Exclusive Economic Zone (EEZ) and the continental shelf. They combine elements of the original two approaches to the division of the oceans: On the one hand, coastal states have been awarded individual and exclusive sovereign rights and jurisdiction for, for example, the purpose of resource exploration and exploitation; on the other hand, all states continue to enjoy individual rights that are derived from the freedom of the high seas (for example, shipping). Thus, while the EEZ and the continental shelf are not part of the sovereign territory, the coastal state enjoys a privileged legal position in respect of many economically beneficial ocean uses as well as the protection of the marine environment.

1.2 Sources of the international law of the sea

The international law of the sea emanates from the different sources of public international law that have been enumerated in declaratory terms in article 38(1) of the Statute of the International Court of Justice,³ the most important being the law of treaties. In 1982, the United Nations (UN) Convention on the Law of the Sea (UNCLOS),⁴ which is often referred to as a 'constitution for the oceans',⁵ was concluded with the intention to settle 'in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea' (paragraph 1 of the Preamble to the UNCLOS). It prevails, as between its states parties, over the four Geneva Conventions adopted on 29 April 1958, dealing with: (1) the territorial sea and the contiguous zone;⁶ (2) the continental shelf;⁷ (3) the high seas;⁸ and (4) fishing and conservation of the living resources of the high seas.⁹ In 1994 and 1995, two implementation agreements to the UNCLOS were concluded: While the first one refers to the implementation of Part XI

3 Statute of the International Court of Justice (26 June 1945, 33 UNTS 993).

4 United Nations Convention on the Law of the Sea (UNCLOS) (10 December 1982, 1833 UNTS 3).

5 Statement made by the President of the Third United Nations Conference on the Law of the Sea (UNCLOS III), TTB Koh, at the occasion of the adoption of the Convention, available at http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf (accessed 30 December 2014).

6 Convention on the Territorial Sea and the Contiguous Zone (29 April 1958, 516 UNTS 205).

7 Convention on the Continental Shelf (29 April 1958, 499 UNTS 311).

8 Convention on the High Seas (29 April 1958, 450 UNTS 11).

9 Convention on Fishing and Conservation of the Living Resources of the High Seas (29 April 1958, 559 UNTS 285).

UNCLOS,¹⁰ the second one is dedicated to the implementation of the provisions applicable to the conservation and management of certain fish stocks.¹¹ The regime established by the UNCLOS and the Geneva Conventions is complemented by numerous multilateral conventions dealing with law of the sea-related issues, in particular those dedicated to shipping adopted within the framework of the International Maritime Organization (IMO)¹² and those addressing regional fisheries management and environmental protection.

While the relevance of international conventions and agreements as sources of the international law of the sea is comparatively high, this does not automatically render reference to customary international law, the general principles of law, or unilateral declarations superfluous. As evidenced by the jurisprudence of the International Court of Justice (ICJ),¹³ all of these sources remain important, in particular with regard to the delineation of maritime zones and the delimitation of overlapping claims.¹⁴

2 Incorporation and implementation of the international law of the sea in the German legal order

2.1 Germany as an actor under the international law of the sea

The Federal Republic of Germany is a party to numerous international law of the sea conventions such as the UNCLOS,¹⁵ the UNFSA,¹⁶ the 1994

10 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (28 July 1994, 1836 UNTS 3).

11 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA) (4 August 1995, 2167 UNTS 3). – Note that the United Nations General Assembly (UNGA) voted to decide upon whether a third implementation agreement to the UNCLOS should be negotiated in order to address the conservation and sustainable use of areas beyond the limits of national jurisdiction. This decision is scheduled for the 69th session of the General Assembly, to begin on 16 September 2014.

12 Particularly relevant examples include the International Convention for the Prevention of Pollution from Ships (MARPOL) (2 November 1973, 1340 UNTS 184) and the International Convention for Safety of Life at Sea (SOLAS) (1 November 1974, 1184 UNTS 278).

13 Compare only *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)* (20 February 1969) (1969) ICJ Reports 3 37ff; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v USA)* (12 October 1984) (1984) ICJ Reports 246 290ff.

14 D Rothwell & T Stephens *The international law of the sea* (2010) 22. Also unilateral acts play an important role in the delineation of maritime zones as well as in the assertion of new maritime claims; see Rothwell & Stephens (above) 23ff.

15 See n 4 above; Ratification Act of 2 September 1994 (Bundesgesetzblatt 1994 II 1798).

16 See n 11 above; Ratification Act of 2 August 2000 (Bundesgesetzblatt. 2000 II 1022).

Implementation Agreement,¹⁷ MARPOL,¹⁸ SOLAS¹⁹ and the London Protocol.²⁰ It played an active role in the negotiations that ultimately led to the adoption of the UNCLOS in December 1982 – a fact that can be demonstrated by recourse to article 1(2), Annex VI of the UNCLOS, by virtue of which it was decided that the seat of the International Tribunal for the Law of the Sea (ITLOS) shall be the Free and Hanseatic City of Hamburg. That said, economic concerns prompted Germany to refuse to accede to the UNCLOS until the adoption of the 1994 Implementation Agreement. As an industrialised country, Germany belonged to a group of mainly western states that strongly refused the idea of introducing a compulsory transfer of deep seabed mining technology to the Enterprise²¹ and developing states (compare article 144 UNCLOS and article 5 Annex III UNCLOS) for reasons of intellectual property ownership. It also criticised the lacking protection for substantial investments concerning deep seabed mining which had already taken place prior to the adoption of the Convention. The final effort to make accession of the western mining states to the UNCLOS possible by adopting special rules for ‘pioneer investors’²² remained unsuccessful.²³ Thus Germany and other industrialised states refused to ratify the Convention and adopted similar national legislation to permit and regulate deep seabed mining. This interim ‘Reciprocating States Regime’, whose compatibility with customary international law remained controversial,²⁴ differed from the UNCLOS regime in important respects, as it neither prescribed any banking of reserved mining sites for eventual use by the Enterprise or developing states, nor any compulsory transfer of technology.²⁵ In 1990, informal negotiations were launched under the auspices of the UN Secretary General in order to come to a compromise solution, which finally resulted in the adoption of the Agreement Relating to the Implementation of Part XI of the United Nations Convention in the Law of the Sea on 28 July 1994.

17 See n 10 above; Ratification Ordinance of 4 October 1994 (Bundesgesetzblatt 1994 II 2565).

18 See n 12 above; Ratification Act of 23 December 1981 (Bundesgesetzblatt 1982 II 2).

19 See n 12 above; Ratification Ordinance of 11 January 1979 (Bundesgesetzblatt 1979 II 141).

20 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Protocol) (7 November 1996, 36 ILM 4); Ratification Act of 9 July 1998 (Bundesgesetzblatt 1998 II 1345).

21 The Enterprise was the organ of the International Seabed Authority (ISA) originally designed to carry out mining activities on the deep seabed directly; see art 170(1) in conjunction with art 153(2)(a) UNCLOS.

22 See Resolutions I & II included in Annex I to the Final Act of the UNCLOS III, reprinted in UN/DOALOS (ed) *The law of the sea* (2001) 195.

23 See W Graf Vitzthum ‘International seabed area’ in Wolfrum (n 1 above) 137 140.

24 RR Churchill & A Vaughan Lowe *The law of the sea* (3rd edn 1999) 234ff.

25 Churchill & Lowe (n 24 above) 232ff.

Concerning the domestic legal perspective, according to article 59(2) *Grundgesetz*

[t]reaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law.²⁶

It is generally recognised that treaties that have been consented to in accordance with that constitutional rule become binding under German domestic law and share the legal status of the Act by which they were transposed into national law.²⁷ Consequently, treaties that fulfil the requirements of article 59(2) *Grundgesetz* (including all of the aforementioned law of the sea agreements) form part of federal law and must be respected by the executive and the judiciary in accordance with the principle of strict obligation to justice and law as codified in article 20(3) *Grundgesetz*. Depending on whether the German legislator considered the rights and obligations contained in the treaties as self-executing, it executed the content of the treaties concerned, following their ratification, by way of implementation acts.²⁸ Furthermore, Germany acceded to several international organisations dealing with international law of the sea-related issues such as, for example, the IMO (concerning shipping), the Food and Agriculture Organization of the United Nations (FAO, concerning fisheries) and the OSPAR and Helsinki Commissions that were established by agreements addressing the protection of the marine environment of certain marine areas.²⁹

2.2 Indirect incorporation through EU legislation

2.2.1 Relevant internal and external Union powers

With regard to the scope of manoeuvre of the Federal Republic of Germany vis-à-vis the implementation of the international law of the sea, it should be noted that the European Union (EU) has been allocated

26 An English translation of the *Grundgesetz* is available at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (accessed 1 June 2015).

27 See only S Vöneky 'Verfassungsrecht und völkerrechtliche Verträge' in J Isensee & P Kirchhof (eds) *Handbuch des Staatsrechts der Bundesrepublik Deutschland* vol XI (3rd edn 2013) 413 416ff; P Kunig 'Völkerrecht und staatliches Recht' in W Graf Vitzthum & A Proelss (eds), *Völkerrecht* (6th edn 2013) 61 98ff. For an in-depth analysis of the treaty categories in terms of art 59 (2) *Grundgesetz* see D Rauschnig in R Dolzer et al (eds) *Kommentar zum Bonner Grundgesetz* vol 12 (as at December 2009), art 59 paras 65ff.

28 See eg Gesetz über das Verbot der Einbringung von Abfällen und anderen Stoffen und Gegenständen in die Hohe See of 25 August 1998 (Bundesgesetzblatt 1998 I 2455; latest amendment: Bundesgesetzblatt 2013 I 1471), by which the legislator executed the London Protocol.

29 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) (22 September 1992, 2354 UNTS 67); Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention) (17 March 1992, 2009 UNTS 197).

competences by its member states that also cover maritime issues.³⁰ It is thus entitled to enact legal standards that are binding upon its member states. According to the so-called principle of conferral, such authority only exists if and to the extent to which the member states have conferred the competence upon the EU to deal with the relevant subject matter. In this respect, according to the Treaty on the Functioning of the European Union (TFEU),³¹ the EU has exclusive prescriptive competence on the field of the conservation of marine biological resources under the common fisheries policy (compare article 3(1)(d) of the TFEU) and shared prescriptive competences in the areas of environment (compare article 4(2)(e) of the TFEU), transport (compare article 4(2)(g) of the TFEU) and energy (article 4(2)(i) of the TFEU), to name just a few. As far as the exclusive EU competence is concerned,

only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts

(Article 2(1) of the TFEU).

The member states are thus no longer entitled to adopt measures that aim at conserving the living resources of the oceans, including the setting of fishing quotas and the prescription to use specific fishing gear.

In contrast, in case the EU has been conferred a competence shared with the member states, 'the Union and the Member States may legislate and adopt legally binding acts in that area' (article 2(2) of the TFEU). By way of example, this would affect enacting rules applicable to the introduction of harmful substances into the sea and the like. That said, the member states are, according to this provision, only entitled to legislate if and to the extent to which the EU has not yet decided to do so. Thus, any legislative act adopted by the EU constitutes a legal obstacle for regulative measures of the member states on the field concerned. An example is the field of safety of ships, with regard to which the EU responded to the sinking of the oil tankers *Erika* and *Prestige* by enacting three sets of legislative measures.³² If and to the extent to which these measures have not merely established minimum safety standards, the member states are legally prevented from setting autonomous shipping safety regulations that

30 The role of the EU as an actor under the international law of the sea is analysed by V Frank *The European community and marine environmental protection in the international law of the sea* (2007) 43ff; H Ringbom *European Union maritime safety policy and international law* (2008) 53ff; A Proelss *Meeresschutz im Völker- und Europarecht* (2004) 268ff.

31 Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) (13 December 2007, 2008/C 115/01).

32 Reference to the so-called 'Erika' packages is not made here in order to appreciate the co-editor of this volume, but results from the name of the oil tanker which sank off the coast of France in 1999. For details see A Proelss 'The "Erika III" package: Progress or breach of international law?' in H-J Koch et al (eds) *Climate change and environmental hazards related to shipping* (2013) 129.

deal with the same subject matter as the standards enacted by the EU. This obstacle can only be overcome by way of express authorisation of the member states by the EU to legislate in place of the EU.³³ It should be emphasised, though, that the aforementioned ‘barrier effect’ of EU law only applies to the extent to which the scope of the relevant supranational legislative measure reaches. Thus, the European standards dedicated to, for example, safety at sea do not at all prevent the member states from adopting rules establishing, say, a duty to make use of clean fuels for ship propulsion.

The aforementioned areas of Union competence are substantiated in the TFEU by individual rules of jurisdiction that address the competent EU institutions, the pertinent legislative procedure applicable to the respective subject matter, and the individual scope of EU power. In respect of maritime issues, the most important of these rules are codified in articles 43(3), 100(2) and 192(1) of the TFEU (concerning fisheries measures, shipping, and protection of the marine environment respectively).³⁴ For example, article 192(1) of the TFEU prescribes that

[t]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the [environmental] objectives referred to in article 191.

It should be noted that the powers of the EU do not only refer to the intra-Union perspective. Rather, article 216(1) of the TFEU emphasises that:

The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

Since the TFEU does not contain any power expressly dealing with the conclusion of treaties on the field of the international law of the sea, the EU has made use of its implicit treaty-making power to accede to numerous

relevant agreements, including the UNCLOS and the UNFSA.³⁵ Equally, it has become a member to several international organisations, such as the

33 For a detailed assessment concerning the conclusion of bi- or multilateral commodity agreements see A Proelss ‘Die Kompetenzen der Europäischen Union für die Rohstoffversorgung’ in D Ehlers et al (eds) *Rechtsfragen des internationalen Rohstoffhandels* (2012) 161 174ff.

34 Based upon its powers to prescribe, the EU has adopted numerous legal measures concerning the field of maritime policy. They cannot be assessed here in detail but will, where necessary, be considered in the context of the implementation of the international law of the sea in Germany analysed in section 2.3.2 below.

FAO, the OSPAR and Helsinki Commissions, and different regional fisheries management organisations.³⁶ From the outside (that is, international) perspective, it is clear that accession of the EU to an international agreement or organisation presupposes that the agreement concerned permits membership or accession of an international organisation. In contrast to the aforementioned examples, this is not the case with regard to the IMO and the great majority of the agreements adopted under its auspices (including MARPOL and SOLAS). Agreements to which the EU has acceded are 'binding upon the institutions of the Union and on its Member States' (article 216(2) of the TFEU).³⁷

2.2.2 Challenges arising out of the duality of law of the sea-related actors within the EU

Particular challenges arise in situations where both the EU and the member states have the power to conclude an international agreement with other states. The UNCLOS is a prominent example in this respect. Some of its provisions (in particular those dealing with the conservation of marine living resources codified in article 61 and what follows) fall within the exclusive legislative competence of the EU (compare article 3(1)(d) of the TFEU), which is why the member states were no longer entitled to accede to the Convention without the participation of the Union. Other parts of the UNCLOS (such as those containing provisions that address shipping and the protection of the environment) affect powers shared between the member states and the EU (compare articles 4(2)(e) and 4(2)(g) of the TFEU). Finally, a third category of UNCLOS provisions concerns issues for which the member states have not conferred any legislative powers upon the EU and thus remain exclusively competent. This complicated situation gives rise to specific legal challenges related to, *inter alia*, (1) accession to and participation in the international agreement concerned and (2) implementation of the rights and duties within domestic and/or supranational law.

35 See Council Decision of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the Implementation of Part XI thereof [1998] OJ L179/1; Council Decision of 8 June 1998 on the ratification by the European Community of the Agreement for the Implementing of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Stocks and Highly Migratory Fish Stocks [1998] OJ L189/14.

36 For a detailed analysis see R. Frid *The relations between the EC and international organizations* (1995).

37 Note that only if and to the extent to which the provisions of agreements in terms of art 216(2) TFEU (n 31 above) are self-executing is the European Court of Justice (ECJ) competent to interpret their scope and meaning within the EU legal order and may also refer to these provisions in order to assess the legality of a secondary EU act under the preliminary ruling procedure codified in art 267(1) TFEU. See ECJ Case 9/73 *Schlüter v Hauptzollamt Lörrach* [1973] ECR 1135, para 27.

Concerning the first group of challenges, the following principles apply: In case some parts of a multilateral agreement fall within the exclusive competence of the EU and others within the exclusive competence of its member states, the agreement concerned must be concluded jointly by the EU and the member states in terms of a so-called mixed agreement. In contrast, if the Union and the member states share their competences on the fields regulated by the treaty concerned (as is the case, for example, with regard to treaties aiming at the protection of the marine environment), conclusion of a mixed agreement is, although legally admissible, not mandatory.³⁸ Even in such a situation conclusion of a mixed agreement is usually advantageous, though, as the rule codified in the second sentence of article 2(2) of the TFEU, according to which the member states are only entitled to legislate if and to the extent to which the EU has not yet decided to do so, is not applicable to mixed agreements. Against this background, the UNCLOS as well as the UNFSA were concluded jointly by the EU and the member states. In line with the obligation contained in article 5, annex IX of the UNCLOS demanding that the instrument of formal confirmation or of accession

shall contain a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to the organization by its member States which are Parties to this Convention,³⁹

the EU submitted declarations specifying the areas under the UNCLOS and the implementation agreements for which it has been allocated – exclusive or shared – legislative powers.⁴⁰

Notwithstanding its general acceptance, recourse to the concept of mixed agreements does not avoid all legal problems that arise in the context of the EU's position as an actor under the international law of the sea. With regard to the external dimension, there is a risk that the frequently occurring intra-Union disputes concerning the division of powers between the Union and its member states are transferred to the relationship between the EU and third states or organisations. Naturally, the aforementioned declarations in terms of article 5, annexure IX of the UNCLOS are framed in comparatively general terms and are thus not sufficiently qualified to keep internal controversies on the details of the

38 A Rosas 'Mixed union – Mixed agreements' in M Koskeniemi (ed) *International law aspects of the European Union* (1998) 125 130; A Proelss 'The intra-community effects of mixed agreements' in PJJ Welfens et al (eds) *Integration in Asia and Europe* (2006) 255 256.

39 See also UNFSA (n 11 above) art 47(1).

40 Declaration Concerning the Competence of the European Community with regard to Matters Governed by the United Nations Convention on the Law of the Sea of 10 December 1982 (4 August 1995, 2167 UNTS 3) and the Agreement relating to the Implementation of Part XI of the Convention (28 July 1994, 1836 UNTS 3). The declarations submitted by the EU at the occasion of signature and ratification of the UNFSA are available at https://www.un.org/depts/los/convention_agreements/fish_stocks_agreement_declarations.htm#EC (accessed 1 June 2015).

scope of EU powers off the field of the EU's external relations. The case of the FAO shows that cooperation within an international organisation may indeed be interrupted by disputes between the Union and its member states on the entitlement to speak and to exercise the voting rights.⁴¹

At the same time, other states might fear that their position within an international organisation will be weakened due to membership of the EU. Indeed, fears of marginalisation are particularly plausible in situations where the EU has been allocated a number of votes equal to the number of its member states which are contracting parties to the agreement concerned.⁴² The Helsinki Commission is a particular noteworthy example, as all parties, with the single exception of the Russian Federation, are at the same time members of the EU. The Union is thus in a position to make use of the Helsinki Commission in terms of an sub-regional implementation organ in respect of Baltic affairs – a development that is suspiciously eyed by the Russian Federation.

Regarding regional fisheries management organisations, in most instances the member states have withdrawn their former membership in light of the exclusivity of EU powers in terms of article 3(1)(d) of the TFEU, but the other contracting parties usually insisted on the EU being allocated no more than one vote within the relevant Commissions where decisions are usually taken by a single majority.⁴³

In respect of the intra-Union dimension, that is, the second group of challenges, it has been subject of debate whether article 216(2) of the TFEU (which declares international agreements to which the EU has become party as being binding on the EU and the member states and which allocates to such agreements a rank between primary and secondary EU law) is also applicable to the provisions of mixed agreements with regard to which the member states are exclusively competent. This author has submitted that the answer should be positive, and that this view is backed by the jurisprudence of the ECJ,⁴⁴ but admittedly certain ambiguities remain. Regarding situations where the EU has not and could not become a member to an international agreement and/or organisation (as in the case of the IMO and the agreements adopted under its auspices), it has been submitted that the EU should, when adopting legal measures on the field of, for example, safety of shipping that deviate from the relevant international obligations (such as those contained in MARPOL), in

41 In the case of the FAO, the controversy on who has the power to exercise the membership rights even culminated in a legal dispute before the ECJ, compare Case C-25/94 *Commission v Council* [1996] ECR I-1469.

42 See eg OSPAR Convention (n 29 above) art 20 (2); Helsinki Convention (n 29 above) art 23 (2).

43 See eg the Convention on the Future Multilateral Cooperation in North-East Atlantic Fisheries (NEAFC) (18 November 1980, 1285 UNTS 129) art 3 (9).

44 Proelss (n 38 above) 257ff, but see ECJ Case C-240/09 *Lesoochranárske zoskupenie (Slovenian Brown Bear)* [2011] ECR I-1255, para 32.

principle take into account the fact that some or all of its member states are legally bound by the international agreement concerned.⁴⁵ This line of argument entails a duty of the institutions of the EU to interpret and apply EU law in a manner friendly towards the international legal obligations of the member states. The ECJ has refused to follow this line of argument and has relied on a rather formalistic notion of the concept of autonomy of the EU legal order.⁴⁶ As in the case of overlapping jurisdictions between courts and arbitral tribunals,⁴⁷ the Court's case law is arguably based on an oversubscription to the autonomy of the Union's legal order; it does not accommodate the principle of sincere cooperation embodied in article 4(3) of the TEU in conjunction with article 351(1) of the TFEU.⁴⁸

Thus, the more convincing view insists on the premise that EU law ought to be interpreted in a manner friendly toward the rights and obligations of the member states deriving from international agreements on the field of, for example, the international law of the sea. Furthermore, article 344 of the TFEU should not be applied in a manner that creates an absolute barrier against the jurisdiction of international law of the sea courts and tribunals within the EU legal order. At the same time, this analysis would fail to recognise the high relevance that is attributed to the jurisprudence of the ECJ in legal practice, would it not emphasise the approach on which the Court has based its jurisprudence. Altogether, the scope of manoeuvre of the member states on the field of the law of the sea has diminished commensurate to the increase of respective powers on behalf of the EU. The consequences of this development will be analysed below in the context of the domestic implementation of the relevant rights and duties.

2.3 International law of the sea within the national legal order

2.3.1 Delineation and delimitation of Germany's maritime zones

As stated by Rüdiger Wolfrum, Germany, with its North and Baltic Sea coastlines of altogether no more than 2000 km and a comparatively small

⁴⁵ Proelss (n 32 above) 141ff.

⁴⁶ ECJ Case C-308/06 *Intertanko* [2008] ECR I-4057, paras 42ff.

⁴⁷ In the *MOX Plant Case*, the ECJ decided that the OSPAR Convention would, due to the accession by the EU, form an integral part of the EU legal order in the sense of TFEU art. 216 (2). The Court considered itself as being exclusively competent to deal with disputes relating to the interpretation and application of the provisions of that Convention and to assess member states' compliance with them. Consequently, initiation of dispute settlement proceedings between EU member states before an annex VII UNCLOS or OSPAR arbitral tribunal due to an alleged violation of the Convention would constitute an infringement of art 344 TFEU and thus a violation of primary European law. Compare Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, paras 61ff.

⁴⁸ Proelss (n 32 above) 144ff; see also J Willem Van Rossem 'The autonomy of EU law: More is less?' in RA Wessel & S Blockmans (eds) *Between autonomy and dependence – The EU legal order under the influence of international organisations* (2013) 13 38ff.

EEZ and continental shelf, is a 'geographically disadvantaged State'.⁴⁹ The final delineation of its maritime zones did not take place before 1994, when Germany acceded to the UNCLOS. Concerning the baselines from which the breadth of the territorial sea and the EEZ is measured, Germany has applied a mixed system of normal and straight baselines, taking into account that the East and North Frisian Islands each constitute 'a fringe of islands along the coast in its immediate vicinity' in terms of article 7(1) of the UNCLOS. While recourse to the regime of straight baselines, which was accepted by the ICJ in the *Anglo-Norwegian Fisheries* case as early as 1951,⁵⁰ was done in a restrictive manner, that is, in line with the UNCLOS,⁵¹ in the North Sea area, the situation is slightly different in the Baltic Sea. The Federal Republic of Germany has adopted the system of straight baselines drawn by the former German Democratic Republic in 1982,⁵² which, again, has been described as 'basically conservative in its conception'.⁵³ That said, the system has been questioned with regard to whether the requirements of article 7(1) of the UNCLOS (concerning the element of 'where the coastline is deeply indented and cut into') and article 10 of the UNCLOS (concerning bays) have lawfully been implemented (but note that the effect of the lines concerned has been qualified at the same time as being 'essentially minimal').⁵⁴

49 R Wolfrum 'Germany and the Law of the Sea' in T Treves (ed) *The law of the sea: The European Union and its member states* (1997) 199.

50 *Anglo-Norwegian Fisheries (United Kingdom v Norway)* (18 December 1951) (1951) ICJ Reports 116 128ff. For an in-depth analysis of the legal requirements for the drawing of straight baselines see K Trümpler *Grenzen und Abgrenzungen des Küstenmeeres* (2007) 112ff.

51 See US Department of State *Limits in the sea no 38: Straight baselines Germany* (1974) 4: 'The Federal Republic of Germany is not a party to the Geneva Convention on the Territorial Sea and Contiguous Zone, but it has drawn conservative straight baselines in conformity with the Convention language.' – The sole controversial issue seems to be terminal point no 17, which marks the limit of the international boundary between Denmark and Germany. The US Department of State has taken the view that both the point of origin and the terminal point of a straight baseline ought to be located on the low-level line of one and the same coastal state. However, this criterion does not seem to find a legal basis in art 7(1) UNCLOS.

52 See annex 2 to the *Anordnung über die Ordnung in den Grenzgebieten und den Seegewässern der Deutschen Demokratischen Republik* of 25 March 1982 (Gesetzblatt 1982 I 208).

53 US Department of State *Limits in the Sea No 52: Straight Baselines East Germany* (1973) 5.

54 As above.

The breadth of the territorial sea in the North Sea area was extended to 12 nautical miles in 1994.⁵⁵ With the sole exception of the deep water roadstead located in the German Bight west of the Island of Helgoland, the relevant Proclamation does not specify individual points whose connection line would constitute the outer limit of the territorial sea, but merely refers to the distance of 12 nautical miles measured from the baselines. In contrast, concerning the Baltic Sea, the proclamation identifies 37 points whose connecting line establishes the outer limit of the territorial sea. Due to the geographical and political features of the area concerned, Germany could not and did not extend its territorial sea to 12 nautical miles in all parts of its Baltic coast.

It is interesting to note that no legal act exists that would define the course of Germany's normal baseline. The course of the baselines (both normal and straight) directly follows from the first set of maritime border charts for the North Sea and Baltic Sea,⁵⁶ which were published by the German Hydrographic Institute (today: Federal Agency for Navigation and Hydrography) in 1970. These charts showed and identified the basepoints for the straight baselines drawn for both the North and Baltic Sea coasts. As regards normal baselines, the charts simply stated that the low-water line along the coast served as the normal baseline if and to the extent to which Germany did not draw straight baselines. The term 'low-water line' as used in article 5 of the UNCLOS was not further substantiated, and no further specification has ever been adopted since that time. It thus seems that Germany has put significantly more weight to the second element of article 5 of the UNCLOS ('as marked on large-scale charts officially recognized by the coastal State') than other coastal states.⁵⁷ Similarly, the basepoints in terms of article 7(1) of the UNCLOS for the drawing of straight baselines were never updated or changed. To this day, the two aforementioned maritime border charts (to which the 1994 Proclamation refers) remain the sole authoritative source concerning normal and straight baselines at the German coast. That said, the course of the normal baseline was adjusted in a revised version of the two charts in light of the introduction of the lowest astronomical tide (LAT) method.

Final delimitation between the territorial seas of Germany and its neighbours is still pending.⁵⁸ In this respect, the 1994 Proclamation on the

55 Proklamation der Bundesregierung über die Ausweitung des deutschen Küstenmeeres of 19 October 1994 (Bundesgesetzblatt 1994 I 3428). With the extension to 12 nautical miles, a controversy was settled that had arisen with regard to the breadth of the German territorial sea nearby the deep water roadstead. For details see Wolfrum (n 49 above) 203ff.

56 Seegrenzkarten no 2920 & 2921.

57 For an analysis of the normal baseline in municipal law see International Law Association *Report of the Committee on Baselines under the International Law of the Sea* (2012) 16 <http://www.ila-hq.org/en/committees/index.cfm/cid/1028> (accessed 30 December 2014).

58 For information on the more or less theoretical dispute between Germany and Denmark see Wolfrum (n 49 above) 208ff.

extension of the territorial sea to 12 nautical miles⁵⁹ merely states the need to decide upon the issue at a later point of time. Concerning the boundary between Germany and the Netherlands, reference is made in the Proclamation to the 1960 Ems Dollard Treaty⁶⁰ which established a joint regime for the disputed maritime area. With the 1962 Supplementary Agreement to the Ems Dollard Treaty,⁶¹ Germany and the Netherlands agreed on a boundary line only for the purpose of jurisdiction for the prospection and extraction of natural resources within an area located within three nautical miles from the baselines.⁶² For the rest, the boundary question has been left unresolved to this day.⁶³

The dispute has recently come to the fore again when the competent agency of the Federal State of Lower Saxony issued a permit in 2010 for the construction and operation of the offshore windfarm 'Riffgat' within the territorial sea area disputed between Germany and the Netherlands. The Netherlands suggested using the incident as an opportunity to negotiate a final boundary agreement for the purpose of delimitating the territorial seas, but Germany objected. Since 2012, negotiations between the two states have focused on attempting to achieve conclusion of an agreement on a usage regime for the disputed sea area extending from three to 12 nautical miles (while leaving the delicate issue of final delimitation of the state boundary expressly open), following the model of the Supplementary Agreement to the Ems Dollard Treaty.⁶⁴ While these negotiations have not yet been successfully completed, the last months have seen a continuing rapprochement of the positions of the two states.

With regard to Poland, the legal status of the deep-sea mooring of the port of Szczecin has been a controversial issue in the relationship between the two states. While it was agreed in the 1989 Maritime Boundary Delimitation Agreement between the German Democratic Republic and

59 Bundesgesetzblatt 1994 I 3428 (n 55 above).

60 Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany concerning Arrangements for Co-operation in the Ems Estuary (8 April 1960, 509 UNTS 64).

61 Supplementary Agreement to the Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany concerning Arrangements for Co-operation in the Ems Estuary (14 May 1962, 509 UNTS 140).

62 For details see AG Oude Elferink *The Delimitation of the Continental Shelf between Denmark, Germany and the Netherlands* (2013) 96.

63 For background information see Wolfrum (n 49 above) 205ff. – The situation is somewhat contradictory to that in the Adriatic Sea, where Croatia was forced to settle its pending boundary dispute with Slovenia in order to be accepted as candidate for EU accession.

64 Note that a mere geographical extension of the line agreed upon in the 1962 Supplementary Agreement to a distance of 12 nautical miles was objected to by the Netherlands.

Poland,⁶⁵ which was adopted by Germany following its reunification,⁶⁶ that the mooring is not part of the territorial sea or EEZ of Germany, Poland seems to have taken the view that it forms part of the Polish territorial waters.⁶⁷ The dispute has been suspended, though, since Poland has recently not reacted to activities such as military manoeuvres involving ships under German jurisdiction in the area concerned anymore by issuing notes of protest.

With declaration of 25 November 1994, Germany delineated its EEZ in the North and Baltic Seas.⁶⁸ While no delimitation agreement concerning the EEZ has been reached with any of the neighbouring states, Germany and the United Kingdom recently agreed by way of exchange of diplomatic notes that three nautical coordinate points would be adjusted in conformity with the coordinated change of geodetic reference frames from European Dat (ED) 50 to the World Geodetic System (WGS) 84. With regard to the continental shelf, corresponding developments started significantly earlier, when Germany issued a proclamation on the exploration and exploitation of the continental shelf in 1964.⁶⁹ As is well known, the controversial issue of delimitation of the continental shelf vis-à-vis Denmark and the Netherlands, on which the 1964 proclamation remained silent, gave rise to the *North Sea Continental Shelf Cases* before the ICJ.⁷⁰ The issue was ultimately settled by way of conclusion of delimitation agreements that were based upon the judgment of the ICJ.⁷¹

65 Vertrag zwischen der Deutschen Demokratischen Republik und der Volksrepublik Polen über die Abgrenzung der Seegebiete in der Oderbucht of 22 May 1989 (Gesetzblatt 1989 II 150).

66 See Vertrag zwischen der Bundesrepublik Deutschland und der Republik Polen über die Bestätigung der zwischen ihnen bestehenden Grenze of 14 November 1990 (Bundesgesetzblatt 1991 II 1328) art 1.

67 Wolfrum (n 49 above) 212, argues that the area concerned forms part of the high seas.

68 See Proklamation der Bundesrepublik Deutschland über die Errichtung einer ausschließlichen Wirtschaftszone in der Nordsee und in der Ostsee of 25 November 1994 (Bundesgesetzblatt 1994 II 3769). Note that prior to that proclamation, Germany had already claimed, as part of a concerted action of all Member States of the European Economic Community, a fishery zone in the North and Baltic Sea (Proklamation der Bundesrepublik Deutschland über die Errichtung einer Fischereizone der Bundesrepublik Deutschland in der Nordsee of 21 December 1976 (Bundesgesetzblatt 1976 II 1999); Proklamation der Bundesrepublik Deutschland über die Errichtung einer Fischereizone der Bundesrepublik Deutschland in der Ostsee of 18 May 1978 (Bundesgesetzblatt 1978 II 867).

69 See Proklamation der Bundesregierung über die Erforschung und Ausbeutung des deutschen Festlandssockels of 20 January 1964 (Bundesgesetzblatt 1964 II 104).

70 *North Sea Continental Shelf (Germany v Denmark; Germany v the Netherlands)* ICJ (20 February 1969) (1969) ICJ Reports 3.

71 Delimitation Agreement with Denmark of 9 June 1965 (Bundesgesetzblatt 1966 II 207); Delimitation Agreement with the Netherlands of 1 December 1964 (Bundesgesetzblatt 1965 II 1142); Delimitation Agreements with Denmark and the Netherlands of 28 January 1971 (Bundesgesetzblatt 1972 II 882, 889); Delimitation Agreement with the United Kingdom of 25 November 1971 (Bundesgesetzblatt 1972 II 897). For a comprehensive list of maritime boundary delimitation agreements concluded between Germany and its neighbouring states see <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/DEU.htm> (accessed 1 June 2015).

2.3.2 Implementation of substantive legal rights and obligations

While government agencies and legal scholars have always agreed that the domestic legal order is automatically applicable within the internal waters and the territorial sea of Germany, taking into account that these zones form part, by virtue of the international law of the sea, of the territory of the state, opinions are divided with regard to the EEZ. Some scholars take the view that domestic law would be applicable *ipso iure* in the German EEZ if and to the extent to which Germany is entitled to exercise sovereign rights and jurisdiction according to the international law of the sea.⁷² Others argue that the application of domestic law within the EEZ would depend on an express confirmation in this respect by the national legislator.⁷³ An analysis of the relevant legislative practice suggests that the second view is essentially correct.⁷⁴ Sections 2(3) of the Federal Mining Act,⁷⁵ 1(4) of the Regional Planning Act,⁷⁶ 1(2) of the Environmental Appeals Act,⁷⁷ 3(2) of the Environmental Damages Act,⁷⁸ and 56(1) of the Federal Nature Conservation Act⁷⁹ all contain provisions which expressly render these acts applicable to the EEZ and continental shelf. The legislator thus seems to have acted on the assumption that a constitutive declaration of applicability was necessary. Indeed, the fact that the EEZ and continental shelf are not part of the territory of the state but ought to be considered as areas of functional jurisdiction within which (only) the coastal State can exercise functionally limited sovereign rights and jurisdiction, militate in favour of a careful approach. It safeguards that the legislator is required to examine on a case-by-case basis whether the rules and principles codified in the relevant act are covered by the sovereign rights and jurisdiction that the coastal state may lawfully exercise within these areas.

72 D Czybulka 'Naturschutzrecht im Küstenmeer und in der Ausschließlichen Wirtschaftszone' (1999) 21 *Natur und Recht* 562 567ff; D Czybulka 'Das Rechtsregime der Ausschließlichen Wirtschaftszone (AWZ) im Spannungsfeld von Nutzungs- und Schutzinteressen' (2001) 23 *Natur und Recht* 367 370; H Krieger 'Die Anwendbarkeit nationaler und internationaler Regelungen auf die Erdgasgewinnung aus dem deutschen Festlandsockel' (2002) 117 *Deutsches Verwaltungsblatt* 300 304.

73 R Lagoni 'Die Errichtung von Schutzgebieten in der ausschließlichen Wirtschaftszone aus völkerrechtlicher Sicht' (2002) 24 *Natur und Recht* 121 125; R Wolf 'Planung und Gebietsschutz in der Ausschließlichen Wirtschaftszone' (2005) 27 *Natur und Recht* 375 378.

74 See also A Proelss 'Völkerrechtliche Rahmenbedingungen der Anwendung naturschutzrechtlicher Instrumente in der AWZ' (2010) 21 *Zeitschrift für Umweltrecht* 359; C Kieß in S Schlacke (ed) *GK-BNatSchG* (2012) sec 56 para 20; M Gellermann in M Beckmann et al (eds) *Landmann/Rohmer – Umweltrecht* vol II (as at August 2013) preliminary observations on the Federal Nature Conservation Act para 4.

75 Bundesgesetzblatt 1980 I 1310; latest amendment Bundesgesetzblatt 2013 I 3154.

76 Bundesgesetzblatt 2008 I 2986; latest amendment Bundesgesetzblatt 2009 I 2585.

77 Bundesgesetzblatt 2013 I 753 amendment Bundesgesetzblatt 2013 I 3154.

78 Bundesgesetzblatt 2007 I 666; latest amendment Bundesgesetzblatt 2013 I 2565.

79 Bundesgesetzblatt 2009 I 2542; latest amendment Bundesgesetzblatt 2013 I 3154. An informal English translation is available at <http://www.eui.eu/Projects/InternationalArtHeritageLaw/Documents/NationalLegislation/Germany/federalnatureconservationact.pdf> (accessed 1 June 2015).

Concerning the EEZ, it has also been subject of debate whether the Federation would be exclusively competent to enact laws and regulations in that zone by virtue of the nature of the matter, or whether the legislative competences of the Federation on the one hand and the Federal States on the other would have to be delimited in accordance with the general scheme embodied in the *Grundgesetz*. According to the latter view, either the Federation or the relevant Federal State(s) would be responsible for enacting domestic legal measures in the EEZ, depending on whose legislative powers are affected by the subject matter of the measure concerned. The prevailing – and correct – view is that the Federation cannot rely on an unwritten power to establish a comprehensive domestic regime for the EEZ. No reason exists why those Federal States that border the North and Baltic Seas (that is, Bremen, Hamburg, Lower Saxony, Mecklenburg-West Pomerania, Schleswig-Holstein) should *a priori* be prevented from extending their laws and regulations to the EEZ.

This conclusion is supported by article 73(3) no 2 of the *Grundgesetz*, according to which the Federal States may deviate from laws enacted by the Federation on the field of, *inter alia*, the protection of nature and landscape management. In respect of the protection of the marine environment, the power of the Federal States to deviate from federal legislation is limited only insofar as the ‘general principles’ of marine environmental protection are concerned. Thus, whether the Federation is entitled to enact laws and regulations on the political fields covered by the sovereign rights and jurisdiction in terms of articles 56(1) and 77 of the UNCLOS depends on whether articles 70 *et seq* of the *Grundgesetz* consider these fields as matters under exclusive or concurrent legislative powers.⁸⁰ Apart from the protection of the marine environment and shipping, areas of federal legislative competence include economic matters such as mining and energy production (compare article 74(1) no 11 of the *Grundgesetz*), fishing (compare article 74(1) no 17 of the *Grundgesetz*), shipping (compare article 74(1) no 21 of the *Grundgesetz*) and marine spatial planning (compare article 74(1) no 31 of the *Grundgesetz*).

Protection of the marine environment

With regard to the internal waters and territorial sea, the coastal state has, by virtue of its sovereignty, the right to adopt measures aiming at the protection of the marine environment. It may even adopt laws and regulations for the preservation of the environment in relation to ships of other states that exercise their right of innocent passage (compare article 21(1)(f) of the UNCLOS), provided that these measures ‘do not

⁸⁰ A Proelss ‘Ausschließliche Wirtschaftszone (AWZ)’ in Graf Vitzthum (n 2 above) 222 258; HD Jarass, *Naturschutz in der Ausschließlichen Wirtschaftszone* (2002) 50ff.; Kieß (n 74 above) preliminary observations on sec 56 - 58 para 13; A Proelss et al ‘Protection of cetaceans in European waters’ (2011) 26 *International Journal of Marine and Coastal Law* 5 25.

apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards' (article 21(2) of the UNCLOS).

Taking into account that the *Länder*, by virtue of article 73(3) no 2 of the *Grundgesetz*, may only make use of their right to deviate from laws enacted by the Federation if and to the extent to which the 'general principles' of marine environmental protection are not affected, the fields of marine environmental protection and nature conservation are clearly dominated by federal legislation. Section 56(1) of the Federal Nature Conservation Act as well as section 2(1) no 2 of the Federal Water Resources Act⁸¹ clarify in declaratory terms that their provisions are also applicable within the 'coastal waters' of Germany.⁸² The concept of coastal waters is not identical with that of the territorial sea, but reflects the comprehensive approach embodied in the Federal Water Resources Act: It encompasses all waters between the coastal line at medium high tide and the seaward limits of the territorial sea.⁸³ It was used in order to harmonise the nature conservation regime with that of the Federal Water Resources Act. As neither the Federal Nature Conservation Act nor the Federal Water Resources Act go beyond the rights and duties that the coastal state is entitled to exercise within its 'maritime aquitory'⁸⁴ under the international law of the sea, usage of the concept 'coastal waters' does not give rise to legal concerns.⁸⁵

With regard to the EEZ, section 56(1) of the Federal Nature Conservation Act states that the provisions of this Act, with the exception of the provisions dealing with landscape planning (Chapter 2), are also applicable in the EEZ and on the continental shelf, 'provided that their application is compatible with the UN Convention on the Law of the Sea of 10 December 1982'. Thus, whether or not the requirements of domestic nature conservation law are to be observed within the EEZ or on the continental shelf primarily⁸⁶ depends on the scope and limits of the coastal state's jurisdiction in terms of article 56(1)(b)(iii) of the UNCLOS. The express commitment to the UNCLOS in section 56(1) of the Federal

81 Bundesgesetzblatt 2009 I 2585; latest amendment Bundesgesetzblatt 2013 I 3154.

82 See also J Crowley 'International law and coastal state control over the laying of submarine pipelines on the continental shelf' (1987) 56 *Nordic Journal of International Law* 39 46.

83 See the Federal Water Resources Act sec 3 no 2. Compare also A Proelss in M Beckmann et al (n 74 above) vol I, sec 43 WHG para 21; Kieß (n 74 above) para 17ff. The concept of coastal line at medium high tide is further substantiated by federal State law; see sec 41 (2) of the Water Act of Lower Saxony (2010 Niedersächsisches Gesetz- und Verordnungsblatt 64).

84 This term covers all maritime areas over which the coastal state exercises jurisdiction.

85 Proelss (n 83 above) para 21.

86 Further limitations are expressly codified in the Federal Nature Conservation Act. Note, eg that according to sec 56(3), 15, which regulates obligations of a party intervening in nature and landscape, 'shall not apply to construction and operation of wind turbines, in the German exclusive economic zone, for which a permit is issued by 1 January 2017.'

Nature Conservation Act has the effect that the provisions codified in this Act ought to be interpreted in a manner compatible with the regime of the EEZ and that of the continental shelf. By setting legal limits towards a potential process of indirect 'territorialization', its purpose is thus to safeguard the functional character of the zones concerned.

According to article 56(1)(b)(iii) of the UNCLOS, the coastal state has jurisdiction in respect of, *inter alia*, the protection and preservation of the marine environment. In contrast to the term 'sovereign rights' in the sense of article 56(1)(a) of the UNCLOS, the concept of 'jurisdiction' is in need of further substantiation by more specific UNCLOS provisions, such as those contained in Part XII.⁸⁷ This comprehension is supported by the wording of article 56(1)(b) of the UNCLOS, which speaks of 'jurisdiction as provided for in the relevant provisions of this Convention'. Furthermore, with its reference to the seabed and its subsoil, article 56(1)(a) of the UNCLOS makes clear that the continental shelf represents an integral part of the legal regime of the EEZ whenever the coastal state has established such a zone. That said, according to article 56(3) of the UNCLOS the rights established in article 56(1) of the UNCLOS in regard to the seabed and its subsoil shall be exercised in accordance with Part VI UNCLOS concerning the continental shelf. This is why article 79(2) of the UNCLOS, which regulates the coastal state's rights vis-à-vis the laying or maintenance of submarine cables or pipelines on its continental shelf by other states, is one of the specific norms that substantiate the jurisdiction of the coastal state concerning the protection and preservation of the marine environment in terms of article 56(1)(b)(iii) of the UNCLOS.⁸⁸

The legal consequences of the need to interpret the provisions of the Federal Nature Conservation Act, as far as their application in the EEZ and on the continental shelf is concerned, in line with the sovereign rights and jurisdiction of the coastal state in terms of article 56(1) of the UNCLOS can be demonstrated by reference to the example of the laying of a transit pipeline on the continental shelf. In this respect, sections 132 and 133 of the Federal Mining Act require an operator who intends to lay a transit pipeline on the German continental shelf to apply for two separate

87 See DJ Attard *The exclusive economic zone in international law* (1987) 48; Proelss (n 80 above) 235. Note that according to art 194(5) UNCLOS, measures taken in accordance with Part XII UNCLOS 'shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.'

88 Note that as far as shipping is concerned, the environmental jurisdiction of the coastal state in the EEZ is substantiated by the requirements contained in art 211(5) & (6) UNCLOS. Different to the case of submarine pipelines, the pertinent laws and regulations adopted by the coastal state have to conform and give effect to the generally accepted international rules and standards (GAIRAS) established through the competent international organisation, ie the International Maritime Organization (IMO). For a discussion of the meaning of the concept of GAIRAS see EJ Molenaar *Coastal state jurisdiction over vessel-source pollution* (1998) 175ff; H Schult *Das völkerrechtliche Schiffssicherheitsregime* (2005) 72ff.

authorisations: the first one, as regards the utilisation of the seabed and subsoil thereof, from the competent mining agency, and the other one, concerning the legal order of the EEZ, from the Federal Maritime and Hydrographic Agency. Section 132(2) number 3 refers to unjustifiable interferences with the marine flora and fauna *and* to the pollution of the marine environment as potential reasons for rejecting an authorisation to lay transit pipelines on the German continental shelf. In contrast, the Marine Facilities Ordinance⁸⁹ which establishes in its section 3 the second authorisation requirement, only mentions 'pollution of the marine environment in terms of Art. 1 (1) No. 4 UNCLOS' as one of the reasons justifying a refusal to grant the requested authorisation.

This author has submitted elsewhere that the coastal state's nature conservation law is generally not applicable to transit pipelines in terms of article 79(2) of the UNCLOS.⁹⁰ The provisions contained in article 79 of the UNCLOS substantiate the jurisdiction of coastal states for the prevention, reduction and control of pollution from pipelines as *leges speciales* and exclude, with the sole exception of article 208 UNCLOS, recourse to Part XII UNCLOS. The coastal state can only assert its nature conservation interests on its continental shelf *ex ante* by denying permission for a specific pipeline course in accordance with article 79(3) of the UNCLOS, as long as the denial does not occur in an abusive manner.⁹¹ Sections 132 and 133 of the Federal Mining Act are thus to be interpreted in a restrictive manner in order to provide for their compatibility with the international law of the sea. This is why unjustifiable interferences with the marine flora and fauna cannot be made recourse to as a reason for rejecting an authorisation to lay transit pipelines on the German continental shelf. This conclusion is backed by section 57 of the Federal Nature Conservation Act which clarifies with regard to the establishment of marine protected areas in the EEZ that restrictions of the right of other states to lay submarine cables and pipelines in the German EEZ are only permitted in accordance with article 56(3) in conjunction with article 79 of the UNCLOS.

With regard to the implementation of other relevant agreements, the Federal Act Establishing a Prohibition for the Dumping of Waste and other Matter into the High Seas is a particularly noteworthy example.⁹² This Act, which serves the execution of the London Protocol,⁹³ is applicable to all ships, airplanes and platforms that are located within or above the German EEZ and, as far as the high seas *sensu stricto* are

89 Seeanlagenverordnung of 23 January 1997 (Bundesgesetzblatt 1997 I 57); latest amendment BAnz. 2013 AT 30.08.2013 V1.

90 For details see A Proelss 'Pipelines and protected sea areas' in R Caddell & R Thomas (eds) *Shipping, law and the marine environment in the 21st century* (2013) 276 287ff.

91 See also D Czybulka in J Schumacher & P Fischer-Hüftle (eds) *Bundesnaturschutzgesetz* (2nd edn 2010) sec 57 para 88.

92 Bundesgesetzblatt 1998 I 2455 (n 28 above).

93 London Protocol (n 20 above).

concerned, to all ships and platforms flying the German flag. Within the scope of application of the London Protocol, section 4 establishes an absolute prohibition of dumping of waste and other matter into the EEZ and high seas with the sole exception of dredged material and urns intended for funerals at sea. In this respect, the Federal Maritime and Hydrographic Agency is the responsible authority for assessing whether the strict criteria that are to be applied for the granting of a special permit are fulfilled (compare section 5 in conjunction with section 8 of the Act).

Marine spatial planning

Similar to the Federal Nature Conservation Act, section 1(4) of the Regional Planning Act states that spatial planning in the EEZ ought to be done in conformity with the requirements contained in the UNCLOS. Based on this Act, the Ministry of Transport adopted two ordinances concerning spatial planning in the German EEZ in the Baltic and North Seas which included in their annexes the pertinent regional planning programmes.⁹⁴ These programmes establish, *inter alia*, priority and reserved areas for different maritime uses such as wind power generation, sand and gravel exploitation, the laying of pipelines and cables, shipping, and marine scientific research. Notwithstanding the fact that the sovereign rights and jurisdiction of the coastal state in terms of article 56(1) of the UNCLOS do not expressly cover the field of marine spatial planning, the coastal state is generally free to decide how to structure the implementation of its rights, provided that that process respects the legal limits arising out of the functional nature of the EEZ. This implies that the competences of the coastal state vis-à-vis the fields of policy mentioned in article 56(1) of the UNCLOS generally include the right to adopt planning mechanisms dedicated to the question on where and how the activities concerned shall be undertaken.⁹⁵

94 Compare Verordnung über die Raumordnung in der deutschen ausschließlichen Wirtschaftszone in der Nordsee of 21 September 2009 (Bundesgesetzblatt 2009 I 3107); Verordnung über die Raumordnung in der deutschen ausschließlichen Wirtschaftszone in der Ostsee of 10 December 2009 (Bundesgesetzblatt 2009 I 3861).

95 For details see A Proelss 'Der Beitrag des Völkerrechts zu einem marinen Infrastrukturrecht' in P Ehlers & W Erbguth (eds) *Infrastrukturrecht zur See: Neue Wege der Meeresordnung* (2009) 13 20; F Maes 'The International Legal Framework for Marine Spatial Planning' (2008) 32 *Marine Policy* 797 801ff. See also COM (2010) 771 final of 17 December 2010, Maritime Spatial Planning in the EU – Achievements and Future Development, 4. The recently proposed Directive Establishing a Framework for Maritime Spatial Planning and Integrated Coastal Management (COM [2013] 133 final of 12 March 2013) focuses on the procedural dimension of the pertinent planning processes.

Concerning the designation of priority or reserved areas that aim to exclude usage of the German EEZ by third states, the issue is more complicated. According to article 58(1) of the UNCLOS, in the EEZ

all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

The freedoms codified in this provision cannot be exercised anymore, though, if the coastal state decides to establish maritime areas in its EEZ within which only certain activities of the coastal state can lawfully be undertaken. Thus, the decisive point seems to be the relationship between the sovereign rights and jurisdiction in terms of article 56(1) of the UNCLOS on the one hand and the freedoms of other states under article 58(1) on the other. This author has presented the argument that (only) in the event of a conflict, and unless the behaviour of the coastal state ought to be qualified as an abuse of rights (compare article 56(2) of the UNCLOS), a presumption exists which derives from the *sui generis* character of the EEZ that the coastal state's legal position enjoys priority.⁹⁶ For reasons of limitations of space, the rationale of this argument cannot be repeated here in detail. Arguably, the UNCLOS considers free decisions of user conflicts on a case-by-case basis, founded on an individual balancing of the conflicting interests involved, as the appropriate mechanism only in situations covered by article 59 of the UNCLOS, that is, in cases where the Convention does *not* attribute rights or jurisdiction to the coastal state or to other states within the EEZ, and where a conflict arises between the interests of the coastal state and any other state.

The designation of priority or reserved areas by the coastal state in its EEZ is thus in line with the international law of the sea. Consequently, other states must observe the areas concerned, provided that the pertinent process of spatial planning has been initiated and publicly announced prior to the exercise of the freedoms codified in article 58(1) of the UNCLOS. The sole exception to this general rule is the adoption of restrictions for international shipping for reasons of marine environmental protection, for example, by way of designation of a MPA. The UNCLOS does not allow the coastal state to unilaterally establish maritime areas in its EEZ that aim to suspend international navigation in an absolute manner.⁹⁷ Spatial

96 A Proelss 'The law on the EEZ in perspective' (2012) 26 *Ocean Yearbook* 87 92ff; Proelss (n 90 above) 284ff; similar Attard (n 87 above) 75; see also MH Nordquist (ed) *Commentary on the United Nations Convention on the Law of the Sea 1982* vol II (1993) 569 (para 59.6(b)). Contra Churchill/Lowe (n 24 above) 175; W Erbguth 'Maritime Raumordnung' (2011) 64 *Die Öffentliche Verwaltung* 373 375.

97 Jarass (n 80 above) 35; Lagoni (n 73 above) 127; Proelss (n 95 above) 24ff; A Meriardi 'Legal Restraints on Navigation in Marine Specially Protected Areas' in T Scovazzi (ed) *Marine specially protected areas* (1999) 29 34.

restrictions for international shipping can only lawfully be implemented via the International Maritime Organization (IMO), either by way of reliance on article 211(6) of the UNCLOS or by recourse to the criteria adopted under the MARPOL Convention⁹⁸ for the designation of Special Areas or Particularly Sensitive Sea Areas (PSSAs).⁹⁹

Offshore wind energy production

The sovereign rights allocated to the coastal state by article 56(1) of the UNCLOS with regard to the EEZ do not only cover the exploration and exploitation of the non-living natural resources, but extend to 'other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds'. This provision in conjunction with article 60(1)(b) of the UNCLOS, according to which the coastal state has

the exclusive right to construct and to authorize and regulate the construction, operation and use of [...] installations and structures for the purposes provided for in article 56 and other economic purposes,

establishes the jurisdictional basis for the construction and operation of offshore wind farms in the EEZ.¹⁰⁰ The Federal Republic of Germany has made use of its jurisdiction to prescribe by way of adoption of the Offshore Installations Ordinance.¹⁰¹ According to section 2(1), (2) of the Ordinance, the Federal Maritime and Hydrographic Agency is obligated to address requests for construction and operation of offshore wind farms by recourse to a special administrative procedure, the so-called licensing procedure (*Planfeststellungsverfahren*). If the planned activity is aimed at energy production (and not only energy transmission), this procedure typically involves the duty to undertake an environmental impact

⁹⁸ n 12 above.

⁹⁹ IMO Res A 927(22) of 15 January 2002, Revised Guidelines for the Identification and Designation of Special Areas under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas; IMO Res A.982(24) of 6 February 2006, Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas.

¹⁰⁰ Even though wind power installations are, as far as their concreted base are concerned, typically attached or moored to the seabed, the production of wind energy in the EEZ cannot be held as constituting an exploration or exploitation of natural resources of the seabed and its subsoil. Thus, the reference made by art 56(3) UNCLOS to the regime of the continental shelf is not applicable. With regard to offshore wind energy production, the rights of the coastal state codified in art 60 UNCLOS cannot be exercised in continental shelf areas that are located beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. In contrast, art 60 UNCLOS applies *mutatis mutandis* to artificial islands, installations and structures located on an extended continental shelf, provided that these structures are used for the exploration or exploitation of its natural resources in terms of art 77(4) UNCLOS.

¹⁰¹ n 89 above.

assessment.¹⁰² Section 5(6) no 2 of the Offshore Installations Ordinance clarifies that a license may only be granted provided that the activity concerned will not pose a threat to the marine environment, in particular with regard to potential future pollutions in terms of article 1(1) number 4 of the UNCLOS, and that bird migration will not be endangered. For the purpose of promoting the construction of offshore wind farms in the EEZ, the German legislator has exempted all facilities whose construction and operation has been or will be authorised until 1 January 2017 from the obligations of the intervening party in terms of article 15 of the Federal Nature Conservation Act.¹⁰³ This privilege does not apply to installations and structures established for the purpose of grid connection, as these cannot be regarded under the pertinent legal standards as mere components or equipment of the wind farm.¹⁰⁴

Concerning the relationship between the construction and operation of offshore wind farms and other installations in the EEZ on the one hand and nature conservation requirements on the other, one may ask whether the coastal state is entitled to apply its domestic nature conservation standards to safety zones that have, based on article 60(4) and (6) of the UNCLOS, lawfully been established around its offshore installations. This author has presented the argument that while article 60(2) of the UNCLOS assigns to the coastal state 'exclusive jurisdiction' that comprises the right to adopt environmental protection standards, article 60(4) of the UNCLOS clarifies that the coastal State may establish safety zones only 'to ensure the safety both of navigation and of the artificial islands, installations and structures'.¹⁰⁵ Designation of a safety zone for environmental or nature conservation purposes would thus not constitute a lawful exercise of the rights accorded to the coastal state.¹⁰⁶ Arguably, this conclusion would seem to be valid also in a situation where the coastal state lawfully establishes a safety zone around one of its installations and then, relying on its competence flowing from article 60(2) of the UNCLOS, decides to make its domestic environmental protection standards applicable to that zone. Admittedly, article 208(1) of the UNCLOS obliges coastal states to

adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities

102 Compare sec 3(1) of the Offshore Installations Ordinance in conjunction with no 1.6.1 of annex 1 to the Environmental Impact Assessment Act as promulgated on 24 February 2010 (Bundesgesetzblatt 2010 I 94); latest amendment: Bundesgesetzblatt 2013 I 2749.

103 Compare the Federal Nature Conservation Act art 56(3).

104 Kieß (n 74 above) para 34.

105 Proelss (n 96 above [Law on the EEZ in Perspective]) 106ff.

106 See also U Jenisch 'Offshore-Windenergieanlagen im Seerecht' (1997) 19 *Natur und Recht* 373 378.

subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to articles 60 and 80.¹⁰⁷

That said, it is submitted that the correlation between the operation of a platform that can potentially produce harmful effects to the marine environment on the one hand and the legitimate safety needs of the coastal state embodied in the right to designate safety zones in terms of article 60(4) to (6) of the UNCLOS on the other is not close enough.

Shipping

Germany has implemented its duty arising out of article 91(1) of the UNCLOS to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag with the adoption of the Law of the Flag Act.¹⁰⁸ The Ordinance referring to the International Regulations for Preventing Collisions at Sea¹⁰⁹ serves to implement the 1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREGs) adopted within the IMO.¹¹⁰ It is applicable to all German waterways used by seagoing vessels, the internal waters and the territorial sea as well as to ships flying the German flag in areas beyond the limits of the territory of Germany.

In contrast, the MARPOL Convention and its Annexes as well as other IMO Conventions have been regarded by the German institutions as being predominantly self-executing and thus as having direct effect within the domestic legal order. If and to the extent to which this has not been the case, the German legislator has provided for the necessary implementation by way of amendments to the Federal Maritime Responsibilities Act.¹¹¹ Amendments to the Protocols and Annexes to the MARPOL Convention are made binding and applicable within the domestic legal order by way of ordinances of the Federal Ministry of Transport.¹¹² Enforcement of the MARPOL Convention is addressed by the Ordinance concerning Violations of the MARPOL Convention.¹¹³ This Ordinance is applicable

107 Reference to art 208(1) UNCLOS has been brought forward by Lagoni (n 73 above) 124.

108 Flaggenrechtsgesetz of 26 October 1994 (Bundesgesetzblatt 1994 I 3140); amendment Bundesgesetzblatt 2013 I 3154.

109 Verordnung zu den Internationalen Regeln von 1972 zur Verhütung von Zusammenstößen auf See of 13 June 1977 (Bundesgesetzblatt 1977 I 813); latest amendment: Bundesgesetzblatt 2012 I 112.

110 Convention on the International Regulations for Preventing Collisions at Sea (20 October 1972, 1050 UNTS 16).

111 Gesetz über die Aufgaben des Bundes auf dem Gebiet der Seeschifffahrt as promulgated on 26 July 2002 (Bundesgesetzblatt 2002 I 2876); amendment: Bundesgesetzblatt 2013 I 3836.

112 See art 2 no 1 of the Act concerning Accession to the MARPOL Convention (n 18 above).

113 Verordnung über Zuwiderhandlungen gegen das Internationale Übereinkommen von 1973 zur Verhütung der Meeresverschmutzung durch Schiffe und gegen das Protokoll von 1978 zu diesem Übereinkommen of 19 February 1989 (Bundesgesetzblatt 1989 I 247); latest amendment: Bundesgesetzblatt 2008 I 698.

to all German ships as well as to foreign ships that pass through the internal waters, territorial sea and EEZ of Germany (compare section 1 no 1). With regard to ships flying the flags of states that are not parties to the MARPOL Convention, or the relevant annex respectively, presence of the ship in the German EEZ is identified as the factor that triggers the applicability of the enforcement mechanisms codified in the Ordinance. For state parties to the UNCLOS, articles 211(5) and 220(1)(3) of the UNCLOS provide a jurisdictional basis for such course of action, which is why the Ordinance concerned can generally not be regarded as providing for an unlawful exercise of extra-territorial jurisdiction.

Resource exploitation

Germany has implemented its right to explore and exploit the natural resources of the continental shelf under article 56(1)(a), (3) in conjunction with article 77(1) of the UNCLOS with the adoption of the Federal Mining Act.¹¹⁴ This Act covers the search for and exploitation of mineral resources as well as the exploration and use of the subsoil of the submarine areas concerned for the purpose of underground storage. Both the exploration and exploitation of resources that are free for mining in terms of section 3 of the Federal Mining Act¹¹⁵ require a licence to be issued by the competent authority of the Federal State whose coastline and territorial waters border the exploration or exploitation area on the continental shelf.¹¹⁶ As long as no statutory ground for denying the permission is applicable in a case at hand, the authority is legally bound to grant the requested licence.¹¹⁷ Section 49 of the Federal Mining Act aims to safeguard other legitimate uses of the sea. As far as shipping, the laying of pipelines and cables and marine scientific research in the territorial sea, or on the continental shelf respectively, is concerned, this provision particularly serves to take into account the rights and interests of other states reflected in articles 17, 58(1), 79(1) and 246(3) of the UNCLOS.¹¹⁸ With regard to fisheries, section 49 no 3 of the Federal Mining Act does also not exclusively address domestic interests, but rather takes into account access rights of fishing vessels flying the flag of other European member states.¹¹⁹

Depending on the individual circumstances, the exploration and exploitation of marine resources ought to be measured against the

114 Bundesgesetzblatt 1980 I 1310 (n 75 above).

115 This includes sand and gravel; see D Czybulka & K Stredak *Rechtsfragen der marinen Kies- und Sandgewinnung in Nord- und Ostsee* (2008) 35ff.

116 Compare the Federal Mining Act sec 6 in conjunction with sec 136.

117 Czybulka & Stredak (n 115 above) 41.

118 Insofar as the rights of other states are affected, the jurisdictional basis for sec 49 of the Federal Mining Code is established by arts 21(1), 22, 79(2) & (3), 194 & 249 UNCLOS.

119 See RR Churchill & D Owen *The EC Common Fisheries Policy* (2010) 196ff; Proelss et al (n 80 above) 27.

requirements of other fields of domestic law.¹²⁰ For example, with regard to the selection and designation of MPAs in the German EEZ, section 57(3) no 5 of the Federal Nature Conservation Act states that ‘restrictions on the generation of power from water, current and wind, and on the *prospecting and extraction of mineral resources*, are permissible only pursuant to section 34.’¹²¹ Section 34 of the Federal Nature Conservation Act, again, serves to implement article 6 of the EU Habitats Directive¹²² by prescribing procedural duties that must be fulfilled prior the granting of a permit. In this respect,

[p]rior to the approval or the implementation of projects, their compatibility with the conservation objectives of a Natura 2000 site shall be assessed, if they, either individually or in combination with other projects or plans, have the potential to affect the site significantly, and do not directly serve the purpose of the site’s management.¹²³

Within the internal waters and the territorial sea, the exploration and exploitation of resources further requires permission according to the Federal Water Resources Act,¹²⁴ provided that it cannot be excluded that the activities concerned will permanently or to a more than insignificant extent negatively affect the physical, chemical or biological state of the water. In most instances, this permission will be incorporated in the mining licence issued by the competent Mining Agency.¹²⁵

With regard to areas beyond the limits of national jurisdiction, Germany has, following the implementation of the 1994 Implementation Agreement to the UNCLOS within the domestic legal order,¹²⁶ adopted an Act for the Regulation of Deep Seabed Mining¹²⁷ that states the requirements for the granting of access to the deep seabed and the respective responsibilities of German nationals. It furthermore aims at ensuring effective supervision of mining activities and enforcement of violations of the pertinent regulations.

Fisheries

Domestic implementation of the UNCLOS and UNFSA provisions on fisheries in the territorial sea, in the EEZ and on the high seas is, in light of

120 In contrast, the Offshore Installations Ordinance is, according to its sec 1(2), not applicable to installations that are used for the purpose of mining.

121 Italics added.

122 Council Directive 92/43/EEC of 22 July 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora [1992] OJ L206/7.

123 For an assessment of the meaning of the term ‘project’ see Proelss et al (n 80 above) 29ff. See also Czybulka & Stredak (n 115 above) 84ff.

124 See Bundesgesetzblatt 2009 I 2585 (n 81 above).

125 Compare the Federal Water Resources Act sec 19(2).

126 Ratification Ordinance of 4 October 1994.

127 Gesetz zur Regelung des Meeresbodenbergbaus of 6 June 1995 (Bundesgesetzblatt 1995 I 778 782); latest amendment: Bundesgesetzblatt 2013 I 3154.

the exclusive competence of the EU concerning the field of the conservation of marine biological resources under the Common Fisheries Policy (CFP),¹²⁸ more or less limited to the execution of the relevant EU regulations on the national level (for example, by distributing fishing quotas between individual fishing vessels), the transposition of the relevant directives into national law, and the enforcement of the European rules and standards. The CFP, which is currently undergoing a broad and controversial process of reform, cannot be described here in detail.¹²⁹ Where supranational law assigns to the national legislator a scope of discretion on how to implement the CFP (a situation that usually arises in the context of directives, which are, according to article 288 of the TFEU, only binding 'as to the result to be achieved'), the member states have the possibility to adapt the supranational requirements to the specific organisational, procedural and administrative features of their domestic legal systems.

In Germany, these issues are primarily addressed by the Federal Marine Fisheries Act.¹³⁰ That said, section 21 of this Act authorises the *Länder* to adopt measures in order to fill the regulatory gaps of the Federal Marine Fisheries Act, provided that they respect the legal framework set by the CFP. With regard to marine fisheries, the relevance of this authorisation is essentially limited to recreational and sport fishing, fisheries based on fixed equipment and shellfish fisheries.¹³¹ In particular, it should be noted that the CFP and the Federal Marine Fisheries Act leave no room for an exercise of prescriptive jurisdiction by the Federal States in respect of EEZ fisheries.¹³² Concerning the relationship between fisheries and nature conservation, section 57(3) no 3 of the Federal Nature Conservation Act prescribes that restrictions to fishing activities within MPAs in the EEZ are only permissible if and to the extent to which they are compatible with the CFP and the provisions of the Federal Marine Fisheries Act. The implicit hierarchy embodied in this provision can be traced back to the relationship between the EU's power on the field of fisheries policy and that on the field of environmental protection (with regard to which the EU only has a shared competence, compare article 4(2)(e) of the TFEU). This author has argued that whenever a certain environmental measure is likely to (also) affect the conservation of European fish stocks, the EU is exclusively competent to adopt the measure concerned on the basis of its competence under article 3(1)(d) in

128 Compare TFEU (n 31 above) art 3(1)(d).

129 For an overview on the CFP see Churchill & Owen (n 119 above) 129ff; T Markus *European Fisheries Law* (2009).

130 Gesetz zur Regelung der Seefischerei und zur Durchführung des Fischereirechts der Europäischen Union as promulgated on 6 July 1998 (Bundesgesetzblatt 1998 I 1791); latest amendment: Bundesgesetzblatt 2013 I 3118.

131 T Markus in *Das Deutsche Bundesrecht* IV C/10, sec 21 See Fisch G para 1.

132 Compare the Federal Marine Fisheries Act sec 1(2).

conjunction with article 38(1) and 43(3) of the TFEU, no matter whether the fisheries component contained therein is predominant or not.¹³³

3 Conclusion

This chapter has attempted to assess the implementation of the international law of the sea within the domestic legal system of Germany. Notwithstanding the fact that its coastline is comparatively small, Germany has been particularly dedicated to the rule of law in maritime affairs since its accession to the UNCLOS in 1994. It has been demonstrated that Germany has applied a high standard of compliance with the relevant international law of the sea treaties. It is particularly noteworthy in this respect that the German legislator has emphasised the unique legal status of the EEZ and the continental shelf by introducing declarations of applicability into the relevant domestic legal acts. These declarations aim at safeguarding the functionally limited nature of the rights and jurisdiction allocated to coastal states within these zones, and thus serve, in terms of legal self-restraint, as a barrier to creeping jurisdiction.

Of course, the generally positive assessment of its compliance record should not lead oneself to ignore that Germany is actively (and legitimately) pursuing its national interests concerning the use and protection of the oceans, in particular as far as the exploration and exploitation of natural resources is concerned. Germany has been one of the pioneering states on the field of deep seabed mining, and it is not without relevance that the competent Federal Institute for Geosciences and Natural Resources signed a contract with the ISA for exploration for polymetallic nodules in the Clarion-Clipperton Fracture Zone already in 2006 and has only recently completed negotiations with that organisation concerning conclusion of a contract for exploration for polymetallic sulphides in the central Indian Ocean.

Particular challenges and peculiarities arise out of the influence of EU law on the one hand and the federal structure of Germany on the other. Concerning the second issue, controversies on the allocation of legislative competences between the Federation and the *Länder* have at times delayed the effective implementation of the international law of the sea within the domestic legal order, but it seems fair to conclude that the majority of these challenges has been settled in recent years by way of amending the relevant Federal laws and statutes. Interestingly, the influence of domestic court decisions in this context as well as with regard to the implementation of the international law of the sea in general has been marginal, to say the least. Existing case-law is virtually limited to disputes that have arisen in the

133 Proelss et al (n 80 above) 35ff.

context of the installation and operation of offshore wind farms in the EEZ.¹³⁴ Given that these decisions addressed very specific questions concerning the lawful application of domestic law rather than dealing with the implementation of international legal rules and principles, they have not at all attracted widespread attention in legal literature. One exception is a recent judgment addressing piracy at sea, whose relevance concerning the international law of the sea does not go beyond mere general references to the UNCLOS, though.¹³⁵

The situation ought to be assessed in a different manner as far as EU law is concerned. While the ECJ is only competent to interpret and apply EU law, the Court's jurisdiction may, depending on the circumstances of the individual case, cover legal questions on the interpretation of international law of the sea treaties to which the EU has acceded. Taking further into account that EU law enjoys primacy over conflicting domestic law, and keeping in mind that the member states are bound to the requirements of secondary EU law, the impact of Court decisions on German domestic law in such situations is indirect but strong. With regard to the UNCLOS, it is submitted that the *Intertanko* decision is the most influential judgment of the ECJ that addresses the intra-Union effects of this agreement. That said, this chapter has argued that the Court's relevant jurisprudence is based on an oversubscription to the autonomy of the Union's legal order and has weakened rather than strengthened the claim for normative validity of the international law of sea. The future will tell whether the ECJ will be willing to take a more international law friendly approach in coming years.

134 See Higher Administrative Court Hamburg, Order of 30 September 2004, (2005) 16 *Zeitschrift für Umweltrecht* 208; Higher Administrative Court Hamburg, Order of 1 September 2004, (2005) 16 *Zeitschrift für Umweltrecht* 210; Higher Administrative Court Hamburg, Order of 15 September 2004, (2005) 24 *Neue Zeitschrift für Verwaltungsrecht* 347.

135 District Court Hamburg, Judgment of 19 October 2012, on file with the author.

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CHAPTER 6

THE INTERNATIONAL LAW OF THE SEA IN SOUTH AFRICA

*Patrick Vrancken**

1 Relevant international law obligations

1.1 The development and sources of the international law of the sea

Having only come into being as a legal entity in 1910 and become independent by the 1930s (→ De Wet/Introduction), South Africa had no influence on the international law of the sea during the first four centuries of its development (→ Proelss). During the ensuing years, the international isolation caused by the apartheid regime resulted in the country having hardly any impact on the most important source of the international law of the sea (→ Proelss), the 1982 United Nations (UN) Convention on the Law of the Sea (UNCLOS).¹

1.2 South African participation in the making of the international law of the sea

1.2.1 UNCLOS I

In contrast to the great majority of African states which had not yet gained their independence by the time the First United Nations Conference on the Law of the Sea (UNCLOS I) was convened in 1958, South Africa did participate actively in the Conference. For instance, in the First Committee on the territorial sea and the contiguous zone, South Africa indicated that

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1 United Nations Convention on the Law of the Sea (UNCLOS) (10 December 1982, 1833 UNTS 3).

it 'saw with regret the approach of the irrevocable end of the three-mile rule' and that it 'could not help feeling that there had not been sufficient political preparation for the weighty decisions which the Conference was' expected to take.²

In the Second Committee on the general regime of the high seas, South Africa was at odds with many other participating states when, in relation to the discussions on a draft resolution relating to nuclear explosions on the high seas³ and a proposal to insert a provision in the convention prohibiting the testing of nuclear weapons on the high seas,⁴ it stated that it 'regretted that so much time was being spent on what was largely a sterile exercise in propaganda' and added that '[t]he International Law Commission had wisely refrained from dealing with the question of nuclear tests'.⁵ Moreover, South Africa proposed, unsuccessfully it turned out, that the following sentence be added to the first paragraph of article 11 of the Convention:⁶ 'A State may, however, waive its jurisdiction, either generally or in a particular case, over its own nationals who may be involved in penal or disciplinary responsibility for collision on the high seas'.⁷ South Africa also argued, unsuccessfully again, that 'the most appropriate instrument in which to embody the results of the Second Committee's work would be a simple declaration, adopted by a two-thirds majority', on the grounds that such 'a declaration would probably prove more widely acceptable' and 'would not require any ratification or other time-consuming action by parliamentary assemblies'.⁸

By contrast, South Africa did agree that the Third Committee on the conservation of the living resources of the high seas should 'recommend to the Conference that the results of its work be embodied in a convention'.⁹ Furthermore, South Africa successfully argued that a proposal to the effect

2 49th meeting, 16 April 1958. See the Official Records of UNCLOS I volume III (UN Doc A/CONF.13/39 (1958)) 151.

3 See UN Doc A/CONF.13/C.2/L.71 & A/CONF.13/C.2/L.71/Rev.1 (1958) in the Official Records of UNCLOS I volume IV (UN Doc A/CONF.13/40 (1958)) 134.

4 See UN Doc A/CONF.13/C.2/L.30 (1958) in the Official Records of UNCLOS I volume IV (n 3 above) 124.

5 18th meeting, 27 March 1958. See the Official Records of UNCLOS I volume IV (n 3 above) 48.

6 UNCLOS (n 1 above) art 35 at that stage.

7 See UN Doc A/CONF.13/C.2/L.74 (1958). The proposal was based on the fact that 'under South African law the competent authorities were entitled to waive jurisdiction in penal or disciplinary proceedings. Similar provisions existed in the laws of several other Commonwealth countries' 10th plenary meeting, 23 April 1958 (see the Official Records of UNCLOS I volume II (UN Doc A/CONF.13/38 (1958)) 21).

8 34th meeting, 15 April 1958. See the Official Records of UNCLOS I volume IV (n 3 above) 103 as well as the proposed resolution as UN Doc A/CONF.13/C.2/L.150 (1958). The South African representative did indicate that '[a] binding instrument was doubtless desirable; but his delegation had felt that the major maritime Powers would be unlikely to ratify such an instrument without many reservations' (page 105). See further the explanation given at the 11th plenary meeting, 23 April 1958 See the Official Records of UNCLOS I volume II (n 7 above) 24.

9 41st meeting, 21 April 1958. See the Official Records of UNCLOS I volume V (UN Doc A/CONF.13/41 (1958)) 124.

that 'the living creatures of the sea' should be caught by '[h]umane methods ... whenever such methods are developed to a practical state',¹⁰ take the form of a resolution on the ground that such a resolution 'would have more influence on ["the people who caught whales, seals and other creatures of the sea"] than a short article tucked away in a draft convention which would probably not be ratified by a large number of States'.¹¹

Finally,¹² in the Fourth Committee on the continental shelf, South Africa, like many other participating states, 'accepted the broad ideas underlying the articles ... drafted by the International Law Commission', but 'had some misgivings about the vagueness of some of the provisions' relating to the extent of the shelf.¹³ Nevertheless, South Africa was of the opinion

that the results of the Committee's work should be embodied in a convention relating solely to the continental shelf, and not in a general convention or in a declaration, because the continental shelf, unlike the regime of the high seas, was a comparatively new concept in international law.¹⁴

As far as the plenary meetings are concerned, South Africa initiated the deletion of a restriction initially placed in draft article 46(1)(b)¹⁵ on the right of visit in the case of a ship engaged in the slave trade.¹⁶ South Africa also initiated a resolution relating to Iceland, the Faroe Islands and Greenland as well as a larger group of countries economically dependent on fisheries,¹⁷ after a draft provision aimed at addressing the concerns of

10 UN Doc A/CONF.13/C.3/L.6 (1958) in the Official Records of UNCLOS I volume V (n 9 above) 136.

11 35th meeting, 16 April 1958. See the Official Records of UNCLOS I volume V (n 9 above) 100.

12 There is no mention of any South African active contribution to the work of the Fifth Committee on the question of free access to the sea by landlocked States (Official Records of UNCLOS I volume VII (UN Doc A/CONF.13/43 (1958))).

13 4th meeting, 4 March 1958. See the Official Records of UNCLOS I volume VI (UN Doc A/CONF.13/42 (1958)) 2.

14 36th meeting, 11 April 1958. See the Official Records of UNCLOS I volume VI (n 13 above) 107. A few days later, the South African representative added that the State's views 'on whether it was generally desirable to have a convention on the continental shelf, would be formed in the light of the discussion on the reservations clause' 39th meeting (17 April 1958). See the Official Records of UNCLOS I volume VI (n 13 above) 114.

15 Now article 22(1)(b) of the Geneva Convention on the High Seas (Convention on the High Seas) (29 April 1958, 450 UNTS 11).

16 10th plenary meeting (23 April 1958). See the Official Records of UNCLOS I volume II (n 7 above) 22. The deleted words of the provision drafted by the International Law Commission are: 'while in the maritime zones treated as suspect in the international conventions for the abolition of the slave trade' (UN Doc A/3159 (1956) in (1956) II *Yearbook of the International Law Commission* 261).

17 UN Doc A/CONF.13/L.27 (1958) in Official Records of UNCLOS I volume II (n 7 above) 114: 'where for the purpose of conservation it becomes necessary to limit the total catch of a stock or stocks of fish in an area of the high seas adjacent to a coastal State any other States fishing in that area should collaborate with the coastal State to secure just treatment of such situation by establishing agreed measures which shall recognize any preferential requirements of the coastal State relating to its dependence

Iceland¹⁸ did not obtain the necessary support.¹⁹ The purpose of the resolution was 'to secure the acceptance of a moral obligation ... to take steps to agree with coastal States on fisheries regulations, having special regard to those States' dependence on the fishing industry'.²⁰

1.2.2 UNCLOS II and the 1958 Conventions

South Africa participated also in the unsuccessful Second United Nations Conference on the Law of the Sea (UNCLOS II) convened in 1960, but there is no record of any contribution to the debates.²¹ In 1963, South Africa ratified the three conventions largely codifying customary international law (the Convention on the Continental Shelf,²² the Convention on the High Seas²³ and the Convention on the Territorial Sea and the Contiguous Zone²⁴) as well as the undoubtedly norm-creating Convention on Fishing and Conservation of the Living Resources of the High Seas.²⁵ It is unclear how South Africa voted on UN General Assembly Resolution 2172 (XXI) of 1966, relating to the non-living resources beyond the continental shelves, and Resolution 2340 (XXII) of 1967, establishing an *Ad Hoc* Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, which did not include South Africa. However, together with most developed states, South Africa voted against the Moratorium Resolution 2574D (XXV) of 1969, which called upon all states to abstain from any exploitation of the resources of the seabed beyond national jurisdiction. In contrast, South Africa voted in favour of Resolution 2750C (XXV) of 1970 in terms of which the Third United Nations Conference on the Law of the Sea (UNCLOS III) was convened in 1973.

upon the fishery concerned while having regard to the legitimate interests of the other States'.

- 18 The first paragraph of article 60A read: 'Where a people is overwhelmingly dependent upon its coastal fisheries for its livelihood or economic development and it becomes necessary to limit the total catch of a stock or stocks of fish in areas adjacent to the coastal fisheries zone, the coastal State shall have preferential rights under such limitations to the extent rendered necessary by its dependence on the fishery' (UN Doc A/CONF.13/L.21 (1958)) in the Official Records of UNCLOS I volume II (n 7 above) 109.
- 19 15th plenary meeting, 25 April 1958. See the Official Records of UNCLOS I volume II (n 7 above) 46.
- 20 15th plenary meeting (n 19 above) 45. After the resolution was adopted, Iceland thanked South Africa 'for having been instrumental in securing the adoption of the principles contained in' the resolution (16th plenary meeting, 26 April 1958 in the Official Records of UNCLOS I volume II (n 7 above) 48).
- 21 See the Official Records of UNCLOS II (UN Doc A/CONF.19/8 & A/CONF.19/9 (1960)).
- 22 Convention on the Continental Shelf (29 April 1958, 499 UNTS 311).
- 23 Convention on the High Seas (29 April 1958, 450 UNTS 11).
- 24 Convention on the Territorial Sea and the Contiguous Zone (29 April 1958, 516 UNTS 205).
- 25 Convention on Fishing and Conservation of the Living Resources of the High Seas (29 April 1958, 599 UNTS 285).

1.2.3 UNCLOS III

At the Conference, strong reservations regarding the credentials of South Africa were first expressed by Chad in the Credentials Committee²⁶ and reiterated in the December 1973 plenary meeting, during which the report of the Committee was discussed, by Albania,²⁷ Uganda (as chair of the African group)²⁸ and Cameroon, the latter stating that the South African representatives 'were adventurers and should not be seated at the Conference'.²⁹ Six months later, Guinea reiterated that:

The liberation movements operating in ... South Africa ... were fighting for the restitution of their fatherlands and were the authentic representatives of their respective peoples. They deserved to occupy a place at the Conference, so that any decisions which might be adopted on behalf of States and peoples would have greater guarantees.³⁰

Later that day, the representative of the United Nations Council for Namibia stressed that:

It was ... only right that the interests of Namibia in the Conference should be represented not by South Africa, but by a delegation from the Council which included, as an integral part, the representative of the national liberation movement of Namibia, the South West Africa People's Organization (SWAPO), recognized by the General Assembly as the authentic representative of the Namibian people.³¹

When the Conference decided on

whether it was competent to take a decision on a Senegalese proposal that the liberation movements recognized by the Organization of African Unity or the League of Arab States should be invited to participate in the Conference as observers,

South Africa, along with Israel, was the only state to vote against the

26 UN Doc A/CONF.62/15 (1973) para 9.

27 12th plenary meeting, 15 December 1973 (UN Doc A/CONF.62/SR.12 (1973)) para 12.

28 12th plenary meeting (n 27 above) para 17.

29 12th plenary meeting (n 27 above) para 8. South Africa was not alone in that position as the credentials of other States, including Cambodia, Portugal and Vietnam, were also questioned. Seven months later, the representative of Cameroon referred to 'racist political brigands' (26th plenary meeting, 2 July 1974 (UN Doc A/CONF.62/SR.26 (1974)) para 2.

30 21st plenary meeting, 28 June 1974 (UN Doc A/CONF.62/SR.21 (1974)) para 62. Reference was made at the same time to 'Angola, Mozambique, Zimbabwe, Namibia ... and the Middle East'. See also statements by Albania (27th plenary meeting, 3 July 1974 in UN Doc A/CONF.62/SR.27 (1974)) para 44, Congo (28th plenary meeting, 3 July 1974 in UN Doc A/CONF.62/SR.28 (1974)) para 39, Romania (50th plenary meeting, 28 July 1974 in UN Doc A/CONF.62/SR.50 (1974)) para 2 and Tunisia (37th plenary meeting, 11 July 1974 in UN Doc A/CONF.62/SR.37 (1974)) para 1.

31 22nd plenary meeting, 28 June 1974 (UN Doc A/CONF.62/SR.22 (1974)) para 46.

proposal.³² The next day, Senegal indicated that the African National Congress (ANC) was the South African liberation movement recognised by the OAU³³ and the Conference decided by consensus that the ANC 'would be treated as observers in the same way as non-governmental organizations',³⁴ a consensus with which South Africa immediately indicated that it disagreed.³⁵

Nevertheless, South Africa continued to participate in the work of the Conference. In the First Committee on the legal regime of the deep seabed, South Africa expressed the concern 'that all the projections and forecasts concerning the possible effects of sea-bed mining were short-term and based on a fairly large number of assumptions, as had been repeatedly stressed by the experts'.³⁶ It also argued that the challenge faced by the Conference was to

devise the means of ensuring that the Seabed Authority would be strong enough and that it would, at the same time, be obliged to concentrate on its work, while resisting the temptation to allow a possible majority to change its basic aims and induce it to intervene in political affairs, which it had not been established to handle.³⁷

In the Second Committee,³⁸ South Africa indicated that, as one of 'those countries whose natural living marine resources were being depleted by foreign vessels with little or no regard for rational exploitation',³⁹ it 'fully supported the concept of an exclusive economic zone extending to a maximum distance of 200 nautical miles measured from the baselines used for calculating the 12-mile territorial sea'.⁴⁰ It added that, if a

coastal State did not possess the capability to harvest the maximum sustainable yield, it should, until it had that capacity [and with a "suitable financial reward"], share with other States the exploitation of the resources in order to ensure that available stocks were fully utilized.⁴¹

Moreover, South Africa supported the view that '[c]oastal State jurisdiction within the economic zone should also embrace the right to

32 38th plenary meeting, 11 July 1974 (UN Doc A/CONF.62/SR.38 (1974)) para 114. Most developed States, including then West Germany, abstained.

33 40th plenary meeting, 12 July 1974 (UN Doc A/CONF.62/SR.40 (1974)) para 71.

34 40th plenary meeting (n 33 above) para 74 - 75. See also UN Doc A/CONF.62/L.8/REV.1 (1974) para 38, where it is stated that the Panafricanist Congress (PAC) was also invited; and Annex I, Res IV and Appendix 'Liberation Movements' to the Final Act of the Third UN Conference on the Law of the Sea ((1982) 21 ILM 1259).

35 40th plenary meeting (n 33 above) para 78.

36 12th meeting (n 27 above) para 30.

37 12th meeting (n 27 above) para 30.

38 Which dealt with the regimes of the maritime zones other than the deep seabed.

39 30th meeting, 7 August 1974 (UN Doc A/CONF.62/C.2/SR.30 (1974)) para 2.

40 27th meeting, 5 August 1974 (UN Doc A/CONF.62/C.2/SR.27 (1974)) para 8.

41 27th meeting (n 40 above) para 9. Two days later South Africa clarified that, as far as it was concerned, 'the coastal State should have sole discretion in that regard' (30th meeting (n 39 above)) para 3.

prevent and combat all forms of marine pollution' as well as control over scientific research, with the right 'to participate in the research and have access to the results'.⁴² Finally, South Africa called for international bodies competent with regard to '[h]ighly migratory and other living resources of the high seas beyond the limits of national jurisdiction' to be 'considerably strengthened', and for anadromous species to be given 'special management treatment'.⁴³ In the Third Committee on the preservation of the marine environment and scientific research, South Africa stressed that, as far as it was concerned, 'the problem of marine pollution, especially ship-based pollution, was of vital importance' and

[b]ecause of inadequate international arrangements, especially with regard to coastal State jurisdiction, South Africa had to spend large amounts of money on equipment and cleaning operations in order to minimize the effects of pollution caused by spillages or discharges.⁴⁴

For those reasons, South Africa indicated that it 'would support any proposal granting suitable powers of enforcement to the flag State, the port State or both', but that it was 'also necessary that the coastal States ... be endowed with strong and effective powers of enforcement'.⁴⁵

Towards the end of August 1974, reservations with regard to the credentials of South Africa were expressed again in the Credentials Committee by China, Hungary and the Ivory Coast (on behalf of the African delegations),⁴⁶ reservations which were reiterated at the plenary meeting dealing with the Committee's report by Albania, Algeria, Egypt and Yugoslavia.⁴⁷ The matter was brought to an end when South Africa withdrew from the Conference between its second and third session and, therefore, did not make any further contribution to the negotiations leading to the adoption of the UNCLOS.⁴⁸

42 27th meeting (n 40 above) para 12 - 13.

43 30th meeting (n 39 above) para 4 - 5.

44 12th meeting, 5 August 1974 (UN Doc A/CONF.62/C.3/SR.12 (1974)) para 24 - 25.

45 12th meeting (n 44 above) para 27. See also the 13th meeting, 9 August 1974 (UN Doc A/CONF.62/C.3/SR.13 (1974)) para 31.

46 UN Doc A/CONF.62/34 (1974) para 6 - 10.

47 50th plenary meeting (n 30 above) paras 8 - 9 & 11.

48 See in general DJ Devine 'Southern Africa and the law of the sea: Problems common, uncommon and unique' (1986) *Acta Juridica* 36. See further RE Bissell *Apartheid and international organizations* (1977); R Suttner 'Has South Africa been illegally excluded from the United Nations General Assembly' (1984) 17 *Comparative and International Law Journal of Southern Africa* 279-301; J Dugard 'Sanctions against South Africa. An international law perspective' in M Orkin (ed) *Sanctions against Apartheid* (1989) 113 - 122; United Nations *The United Nations and Apartheid 1948-1994* (1994).

1.3 South Africa as a state party to the LOSC and other international law of the sea treaties

Although South Africa was still not participating in UNCLOS III when the LOSC was adopted in 1982, it was allowed to sign the Convention with a declaration in 1984.⁴⁹ Thirteen years later, South Africa became the 122nd state to ratify the LOSC after the latter had come into force three years earlier in 1994. At the same time, South Africa was the 86th state to ratify the 1994 Agreement Relating to the Implementation of Part XI of the LOSC, which governs activities in the International Seabed Area.⁵⁰ Six years later, in 2003, South Africa was the 35th state to ratify the 1995 Agreement for the Implementation of the Provisions of LOSC Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.⁵¹

Upon its return to the General Assembly in 1994, South Africa stressed that it was 'fully aware of its responsibilities and obligations in both the marine and maritime fields', that it 'share[d] global concerns about the degradation of the marine environment' and that it would

fully cooperate at the regional and international levels to ensure the preservation of living and non-living marine resources to the benefit of all mankind, for posterity and for the very survival of the treasures of the Earth's oceans.⁵²

In 1997, South Africa welcomed the progress made by the International Seabed Authority and the International Tribunal for the Law of the Sea as well as the election of members of the Commission on the Limits of the Continental Shelf.⁵³ South Africa also indicated that it was 'pleased with the results of the increased inter-agency cooperation that now exist[ed] in the field of the oceans', while '[i]llegal foreign fishing in South Africa's territorial waters and its exclusive economic zone, particularly in the area surrounding the Prince Edward Islands, continue[d] and [was] a cause of great concern'.⁵⁴

49 MH Nordquist (ed) *United Nations Convention on the Law of the Sea 1982. A commentary vol V* (1989) 197 fn 22. See further FM Luyt 'Signature and ratification: a brief note' (1985) 1 *Sea Changes* 114 - 119. The two liberation movements were not entitled to sign as they are not listed in article 305 of the LOSC.

50 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (28 July 1994, 1836 UNTS 3). The Agreement came into force in 1996.

51 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (4 August 1995, 2167 UNTS 88). The Agreement came into force in 2001.

52 48th session, 101st meeting, 28 July 1994 (UN Doc A/48/PV.101) 9.

53 52nd session, 56th meeting, 26 November 1997 (UN Doc A/52/PV.56) 23 - 24.

54 52nd session (n 53 above) 24-25.

When a South African delegate next spoke in 2003, he stressed that '[c]apacity-building and the transfer of technology to developing countries are fundamental in the achievement of full implementation of the Convention' and that

[t]he need to assist developing countries with adequate resources to establish national and regional programmes and structures and to develop skills to ensure [its] effective implementation is crucial in maintaining and strengthening the regime of the oceans.⁵⁵

He added that 'South Africa attache[d] special importance to international cooperation on fisheries', that fishing subsidies were 'of great concern to South Africa as a developing coastal State' and that South Africa called 'for fairness and equity in the allocation of the share of fisheries resources for straddling and highly migratory fish stocks'.⁵⁶

In 2008, South Africa reiterated that it attached 'great importance to the conservation, management and sustainable use of marine living resources in the world's oceans as a basis for sustainable development'.⁵⁷ It also stressed that it was 'imperative to mitigate the impact of climate change on the oceans and to assist developing States, particularly coastal and small island States, in adapting to the effects of climate change'.⁵⁸ The following year, South Africa expressed its concern at the lack of implementation and operationalisation of the common heritage of humanity principle, including the 'most unsatisfactory situation' where a sub-commission to consider South Africa's continental shelf submission to the Commission on the Limits of the Continental Shelf would only be formed ten years after its submission, that is to say in 2019.⁵⁹ South Africa also repeated, with regard to the debate surrounding the question of the application of the common heritage of humankind principle to marine genetic resources in the deep seabed beyond areas of national jurisdiction, that, as far as it was concerned,

the common heritage of humankind principle is not solely about benefit sharing. It is just as much about conservation and preservation. The principle is about solidarity; solidarity in the preservation and conservation of a good we all share and therefore should protect. Solidarity also implies joint efforts to ensure that this good, which we all share, is for all our benefit.⁶⁰

55 58th session, 64th meeting, 24 November 2003 (UN Doc A/58/PV.64) 16 - 17.

56 58th session (n 55 above) 17.

57 63rd session, 63rd meeting, 4 December 2008 (UN Doc A/63/PV.63) 27.

58 63rd session (n 57 above) 27.

59 64th session, 56th meeting, 4 December 2009 (UN Doc A/64/PV.56) 22 - 23.

60 64th session (n 59 above) 23.

South Africa added, in 2010, that

the logic of [LOSC] is based on a zonal approach to regulation. It is therefore not the nature of the resources that determines the applicable regime, but rather the maritime zone in which the resources are found.⁶¹

After 'emphasiz[ing] the importance of enforcing the prohibition on shark finning',⁶² South Africa also expressed the 'hope that some of the laudable plans and visions that we[re] expressed in the course of' the 11th meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS)⁶³ devoted to the theme 'Capacity-building in ocean affairs and the law of the sea, including marine science', would be made real.⁶⁴ Moreover, South Africa indicated that it was pleased that the mandate of the Process, which had been established by the General Assembly in 1999,⁶⁵ had been extended, while it considered it unfortunate that no sufficient time had been set aside 'for the consideration of the selection of topics to ensure that the topics chosen provided for meaningful discourse to contribute significantly to the mandate of the General Assembly in oceans issues'.⁶⁶ South Africa also expressed the view that, 'where possible and without forcing the issue, the UNICPOLOS should be able to adopt agreed consensus elements with a view to assisting the General Assembly in its consultations on the omnibus draft resolution' which the Assembly adopts every year and in favour of which South Africa has consistently voted.⁶⁷ South Africa repeated in 2012 its 'continued and steadfast call for an implementing agreement for

61 65th session, 59th meeting, 7 December 2010 (UN Doc A/65/PV.59) 18.

62 65th session (n 61 above) 17.

63 See the Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its eleventh meeting (UN Doc A/65/164 (2010)).

64 65th session (n 61 above) 17.

65 Resolution 54/33. At the third meeting in 2002, the Head of the Permanent Mission of South Africa to the United Nations stressed in a presentation on the protection and preservation of the marine environment that the servicing of the relevant international instruments 'required excessive financial and human resources on the part of a developing country like South Africa,' but that the country had no choice but to commit those resources because 'to do otherwise would result in the marginalisation of national objectives and rights of developing countries in international fora' (Summary of discussions available at http://www.un.org/Depts/los/consultative_process/3rdMeetingPanels.htm (accessed 30 April 2015)). At the eighth meeting in 2007, the 'Director of the Sustainable Seas Trust and African Coelacanth Ecosystem Programme of the South African Institute for Aquatic Biodiversity presented an example of regional cooperation and coordination for the conservation and sustainable use of ocean resources, catalysed by the existence and protection of the coelacanth in the western Indian Ocean, highlighting challenges faced by African countries in terms of capacity-building and sustainable development of coastal communities' (Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its eighth meeting (UN Doc A/62/169 (2007) para 19)).

66 65th session (n 61 above) 17.

67 65th session (n 61 above) 17.

[LOSC] on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction'.⁶⁸

South Africa has not deposited yet the charts or lists of geographical coordinates relating to the baselines, outer limit lines and lines of delimitation referred to in articles 16(2), 47(9), 75(2) and 84(2) of the LOSC. In contrast, South Africa met the 2009 deadline for the submission to the Commission on the Limits of the Continental Shelf of information on the limits of the South African continental shelf beyond 200 nm from the mainland.⁶⁹ The submission, which involves about 1 137 000 km²,⁷⁰ is based on the 1 per cent sediment thickness method⁷¹ in the west, together with an alternation of the 'foot of the slope + 60 nm' method⁷² and the '2 500 m + 100 nm' method⁷³ in the south and east, with the 350 nm method⁷⁴ being used on a short section immediately south of Mossel Bay.⁷⁵ South Africa also made a joint submission with France with regard to the areas around the Crozet Islands and the Prince Edward Islands.⁷⁶ As far as the latter's continental shelf is concerned, the submission, which involves about 600 000 km²,⁷⁷ is based on the 350 nm method⁷⁸ to the north-east and north; the 'foot of the slope + 60 nm' method⁷⁹ to the north-west, west, south-south-west and south-east; as well as the 350 nm method⁸⁰ again to the south-west.⁸¹

68 67th session, 50th meeting, 10 December 2012 (UN Doc A/67/PV.50 page 14). On the work of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, established pursuant to paragraph 73 of General Assembly Resolution 59/24, see UN Doc A/61/65 (2006), UN Doc A/63/79 (2008), UN Doc A/65/68 (2010), UN Doc A/66/119 (2011), UN Doc A/67/95 (2012), UN Doc A/68/399 (2013) and UN Doc A/AC.276/6 (2013).

69 See UN Doc CLCS.31.2009.LOS (continental shelf notification) of 5 May 2009.

70 UNEP/Grid-Arendal *Continental Shelf. The Last Maritime Zone* (2009) 31. The area is almost the size of South Africa's land territory.

71 LOSC (n 1 above) art 76(4)(a)(i).

72 LOSC (n 1 above) art 76(4)(a)(ii) & 76(4)(b).

73 LOSC (n 1 above) art 76(5).

74 As above.

75 See page 4 and table 1 of the submission's executive summary. South Africa does not claim a continental shelf beyond 200 nm south-west of Cape Town. See further P Vrancken *South Africa and the law of the sea* (2011) 188 - 189.

76 Doc CLCS.34.2009.LOS (continental shelf notification) of 7 May 2009. The submission's executive summary is available at www.un.org/Depts/los/clcs_new/submissions_files/frazaf34_09/frazaf2009exec_sum_resume.pdf (accessed 29 April 2015).

77 UNEP (n 70 above) 31.

78 LOSC (n 1 above) art 76(5).

79 LOSC (n 1 above) art 76(4)(a)(ii) & 76(4)(b).

80 LOSC (n 1 above) art 76(5) LOSC.

81 Page 4 and appendix of the submission's executive summary. South Africa does not claim a continental shelf beyond 200 nm south of the Prince Edward Islands. Altogether, the submission to the CLCS is much less ambitious than what appeared since 1994 through the series of straight lines joining the coordinates listed in Schedule 3 of the MZA. See section 8(2) of the Maritime Zones Act 15 of 1994. See further Vrancken (n 75 above) 190 - 191.

South Africa has been a member of the Council of the International Seabed Authority in 1996-1998⁸² as well as 2001-2002 and from 2004 to 2012.⁸³ A South African is a member of the International Tribunal for the Law of the Sea since 2005 and its vice-President from 2011 to 2014.⁸⁴ No South African national has as yet been nominated to be a member of the Commission on the Limits of the Continental Shelf.

Over and above the LOSC and its related instruments already mentioned, South Africa is a party to a wide range of international law instruments regulating activities at sea.

1.4 South Africa as a member of international organisations involved in matters concerning the international law of the sea

1.4.1 Global level

South Africa is a member of global international organisations the activities of which have an impact on matters concerning the international law of the sea. One of those organisations is the International Hydrographic Organisation (IHO), which has a Southern Africa and Islands Hydrographic Commission.⁸⁵ The Commission, which was established in Cape Town in 1996, consists of France, Mauritius, Mozambique, Norway, South Africa and the United Kingdom, as members, as well as Angola, Comoros, Kenya, Madagascar, Malawi, Namibia, Portugal, the Seychelles and Tanzania, as associate members.⁸⁶ 'The main achievements [of the Commission] have been the agreements reached to improve surveying and charting in the region, with focus on capacity building'.⁸⁷ As far as it is concerned, South Africa has been appointed Coordinator of the INT Chart Scheme Region H, which

82 As one of 18 States Parties 'elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole' (section 3(15)(e) of the Annex of the 1994 Agreement Relating to the Implementation of Part XI of the 1982 UN Convention on the Law of the Sea).

83 As one of four of the 'States Parties which, on the basis of production in areas under their jurisdiction, are major net exporters of the categories of minerals to be derived from the Area' (section 3(15)(c) of the Annex of the 1994 Agreement Relating to the Implementation of Part XI of the 1982 UN Convention on the Law of the Sea).

84 See the biographical information regarding Judge AJ Hoffmann at <https://www.itlos.org/the-tribunal/members/judge-albert-j-hoffmann/> (accessed 30 April 2015).

85 South Africa ratified the Convention on the International Hydrographic Organisation (3 May 1967, 751 UNTS 41) in 1968.

86 See the Statutes of the Commission http://www.iho.int/mtg_docs/rhc/statutes/SAIHC_Statutes_2013.pdf (accessed 30 April 2015).

87 IHO 'Southern Africa and Islands Hydrographic Commission (SAIHC)' http://www.iho.int/srv1/index.php?option=com_content&view=article&id=431&Itemid=390 (accessed 30 April 2015).

includes the south-east Atlantic Ocean, the south-west Indian Ocean and the adjacent segment of the Southern Ocean.⁸⁸

South Africa became a member of the International Maritime Organisation (IMO) in 1995.⁸⁹ Since then, South Africa has been a member of the IMO Council⁹⁰ and many of the Organisation's committees and working groups.⁹¹ It has also been instrumental in facilitating a number of IMO initiatives, starting with financially contributing to and hosting a Conference on Maritime Search and Rescue and the Global Maritime Distress and Safety System for countries in the Western Indian Ocean, Red Sea and the Persian Gulf in 1996,⁹² and ending with hosting in 2012 a conference focussing on the implementation of the provisions of the 1993 Torremolinos Protocol to the 1977 International Convention on the Safety of Fishing Vessels.⁹³

As a developing state, South Africa does call upon the IMO for assistance when needed. For instance, in 2005, South Africa submitted under article IX of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, a 'request for scientific, technical and legal training to improve South Africa's compliance with the London Convention and Protocol, particularly with regard to monitoring and enforcement'.⁹⁴ That is not to say that South Africa is not holding its own in a number of maritime related fields. For instance, a Resource Ballast Technologies System developed in South Africa was approved by IMO in 2008.⁹⁵ Three years earlier, South Africa submitted a proposal for

88 IHO (n 87 above).

89 The organisation was established by the 1948 Convention on the Intergovernmental Maritime Consultative Organisation (6 March 1948, 289 UNTS 48). Its name was changed in 1975 and 1977 by IMO Assembly resolutions A.358(IX) and A.371(X) respectively.

90 See for instance IMO Doc C 94/INF.1 (2005), C 96/INF.1 (2006), C 97/INF.1 (2006), C 98/INF.1 (2007), C/ES 24/INF.1 (2007), C 99/INF.1 (2008), C 101/INF.1 (2008), C 102/INF.1 (2009), C/ES.25/INF.1 (2009), C 103/INF.1 (2009), C 104/INF.1 (2010). A South African has been vice chairman in many sessions.

91 For instance, a South African was the chairperson at the first three sessions of the Council Risk Review, Management and Reporting Working Group in 2007 - 2008 (IMO Doc CWGRM 1/INF.1 (2007), CWGRM 2/INF.1 (2007), CWGRM 3/INF.1 (2008)) as well as the 7th, 8th, 9th and 11th sessions of the Ad Hoc Council Working Group on the Organisation's Strategic Plan in 2007-2010 (IMO Doc CWGSP 7/INF.1 (2007), CWGSP 8/INF.1 (2008), CWGSP 9/INF.1 (2009) and CWGSP 11/INF.1 (2010)).

92 See IMO Doc COMSAR 5/INF.2 (2000) 166 - 238.

93 <http://cil.nus.edu.sg/1993/1993-torremolinos-protocol-relating-to-the-1977-torremolinos-international-convention-for-the-safety-of-fishing-vessels/> (accessed on 30 April 2015). The Conference produced the Cape Town Agreement on the Implementation of the 1993 Protocol, <http://cil.nus.edu.sg/2012/2012-cape-town-agreement-on-the-implementation-of-the-provisions-of-the-1993-torremolinos-protocol-relating-to-the-1977-international-convention-for-the-safety-of-fishing-vessels/> (accessed 30 April 2015). See further <http://www.imo.org/About/Conventions/ListOfConventions/Pages/The-Torremolinos-International-Convention-for-the-Safety-of-Fishing-Vessels.aspx> (accessed 30 April 2015).

94 IMO Doc LC/SG 28/5/4 (2005). See also IMO Doc LC 27/8 (2005).

95 IMO Doc MEPC 59/2/10 (2008).

the designation of South Africa's southern continental shelf waters as a special area under Annex I of MARPOL.⁹⁶ The proposal was adopted by the Marine Environment Protection Committee in 2007 and the relevant amendments came into force on 1 March 2008.⁹⁷

South Africa was one of the 34 states which signed the Constitution of the Food and Agriculture Organisation in 1945⁹⁸ and was a member of the Organisation's Council⁹⁹ until it withdrew from the Organisation in 1963 in protest against the activities of the UN with regard to racial discrimination.¹⁰⁰ South Africa was readmitted thirty years later,¹⁰¹ was a member of the Council from 1997 to 2002 as well as from 2007 to 2010 and is again a member since 2013. South Africa is also a member of the Committee on Fisheries (COFI).¹⁰² The 6th session of the COFI Sub-Committee on Aquaculture¹⁰³ was held in Cape Town in 2012.¹⁰⁴ South Africa has not been involved to the same extent in the sessions of the COFI Sub-Committee on Fish Trade.¹⁰⁵

Moreover, South Africa contributes financially to the International Whaling Commission (IWC)¹⁰⁶ and is actively involved in the latter's work. For instance, in 2012, South Africa co-sponsored a proposal to establish a South Atlantic Whale Sanctuary¹⁰⁷ and contributed to the adoption of a Schedule amendment to enable indigenous peoples to continue meeting their aboriginal subsistence needs.¹⁰⁸ South Africa also opposed plans by South Korea to start lethal scientific whaling, on the

96 IMO Doc MEPC 54/8 (2005). See also IMO Doc MEPC.54/INF.2 (2005) and IMO Doc MEPC 54/21 (2006) paragraphs 8.7 - 8.10.

97 IMO Doc MEPC 56/8/1 (2007) paragraph 11.

98 SATS 11/1947.

99 A South African was temporary chairperson in 1948.

100 United Nations (n 48 above) 13, 42.

101 United Nations (n 48 above) 126.

102 The Committee was established by the Conference as a committee of the Council in 1965 (Resolution 13/65). South Africa was part of the drafting committee during the 25th session in 2003 (FAO Doc FIPL/R702(En) (2003)) and a South African was the chairperson of the committee during the 26th session in 2005 (FAO Doc FIPL/R780 (En) (2005)).

103 The Sub-Committee was established by COFI in 2001.

104 FAO Doc FIRA/R1006(Tri) (2012) <http://www.fao.org/cofi/34736-07ac23d09354a6895cd0a3a71486cfe2f.pdf> (accessed 30 April 2015). The chairperson was a South African and South Africa was a member of the drafting committee.

105 The Sub-Committee was established by COFI in 1985.

106 See for instance the 2012 *Annual Report of the International Whaling Commission*. (hereafter 2012 *IWC Annual Report*)161.

107 2012 *IWC Annual Report* (n 106 above) 8. The proposal, which had been submitted each year between 2001 and 2008 as well as in 2011, did not muster the required number of supporting votes (see 2012 *IWC Annual Report* (n 106 above) 9).

108 IWC Doc IWC/64/10. South Africa expressed its sympathy for 'people who depended upon subsistence whaling and said that while the development of alternative livelihood programmes such as whalewatching were helpful they could not solve all of the problems involved' (2012 *IWC Annual Report* 20-21). A South African was the chairperson of the Aboriginal Subsistence Whaling Sub-committee during its meeting in June 2012 (2012 *IWC Annual Report* (n 106 above) 15, 78). That person had been the chairperson of the Working Group on Whale Killing Methods and Associated Welfare Issues in 2011 (2012 *IWC Annual Report* (n 106 above) 107).

ground that there was no longer any need to kill animals in the light of the many new non-lethal methods to obtain data.¹⁰⁹ By contrast, South Africa congratulated the USA on the development of 'spectacular and sophisticated mapping packages which were incredibly useful for developing practical mitigation measures' and indicated that it 'would like to collaborate intersessionally with the USA on further development and use of the tools'.¹¹⁰ Finally, South Africa submitted to the IWC Scientific Committee information 'on long-term records of bycatches off South Africa',¹¹¹ informed the Committee of its plans for a South African Blue Whale project,¹¹² was granted research funding for a right whale survey off South Africa¹¹³ and 'thanked the Scientific Committee for its review of ziphiids' while noting that 'the Committee had expressed great concern regarding the conservation status of several small cetacean species and had made recommendations to mitigate impacts'.¹¹⁴

1.4.2 Continental level

At the continental level, South Africa played a leading role in the adoption of the 2009 African Maritime Transport Charter and the 2050 Africa Integrated Maritime Strategy. The latter, adopted in 2014 by the Assembly of Heads of State and Government of the AU,¹¹⁵ stresses that 'the development of [the African Maritime Domain] requires ... the implementation of national and international regulations and instruments'¹¹⁶ to improve the existing 'vulnerable legal framework[s]'.¹¹⁷ For that reason, one of the strategic objectives of the Strategy is to '[p]romote the ratification, domestication and implementation of international legal instruments'¹¹⁸ while coordinating the harmonisation of the domestic regulatory regimes¹¹⁹ into 'an African unified and harmonised Maritime Code'.¹²⁰ An important milestone on the road towards achieving that goal was the establishment in Johannesburg in October 2013 of the African Association of National Maritime Administrations, to which the South African Maritime Safety Authority contributed to a considerable extent.

109 2012 *IWC Annual Report* (n 106 above) 43.

110 2012 *IWC Annual Report* (n 106 above) 48.

111 2012 *IWC Annual Report* (n 106 above) 39.

112 2012 *IWC Annual Report* (n 106 above) 12. The Project 'is to combine acoustic technology with traditional line transect sighting and mark-recapture surveys methods in waters off South Africa and in the Antarctic'.

113 2012 *IWC Annual Report* (n 106 above) page 151.

114 2012 *IWC Annual Report* (n 106 above) page 54.

115 The 2050 AIM Strategy (AU Doc Assembly/AU/16(XXII) Add.1) is available at <http://pages.au.int/maritime/documents/2050-aim-strategy-0> (accessed 30 April 2015).

116 2050 AIM Strategy (n 115 above) para 4.

117 2050 AIM Strategy (n 115 above) para 16.

118 2050 AIM Strategy (n 115 above) para 21(x).

119 2050 AIM Strategy (n 115 above) para 24(e).

120 2050 AIM Strategy (n 115 above) para 25(xxi).

1.4.3 Regional level

South Africa participates in the governance of three of the regions involved in the UNEP Regional Seas Programme. Indeed, South Africa is a founder member of the Commission for the Conservation of Antarctic Marine Living Resources and participates actively in the work of the Commission.¹²¹ For instance, in 2012, South Africa stated that, because it had 'suffered tremendously from IUU fishing',¹²² it 'welcome[d] measures that are meant to combat IUU', but considered market-related measures proposed by the EU to be 'not acceptable' mainly on the grounds, relied upon by Argentina, that those 'measures represent an unfair restriction on trade and an arbitrary and unjustifiable discrimination under the rules of the WTO', and similar measures taken by regional fisheries management organisations, 'whose objectives are the optimisation of economic benefits[,] should not be transferred to the context of the Antarctic Treaty System'.¹²³ South Africa also hosted an African Capacity Building Workshop which 'made an important contribution to improving understanding and acceptance of [the Commission] and ... forged strong links between other organisations and' the Commission.¹²⁴

As far as the Eastern African region is concerned, South Africa participates actively in the meetings of the contracting parties to the 1985 Nairobi Convention. For instance, during the seventh meeting in 2012, South Africa, which was elected Vice Chair (Resources Mobilisation) of the meeting's bureau,¹²⁵ argued that 'a new way of thinking [was] essential if' the Parties to the Convention were to progress because '[t]he oceans and the coastlines are dynamic areas with a hive of human activities' and '[n]umerous organisations that are in essence specialist organisations of some or most of those activities need to be brought closer to [the] fold, to ensure that information sharing and cross pollination of ideas takes place'.¹²⁶ Furthermore, South Africa is one of the national nodes of the Nairobi Convention Clearinghouse Mechanism for Information and Awareness.¹²⁷ South Africa is likewise actively engaged in the Western and Central African region. Indeed, South Africa, which is the only contracting party to have honoured its financial commitments,¹²⁸ was paid by the Executive Director of UNEP 'a deserved tribute ... for its tireless

121 South Africa also participates in some of the fisheries and is involved in research fishing in segments of the Convention area.

122 Reference was made specifically to 'the decimation of the Patagonian toothfish fishery around the Prince Edward Islands in the 1990s'.

123 Paragraph 3.17 read with paragraph 3.15 of the 2012 Report of the Standing Committee on Implementation and Compliance (CCAMLR Doc CCAMLR-XXXI (2012)) 130 - 131.

124 Report of the Standing Committee on Implementation and Compliance (n 123 above) para 8.15 page 139.

125 UN Doc UNEP(DEPI)/EAF/CP.7 (2012) 11.

126 UN Doc UNEP(DEPI)/EAF/CP.7 (n 125 above) 41.

127 UN Doc UNEP(DEPI)/EAF/CP.7 (n 125 above) 61.

128 UN Doc UNEP(DEPI)/WACAF/COP.9/10 (2011) 12.

support to the Convention' at the ninth meeting of the contracting parties to the 1981 Abidjan Convention in 2011.¹²⁹

South Africa is also involved in a number of other regional organisations involved in matters concerning the international law of the sea. For instance, South Africa participates in the work of the Southern African Transport and Communication Commission (SATCC), the SADC body constituted to guide and coordinate cooperation and integration policies and programmes in the transport sectoral area.¹³⁰ It comprises a technical unit, the SATCC-TU,¹³¹ as well as sub-sectoral committees with their specialised working groups,¹³² which report to the Committee of Senior Officials,¹³³ which in turn reports to the Committee of Ministers.¹³⁴

Moreover, South Africa is an active member of the International Commission for the Conservation of Atlantic Tunas (ICCAT), chairing the Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures in 2010,¹³⁵ chairing Panel 3 (temperate tunas, South) in 2011-2012¹³⁶ and hosting the 23rd regular meeting of the Commission in 2013. Since it became a member in 2008, South Africa participates actively in the work of the South East Atlantic Fisheries Organisation (SEAFO).¹³⁷

129 UN Doc UNEP(DEPI)/WACAF/COP.9/10 (n 128 above) 10.

130 Article 13.3(1) of the Protocol on Transport, Communication and Meteorology (24 August 1996) to the Treaty of the Southern African Development Community (SADC Treaty) (17 August 1992, 32 ILM 116, 5 AJICL 418) read with article 12(1) of the Treaty. See further articles 13.14 and 13.17-13.19 of the Protocol.

131 Protocol on Transport (n 130 above) art 13.3(2)(d). The SATCC-TU is the body 'providing technical, implementation and monitoring support to all the implementation agencies with the implementation of the provisions of the Protocol, monitoring compliance by Member States with their obligations in terms of the Protocol and providing secretarial and administrative support to the SATCC and to this end, may receive requests for assistance from all components of the SATCC'. See further articles 13.10-13.12 as well as art 13.15 & 13.16 of the Protocol.

132 Protocol on Transport (n 130 above) art 13.3(2)(c). There is a Ports and Shipping Services Sub-Committee as well as a Maritime Safety and Marine Environment Sub-Committee. See further the Protocol on Transport (n 130 above) arts 13.6 & 13.7.

133 Protocol on Transport (n 130 above) art 13.3(2)(b). The Committee of Senior Officials serves "as nodal point to guide and co-ordinate the sectoral and sub-sectoral implementation strategies and sustain their implementation within the parameters of the regional policy agenda". See further article the Protocol on Transport (n 130 above) art 13.5.

134 Protocol on Transport (n 130 above) art 13.3(2)(a), which provides that the Committee of Ministers is responsible for 'overall guidance and general coordination for the preparation and the implementation of a regional policy agenda and development strategies'. See further the Protocol on Transport (n 130 above) art 13.4.

135 Report for Biennial Period, 2008-2009, Part II (2009) vol. 1, Annex 11, paragraph 9 (available at http://www.iccat.int/Documents/BienRep/REP_EN_08-09_II_1.pdf (accessed 14 May 2015)).

136 Report for Biennial Period, 2010 - 2011, Part II (2011) vol. 1, page i.

137 Established by article 5(1) of the 2001 Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean (Windhoek, 4 April 2001 L234 p40).

As far as the waters within national jurisdiction are concerned, South Africa signed a Strategic Action Programme for the Benguela Current Large Marine Ecosystem in 1999,¹³⁸ which was given effect first by means of the 2007 Interim Agreement on the Establishment of the Benguela Current Commission,¹³⁹ and now by means of the Benguela Current Convention signed in 2013.¹⁴⁰ On the other side of its coast, South Africa played an active role in the creation,¹⁴¹ and is a member of the South West Indian Ocean Fisheries Commission.¹⁴² South Africa is a cooperating non-contracting party to the 1993 Agreement for the Establishment of the Indian Ocean Tuna Commission.¹⁴³ South Africa is also a non-contracting participating member of the Commission for the Conservation of Southern Bluefin Tuna.¹⁴⁴

2 Incorporation and implementation of the international law of the sea into the South African legal order

2.1 Constitutional law

The South African Constitution does not include a provision expressly defining the state's territory. The most relevant provision is section 103, which provides that the Republic has nine provinces¹⁴⁵ and that '[t]he geographical areas of the respective provinces comprise the sum of the indicated geographical areas reflected in the various maps referred to in the Notice listed in Schedule 1A' of the Constitution.¹⁴⁶ In none of those maps is the territorial sea included in the territory of the adjacent municipality. The position was the same before section 103 was amended, as well as under the 1993 Constitution,¹⁴⁷ when the national territory and the

138 Together with Angola and Namibia.

139 31 January 2007 http://www.benguelacc.org/index.php/en/component/docman/doc_download/113-interim-agreement-english (accessed 30 April 2015)

140 18 March 2013 http://www.benguelacc.org/index.php/en/component/docman/doc_download/695-signed-benguela-current-convention-english (accessed 30 April 2015).

141 See FAO Doc SAFR/DM/SWIO/04/INF 6 E (2004).

142 The Statutes of the Commission were adopted in 2004. See FAO Council Resolution 1/127 (FAO Doc SAFR/DM/SWIOFC/05/INF 4 E (2004)). South Africa is also a member of the South West Indian Ocean Fisheries Project. See SWIOPF 'Background and context' available at <http://www.swiofp.net/about> (accessed 30 April 2015).

143 Agreement for the Establishment of the Indian Ocean Tuna Commission (25 November 1993, 1927 UNTS 329). South Africa is not a signatory of the 2006 Southern Indian Ocean Fisheries Agreement http://www.fao.org/fileadmin/user_upload/legal/docs/2_035t-e.pdf (accessed 30 April 2015).

144 The Convention for the Conservation of Southern Bluefin Tuna (10 May 1993, 1819 UNTS 359) art 6(1).

145 The Constitution of the Republic of South Africa, 1996 sec 103(1).

146 n 145 above, sec 103(2).

147 The Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution) secs 1(2) & 124(2).

provinces were defined in terms of magisterial districts. As a result, two approaches to the question whether the South African territorial sea is part of the South African territory are possible: a narrow approach, in terms of which it is not; and a broad approach, in terms of which it is.¹⁴⁸

It would appear, however, that section 233 of the Constitution demands that section 103 be interpreted as only defining the land territory of the provinces, because such an interpretation is reasonable and more consistent with international law. Indeed, when interpreted in this way, section 103 of the Constitution does not stand in the way of the incorporation into South African domestic law, in terms of section 232 of the Constitution, of the customary international law principle that the territorial waters of a coastal state are part of its territory.¹⁴⁹ The fact that South Africa has internal waters and a territorial sea is confirmed by the Maritime Zones Act, 1994,¹⁵⁰ in terms of which the state also claims a contiguous zone¹⁵¹ and an exclusive economic zone,¹⁵² over and above its continental shelf.¹⁵³

The Constitution places most matters concerning the international law of the sea within the jurisdiction of the national sphere of government. Indeed, the Constitution expressly excludes 'marine resources' as well as 'the regulation of international and national shipping and matters related thereto' from the functional areas of concurrent national and provincial legislative competence.¹⁵⁴ As a result, the latter only include cultural matters, the environment and pollution control as well as nature conservation, pontoons, ferries, jetties, piers and harbours to the extent of the abovementioned limitation.

Executive powers relating to matters concerning the international law of the sea are divided between several departments, including the Department of Agriculture, Forestry and Fisheries,¹⁵⁵ the Department of

148 There has never been any doubt in South African law that the South African internal waters are part of the South African territory. See P Vrancken 'The marine component of the South African territory' (2010) 127 *South African Law Journal* 211.

149 There has never been any doubt in South African law that the South African internal waters are part of the South African territory. See Vrancken (n 148 above) 218 - 223.

150 Maritime Zones Act 15 of 1994 secs 3 & 4 respectively. In *Schlumberger Logelco Inc v Coflexip SA* 2000 (3) SA 861 (SCA) para 5, the Supreme Court of Appeal confirmed that the object of the Act was 'to bring our law in line with the LOSC'. In terms of sec 4(1), South Africa claims a territorial sea of the greatest breadth allowed by article 3 of LOSC: 12 nautical miles.

151 n 150 above, in terms of sec 5(1), South Africa claims a contiguous zone extending up to the greatest distance from the baselines allowed by art 33(2) of LOSC: 24 nautical miles. The area is also the maritime cultural zone (sec 6(1)).

152 n 150 above, in terms of sec 7(1), South Africa claims a contiguous zone extending up to the greatest distance from the baselines allowed by article 57 of LOSC: 200 nautical miles.

153 n 150 above, sec 8(1) states that the continental shelf is 'as defined in article 76 of' LOSC.

154 n 145 above, schedule 4.

155 More specifically the Fisheries Management Branch.

Defence, the Department of Environmental Affairs,¹⁵⁶ the Department of International Relations and Cooperation, the Department of Mineral Resources and the Department of Transport.¹⁵⁷

2.2 Secondary legislation

2.2.1 Maritime zones

The Maritime Zones Act 15 of 1994, confirms that the normal South African baseline corresponds to that defined by LOSC: the low-water line.¹⁵⁸ The Act gives effect to the provisions of LOSC regarding baselines around ports¹⁵⁹ and straight baselines¹⁶⁰ although, as far as the latter are concerned, it is doubtful that the South African coast actually meets everywhere the requirements for the drawing of such baselines.¹⁶¹ In terms of the Act, South Africa asserts in its contiguous zone,¹⁶² its exclusive economic zone¹⁶³ and its continental shelf¹⁶⁴ the main powers conferred upon coastal states by LOSC.¹⁶⁵ Moreover, the Act recognises the right of innocent passage both in the internal waters which were territorial waters before the commencement of the Act,¹⁶⁶ and in the territorial sea.¹⁶⁷

2.2.2 Right of innocent passage

The right of innocent passage is defined and regulated by the Marine Traffic Act 2 of 1981,¹⁶⁸ and it is obvious that the drafters of the Act relied

156 More specifically the Oceans and Coasts Branch.

157 The Department's Chief Directorate Shipping was replaced by the South African Maritime Safety Authority (SAMSA) established by the South African Maritime Safety Authority Act 5 of 1998.

158 See the Maritime Zones Act (n 150 above) sec 2(1) and LOSC (n 1 above) art 5.

159 See the Maritime Zones Act (n 150 above) sec 2(3)-(5) and LOSC (n 1 above) art 11.

160 See the Maritime Zones Act (n 150 above) sec 2(2) and schedule 2 and LOSC (n 1 above) art 7.

161 See Vrancken (n 75 above) 85 - 90.

162 See the Maritime Zones Act (n 150 above) sec 5(2) and LOSC (n 1 above) art 33(1). South Africa also asserts rights and powers (s 6(2)) apparently corresponding to those allowed by article 303(2) of LOSC (n 1 above).

163 See the Maritime Zones Act (n 150 above) sec 7(2) and LOSC (n 1 above) art 56(1)(a).

164 See the Maritime Zones Act (n 150 above) sec 8(3) and LOSC (n 1 above) art 77(1).

165 As far as installations (defined in section 1 of the Maritime Zones Act (n 150 above)) are concerned, see the Maritime Zones Act (n 150 above) sec 9 and LOSC (n 1 above) arts 60 and 80. In terms of section 10, South Africa asserts the right, 'in any area of the sea or the airspace above the sea, [to] take such measures as are necessary against any vessel or aircraft in order to protect the coastline of the Republic or related interests, including fishing, from pollution or any threat of pollution resulting from a maritime casualty or an act or omission relating to such a casualty and which may reasonably be expected to result in major harmful consequences'. See, as far as the exclusive economic zone is concerned, LOSC (n 1 above) art 56(1)(b)(iii).

166 See the Maritime Zones Act (n 150 above) sec 3(3) and LOSC (n 1 above) art 8(2). See further Vrancken (n 75 above) 120.

167 See the Maritime Zones Act (n 150 above) sec 4(3) and LOSC (n 1 above) art 17.

168 Marine Traffic Act 2 of 1981.

upon the relevant draft provisions of the LOSC¹⁶⁹ in that the use of two different provisions to define the terms 'passage' and 'innocent passage' in the LOSC¹⁷⁰ was followed in the Act.¹⁷¹ Nevertheless, the concept of 'passage' is wider in South African law, while the concept of 'innocence' appears to be narrower.¹⁷² The Act incorporated into South African law both the requirement that submarines and other underwater vehicles navigate on the surface and show their flag while in the territorial sea,¹⁷³ and the power to suspend the right of innocent passage temporarily.¹⁷⁴ The Act does not deal expressly with the right of innocent passage of warships.¹⁷⁵

2.2.3 Contiguous zone regime

Several pieces of South African legislation relate to the powers given by the LOSC to South Africa in its contiguous zone. The International Trade Administration Act 71 of 2002,¹⁷⁶ confers extensive powers to the investigating officers appointed by the International Trade Administration Commission.¹⁷⁷ However, the Act is silent on the issue of whether those powers may be exercised beyond the maritime borders of South Africa, that is, the outer limits of its territorial sea.¹⁷⁸ As far as it is concerned, the Customs and Excise Act 91 of 1964,¹⁷⁹ allows the Commissioner to patrol the South African borders and acquire any equipment necessary for patrolling the state's sea borders,¹⁸⁰ while empowering an officer patrolling the borders to make an arrest.¹⁸¹ The Act provides that '[a]ny customs patrol boat may exercise on behalf of the Republic, or on behalf

169 The drafters retained, however, the term 'territorial waters' used in earlier legislation (see the Territorial Waters Act 87 of 1963) instead of adopting the term 'territorial sea' used in LOSC.

170 n 1 above, arts 18 - 19.

171 n 168 above, sec 1(iii) and (viii).

172 See Vrancken (n 75 above) 141 - 143.

173 See the Marine Traffic Act (n 168 above) sec 3 and LOSC (n 1 above) art 20.

174 See the Marine Traffic Act (n 168 above) sec 7(1) and LOSC (n 1 above) art 25(3). Section 7(1) is silent on the issue of whether a suspension may be decreed and enforced in such a way as to discriminate between ships of different States and must be interpreted in terms of section 233 of the Constitution so as to exclude any discrimination when decreeing or enforcing a suspension. See further Vrancken (n 75 above) 144.

175 If a customary international rule has crystallised to the effect that warships have a right of innocent passage, the right would also exist in South African law if one interprets the Act in accordance with section 233 of the Constitution as leaving the issue open. See further Vrancken (n 75 above) 145.

176 International Trade Administration Act 71 of 2002.

177 n 176 above, secs 38 - 45.

178 On the ground that the powers of the coastal State in its contiguous zone with regard to customs and fiscal matters are of a customary international law nature, at least with regard to contraventions within the land territory, the internal waters or the territory sea of the State, investigating officers would be entitled to exercise their powers in the contiguous zone if one interprets the Act in accordance with section 233 of the Constitution as leaving the issue open.

179 Customs and Excise Act 91 of 1964.

180 n 179 above, sec 4C(1)(a).

181 n 179 above, sec 4C(1)(b).

of a foreign state, the right of hot pursuit of any vessel in accordance with article 111 of the' LOSC.¹⁸² However, the Act is once again silent on the issue of whether the powers which it confers may be exercised beyond the outer limits of the South African territorial sea in cases other than hot pursuit.¹⁸³ The Immigration Act 13 of 2002,¹⁸⁴ is also silent as far as the powers of immigration officers are concerned.¹⁸⁵

2.2.4 Exploitation of natural resources

The Marine Living Resources Act 18 of 1998,¹⁸⁶ incorporated into domestic law the international rights and duties of South Africa with regard to living natural resources in its exclusive economic zone and continental shelf,¹⁸⁷ by giving effect to the provisions of the LOSC regarding the conservation and utilisation of the living resources,¹⁸⁸ as well as the enforcement of the laws and regulations of the coastal state.¹⁸⁹ The Act compels the Minister and any other organ of state exercising any power under the Act to have regard to 'any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law'.¹⁹⁰ More specifically, the Act empowers the Minister to make regulations 'prescribing fines greater in amount than those already specified in any provision of th[e] Act' if this is necessary to ensure that South African law is 'in accordance with international law'.¹⁹¹ In addition, the Act requires that the Minister has 'due regard' to the provisions of the LOSC when making regulations 'prescribing the operation of, and conditions and procedures to be

182 Customs and Excise Act (n 179 above) sec 4C(3)(a).

183 On the ground that the powers of the coastal state in its contiguous zone with regard to customs and fiscal matters are of a customary international law nature, at least with regard to contraventions within the land territory, the internal waters or the territory sea of the State, customs officers would be entitled to exercise their powers in the contiguous zone if one interprets the Act in accordance with section 233 of the Constitution as leaving the issue open. The same reasoning would apply in the case of the Counterfeit Goods Act 37 of 1997.

184 Immigration Act 13 of 2002.

185 On the ground that the powers of the coastal state in its contiguous zone with regard to immigration matters are of a customary international law nature, at least with regard to contraventions within the land territory, the internal waters or the territory sea of the State, immigration officers would be entitled to exercise their powers in the contiguous zone if one interprets the Act in accordance with section 233 of the Constitution as leaving the issue open. As far as the same area *qua* maritime cultural zone is concerned, the National Heritage Resources Act 25 of 1999 does include among the heritage resources which must be considered part of the national estate wrecks and any cargo, debris or artefacts found or associated therewith, which are within 24 nautical miles of the baselines and older than 60 years (see sections 2, 3(1) & 3(2)(f) of the Act). See further Vrancken (n 75 above) 172 - 176.

186 Marine Living Resources Act 18 of 1998.

187 n 186 above, sec 3(2) provides expressly that it applies beyond the maritime borders of South Africa.

188 n 186 above, sec 14 & LOSC (n 1 above) arts 61 - 62.

189 n 186 above, sec 51 & LOSC (n 1 above) art 73.

190 Marine Living Resources Act (n 186 above) sec 2(i).

191 Marine Living Resources Act (n 186 above) sec 77(2)(a)(ii).

observed by any fishing vessel while in South African waters¹⁹² or regulating 'the navigation of foreign fishing vessels through South African waters'.¹⁹³

Non-living resources at sea are regulated by the Mineral and Petroleum Resources Development Act 28 of 2002.¹⁹⁴ The legal basis in domestic law for jurisdiction over the installations in the exclusive economic zone¹⁹⁵ and on the continental shelf¹⁹⁶ of South Africa is in both the Maritime Zones Act¹⁹⁷ and the Marine Traffic Act.¹⁹⁸

2.2.5 High seas regime

As far as the high seas are concerned, the Prevention and Combating of Trafficking in Persons Act 7 of 2013,¹⁹⁹ one of the objects of which is to 'give effect to the Republic's obligations concerning the trafficking of persons in terms of international agreements',²⁰⁰ extends the jurisdiction of the South African courts to persons who, after the commission of the offence, are present 'on board a ship, vessel, off-shore installation [or] a fixed platform ... registered or required to be registered in the Republic' beyond the latter's territorial sea.²⁰¹ By contrast, there is no provision in the Drug and Drug Trafficking Act 140 of 1992,²⁰² for the extraterritorial application of the very wide powers which the Act grants to police officials.²⁰³ Likewise, the Electronic Communications Act 36 of 2005,²⁰⁴ forbids any person to provide a broadcasting service without a licence,²⁰⁵ but does not contain any provision empowering the South African authorities to enforce the Act extraterritorially as provided for by the LOSC.²⁰⁶ That power, in the case of broadcasting from a foreign vessel on the high seas, has probably not become customarily international law yet and is therefore not part of South African law in terms of section 232 of the Constitution.²⁰⁷ As far as it is concerned, the Defence Act 42 of 2002,²⁰⁸

192 Marine Living Resources Act (n 186 above) sec 77(2)(i).

193 Marine Living Resources Act (n 186 above) sec 77(2)(k)(i).

194 Mineral and Petroleum Resources Development Act 28 of 2002. See for instance section 7 of the Act.

195 See LOSC (n 1 above) art 60.

196 See LOSC (n 1 above) art 80.

197 Maritime Zones Act (n 150 above) sec 9. See *Schlumberger* (n 150 above) para 7.

198 Marine Traffic Act (n 168 above) secs 8B and 8C.

199 Prevention and Combating of Trafficking in Persons Act 7 of 2013. The Act has not come into effect yet.

200 n 199 above, sec 3(a).

201 n 199 above, sec 12(1)(d).

202 Drug and Drug Trafficking Act 140 of 1992.

203 n 202 above, sec 11.

204 Electronic Communications Act 36 of 2005.

205 n 204 above, sec 7. Broadcasting services are not among the categories of services that may be exempted from that requirement (see section 6(1) read with section 1).

206 n 1 above, art 109.

207 ED Brown *The International law of the sea* (1994) I 313; RR Churchill & AV Lowe *The law of the sea* (1999) 211 - 212.

208 Defence Act 42 of 2002.

empowers '[a]ny South African warship [to] exercise the right of flag verification as provided for in [article 110(2) of the LOSC] in the circumstances mentioned in' article 110(1).²⁰⁹ Moreover, the Act empowers any warship or military aircraft of the SANDF to 'exercise on behalf of the Republic or on behalf of a foreign state, the right of hot pursuit of any ship in accordance with' article 111 of the LOSC.²¹⁰ Finally, the definition of 'piracy' in the Act corresponds verbatim to the definition of the LOSC²¹¹ and the Act empowers '[a]n officer of the Defence Force [to] seize a ship or aircraft and the property on board, and arrest any person on board, in accordance with articles 105 and 107 of the LOSC'.²¹²

The Marine Living Resources Act makes it possible for the South African authorities to give effect to the provisions of the LOSC regarding the conservation and management of the living resources of the high seas²¹³ both by requiring that any person undertaking 'fishing or related activities on the high seas by means of a fishing vessel registered in the Republic' hold a high seas fishing vessel licence,²¹⁴ and by providing that any act or omission in contravention of any provision of the Act, which is committed on the high seas on board a 'local fishing vessel' by any person, must 'be dealt with and judicial proceedings taken as if such act or omission had taken place in the territory of the Republic'.²¹⁵ The Act also confers upon the Minister and Director-General certain powers relating to the implementation of

measures to conserve or manage one or more species of marine living resources contained in international conventions, treaties or agreements, or that are adopted or applied in accordance with the relevant rules of international law as reflected in the [LOSC], whether by global, regional or subregional fishery organisations and which measures are binding on the Republic in terms of international law.²¹⁶

209 n 208 above, sec 26(1).

210 Defence Act (n 208 above) sec 27(1).

211 Except for minor editorial differences as well as a statement that the crew of a ship includes its master. See the Defence Act (n 208 above) sec 24(1). On the advantages and disadvantages of adopting the LOSC definition in South African law, see P Vrancken & S Hooft 'The contribution of the Defence Act to the fight against piracy' (2010) 31 *Obiter* 428, where it is argued that, because piracy has been a crime under customary international law for centuries and customary international law is law in South Africa, piracy is also a common-law crime in South Africa to the extent that it is not inconsistent with the Constitution or an Act of Parliament [see *contra* D Devine 'Legal protection of offshore installations outside South African territorial waters' (1993) 11 *Journal of Energy and Natural Resources Law* 290 - 291].

212 Defence Act (n 208 above) sec 25(1).

213 n 1 above, arts 116 - 120

214 n 186 above, sec 40.

215 n 186 above, sec 70(1)(b) - (c) read with sec 1.

216 Marine Living Resources Act (n 186 above) sec 42 read with sec 1.

2.2.6 *Incorporation by means of a schedule to an Act*

The Merchant Shipping Act 57 of 1951,²¹⁷ which confers jurisdiction on the South African courts to try both citizens and non-citizens for offences committed on board a South African ship on the high seas,²¹⁸ is a wide-ranging statutory tool for the incorporation of international law of the sea instruments into South African law. In 1995,²¹⁹ the Act gave the force of law in the Republic²²⁰ to the 1974 International Convention for the Safety of Life at Sea (SOLAS) as amended by its 1978 Protocol, the 1972 Convention on the International Regulations for Preventing Collisions at Sea, the 1966 International Convention on Load Lines, the 1969 International Convention on Tonnage Measurement of Ships and the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, all of which were reproduced in the Act's second, third, fourth, fifth and sixth schedules. The latter must be amended by the Minister by notice in the Government Gazette as soon as practicable after the entry into force for the Republic of any amendment to the Convention, to reflect such amendment.²²¹ The Act also empowers the Minister to 'make such notifications, declarations and regulations as may be reasonably necessary to give effect, subject to such exemptions, restrictions and modifications as may be desirable, to the provisions of' the abovementioned instruments,²²² to all of which, as indicated above, South Africa is a party.²²³

217 Merchant Shipping Act 57 of 1951.

218 n 217 above, sec 327(1).

219 Upon its amendment by the Transport General Amendment Act 16 of 1995. In its original version, the Act included the 1948 International Convention for the Safety of Life at Sea (in schedule 2), the 1948 International Collision Regulations Convention (in schedule 3) and the 1930 International Convention Respecting Load Lines (in schedule 4).

220 Subject to the provisions of the Act. Section 356 bis (1) (inserted in terms of section 60 of the Merchant Shipping Amendment Act 40 of 1963 read with section 2(1) of the Act.

221 Section 356 bis (2) [inserted in terms of section 60 of the Merchant Shipping Amendment Act (n 220 above) read with section 2(1) of the Act.

222 Section 356(2) read with section 2(1) of the Act, which adds that the regulations made under the subsection 'may include other and more extensive provisions than those contained in the said conventions, provided they relate to the same or similar matters as are dealt with in the said conventions'.

223 It is on that basis that were made, for instance, the Life-Saving Equipment Regulations (1968); the Load Line Regulations (1968); the Merchant Shipping (Carriage of Cargoes) Regulations (2004); the Merchant Shipping (Carriage of Charts and Nautical Publications) Regulations (2002); the Merchant Shipping (Collision and Distress Signals) Regulations (2005); the Merchant Shipping (EPIRB Registration) Regulations (2002); the Merchant Shipping (Eyesight and Medical Examination) Regulations (2004); the Merchant Shipping (IGC Code) Regulations (1998); the Merchant Shipping (INF Code) Regulations (2003); the Merchant Shipping (Maritime Security) Regulations (2004); the Merchant Shipping (National Small Vessel Safety) Regulations (2007); the Merchant Shipping (Radio Installations) Regulations (2002); the Merchant Shipping (Safety Management) Regulations (2003); the Merchant Shipping (Safe Manning) Regulations (1999); the Merchant Shipping (Training and Certification) Regulations (1999); the Merchant Shipping Loading, Unloading and Coaling Regulations (1961); the Merchant Shipping Long-Range Identification and Tracking

Other pieces of legislation incorporate international instruments through schedules. The Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986,²²⁴ gives effect to the 1973 International Convention for the Prevention of Pollution from Ships as amended by its 1978 Protocol²²⁵ in relation to 'any South African ship, wherever it may be'²²⁶ and 'any other ship while it is in the Republic or its territorial waters or exclusive economic zone'.²²⁷ The Act also empowers the Minister of Transport to make regulations 'relating to the carrying out of, and giving effect to, the provisions of the Convention'.²²⁸ The Marine Pollution (Intervention) Act 64 of 1987,²²⁹ incorporates the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties and its 1973 Protocol.²³⁰ The Act compels the Minister of Transport to amend Schedule 2 of the Act, in which the Protocol is reproduced, to reflect as soon as practicable any amendment of the Protocol which has entered into force for the Republic.²³¹ The Act also empowers the Minister to 'make regulations relating to the carrying out of, and giving effect to, the provisions of the Convention and Protocol'.²³² The South African Maritime and Aeronautical Search and Rescue Act 44 of 2002,²³³ incorporates the 1979 International Convention on Maritime Search and Rescue²³⁴ and establishes

of Ships Regulations (2009), and the Tonnage Regulations (1986). With regard to the provisions of Chapter VIII of SOLAS, which relate to nuclear ships, section 24(1)(b) read with section 36(1) of the National Nuclear Regulator Act 47 of 1999, provides for the inclusion in a nuclear vessel licence of any conditions considered necessary to ensure compliance with the safety standards set by the Safety Standards and Regulatory Practices Regulations (2006).

224 Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986, as amended by the International Convention for the Prevention of Pollution from Ships Amendment Act 66 of 1996.

225 The text of the 1973 Convention, Protocol I on Provisions Concerning Reports on Incidents Involving Harmful Substances, Protocol II on Arbitration, the 1978 Protocol as well as the Convention's Annex I (Regulations for the Prevention of Pollution by Oil) together with its three appendixes, Annex II (Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk) together with its five appendixes, Annex III (Regulations for the Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form) together with its appendix, and Annex V (Regulations for the Prevention of Pollution by Garbage from Ships) together with its appendix, are all reproduced in the schedule to the Act.

226 n 224 above, sec 2(1)(a).

227 n 224 above, sec 2(1)(b).

228 n 224 above, sec 3(1)(a) of the Act. It is on that basis that were made, for instance, the Marine Pollution (BCH Code) Regulations (1998); the Merchant Shipping / Marine Pollution (IBC Code) Regulations (1998), and the Reception Facilities for Garbage from Ships Regulations (1992).

229 Marine Pollution (Intervention) Act 64 of 1987, as amended by the Shipping General Amendment Act 23 of 1997.

230 Subject to the provisions of n 229 above, s 2(1). The Convention is reproduced in schedule 1.

231 n 229 above, sec 2(2). Amendments must be made by notice in the Government Gazette.

232 n 229 above, sec 3(1).

233 South African Maritime and Aeronautical Search and Rescue Act 44 of 2002.

234 n 233 above, sec 2(1)(a). The Convention is reproduced in schedule 1 of the Act.

the South African Search and Rescue Organisation to act on behalf of the Department [of Transport] as the authority responsible for the application of the [Convention] as well as other conventions binding on the Republic regarding maritime ... search and rescue operations.²³⁵

The Merchant Shipping (Safe Containers Convention) Act 10 of 2011,²³⁶ incorporates articles II to VI of the 1972 International Convention for Safe Containers.²³⁷ As far as it is concerned, the Carriage of Goods by Sea Act 1 of 1986,²³⁸ incorporates into domestic law the 1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading²³⁹ as amended by its 1968 Protocol²⁴⁰ and 1979 Protocol²⁴¹ although South Africa is not a party to either the Convention or the Protocols.²⁴² The Act also empowers the State President to amend the schedule to the Act by proclamation in the Government Gazette in order 'to give effect to any amendment of or addition to the Rules which may be made from time to time and adopted by the Government of the Republic'.²⁴³ The Wreck and Salvage Act 94 of 1996,²⁴⁴ is similar to the Carriage of Goods by Sea Act in that it incorporates the 1989 International Convention on Salvage although South Africa is not a party to it.²⁴⁵ The Act also gives effect to the provisions of the attachment to the Convention in connection with the application and interpretation of the Convention²⁴⁶ while stressing that,

[n]otwithstanding anything to the contrary in any other law or the common law contained, a court of law or any tribunal may, in the interpretation of the Convention, consider the preparatory texts to the Convention, decisions of foreign courts and any publication.²⁴⁷

235 n 233 above, sec 2(1)(b). One such instrument is the 2000 Agreement between the Government of the Republic of South Africa and the Government of the Republic of Namibia Regarding the Co-ordination of Search and Rescue Services (8 September 2000, 2539 UNTS 15).

236 Merchant Shipping (Safe Containers Convention) Act 10 of 2011.

237 Subject to the other provisions n 236 above, sec 5. The schedule includes the two annexes to the Convention.

238 Carriage of Goods by Sea Act 1 of 1986, as amended by the Shipping General Amendment Act 23 of 1997.

239 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules) (25 August 1924, 120 LNTS 155).

240 Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Visby Rules) (23 February 1968, 1412 UNTS 128).

241 Protocol Amending the International Convention for the Unification of Certain Rules relating to Bills of Lading as modified by the Amending Protocol of 23rd February 1968 (SDR Protocol) (21 December 1979, 1412 UNTS 146).

242 Carriage of Goods by Sea Act (n 238 above) sec 1(1). The Convention as amended by the Protocol is reproduced in the schedule to the Act.

243 Carriage of Goods by Sea Act (n 238 above) sec 1(2).

244 Wreck and Salvage Act 94 of 1996.

245 Subject to the other provisions of n 244 above, sec 2(1)). The schedule includes the attachment to the Convention.

246 Wreck and Salvage Act (n 244 above) sec 2(2).

247 Wreck and Salvage Act (n 244 above) sec 2(5).

2.2.7 Incorporation without a schedule

The Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004,²⁴⁸ aims at incorporating into domestic law international instruments which South Africa had not yet ratified or acceded to at the time of its enactment, in this case the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. However, the Act differs from the Wreck and Salvage Act in that it does not reproduce the Convention and its Protocol in a schedule. Instead, the Act refers to the instruments in some of its provisions²⁴⁹ and gives effect to the instruments in a number of other provisions.²⁵⁰

Like the Protection of Constitutional Democracy against Terrorist and Related Activities Act, the Antarctic Treaties Act 60 of 1996,²⁵¹ incorporates into South African law the 1959 Antarctic Treaty and its 1991 Protocol on Environmental Protection as well as the 1972 Convention for the Conservation of Antarctic Seals and the 1980 Convention on the Conservation of Antarctic Marine Living Resources without reproducing those instruments in schedules to the Act.²⁵² Instead, the latter, while listing the instruments in a schedule, place[d] a duty on the Minister of Environmental Affairs to cause the texts of the treaties to be published in the Government Gazette 'as soon as practicable after the promulgation of th[e] Act'.²⁵³ As far as it is concerned, the Marine Pollution (Control and Civil Liability) Act 6 of 1981,²⁵⁴ gives effect to the 1969 International Convention on Civil Liability for Oil Pollution Damage by containing many of its provisions either verbatim or in an adapted form, while it refers to the fact that the Convention had been published for general information in the Government Gazette three years earlier.²⁵⁵ Sections 13-15 of the Act were repealed by the Merchant Shipping (Civil Liability Convention) Act 25 of 2013,²⁵⁶ which gives force of law in the Republic to the 1992 Protocol to the Convention, published in the Gazette in 2009.²⁵⁷ The Act provides

248 Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004.

249 See for instance the Protection of Constitutional Democracy against Terrorist and Related Activities Act (n 248 above) the seventh paragraph of the preamble and sec 1(1)(x)(h) - (i).

250 See for instance the Protection of Constitutional Democracy against Terrorist and Related Activities Act (n 248 above) sec 10.

251 Antarctic Treaties Act 60 of 1996.

252 n 251 above, sec 3(1). See further the Antarctic Treaties Regulations (1997).

253 The Antarctic Treaties Act (n 251 above) sec 3(2). The Minister did so early in 1997.

254 Marine Pollution (Control and Civil Liability) Act Act 6 of 1981.

255 n 254 above, sec 1(1).

256 Marine Pollution (Control and Civil Liability) Act (n 254 above) sec 17 of Act 25 of 2013.

257 Marine Pollution (Control and Civil Liability) Act (n 254 above) sec 1 & 2(1).

that the English text of the Protocol prevails for the purposes of interpretation²⁵⁸ and prescribes how a provision and two references in the Convention must be construed in South African law.²⁵⁹ Moreover, the Act gives to the Minister of Transport the power to publish in the Gazette any changes made to the Convention as amended by the Protocol 'if those changes are binding on the Republic in terms of section 231 of the' Constitution,²⁶⁰ while it compels the Minister to publish in the Gazette a list of the states to which the Convention as amended by the Protocol does apply.²⁶¹ Finally, the Act empowers the Minister to make regulations to give effect to certain provisions of the Convention.²⁶² The Merchant Shipping (International Oil Pollution Compensation Fund) Act 24 of 2013,²⁶³ follows essentially the same pattern with regard to the 1992 Protocol to the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

Finally, the Ship Registration Act 58 of 1998,²⁶⁴ which ensures that a genuine link exists between South Africa and every vessel granted the South African nationality,²⁶⁵ makes no mention of any international instrument or international law.²⁶⁶ This is also the case of the Dumping at Sea Control Act 73 of 1980,²⁶⁷ the aim of which is to incorporate the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters.²⁶⁸ Likewise, the Sea Birds and Seals Protection Act 46 of 1973,²⁶⁹ and the Admiralty Jurisdiction Regulation Act 105 of 1983,²⁷⁰ make no reference to international law whatsoever.

3 The role of the South African courts in applying and developing the international law of the sea

3.1 High court jurisdiction

As indicated earlier, the nature and extent of the marine component of the South African territory is not as clear in domestic law as one would wish.

258 Marine Pollution (Control and Civil Liability) Act (n 254 above) sec 2(3).

259 Marine Pollution (Control and Civil Liability) Act (n 254 above) sec 6.

260 Marine Pollution (Control and Civil Liability) Act (n 254 above) sec 2(2).

261 Marine Pollution (Control and Civil Liability) Act (n 254 above) sec 5.

262 Marine Pollution (Control and Civil Liability) Act (n 254 above) sec 15(1)(b) - (f).

263 Merchant Shipping (International Oil Pollution Compensation Fund) Act 24 of 2013.

264 Ship Registration Act 58 of 1998.

265 LOSC (n 1 above) art 91(1).

266 South Africa is not a signatory of the 1986 UN Convention on Conditions for Registration of Ships 7 February 1986 ((1986) 7 LOSB 87), which has not come into effect. See further Vrancken (n 75 above) 224 - 228.

267 Dumping at Sea Control Act 73 of 1980.

268 The Act will be repealed once section 98 of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 comes into effect.

269 Sea Birds and Seals Protection Act 46 of 1973.

270 Admiralty Jurisdiction Regulation Act 105 of 1983.

The then Cape Provincial Division of the Supreme Court had to contend with that fact in the *Yorigami* case in order to establish whether it had jurisdiction.²⁷¹ After confirming that no assistance was to be found in domestic legislation²⁷² and recalling that it had earlier reached the conclusion that '[i]nternational law [was] part of the law of the Republic',²⁷³ the Court held correctly that,

[a]ccording to international law, if the municipal law of a State does not by a statute extend its jurisdiction over its maritime belt, its Courts ought to presume that since by the law of nations the jurisdiction of a State does extend over its maritime belt, their sovereign has tacitly consented to that wider range of its jurisdiction.²⁷⁴

3.2 Fisheries management

More recently, the Marine Living Resources Act has given rise to a fair amount of litigation revolving around administrative law, criminal law and human-rights law issues. In the only case which reached the Constitutional Court, the *Bato Star* case,²⁷⁵ the Court merely made a very brief mention of the extension of the state's jurisdiction to 200 nautical miles in 1977 in the process of stressing how sensitive the South African marine living resources are.²⁷⁶ When the Supreme Court of Appeal ruled on the case a few months earlier, it did not make any reference whatsoever to the law of the sea,²⁷⁷ and neither did it in the *Pepper Bay* case,²⁷⁸ the

271 *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 C.

272 *Yorigami Maritime Construction* (n 271 above) 695 C - D.

273 *Yorigami Maritime Construction* (n 271 above) 696E, referring to *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 C 238.

274 *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* (n 271 above) 695E (the Court referred only to the 5th edition of Oppenheim *International Law* and Magoffin's translation of Bynkershoek *De Dominio Maris Dissertatio* including Scott's introduction). See also *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* (n 271 above) 394G - H where the Court referred to *Bonser v La Macchia* 1969 (43) ALJR 275 at 280 and *State of New South Wales v Commonwealth of Australia* 1976 (50) ALJR 218 at 222.

275 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC).

276 n 275 above, para 6. The terminology used by the Court is somewhat problematical in that it referred to a '200-mile economic zone' when the effect of the enactment of section 3 of the Territorial Waters (Amendment) Act 98 of 1977, was to extend the fishing zone to 200 nautical miles. It is only since 1994 that South Africa claims an exclusive economic zone.

277 *Minister of Environmental Affairs and Tourism & Others v Phambili Fisheries (Pty) Ltd and Minister of Environmental Affairs and Tourism & Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA).

278 *Minister of Environmental Affairs and Tourism & Another v Pepper Bay Fishing (Pty) Ltd and Minister of Environmental Affairs and Tourism & Another v Smith* 2004 (1) SA 308 (SCA). There is also no reference to the law of the sea in the decision appealed against (*Smith v Minister of Environmental Affairs* 2003 (1) All SA 628 (C)).

Packereysammy case,²⁷⁹ the *Atlantic Fishing* case,²⁸⁰ the *Foodcorp* case,²⁸¹ the *Scenematic* case,²⁸² the *Cameron* case,²⁸³ the *New Foodcorp* case,²⁸⁴ and the *Oceana* case.²⁸⁵ However, in the *Rock Lobster* case,²⁸⁶ the Court acknowledged that

[o]ne of the issues facing government in its regulatory function is that it has obligations towards coastal communities under international treaties, principally the United Nations Convention on the Law of the Sea and the Voluntary Code of Conduct for Responsible Fisheries adopted by the Food and Agricultural Organisation of the United Nations on 31 October 1995. These instruments oblige the government of the Republic of South Africa to heed the economic and socio-economic needs of coastal fishing communities.²⁸⁷

3.3 Criminal jurisdiction

Reverting to the Constitutional Court, it referred in the *Basson* case,²⁸⁸ when dealing with the scope of criminal jurisdiction in South Africa law, to Watermeyer CJ who, in the *Holm* case,²⁸⁹ referred in turn to Wheaton as saying that the judicial power of a state extends to the punishment of all offences against municipal laws of the state, 'by whomsoever committed, on board its public and private vessels on the high seas and on board its public vessels in foreign ports' as well as '[t]o the punishment of all such offences by its subjects wheresoever committed' and 'the punishment of piracy and other offences against the law of nations by whomsoever and wheresoever committed'.²⁹⁰ After adding that Watermeyer CJ had pointed out that the above propositions were 'not accepted by all sovereign states',²⁹¹ the Court only went as far as to stating that there were

279 *S v Packereysammy* 2004 (2) SACR 169 (SCA).

280 *Minister of Environmental Affairs and Tourism & Others v Atlantic Fishing Enterprises (Pty) Ltd & Others* 2004 (3) SA 176 (SCA).

281 *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism, Branch Marine and Coastal Management & Others* 2005 (1) All SA 531 (SCA). There is also no reference to the law of the sea in the decision appealed against (*Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism, Branch Marine and Coastal Management* 2004 (5) SA 91 (C)).

282 *Minister of Environmental Affairs and Tourism & Another v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA). There is also no reference to the law of the sea in the decision appealed against (*Scenematic Fourteen (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) BCLR 430 (C)).

283 *S v Cameron* 2005 (2) SACR 179 (SCA).

284 *New Foodcorp Holdings (Pty) Ltd v Minister of Agriculture, Forestry and Fisheries* 2013 (1) SA 406 (SCA).

285 *Oceana Group Ltd & Another v Minister of Water & Environmental Affairs & Others* 2012 (2) All SA 602 (SCA).

286 *West Coast Rock Lobster Association & Others v The Minister of Environmental Affairs and Tourism & Others* 2011 (1) All SA 487 SCA.

287 *West Coast Rock Lobster Association* (n 286 above) para 19. The Court did not indicate which specific provision(s) of the instruments it was referring to.

288 *S v Basson* 2005 (1) SA 171 (CC).

289 *R v Holm; R v Pienaar* 1948 (1) SA 925 (A).

290 *Basson* (CC) (n 288 above) para 224.

291 *Basson* (CC) (n 288 above) para 224.

exceptions to the rule that the South African courts only exercise jurisdiction over persons who commit crimes within the State's territory, and that treason, 'transnational crimes where more than one state may have an interest in holding the offender liable for the crime' and conspiracy where there is a 'real and substantial link' with South Africa where such exceptions.²⁹² A year earlier, in the *Lawyers for Human Rights* case,²⁹³ the Court had confirmed that '[p]eople arriving by ... sea are already physically inside the country when their conveyance arrives' at a seaport.²⁹⁴

3.4 EEZ and continental shelf

As far as the Supreme Court of Appeal is concerned, it was called upon to rule in the *Schlumberger* case²⁹⁵ on the issue of 'whether a South African patent can be infringed by the installation of a pipeline to transfer a substance from the seabed to a research, exploration or production platform situated within the' South African EEZ. The Court held that the term 'Republic' in the Patents Act 57 of 1978,²⁹⁶ bears its ordinary meaning.²⁹⁷ In order to establish the latter, the Court also held that the LOSC placed 'beyond doubt' the fact the term 'Republic' does 'include the territorial sea or waters of the Republic'.²⁹⁸ The Court confirmed also that the South African claim to an EEZ does accord with art 55 of the LOSC.²⁹⁹ Two years later, the Court had to decide in the *De Beers Marine* case³⁰⁰ whether the supply at the Cape Town harbour of bunker fuel as stores to South African vessels exploring for diamonds off the coast of Namibia qualified as 'export', and was therefore not dutiable, in terms of the Customs and Excise Act. The appellant argued that the term 'continental shelf' referred only to the seabed and subsoil and did not extend to the sea above it.³⁰¹ It found support for this contention in article 78(1) of the LOSC which stresses that '[t]he rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters

292 *Basson* (CC) (n 289 above) paras 225 - 226.

293 *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC).

294 n 293 above, para 7 & 26.

295 *Schlumberger* (n 150 above).

296 The Patents Act 57 of 1978.

297 *Schlumberger* (n 150 above) para 4.

298 *Schlumberger* (n 150 above) para 4. The Court referred to article 2(1) of the Convention. It also relied on *Oppenheim's International Law* (9th edn 1992) I 572 - 3; J Dugard *International law: A South African perspective* (2nd edn 2000) 286; *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* (n 272 above) 695DG and on appeal to the Full Court at 1978 (2) SA 391 (C) 394G - H.

299 *Schlumberger* (n 150 above) para 6. In paragraphs 12 - 13, the Court discussed briefly the fact that '[b]oth art 5ter of the Paris Convention [for the Protection of Industrial Property] and section 71B of the Patents Act contain, depending on one's point of view, a number of possible anomalies or lacunae'.

300 *De Beers Marine (Pty) Ltd v Commissioner, South African Revenue Service* 2002 (5) SA 136 (SCA).

301 *De Beers Marine* (n 300 above) para 8.

or of the air space above those waters'. The Court replied by, somewhat contradictorily, on the one hand stating that '[a]rticle 78 ... is concerned with the legal status of the superjacent waters' and 'accordingly has no direct bearing on the present enquiry'³⁰² and, on the other hand, ruling that '[t]o seek to separate the sea surface from the seabed when applying the provisions of the ... Act to the continental shelf does appear to be somewhat artificial'.³⁰³ On that basis, the Court held, it would seem incorrectly, that the fuel had not been physically removed from South Africa for the purposes of the Act.³⁰⁴

3.5 Salvage

More recently, the Supreme Court of Appeal was called upon to turn to the 1989 Salvage Convention in the *MV Cleopatra Dream* case.³⁰⁵ The Court took note of the fact that both parties agreed that the salvage services rendered by the appellant 'constituted a "salvage operation" as described in art 1(a) [of] the Convention',³⁰⁶ that '[t]he *Cleopatra Dream* was a "vessel" for the purposes of the Convention',³⁰⁷ and that the saving of the vessel's bunkers and cargo 'without harm or damage or loss to the respondents ... constitute[d] a "useful result" as contemplated by art 12(1) of the Convention that "gives right to a reward"'.³⁰⁸ The Court also took note of the fact mentioned earlier that the Wreck and Salvage Act allows a court, 'in the interpretation of the Convention, [to] consider the preparatory texts to the Convention, decisions of foreign courts and any publication'.³⁰⁹ When doing so, the Court outlined very briefly the legislative history of the Convention and identified five categories of preparatory texts.³¹⁰ The Court then focussed its attention on

the Report of the CMI to the IMO that was approved by the XXXII International Conference of the IMO held in Montreal in May 1981 on the draft International Convention on Salvage³¹¹

302 *De Beers Marine* (n 300 above) para 16.

303 *De Beers Marine* (n 300 above) para 17.

304 As above. See further GC Muller 'Is die waters bo die vastelandsplat deel van die Suid-Afrikaanse grondgebied vir doeleindes van die Doeane- en Aksynswet?' (2008) 71 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 54; P Vrancken 'How foreign is the EEZ?' (2002) 27 *South African Yearbook of International Law* 305.

305 *Transnet v The MV Cleopatra Dream* 2011 (5) SA 613 (SCA). For the decision of the court *a quo*, see *Transnet Ltd t/a National Ports Authority v MV Cleopatra Dream* 2010 (3) All SA 110 (WCC). See also *MV Mbashi: Transnet Ltd v MV Mbashi* 2002 (3) SA 217 (D&CLD), discussed in N Botha 'Air and sea law: Two recent decisions' (2003) 28 *South African Yearbook of International Law* 343.

306 *MV Cleopatra Dream* (SCA) (n 305 above) para 22.

307 *MV Cleopatra Dream* (SCA) (n 305 above) para 48.

308 As above.

309 Section 2(5) of the Act.

310 *MV Cleopatra Dream* (SCA) (n 305 above) para 27 - 29.

311 *MV Cleopatra Dream* (SCA) (n 305 above) para 56, 57 - 59.

in order to reach a number of conclusions regarding the interpretation of article 17 of the Convention,³¹² after which the Court turned to article 5.³¹³

4 Conclusion

With a convex coast of about 3 000 km washed by the waters of the Atlantic Ocean and the Indian Ocean while closest to a large section of the Southern Ocean and at a strategic point along one of the most important world shipping routes, South Africa has, even in the darkest days of apartheid, accorded a special place to the law of the sea.

The contributions of the South African delegates at the three UN conferences on the law of the sea provide ample evidence of a sophisticated and wide-ranging, although not always politically attuned, engagement with the issues under discussion. That engagement consistently reflects the interests of a state which saw itself as being developed and which was primarily concerned by threats to its vast natural resources resulting from foreign exploitation and ship-based pollution. The lack of participation during most of UNCLOS III did not affect negatively the protection of those interests at the international level because they were shared by many other states. At the same time, however, marine and maritime domestic law struggled to keep pace with increasingly complex developments.

The dawn of a new legal order in 1994 ushered in a remarkable wave of statutory developments and engagement with international instruments while the state returned to its position as an important role player in the international arena. At the global level, South Africa immediately normalised its relationship with the international organisations the activities of which have an impact on matters concerning the international law of the sea. In fact, during the last twenty years, the country has taken a leadership role in its areas of strength, which include, for instance, hydrography, search and rescue as well as cetacean affairs. The same approach was followed at the continental and regional levels, where South Africa continues to play a critical role in the somewhat slow progress being made in shipping and environmental matters, thanks to the leadership role played by the South African Maritime Safety Authority (SAMSA) and the Oceans and Coast Directorate in the Department of Environmental Affairs respectively.

In the domestic arena, a golden opportunity was missed to lay to rest the issue of whether the South African territorial waters are part of the national territory. The only reason seems to be that the drafters of the Interim and Final Constitutions had to worry about many other issues,

312 *MV Cleopatra Dream* (SCA) (n 305 above) para 60.

313 *MV Cleopatra Dream* (SCA) (n 305 above) para 61 - 67.

which they considered to be, in a sense understandably, of a higher degree of priority. While that approach might appear to be of little consequence to the extent that it impacts on a largely theoretical matter such as the constitutional status of the territorial sea, it is indicative of a lack of concerted and coherent approach to marine and maritime affairs. The result is a large and complex body of domestic law which often mirrors exactly the corresponding international law, but does not always consistently and exhaustively take into account the spatial divisions of the marine environment and their associated legal regimes. There are, for instance, several pieces of legislation which completely ignore that UNCLOS allows a coastal state to extend its jurisdiction in its contiguous zone. The lack of a systematic approach also explains the wide range of techniques for the incorporation of the international law of the sea into domestic law, and the fact that those techniques are used without any discernible logic whatsoever. Finally, decades of essentially ad hoc legislative action have also turned instruments so central in the legislative arsenal as the Merchant Shipping Act, for example, into dinosaurs which only a major law reform project could tackle successfully. Such a task is likely to present quite a challenge in the light of the present capacity deficit at universities as well as in the relevant government departments, but the latest enactments, such as the Merchant Shipping (International Oil Pollution Compensation Fund) Act 36 of 2013, point in the right direction.

As far as they are concerned, the South African courts have had relatively few opportunities to engage with the international law of the sea. The main reason is that there is in the field a large amount of highly technical international provisions which are arguably of a self-executing nature, but would not be applied by the courts on that basis because they have been incorporated into South African domestic law. When the courts have engaged with the international law of the sea, they have in most cases accommodated and promoted it very competently. The best example is probably the *MV Cleopatra Dream* case in which the 1989 Salvage Convention was applied.

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D: International economic law

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International economic law encompasses a variety of topics. Due to its limited length however, this chapter will be confined to trade related aspects; thus other contentious and important areas as for example the international protection of foreign investment had to be left out.

1 Relevant international law obligations

1.1 The development of international economic law

Since the early days of classic public international law, trade between countries has been of extraordinary importance for foreign relations and politics. It was the ‘fathers of free trade’ like Adam Smith, John Stuart Mill and David Ricardo who laid down the theoretical foundation for a liberalisation of international trade relations.¹

However, for a long time developments took place relatively independent from international law, which mainly consisted of bilateral treaties like the prototypic Cobden-Chevalier Treaty. This agreement, signed in 1860 between France and the United Kingdom, became a model for subsequent Free Trade Agreements.² While the pre-war period – overcoming the previous mercantilist approach – was marked by a willingness to leave the economic flows largely free from state interference,

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1 M Herdegen ‘International economic law’ in R Wolfrum (ed) *The Max Planck encyclopedia of public international law* (2014) para 8.

2 DF Vagts ‘International economic law and the american journal of international law’ (2006) 100 *American Journal of International Law* 769 770f.

particularly from 1919 onwards most countries once again actively tried to maximise their interests at the expense of others.³

In pursuit of autarky, significant economic nations as Germany or the United States erected major barriers to trade by establishing tariffs and curtailing imports.⁴ Parallel to this, international law gained increasing importance as a mechanism for mitigating the negative consequences of the protectionist attitude. Apart from numerous bilateral trade agreements based on the principle of reciprocity, on a multilateral level the League of Nations tried to oppose the discrimination between the nations.⁵ Due to a lack of political support amongst the member states, those aspirations were doomed to fail.

It took another World War for countries to realise that topics such as trade and finance had to be dealt with authoritatively on an international level.⁶ The national restrictions slowly gave way to a more cooperative approach, which was alluded to in the Atlantic Charter of 1941. Because the world economy was on the rise, states were willing to give away some of their own economic power in exchange for the benefits of international cooperation.⁷

Although in the years after the Bretton Woods Conference a comprehensive international trade organisation did not come into existence due to the failure of the US to ratify the Charter of that organisation (the International Trade Organization (ITO)), the establishment of the IMF and the World Bank Group constituted a major advancement, which would have been inconceivable only 10 years earlier.⁸

Apart from the General Agreement on Tariffs and Trade (GATT), which will be discussed in detail below, over the course of the following time many bilateral treaties of friendship were concluded serving as a precedent for the subsequent preferential trade agreements.⁹

1.2 Sources of international economic law

International economic law unlike many other areas is almost exclusively based on treaties; thus customary international law, or even soft law, is largely negligible.

3 Vagts (n 2 above) 770.

4 C Kindleberger *The world in depression, 1929 - 1939* (1986) 125 - 226.

5 Vagts (n 2 above) 774.

6 Herdegen (n 1 above) para 9.

7 Vagts (n 2 above) 779.

8 Herdegen (n 1 above) para 9.

9 As above.

1.2.1 International economic treaties – the GATT system

As pointed out above, the GATT was the starting point for the development of the most important forum of multilateral economic cooperation. It was negotiated in 1947, originally as part of the ITO, in order to record the results of a tariff conference and encompassed tariff concessions as well as more general rules on trade. Despite being envisaged only as a temporary agreement, after the demise of the ITO¹⁰ the GATT 1947 became the international normative framework of international trade. However, it was all but comprehensive and suffered from the absence of an international organisation to supervise and enforce the trade regulations.¹¹

During six following negotiation rounds the GATT-parties gradually expanded the scope of the agreement, which led to an increased need for coordination and cooperation. Thus, in the following course of events, the GATT evolved more and more into a *de facto* organisation.¹² However, this progression could hardly remedy the problems which were being faced. Consequently the eight-year-long seventh negotiation round (the Uruguay Round) resulted in a new, consolidated and enlarged system based on the 'old' GATT.¹³ The Agreement Establishing the World Trade Organization (WTO Agreement) formed the World Trade Organization (WTO) as an international organisation. Complementing the GATT, the states agreed on the General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) along with a number of other agreements.¹⁴

WTO – legal personality and tasks

By virtue of article I of the WTO Agreement the WTO was established in order to 'provide the common institutional framework for the conduct of trade relations among its Members'¹⁵ as its area of responsibility.

Article III of the WTO Agreement further specifies the institution's core functions. While the most obvious task is the implementation and administration of the corresponding legal statutes, the WTO shall also 'provide the forum for negotiations among its Members concerning their multilateral trade relations'¹⁶ not necessarily limited to matters relating to existing agreements. Furthermore, its responsibility also encompassed the

10 See W Diebold 'The end of the ITO' *Essays in International Finance* 16 (1952) 16 - 24.

11 JA Finalyson & MW Zacher 'The GATT and the regulation of trade barrier: regime dynamics and functions' (1981) 35 *International Organization* 561 562.

12 P-T Stoll & F Schorkopf *WTO – World economic order, world trade law* (2006) 13.

13 As above.

14 Agreement Establishing the World Trade Organization (15 April 1994, LT/UR/A/2) entered into force on 1 January 1995; Stoll & Schorkopf (n 12 above) 14.

15 WTO Agreement (n 14 above) art II:1.

16 WTO Agreement (n 14 above) art II:2.

administration of dispute settlement, the periodical review of the trade policies of its members as well as the dynamic development of the world trade order.¹⁷

With 159 members¹⁸ the WTO can be viewed as a quasi-universal international organisation. Despite the complex process of accession, nowadays all major economies participate in the WTO-system.¹⁹ The membership of the EU as a legal person is explicitly provided for in article XI:1 of the WTO Agreement.

While the WTO has a large, extensively sub-divided structure, there are three main bodies: the Ministerial Conference as the representative body (article IV:1 of the WTO Agreement), the General Council serving as the executive body (article IV:1 of the WTO Agreement) and the administrative Secretariat (article VI of the WTO Agreement).

Dispute settlement

One aspect which renders the WTO unique when compared to almost any other quasi-universal international organisation, is its effective dispute settlement and enforcement mechanism. Due to the inefficiency of the former dispute resolution system under the old GATT 1947 caused by inadequacies in its structural framework, the member states opted for a strong mechanism.²⁰

The dispute settlement procedure is closely regulated and divided into three parts: Consultation, the Panel procedure and enforcement.²¹ It is intended to keep the balance between protecting and enforcing the reciprocal rights and obligations on the one hand and offering dispute settlement based on amicable solutions on the other. One prominent organ is the Dispute Settlement Body (DSB), which consists of representatives of all WTO members.

The importance of political opportunities and mediation is underlined by the fact that consultations – in which the DSB does not interfere – are mandatory prior to any administered dispute settlement.²² The formal procedure begins with a panel that is established by the DSB and prepares an initial report. Any party to the dispute may appeal the report to the Appellate Body, which in turn can uphold, amend or dismiss the Panel's

17 Stoll & Schorkopf (n 12 above) 15; WTO Agreement (n 14 above) art. II:5.

18 World Trade Organization 'Understanding the organization' http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed 23 May 2015).

19 Stoll & Schorkopf (n 12 above) 21.

20 Stoll & Schorkopf (n 12 above) 72.

21 Stoll & Schorkopf (n 12 above) 72.

22 WTO Dispute Settlement Understanding (DSU) (1994) arts 4, 5.

findings. A report only becomes legally binding once it has been adopted by the DSB.²³

As all members are represented in the DSB, these powers could render the whole system useless, if a normal consensus would be required for them. However, the Dispute Settlement Understanding (DSU) has abolished this flaw of the GATT47-system and introduced negative or reverse consensus. Thus, in order to prevent the adoption of a report, consent of all members, including the disputing parties, is necessary.²⁴ Because in practice this rarely ever happens, the mechanism works very effectively and usually leads to a termination of the infringement. If the state continues to violate WTO law, the DSB can authorise retaliating measures to be taken by the member state, whose rights were infringed by others in order to ensure compliance.

1.2.2 Other international agreements

Furthermore, international economic law is influenced and shaped by Preferential or Free Trade Agreements. Unlike the WTO-System they do not strive for universal membership, but are used to regulate trade usually on a bilateral or regional level.²⁵ The European Union²⁶ has made frequent use of them in order to liberalise trade (for example, the Cotonou Agreement with the ACP group).²⁷

2 Implementation of international economic law

2.1 The dominant model: Implementation through European Union legislation

The implementation of international trade law in Germany is heavily influenced by its membership in the European Union. The legal relationship between the European Union and its member states rests on the principle of conferred competences outlined in article 4(1) and article 5(2) of the TEU.²⁸ Accordingly, the Union has a competence to act only where it is expressly conferred upon it by the European Treaties.

23 Stoll & Schorkopf (n 12 above) 84ff.

24 Stoll & Schorkopf (n 12 above) 76.

25 T Cottier 'Towards a common external economic policy of the European Union' in M Bungenberg & C Herrmann (eds) *Common commercial policy after Lisbon* (2013) 3 6.

26 The Term Union not only be used for the European Union, but also for the previous European Community, which was incorporated into the European Union in 1993.

27 See A Panagariya 'EU preferential trade agreements and developing countries' (2002) 25 *The World Economy* 1415 for further examples.

28 Treaty on European Union (TEU) [1992] OJ C191/1.

Basically, there are three types of competences: shared, complementary or exclusive.²⁹ While the first two forms are defined by strong cooperation and mutual dependence, the latter entails the Union's sole right to act legislatively. The member states' role is thereby reduced to the implementation of EU acts or acting after they have been empowered by the Union to do so. In particular, without EU permission, they are barred from adopting any legally binding acts, including international agreements in this field.³⁰

2.1.1 The European Union's external competences in the field of economic policy

Since the establishment of the European Community (EC), the Common Commercial Policy (CCP) has been commonly regarded as one of the most important and dynamic fields of EU external relations.³¹ It rests on three main pillars: the WTO, preferential trade agreements and regulations addressing third country relations.³²

The exclusive competence of the Union for the CCP is nowadays codified in article 3(1)(e) of the TFEU. However, this was common ground even in the absence of an explicit provision in the former European Treaties. Accordingly, the European Court of Justice (ECJ) used its first opportunity to outline the exclusivity of this competence in the area of CCP,³³ a finding widely undisputed by the other organs, the member states and some of the leading scholars in this field.³⁴

However, while the exclusive *nature* of the competence remained uncontested, the same cannot be said for its exact *scope*. After a failed Constitutional Treaty, the Treaty of Lisbon (ToL) tried to resolve the outstanding conflicts by codifying many of the preceding developments. Apart from the inclusion of foreign direct investment, the examination of which goes beyond the scope of this study one major goal was to clarify and develop the Union's competences.³⁵

29 M Herdegen *Europarecht* (2014) sec 8 para 59.

30 Treaty on the Functioning of the European Union (TFEU) [2007] 2008/C 115/01 art 2(1).

31 A Dimopoulos 'The effects of the Lisbon Treaty on the principles and objectives of the common commercial policy' (2010) 15 *European Foreign Affairs Review* 153 160.

32 Cottier (n 25 above) 4.

33 Case 8/73 *Hauptzollamt Bremerhaven/Massey-Ferguson* [1973] ECR 897, para 3.

34 A Bleckmann *Europarecht* (6th edn 1997) para 1427; A von Bogdandy & M Nettesheim 'Strukturen des gemeinschaftlichen Außenhandelsrechts' (1993) *Europäische Zeitschrift für Wirtschaftsrecht* 465 466; R Streinz *Europarecht* (9th edn 2012) para 624; T Oppermann et al *Europarecht* (6th edn 2014) sec 31 para 11.

35 M Bungenberg & C Herrmann 'Foreword' in Bungenberg & Herrmann (n 25 above) V ff.

Thus, the new article 207 of the TFEU³⁶ is now found under the heading 'External action by the Union' and outlines the major competences including 'conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property'.³⁷ However, even this enumeration is not conclusive and does not provide a workable definition of the CCP.³⁸ Nevertheless, it can be seen that after Lisbon the EU is now exclusively competent to deal with all external matters within the scope of the current WTO law.³⁹

This is remarkable given the previous vivid dispute about this issue which goes back to the early days of the European Union. While it never formally acceded to the old GATT 1947, by virtue of its competence for customs and trade law it 'grew' into the rights of its member states, all of which were parties to the GATT. Consequently, the Union considered herself to be bound by the respective provisions and started to assert membership rights.⁴⁰

However, this 'unofficial' accession created certain legal difficulties regarding the Union's status as a legal 'phantom'.⁴¹ In order to resolve the existing uncertainties and to decide the struggle for competences with the member states, the reform of the GATT system after the Uruguay Round in 1994 marked a crucial moment.⁴²

However, although the Commission represented all member states during the negotiations, there was considerable disagreement as to who had the competence to conclude the new agreements under the WTO regime.⁴³ While the Commission wanted to clarify and extend the applicability of article 133 of the Treaty establishing the European Community (TEC),⁴⁴ the member states intended to reverse the 'subtle incapacitation' by the Union and confine its competence to the core GATT rules.

These contrasting positions could be understood because of the possible wide implications of the expansion of the competence. On the one hand, the CCP has proven itself as a useful tool to promote not only purely economic objectives, but also other policy priorities such as human rights

36 Replacing art 133 TEC and widely resembling art III-315 of the failed Constitution.

37 TFEU (n 30 above) art 207.

38 Even the enumeration in the ToL is not comprehensive. See MJ Hahn 'Article 207' in C Calliess & M Ruffert (eds) *EUV/AEUV* (4th edn 2011) para 7.

39 Cottier (n 25 above) 9.

40 Herdegen (n 29 above) sec 27 para 15.

41 P Hilpold *Die EU im GATT/WTO-System* (2009) 146f.

42 Hilpold (n 41 above) 148.

43 As above.

44 Now TFEU (n 30 above) art 207.

with regard to third countries.⁴⁵ On the other hand, the member states fear a potential circumvention of the principle of conferral. Where both internal and external matters are affected, the CCP could be used to regulate 'internally' in the absence of an internal competence through international agreements.

The dispute had to be authoritatively decided by the ECJ, outlining the actual scope of the CCP in its Opinion 1/94.⁴⁶ The judges considered each pillar of the WTO-Agreement in turns. Concerning the core GATT rules, it held rather uncontroversially that the transboundary trade with goods was encompassed by the term Common Commercial Policy in article 133 of the TEC. This was also reflected by a widely uncontested over 40 year long practice under the former GATT 1947. Thus, the Union had the exclusive competence to conclude the new GATT as well.⁴⁷

However, the new pillars – the GATS and TRIPS – turned out to be more disputed. The Commission contended that the trade with services also fell under the CCP directly by virtue of article 133 of the TEC. Alternatively it advanced the argument that the Union's competence was at least tacitly implied in the European Treaties under the established AETR case law.⁴⁸

Furthermore, the Commission relied on articles 95 and 308 of the TEC and tried to build on the ECJ's tendency – which was backed by the prevailing theory in the literature – to interpret the CCP rather broadly.⁴⁹

Yet, the court did not follow the Commission's suggestions and passed a decision, which was regarded as a ruling in favour of the member states' views. Concerning the GATS it differentiated with respect to the nature of the services. While transboundary services without the provider crossing boundaries were part of the CCP, constellations where the provider itself had to traverse boundaries were more closely linked to the freedom of establishment and the freedom of movement.⁵⁰ The TRIPS was held to be

45 Usually the Trade Agreements include a 'human rights clause' which is often complemented by conditions for sustainable development. See L Bartels 'Human rights and sustainable development obligations in EU free trade agreements' http://www.academia.edu/1902855/Human_rights_and_sustainable_development_obligations_in_EU_free_trade_agreements (accessed 10 June 2015) and K De Gucht's speech about 'Trade policy and human rights', http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146727.pdf (accessed 10 June 2015).

46 Opinion 1/94 *Re WTO Agreement* [1994] ECR I-5267.

47 *Re WTO Agreement* (n 46 above) paras 27 & 36ff.

48 Case 22/70 *Commission vs Council (AETR)* [1971] ECR 263; see also a similar reasoning behind Opinion 1/76, [1977] ECR 741; L Holdgaard & R Holdgaard 'The external powers of the European community' (2001) 1 *Retsvidenskabeligt Tidsskrift* 108 114.

49 Hilpold (n 41 above) 199.

50 *Re WTO Agreement* (n 46 above) paras 41ff.

not encompassed by the CCP apart from minor provisions relating to the prohibition of the release into free circulation of counterfeit goods.⁵¹

Because both the TRIPS and the GATS could not be subsumed under the CCP any more, they had to be concluded as ‘mixed agreements’.⁵² This term is used whenever ‘the European Union and one or more of the Member States are parties to an agreement’ or if they share competence in relation to it, as was the case with the new WTO-pillars.⁵³ Consequently, all member states as well as the Union had to ratify the TRIPS and GATS. However, because a close cooperation and a uniform interpretation by the ECJ remained crucial in order to avoid misunderstandings, it seemed only natural that the Commission was the prevalent actor in the context of the WTO’s dispute settlement system, acting on its own when questions of the GATT were concerned and respectively on behalf of the member states when the GATS or TRIPS were affected.⁵⁴

Thus, the factual practice over the years indicated the development and the expansion of the CCP’s scope, which was eventually codified in article 207 of the TFEU. By that, the ToL served to resolve a lengthy conflict between the Union and the member states about the boundaries of the CCP.

2.1.2 The Union’s internal competences in the field of economic policy

While article 3(1)(e) of the TFEU provides a sound legal basis for the conclusion of international agreements regarding the CCP and fully aligns the European Union’s external competences with the scope of the current WTO Law, the internal powers are less clear and merit close attention.⁵⁵

Because – despite being part of the Union legal order – WTO law is not accorded direct effect, (→ 4) secondary legislation is required in order to implement the rights and obligations under the concluded international agreements.⁵⁶ The ToL clarifies the distinction between the external competences necessary to conclude and amend international agreements (article 207(3-5) of the TFEU) and those to adopt internal implementing measures.⁵⁷

51 *Re WTO Agreement* (n 46 above) paras 54ff.

52 *Re WTO Agreement* (n 46 above) paras 98 and 105ff.

53 See D McGoldrick *International relations law of the European Union* (1997) 78 and R Leal-Arcas ‘The European community and mixed agreements’ (2001) 6 *European Foreign Affairs Review* 483 - 513 for a more detailed view.

54 McGoldrick (n 53 above) 137ff.

55 Dimopoulos (n 31 above) 153; C Vedder & S Lorenzmeier in E Grabitz and M Hilf (ed) *Das Recht der Europäischen Union* (40. Ergänzungslieferung 2009) art 133 para 48; para 624; R Streinz *Europarecht* (9th ed 2012) paras 638ff.

56 Hilpold (n 41 above) 145.

57 Hilpold (n 41 above) 154.

The European Union's power to introduce as well as to modify secondary legislation concerning CCP is determined by article 207(2) and 291 of the TFEU and other Union competences. The wording of these provisions indicates that the former 'two-stepped' approach remains valid.⁵⁸ By virtue of article 207(2) of the TFEU the 'European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy'. Those regulations then serve as necessary basis for implementing measures in the meaning of articles 290 and 291 of the TFEU.⁵⁹ Most important basic regulations⁶⁰ adopted under article 207 of the TFEU (and its predecessor provisions) were updated immediately before the entry into force of the ToL and remain in force.

The narrow wording of article 207(2) of the TFEU proves problematic with respect to measures *outside* the scope of the basic regulations. Because its predecessor norm, article 133(2) of the TEC was phrased rather blurrily, stating that the 'Commission shall submit proposals to the Council for implementing the common commercial policy', it was widely accepted that individual measures could also be based directly on the treaty provision itself, if no framework regulation existed.

However, the strict wording of article 207(2) of the TFEU seems to indicate that such an approach is no longer possible under the ToL. This is supported by a narrow interpretation of the principle of limited conferral.⁶¹

This restrictive reading would cause great difficulties. Especially with respect to retaliation measures warranted by a DSB decision, it would lead to the unsatisfactory consequence that no actions could be taken at all. The Union would lack a sufficient legal basis whereas the member states are no longer entitled to act due to the Union's exclusive competence.⁶²

These intolerable results can be avoided by a referral to the 'implied powers' doctrine. In its case law the ECJ held, that the competences bestowed upon the Union, by logical implication also entail a legitimation

58 Before Lisbon, framework resolutions ('step one') as well as the individual measures ('step two') used to be based on the somewhat blurry wording of article 133(2) TEC, stating that the 'Commission shall submit proposals to the Council for implementing the common commercial policy'.

59 See Hahn (n 38 above) para 90.

60 In particular, Regulation 260/2009, establishing the common rules for imports; Regulation 1061/2009, establishing the common rules for exports; Regulation 1225/2009, establishing protection against dumped imports; Regulation 597/2009, establishing protection against subsidised imports; and – although not having been updated – Regulation 3286/94, establishing protection against trade barriers in third countries. For a more detailed discussion see R Arnold & E Meindl 'Außenhandelsrecht' in MA Dausen (ed) *Handbuch des EU Wirtschaftsrecht* (2013) paras 34ff, 35.

61 Arnold & Meindl (n 60 above) K.I para 158f.

62 Hahn (n 38 above) paras 91ff.

to adopt measures necessary to reasonably and effectively exercise those powers.⁶³ Arguably, such approach could adequately close the unintended 'gap' without either violating the ratio of article 207(2) of the TFEU or the principle of limited conferral.⁶⁴

2.1.3 *Parallelism of internal and external competences*

In addition to the implementing measures concerning the CCP, the Union might take action in areas directly or indirectly related to trade law by virtue of its other competences outlined in article 3 or 4 of the TFEU. In the field of economic law, article 114 of the TFEU is of paramount importance, stating that measures might be adopted 'for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the *internal market*'.

While in theory the distinction between internal and external trade might seem clear, in practice the demarcation between articles 114 and 207 of the TFEU as a basis for Union acts is far from being undisputed. Member states feared that reliance on the implementation of the CCP could be used to circumvent the principle of limited conferral when being faced with the lack of a sufficient basis for internal action.⁶⁵ In fact, much of the dispute about the actual scope of the CCP, which ultimately led to the contentious Opinion 1/94, can be understood against this background.

The Court itself pointed out this danger of a potential bypassing of sufficient legal bases, remarking that 'the Community institutions would be able to escape the internal constraints to which they are subject'.⁶⁶ Thus, article 207(6) of the TFEU as a safeguard now expressly states that the

exercise of the competences ... in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonization of legislative or regulatory provisions of the Member States ...

Thus, according to the principle of parallelism, it is not permitted to use external competences to override the limits of internal Union power.⁶⁷

An infringement of member states' competences might occur in relation to matters listed in article 207(1) of the TFEU, but also to such

63 See eg Case 8/55 *Fédération Charbonnière de Belgique v High Authority* [1956] ECR, 297/311.

64 For a more detailed discussion see Arnold & Meindl (n 60 above) paras 34ff & 92.

65 See L. Ankersmit 'The CJEU's volte-face on TRIPS in light of treaty modifications' <http://europeanlawblog.eu/?p=1897> (accessed 10 June 2015).

66 *Re WTO Agreement* (n 46 above) para 60.

67 A. Dimopoulos 'The common commercial policy after Lisbon' (2008) 4 *Croatian Yearbook of European Law and Policy* 101 118.

which – albeit not being explicitly mentioned in the ToL – nevertheless are covered by the scope of the CCP.⁶⁸ In two recent cases the Court assessed the arising difficulties.

In *Daiichi*⁶⁹ the question was posed whether certain measures concerning intellectual property rights would still be covered by the competence flowing from article 207 of the TFEU.

*Commission v Council*⁷⁰ concerned the signing of a European Convention on the protection of certain services. It was heavily disputed whether its aim was the improving of the functioning of the internal market or rather the regulation of trade between the EU and other countries. This matter was aggravated by the fact that *Directive 98/84/EC* already dealt internally with this matter and was adopted on the basis of the current article 114 of the TFEU.

Eventually, both cases show that since the entry into force of the ToL, the Court seems more lenient in regard to the potential circumvention of the division of competences by regulating ‘internally’ through international agreements.⁷¹

This newly gained attitude became clear in the *Daiichi* ruling. The judges remarked that CCP by its definition ‘relates to trade with non-member countries, not to trade in the internal market’.⁷² Thus,

the mere fact that an act of the European Union, such as an agreement concluded by it, is liable to have implications for international trade is not enough for it to be concluded that the act must be classified as falling within the common commercial policy. On the other hand, a European Union act falls within the common commercial policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade.⁷³

However, a ‘specific link with international trade’ was deemed to be sufficient in order to rely on article 207 of the TFEU as a legal basis.⁷⁴

With respect to the contentious nature of the TRIPS Agreement, the ECJ noted that its ‘primary objective ... is to strengthen and harmonise the

68 C Tietje *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon* (2009) 83 *Beiträge zum Transnationalen Wirtschaftsrecht* 11; HG Krenzler & C Pitschas ‘Die Gemeinsame Handelspolitik im Verfassungsvertrag – ein Schritt in die richtige Richtung’ in C Herrmann et al (eds) *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag* (2006) 11ff.

69 Case C-414/11 *Daiichi Sankyo Co. Ltd et al v DEMO Anonymos Viomichaniki kai Emporiki Etairia Farmakon* (18 July 2013).

70 Case C-137/12 *Commission v Council* (22 October 2013).

71 Arnold & Meindl (n 60 above).

72 *Daiichi* (n 69 above) para 50.

73 *Daiichi* (n 69 above) para 51.

74 *Daiichi* (n 69 above) para 53.

protection of intellectual property on a worldwide scale'.⁷⁵ Accordingly, although it remained 'open to the European Union, ... to legislate on the subject of intellectual property rights by virtue of competence relating to the field of the internal market', article 207 of the TFEU could be used as a legal basis because 'the context of the [TRIPS] rules is the liberalisation of international trade, not the harmonisation of the laws of the Member States of the European Union'.⁷⁶

The Court in *Commission v Council* upheld this line of reasoning. Whenever multiple legal bases seem relevant because internal as well as external trade matters were affected, the 'measure [had to] be based on a single legal basis, namely that required by the main or predominant purpose or component'.⁷⁷ The Court reiterated that mere 'implications for international trade' were insufficient.⁷⁸ While – especially in the light of the 'provisions [of the convention] similar to those of Directive 98/84' – this would indicate that article 207 of the TFEU could not be relied on, the ECJ arrived at a different conclusion. It used the existence of the similar Directive 98/84 as a contrasting point. The judges held, that

since the approximation of the legislation of Member States in the field concerned has already been largely achieved by Directive 98/84, the primary objective of the Convention is not to improve the functioning of the internal market, but to extend legal protection of the relevant services beyond the territory of the European Union and thereby to promote international trade in those services.⁷⁹

Because sufficient protection within the Union was already granted by the Directive, the Convention on the other hand 'intended to introduce similar protection in European non-member countries, in order to promote the supply of such services to those States by EU service providers'.⁸⁰

By his 'extension' point, the ECJ hardly had any difficulties finding the relevant legal basis in article 207 of the TFEU, even though the Convention increased the protection standard compared to the narrower Directive and thus at least indirectly improved the functioning of the internal market.⁸¹

⁷⁵ *Daiichi* (n 69 above) para 58.

⁷⁶ *Daiichi* (n 69 above) paras 59f.

⁷⁷ *Commission v Council* (n 70 above) para 53.

⁷⁸ *Commission v Council* (n 70 above) para 57.

⁷⁹ *Commission v Council* (n 70 above) para 67.

⁸⁰ *Commission v Council* (n 70 above) para 64.

⁸¹ See L Ankersmit 'Commission v. Council: the saga over the scope of the CCP continues' <http://europeanlawblog.eu/?p=2035> (accessed 10 June 2015). The Court only held in para 71 that while it was true 'that articles 6 and 8 of the Convention are also supposed to improve the conditions for the functioning of the internal market', 'that objective [was] purely incidental to the primary objective' and thus of no further relevance.

Albeit it is commonly recognised that a clear definition of the scope of exclusive competences is crucial, these cases show that – somewhat in contrast to its narrow understanding in Opinion 1/94 – the ECJ nowadays seems more ready to embody a wider reading of article 207 of the TFEU. Accordingly, the Union has now the exclusive competence over international trade related matters even if they have significant repercussions on the internal market, only provided that a specific link with international trade exists.

2.2 Mixed agreements

Despite the fact that the European Union's external competences are now fully aligned with the actual scope of the WTO law, there can be trade related international agreements, which affect other areas within the competence of the member states. These treaties remain to be concluded as mixed agreements and thus require ratification by the European Union as well as the member states.

In fact, all recent bilateral trade agreements fell in this category as the European Union lacked the sole competence especially for service related aspects before Lisbon.⁸² Furthermore, member states often insisted to include aspects into Preferential Trade Agreements outside the scope of the European Union's exclusive competence in order to 'trigger' the requirement of their consent.⁸³ For example, the treaties with Eastern- and Middle-European states as well as South Africa or Mexico were complemented with certain political aims and thus needed approval by the member states.⁸⁴

Thus, although the phenomenon of mixed agreements since the ToL is of no great relevance in the context of WTO-Law, it still remains an important tool for the European Union's other trade related treaties.

3 German participation in international economic law making

As after the ToL WTO law is within the sole competence of the European Union, no German national competences are affected any longer. Thus, member states will not participate in the ratification of the outcomes of the

82 Arnold & Meindl (n 60 above) para 67; Case C-360/93 *European Parliament v Council* [1996] ECR I 1195, para 30.

83 P Gilsdorf 'Die Außenkompetenz der EG im Wandel' (1996) 31 *Europarecht* 145 163; HG Krenzler & H da Fonseca-Wollheim 'Die Reichweite der gemeinsamen Handelspolitik nach dem Vertrag von Amsterdam – eine Debatte ohne Ende' (1998) 33 *Europarecht* 223 229.

84 *Fédération Charbonnière de Belgique* (n 63 above) para 67.

ongoing Doha Round.⁸⁵ While Germany might still take part in mixed agreements (→ 2.2), it is crucial to examine what – if any – influence Germany still has on the unequally more important matters covered by the WTO law.

3.1 Possible obligation to leave the WTO

A preliminary question raised in connection with the ToL, however, is whether member states – regardless of any possible remaining influence – might even have the obligation to abandon their remaining status as formal members of the WTO. The main argument in favour of this approach flows from an analogous application of article 351 of the TFEU, which states that '[t]o the extent that ... agreements are not compatible with the [European] Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established'. Arguably, according to a wide reading this could even encompass the termination of an international treaty as an *ultima ratio*.⁸⁶

Yet, it seems questionable whether such incompatibilities are really likely to arise in the context of the WTO. Even when examining the Dispute Settlement Mechanism as an area seeming most susceptible to an adverse effect of a parallel membership, problems are far from apparent.⁸⁷ Noteworthy, until today no member state has ever been a party to dispute settlement on its own. Rather, the Union participated in the proceedings jointly with several or even all member states. This was particularly the case with respect to the mixed agreements TRIPS and GATS.⁸⁸

Remarkably even when the exclusive competence of the European Union was affected, the WTO-claimants tended to name both, the Union and the member states as opposing parties. Thus, although in the *LAN-Case*⁸⁹ concerning custom laws, the tariff was entered into by the Union alone and was within its exclusive competence as it only concerned GATT matters, the United States also complained against the Republic of Ireland and the United Kingdom as their authorities executed the disputed laws. The panel accepted that the administrative organs acted for the Union that – as a consequence of this 'executive federalism' – had to assume the full

85 R Raith 'The Common commercial policy and the Lisbon judgement of the German Constitutional Court of 30 June 2009' (2009) 12 *Zeitschrift für europarechtliche Studien* 613 617.

86 JP Terhechte 'Artikel 351 AEUV, das Loyalitätsgebot und die Zukunft mitgliedstaatlicher Investitionsschutzverträge nach Lissabon' (2010) 45 *Europarecht* 517 524.

87 M Hahn & L Danieli 'You'll never walk alone: The European Union and its member states in the WTO' in Bungenberg & Herrmann (n 25 above) 49 59.

88 C Tietje 'Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO?' in C Herrmann et al (eds) *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag* (2006) 161.

89 WTO, *European Communities: Customs Classification of Certain Computer Equipment – Report of the Panel* (22 June 1998) WT/DS/62, WT/DS/67 and WT/DS/68/R.

responsibility for possible violations.⁹⁰ In the *Selected Customs Matters Case*⁹¹ the panel concluded that authorities of the member states acted as ‘organs’ of the Union when executing EU law.

As has been shown, even the parallel membership in the DSB as the area most prone to conflicts does not jeopardise the Union’s role as the sole and comprehensive representative, casting further doubts on the thesis that an incompatibility in the sense of article 351 II of the TFEU exists. Through the practiced representation of all member states by the Commission it seems hardly conceivable, how any severe ‘incompatibilities’ should emerge. Only the member states’ lack of competence to conclude similar agreements to the WTO after Lisbon does not appear to suffice on its own.⁹²

Thus, the better arguments speak for the legal possibility of a continuing parallel membership. However, it is a different question, whether it is politically sensible as well. From a financial point of view it might seem reasonable to save the money for 28 state missions to the WTO and confine them to a joint EU mission. On the other hand this would bring along a loss of votes in the WTO, which – albeit of little practical relevance at the moment due to the reverse veto procedure in the WTO – could gain importance as the WTO law develops.⁹³

Yet, the main point for retaining the member states position in the WTO is the dynamic relationship between them and the Union in the field of CCP. While it is true that at this very moment the exclusive competences conferred upon the Union encompass all the matters covered by WTO law, this may not necessarily be the case in the future. In the past the ECJ made clear that it was not ready to apply a dynamic interpretation to align the external competences to the WTO law but rather stick closely to the wording of the European Treaties with due respect to member states’ sovereignty. Thus, if either the WTO’s competences would be expanded⁹⁴ or the scope of article 207 of the TFEU would be narrowed down,⁹⁵ the member states again would have an independent role in the WTO framework.⁹⁶

Furthermore it seems conceivable, that member states’ laws could conflict with WTO provisions. Especially in the fields of services and

90 Hahn & Danieli (n 87 above) 60.

91 WTO, *European Communities – Selected Customs Matters – Report of the Panel* (1 December 2006) WT/DS/315/R, 7.553ff.

92 Hahn & Danieli (n 87 above) 57.

93 W Weiß ‘Common commercial policy in the European constitutional area: EU external trade competence and the Lisbon decision of the German Federal Constitutional Court’ in Bungenberg & Herrmann (n 25 above) 29 31.

94 Although this seems rather unlikely as art 207 TFEU covers all matters discussed in the current Doha Round.

95 A possibility provided for by art 48 TEU.

96 Weiß (n 93 above) 31f.

intellectual property, which are not fully harmonised internally within the Union, they can take national measures non-conformant with the TRIPS and GATS rules. This situation might lead to a necessary possibility for the member states to defend themselves on WTO level.

Finally, article 50 of the TEU expressly provides the possibility of a withdrawal from the EU as a reaffirmation of the member states uncontested sovereignty. Although this option might seem rather theoretical nowadays, it shows the support the value of the individual WTO membership has for the member states.⁹⁷

This reading is in line with the conception of the German Federal Constitutional Court (FCC) in its *Lisbon* judgment. While it not only supported the newly established exclusive competence of the Union, but also the complete representation by the Commission and even went so far as to accept the possibility of a simple institutional-formal membership of Germany in the WTO, it clearly rejected the notion, that the ToL could oblige the member states to leave the WTO.⁹⁸

Furthermore, WTO law itself does not require the member states to abandon their status. Through the reversed veto structure in the DSB, the accumulation of votes does not pose a problem as no practical effect is attached to the amount of votes.⁹⁹ Most importantly, the member states pay the membership fees and bear full responsibility for adhering to WTO rules. The internal delimitation of competences between EU and the member states on the other hand is of no interest for other WTO states.¹⁰⁰

In this context it must be borne in mind that a parallel membership of the Union in addition to its member states is rather unusual. In most other international organisations the Union has no formal membership and rarely has the exclusive competence. Even when they are not strictly limited to territorial states – thus necessarily excluding the EU – there is a certain reluctance to accept the ‘exceptionalism’ of the Union.¹⁰¹ Thus, comparing the situation to other international organisations it seems convincing, that a ‘replacement’ of the member states by the Union was not envisaged.¹⁰²

97 Hahn & Danieli (n 87 above) 61f.

98 BVerfG Case 2 BvE 2/08 *Lisbon judgement* (30 June 2009) (2010) 123 *Entscheidungen des Bundesverfassungsgerichts* 267 (30 June 2009) paras 372ff.

99 The EU and MS have 28 votes, the US only 1, China 3; compare with Hahn & Danieli (n 87 above) 53.

100 Weiß (n 93 above) 31f.

101 This is exemplified by the struggle to get an extraordinary observer status in the UN, see Draft Resolution A/64/L67 of the UN General Assembly and J Wouters & M Emerson ‘The EU’s diplomatic debacle an the UN – What else and what next?’ (2010) *CEPS Commentary* <http://ceps.eu/book/eu%E2%80%99s-diplomatic-debacle-un-what-else-and-what-next> (accessed 10 June 2015).

102 Hahn & Danieli (n 87 above) 51f.

Summing up, neither EU law, nor WTO law as it currently stands entails a requirement for the member states to leave the WTO. Quite contrary, an obligation of the Union to 're-empower' the member states to a certain extent during the negotiations might stem from the principle of loyalty (article 4 of the TEU) despite its exclusive competence.

3.2 Remaining influence of the member states

While the member states might at least retain their formal membership in the WTO, it is far from self-evident why the member states seemingly gave away their influence so freely on such an essential matter as international trade. In this context it is crucial to remember that every amendment of the European Treaties has to be adopted unanimously, meaning that no state was being forced into giving up their own competence. However, during the conflict between the member states and the European Union, which culminated in the ECJ's Opinion 1/94, the states recognised that the 'weakening' of the Union caused disadvantages that could never backfire on the EU as a legal abstract but rather on the member states themselves. Ultimately, this understanding leads them to align the primary law with the factual situation through the European Treaties.¹⁰³

This behaviour can only be explained with regard to the various advantages the member states gained from the transfer of powers to the Union as well as their remaining influence on trade policy through the other EU institutions.

The main advantage of a joint approach is quite apparent: the Union has been very successful in bundling the powers of the individual member states in order to be on a par with global actors such as the United States, China, Brazil and India. From the very outset, the Commission assumed responsibilities and worked at two fronts: Externally, it negotiated with third parties; internally, it argued and bargained with the member states. This process required highly sophisticated diplomacy and necessarily caused limited transparency. Due to these complications, over time the Commission (particularly the Directorate-General for Trade) developed unique skills and expertise in the area of foreign trade. Nowadays – speaking with a single voice – the Commission effectively protects and advances European interests and evolved as a one of the leading power during the WTO negotiations.¹⁰⁴

Consequently, the member states made use of this advantage and significantly reduced their resources allocated to foreign trade. Even big economies strongly reliant on export and trade such as Germany only kept a small staff specialised on foreign trade in their ministries of economics,

¹⁰³ Hahn & Danieli (n 87 above) 50.

¹⁰⁴ Cottier (n 25 above) 5.

because they became widely expandable.¹⁰⁵ This development directly mirrors the member states' decision to favour the liberalisation of international trade above the strict protection of national sovereignty.¹⁰⁶

Nevertheless, it is important to point out the tools at the member states' disposal to exercise continuing influence within the Union's governance structure.¹⁰⁷

3.3 Influence through the European Parliament

Given the extremely dominant position of the EU, it seems questionable whether the member states can exercise any substantial influence on international economic law. Regarding the division of competences it seems that they only play a marginal role in this field of law.

The FCC in its *Lisbon judgment* discussed this issue in depth.¹⁰⁸ It noted that the ToL provided for an exclusive competence of the Union for international economic treaties, which might have severe consequences for the internal organisation of the member states.¹⁰⁹ Because the relevant treaties no longer needed to be concluded as mixed treaties, the FCC complained about the absence of any compulsory participation of the national parliaments.¹¹⁰ However, the judges also observed that this apparent lack of democratic legitimisation for such important issues could at least be partly mitigated by the empowerment of European Parliament (EP).¹¹¹

The strengthening of the EP's role through the amendments made by the ToL aimed at increasing the democratic legitimisation of the Union as well as ensuring a certain institutional balance. Although many of these changes do not seem apparent at first glance, they have a significant impact through their extensive interpretation.¹¹²

According to articles 207(3) TFEU, article 218 of the TFEU shall apply – subject to the special provisions of article 207 of the TFEU – where agreements with one or more third countries or international organisations need to be negotiated and concluded. As the ordinary legislative procedure is applicable in the field of CCP, the consent of the Parliament is required

¹⁰⁵ Cottier (n 25 above) 4f.

¹⁰⁶ W Van Gestely & C Crombezz 'The role of oversight committees in closed rule legislation' (2014) *Journal of Theoretical Politics* 2 available at: <http://jtp.sagepub.com/content/early/2013/11/18/0951629813507644.full.pdf> (accessed 10 June 2015).

¹⁰⁷ Van Gestely & Crombezz (n 106 above) 3.

¹⁰⁸ *Lisbon judgment* (n 98 above).

¹⁰⁹ *Lisbon judgement* (n 98 above) para 374.

¹¹⁰ Flowing from art 59 II of the German Constitution.

¹¹¹ *Lisbon judgment* (n 98 above) para 373.

¹¹² CM Brown, 'Changes in the common commercial policy of the European Union after the entry into force of the Treaty of Lisbon: A practitioner's perspective' in Bungenberg & Herrmann (n 25 above) 163 164f.

for the conclusion of trade agreements under the terms of article 218(6)(a)(v) of the TFEU.

However, article 218(5) of the TFEU allows a derogation from this rule, as the Council might adopt a decision authorising the treaty's provisional application even before the entry into force and thus before the EP's consent.¹¹³ This could seriously impede Parliament's right to refuse its consent, as it would basically be faced with a *fait accompli*. These considerations were indeed raised in the context of the very first trade agreement requiring the EP's approval after the entry into force of the ToL.

The ratification of the EU-Korea FTA thus serves as a good example on how the Parliament's factual importance is being expanded even beyond the scope of the wording of the ToL. While the Council could have theoretically ordered a provisional application, especially the Commission argued that 'in the light of the importance of the Agreement' the Council should act 'only after a certain lapse of time so as to allow the European Parliament to express its views on the FTA'. Albeit the Council did not explicitly refer to these non-binding Commission recommendations, it held that the FTA provisional application would only be possible after the safeguard regulation implementing the Agreement was in place, which required the EP's agreement.¹¹⁴ Thus, although article 218(5) of the TFEU offered a different possibility, factually, the provisional application was suspended until the EP's consent.

The EU-Korea FTA is instructive in another aspect. It has been claimed that the EP's role is marginal one, as it can only give or refuse to give its consent to the relevant agreement while not being able to amend or influence them in any other way. However, the EP used the 'leverage' gained out of the consent requirement to achieve a distinct role in the monitoring of the implementation process of the agreement. Although this is by no means a role envisaged by the European Treaties,¹¹⁵ the Commission committed to such a procedure in a Joint Declaration, which is likely to serve as a precedent for similar cases.¹¹⁶

These two examples show that the EP seeks to increase its importance in the structural system of the EU even beyond its bare legal powers. Interestingly, this institutional balance was achieved without provoking a power struggle between the three institutions but rather on a cooperative basis.¹¹⁷ This indicates a tendency in the field of CCP to resolve conflicts

113 Brown (n 112 above) 165.

114 Brown (n 112 above) 166.

115 The implementation is either assigned to the Commission or the member states themselves (TFEU (n 30 above) art 291) without giving the EP any controlling role.

116 Brown (n 112 above) 168.

117 Brown (n 112 above) 170.

by finding a practical solution instead of battling the issue out in front of the ECJ.¹¹⁸

Nevertheless, despite the EP's increased importance and additional influence through its Committee on International Trade (INTA),¹¹⁹ it remains to have only a 'secondary' role in influencing the content of the treaties and negotiations. It is noteworthy that important decisions such as the temporal suspension of Agreements can still be taken without the EP's participation.¹²⁰ Furthermore – even though with 99 members of the parliament Germany is the 'strongest' nation – the member states' influence on the Parliament is of a very indirect nature.¹²¹

3.4 Influence through the Council

The possibilities of influencing the European Union's stance through the Council merit close attention. First of all, the member states' representatives in the Council decide about the Commission's proposal jointly with the European Parliament according to articles 207 and 218 of the TFEU. However, similarly their powers are confined to a veto right and leave them with no discretion to amend the proposal. This alone would not be sufficient with respect to the member states' legitimate interest in influencing the crucial area of trade policy in a more direct way – especially regarding the potential conflict between the Commission which is said to be rather liberal and free trade orientated and the European Parliament which tends to show more protectionist tendencies.¹²²

Against this background, the Trade Policy Committee (TPC) gains importance. This working group appointed by the Council is composed of senior trade officials from each member state and succeeds the former 'Article 133 Committee'. Like the aforementioned INTA it receives regular reports of the Commission on the progress of international trade negotiations.¹²³

Yet, both institutions are far from equal. While the INTA's importance is mostly limited to receiving reports and elaborating a voting suggestion for the European Parliament, the TPC can considerably influence the process on several stages.¹²⁴

118 Brown (n 112 above) 171.

119 The function of INTA will be discussed below in comparison with the Trade Policy Committee (TPC).

120 TFEU (n 30 above) art 218 (9); see K Schmalenbach 'Article 218' in Calliess & Ruffert (n 38 above) paras 23ff.

121 M Krajewski 'Die neue handelspolitische Bedeutung des Europäischen Parlaments' in M Bungenberg & C Herrmann *Die Gemeinsame Handelspolitik der Europäischen Union nach Lissabon* (2011) 55 - 74.

122 S Gstöhl 'The European Union's trade policy' (2013) 11 *Ritsumeikan International Affairs* 17.

123 Gstöhl (n 122 above) 11.

124 As above.

First of all, it serves to condense the member state preferences and to resolve conflicts even before the actual negotiations begin. Even more importantly, according to article 207(3) of the TFEU the TPC *has* to be consulted by the Commission and assists in the negotiations. Thus, its functions are twofold: The Commission uses the TPC ‘as a sounding board’ to ensure that it is ‘on the right track’ and might count on a positive vote in the Council. It can therefore alter its proposals and align them to the Council’s wishes. The member states on the other hand benefit from the ‘watchdog’ function as the TPC monitors whether the Commission sufficiently respects their wishes.¹²⁵ This makes the Committee a very powerful tool to ensure workable compromises and thus an effective representation of the member states’ economic interests on an international scale.

Summing up, while the relevance of the member states’ ‘parallel’ membership in the WTO might seem widely diminished; this does not necessarily entail a significant loss of their power. Not only do they have a limited veto right in the Council, but can also influence the negotiations mediated through the TCP and indirectly through the INTA.

This results in an enormous influence over the stance of the Union within the WTO and on other international trade matters. The main limitation on member states is that they cannot autonomously take positions contrary to those of the European Union but rather have to exercise them within the Union structure of governance.¹²⁶ By that approach on the other hand the member states necessarily join forces and thus can play a much more significant role on the international plane.

4 The role of courts in applying and developing international economic law

Due to the EU’s exclusive competence on the field of WTO law, German courts are no longer competent to exercise judicial review on these matters.¹²⁷ This is not only true for EU secondary legislation but also for transposing measures as far as they are predetermined by EU legislation. As a corollary, the practice of the competent ECJ requires close examination.

The relationship between the ECJ and WTO law is often viewed as somewhat ambiguous. Difficulties arise due to the fact, that three legal systems – international, European and national – intertwine. Furthermore,

125 G Shaffer ‘What’s new in EU trade dispute settlement? Judicialization, public–private networks and the WTO legal order’ (2006) 13 *Journal of European Public Policy* 832–840; Hahn & Danieli (n 87 above) 50f.

126 Hahn & Danieli (n 87 above) 56.

127 For the restrictive exceptions see BVerfG, 2 BvL 1/97 (7 June 2000).

WTO law is a unique field of law with many peculiarities that adds complexity.¹²⁸

From the very outset, the ECJ held that after the Union's accession the WTO agreements form part of Union law and thus are directly binding for the Union organs.¹²⁹ While this finding remains widely uncontested, the question of direct effect of WTO provisions on the other hand is severely disputed and subject to extensive case law of the ECJ.

Although direct effect has no conclusive definition in the European Treaties or secondary legislation, it is widely understood to describe a situation in which an individual can directly rely on a provision of an international treaty before a court.¹³⁰ The ECJ pointed out this phenomenon in the landmark case *Van Gend en Loos*,¹³¹ where it held that citizens could directly rely on EU provision before national courts. Since then, direct effect is said to form one of the bases of the Union legal order.

However, the ECJ was always eager to outline the fundamental differences of Union legislation in comparison to other international agreements. Thus, no general direct effect of international treaties can be presumed; rather, a close analysis is required in order to determine whether individuals can rely on a certain provision before a national or European court.¹³²

4.1 Direct effect of WTO-provisions

The dispute around the possible direct effect of WTO provisions dates back to the early days of the Union. In its case law the ECJ has set out definitive criteria for the applicability of international treaties in front of EU courts.

Besides the wording and the meaning of the relevant provision also the 'international origin'¹³³ of it needs close examination. Thus, prior to addressing the possible direct effect of specific norms, the agreements in question have to be assessed. With regard to their object and purpose they have to be sufficiently unconditional and precise.¹³⁴

Applying these criteria, the ECJ found that the GATT was characterised by 'the great flexibility of its provisions, in particular those

128 Hilpold (n 41 above) 284f.

129 Joined Cases 21–24/72 *International Fruit Company* [1972] ECR 1219, paras 14 and 18; Stoll & Schorkopf (n 12 above) 42.

130 J Errico 'The WTO in the EU: Unwinding the knot' (2011) 44 *Cornell International Law Journal* 179 182.

131 Case 26/62 *van Gend en Loos* [1963] ECR 1.

132 Hilpold (n 41 above) 290; Errico (n 130 above) 183.

133 Case C-104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* [1982] ECR I-3641, para 17.

134 *Hauptzollamt Mainz* (n 133 above) para 23.

[concerning] the possibility of derogation'.¹³⁵ Conflicts were often being solved by 'reciprocal and mutually advantageous arrangements',¹³⁶ and negotiations, which is why the requirements of unconditionality and precision were not met. Consequently, the ECJ denied a direct effect of the relevant GATT provisions.

Many scholars believed that those findings could no longer be upheld after the far-reaching reform, which led to the establishment of the WTO and limited the possibility of derogation.¹³⁷ However, in *Portugal v Council*,¹³⁸ the ECJ reiterated its earlier findings and further elaborated its arguments against a direct effect of WTO law. Acknowledging the numerous changes, it pointed out that members nevertheless retained a great degree of flexibility. Not only would direct effect deprive them of the important possibility of entering into negotiated agreements, but may also lead to a 'disuniform application of the WTO rules',¹³⁹ as other WTO members concluded that the WTO provisions were 'not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law'.¹⁴⁰ The ECJ backed its conclusion with the Council Decision regarding the WTO accession, which explicitly rejected the possibility of a direct invocation of the WTO agreements in front of national or Union courts.¹⁴¹ The rationale behind the Council decision was mainly one of reciprocity: as direct effect was specifically ruled out by important trading partners as the United States, Canada and Japan,¹⁴² the EU feared to jeopardise its negotiation position by allowing it.¹⁴³

4.2 Direct effect of DSB-decisions

The question left open was the possible direct effect of decisions of the DSB, which – according to the ECJ – had to be assessed independently from the WTO agreement in general.¹⁴⁴ This issue arose in the context of damage claims under article 340 of the TFEU against the EU following a violation of WTO law established by the DSB. Advocate General Alber's

¹³⁵ *International Fruit Company* (n 129 above) para 21.

¹³⁶ As above.

¹³⁷ S Griller 'Judicial enforceability of WTO Law in the European Union: Annotation to Case C-149/96, *Portugal v. Council*' (2000) 3 *Journal of International Economic Law* 441.

¹³⁸ Case C-149/96 *Portuguese Republic v Council of the European Union* [1999] ECR I-8395.

¹³⁹ *Portugal v Council* (n 138 above) para 45.

¹⁴⁰ *Portugal v Council* (n 138 above) para 43.

¹⁴¹ Decision of the Council (EC) 94/800/EC of 22 December 1994, relating to the adoption of the agreement in the framework of multilateral negotiations of the Uruguay Round (1986 - 1994), in the name of the European Community with regard to the areas falling within their jurisdiction [1994] OJ L336/1.

¹⁴² See P-T Stoll 'Freihandel und Verfassung' (1997) 57 *Zeitschrift für ausländisches öffentliches Recht und Verfassung* 83 128.

¹⁴³ Stoll & Schorkopf (n 12 above) 235f.

¹⁴⁴ Case C-93/02 *P. Biret International SA v Council of the European Union* [2003] ECR I-10535, paras 56 - 60.

opinion in *Biret*¹⁴⁵ strongly indicated that a DSB decision ought to have direct effect, especially as non-compliance with them would not be a lawful option under WTO law.¹⁴⁶

However, the ECJ once again recounted its former reasoning and extended it to DSB rulings.¹⁴⁷ This can lead to a special hardship for European enterprises. As a consequence of noncompliance of the EU with WTO obligations, trading partners are for example entitled to suspend trade concessions regarding certain items. Thus, affected businesses in the Union (as, for example, battery exporters in *FIAMM*)¹⁴⁸ suffer considerable damages, without any possible remedy. Despite the inherent 'injustice' of this approach, the ECJ saw no other way to sufficiently safeguard the EU negotiating position within the WTO.¹⁴⁹

4.3 Exceptions

Thus, the only narrow exceptions, where litigants could actually rely on WTO law in order to review the lawfulness of EU law, remain to be found in the cases *Nakajima*¹⁵⁰ and *Fediol*.¹⁵¹

Fediol concerned the interpretation of the term 'illicit commercial practices' in Regulation 2641/84, which granted producers the right to complain to the Commission if third-party countries utilised such methods. In this case, a European enterprise alleged that the Commission had to prosecute an Argentinean producer because he had violated several GATT provisions.¹⁵²

While the ECJ reaffirmed that GATT law could not have direct effect due to its structure, it took the relevant provisions into account while interpreting the term 'illicit commercial practices'. However, it did so under a very restrictive approach. The regulation itself explicitly referred to certain GATT rules. Thus, the ECJ clarified that it only applied EU law in the light of these provisions.¹⁵³

Still, supporters of a more GATT-friendly approach took this as a clear sign, which they saw being affirmed by the *Nakajima* ruling. In this case, the plaintiff argued that the anti-dumping regulation was inconsistent with the anti-dumping measures required by the GATT. Once again the ECJ

145 Case C-93/02 *P, Biret International SA v Council of the European Union* [2003] ECR I-10499, Opinion of AG Alber.

146 Errico (n 130 above) 187f.

147 Errico (n 130 above) 189.

148 Case T-69/00 *FIAMM* [2005] ECR II-5393.

149 Errico (n 130 above) 188.

150 Case C-69/89 *Nakajima All Precision Co Ltd v Council* [1991] ECR I-2069.

151 Case 70/87 *Fediol v Commission (Fediol III)* [1989] ECR, 1781.

152 Errico (n 130 above) 190.

153 Hilpold (n 41 above) 296.

did not raise the topic of direct effect, yet it examined the legality of the regulation with regard to WTO obligations.¹⁵⁴ This was the case because the act was explicitly adopted to comply with the anti-dumping codex of the WTO.¹⁵⁵

Since then, there has been considerable debate about the scope of these exceptions and their importance. While some argued in favour of a general 'indirect effect' of WTO law, the ECJ was clear about the exceptional nature of these findings and their restrictive use in its subsequent rulings.¹⁵⁶

Until today the *Fediol principle* has only been applied to Regulation 2641/84,¹⁵⁷ because the condition of a sufficiently clear reference to WTO law has not been met anywhere else.¹⁵⁸ The *Nakajima exception* on the other hand only seemed to require the respective acts to 'implement' WTO-law.¹⁵⁹ However, the courts specified and narrowed down this criterion in their following case-law:

In *Chiquita*¹⁶⁰ it was held that

it is only if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT, that the Court can review the lawfulness of the Community act in question from the point of view of the GATT rules¹⁶¹

Although it claimed that the '*Nakajima* case-law [was] not, a priori, limited to the area of anti-dumping' it specified that in order for the principle to be applied the

agreements and the Community provisions whose legality [was] in question [had to be] comparable in nature and content to ... the Anti-Dumping Codes of the GATT and the anti-dumping basic regulations which transpose[d] them into Community law.¹⁶²

In particular, the Court of First Instance outlined that there was an *obligation* of the Union to align the wording of their acts to the WTO-antidumping-rules,¹⁶³ as the 'Anti-Dumping Code ... required the contracting parties to take all necessary steps ... to ensure ... the

154 Hilpold (n 41 above) 297.

155 Errico (n 130 above) 191.

156 Hilpold (n 41 above) 298.

157 Which has been replaced by the *Trade Barrier Regulation* 3286/94.

158 Hilpold (n 41 above) 298.

159 GM Berrisch & H-G Kamann 'WTO-Recht im Gemeinschaftsrecht' (2006) *Europäisches Wirtschafts- und Steuerrecht* 89 96.

160 Case T-19/01 *Chiquita Brands and Others v Commission* [2005] ECR II-315.

161 *Chiquita* (n 160 above) para 111.

162 *Chiquita* (n 160 above) para 124.

163 Hilpold (n 41 above) 301.

conformity of its laws, regulations and administrative procedures.¹⁶⁴ It found evidence that the purpose of the regulation specifically was 'to transpose into Community law as far as possible the new and detailed rules contained in the 1994 Anti-dumping Code' in order 'to ensure a proper and transparent application of those rules'.¹⁶⁵

Still, from the case law of the courts it is not entirely clear when those conditions are met and the *Nakajima principle* might actually be applied. This is shown by *Italy v Council*¹⁶⁶ where quite surprisingly at least the wording of the judgment strongly suggested that agreements concluded within the framework of *negotiations* under article XXIV:6 of the GATT and even the correspondent '*understanding*' were covered by the exception. This seemed in stark contrast to the narrow reading the Court applied before.

While some authors even argue that the Court has got 'itself somewhat confused with the *Nakajima* case law',¹⁶⁷ at least a serious uncertainty concerning its consistent application must be admitted. This matter is aggravated by the fact that a distinction from the doctrine of consistent interpretation of Union law in the light of international law becomes increasingly more difficult.¹⁶⁸

Initially, one might be tempted to regard *Petrotub*¹⁶⁹ as a stringent continuation of the *Nakajima* principle.¹⁷⁰ After a more detailed examination however it becomes apparent that the Court relied on consistent interpretation to set aside the anti-dumping measure for a violation of EU law.¹⁷¹

Despite these uncertainties, it seems preferable and most consistent to view the *Fediol* and *Nakajima* case law as a special case of the doctrine of consistent interpretation whenever WTO law is affected. In these cases, WTO law attains a more important role than it does in the legal systems of most of the other WTO members.¹⁷² This approach – applied in great detail for example in *Hermès*¹⁷³ and *Schieving-Nystad*¹⁷⁴ – sometimes might hardly be distinguished from direct effect.¹⁷⁵ Thus, it seems rather odd that while the courts favour a wide utilisation of the doctrine of consistent

164 *Chiquita* (n 160 above) para 122.

165 Case C-76/00 *P, Petrotub* [2003] ECR 79, para 54.

166 Case C-352/96 *Italy v Council* [1998] ECR I-6937.

167 PJ Kuijper & M Bronckers 'WTO Law in the European Court of Justice' (2005) 42 *Common Market Law Review* 1325.

168 Hilpold (n 41 above) 302.

169 *P, Petrotub* (n 165 above).

170 Compare GA Zonnekeyn 'The ECJ's *Petrotub* Judgment: towards a Revival of the *Nakajima* Doctrine?' (2003) 30 *Legal Issues of Economic Integration* 249.

171 Kuijper & Bronckers (n 167 above) 1326.

172 Hilpold (n 41 above) 302f.

173 Case C-53/96 *Hermès* [1998] ECR I-3603.

174 Case C-89/99 *Schieving-Nystad* [2001] ECR I-5851.

175 Kuijper & Bronckers (n 167 above) 1326.

interpretation, they are very clear to point out the absence of direct effect of WTO provisions.¹⁷⁶

Given that the US courts are somewhat inconsistent in the application of their 'Charming Betsy' doctrine – the counterpart of the European doctrine of consistent interpretation – this might lead to problems with reciprocity.¹⁷⁷ Bearing in mind that lacking reciprocity was one of the arguments, which lead the courts to deny direct effect of WTO provisions, it remains to be seen how the development on the other side of the Atlantic will eventually influence the European judiciary.

Summing up, while a comprehensive direct effect of WTO provisions has been unequivocally dismissed, through the principle of consistent interpretation, WTO law nevertheless has a non-negligible 'indirect' impact on the legal order of the EU.

5 Conclusion

International economic law is an extremely important and dynamic area of international law. In European countries, due to the strong focus of the European Union on trade related aspects, this matter is heavily influenced by the intertwining of three legal orders – national, European and international.

Although at first glance it might seem, as though Germany gave up most of its power in this area, such a finding does not reflect the reality. Through the long and enduring conflicts between the member states and the Union, as well as numerous amendments of the European Treaties, both parties have figured out an effective and advantageous model of cooperation. While Germany no longer has the power to take autonomous positions within the WTO, it can influence the European Union's stance. Furthermore, it benefits from the combined weight of all member states, which helps assert European interests against those of other global players as the United States or China. Another upside is the bundling of resources leading to a uniquely efficient system.

Although these advantages clearly outweigh the necessary evils, the current case law continues to show that member states are keen to retain as much power as possible in the crucial area of international economic law.

¹⁷⁶ Kuijper & Bronckers (n 167 above) 1329.

¹⁷⁷ Kuijper & Bronckers (n 167 above) 1329ff; US Court of Appeals for the Federal District, *Corus Staal v Department of Commerce* (21 January 2005) 395 F.3d 1343 (Fed Cir 2005).

It follows from the Union-based approach that European law heavily influences the implementation of international economic law. Thus, the question of direct effect and how citizens can rely on WTO-law is solely decided by the ECJ. Although very restrictive in according direct effect, the ECJ seems more open to using WTO-law as an interpretive guideline, which at least indirectly influences the Union law.

Summing up, it can be said Germany's approach to international economic law maximises the benefit of membership in the European Union at the relatively low cost of losing the possibility to take an autonomous stance on certain matters.

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1 International economic law in South Africa

The South African government has been actively involved in the negotiation and signature of international agreements relating for example to the field of international economic law ever since it became a union in 1910.¹ The first, but not necessarily related to international economic law, was the involvement of General Smuts in the drafting of the Covenant of the League of Nations.² And not long after that were the negotiations that led to the signing and ratification of the Articles of Agreement of the International Monetary Fund which came into force in 1945.³

Although the signatories of this agreement undertook to give effect to it in their domestic legal systems, the South African government chose not to do so and until today, the Articles of Agreement of the International Monetary Fund has not been incorporated into South African law.⁴

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1 As a result of the UK South Africa Act, 1909 which created the Union of South Africa.

2 One of the big proponents of the League of Nations was Jan Christian Smuts (see C Howard-Ellis (ed) *The origin, structure & working of the League of Nations* (2003) 80ff).

3 International Monetary Fund and International Bank for Reconstruction and Development *Inaugural meeting of boards of governors, provisional list of members of the delegations officers of the Secretariat* (1946); and for some of South Africa's initial involvement see *Proceedings and documents of the United Nations Monetary and Financial Conference Bretton Woods, New Hampshire July 1-22, 1944 Vol I and II* (1948). Articles of Agreement of the International Monetary Fund (22 July 1944).

4 It needs to be mentioned that the article which has caused the most litigation or which has been cited most in litigation in many other jurisdictions, art VIII(2)(b), has never been the subject of litigation in South Africa and as such the domestic legal status of the IMF's articles of agreement has never been addressed by the South African courts.

In these early years of South Africa, there was no constitution that contained any provision regarding the treatment of international treaties in its domestic law. The legal status of international treaties in South Africa was governed by the common law which was considered to be more or less the same as English law and South Africa thus never followed an entirely monistic approach. The approach was rather more dualistic and thus in order for a treaty to have domestic effect, it had to be incorporated by legislation into South African law (→ De Wet/Introduction).⁵

2 Implementation of international economic law

2.1 The legal effect of treaties

A treaty is described in the Vienna Convention on the Law of Treaties as an international agreement between two states governed by international law.⁶ Although South Africa is not a signatory to this treaty, it is quite clear that South Africa considers itself bound by the principles contained in the treaty and also applies it to its treaty practice.⁷ This is not an uncommon phenomenon since the Convention codifies customary international law and South Africa has to a large extent always respected customary international law and the general principles of customary international law forms part of South African law (→ De Wet/Introduction).⁸

It is, however, trite law that a state is only bound by a treaty if it bound itself to it and if that treaty came into operation.⁹ The mere fact that a treaty is in existence does not have any legal effect on non-signatories. It also does not form a source of international law for non-parties. The only exception to this rule is found in those instances where customary international law had been codified as is the case with the Vienna Convention on the Law of Treaties. The difference thus lies in the fact that in this instance, a state gives credence to customary international law

5 This is called the principle or doctrine of incorporation. See H Booysen *Volkereg en sy verhouding tot die Suid Afrikaanse Reg* (1989) 33; J Dugard *International Law: A South African perspective* (4th edn 2011) 42ff.

6 Vienna Convention on the Law of Treaties (the Vienna Convention) (23 May 1969, 1155 UNTS 331) art 2(1)(a).

7 See Booysen (n 5 above) 34.

8 The Constitution of the Republic of South Africa, 1996 sec 232. For the historical approach to customary international law in South Africa see *Nduli v Minister of Justice* 1978 (1) SA 893 (A) 906C - E, 'It was conceded by counsel for appellants that according to our law only such rules of customary international law are to be regarded as part of our law as are either universally recognised or have received the assent of this country. I think that this concession was rightly made'. See also the discussions by Dugard (n 5 above) 48 - 51; J Dugard 'International law is part of our law' (1971) 13 *South African Law Journal* 15; Booysen (n 5 above); AA Lamprecht 'Nullum crimen sine lege (iure) and jurisdiction in the adjudication of international crimes in national jurisdictions' unpublished LLD thesis, UNISA, 2010 475 - 479; and the sources they refer to.

9 Vienna Convention on the Law of Treaties (n 6 above) art 1(1)(g).

principles to which it is bound whereas in the other instance, a state is not bound by any obligations of treaty law that it did not agree to (you can only be bound by obligations that you had agreed to). The normal principles of *pacta sunt servanda* are thus applicable: without consensus, a state is not bound by international law obligations. And at the local level, citizens may only rely on treaties binding their government if those treaties are incorporated into South African law.

2.2 The legal status of the General Agreement on Tariffs and Trade 1947 in South African law

As indicated, South Africa participated in international law-making since the early years of the twentieth century and as such was one of the contracting parties to the General Agreement on Tariffs and Trade 1947. This agreement was incorporated into South African domestic law through the promulgation of the Geneva General Agreement on Tariffs and Trade Act in 1948.¹⁰ The long title of this act stated its aim as 'to approve of the General Agreement on Tariffs and Trade concluded at Geneva on the thirtieth day of October, 1947; to make provision for the carrying out of the said agreement, and for matters incidental thereto'.¹¹

The state law advisors interpreted the wording of section 3 of the act,¹² to mean that the application of the agreement (as part of South African law) was dependant on the (additional) actions of the governor-general, which required the publication of relevant proclamations.¹³ Since no proclamations were ever published, the agreement thus never became part of the domestic law and the citizens of the country could also not rely on it in any litigation.¹⁴ This is apparently also the information provided to the secretariat of the General Agreement on Tariffs and Trade; in South Africa's trade policy review of 1993 the following statement is found: 'it [South Africa] has observer status in the Government Procurement, Subsidies and Anti-Dumping Codes!¹⁵ The General Agreement [on Tariffs and Trade] has been approved by Parliament *but cannot be invoked before*

10 Geneva General Agreement on Tariffs and Trade Act 29 of 1948. It came into force on 9 April 1948.

11 n 10 above, long title. The General Agreement on Tariffs and Trade (GATT 1947) (30 October 1947, 55 UNTS 194) was primarily a customs matter and all the repealed sections of the act dealt with customs valuations, ie operational provisions.

12 'The agreement shall, in relation to the territories the governments of which are referred to in section two, be applied, either provisionally or definitively as the Governor-general may determine by proclamation in the *Gazette*, with effect from a date specified in such proclamations.'

13 See GS Eisenberg 'The GATT and the WTO agreements: comments on their legal applicability to the Republic of South Africa' (1993/1994) 19 *South African Yearbook of International Law* 132.

14 This act never formed the subject matter of any reported case.

15 South Africa never signed these codes.

national courts'.¹⁶ The government's submission to the secretariat also makes no mention of the relevant act¹⁷ and its implication for South Africa's trade policy. Eisenberg, without giving any cogent authority, is of the opinion that the act is still in operation and shall remain as such until South Africa withdraws from the agreement.¹⁸ However, the only section remaining in the act, merely refers to the approval of the agreement which had been published in the *Government Gazette* in 1947.¹⁹

References to a number of other agreements that formed part of the tariff rounds of the General Agreement on Tariffs and Trade are to be found in other pieces of legislation, yet none of these agreements were ever incorporated into South African law. Notwithstanding references to treaty provisions found in legislation, such as section 74A of the Customs and Excise Act,²⁰ the particular international law documents were not incorporated and it is thus only the General Agreement on Tariffs and Trade of 1947 which was formally incorporated into South African domestic law.

Section 74A of the Customs and Excise Act as amended by Act 101 of 1985 provides as follows:

- (1) The interpretation of sections 65, 66 and 67 shall be subject to the agreement concluded at Geneva on 12 April 1979 and known as the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, the Interpretative Notes thereto, the Advisory Opinions, Commentaries and Explanatory Notes, Case Studies and Studies issued under the said Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade.^[21]
- (2)(a) The Commissioner shall obtain and keep in his office two copies of such Agreement, Interpretative Notes, Advisory Opinions, Commentaries and Explanatory Notes, Case Studies and Studies and shall effect thereto any amendment thereof of which he is notified by the Secretariat of the Customs Co-operation Council, Brussels.
- (b) Whenever in any legal proceedings any question arises as to the contents of the said Agreement, or any such Interpretative Note, Advisory Opinion, Commentary, Explanatory Note, Case Study or Study (hereinafter in this paragraph referred to as the relevant document), or as to the date upon which any amendment thereof was effected thereto in terms of paragraph (a), a copy of the relevant document, or if amended as contemplated in paragraph (a), a

16 Emphasis added. GATT Secretariat 'Trade Policy Review Mechanism the Republic of South Africa' C/RM/S/37A 3 May 1993 vii http://www.wto.org/gatt_docs/English/SULPDF/91700080.pdf (accessed 30 April 2015).

17 Geneva General Agreement on Tariffs and Trade Act (n 10 above).

18 n 13 above, 133. See the discussion to follow on the validity and duration of the GATT 1947.

19 GN 2421 GG 3896 of 18 Nov 1947.

20 Customs and Excise Act 91 of 1964.

21 This refers to the Customs Valuation Agreement (Customs Valuation: Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (Document code LT/TR/A/2), one of the Tokyo round codes).

copy of the relevant document as so amended, shall, unless the contrary is proved, be accepted as sufficient evidence of the contents thereof or of the effective date of any amendment thereof, as the case may be.

This provision requires the use of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (the customs valuation agreement or code), for purposes of interpretation. However, the mere requirement of using the international treaty for purposes of interpretation does not suddenly make it (that is, the treaty) part of South African law.²² It is true that the interpretation along the lines of the international instrument does have an influence on the application of the particular provision in the domestic law but that still does not mean that the agreement itself became part of South African law.²³ It does not comply with the requirements stated in the *Pan American Airways* case as quoted below and neither does it comply with the constitutional requirements as enacted in both 1993 and 1996.²⁴ Treaties that are not properly incorporated do not form part of domestic law and treaties or provisions of treaties merely referred to in passing cannot be considered to be incorporated treaties or even to be considered to be incorporated by reference²⁵ and be given direct application in the domestic law. With the acceptance of the Agreement establishing the World Trade Organisation, the position regarding the GATT 1947 changed due to the fact that the GATT 1994 effectively replaced the GATT 1947 and as a result, the GATT 1947 is no longer a legally binding instrument which means that even though the act remains on the statute books and was not repealed, it

22 This seems to be confirmed by the latter part of the section that clearly states that the copy of the agreement would be considered evidence of its contents. One does not provide evidence of the law of a country before its own courts. The new Customs Duty Act 30 of 2014 (the date of commencement still has to be proclaimed) did not change this position (see secs 97 & 98). What has been changed however, is that is now clearly provided that the tariff classification of goods for customs purposes must be done in accordance with particular international instruments but if there are any inconsistencies between the international instrument and the act, the act would prevail (secs 96 and 97). Similar provisions are to be found concerning the valuation of imported goods (secs 113 & 114) etc.

23 See also C Roodt 'National law and treaties: An overview' (1987-1988) 13 *South African Yearbook of International Law* 72 92: 'It is important to note that a mere general or vague allusion to the treaty in a statute is not sufficient to constitute the necessary legislative implementation'; and A Sanders 'Transformation of treaties' (1974) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 364 369.

24 Prior to the 1993 and 1996 Constitutions, there was no obligation on courts to consider international law when interpreting legislation and it seems as if the government of the time wanted to ensure that specifically with regard to trade matters, an interpretation be followed that would take international law for this particular purpose into account. These provisions did not, however, incorporate the respective international law documents or treaties into South African law. The introduction of the constitution and sec 233, did not change this; sec 231 in essence codified the requirements set out in the *Pan American Airways v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) case which requires an act of incorporation and until it is repealed, the requirements of s 231 cannot be ignored. In the case of GATT 1947 (n 11 above), the position was governed by the pre-constitutional era and as such provisions similar to sec 233 were not part of South African law.

25 The private law doctrine of 'incorporation by reference' also no longer finds application in South African law – see *Moses v Abinader* 1951 (4) SA 537 (A) 552D.

no longer has any legal significance. If an international instrument is repealed, there are no international obligations that need to be complied with and if the only remaining part of the domestic legislation, as is the case under discussion, merely refers to the initial GATT 1947 treaty – the act in essence has been abrogated by disuse.

The same should be applicable to instances where reference is made to international treaties and documents which should have been used for purposes of interpretation of actions if those treaties are no longer in effect. The law also does not work in such a manner that if a treaty is replaced by something new, that it would automatically follow that in municipal law, a new act of incorporation or an amendment of an existing legislative provision is not required.

2.3 The legal status of the Agreement establishing the World Trade Organisation in South African law

The South African government signed the Agreement establishing the World Trade Organisation on 15 April 1994.²⁶ The agreement was ratified by the South African parliament on 6 April 1995.²⁷ With its signature and the consequent ratification, the South African government gave its approval of the Agreement as required by the Final Act.²⁸ The approval given by the South African parliament did not include an incorporation act and neither did parliament expressly provide²⁹ that the agreement would form part of the law of the Republic.³⁰ And as Botha puts it:

26 'Results of the Uruguay Round Signing Ceremony on April 15th, 1994 in Marrakesh, Morocco' NUR086 18 April 1994 http://www.wto.org/gatt_docs/English/SULPDF/91770139.pdf (31.10.2014); see Eisenberg (n 13 above) 135 who wrongly states the date as 14 April 1994).

27 *Debates of the National Assembly (Hansard) Second Session – First Parliament* 23 Jan-11 Oct 1995 col 642 – 653; EC Schlemmer 'Ontwikkelende of ontwikkelde lidland: Suid-Afrika en die Wêreldhandelsorganisasie' (2007) *Tydskrif vir die Suid-Afrikaanse Reg* 786 - 799 and the sources referred to.

28 Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (http://www.wto.org/english/docs_e/legal_e/legal_e.htm#finalact (accessed 30 April 2015)); see also EC Schlemmer 'South Africa and the WTO ten years into democracy' (2004) 29 *South African Yearbook of International Law* 125; Schlemmer (n 27 above) 786ff.

29 Botha states that 'There was some difference in opinion in academic circles on exactly how Parliament was 'expressly so to provide'. In practice, however, this was effected by endorsement of the treaty and a declaration to this effect at the time of promulgation.' (NJ Botha 'International law' in Joubert (ed) 11(2ed) *LAWSA* para 444 and the sources he refers to.)

30 It had been argued elsewhere that due to the fact that the negotiations that took place leading to the signing of the agreement already started in September 1986 ('The Final Act of the Uruguay Round Press Summary' NUR084 5 April 1994 http://www.wto.org/gatt_docs/English/SULPDF/91770054.pdf (accessed 30 April 2015)), the whole process was governed by the pre-1993 Constitutional dispensation (which came into operation on 27 April 1994) and even though the 1993 Constitution contained a provision that deviated from the earlier legal position regarding the incorporation of treaties into domestic law before the treaty can have effect at a domestic level (sec 231(3) 'Where Parliament agrees to the ratification of or accession

In assessing the municipal effect of treaties, therefore, it must be borne in mind that during the 'interregnum' between 27 April 1994 (the date on which the interim Constitution came into operation) and 4 February 1997 (the date on which the Constitution of the Republic of South Africa came into operation) a unique method was employed to accord treaties municipal application.³¹

It remains clear that no matter which format had to be followed, the result is thus that the WTO agreements do not form part of the South African domestic law. The coming into operation of the Constitution of the Republic of South Africa, 1996 did not change this legal position.³²

In the period prior to the coming into operation of the interim constitution, the application of treaties in domestic law was treated as follows, as enunciated by the then Appellate Division³³ in *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd*:³⁴

[T]he conclusion of a treaty, convention or agreement by the South African Government with any other Government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are *not embodied in our municipal law except by legislative process* ... In the absence of any enactment giving [its] relevant provisions the force of law, [it] cannot affect the rights of the subject.³⁵

The Agreement establishing the World Trade Organisation and the covered agreements such as the General Agreement on Tariffs and Trade (1994) were never incorporated into South African law and thus can never

to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution.'), that irrespective of the actions taken in parliament, the agreements do not form part of South African domestic law.

31 n 29 above, para 445.

32 See also in detail DJ Devine 'Some problems relating to treaties in the Interim South African Constitution and some suggestions for the definitive constitution' (1995) 20 *South African Yearbook of International Law* 1.

33 The name of the appellate division was changed to the supreme court of appeal by the Constitution of the Republic of South Africa, 1996 (item 16(3)(a) schedule 6)) with effect from 4 February 1997 when the Constitution came into operation. The supreme court of appeal (and prior to the name change, the appellate division) was the highest court in the Republic until 22 August 2013; the Constitutional Court was made the highest court of the Republic *in all matters* and not only limited to constitutional matters any longer with effect from 23 August 2013 (see sec 167 of the Constitution of the Republic of South Africa, 1996 as amended by the Constitution Seventeenth Amendment Act of 2012).

34 n 24 above.

35 n 24 above, 161 C-D – emphasis added. See also *S v Eliasov* 1967 (4) SA 583 (A) 591; H Booysen 'Judicial control of the prerogative in foreign affairs' (1977) *South African Yearbook of International Law* 216; M Olivier 'The status of international law in South African municipal law: section 231 of the 1993 constitution' (1993/4) 19 *South African Yearbook of International Law* 1 6; *Nduli v Minister of Justice* 1978 (1) SA 893 (A); *Mahuleke v Minister of Internal Affairs* 1981 (1) SA 707 (BSC); *S v Petane* 1988 (3) SA 51 (C); C Roodt 'National law and treaties: an overview' (1987-88) *South African Yearbook of International Law* 72 - 94.

be the source of any rights for South African legal subjects. This has been confirmed by the Supreme Court of Appeal in *Progress Office Machines v SARS*.³⁶

On numerous occasions, the South African courts have confirmed that a South African legal subject cannot rely on international law in order to circumvent the application of a rule of South African law.³⁷ The opposite should also be true, namely that any reliance on an international law principle that does not form part of South African law may not be sanctioned by South African courts and treated as a source of South African law. South African legal subjects do not derive any interests or rights worthy of legal protection from such international law provisions and as such these are not justiciable before a South African court.

Treaties that are not properly incorporated do not form part of domestic law, also, treaties or provisions merely referred to in passing cannot be considered to be incorporated and one can also not consider them to be incorporated by reference and in such a manner be given indirect application almost as if they had been incorporated.³⁸ The same should apply to reports of *inter alia* the international trade administration commission which all contain a statement indicating that the report is done 'in accordance with the International Trade Administration Commission Act ... the Anti-Dumping Agreement ... and the ... Anti-

36 *Progress Office Machines CC v South African Revenue Service & Others* 2008 (2) SA 13 (SCA) 17E-F. Also see *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) per Ngcobo CJ 'An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane. And failure to observe the provisions of this agreement may result in South Africa incurring responsibility towards other signatory States. An international agreement that has been ratified by Parliament under s 231(2), however, does not become part of our law, until and unless it is incorporated into our law by national legislation. An international agreement that has not been incorporated in our law cannot be a source of rights and obligations' (374G-375A). And see *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) 'International conventions do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment' (per Mahomed DP (688C) with reference to *R v Secretary of State for the Home Department, Ex parte Brind* 1991 (1) AC 696 (HL) 761G-762D; *Pan American World Airways* (n 24 above); *Maluleke* (n 35 above) 712G-H; *Binga v Cabinet for South West Africa* 1988 (3) SA 155 (A) 184H-185D; *S v Petane* 1988 (3) SA 51 (C) 56F-G; HR Hahlo & E Kahn *The South African legal system and its background* (3rd edn 1968) 114; J Dugard *International Law: A South African perspective* (1994) 339-46. See however MD Stubbs 'Three-level games: Thoughts on *Glenister*, *Scaw* and international law' (2011) 4 *Constitutional Court Review* 138 who accepts (wrongly and without consideration of authority) that 'the GATT and WTO agreement (*sic*) had been incorporated into domestic law' (145) and '*Scaw* was a win for the state because it held a win-set. It had tentative agreement to, and ratification of, the GATT and the WTO agreement, coupled with full domestic ratification in the form of the ITA Act' (161). See also *Association of Meat Importers and Exporters v International Trade Administration Commission* 2013 (4) All SA 253 (SCA) para 58.

37 See *Binga v Administrator-General SWA* 1984 (3) SA 949 (SWA) 967; Booysen (n 5 above) 78; also see *Inter-Science Research & Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (T) 124.

38 Legal subjects would still not be entitled to rely on any of the obligations that the government might not be complying with in such an instance.

Dumping Regulations^{39, 40} This statement by the statutory commission cannot result in an indirect application of the treaty in South African domestic law. The mere fact that one might be relying on an international treaty for purposes of interpretation does not mean that interpretation *per se* or the interpretative tool can create rights which can be relied upon in a court of law.

The acceptance and coming into operation of the Agreement establishing the World Trade Organisation in Marrakesh in 1994, introduced a new era for international trade. The General Agreement on Tariffs and Trade of 1947 was replaced with the General Agreement on Tariffs and Trade of 1994 and although the 1947 Agreement is an annex to the Marrakesh agreement, it is replaced by the new agreement.

The procedure for the orderly termination of the 1947 agreement is contained in the concomitant decision of the preparatory committee for the World Trade Organisation entitled *Transitional Co-Existence of the GATT 1947 and the WTO Agreement*⁴¹ and was adopted at the sixth special session held on 8 December 1994.⁴² The decision provides that

The legal instruments through which the contracting parties apply the GATT 1947 are herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the CONTRACTING PARTIES may decide to postpone the date of termination by no more than one year.⁴³

After this period, the rights and duties by reason of the 1947 agreement do not continue any longer – the period of co-existence between GATT 1947 and the WTO Agreement is limited to one year with a possible extension of one year. The fact that the GATT 1947 is one of the annexes of the WTO agreement does not mean that it creates new rights and duties but that the rights and duties created after its termination arise out of GATT 1994 and the WTO agreement.

Thus, after December 1997 all of the international law rights and obligations that existed in terms of the 1947 agreement were terminated and replaced with new rights and obligations in terms of GATT 1994. As a result the Geneva General Agreement on Tariffs and Trade Act does not have any role to play and can almost be regarded as *pro non scripto*. If no

39 GN 3197 in GG 25684 of 14 November 2003.

40 See for example Report No. 332 *Investigation into the alleged dumping of staple polyester fibre in or imported from the People's Republic of China (PRC): final determination* 1.04.2010 <http://www.itac.org.za/docs/Report%20332.pdf> (accessed 31 October 2014).

41 *Transitional co-existence of the GATT 1947 and the WTO Agreement* PC/W/17-6SS/W/3 of 7 Dec 1994 http://www.wto.org/gatt_docs/English/SULPDF/91840033.pdf (accessed 30 April 2015).

42 6SS/SR/1 http://www.wto.org/gatt_docs/English/SULPDF/91840166.pdf (accessed 30 April 2015).

43 *Transitional co-existence of the GATT 1947* (n 41 above) para 3.

rights and obligations exist at the international law level, it is also not possible to derive any rights or obligations at the domestic level that an individual may rely on. The fact that the act remained on the statute book⁴⁴ does not change the legal position.

It is true, however, that some important changes were made to South African legislation, especially regarding trade remedies and intellectual property, that were clearly aimed at giving effect to South Africa's international law obligations arising from the WTO agreements. However, it seems as if the Constitutional Court has on occasion applied the WTO agreements directly even though they do not form part of South African law.

3 The role of courts in applying and developing international economic law

3.1 Using the WTO agreements for purposes of interpretation

In terms of the Constitution of the Republic of South Africa, 1996, the Republic is bound by treaties that were binding on it prior to the Constitution⁴⁵ and it is also clear that customary international law forms part of South African law if it is not in violation of the Constitution or legislation.⁴⁶ The Constitution also provides that in interpreting the Bill of Rights the courts must consider international law.⁴⁷ Furthermore, when it comes to the interpretation of legislation, 'every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law' (→ *De Wet/International Decisions*; *Chenwi*).⁴⁸

The Constitutional Court has already on a number of occasions stated that using international law as an interpretative assistant 'is to respect the careful way in which the Constitution itself creates concordance and unity between the Republic's external obligations under international law, and their domestic legal impact'.⁴⁹ It has also stated that:

44 With only one section still in place which merely confirms the incorporation of GATT 1947.

45 n 8 above, sec 231(5) 'The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect'.

46 n 8 above, sec 232 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.

47 This places a positive obligation on the courts to look at international law and thus treaties when they interpret the rights in terms of the bill of rights (see the Constitution (n 8 above) sec 39(1)(a)).

48 The Constitution (n 8 above) sec 233.

49 *Glenister* (n 36 above) 410F - G per Moseneke DCJ and Cameron J discussing the interrelationship between s 39(2) and s 7(2) of the Constitution.

A further provision of the Constitution that integrates international law into our law reinforces this conclusion. It is s 233, which, as we have already noted, demands any reasonable interpretation that is consistent with international law when legislation is being interpreted. There is, thus, no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law. We do so willingly and in compliance with our constitutional duty.⁵⁰

However, Ngcobo CJ held in the same case that:

[T]reating international conventions as interpretive aids does not entail giving them the status of domestic law in the Republic. To treat them as creating domestic rights and obligations is tantamount to 'incorporat[ing] the provisions of the unincorporated convention into our municipal law by the back door.'⁵¹

At this point of the discussion, one has to differentiate the approach of the Constitutional Court with that of the Supreme Court of Appeal when it comes to the Agreement establishing the World Trade Organisation.

3.2 The approach of the Constitutional Court

In March 2010 the Constitutional Court gave a far reaching judgment in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*.⁵² The applicant in this case was the international trade administration commission, a statutory body created in terms of section 7 of the International Trade Administration Act.⁵³ The purpose of the commission is *inter alia* to deal with applications for anti-dumping investigations and matters related to it. The commission should investigate and evaluate allegations of dumping in or to the Republic or the Common Customs Area created by the Southern African Customs Union (SACU) Agreement.⁵⁴ After investigating and evaluating an anti-dumping allegation/application, the commission makes a recommendation to the

50 *Glenister* (n 36 above) 410G - I.

51 *Glenister* (n 36 above) 376H.

52 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC). The following discussion is based on EC Schlemmer 'Die grondwetlike hof en die Ooreenkoms ter Vestiging van die Wêreldhandelsorganisasie' (2010) *Tydskrif vir die Suid-Afrikaanse Reg* 749.

53 International Trade Administration Act 71 of 2002; it came into operation on 1 June 2003.

54 Southern African Customs Union (SACU) Agreement (2002 SACU Agreement) (21 October 2002). This international agreement has presumably been incorporated into South African law in terms of the schedule 1 of the International Trade Administration Act (n 53 above). The addition of the schedule to the act has however not been done yet since it seems as if this will only be done once all the relevant institutions have been created. It does however raise an interesting question, one which I do not attempt to address in this contribution, since the 2002 SACU agreement has already been incorporated into South African law by means of schedule 10 of the Customs and Excise Act (n 20 above). See the comments of Nugent JA in the *Association of Meat Importers and Exporters* (n 36 above) case that the Customs Union Agreement has not yet become law in the Republic (par 14).

minister of trade and industry⁵⁵ who in turn will request the minister of finance to promulgate anti-dumping duties in the *Government Gazette*.⁵⁶

The respondent in this case was SCAW South Africa (Pty) Ltd, a South African company who was complaining about the dumping of steel products by Bridon International Limited (UK), a British company. This complaint was investigated by the Board on Tariffs and Trade (the predecessor of the commission) and as a result of the investigation and recommendation, the minister promulgated an anti-dumping duty of 42,1 per cent in February 2002,⁵⁷ thus before the enactment of the ITA Act. In August 2006 Bridon requested a review based on changed circumstances; the commission found in May 2007 that the anti-dumping duties should continue in force.⁵⁸

On 19 February 2007, SCAW applied to the commission for a sunset review with the intention of having the duties maintained beyond the five-year period.⁵⁹ The anti-dumping regulations do provide that any investigations and reviews undertaken after its promulgation should be done in terms of the regulations. The first time these regulations could play a role, was thus in August 2006 when Bridon requested the review due to changed circumstances.⁶⁰

The commission initiated a sunset review in August 2007 and in October 2008 recommended to the minister that the anti-dumping duties be terminated. As a result of this recommendation SCAW sought an urgent interim interdict to prevent the minister(s) from acting on the recommendations while the judicial review of the commission's investigation was ongoing. The interdicts were granted thus effectively extending the period of the anti-dumping duties for a period longer than five years. The commission then approached the Constitutional Court for

55 Once the SACU Tariff Board is created in terms of the 2002 SACU agreement (n 54 above), the recommendation will be made to this Board.

56 Customs and Excise Act (n 20 above) sec 55(2) & 56. The new Customs Duty Act 30 of 2014 which has not come into operation yet, clearly defines customs duties for purposes of the 2002 SACU agreement (sec 16).

57 And thus subject to the 1969 SACU (11 December 1969) agreement which provided that all SACU members were bound by the duties imposed by South Africa for purposes of goods entering the common customs area.

58 *SCAW South Africa* (n 52 above) 626F - 627A.

59 See *SCAW South Africa* (n 52 above) 627C - E for the details. It is however important to point out that the court refers to the anti-dumping regulations as authority whereas at the point in time when the anti-dumping duties were imposed, the regulations were not in force (they only came into force in November 2003) and they were also not promulgated with retrospective effect. The duties under discussion were thus imposed in terms of the Board on Tariffs and Trade Act 107 of 1986.

60 This discussion will only focus on the Constitutional Court's approach to the WTO agreements and the role of international law in South African domestic law and not on the detail of the anti-dumping law-related issues. For more detail and a discussion of some of the issues not dealt with in this discussion, see GF Brink '*International Trade Administration Commission v SCAW South Africa (Pty) Ltd* Case CCT 59/09 [2010] ZACC 6' (2010) *De Jure* 380.

leave to appeal, contending that the order was contrary to domestic law as well as to South Africa's international law obligations.⁶¹

In its judgment, the Constitutional Court frequently refers to the Anti-Dumping Agreement in order to determine the duration of the anti-dumping duties as well as the duration of the anti-dumping duties in the event of a sunset review. Little reference is made to the relevant domestic law provision. This is problematic since the treaty that the Court uses as yard stick, does not form part of South African domestic law and the relevant domestic law provision contains a much stricter requirement (which is more beneficial to the party paying the anti-dumping duties)⁶² than that contained in the Anti-Dumping Agreement.⁶³ The Court also does not make reference to the South African Customs Union Agreement that does form part of South African domestic law. The importance of these two statements will be seen shortly.

3.2.1 *The Southern African Customs Union Agreement*

In its judgment, the Court places huge emphasis on the obligations of the ministers of trade and industry and finance that arise from national legislation. However, justice Moseneke did not take into account that, for the time being, the two ministers are, when it comes to dumping investigations and the recommendation and promulgation of anti-dumping duties, acting on behalf of the Southern African Customs Union and its Council of Ministers and not primarily as mandatories of South African legal subjects.⁶⁴ The fact that these local ministers are acting in a

61 Another important issue was whether the order given by the High Court 'trenches on separation of roles and powers between the national executive and the courts. This issue has been dealt with more extensively in *Schlemmer* (n 52 above).

62 See Ngcobo CJ's statement in the *Glenister* case (n 36 above) 378C: 'insofar as provisions in the international agreement give rise to rights and obligations under domestic law, these rights and obligations flow from, and are limited by, the extent to which the domestic legislation incorporating the agreement includes those provisions' (emphasis added).

63 See the more detailed discussion of this aspect in *Schlemmer* (n 52 above) 750 where it is argued that even if anti-dumping duties were to have remained in place for a period of seven years due to the intervening sunset review investigation an interpretation of art 11 of the Anti-Dumping Agreement would have led to the conclusion that it would not have amounted to a breach of the WTO obligations. In the case under discussion, however, the South African regulations are *stricter* than the suggested rules in the Anti-Dumping Agreement thus requiring the investigations to be completed quicker than in the Anti-Dumping Agreement, but the Court chose to focus primarily on an international law instrument which is not prescribing that countries enact legislation complying with it. Furthermore, the Court places a lot of emphasis upon the fact that the application for judicial review causes the anti-dumping duties to remain in effect for longer and loosing out of sight the fact that it is a requirement for members of the WTO who impose anti-dumping duties to make provision for their actions to be taken on review.

64 See the wording of the 1969 SACU Agreement (n 57 above) which was incorporated into South African law (GN 3914 GG 2584 of 12 Dec 1969); the 1969 Agreement was terminated from 15 July 2004 on the coming into operation of the 2002 SACU Agreement (R 800 GG 26537 of 2 July 2004) subject to the transitional provisions contained in art 50 which *inter alia* relates to dumping investigations etc.

representative capacity, puts the whole issue *in casu* most probably outside the ambit of the Constitutional Court's jurisdiction.⁶⁵

Moseneke DCJ said the following:

Constitutional issues

The litigants are at one that the application for leave to appeal involves constitutional matters. That is indeed so. First, the order of the High Court restrains two members of Cabinet from exercising executive powers conferred upon them by the Constitution and national legislation. It is plain from section 85(2)(a), (b) and (e) of the Constitution, that the two Ministers exercise executive authority by "implementing national legislation"; by "developing and implementing national policy"; and by "performing any other executive function" provided for in national legislation. As we have seen, the Act and the BTT Act variously require the two Ministers to formulate and implement national policy and to perform specified executive functions related to exports and imports of goods and other international trade activities. More pertinently, they are required to impose, change or remove anti-dumping duties in order to realise the primary economic and developmental objects of the statutes (636E-637B).

It seems as if the justice approached the matter from the wrong angle. The application that was before the North Gauteng Court was for relief to prevent or restrain a minister from making a decision before the review of the process on which the recommendation to the minister would have been based. The legislation requires complainants to adhere to particular time periods and this matter could have been dealt with more expeditiously if the commission had reacted *immediately* on the request for a sunset review and had not delayed with its commencement. *In casu* the commission waited for almost six months before it commenced the review.⁶⁶ It would have been more appropriate had the parties rather applied for a *mandamus* at an earlier stage. In such an instance the commission would have been obliged to comply with its statutory duty. Cognisance should have been taken of the commission's bad track record to deal with investigations speedily and effectively.⁶⁷

It is true that 'the setting, changing or removal of an anti-dumping duty is a policy-laden executive decision that flows from the power to formulate and implement domestic and international trade policy', as formulated by the justice.⁶⁸ However, the issue before the North Gauteng High Court was whether there was reason to grant an interdict so that the process leading to this executive decision could be taken on review. Allowing parties the capacity to request that these decisions and recommendations

⁶⁵ See the discussion on the relationship between the commission and the SACU below.

⁶⁶ *SCAW South Africa* (n 52 above) 627D - E. The application was brought on 19 February 2007 and the commission only complied with the request on 17 August 2007.

⁶⁷ See G Brink 'Proposed amendments to the anti-dumping regulations: Are the amendments in order?' (2006) *Tralac Working Paper No 21* 16.

⁶⁸ *SCAW South Africa* (n 52 above) 637E.

be taken on review, is also one of the international law obligations that the government has to comply with and is contained in the anti-dumping regulations.⁶⁹ The justice does not mention this and it seems as if more emphasis is placed on some international law obligations than others; the treaty itself does not contain any order of priority or importance when it comes to the different obligations related to trade remedies.

In the same paragraph, justice Moseneke states that:

That power [the power to impose anti-dumping duties] resides in the heartland of national executive authority. Separation of powers and the closely allied question whether courts should observe any level of 'deference' in making orders that perpetuate anti-dumping duties beyond their normal lifespan is a constitutional matter of considerable importance.⁷⁰

This pronouncement is evidently wrong. For the time being, and until the Tariff Board of the Southern African Customs Union is formed, the commission undertakes the anti-dumping⁷¹ investigations not only for South Africa but as a matter of fact for the whole of the Customs Union and the imposition of *inter alia* anti-dumping duties, is done on behalf of the Council of Ministers of the Southern African Customs Union.⁷² It is thus of (regional) international importance and not merely a 'constitutional matter'. The formula used for the distribution of the income in the customs union gives a clear indication that the other members (Botswana, Lesotho, Namibia and Swaziland) of the customs union have a substantially greater financial interest than South Africa in the magnitude of the anti-dumping (and other) duties imposed, even though the South African domestic market would be influenced much more than the broader customs union market. This fact alone is indicative that the vested interests that are entitled to be legally protected are not in the first place purely that of the South African industry, the South African treasury and the South African economy, or of the two South African ministers and thus only governed by the South African Constitution and entitled to be protected by the Constitutional Court and the other South African courts. This would open the door for the conclusion that also any other member of the customs union may, in the same matter, approach their highest courts for a finding that may potentially be in conflict with another member's courts' finding on an anti-dumping matter between the same parties – this is not a situation that can be tolerated by any legal system.

69 And also contained in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Anti-Dumping Agreement) (15 April 1994).

70 *SCAW South Africa* (n 52 above) 637E - 638A.

71 All trade remedy investigations.

72 See the 1969 SACU agreement (n 57 above) arts 4 & 5 and the 2002 SACU agreement (n 54 above) art 50 and 51. A customs duty in this context includes anti-dumping duty, countervailing and safeguard duty – see the Customs and Excise (n 21 above) secss 1(1) & 55 and Cronje *Customs and Excise Service* (Oct 2014 SI 37) part IV 6 - 1.

The situation outlined above⁷³ with regard to the imposition of anti-dumping duties already existed prior to the coming into operation of the Southern African Customs Union agreement in 2002.⁷⁴ Article 50 of the 2002 agreement deals with the transition measures that are to remain in place until the relevant structures are created within the customs union itself as well as in the individual member states.⁷⁵ Article 50 provides as follows:

A commission, technical liaison committee or *any other institution, obligation or arrangement of SACU which exists immediately before the entry into force of this Agreement shall*, to the extent that it is not inconsistent with the provisions of this Agreement, *continue to subsist, operate* or bind Member States of SACU as if it were established or undertaken under this Agreement, until the Council determines otherwise.⁷⁶

This treaty was enacted into South African law in schedule 10 of the Customs and Excise Act⁷⁷ and came into operation on 15 July 2004⁷⁸ and thus forms part of the South African domestic law even though the Constitutional Court does not refer to it and also does not reckon with its implications.

3.2.2 The WTO Agreements

The Constitutional Court stated the matters that it had to consider in the *SCAW* case as follows:

I think it is in the interests of justice for this Court to pronounce on: (a) the lawful extent of the legislatively prescribed lifespan of an anti-dumping duty; (b) whether the interdict had the effect of extending the lifespan of the existing anti-dumping duty; and if so, (c) whether the order trenches on separation of roles and powers between the national executive and the courts; (d) *whether the judicial extension of the anti-dumping duties threatens South Africa's trade relations and other obligations under international law*; (e) whether the matters to be determined by this Court on appeal will come up for decision in the final review before the High Court and therefore will not require this Court to prejudge the outcome of the review; and lastly, (f) whether there are reasonable prospects that this Court may find that whilst it may have been competent for the High Court to make the order it did, it was not constitutionally permissible or appropriate for it to do so.⁷⁹

⁷³ Regarding the investigations relating to trade remedies etc.

⁷⁴ See n 72.

⁷⁵ Currently only South Africa has a national body that can investigate trade remedy allegations and the Tariff Board for SACU has not been created; neither has the SACU tribunal been formed. Also refer to sec 2(1) of the transitional provisions in schedule 2 of the International Trade Administration Act (n 53 above).

⁷⁶ Emphasis added.

⁷⁷ GG 26537 of 02.07.2004.

⁷⁸ It should also be added as schedule 1 of the International Trade Administration Act (n 53 above).

⁷⁹ n 52 above, 643G - 644A. Emphasis added.

It is particularly the emphasised part that is relevant and the focus here will be on the Court's handling of international law and how it deals with South Africa's obligations in terms of our membership of the World Trade Organisation. Due to the Court's approach to South Africa's international obligations, it touches upon more aspects than would have been the case had the point of departure been different (and perhaps more correct).

In footnote 1 of the judgment, justice Moseneke makes the following statement:

As a member of the WTO, South Africa is also a signatory to the General Agreement on Tariffs and Trade (GATT). *This agreement was approved by the South African Parliament through the Geneva General Agreement on Tariffs and Trade Act 29 of 1948.* The international rules relating to dumping are contained in article VI of the GATT and the Anti-Dumping Agreement.⁸⁰

This statement is a clear indication that the justice lost sight of the fact that the General Agreement on Tariffs and Trade that was signed in 1947 and incorporated into South African law in 1948 is technically speaking not the same agreement as the General Agreement on Tariffs and Trade that is an annexe to the Agreement establishing the World Trade Organisation. The Agreement establishing the World Trade Organisation replaced the General Agreement on Tariffs and Trade of 1947 with that of 1994 'which is a new and legally distinct agreement'. Article II.4 of the agreement provides as follows:

The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as 'GATT 1994') *is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947*, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified (hereinafter referred to as 'GATT 1947').⁸¹

The agreement that was incorporated into South African law no longer has any legal force and effect at the international level and neither at the domestic level; one cannot argue that it can 'rule from the grave' and in such a manner import the WTO agreements into South African law.⁸²

The fact that justice Moseneke in footnote 1 of the judgment refers to this act as supposed authority for the WTO agreements to form part of

80 Emphasis added. In the light of the fact that the case under discussion deals with dumping, it must be emphasised that South Africa was not a signatory to the so-called anti-dumping code and as such was not bound by it (see *Chairman of the Board v Brenco* 2001 (4) SA 511 (SCA) 528G - H).

81 Emphasis added. The legal position regarding this agreement is more correctly stated in *Association of Meat Importers and Exporters* (n 36 above) par 18.

82 See the discussion above. The WTO agreements were also signed as a 'package' in 1994 and not as separate agreements. The statement by the justice is thus not correct.

South African law, is alarming. For purposes of the legal issue at hand the reliance on that piece of legislation is wrong and unpersuasive.

After the signing of the Marrakesh agreement no legislative act can be traced in terms of which any of the agreements were enacted in full into South African law. Since none exist, these agreements do not form part of South African law and no individual (legal subject) may rely on any rights or legal protection contained in the agreements.⁸³ And yet it seems as if the Constitutional Court applies these agreements directly as if they form part of South African law.

WTO agreements used as an interpretative tool

The question to be considered is whether these agreements may not in any event, be used for purposes of the interpretation of legislation. In English law the presumption exists that in instances of ambiguity, it is *prima facie* presumed that the intention of the legislature was not to act in violation of its international law obligations. This is the case also in those instances where the treaty is not incorporated into domestic law.⁸⁴ The provisions of a treaty can thus be used advantageously in interpreting other legislative provisions.

The interpretation of legislation in instances of ambiguity, however, is something much different from considering the actions or inactions of a statutory body or an organ of state that may/has lead to the violation of a state's international law obligations. Lord Diplock said in the *Salomon* case that unambiguous legislation enacted after the conclusion of a treaty 'must be given effect to, whether or not they carry out Her Majesty's treaty

83 This has been confirmed in *Progress Office Machines* (n 36 above) 17E-F and also referred to by the Constitutional Court in its judgment.

84 See *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116 CA 143F; [1966] 3 All ER 871; *Theophile v Solicitor-General* [1950] AC 186 PC; C Roodt 'National law and treaties: an overview' (1987-88) 13 *South African Yearbook of International Law* 72 83ff. See also *Rustomjee v R* [1876] 2 QB 69 73 where it was held that 'as in making the treaty, so in performing the treaty, she [the queen] is beyond control of municipal law, and her acts are not to be examined in her own courts'. This has also been confirmed in *Lonrho Exports Ltd v Export Credits Guarantee Department* [1996] 4 All ER 673: 'The courts will not adjudicate upon the transactions of or between sovereign states, and in all matters relating to foreign relations, judges should be circumspect and rarely should judges intervene where diplomats fear to tread (see *Maclaine Watson & Co Ltd* [1989] 3 All ER 523 at 544, [1990] 2 AC 418 at 499 per Lord Oliver and *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Pirbhai* (1985) Times, 17 October (689)'. A recent decision by the Zimbabwean High Court also held a similar point of view: 'On the pragmatic approach that has come to be adopted in international practice, neither legal system enjoys primacy over the other. In principle, they both hold sway and supremacy in their respective domains. ... The resultant divergence between the two systems is reconciled on the basis that the State incurs international responsibility for having violated its international obligations and must accordingly effect the requisite reparations in order to satisfy its international responsibility' (*Route Toute BV v Minister of National Security Responsible for Land, Land Reform and Resettlement* HH 128 (2009) 17-18 and confirmed in *Gramara (Private) Ltd v Government of the Republic of Zimbabwe* 2010 JOL 25340 (ZH) 5).

obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties'.⁸⁵

Prior to the new constitutional dispensation, it was accepted in South African law that courts were not allowed to test the compliance of subordinate legislation against the existence of international law obligations.⁸⁶ Currently the Constitutional Court may test any piece of legislation in order to determine whether it complies with the values contained in the Constitution. However, to read into this the capacity to find subordinate legislation invalid because it does not comply with South Africa's international law obligations is taking the matter too far.

The role of unincorporated treaties in the interpretation of legislation and especially also subordinate legislation has been the subject of much debate.⁸⁷ In the past the debate was around the existence (or absence) of a presumption that parliament shall not enact legislation that violates our international law obligations. The existence of such a presumption is not supported by South African authority.⁸⁸ The end of this debate seem to indicate that if a treaty does not form part of domestic law, it should not be used for purposes of interpretation unless it can be shown that the piece of legislation was enacted to give effect to the Republic's international law obligations.

In terms of the old constitutional dispensation, the courts could not test legislation against international law.⁸⁹ The new constitutional dispensation did not change much. If legislation violates the constitution or constitutional values, and the reason for the violation is found to be the violation of international law obligations, it would be possible to reach such a finding. However, apart from the explicit reference in section 39 and the interpretation of the Bill of Rights, there is nothing contained in the current Constitution that empowers the courts to test the validity of legislation against international law norms that do not form part of South African law.

When it comes to the interpretation of legislation, courts are enjoined to find an international law conforming interpretation. This does not mean, however that the Constitutional Court is suddenly endowed with

⁸⁵ n 84 above, 143E & 875 respectively.

⁸⁶ See the *Binga* cases (n 36 & 37 above) and Roodt (n 23 above) 74 & 87.

⁸⁷ See J Dugard 'The revocation of the mandate for Namibia revisited' (1985) 1 *South African Journal of Human Rights* 154 - 159; G Erasmus 'Mandates, military service and multiple choice' (1985-6) *South African Yearbook of International Law* 115 - 137; J Dugard 'International law' (1984) *Annual Survey of South African Law* 80 - 81; P Schaffer 'The inter-relationship between public international law and the law of South Africa: An overview' (1983) 32 *ICLQ* 277 308; Roodt (n 23 above) 87ff and the sources referred to.

⁸⁸ See Roodt (n 23 above) 88 - 89 and the sources referred to.

⁸⁹ *Collco Dealings v Inland Revenue Commissioners* [1962] AC 1 (HL) 19; *Croft v Dumphy* [1933] AC 156 (PC) 164; *Cheney v Conn* [1968] 1 All ER 779 780; *Alexander v Pfau* [1902] TS 155 159; and the *Binga* case (n 36 above) 964.

the capacity to test whether every piece of legislation complies with the principles of international law. This would fall outside its jurisdiction. The same applies to the power of the Court to reprimand a minister or government department for actions that may be considered in breach of an international law obligation. The capacity to exercise a policy decision lies with the relevant ministry. If another state is to complain about the actions of the South African executive it must be done in the correct *fora*. The South African courts do not have inherent jurisdiction to adjudicate matters of international law.

To my mind, the new constitutional dispensation did not change anything in this regard. Section 233 provides that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The focus is on the *interpretation* of the legislation and not on the *application* or *execution* thereof. If the provisions of the relevant piece of legislation is clear and unambiguous, it is not necessary to look at any other means of interpretation. When one is dealing with the *application* or *execution* of legislation, one is dealing with elements of administrative law where other rules of law would rather apply. In this instance, the provision in the regulation is more friendly towards the person against whom the anti-dumping duties are levied than what is provided for in the treaty. In the judgment, justice Moseneke states that the recommendation of the commission was made in terms of national legislation that regulates the administration of international trade and 'seeks to give effect to the international obligations of the Republic' and that the Court is thus 'required by the Constitution to *interpret* domestic legislation governing the duration of anti-dumping duties consistently with these international obligations'.⁹⁰ Interestingly enough there is no reference in the judgment to anything in the legislation or the regulations that is in need of interpretation. No reference can be found to anything that is ambiguous or unclear. The problem that the Court is faced with is rather dealing with the *effect* that the action of the commission and the recommendation of the minister would have on the duration of the anti-dumping duties. In other words, the problem at hand deals with the *application* of the regulation and the *effect* of the actions of the commission. The Court does not pronounce on these issues at all.

If the legislature wanted to prevent South Africa from potentially breaching its international law obligations and thus not to impose anti-dumping duties with a duration of longer than five years, it should expressly have provided so. It should further have made express provision for the weall and woe of the anti-dumping duties in those instances where

90 *SCAW South Africa* (n 52 above) 637D - E emphasis added.

an undeceived importer (or exporter) wants to take the action of the commission on review. The relevant anti-dumping agreement contains an obligation that enjoins a WTO member to make proper provision for access to the courts so that the aggrieved parties affected by the actions of the government or government institutions are able to take these actions on review. This obligation is also contained in the regulations but the justice does not pronounce on this. It is thus submitted that even though the WTO agreements may be used as interpretative tools, it was not necessary for purposes of the regulation at stake.

The authority of the Constitutional Court to make a finding on the breach by South Africa of a WTO obligation

It is generally accepted that '[t]he public international law relationships between states are, because of the doctrine of sovereign immunity, outside the domain of municipal courts'.⁹¹ In the House of Lords, Lord Templeman held⁹² that '(i)nternational law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties'. In the same case, Lord Oliver of Aylmerton stated that:

It is axiomatic that municipal courts have not and cannot have the competence to adjudicate on or to enforce the rights arising out of transactions entered into by independent sovereign States between themselves on the plane of international law.⁹³

Thus, according to these arguments it is not possible for domestic courts to deal with disputes between states falling within the international law domain.

In the *SCAW* case, however, the Constitutional Court did not take the particular nature of international law obligations into account and it also did not consider which court has the authority or jurisdiction to make a determination whether one is dealing with a violation of international law or not. In terms of international law, a violation of international law will

91 H Booysen 'The administrative law implications of the "customary international law is part of South African law" doctrine' (1997) 22 *South African Yearbook of International Law* 46, 50 and the sources referred to; see also H Damian *Staatenimmunität und Gerichtszwang* (1985) 10ff; see also S Fatima *Using international law in domestic courts* (2005) 277; J Crawford *Brownlie's principles of public international law* (8th edn 2012) 63.

92 In *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* 1990 2 AC 418 526j as quoted in *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) 328G.

93 *JH Rayner (Mincing Lane) Ltd* (n 92 above) at 544e. 'So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the Court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant' (545a). This has also been quoted with approval in the *Swissborough* case (n 92 above) 328G - I.

only be an issue if the international law subject against whom the obligation is owed complains about the violation – the reason being because one is dealing with an international law relationship.

The position regarding the obligations in terms of the World Trade Organisation Agreements is the same: reciprocal duties and obligations are owed to other members of the WTO. Pauwelyn explains it as follows:

WTO obligations are of the reciprocal type. They are not integral in nature. A breach of WTO obligations does not necessarily affect the rights of all other WTO members. More than one, and in some instances all, WTO members may be so affected. But if all WTO Members are, indeed, affected this is not necessarily so, based on the *nature* of the WTO obligation. It is a consequence rather of WTO obligations being trade-related and trade restrictions, in turn, being capable of affecting the economic interests (not necessarily the rights) of many WTO members.⁹⁴

The concomitant result is that if a breach takes place, it is at a bilateral level.

WTO dispute settlement does not, in the first place, tackle *breach*, but rather nullification of benefits *that accrue to a particular member*. Panel and Appellate Body proceedings only examine claims made by one WTO member against one other WTO member. Most importantly, in case the defendant loses and does not comply within a reasonable period of time, the winning state will be authorised to impose *state-to-state countermeasures against the losing state* (DSU Art. 22). This exclusively bilateral modality of enforcement of WTO rules is an important indication that most WTO obligations are reciprocal in nature.⁹⁵

It is thus clear that the obligations arising out of the WTO agreements are reciprocal in nature and that a *member* has to complain about a violation or a breach and since it is a closed treaty system, only members of the WTO may approach the Dispute Settlement Body for eventual adjudication of a dispute.⁹⁶

The parties *in casu* were not in an international law relationship and the party requesting the interdict is not another state complaining of a potential breach of international law, but a national of South Africa. In cases of dumping it is typically not states that are guilty of dumping products but primarily an exporter (a company like Bridon *in casu*) and it would be the exporter who would be guilty of dumping and it is also this

94 J Pauwelyn 'The nature of WTO Obligations' *Jean Monnet Working Paper* 1/02 (2002) 12ff; also see M Hahn *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (1995) 396.

95 Pauwelyn (n 94 above) 17 - 18 – emphasis added.

96 *United States – Import prohibition of certain shrimp and shrimp products* WT/DS58/AB/R report of the appellate body of 12 Oct 1998 par 101; see also G Erasmus 'The incorporation of trade agreements and rules of origin: the extent of constitutional guidance' (2003) 28 *South African Yearbook of International Law* 157 165.

company's actions which are investigated by the relevant authorities. The imposition of anti-dumping duties is also not directed against a state but against particular products from particular manufacturers or exporters. The international dispute only arises after the exporter, Bridon, complains to its home state and the home state decides that it is worth its while to take up the matter at the international level.⁹⁷ The only body with the necessary capacity to adjudicate a potential breach of the WTO agreements, is the Dispute Settlement Body of the WTO.⁹⁸

No domestic court has inherent jurisdiction to pronounce on an international law matter. The South African courts and also the Constitutional Court do not have the capacity to adjudicate whether an act by the South African government, a legislative provision or any action on the side of the commission *in casu* amounts to a violation of the WTO agreements and yet, this is the end effect of the Constitutional Court's judgment.

3.3 The approach of the Supreme Court of Appeal

In a more recent case, *Bridon International GmbH v International Trade Administration Commission*,⁹⁹ the Supreme Court of Appeal, without referring to the *SCAW* case, found that particular provisions of the ITA act were promulgated to give effect to South Africa's WTO obligations.¹⁰⁰

Unlike in the *SCAW* case, the Court does not get confused between the GATT 1947 and 1994.¹⁰¹ The Court correctly states that the WTO Agreement and the Agreement on Implementation of Article VI of GATT became binding on the Republic. Just as the Constitutional Court, the Court confuses the constitutional mechanism that had to be applied but correctly held that 'because they were not enacted into our municipal law

97 P Van den Bossche 'General introduction to WTO dispute settlement' in P Van den Bossche *The law and policy of the World Trade Organization* (2005) 172 202; Erasmus (n 96 above) 165. It is often also only at this stage that the deficiency of a particular legislative provision comes to the fore – see Cottier and Takenoshita 'The balance of power in WTO decision-making: towards weighted voting in legislative response' 2003 *Aussenwirtschaft* 169.

98 See R Bustamante 'The need for a GATT doctrine of *locus standi*: Why the United States cannot stand the European Community's banana import regime' (1997) 6 *Minnesota Journal of Global Trade* 533-583; WJ Davey 'Has the WTO dispute settlement system exceeded its authority?' (2001) 4 *Journal of International Economic Law* 95 97 - 99; and Pauwelyn (n 94 above) 23ff.

99 *Bridon International GmbH v International Trade Administration Commission* 2013 (3) SA 197 (SCA).

100 n 99 above, 202H - I 'These sections, together with the Anti-Dumping Regulations, promulgated by the minister in GN 3197 of 14 November 2003, were clearly intended to give effect to South Africa's obligations in terms of international instruments to protect confidential information in the course of anti-dumping proceedings.'

101 Although it must immediately be pointed out that there was no discussion of the issue.

by national legislation ... the provisions of these agreements did not in themselves become part of South African law'.¹⁰²

The Court found that the WTO agreements do not form part of South African law but due to the fact that the relevant statutory provisions dealing with anti-dumping investigations and the disclosure and protection of confidential information were an attempt to give effect to South Africa's international law obligations, in interpreting the relevant sections of the act and regulations, an interpretation that is conforming with international law, should be followed – thus complying with the constitutional obligation in section 233. This is then also the way in which the Court further deals with the matter.¹⁰³

It is of importance to note that the Court does not refer to the finding of the Constitutional Court in the *SCAW* case where it found, by implication, that the WTO agreements are part of South African law and in essence applied it directly. This is a clear indication that the Court must have considered that decision to be wrong. The decision by the Constitutional Court was given almost two years prior to the decision of the Supreme Court of Appeal and at that stage the Supreme Court of Appeal was still the highest court in South African concerning all matters other than constitutional matters and was thus not bound by the decision of the Constitutional Court.¹⁰⁴

The decision of the Supreme Court of Appeal in *Association of Meat Importers and Exporters v The International Trade Administration Commission* is also a clear indication that South African courts normally do not apply unincorporated treaties in their decisions but that they will use the wording of a treaty when they have to deal with the interpretation of a domestic provision that is based on the wording of such a treaty. In this case the Court said the following with regard to the *Progress Office Machines* case which received a lot of criticism due to its end result:

To give the regulation that meaning will not mean this country is in breach of its obligations under article 11.3 of the WTO Agreement. The meaning given to article 11.3 in *Progress Office Machines* is authoritative only so far as that article is applied domestically, but is immaterial so far as this country's relations with its WTO partners are concerned. Perhaps they might see things in the same way as this court did in *Progress Office Machines* – in which case the regulations no doubt call for amendment – but perhaps they might not – in which case all is well and good. *It is not for us to speculate on how the WTO members understand their agreement.*¹⁰⁵

102 *Bridon International GmbH* (n 99 above) 202H - 203C.

103 See also *Association of Meat Importers and Exporters* (n 36 above) par 61.

104 This position changed with the enactment of the Constitution Seventeenth Amendment Act 72 of 2012 and the Superior Courts Act 10 of 2013 which made the Constitutional Court the highest court in all matters – this legislative (and Constitutional) amendment came into effect on 23 August 2013.

105 *Association of Meat Importers and Exporters* (n 36 above) para 82 – emphasis added.

The emphasised part is an affirmation of the legal position discussed above (→ 4.6) indicating the sense that international law matters are not justiciable in domestic courts.

There thus seems to be a clear distinction between the application of legal principles regarding the application of international economic law between the Constitutional Court and the Supreme Court of Appeal. The fact that the Constitutional Court sometimes states the law correctly, but then applies it incorrectly, is a matter of concern. The fact that it is now the court of last appeal in all matters and no longer only constitutional matters may be a matter for concern.

4 Conclusion

The Agreement establishing the World Trade Organisation and its covered agreements, as well as any other international treaty, need to be treated with circumspection when they have not been incorporated into a country's domestic law. The South African Constitutional Court in the *SCAW* matter dealt with the WTO agreements as if they formed part of South African law even though it first stated that such unincorporated treaties do not form part of domestic law. This position is also held by the Supreme Court of Appeal but different from the Constitutional Court; it has up until now, applied these principles correctly.

Just as much as it is within the power of the executive to decide which treaties to sign, it is also within their power to decide to renege on their obligations. Even though the executive does not necessarily intend to be bound to the letter to its international law obligations (whether it be the obligations in terms of the WTO agreements or others), it seems as if the Constitutional Court is of the opinion that, especially with regard to the WTO agreements, the executive should be so inclined. The Court's finding that the decision of the High Court results in a breach of South Africa's international law obligations in the *SCAW* case, in essence contains a value judgment concerning what the policy of the executive in this instance should be without any evidence to this effect being presented.

As to the Constitutional Court's finding in the *SCAW* case that in not keeping to the duration of the anti-dumping duties, there is a breach of the country's WTO obligations, the Constitutional Court embarked on the international law terrain and in particular the terrain of the WTO's Dispute Settlement Body. No domestic court has the jurisdiction or capacity to make such a finding.

The Supreme Court of Appeal on the other hand has dealt with the application and implication of the WTO agreements in South African law in a much more nuanced and pure manner and held that it is not within its authority or jurisdiction to pronounce on the meaning of such

unincorporated agreements – thus that they are not justiciable. It is hoped that the precedents that were created by this Court would be followed in future and that the unsound argumentation of the Constitutional Court in this respect would be corrected.

All in all, South Africa and in particular the legislature has to a large extent tried to give effect to the international law obligations arising from the WTO agreements¹⁰⁶ there has however not been a uniform approach to the application of the relevant statutory provisions. The fact that the Constitutional Court has taken over the role as the court of final instance in all matters, might not be to the benefit of the trading community. The unfortunate decision in the *SCAW* case might not be of important precedential value, but it has given signals which are not necessarily in line with the development of international economic and trade law principles in South Africa and the approach regarding the justiciability of international law obligations is not in line with developments elsewhere.

106 '[The] passing of the International Trade Administration Act 71 of 2002 (ITAA) creating ITAC and the promulgation of the Anti-Dumping Regulations made under s 59 of ITAA are indicative of an intention to give effect to the provisions of the treaties binding on the Republic in international law' (*Progress Office Machines* (n 36 above) para 6 and also cited with approval in *Association of Meat Importers and Exporters* (n 36 above) para 60, 61).

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E: International environmental law

CHAPTER 9

INTERNATIONAL ENVIRONMENTAL LAW IN GERMANY

Wolfgang Durner*

1 Relevant international law obligations

1.1 The development of international environmental law

From its very beginning international law has covered certain aspects of environmental protection. Even the traditional freedom of fishing on the high seas, in a way, could be regarded as an international obligation governing the use of the environment. Nevertheless, throughout the 19th century the idea to protect the environment was not yet a central consideration in the making of international law and thus most relevant parts of international environmental law were created in the second half of the 20th century.¹ As the harmful impacts of industrialisation became more widespread and affected neighbour states, international courts and tribunals had to resolve bilateral conflicts on the sharing of common resources and transfrontier pollution. Due to the absence of applicable treaty law, this led to the establishment of important abstract rules. Particular important ones were the duty to prevent damage to the environment of other states and the principle of equitable utilisation of shared resources. Today both of these rules are universally accepted as part of customary international law (→ 1.2.2). When environmental threats grew in dimension and soon transcended bilateral constellations, environmental protection became one of the striking examples for the transformation of the international law of coexistence towards an international law of cooperation.² While rules on bilateral environmental

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1 U Beyerlin & T Marauhn *International environmental law* (2011) 1; PH Sand 'The evolution of international environmental law' in D Bodansky et al (eds) *The Oxford handbook of international environmental law* (2007) 30; P Sands & J Peel *Principles of international environmental law* (3rd edn 2012) 22; D Tladi *Sustainable development in international law* (2007) 13.

2 W Friedmann *The changing structure of international law* (1964) 60.

conflicts still remain a cornerstone of international environmental law, much of modern treaty-making has shifted to address global environmental challenges.

The earliest attempts of the international community to establish cooperative environmental treaty law focused on the protection and management of species with an economic value such as birds useful for agriculture,³ whales⁴ and fish.⁵ These regional approaches became even wider in scope after the creation of the United Nations.⁶ In 1972, a crucial step was taken with the United Nations Conference on the Human Environment in Stockholm, which produced various environmental agreements such as the 1972 London Dumping Convention and the 1972 World Heritage Convention. Those agreements were complemented by two important soft law-documents, the Stockholm Declaration with 26 principles on the environment and development⁷ and an Action Plan containing 109 recommendations. Twenty years later, the 1992 United Nations Conference on Environment and Development in Rio aimed to integrate environmental and developmental policy by promoting 'sustainable development'.⁸ According to principle 4 of the Rio Declaration 'environmental protection shall constitute an integral part of the development process chain and cannot be considered in isolation from it'. Under this long-term approach, modern treaty law frequently seeks to launch a cooperative process rather than imposing immediate international obligations. This framework aims at the establishment of international organisations and enables the subsequent elaboration of substantive law.⁹

1.2 Sources of international environmental law

According to article 38 of the ICJ Statute the Court shall apply mainly international conventions, international custom and the general principles of law. While in an environmental context the role of general principles is rather neglectable,¹⁰ treaty and customary law both play an important role. Moreover, certain aspects of international environmental policy are

3 Convention pour la protection des oiseaux utiles à l'agriculture (19 March 1902, 51 LNTS 221); Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (12 October 1940, 161 UNTS 193); M Bowman et al *Lyster's international wildlife law* (2nd edn 2010) 3.

4 International Convention for the Regulation of Whaling (2 December 1946, 161 UNTS 72).

5 International North Pacific Fisheries Convention (9 May 1952, 205 UNTS 79).

6 Sands & Peel (n 1 above) 26.

7 LB Sohn 'The Stockholm Declaration on the Human Environment' (1973) 14 *Harvard International Law Review* 423; P Birnie et al *International law and the environment* (3rd edn 2009) 48.

8 L Campiglio et al (eds) *The environment after Rio* (1994); Tladi (n 1 above) 22.

9 Beyerlin & Marauhn (n 1 above) 241; D Bodansky *The art and craft of international environmental law* (2010) 136; T Gehring 'Treaty making and treaty evolution' in Bodansky et al (n 1 above) 467.

10 Birnie et al (n 7 above) 26 - 28.

subject to non-binding norms which are usually labelled by the collective term of 'soft law' (→ 1.2.3).

1.2.1 *International environmental treaties*

Since 1972, international environmental treaties have become substantial in number and fairly comprehensive in scope. Two groups of agreements should be distinguished: On the one hand, global conventions seeking to address global environmental problems and fostering universal participation. On the other hand, regional conventions that either deal with resources or problems of a regional scope or seek to establish particular regional standards. Both groups of agreements are of significant relevance in the German context and some prime examples should be mentioned:

Global conventions

With respect to the protection of the global atmosphere the two key regimes are formed by the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1992 UN Framework Convention on Climate Change (UNFCCC). Both were supplemented by important protocols, the 1987 Montreal Protocol on Substances that deplete the Ozone Layer and the 1997 Kyoto Protocol respectively.¹¹ While the former regime has resulted in a rather far-reaching ban on ozone depleting substances, progress in preventing climate change has been remarkably poor. In another area, international trade in hazardous wastes is regulated by the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,¹² which is based on a prior informed consent scheme for transfrontier movements and seeks to promote the reduction of hazardous waste generation as well as environmentally sound waste disposal.

For chemicals, a comparable regime is formed by the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC-Convention) and the subsequent 2001 Stockholm Convention on Persistent Organic Pollutants (POP-Convention) that seeks to ban or reduce the production, trade and use of certain ultra-hazardous chemicals.¹³ Other global conventions aim to protect the marine environment. The most important ones include the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes

11 D Bodansky et al *International climate change law* (forthcoming).

12 K Kummer *International management of hazardous wastes* (2nd edn 1999) 87; D Langlet *Prior informed consent and hazardous trade* (2nd edn 2009) 73.

13 M Pallemmaerts *Toxics and transnational law* (2003) 419; DA Wirth 'Hazardous substances and activities' in Bodansky et al (n 1 above) 394; Langlet (n 12 above) 115.

and Other Matter (London Dumping Convention) and the 1973/1978 International Convention for the Prevention of Pollution from Ships (MARPOL Convention). These specific instruments are embedded into the wider context of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and its Part XII on the Protection and Preservation of the Marine Environment¹⁴ (→ Vrancken, Proellß). Deficits in regulating land based sources of marine pollution are still a main weakness of this regime.¹⁵ Freshwater protection is addressed by the 1997 UN Convention on the Law of Non-Navigational Uses of International Watercourses,¹⁶ which has so far not received the 35 ratifications necessary to enter into force.

With respect to nature conservation, the most important agreements include the 1971 Ramsar Convention on Wetlands of International Importance, especially as Waterfowl Habitat,¹⁷ the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention)¹⁸ and the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals.¹⁹ In contrast to the abovementioned conventions, the 1973 Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) takes a different approach in regulating trade – for instance by completely abolishing trade in ivory – rather than protecting endangered species in situ.²⁰ All these agreements are supplemented by the quite over-ambitious 1992 Convention on Biological Diversity (CBD) that seeks to address almost every aspect of the protection of biological diversity.²¹

Regional treaties

Not all important environmental problems have so far been addressed by multilateral conventions. Partially the gaps are filled by regional agreements. Several significant legal instruments for environmental protection have been negotiated under the auspices of the United Nations Economic Commission for Europe (UNECE) and thus have mainly European parties. Transboundary air pollution in Europe is quite effectively regulated by the 1979 Geneva Convention on Long-Range

14 A Kirchner (ed) *International marine environmental law* (2003); D Freestone & SMA Salman 'Ocean and freshwater resources', in Bodansky et al (n 1 above) 337.

15 Pallemmaerts (n 13 above) 35.

16 L Boisson de Chazournes *Fresh water in international law* (2013) 26; S McCaffrey *The law of international watercourses* (2nd edn 2007) 359.

17 Bowman et al (n 3 above) 403.

18 Bowman et al (n 3 above) 451.

19 Bowman et al (n 3 above) 535.

20 Bowman et al (n 3 above) 483; for the convention's most recent developments see J Scanlon 'CITES at its best: CoP16 as a 'watershed moment' for the world's wildlife' (2013) 22 *Review of European Community & International Environmental Law* 222.

21 Bowman et al (n 3 above) 587; AE Boyle 'The Rio Convention on Biological Diversity' in M Bowman & C Redgewell (eds) *International law and the conservation of biological diversity* (1996) 33.

Transboundary Air Pollution (LRTAP) and its protocols.²² Regional European conventions aimed at protecting the marine environment with German participation include the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) and the 1992 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area.²³ On land they are *inter alia* complemented by the 1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats²⁴ and the 1991 Convention on the Protection of the Alps and its various implementation protocols.²⁵

Moreover, some important European conventions seek to establish stricter standards with respect to general issues of environmental protection: The 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context and its 2003 Protocol on Strategic Environmental Assessment provide for a wide application of the instrument of environmental impact assessment including public participation.²⁶ Freshwater resources are governed by the 1991 Helsinki ECE-Convention on the Protection and Use of Transboundary Watercourses and International Lakes,²⁷ a framework treaty which is further regionalised by various bilateral or regional treaties on specified rivers and lakes, most important amongst them the 1999 Convention on the Protection of the Rhine.²⁸ The 1992 Helsinki Convention on the Transboundary Effects of Industrial Accidents promotes international cooperation to prevent and to manage industrial accidents.²⁹ The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters sets ambitious standards for environmental participation and litigation.³⁰ Some of these regional conventions have created detailed standards that oblige state parties to introduce rather far-reaching administrative and judicial procedures into their national environmental legislation. Germany

22 Birnie et al (n 7 above) 342 ; L Gündling 'Multilateral cooperation of states under the ECE Convention on Long-range Transboundary Air Pollution' in C Flinterman et al (eds) *Transboundary air pollution* (1986) 19.

23 A Proelß *Meeresschutz im Völker- und Europarecht* (2004) 191; Sands & Peel (n 1 above) 409.

24 Bowman et al (n 3 above) 297; C Lasén Díaz 'The Bern Convention: 30 Years of nature conservation in Europe' (2010) 19 *Review of European Community & International Environmental Law* 185.

25 Bowman et al (n 3 above) 639.

26 Sands & Peel (n 1 above) 814; A Boyle 'Developments in the international law of environmental impact assessments and their relation to the Espoo Convention' (2011) 21 *Review of European Community & International Environmental Law* 227.

27 Boisson de Chazournes (n 16 above) 33.

28 Birnie et al (n 7 above) 573.

29 Sands & Peel (n 1 above) 623.

30 Sands & Peel (n 1 above) 858.

in particular had to face fairly significant obstacles to comply with some of the Aarhus Convention's obligations (→ 2.2.4 and 3.2).³¹

In terms of general importance, by far the most prominent regional treaty is the European Convention on Human Rights (→ Wenzel). According to the German Constitutional Court's *Görgülü* decision, German law, especially the constitutional human rights of the basic law, must be interpreted in harmony with the convention's requirements (→ Herdegen).³² While neither the European Convention nor its protocols guarantee a specific right to a healthy environment, the European Court of Human Rights has held repeatedly that environmental aspects may affect the right to life (article 2), the right to privacy (article 8) and the right to the peaceful enjoyment of one's possessions (article 1, protocol 1).³³ In 1994 for example, in its landmark-decision '*López Ostra v Spain*', the Court found that by not taking any measures to protect the plaintiff against smoke that originated from a waste treatment plant located a few meters from her home, Spain had violated the right to privacy and family life since it had failed to find an adequate balance between economic development and the plaintiff's rights.³⁴ In the light of this case law, the European Convention on Human Rights guarantees a minimum standard of environmental protection as a human right which compels European states to regulate environmental risks and to enact and enforce environmental laws.³⁵

1.2.2 Customary environmental obligations

While an increasing number of aspects of international environmental protection are covered by specific treaty law, customary international obligations still remain relevant to fill legislative gaps, to guide non-parties to these agreements and to offer a conceptual framework for the further elaboration of treaty law.³⁶ However, opinions are divided as to what extent certain general rules of international environmental policy – such as the precautionary principle or the polluter pays principle – have become customary law; in particular, the status of the principle of 'sustainable

31 Some of these are listed in Germany's latest implementation report for the fifth Conference of Parties 2014: Bundesregierung *Nationaler Umsetzungsbericht der Aarhus-Konvention für Deutschland* (2013). The competing conceptual philosophies of German and supranational environmental law are emphasised by R Breuer (ed) *Umweltschutz im Widerstreit differierender Konzepte* (2000).

32 BVerfG Case 2 BvR 1481/04, (14 October 2004) (2005) 111 *Entscheidungen des Bundesverfassungsgerichts* 307; C Tomuschat 'The effects of the judgments of the European Court of Human Rights according to the German Constitutional Court' (2010) 11 *German Law Journal* 513.

33 Council of Europe (ed) *Manual on human rights and the environment* (2nd edn 2012).

34 ECHR Case *López Ostra v Spain* App no 16798/90 (9 December 1994) (1994) ECHR 46.

35 A Boyle 'Human rights and the environment: where next?' (2012) 23 *European Journal of International Law* 613–615 summarizing the case law of the European Court of Human Rights.

36 Birnie et al (n 7 above) 34–37; P-M Dupuy 'Formation of customary international law and general principles' in Bodansky et al (n 1 above) 450.

development' called for in principle 4 of the Rio Declaration (→ 1.1), has been discussed controversially.³⁷ In spite of this controversy, the ability of such principles to guide state behaviour may be quite independent of the question as to whether or not they are legally binding³⁸ (→ 2.3.3). Nevertheless, a limited but increasing number of environmental obligations exist that are almost universally recognised as customary international law.

Most important amongst these is a principle established in the Trail Smelter dispute in 1941 according to which no state is entitled to use its territory in a way that would cause harm by air pollution to another state's territory.³⁹ This 'no harm principle' was later integrated into principle 21 of the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment. According to principle 21 states have

the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* in 1996 the ICJ found this general obligation of states 'to respect the environment of other States or of areas beyond national control' had become customary international law.⁴⁰ This principle has been invoked in dozens of international agreements and may be regarded as the backbone of modern international environmental law. In its modern formulation it constitutes a general duty to prevent and reduce environmental harm.⁴¹

This duty is essentially substantive, but also has a procedural dimension: In its very first decision in the 1949 *Corfu Channel case (UK v Albania)* the ICJ recognised an obligation to warn other states of imminent danger which was *inter alia* based by the Court on 'elementary considerations of humanity'.⁴² This duty to notify other states has been affirmed in various environmental contexts, amongst others in article 198 of the UNCLOS with respect to the marine environment. The *Lac Lanoux*

37 For a detailed analysis see Tladi (n 1 above) 94 - 112; for differing views compare Sands & Peel (n 1 above) 208 on the one hand ('There can be little doubt that the concept of sustainable development has entered the corpus of customary international law') and Birnie et al (n 7 above) 125 - 127 on the other hand.

38 Bodansky (n 9 above) 191; more generally N de Sadeleer *Environmental principles: from political slogans to legal rules* (2002).

39 *Trail Smelter Arbitration (USA v Canada)* Arbitral Tribunal, 3 U.N. Rep. Int'l Arb. Awards 1905 (1941) see further on the impacts of this precedent RM Bratspies & RA Miller *Transboundary harm in international law: Lessons from the trail smelter arbitration* (2006).

40 *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* (8 July 1996) (1996) ICJ Reports 241 para 29.

41 Birnie et al (n 7 above) 137.

42 *Corfu Channel case (United Kingdom v Albania)* (15 December 1949) (1949) ICJ Reports 4 22.

arbitration of 16 November 1957 had to settle a dispute between France and Spain on the admissibility of a French project involving the diversion of the waters of *Lac Lanoux*, a lake situated on French territory whose waters eventually flow to Spain. The Tribunal, while finding that France had taken Spanish interests into sufficient consideration, stressed that

according to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian state with its own.⁴³

These obligations imply a duty of prior notification before carrying out projects potentially harmful to the environment of other states.⁴⁴ According to recent ICJ case law, a state has to give 'prior notice' of such activities and 'use its best endeavours to find common solutions' with neighbour states affected.⁴⁵ These standards have become even stricter where shared resources such as watercourses or wildlife stocks are affected. In its judgment of 25 September 1997 on the '*Case Concerning the Gabčíkovo-Nagymaros Project*', the Court endorsed the principle of equitable utilisation of a 'shared resource' and recognised that under international law each riparian state had the 'right to an equitable and reasonable share of the natural resources' of the Danube.⁴⁶ A further significant step in developing customary environmental obligations was the ICJ's decision of 20 April 2010 in the *Pulp Mills* case where the Court found that

it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.⁴⁷

1.2.3 *Soft law in the field of environmental protection*

There is a large amount of soft law in the field of environmental protection which to a differing extent may be able to influence state behaviour.⁴⁸ The term 'soft law', however, refers to a hybrid group of norms: The Stockholm and the Rio Declarations have been mentioned as governmental declarations that proclaim certain general instruments and abstract

43 *Lac Lanoux Arbitration (France v Spain)* (1957) 24 International Law Reports (1957) 101 139.

44 FL Kirgis *Prior consultation in international law* (1983) 88 and 128.

45 *Certain Activities Carried out by Nicaragua in the Border Area (Nicaragua v Costa Rica) Order* (8 March 2011) (2011) ICJ Reports 26.

46 *Case Concerning the Gabčíkovo Nagymaros Project (Hungary v Slovakia)* (25 September 1997) (1997) ICJ Reports 7 56.

47 *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (2010) ICJ Reports 14 83.

48 Beyerlin & Marauhn (n 1 above) 289; P-M Dupuy 'Soft law and the international law of the environment' (1991) 12 *Michigan Journal of International Law*, 420; SJ Toope 'Formality and informality' in Bodansky et al (n 1 above) 107.

principles on the environment and development some of which – such as the environmental impact assessment recommended in principle 17 of the Rio Declaration – subsequently became customary law (→ 1.2.2). Similar documents have been elaborated by NGOs; one of the most important ones is the International Union for Conservation of Nature (IUCN) which has submitted various soft law documents, amongst them drafts for the codification of international environmental law.⁴⁹

On the other hand, certain more technical types of soft law may be very specific and detailed such as the United Nations' recommendations on classification and labelling of Chemicals⁵⁰ or UNEP's recommendations on best available techniques under the POP-Convention.⁵¹ They may serve as a means to establish accepted interpretations of more general treaty obligations⁵² and are able to become part of national law through legislative or judicial reception as will be shown by some examples (→ 2.3.3 and 3.1).

1.3 German participation in international environmental law making

Germany's participation in international environmental law making has been quite comprehensive. By the end of 2014, Germany was party to more than 60 multilateral and almost 70 bilateral treaties on environmental issues including fisheries.⁵³ All of the central conventions mentioned above (→ 1.2.1) have been ratified by Germany and are thus binding once they enter into force. These formal treaties are supplemented by dozens of technical or executive agreements, notes of understanding and informal environmental arrangements.⁵⁴ Increasingly, Germany has sought to influence negotiations for international environmental agreements and hosted conferences on environmental issues such as the UN negotiations for a binding global climate change agreement taking place in Bonn in June 2013. Germany's former capital Bonn has become seat of several international environmental institutions such as the Secretariat of the UNFCCC (→ 1.2.1), the Secretariat of the UN

49 International Union for Conservation of Nature (IUCN) 'International Covenant on Environment and Development' in H Bocken & D Ryckbost (eds) *Codification of environmental law* (1996) 183.

50 United Nations *Globally harmonized system of classification and labelling of chemicals (GHS)* (3rd edn 2009).

51 UNEP *Overview and summary of outcomes from the regional consultations on the draft guidelines on Best Available Techniques (BAT) and Best Environmental Practices (BEP) relevant to article 5 and Annex C of the Stockholm Convention on Persistent Organic Pollutants (POPs)* (2005).

52 Birnie et al (n 7 above) 148.

53 *Fundstellennachweis B. Völkerrechtliche Vereinbarungen*, Bundesgesetzblatt 2014 II, 1026.

54 For a detailed survey see WE Burhenne & PH Sand 'Internationale Umweltvereinbarungen' in K Hansmann & D Sellner (eds) *Grundzüge des Umweltrechts* (4th edn 2012) 1157 1161 - 1205.

Convention to Combat Desertification (UNCCD) and UNEP's Convention on Migratory Species of Wild Animals.

2 Incorporation of international environmental obligations into the German legal order

2.1 Germany's mitigated dualism

The German Basic Law, being based on the concept of dualism, allows international law to become part of the German legal order only once it is accepted as national law. However, the Basic Law's dualist concept is mitigated by certain clauses that incorporate international norms into the German legal order. This applies to customary international law through article 25 of the Basic Law and – to a lesser extent – to basic fundamental rights through article 1(2) of the Basic Law (→ Wolfrum/Vöneky, Herdegen).

2.1.1 Incorporation of customary international law through article 25 of the Basic Law

According to article 25 Basic Law, the 'general rules of international law' shall be an integral part of federal law and shall take precedence over parliamentary laws and directly create rights and duties for the inhabitants of the federal territory. While treaty law requires legislative transformation to become part of the national legal order, universally accepted customary environmental obligations are in principle able to be applied directly.⁵⁵

In the field of environmental protection, however, most of the provisions of customary international law mentioned above are too general to create rights and duties for non-state actors. Moreover, even where customary obligations might be concrete enough to be applied by national courts, usually there are international treaties as well as European and domestic provisions which set out those principles in more specific terms. Thus, the general duty to protect the environment (→ 1.2.2) is confirmed in article 20a of the Basic Law (→ 2.3.1). The customary duty to carry out environmental impact assessments in a trans-border context (→ 1.2.2) is – in much more detail – part of the 1991 Espoo Convention (→ 1.2.1) and is further elaborated in Directive 2011/92/EU on the Assessment of the Effects of certain Public and Private Projects on the Environment and in the implementing German Environmental Impacts Assessment Act (*Gesetz über die Umweltverträglichkeitsprüfung*). Those European and national provisions may be interpreted in the light of their

55 R Geiger *Grundgesetz und Völkerrecht* (6th edn 2013) 153.

international origins (→ 3.1) but nevertheless leave very little scope for the application of article 25 of the Basic Law.

For all these reasons, there is hardly any domestic case law with respect to the customary environmental obligations and not a single case for customary environmental obligations taking precedence over domestic parliamentary laws. In 2008, the Federal Administrative Court referred to the customary no harm principle (→ 1.2.2) in order to support its before established doctrine that foreign plaintiffs have locus standi in German courts in order to challenge German permits that may have transboundary impacts (→ 3.3).⁵⁶ In 2013, on the other hand, the higher administrative Court of North-Rhine Westphalia refused to accept the existence of a customary international ban on nuclear weapons. Therefore, the plaintiff had no legal standing to claim the withdrawal of the US forces' nuclear arms from German territory.⁵⁷

In the literature some bolder consequences have been suggested: It has been argued, for instance, that an allegedly self-executing customary 'human right to water' prohibits stopping the supply of drinking water even to those clients who violate their contract and refuse to pay their bills.⁵⁸ Such a human right – whose very existence is still rather uncertain – also played a prominent role in the Constitutional Court of South Africa's *Mazibuko* case⁵⁹ (→ Chamberlain/Murombo). In German courts, on the other hand, customary environmental law plays only a minor role. International environmental law, as a matter of principle, requires transformation to have significant domestic effects.

2.1.2 The need for transformation of international environmental treaties

According to article 59(2) of the Basic Law, treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the parliamentary consent in form of a federal law. Even if the content of this provision leaves scope for differing interpretations,⁶⁰ article 59 implies that environmental treaties require legislative transformation in order to become applicable in the domestic legal order unless they are directly applicable (→ Wolfrum/Vöneky). This

56 BVerwG Case 4 C 3/07 (16 October 2008) (2009) 132 *Entscheidungen des Bundesverwaltungsgerichts* 151 158.

57 OVG Münster Case 4 A 1913/11 (7 May 2013) (2013) 26 *Neue Zeitschrift für Verwaltungsrecht Rechtsprechungs-Report* 789.

58 SR Laskowski 'The (missing) implementation of the human right to water and sanitation in the Federal Republic of Germany' in H Smets (ed) *Le droit à l'eau potable et à l'assainissement, sa mise en oeuvre en Europe* (2012) 181 188 who restricts this claim to 20 liters per day.

59 Boisson de Chazournes (n 16 above) 157.

60 Geiger (n 55 above) 163; M Nettesheim 'Article 59' in M Herdegen et al (eds) *Maunz & Dürig, Grundgesetz, loose leaf commentary* (2009) paras 173 - 180.

transformation may be carried out through autonomous domestic legislation. The dominant model, however, relies to a large extent upon transformation through European Union law.

2.2 The dominant model: Transformation through European Union legislation

Article 192(1) of the Treaty on the Functioning of the European Union (TFEU) empowers the European Parliament and the Council to take action – including legislative action – in order to achieve the environmental objectives referred to in article 191(1). As those objectives cover more or less any aspect of environmental protection – including the protection of human health and the promotion of measures at international level to deal with regional or worldwide environmental problems – the Union is given comprehensive legislative competence in the field of environmental protection.⁶¹ According to the ECJ, these legislative powers include taking measures which relate to criminal law in order to ensure that the rules on environmental protection are fully effective.⁶² According to article 192(2), provisions with a primarily fiscal nature or affecting urban and landscape planning and land use are included as well, even though they require unanimity in the Council. Moreover, provisions enacted under article 114(1) may also regulate environmental aspects if their main object is the establishment and functioning of the internal market.⁶³ With respect to its member states, the Union is thus entitled to transform virtually any international environmental obligation into Union Law which then either has direct effect in the member states or obliges them to implement the respective obligations in their domestic legislation (→ 2.2.4).

Furthermore, the Union's primary law – the treaties founding the Union – contains some substantive guidelines for the Union's environmental policy which may be regarded as an implementation of international law: According to article 191(2) of the TFEU the

Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

This provision, in fact, transforms some of the most prominent principles of international environmental policy into binding European constitutional law: The general duty to protect the environment, the

⁶¹ JH Jans & HHB Vedder *European environmental law* (4th edn 2012) 59 - 64.

⁶² Case C-176/03 *Commission v Council* [2005] ECR I-7879, paras 46ff.

⁶³ Case C-300/89 *Commission v Council* [1991] ECR I-2878, para 11; Jans & Vedder (n 61 above) 74 - 79.

precautionary principle and the polluter pays principle – whether or not they may be regarded as formally binding customary international law (→ 1.2.1) – are thus binding for the European legislator and form a conceptual framework for the Union's secondary environmental law making.⁶⁴

2.2.1 The Union's external competences in the field of environmental protection

Under article 216(1) of the TFEU the Union may conclude an agreement with one or more third countries or international organisations where this is necessary in order to achieve one of the objectives referred to in the Treaties. These objectives include the environmental policy set out in article 191(1) of the TFEU⁶⁵ (→ 2.2.1). Based on its external environmental competences, the Union has concluded more than 50 international treaties in the field of environmental protection which have been implemented by a similar number of acts of secondary legislation.⁶⁶

2.2.2 Mixed agreements

In negotiating and concluding international environmental treaties the Union may be forced to adopt 'mixed agreements' which on the European side must be signed and ratified both by the European Union and its member states.⁶⁷ This is the case when neither the Union nor the member states have exclusive competence in the area covered by the treaty as is the case in the field of environmental protection according to article 191(1) of the TFEU. The legal standards defining the Union's external competences are complicated and depend on the extent the Union has exercised its internal legislative powers and adopted provisions.⁶⁸ In practice, however, and due to political rather than legal considerations most of the abovementioned treaties have been concluded as mixed agreements, sometimes even without any clarification of the respective competences of

64 A Epiney *Umweltrecht der Europäischen Union* (3rd edn 2013) 141; K Meßerschmidt *Europäisches Umweltrecht* (2011) 264.

65 S Breier 'Die Außenkompetenzen der Gemeinschaft und ihrer Mitgliedstaaten auf dem Gebiet des Umweltschutzes' in PC Müller-Graff et al (eds) *Die Europäische Gemeinschaft in der internationalen Umweltpolitik* (2006) 99; Jans & Vedder (n 61 above) 64 - 74.

66 Lists of those treaties are provided by W Heintschel von Heinegg 'Spektrum und Status der internationalen Umweltkonventionen – Der Beitrag der Europäischen Gemeinschaft zur fortschreitenden Entwicklung des völkervertraglichen Umweltschutzes' in Müller-Graff et al (n 65 above) 77 92 and by Meßerschmidt (n 64 above) 327.

67 C Hillion & P Koutrakos (eds) *Mixed agreements revisited. The EU and its member states in the world* (2010).

68 T C Hartley *The foundations of European Union Law* (7th edn 2010) 173.

Union and member states.⁶⁹ Nevertheless, under normal circumstances the Union and its member states will participate in international environmental conventions jointly and will develop common negotiating positions and seek to unite their negotiating powers.

On that basis, over the last two decades the European Union has become a major player in international environmental negotiations.⁷⁰ Increasingly the Commission and the European Court of Justice both seek to widen the Union's competences and to reduce member states' abilities to pursue a separate diplomatic strategy. In 2010 for instance the Court held that the Unions' member states are subject to special

duties of action and abstention in a situation in which the Commission has submitted to the Council proposals that, although they have not been adopted by the Council, represent the point of departure for concerted Community action.⁷¹

Sweden therefore had infringed the 'duty of cooperation in good faith' by unilaterally proposing to list a substance in Annex A to the Stockholm POP-Convention (→ 1.2.1).

In the *Slovak Brown Bear* case the ECJ noted, that according to the 'declaration of competence' made in accordance with the signing of the Aarhus Convention (→ 1.2.1) the Community had stated that

the legal instruments in force do not cover fully the implementation of the obligations resulting from article 9(3) of the Convention ... and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community.

The Court, nevertheless, found that contrary to this official statement article 9(3) of the Aarhus Convention fell within the scope of Union law and that the Court had jurisdiction to interpret the provision.⁷² The decision's underlying intention is apparently to enlarge the Union's negotiating powers⁷³ which is even more obvious since the 'declaration of

69 In its declaration of competence under the Climate Change Convention the Community stated to be competent 'alongside its Member States ... as determined by the Treaty establishing the European Economic Community.' (Climate Change Secretariat *United Nations Framework Convention on Climate Change Handbook* (2006) 45).

70 C Bretherton & J Vogler *The European Union as global actor* (2nd edn 2006) 85 ('global leader'); J Brunnée 'The United States and international environmental law: Living with an elephant' (2004) 15 *European Journal of International Law* 617 624; Müller-Graff et al (n 65 above); S Fröhlich *Die Europäische Union als globaler Akteur* (2007).

71 Case C-246/07 *European Commission v Sweden* [2010] ECR I-03317, paras 71ff.; P van Elswege 'Note to Commission v Sweden' (2011) 105 *American Journal of International Law* 307.

72 Case C-240/09 *Slovak Bear* [2011] ECR I-01255, paras 28 - 43.

73 C Eckes 'Environmental policy "outside-in": How the EU's engagement with international environmental law curtails national autonomy' (2012) 13 *German Law Journal* 1151 1165; Jans & Vedder (n 61 above) 72 - 74; D Krawczyk 'Case Note: The

competence' in question had been based on the Court's own former case law. Therefore, while mixed agreements are in practice still the predominant model for Germany's environmental diplomacy, the respective negotiating powers will increasingly be transferred to the European level.

2.2.3 Regulations, directives and decisions

Having entered into a mixed agreement, the European Union may either implement the treaty through European legislation or leave implementation to its member states. The Union's secondary law, as a matter of principle, is of tremendous importance for the German legal order (→ Hestermeyer). Normally, the Union will seek to harmonise implementation of environmental treaties to the fullest extent possible, provided that these measures find political support in the Council. In order to transform international obligations into European law, the Union will – under normal circumstances – enact either regulations or directives; in rare circumstances implementation will be restricted to mere decisions.⁷⁴

Strengthening international obligations through Union implementation

Irrespective of the form chosen, nonetheless, the obligation in question for various reasons will substantially gain in relevance and enforceability due to its transformation:⁷⁵ European regulations have direct effect in the domestic legal order of the member states, and under certain conditions the same applies to directives. According to the principle of supremacy Union law takes precedence over domestic law in case of a conflict. Their execution is subject to the supervision of the Commission under article 17 of the Treaty on European Union as well as to the other enforcement mechanisms of European Union law (→ Hestermeyer). Reservations the member states may have formulated under article 19 of the Vienna Convention on the Law of Treaties when signing or ratifying a mixed agreement do not have any relevance with respect to Union law implementing this agreement.

Moreover, the European Court of Justice tends to give obligations a far stricter meaning than international courts and is quite willing to disregard the literal content of the text in order to promote the underlying objective of a European provision.⁷⁶ With regard to legislation meant to implement

Slovak Brown Bear case: The ECJ hunts for jurisdiction and environmental plaintiffs gain the trophy' (2012) 14 *Environmental Law Review* 53.

74 See generally HCH Hofmann et al *Administrative law and policy of the European Union* (2011) 91 - 94.

75 M Rossi 'Europäisiertes internationales Umweltverwaltungsrecht' in C Möllers et al (eds) *Internationales Verwaltungsrecht* (2007) 165 171.

76 Hartley (n 68 above) 72.

international obligations, this may – particularly with regard to procedural aspects – result in a strengthening of its environmental effectiveness.⁷⁷ A striking example for this is the interpretation of the provisions of Directive 2003/35/EC which implemented article 9(2) of the Aarhus Convention (→ 1.2.1): In the negotiation of the Convention Germany insisted on a wording of article 9(2) which it believed to allow the continuance of the concept of impairment of a subjective right as a precondition for judicial standing.⁷⁸ Subsequently, Germany insisted on this formulation being integrated into the implementing Directive 2003/35/EC. Nevertheless, the ECJ considering the overall environmental purposes of the directive, obligated member states to allow non-governmental organisations to invoke any ‘rule flowing from EU environment law and intended to protect the environment’ irrespective of whether that rule protects only the interests of the general public or the interests of individuals.⁷⁹ Transformation into Union Law has thus given article 9(2) of the Aarhus Convention a far reaching meaning which would have been rather unlikely according to the normal standards of interpretation of international law.

Regulations

The strictest option to implement international law at the Union level is by enacting regulations. According to article 288(2) of the TFEU, a regulation has general application, is binding in its entirety and directly applicable in all member states. Regulations do not require or even allow any formal transformation through the member states⁸⁰ (→ Hestermeyer) although supplementary national legislation may be necessary to set their provisions into action (→ 2.3.4). Nevertheless, in conformity with the principle of subsidiarity enshrined in article 5(3) of the Treaty on the European Union, regulations are comparatively rarely used in the area of environmental protection.⁸¹ The main field of application for environmental regulations is where the free movement of goods and the functioning of the European Single Market are affected. Thus, the 1989 Basel Convention’s provisions on the transboundary movements of hazardous wastes (→ 1.2.1) have been transformed into directly applicable European regulations on shipments of waste since 1994.⁸² The same applies with respect to chemicals to the 1998 Rotterdam PIC-Convention (→ 1.2.1) which is

77 Y Shigeta ‘The ECJ’s ‘hard’ control over compliance with international environmental law’ (2009) 11 *International Community Law Review* 251; for a practical example – EU legislation meant to implement CITES – see VGH Kassel Case 8 UE 3440/89 (20 October 1993) (1994) 47 *Neue Juristische Wochenschrift* 1427.

78 A Schwerdtfeger *Der deutsche Verwaltungsschutz unter dem Einfluss der Aarhus-Konvention* (2010) 126.

79 Case C-115/09 *Trianel* [2011] ECR I-03673, para 50.

80 Hartley (n 68 above) 216.

81 Meßerschmidt (n 64 above) 181.

82 Council Regulation (EEC) 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community [1993] OJ L30/1; replaced by Regulation (EC) 1013/2006 of 14 June 2006 on shipments of waste [2006] OJ L 190/1.

implemented by a European Export-Import-Regulation,⁸³ and to the 1973 Convention on the International Trade in Endangered Species of Wild Flora and Fauna (→ 1.2.1), whose provisions are implemented uniformly in all EU member states by a set of European Regulations.⁸⁴

Directives

The Union's standard approach however for transforming international environmental obligations is the enactment of implementing directives. A directive, according to article 288 (2) of the TFEU,

shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

Thus, directives do require national implementation by member state legislation. Under normal circumstances, national authorities and national courts are expected to apply these national statutes rather than the directive, even though national courts are

bound to interpret domestic law so far as possible, once the period for transposition has expired, in the light of the wording and the purpose of the directive concerned.⁸⁵

Moreover, even directives can have direct effect when their provisions are unconditional and sufficiently clear and precise and have not been implemented after the expiry of the period for transposition (→ Hestermeyer).⁸⁶ As the Union's environmental directives have become extremely detailed over the years – detailed to an extent that the directives tend to be several times longer than the domestic German implementation acts – under normal conditions sufficient precision in the abovementioned sense is the rule rather than an exception.

All in all, there are more than 50 European directives that implement international obligations: Directive 2011/92/EU on the Assessment of the Effects of certain Public and Private Projects on the Environment and its predecessors transform both the customary duty to carry out environmental impact assessments in a transboundary context (→ 1.2.2)

83 Regulation (EC) 689/2008 of 17 June 2008 concerning the export and import of dangerous chemicals [2008] OJ L 204/1; Langlet (n 12 above) 133.

84 Council Regulation (EC) 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein [1997] OJ L61/1; Commission Regulation (EC) No 865/2006 of 4 May 2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 [2006] OJ L166/1; Commission Implementing Regulation (EU) No 792/2012 of 23 August 2012 laying down rules for the design of permits, certificates and other documents provided for in Council Regulation (EC) No 338/97 [2012] OJ L242/13.

85 Case C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos* [2006] ECR I-6057, para 108.

86 For references see Hartley (n 68 above) 219.

as well as the 1991 Espoo Convention (→ 1.2.1) into European Law. The 1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats (→ 1.2.1) was implemented – and in many respects transcended – by the Habitats-Directive 92/43/EEC,⁸⁷ one of the Union's most important environmental achievements which established the European network *Natura 2000*.⁸⁸ The 1992 Helsinki Convention on Industrial Accidents (→ 1.2.2) has been transformed by various directives, the newest one being the 'Seveso III Directive' 2012/18/EU.⁸⁹ Some additional examples for European directives implementing international law will be presented in the context of their German implementation (→ 2.3.2).

A rather special case is the Union's implementation of the customary concept of equitable utilisation of shared water resources (→ 1.2.2) which forms the cornerstone both of the 1997 UN Watercourses-Convention and of the 1991 Helsinki ECE-Convention on Transboundary Watercourses (→ 1.2.1). Elements from all these sources have been transformed into European law by the Union's Water Framework Directive 2000/60/EC⁹⁰ which establishes an integrated transboundary river basin management for Europe and instruments such as the obligatory 'management plan' which still clearly show the directive's international origins.⁹¹ In fact, in case of transboundary rivers the directive's implementation is coordinated by the 'river commissions' established by and acting under international law to manage the shared resource.⁹² In the case of the river Maas, even a new international agreement was negotiated and set into force in order to implement directive 2000/60/EC.⁹³ Under this approach, international law, Union law and domestic provisions amalgamate into a hybrid comprehensive regime.⁹⁴

Due to various reasons, *inter alia* the fact that the period for transposition is often unrealistically short, the ECJ has frequently found environmental directives to be directly effective.⁹⁵ This applied also to

87 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

88 M Gellermann *Natura 2000* (2nd edn 2003); R Slepcevic *Litigating for the environment* (2009) 59.

89 Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances [2012] OJ L197/1.

90 Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy [2000] OJ L327/1.

91 J Sohnle 'Les thèmes de la directive cadre sur l'eau dans le concert des normes internationales' (2008) 9 *ERA-Forum* 423.

92 Boisson de Chazournes (n 16 above) 176. This approach had been elaborated by A Epiney & A Felder *Überprüfung internationaler wasserwirtschaftlicher Übereinkommen im Hinblick auf die Implementierung der Wasserrahmenrichtlinie* (2002).

93 S Solf *Europäisches Flussgebietsmanagement und deutsche Wasserwirtschaftsverwaltung* (2006) 176.

94 G Reichert *Der nachhaltige Schutz grenzüberschreitender Gewässer in Europa* (2005) 340.

95 L Krämer *Focus on European environmental law* (1992) 160; Meßerschmidt (n 64 above) 223.

various provisions of the Unions implementation directives, *inter alia* to the provisions of Directive 2003/35/EC implementing article 9(2) of the Aarhus Convention in the German based *Trianel* case⁹⁶ (→ 2.2.4). One of the more controversial cases⁹⁷ was the *Großkrotzenburg* decision in which the ECJ recognised the direct effect of the duty to carry out environmental impact assessments under the EIA Directive 86/377⁹⁸ which was later replaced by the abovementioned Directive 2011/92/EU. For several years, German courts – contrary to the point of view in all other member states – considered article 6 of the Habitats Directive to have certain pre-effects⁹⁹ which ‘more or less acknowledged the direct effect of article 6’.¹⁰⁰

Decisions

In some instances, the Union will enact neither regulations nor directives but restrict itself to simple implementation decisions. This was the case with respect to the Kyoto Protocol elaborated under the UN-Climate Change Convention (→ 1.2.1) which commits the Union to a collective greenhouse gas reduction target. The Protocol was adopted on behalf of the Community by Council Decision 2002/358/EC of 25 April 2002 which at the same time confirmed in its Annex II an internal 1998 ‘burden sharing agreement’ that had been concluded amongst the member states in order to allocate differentiated emission levels to each of them. Basically, it is left to the member states to enact legislation in order to meet their individual reduction targets. Thus, the European implementation of the Climate Change Convention results in a complex multi-level governance system.¹⁰¹

2.3 National transformation of international environmental obligations

National transformation is required for the implementation of bilateral or multilateral (mixed) agreements which have not or not completely been transformed into European regulations or directives. Moreover, national implementation is also mandatory for international obligations which have been transformed into European directives.

96 n 79 above, para 59.

97 M Hedemann-Robinson *Enforcement of European Union environmental law* (2007) 232.

98 Case C-431/92 *Großkrotzenburg* [1995] ECR I-2189, paras 28 - 40.

99 BVerwG Case 4 VR 3.97 (21 January 1998) (1998) 17 *Neue Zeitschrift für Verwaltungsrecht* 616 622; BVerwG Case 4 A 9.97 (19 May 1998) (1998) 17 *Neue Zeitschrift für Verwaltungsrecht* 961 967; BVerwG Case 4 C 2.99, (27 January 2000) (2000) 115 *Deutsches Verwaltungsblatt* 814; BVerwG Case 4 A 28.01 (17 May 2002) (2002) 21 *Neue Zeitschrift für Verwaltungsrecht* 1243 1244.

100 JH Jans ‘Case law analysis. The habitats directive’ (2000) 12 *Journal of Environmental Law* 385 388.

101 W Durner ‘The implementation of the climate change convention’ (1999) 37 *Archiv des Völkerrechts* 357; M Schröder ‘Klimaschutz durch die Europäische Union’ (2006) 90 *Jahrbuch des Umwelt- und Technikrechts* 19.

2.3.1 Constitutional law

Some basic customary elements of international environmental law have been confirmed by the German Constitution: In 1994, under the influence of the Rio Conference, a new article 20a was introduced into Germany's Basic Law:

Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.

This provision confirms in clear language the general duty to protect the environment established in the Trail Smelter arbitration and formulated *inter alia* in principle 21 of the 1972 Stockholm Declaration (→ 1.2.2).¹⁰² Moreover, the reference to the 'responsibility toward future generations' is generally understood to refer to the concept of 'sustainable development' adopted at the Rio Conference (→ 1.2.2).¹⁰³ Both principles, whether they are internationally binding or not, have thus become formal constitutional law in Germany. Moreover, the constitutions of all German states contain similar provisions.¹⁰⁴

It should be noted, however, that in establishing objective duties article 20a falls short of recognising a basic human right to a healthy environment as had been demanded before by various political groups.¹⁰⁵ However, like in the case of the European Convention of Human Rights (→ 1.2.1), the German Constitutional Court has held that the right to life and physical integrity enshrined in article 2(2) of the Basic Law implies a duty of the German state to protect individuals against pollution.¹⁰⁶ Both article 20a of the Basic Law as well as the constitution's basic human rights

¹⁰² HG Dederer 'Grenzüberschreitender Umweltschutz' in J Isensee & P Kirchhof (eds) *Handbuch des Staatsrechts der Bundesrepublik Deutschland* vol XI (3rd edn 2013) 857 882 - 884 points out that article 20a extends to transboundary environmental affairs.

¹⁰³ Dederer (n 102 above) 887; K Gärditz 'Article 20a GG' in M Beckmann et al (eds) *Landmann/Rohmer, Umweltrecht, Loose leaf commentary* (2013) paras 52 - 66; HJ Peters 'Art. 20a GG - Die neue Staatszielbestimmung des Grundgesetzes' (1995) 14 *Neue Zeitschrift für Verwaltungsrecht* 555; M Reese 'Leitbilder des Umweltrechts' (2010) 21 *Zeitschrift für Umweltrecht* 339 341; A Rest 'International environmental law in German Courts' in M Anderson & P Galizzi (eds) *International environmental law in national courts* (2002) 81 - 85.

¹⁰⁴ M Klopfer *Umweltrecht* (3rd edn 2004) 113.

¹⁰⁵ Klopfer (n 104 above) 117; R Steinberg *Der ökologische Verfassungsstaat* (1998) 76.

¹⁰⁶ BVerfG Case 1 BvR 385/77 (20 December 1979) (1980) 53 *Entscheidungen des Bundesverfassungsgerichts* 30; Case 1 BvR 612/72 (14 January 1981) (1981) 56 *Entscheidungen des Bundesverfassungsgerichts* 54 73.

thus establish a minimum standard of individual protection which necessarily must be implemented at the level of statute law.¹⁰⁷

2.3.2 Secondary legislation

Apart from these general concepts, most of the implementation of international environmental law takes place through secondary legislation. While in the field of environmental protection some minor legislative competences rest with the German states (*Länder*), most of the international obligations in question require implementation at the federal level.¹⁰⁸

Autonomous implementation of international obligations – Implementation of directives

Parallel to the European Union's increasing activities in concluding and implementing international environmental agreements (→ 2.2.2), the autonomous domestic implementation of international obligations has lost parts of its original field of application. Nonetheless, in areas not as yet covered by Union legislation international environmental obligations require national implementation. Such implementation is normally carried out through federal statutes, in particular with respect to activities subject to German law (due to its flag-state jurisdiction) which take place outside of the Union's territory. Thus, sections 4 and 5 of the German High Seas Dumping Act (*Hohe-See-Einbringungsgesetz*) of 1998 prohibit all sorts of dumping with narrowly defined exceptions for dredged materials and sea funerals thereby implementing Germany's obligations under the London Dumping Convention (→ 1.2.1). The German Protocol on Environmental Protection Implementing Act (*Umweltschutzprotokoll-Ausführungsgesetz*) of 1994 transforms Germany's obligations under the 1991 Madrid Protocol on Environmental Protection to the Antarctic Treaty into federal law.

Where the treaty in question was signed as a mixed agreement both by the Union and by its member states (→ 2.2.2), the German legislator's task is normally defined by European implementation law, and member states will be responsible either to implement European directives or to supplement European regulations. With respect to the abovementioned examples (→ 2.2.4), the European Directive 2011/92/EU on the Assessment of the Effects of certain Public and Private Projects on the Environment is implemented by various implementation acts, the most important of which is the Federal Environmental Impacts Assessment Act (*Gesetz über die Umweltverträglichkeitsprüfung*). The European Habitats-Directive 92/43/EEC has been implemented both in the Federal Nature

¹⁰⁷ Kloepfer (n 104 above) 134; Steinberg (n 105 above) 140 - 152.

¹⁰⁸ Dederer (n 102 above) 868.

Conservation Act (*Bundesnaturschutzgesetz*) as well as in the 16 Nature Conservation Acts of the German states. The same applies to the Union's Water Framework Directive 2000/60/EC which required implementation both at the federal level through the Federal Water Act (*Wasserhaushaltsgesetz*) as well as at the state level by the 16 State Water Acts. In 2012, the Waste Framework Directive 2008/98/EC which implements both the 1972 London Dumping Convention as well as the 1989 Basel Convention's provisions on waste reduction and environmentally sound waste disposal (→ 1.2.1) has been transformed into domestic law by the new Federal Waste Management and Product Recycling Act (*Kreislaufwirtschaftsgesetz*).

Transformation techniques: Parliamentary statutes and administrative regulations

As mentioned above, international treaties, in order to become domestically applicable, normally require both legislative ratification as well as normative transformation into German law (→ 2.1 and 2.1.1). With respect to framework treaties, the standard model for federal environmental implementation statutes will be a parliamentary statute that sets out the basic obligations for the executive and at the same time, in order to allow for more flexible implementation of details, grants competence to issue administrative regulations either to the Federal Minister for the Environment or to another branch of the federal government according to article 80 of the Basic Law.¹⁰⁹ A typical and rather early example for this approach is article 2 of the MARPOL Implementation Act (*MARPOL-Umsetzungsgesetz*) of 1973¹¹⁰ which empowers the Federal Ministry of Transport, Building and Housing to enact regulations in order to implement amendments to MARPOL or its Protocols (→ 1.2.1) provided that these amendments remain within the limits set out by the aims of MARPOL.¹¹¹ Similarly, decisions and standards elaborated under the OSPAR-Convention for the Protection of the North-East Atlantic (→ 1.2.1) are transformed into national law by administrative regulations enacted by the Federal Minister for the Environment.¹¹²

109 HD Treviranus 'Inkraftsetzen völkerrechtlicher Vereinbarungen durch Rechtsverordnungen' (1983) 36 *Neue Juristische Wochenschrift* 1948.

110 Gesetz zu dem Internationalen Übereinkommen von 2.11.1973 zur Verhütung der Meeresverschmutzung durch Schiffe und zu dem Protokoll von 1978 zu diesem Übereinkommen (MARPOL-Gesetz, Bundesgesetzblatt 1982 II 2) in der Fassung der Bekanntmachung vom 18.09.1998 (Bundesgesetzblatt 1998 II 2546).

111 For more details C Tietje *Internationalisiertes Verwaltungshandeln* (2001) 371.

112 Tietje (n 111 above) 377; see also Proelß (n 23 above) 346 on the absence of EU implementation.

Integration into the system of national environmental law or reference to international law?

Traditionally, international environmental obligations tend to be rather general in scope and leave wide discretion to the national legislator on how to achieve the objectives agreed upon. In these instances, it may be possible to conform to the international obligations by strictly applying existing domestic law. In most instances, therefore, the international origin of the domestic provisions is not visible for the reader.¹¹³ Thus, the reduction targets fixed under the 1979 Geneva Convention on Transboundary Air Pollution and its protocols (→ 1.2.1) have been achieved by setting strict emission standards under the existing Federal Clean Air Act (*Bundes-Immissionsschutzgesetz*).¹¹⁴ Similarly with respect to marine pollution, the emission standards fixed in the Federal Waste Water Regulation (*Abwasserverordnung*) ensure the fulfilment of the reduction targets elaborated under the OSPAR Convention and the Helsinki Convention (→ 1.2.1) with respect to marine pollution from land based sources.¹¹⁵ Considering the wide scope of the 1992 Convention on Biological Diversity (→ 1.2.1), almost any German provision on nature and animal protection might be interpreted as implementing this programmatic treaty. Also, vast parts of German energy law, in a way, can be regarded as means of implementation of the Kyoto Protocol and therefore may be interpreted in the light of the Protocol's objectives (→ 3.1).¹¹⁶

Sometimes, however, national implementation legislation explicitly refers to international agreements and even to their concrete obligations. In order to transform the Aarhus Convention's provisions on access to justice in environmental matters (→ 1.2.1) into domestic law, parliament chose to create a new law, the Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz*) which brought major changes to Germany's administrative procedural law.¹¹⁷ A similar case is presented by the abovementioned Federal Environmental Impacts Assessment Act. A rather far reaching example for this technique of implementation are sections 5 and 6 of the German Seabed Mining Act (*Meeresbodenbergbaugesetz*) of 1995 which oblige all persons engaged in deep seabed mining to respect the applicable provisions both of UNCLOS as well as of its 1994 implementation agreement. These provisions with their umbrella reference to UNCLOS renounce any formal transformation and restrict themselves to setting the international provisions into force. This approach may be

113 W Durner 'Internationales Umweltverwaltungsrecht' in C Möllers et al (eds) *Internationales Verwaltungsrecht* (2007) 121 130.

114 J Salzwedel & W Preusker *The law and practice relating to pollution control in the Federal Republic of Germany* (1982) 24 - 78.

115 J Salzwedel & W Durner 'Wasserrecht' in Hansmann & Sellner (n 54 above) 593 622 & 663.

116 BVerwG Case 7 C 11.10 (10 October 2012) (2013) 32 *Neue Zeitschrift für Verwaltungsrecht* 592 594.

117 S Schlacke *Überindividueller Rechtsschutz* (2008) 232 - 311.

explained by the fact that several of the central provisions of UNCLOS are regarded as self-executing.¹¹⁸ However, interpretative problems associated with the convention, are thereby drawn into the domestic law system (→ Proelß).

2.3.3 Legislative reception of international environmental soft law

National implementation of international environmental law is not confined to binding international obligations but may also include recommendations, declarations or other forms of international soft law (→ 1.2.3). Even the constitutional reception of the concept of 'sustainable development' in article 20a Basic Law (→ 2.3.1) may refer to a concept which – at least in 1994 – was at the international level still restricted to a soft law-status (→ 1.2.2). Similarly, various international recommendations, such as WHO standards, are formally transformed into domestic law through national or European legislation.

Normally, these recommendations will only be mentioned in the explanatory memorandum to the Act in question. The memorandum to the Federal Regulation concerning Drinking Water (*Trinkwasser-verordnung*), for instance, stipulates that the regulation not only aims at implementing the European Directive 98/83/EC on the quality of water intended for human consumption but also refers to the 2004 WHO Guidelines for Drinking Water Quality.¹¹⁹ On the other hand, section 25(1) of the German Plant Protection Act (*Pflanzenschutzgesetz*) explicitly provides that international agreements in particular the FAO's International Code of Conduct on the Distribution and Use of Pesticides¹²⁰ have to be taken into account when exporting pesticides. This provision renders international soft law legally binding.¹²¹ Similar provisions exist at the EU-level: The 'Globally Harmonized System of Classification and Labeling of Chemicals',¹²² formally a mere recommendation of several UN-institutions, is transformed into binding European law through Regulation (EC) No 1272/2008 of 16 December 2008 on classification, labeling and packaging of substances and mixtures.¹²³ All these obligations, while rooting in international soft law, may therefore influence human behavior rather effectively at the domestic level due to their legislative reception.

118 A Proelß 'The 'Erika III' Package: Progress or breach of international law?' in H-J Koch et al (eds) *Climate change and environmental hazards related to shipping* (2013) 129–139.

119 Bundesrats-Drucksache 530/10 of 2.9.2010, 51, 65, 75 & 90.

120 Food and Agriculture Organization of the United Nations (FAO) *International code of conduct on the distribution and use of pesticides* (2003).

121 Durner (n 113 above) 144–145 & 161.

122 United Nations *Globally harmonized system of classification and labelling of chemicals* (3rd edn 2009).

123 H Wahl 'Die EG-GHS-Verordnung' (2008) *Stoffrecht* 249.

2.3.4 Transnational environmental management

International environmental cooperation is not restricted to entering into and transforming legal obligations but also includes transnational collaboration at the administrative level. Some domestic provisions explicitly refer to international agreements in order to allocate the respective tasks to federal or state agencies. Section 13(1) of the German Waste Transportation Act (*Abfallverbringungsgesetz*), a national supplement to the abovementioned regulation 1013/2006 on Shipments of Waste (→ 2.2.4), provides that the Federal Environmental Agency (*Umweltbundesamt*) shall act as the ‘competent authority’ under article 2(6) of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes (→ 1.2.1). In a similar approach, sections 44-51 of the Federal Nature Conservation Act (*Bundesnaturschutzgesetz*) supplement the Union’s regulations that implement the CITES-Convention (→ 1.2.1 and 2.2.4). In cooperating with the international Secretariats established under those treaties, domestic agencies become part of a global administrative network.¹²⁴

The most important examples for international administrative cooperation, however, deal with the transnational environmental management of shared environmental resources. With respect to international rivers, the abovementioned river or basin commissions (→ 2.2.4) play an important role in such transboundary management. Germany is represented in several of these institutions.¹²⁵ The most prominent one is the International Commission for the Protection of the Rhine against Pollution which was established in 1950. Based in Koblenz, Germany, it operates under the 1999 Convention on the Protection of the Rhine (→ 1.2.1) and is widely considered to be amongst the most effective institutions to manage freshwater resources worldwide.¹²⁶ The Commission coordinates not only the implementation plans of the European Water Framework Directive 2000/60/EC (→ 2.2.4)¹²⁷ but also – under its ‘Warning and alarm plan Rhine’ – the riparian state’s emergency action in case of pollution incidents¹²⁸ as well as their combined efforts to reduce floods.¹²⁹

124 N Krisch & B Kingsbury ‘Introduction: Global governance and global administrative law in the international legal order’ (2006) 17 *European Journal of International Law* 1.

125 For references see M Niedobitek *Das Recht der grenzüberschreitenden Verträge* (2001) 73.

126 Birnie et al (n 7 above) 575; E Louka *International environmental law: Fairness, effectiveness, and world order* (2005) 231; Sands & Peel (n 1 above) 320.

127 International Commission for the Protection of the Rhine (ICPR) *Rhine 2020: Program on the sustainable development of the Rhine Conference of Rhine Ministers* (2001).

128 International Commission for the Protection of the Rhine (ICPR) *Warning and alarm plan Rhine: Reported incidents* (2010).

129 International Commission for the Protection of the Rhine (ICPR) *Report on the identification of potential significant flood risk areas in the international river basin district Rhine* (2013).

A less far reaching example for the internationalisation of common environmental resources is the transnational management of habitats, in particular with respect to transboundary national parks. Again, those parks are frequently established on the basis of bilateral administrative agreements or even formal international treaties which are concluded by the German states rather than by the Federation.¹³⁰ Up to now, no transnational agencies have been founded under these agreements, but administrative cooperation between national agencies is institutionalised. In some of the German states, on the other hand, environmental administrations may cooperate in such habitat protection even without any formal legal basis. This applies to the transfrontier ‘*Internationalpark Unteres Odertal*’ which was established by two national regulations in Germany and in Poland on the basis of a common declaration of both Governments.¹³¹

3 The role of courts in applying and developing international environmental law

According to the German Constitutional Court, the German Basic Law is ‘völkerrechtsfreundlich’, intended to accommodate international law.¹³² For German judges acting under the Basic Law’s dualist concept this implies the duty to refer to international environmental law as an interpretative guideline, to apply and enforce self-executing international environmental law and generally to accommodate international law in order to meet Germany’s international obligations.

3.1 International environmental law as an interpretative guideline

Both the ECJ as well as the German judiciary have frequently referred to the role of international environmental law as an interpretative guideline. According to the ECJ, when secondary EU legislation meant to implement international environmental obligations requires interpretation, the implemented treaty’s objectives, principles and provisions must be taken

130 For references see Niedobitek (n 125 above) 80; for illustrative case studies K Abele *Grenzüberschreitende Ausweisungen von Natur- und Landschaftsschutzgebieten. Perspektiven der Zusammenarbeit zwischen Baden-Württemberg, Frankreich und der Schweiz am Beispiel Oberrhein* (1997).

131 E Gerbsch ‘Grenzüberschreitende Zusammenarbeit im deutsch-polnischen (Inter-) Nationalpark “Unteres Odertal”: Ein Projekt mit Vorbildfunktion?’ in M Niedobitek & A Löwe (eds) *Grenzüberschreitende Zusammenarbeit in Europa* (2013) 227 232; for older references see B Scharinger *Rechtsgrundlagen für die Errichtung von Nationalparks* (1999) 93.

132 BVerfG Case 2 BvR 2365/09 (4 May 2011) (2011) 128 *Entscheidungen des Bundesverfassungsgerichts* 326; Geiger (n 55 above) 179; V Röben *Außenverfassungsrecht* (2007) 207.

into account.¹³³ German courts in interpreting national or European environmental legislation may also refer to its supranational origins although rather few judgments address those origins explicitly.¹³⁴ This is particularly the case where the provisions in question have explicitly been enacted in order to implement international obligations. The London Dumping Convention (→ 1.2.1) for instance is transformed into national law by the German High Seas Dumping Act (*Hohe-See-Einbringungsgesetz* → 2.3.2). In order to construe this national statute and its central term ‘disposal’, the Federal Administrative Court referred to the international convention and its protocols.¹³⁵ Similar references were made to MARPOL with respect to European and German MARPOL-implementation legislation,¹³⁶ to the 1979 Bern Convention (→ 1.2.1) in interpreting the Habitats-Directive 92/43/EEC¹³⁷ and the Federal Nature Conservation Act (*Bundesnaturschutzgesetz*),¹³⁸ to article 6 of the Aarhus Convention with respect to section 3(2) of the Federal Building Code (*Baugesetzbuch*),¹³⁹ to CITES in interpreting the former German implementation act¹⁴⁰ or even generally to ‘international and regional conventions’ protecting certain species in order to prove that they are being threatened.¹⁴¹

Even international environmental soft law may be applied as an interpretative guideline to construe national statutes and may thus have a domestic effect without any formal legislative reception (→ 2.3.3). Consequently, German courts have frequently referred to WHO-recommendations in order to interpret national provisions that fix standards of human harm¹⁴² or to resolutions of the non-governmental International Union for Conservation of Nature (→ 1.2.3) with respect to

133 Case C-154/02 *Jan Nilsson* [2003] ECR I-12733, para 39 (CITES); Case C-308/06 *International Association of Independent Tanker Owners (Intertanko) and Others* [2008] ECR I-4057, para 52 (MARPOL); C Zengerling *Greening International Jurisprudence* (2013) 68.

134 Rest (n 103 above) 79.

135 BVerwG Case 7 C 7.10 (14 July 2011) (2011) 22 *Zeitschrift für Umweltrecht* 538 540.

136 BGH, Case III ZR 358/03 (2 December 2004) (2006) 19 *Neue Zeitschrift für Verwaltungsrecht Rechtsprechungs-Report* 28 30.

137 BVerwG Case 9 A 64/07 (12 August 2009) (2010) 134 *Entscheidungen des Bundesverwaltungsgerichts* 308 325.

138 OVG Schleswig Case 1 L 321/91 (2 July 1993) (1993) 15 *Natur und Recht* 97 98.

139 BVerwG Case 4 CN 3/12 (18 July 2013) (2013) 32 *Neue Zeitschrift für Verwaltungsrecht* 1413 1415.

140 Amtsgericht Nürnberg, Case 67 Gs 442/81 (12 June 1981) (1982) 35 *Neue Juristische Wochenschrift* 535; VGH Mannheim Case 10 S 1891/89 (15 September 1989) (1989) 10 *Neue Zeitschrift für Verwaltungsrecht* 84ff; VGH Kassel Case 3 TG 3273/95 (29 November 1995) (1995) 9 *Neue Zeitschrift für Verwaltungsrecht Rechtsprechungs-Report* 432 433.

141 VGH München Case 22 B 10.1875 (24 May 2011) (2011) 22 *Zeitschrift für Umweltrecht* 486.

142 Eg BVerwG Case 1 C 102.76 (17 February 1978) (1978) 55 *Entscheidungen des Bundesverwaltungsgerichts* 250 259; VGH Mannheim Case 3 S 590/02 (19 April 2002) (2002) 16 *Neue Zeitschrift für Verwaltungsrecht Rechtsprechungs-Report* 27ff; for more general observations on the reception of European and international standards see E Albrecht ‘Standards and Thresholds in German Environmental Law’ in M Schmidt et al (eds) *Standards and Thresholds for Impact Assessment* (2008) 19ff.

construing national wildlife law.¹⁴³ All in all, the important role of international environmental law as an interpretative guideline is undisputed. This role has been strengthened in the context of the ECJ's *Brown Bear* case, even though some of the German court decisions in the aftermath of the ECJ's ruling may raise the question of where to draw the boundaries of proper judicial interpretation (→ 3.3).

3.2 Self-executing international environmental law

Self-executing international environmental law as part of European Union law

International agreements which are binding for the Union become an integral part of the Unions legal order¹⁴⁴ and have legal effects in the Union's internal law and in the member states. To the extent that their provisions are self-executing and establish 'a clear, precise and unconditional obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure', they are regarded as directly applicable (→ Wolfrum/Vöneky).¹⁴⁵ However, since environmental agreements are frequently formulated in a rather broad and political language¹⁴⁶ and therefore usually not self-executing¹⁴⁷ there have been only few cases where the ECJ applied this doctrine in an environmental context.¹⁴⁸ In 2004, for instance, the Court found that article 6(3) of the Protocol and article 6(1) of the amended Athens Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources had direct effect.¹⁴⁹

143 OVG Lüneburg Case 3 K 2630/98 (22 February 1999) (1999) 20 *Natur und Recht* 470 471ff; BVerwG Case 6 BN 1/99 (10 September 1999) (1999) 19 *Neue Zeitschrift für Verwaltungsrecht* 198 200; OVG Koblenz Case 1 A 10200/09 (28 October 2009) (2009) 23 *Neue Zeitschrift für Verwaltungsrecht Rechtsprechungs-Report* 310 311.

144 Case C-344/04 *International Air Transport Association (IATA) and European Low Fares Airline Association (ELFAA) v Department for Transport* [2006] ECR I-403, para 36; Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, para 82; Epiney (n 64 above) 61.

145 Case C-300/98 *Dior* [2000] ECR I-11307, para 42; R Uerpmann-Wittzack 'The constitutional role of public international law' in A v Bogdandy & J Bast (eds) *Principles of European constitutional law* (2nd edn 2010) 131 139.

146 Rest (n 103 above) 80.

147 Zengerling (n 133 above) 56. According to D Bodansky 'International environmental law in United States courts' (1998) 7 *Review of European, Comparative & International Environmental Law* 57 58 US courts up to 1998 had only ruled on the self-executing status of two environmental treaties – CITES and the Basel-Convention – finding both of them non self-executing.

148 Zengerling (n 133 above) 69; for further suggestions see Epiney (n 64 above) 65.

149 Case C-213/03 *Pêcheurs de l'étang de Berre* [2004] ECR I-3757, paras 39 - 46.

Self-executing international environmental law in the domestic legal order

Even under the Basic Law's mitigated dualism, German courts have always accepted the principle that self-executing international obligations have direct effect in the domestic order and must be obeyed by public authorities.¹⁵⁰ However, for the reasons stated above, only very few cases of self-executing environmental obligations have been accepted. In the field of nature protection the Federal Administrative Court will take into consideration whether or not a wetland affected by a project is protected by the 1971 Ramsar Convention (→ 1.2.1) even though there are no specific national provisions on wetlands.¹⁵¹ While these decisions do not explicitly mention the concept of self-executing international law, they suggest that article 3(1) of the Ramsar Convention is regarded as being self-executing.¹⁵² Nevertheless, until very recently self-executing environmental obligations played only a fairly limited role in domestic litigation (→ 2.1.1). Conventions, whose direct applicability has explicitly been denied by German courts include the Kyoto-Protocol¹⁵³ and the UNCLOS provisions on marine pollution.¹⁵⁴

An illustrating decision for the limited immediate relevance of international environmental obligations in domestic litigation is the *Waldschlösschenbrücke* case in which the plaintiff, challenging the permit for a bridge on the river Elbe, argued that the project violated the UNESCO-World Heritage Convention (→ 1.2.1). In 2007 the Higher Administrative Court of Saxony rejected this claim arguing that the convention would not strictly prohibit the building of the bridge. Additionally, however, the Court noted that the convention had not been transformed into national law upon its ratification due to the legislator's assumption that German law would be in accordance with the obligations of the treaty. Thus, the Convention, even though binding for Germany, had not become part of domestic law and its impact was confined to influencing the interpretation

150 BVerwG Case 1 C 52.87 (6 October 1988) (1989) 80 *Entscheidungen des Bundesverwaltungsgerichts* 233 235ff.

151 BVerwG, Case 4 A 15.01 (17 December 2002) (2002) 23 *Natur und Recht* 539 543; see also OVG Lüneburg, Case 7 MS 91/05 (12 December 2005) (2006) 17 *Zeitschrift für Umweltrecht* 94 96.

152 W Durner 'Naturschutzrechtliche Anforderungen' in J Ziekow (ed) *Handbuch des Fachplanungsrechts* (2nd edn 2014) sec 7 at 2.

153 BVerwG Case 4 C 4/02 (13 March 2003) (2003) 22 *Neue Zeitschrift für Verwaltungsrecht* 738 740.

154 OVG Hamburg Case 1 Bf 162/04 (15 September 2004) (2004) 16 *Zeitschrift für Umweltrecht* 208 209.

of the applicable national provisions.¹⁵⁵ This reasoning has been approved by the German Constitutional Court.¹⁵⁶

3.3 Tendencies to accommodate and to promote international law

The ECJ's *Slovak Brown Bear* case: Semi self-executing international environmental law?

The ECJ, however, strengthened the relevance of international obligations considerably in the *Slovak Brown Bear* case where it had to decide on the direct applicability of article 9(3) of the Aarhus Convention. According to this provision:

[E]ach Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

The reader should be reminded that the then European Community, when ratifying the Aarhus Convention, had stated that its member states were responsible for the implementation of article 9(3) of the Convention (→ 2.2.2) and that Germany had insisted on language that was believed to allow the continuance of its own rather narrow concept of judicial standing in environmental matters (→ 2.2.3).

After finding that article 9(3) of the Aarhus Convention – contrary to the Union's declaration of competence – fell within the scope of European Union law and its own jurisdiction (→ 2.2.2) – the Court stated that the provision did not meet the abovementioned standards for self-executing norms and therefore did not have any direct effect in the Union (→ 3.2). Quite surprisingly, the Court then declared:

It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organization ... to challenge before a court a

155 OVG Bautzen Case 4 BS 216/06 (9 March 2007) (2007) 17 *Landes- und Kommunalverwaltung* 520 522; A v Bogdandy & D Zacharias 'Zum Status der Weltkulturerbekonvention im deutschen Rechtsraum – Ein Beitrag zum internationalen Verwaltungsrecht' (2007) 26 *Neue Zeitschrift für Verwaltungsrecht* 527 531; Dederer (n 102 above) 880.

156 BVerfG Case 2 BvR 695/07 (29 May 2007) (2007) 26 *Neue Zeitschrift für Verwaltungsrecht* 1176 1177.

decision taken following administrative proceedings liable to be contrary to European Union environmental law.¹⁵⁷

In Germany, this rather sibylline passage gave rise to a controversial discussion on its impact on the domestic legal order with dozens of papers suggesting completely different solutions on how to implement the objectives of article 9(3) of the Aarhus-Convention by means of judicial interpretation.¹⁵⁸ Some courts, such as the Higher Administrative Court of Rhineland-Palatinate have denied the possibility to derive legal standing from article 9(3) of the Aarhus Convention,¹⁵⁹ other courts, including the Federal Administrative Court, have been more creative¹⁶⁰ and some courts even went so far as to suggest that article 9(2 and 3) – in fact contrary to the ECJ's interpretation – both had direct effect simply due to its ratification.¹⁶¹ At the time being, one has to conclude that the ECJ's vague reasoning in the *Brown Bear* case, at least in Germany, has resulted in absolute confusion to such an extent that it has become almost impossible to foresee the legal solution German courts will eventually follow. In giving a non-self-executing treaty provision an effect that comes extremely close to transforming it into national law by means of mere judicial interpretation, the *Slovak Brown Bear* case has promoted international law to an extent that raises delicate questions of democratic legitimacy (→ Schlemmer).

The *Emsland* case: Promoting international cooperation beyond international obligations

Some decisions of German courts have also promoted international law in a way that goes well beyond using international treaties as a mere interpretative guideline for national statutes. Historically, the most important of these may be the *Emsland* decision. In the *Emsland* case the

157 *Slovak Bear* (n 72 above) paras 44 - 52.

158 See for instance J Berkemann 'Der slowakische Braunbär im deutschen Prozessrecht' (2013) 128 *Deutsches Verwaltungsblatt* 1137; F Ekarde 'Das Umweltrechtsbehelfsgesetz vor dem EuGH und dem BVerwG' (2012) 31 *Neue Zeitschrift für Verwaltungsrecht* 530; K Gärditz 'Verwaltungsgerichtlicher Rechtsschutz im Umweltrecht' (2014) 33 *Neue Zeitschrift für Verwaltungsrecht* 1 5; A Schink 'Der slowakische Braunbär und der deutsche Verwaltungsprozess' (2012) 65 *Die öffentliche Verwaltung* 622; S Schlacke 'Zur fortschreitenden Europäisierung des (Umwelt-)Rechtsschutzes' (2014) 33 *Neue Zeitschrift für Verwaltungsrecht* 11; M Seibert 'Verbandsklagen im Umweltrecht' (2013) 32 *Neue Zeitschrift für Verwaltungsrecht* 1040.

159 OVG Koblenz Case 8 B 10254/13 (27 February 2013) (2013) 32 *Neue Zeitschrift für Verwaltungsrecht* 881 882; similar VGH Kassel Case 2 B 1716/12 (20 March 2013) (2013) 127 *Deutsches Verwaltungsblatt* 731; OVG Schleswig Case 12 MN 300/12 (30 July 2013) (2013) 26 *Neue Zeitschrift für Verwaltungsrecht Rechtsprechungs-Report* 917 918.

160 BVerwG, Case 7 C 21.12 (5 September 2013) (2014) 33 *Neue Zeitschrift für Verwaltungsrecht* 64; M Lau 'Das Urteil des BVerwG vom 5.9.2013 oder vom Versuch, den "slowakischen Braunbären" zu zähmen?' (2013) 33 *Neue Zeitschrift für Verwaltungsrecht* 637.

161 VGH Kassel Case 9 B 1916/11 (19 March 2012) 25 *Neue Zeitschrift für Verwaltungsrecht Rechtsprechungs-Report* 544 545; OVG Münster Case 8 D 38/08.AK (12 June 2012) (2012) 34 *Natur und Recht* 722 728.

Federal Administrative Court had to decide on the lawsuit of a Dutch citizen residing in the Netherlands who asked for judicial review of a permit to construct and operate a nuclear power plant issued by a German authority under the German Atomic Energy Act (*Atomgesetz*). The question was whether or not the plaintiff had locus standi to apply to a German administrative court. Until then, most European courts had been reluctant to accept environmental lawsuits by non-residents.¹⁶² While the Administrative Court of Oldenburg had argued that the German permit had no legal effect in the Netherlands and therefore the plaintiff had no legal standing in Germany, the Federal Administrative Court in its judgment of 17 December 1986 stressed that the principle of territoriality did not prohibit national courts to grant legal standing to foreigners. Moreover, the Court argued that the provisions of the *Atomgesetz* on the protection against the harmful effects of ionising radiation were not limited to the protection of the environment in Germany but also intended to implement Germany's 'international obligations'. On the basis of these considerations, the Court concluded that section 7(2) AtG in the light of its international purpose granted locus standi to the Dutch plaintiff.¹⁶³

While the Court did not refer to specific international norms, the most fundamental of these 'international obligations' is obviously the abovementioned no harm principle (→ 1.2.2). In 2008, indeed, the Federal Administrative Court referred directly to the no harm principle and clarified that granting locus standi to foreign plaintiffs contributed to fulfil Germany's customary obligation not to cause harm to another state's environment.¹⁶⁴

The *Emsland* case turned out to be a landmark decision that became a precedent for many other fields of environmental protection. Since 1986, German courts, as a matter of principle, have granted locus standi in environmental matters irrespective of the plaintiff's citizenship, nationality or domicile.¹⁶⁵ The Federal Administrative Court's reasoning is even more remarkable since the principle of equal access to national remedies, which has become binding for Germany under article 3(9) of the 1998 Aarhus Convention (→ 1.2.1) and may since then have become regional

162 For details see M Bothe et al (eds) *Rechtsfragen grenzüberschreitender Umweltbelastungen* (1982).

163 BVerwG Case 7 C 29/85 (17 December 1986) (1987) 75 *Entscheidungen des Bundesverwaltungsgerichts* 285; for a thorough case-analysis in English see Rest (n 103 above) 97 - 99.

164 BVerwG Case 4 C 3/07 (16 October 2008) (2008) 132 *Entscheidungen des Bundesverwaltungsgerichts* 151 158.

165 OVG Saarlouis, Case 8 Q 4/93 (25 March 1994) (1995) 14 *Neue Zeitschrift für Verwaltungsrecht* 97; OVG Saarlouis Case 8 M 10/93 (23 September 1997) (1998) 27 *Amtliche Sammlung von Entscheidungen der Oberverwaltungsgerichte Rheinland-Pfalz und Saarland* 60ff; OVG Münster, Case 20 D 118/03.AK *inter alia*, (3 January 2006) (2006) 17 *Zeitschrift für Umweltrecht* 375ff; OVG Lüneburg, Case 7 ME 263/02 (29 December 2006) (2007) 18 *Zeitschrift für Umweltrecht* 154 155ff; Rest (n 103 above) 100; J Menzel *Internationales Öffentliches Recht* (2011) 750.

customary law,¹⁶⁶ was not as yet part of public international law in 1986 when the principle was applied only amongst the member states of the Nordic Council.¹⁶⁷ Thus, while the *Emsland* decision was inspired by international law, this body of law did not yet require the consequences drawn by the Court.

4 Assessment, achievements and challenges

German environmental law was already quite advanced and detailed when international environmental law began to emerge in the 1970s.¹⁶⁸ Therefore, for a long time, international influences on German environmental law were rather limited as Germany was able to meet most of its international obligations on the basis of existing domestic law. Overall, the impact of international environmental law on the German legal order has been appreciable but restricted.

Since the mid-1980s, however, some new elements were introduced into German law such as the environmental impact assessment. Most of these innovations had European origins, and as a matter of principle the international influences have to some extent been overshadowed by the process of European integration. In particular, the 1998 Aarhus Convention (→ 1.2.1) introduced far-reaching standards on participation and litigation that modify the traditional German law of administrative procedure quite fundamentally.¹⁶⁹ In many instances, these developments helped to modernise German environmental law.¹⁷⁰ On the other hand, as the *Brown Bear* case illustrates, this development may cause some collateral damage as well (→ 3.3). Judicial reception of vague international concepts that have not been transformed by the democratic legislator compromises legal certainty and shifts political power from parliament to the courts. For Germany, the main challenge of the future reception of international environmental law may therefore well be to open its domestic law to international developments without compromising the existing balance of powers.

¹⁶⁶ As suggested by Dederer (n 102 above) 891.

¹⁶⁷ Birnie et al (n 7 above) 306.

¹⁶⁸ Kloepfer (n 104 above) 94 - 103.

¹⁶⁹ Kloepfer (n 104 above) 105; Schwerdtfeger (n 78 above).

¹⁷⁰ See generally N Wiesinger *Innovation im Verwaltungsrecht durch Internationalisierung* (2013) 15.

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CHAPTER 10

INTERNATIONAL ENVIRONMENTAL LAW IN SOUTH AFRICA

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1 Introduction

Environmental law in South Africa is a recent field of law and regulation; however it has emerged as one of the most actively regulated areas where the state and regulators are churning out legislation, norms and standards, and other policy instruments expeditiously. Prior to 1994 before South Africa transitioned to the democratic dispensation, the environment was regulated through fragmented and often conflicting national and sectoral laws that often were not informed by modern principles of environmental management. The advent of the Constitution of the Republic of South Africa, 1996 meant that all laws had to be aligned to the principles and rights that underlie the Constitution. Amongst these is the principle of sustainable development enshrined in the environmental rights provision, section 24. Nevertheless, given the global and transboundary nature of most environmental challenges, even before 1996 international environmental law heavily influenced South African environmental law. The trend of infusing domestic environmental law with international hard and soft law principles continued after 1996 with South Africa openly joining international bodies that had hitherto shunned it during apartheid. This chapter explores the role that international environmental law has played in shaping and directing domestic environmental law in South Africa, analysing the strengths and weaknesses of this internationalisation approach. The interface between international environmental law and domestic environmental law is demonstrated through selected illustrative fields of environmental regulation, without intending an exhaustive study of all environmental sectors.

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Beginning with the regional context and sources of environmental law, the chapter proceeds with an exposition of the changing role played by South Africa in international environmental law and diplomacy. The last part analyses how the judiciary has incorporated international environmental law. This chapter is embedded with an analysis of how South Africa has transformed or incorporated international environmental law principles.

1.1 Relevant international law obligations

The chapter discussing international environmental law in Germany has dealt with the development of international environmental law and sources of international environmental law (→ Durner). In this chapter, we supplement this only with a brief outline of the regional instruments relevant to the African continent.

1.2 Regional sources of international law

There are a number of regional instruments relevant to environmental regulation in South Africa. The most significant of these are outlined below.¹ The approach of the African regional instruments to environmental regulation is a distinctly anthropocentric one that focuses on equitable allocation of natural resource benefits and participation in environmental decision-making. The dominant themes are reliance on a human rights framework, access to resources, fair distribution of benefits, special consideration for vulnerable groups and protection of resources for Africa's children.

The 1968 African Convention on the Conservation of Nature and Natural Resources² represents the first comprehensive environmental management treaty in Africa. It addresses the management of natural resources including wildlife and endangered species. A revised version of the Convention was adopted in 2003.³ It is interesting to note that the first

1 Please note that the instruments discussed below are by no means the complete list. In addition, the treaties discussed are complemented by a wide range of African soft law mechanisms such as the African Common Position on the African Environment and Development and the African Strategies for the Implementation of Agenda 21. For a more detailed discussion see H Strydom & N King (eds) *Fuggle & Rabie's environmental management in South Africa* (2nd edn 2009) 182 - 188.

2 African Convention on the Conservation of Nature and Natural Resources (15 September 1968); see detailed analysis in M Bowman et al *Lyster's international wildlife law* (2nd edn 2010) 262.

3 B Erinosho 'The Revised African Convention on the Conservation of Nature and Natural Resources: Prospects for a comprehensive treaty for the management of Africa's natural resources' *African Journal of International and Comparative Law* (2013) 21 378; M Van der Linde 'Review of the African Convention on Nature and Natural Resources (1969 - 2001)' (2002) 2 *African Human Rights Law Journal* 33; note however that neither version has been ratified by South Africa.

version of this Convention predates the Stockholm Conference of 1972, indicating that Africa was taking steps to implement a more co-ordinated approach to environmental governance ahead of what are typically considered as the watershed moments in the development of international environmental law on the global stage in the early 1970s (→ Durner).⁴

At the sub-regional level, South Africa is also influenced by the Southern African Development Community (SADC) Protocols, a number of which are relevant to environmental regulation.⁵

1.2.1 *The use of a human rights framework*

From an early stage, African regulation of the environment has been premised on a rights-based approach.⁶ This is notwithstanding the uncertainty around the relationship between human rights law and environmental law in the international arena at the time.⁷ The African approach is evident in the 1981 African Charter on Human and People's Rights (the Banjul Charter),⁸ which includes a right to a satisfactory environment favourable to the development of the rights-holder.⁹

This 'right to a satisfactory environment' has been interpreted by the African Commission on Human and Peoples' Rights to encompass substantive obligations such as pollution prevention, the promotion of conservation and ensuring ecological sustainable development and the use of natural resources. This wording is repeated almost identically in section 24(b) of the Constitution of South Africa, which enshrines an environmental right. The African Commission has further indicated that the right to a satisfactory environment also includes what might be termed 'procedural protections' in the form of access to information to affected communities involved and the opportunity to participate in the development process.¹⁰

4 M van der Linde 'Regional environmental law under the auspices of the African Union' in Strydom & King (n 1 above) 166.

5 All the SADC Protocols discussed below have been ratified by South Africa, see <http://www.sadc.int/documents-publications/protocols> (accessed 20 April 2015).

6 For which see generally AE Boyle & MR Anderson (eds) *Human rights approaches to environmental protection* (1998).

7 For instance Boyle argues that the failure of the Rio Declaration to recognise environmental rights is indicative of the continuing uncertainty of the role of human rights in environmental law at the time. AE Boyle 'The role of international human rights law in the protection of the environment' in Boyle & Anderson (n 6 above) 43.

8 African Charter on Human and Peoples' Rights (the Banjul Charter) (27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58). Ratified by South Africa in 1996.

9 n 8 above, art 24. Prior to this the environmental right had been included only in international soft law instruments. See Strydom & King (n 1 above) 177.

10 Communication 155/96 *Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v Nigeria*. This decision has been criticised for not clearly stating which international law instruments it took into account and for failing to consider contemporary developments in Africa such as the revised African Convention on the Conservation of Nature and Natural Resources; see Strydom & King (n 1 above) 179 - 180.

1.2.2 Equity and balancing environmental and developmental imperatives

Equitable allocations of resources, and the relationship between natural resources and development, are themes that underpin Africa's regional law mechanisms. Included in the Banjul Charter (→ 1.2.1) is the right to free disposal of wealth and natural resources.¹¹ Of particular interest is that this right also calls on state parties to 'eliminate all forms of foreign exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources'.¹²

The need to balance exploitation of natural resources and development initiatives is reflected also in the SADC Protocol on Mining which contains a provision on environmental protection which enjoins member states to promote sustainable development by balancing mineral development and environmental protection.¹³

1.2.3 Links between natural resources, conflict and governance mechanisms

In Africa, natural resources have been associated with conflict for centuries¹⁴ and the regional instruments acknowledge this. The African Charter on Democracy, Elections and Governance¹⁵ reflects the African understanding of the link between natural resources, environmental protection, good governance and peace and security. Article 9 requires state parties to design and implement social and economic policies and programmes that promote sustainable development and human security. This Charter further calls on state parties to institutionalise good economic and corporate governance through, amongst other things, equitable allocation of the nation's wealth and natural resources,¹⁶ and compels the pursuit of sustainable development and human security through achievement of New Partnership for Africa's Development (NEPAD) objectives and the United Nations Millennium Development Goals (MDGs).¹⁷

11 n 8 above, art 21.

12 As above.

13 SADC Protocol on Mining (8 September 1997) art 8.

14 PA Mwanika 'Natural resources conflict management processes and strategies in Africa' (2006) 216 *Institute for Security Studies (ISS) Paper 2* <http://www.issafrica.org/uploads/216.pdf> (accessed 4 May 2015).

15 African Charter on Democracy, Elections and Governance (30 January 2007).

16 African Charter on Democracy, Elections and Governance (n 15 above) art 33.

17 African Charter on Democracy, Elections and Governance (n 15 above) art 37.

1.2.4 Intergenerational equity

Several of the relevant regional instruments include references to the need for environmental protection in order to ensure intergenerational equity and to manage the resources of the continent in such a way as to do justice to the interests of the next generation. These include the African Charter on Democracy, Elections and Governance, which compels states to implement policies and strategies to protect the environment to achieve sustainable development for the benefit of, not only present, but also future generations.¹⁸

The SADC Protocol on Forestry further acknowledges that many people in the region depend on forests for their livelihood and that sustainable forest management is essential to the alleviation of poverty.¹⁹ It aims to promote the development, conservation, sustainable management and utilisation of all types of trees, to achieve effective protection of the environment, and again to safeguard the interests of both the present and future generations.

1.2.5 Environmental health

After the Basel Convention,²⁰ which aims to protect human health and the environment against the adverse effects of hazardous wastes, came into force (→ Durner), it became evident that many developed countries were continuing to export their toxic waste to developing countries in general and Africa in particular.²¹ In response to this reality, and to article 11 of the Basel Convention which encourages parties to enter into bilateral, multilateral and regional agreements on hazardous waste to help achieve the objectives of the Convention, a group of African countries entered into the 1991 Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako Convention). The Bamako Convention came into force in 1998 and prohibits import of hazardous waste into less developed countries.²² The Bamako Convention mirrors the Basel Convention

18 n 15 above, art 42. Note however the disappointing omission of any direct references to the environment in the 1990 African Charter on the Rights and Welfare of the Child (African Children's Charter) (11 July 1990, CAB/LEG/24.9/49) which was ratified by South Africa in 2000.

19 SADC Protocol on Forestry (3 August 2002).

20 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the Basel Convention) (22 March 1989).

21 See for example the Nigeria-Italy Waste Trade incident (the *Koko* case) in Nigeria and the Probo Koala incident in Ivory Coast, see also EC Eguh 'Regulations of transboundary movement of hazardous wastes: Lessons from Koko' (1997) 9 *African Journal of International and Comparative Law* 130 - 155 for an analysis of the *Koko* case.

22 South Africa has not yet ratified the Bamako Convention; see generally K Kummer *International management of hazardous waste* (1999).

except that it goes further in prohibiting all imports of hazardous waste, without provision of exceptions to be made.²³

The SADC Protocol on Health calls on state parties to collaborate, co-operate and assist in a cross-sectional approach to address regional environmental health issues, including toxic waste, waste management, pollution of air, land and water and the degradation of natural resources.²⁴ These instruments are useful in giving content to the South African environmental right that includes the right to an environment that is not harmful to health.

1.2.6 Special protection for marginalised and vulnerable groups

Another strong theme which emerges from an analysis of the relevant regional instruments is how many of them recognise that existing vulnerable groups stand to be further marginalised and disempowered by decisions around the exploitation of natural resources and distribution of their associated benefits. The Protocol on the Rights of Women in Africa²⁵ recognises the crucial link between environmental protection and the rights of women and contains a number of provisions that speak to this connection.²⁶

Article 18 enshrines women's rights to a healthy and sustainable environment. It further calls on state parties to adopt an approach that facilitates women's access to energy sources and their inclusion in environmental governance. Special mention is also made of the need to protect and enable the development of women's indigenous knowledge systems. This acknowledgement of the role of women in maintaining and enriching indigenous knowledge systems is particularly commendable given the deep understanding of ecosystems possessed by rural African women.²⁷ Article 19 develops these ideas further by providing for women's right to enjoy their right to sustainable development. This, in turn, requires state parties to approach development planning in a gender-sensitive way which recognises the disproportionate impact of environmental harm on women, promotes their inclusion in decision-making, and facilitates their access to natural resources.²⁸ Other examples are articles 30 and 31 of the African Charter on Democracy, Elections and Governance that speak to

23 D Tladi 'The quest to ban hazardous waste import into Africa: First Bamako and now Basel' (2000) 33 *Comparative and International Law Journal of Southern Africa* 210.

24 SADC Protocol on Health (18 August 1999) art 23.

25 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) (11 July 2003).

26 Ratified by South Africa in 2004.

27 M Van der Linde & E Basson 'Environment' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd edn 2014) 50 - 57.

28 In addition, art 15 provides a right to food security in terms of which women must be provided with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food; art 16 provides for a right to adequate housing, which is envisaged as a right to acceptable living conditions in a healthy environment.

citizen participation and the participation of vulnerable groups in development processes.

In addition, the SADC Protocol on Gender and Development requires state parties, by 2015, to review all of their policies and laws that determine, access to, control over and benefit from productive resources by women in order to end discrimination against women with regard to land and water rights.²⁹

1.2.7 Ecosystem approach and regional cooperation

At a regional level, the 1991 Treaty Establishing the African Economic Community (Abuja Treaty) aims to promote social, economic and cultural development using an integrated and co-ordinated approach in the region. Chapter IX of the Abuja Convention requires member states to harmonise their policies on energy and natural resources.

At a sub-regional level, the SADC Protocol on Shared Watercourses³⁰ is premised on another of the regional themes, which is the need to adopt an ecosystem approach to the management of natural resources. This Protocol recognises that many watercourses in the region are shared amongst several member states hence necessitating that these watercourses be developed in an environmentally sound manner. To this end, SADC passed an initial Protocol on Shared Watercourses in 1995, which was revised in 2000. The Protocol aims to foster closer cooperation for protection, management, and use of shared watercourses in the region. Member states agree to cooperate on projects and exchange information on shared watercourses, consulting with each other and collaborating on initiatives that balance development of watercourses with conservation of the environment.

The SADC Protocol on Energy also requires regional cooperation. It enshrines the principle of ensuring that the development and use of energy is environmentally sound³¹ and addresses cooperation between SADC countries in the development of renewable energy capacity. The SADC Protocol on Wildlife Conservation and Law Enforcement recognises that wildlife resources in Southern Africa have the potential to affect the region's economic development and environmental protection and thus seeks to establish a common framework for conservation and sustainable use of wildlife in the region. Member states agree to collaborate with one another on common approaches for achieving the goals of international agreements on wildlife. The Protocol advocates that member states harmonise legal instruments for wildlife, establish management

29 SADC Protocol on Gender and Development (16 August 2008) art 18. This Protocol has not yet come into force.

30 SADC Protocol on Shared Watercourses (7 August 2000).

31 SADC Protocol on Energy (24 August 1996) art 2(8).

programmes for wildlife, and create a regional database of wildlife status and management.

1.2.8 Reflections and assessment

It is therefore clear that a lot of work has been done in Africa to implement good practices in environmental regulation. In fact, Van der Linde highlights that approximately one third of all treaties developed by the African Union are relevant to the environment in some way.³² As seen from the instruments outlined above, in Africa, these practices include: the use of a human rights framework; constructing environmental regulation against the backdrop of sustainable development discourse; acknowledging the pervasive link between control of natural resources and peace and stability in Africa; managing resources with the interests of future generations in mind; addressing environmental health concerns as part of environmental regulation; providing special protection for vulnerable groups, particularly women; and adopting an ecosystem approach based on regional cooperation.

Nevertheless the African challenge remains one of implementation. Despite a progressive system on paper, sometimes leading the way in the international arena, environmental regulation in Africa remains disjointed. In addition, it has thus far failed to address the persistent problem of the disproportionate impact of environmental degradation on the most marginalised and vulnerable members of society. Furthermore, South Africa has not yet ratified a number of the key regional instruments revealing a disappointing level of commitment to regional norms and cooperation.

2 South African participation in international environmental law making

South Africa prides itself as a powerhouse in Africa not only economically but also in terms of regional foreign policy and how Africa interacts with the global political economy.³³ South Africa sitting at the UN Security Council and as a member of the BRICS group, is closely watched as its policy positions and decisions may be crucial reflections of how Africa, especially Southern Africa thinks on particular issues. This could be

³² n 1 above, 168.

³³ Recent reports indicates that Nigeria has just eclipsed South Africa in this economic leadership position: C Bisserker “Wake-up call” for SA as Nigeria’s economy takes top spot’ *Business Day* (7 April 2014). JO Agoi ‘Nigeria all set to overtake SA as Africa’s largest economy’ *Mail & Guardian* (6 April 2014).

misleading given the diversity of African country positions on many issues and the geopolitical dynamics and age-old allegiances.³⁴ Nevertheless, what is beyond doubt is that South Africa has proved herself a leader in terms of developing a modern environmental regulatory framework that is, relative to other African countries, more in sync with international aspirations and efforts to manage global environmental challenges.³⁵ This participation in global efforts begun even before democracy in 1994, and culminated in South Africa hosting the 2002 World Summit on Sustainable Development (WSSD)³⁶ as well as recently the Conference of the Parties (COP17) to the UNFCCC in 2011.³⁷

This outward assessment of South Africa's progress is often a contrast to some internal criticism that the country is not doing enough to prepare for climate change, transition to renewable energy or take the lead in promoting sustainability and poverty alleviation. Generally, therefore the perception of Africa as a dormant receiver of international law³⁸ is fast changing to an understanding that Africa can contribute to the development of international law including environmental law.³⁹ In the next section we explain how international environmental treaties become law in South Africa and note the innovation that the courts have also developed to incorporate the spirit of some soft law declarations that are not yet considered as binding at the international level.

2.1 Incorporation of treaty-based international environmental law

The South African Constitution defines how international treaties become part of municipal law (→ De Wet/Introduction). However, unlike some European countries and like other African countries, South Africa's Constitution provides for a dualist system whereby international treaties

34 The National Development Plan (2011) 239 observes that: 'Apart from the perception of South Africa as a regional bully, there is also the view that policy makers [in South Africa] have a weak grasp of African geopolitics.'

35 This is a separate question from the question of implementation and enforcement.

36 Outcomes of the 2000 WSSD include the Johannesburg Declaration on Sustainable Development (September 2002, A/CONF.199/20) the Plan of Implementation of the World Summit on Sustainable Development (September 2002, A/CONF.199/20) and Johannesburg Principles on the Role of Law and Sustainable Development (2002).

37 Held in Durban in 2011; sec 26 of the National Environmental Management Act 107 of 1998 (NEMA) now formally entreats Minister to be engaged in regional and international environmental treaty negotiation.

38 AP Mutharika 'The role of international law in the 21st century: An African perspective' (1995) 18 *Fordham International Law Journal* 1706 1719; A Boyle 'Relationship between international environmental law and other branches of international law' in D Bodansky et al (eds) *Oxford handbook on international environmental law* (2007) 125 - 126 – contrast J Glazewski *Environmental law in South Africa* Service Issue 1 (2013) 2 - 4 arguing that international environmental law has become a branch of international law in its own right, a view which the authors share.

39 RF Oppong 'Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems in Africa' (2007) 30 *Fordham International Law Journal* 296 318.

do not generally become law at the municipal level unless expressly incorporated⁴⁰ by domestic legislation.⁴¹ We say generally, because the South African Constitution in fact provides for exceptions to this general dualist model (→ De Wet/Introduction above). Thus for example in *Glenister*, despite ruling that treaties must be constitutionally incorporated into domestic law in order to be applicable, the Constitutional Court immediately cited an Australian case on the status of the UN Convention on the Rights of the Child under Australian law, and a Canadian and other commonwealth cases to support its ruling.⁴² This was regardless the status of these treaties in South Africa itself.

The general legal framework for this domestication of international treaties and exceptions to the rules has extensively been explored elsewhere (→ De Wet/Introduction). In the context of environmental law these Constitutional provisions enable courts interpreting section 24 of the Constitution to rely on international law, foreign law and customary international law as well. All this must be done to promote the spirit of the Bill of Rights. The duty to consider ‘the spirit’ of the Bill of Rights can, in the hands of a proactive judiciary and policy makers, be used effectively to ensure that South Africa’s domestic laws and regulations are aligned to relevant international environmental law developments.⁴³ For example, before the recent regulations that explicitly incorporate the Convention on the International Trade in Endangered Species (CITES),⁴⁴ there were Provincial nature conservation ordinances⁴⁵ that in effect regulated hunting and trade in endangered species. The interpretation of section 24(b)(ii) of the Constitution regarding the duty to ‘promote conservation’ is likely to become a contested issue once further steps are taken to look at options to stamp out rhino poaching. Some of the proposed option such as

40 JH Jackson ‘Statue of treaties in domestic legal systems: a policy analysis’ (1992) 86 *American Journal of International Law* 310 argues that the terms ‘incorporation’, ‘transformation’, ‘adoption’, ‘reception’, have all been used interchangeably to refer to the process by which a country enacts municipal legislation to implement its obligations under a treaty. He states that there is no agreed definition of the concept of ‘transformation’.

41 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 92; The Constitution of the Republic of South Africa, 1996 sec 231(2).

42 n 41 above, para 93.

43 This is cemented by sec 233 of the Constitution (n 41 above), which provides that ‘when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’.

44 Convention on International Trade in Endangered Species (CITES) Regulations General Notice R.173 in *Government Gazette* 33002 (5 March 2010) as amended by *Government Notice* R575 *Government Gazette* 34452 (11 July 2011) made under sec 97(1)(b)(iv) of the National Environmental Management: Biodiversity Act 10 of 2004.

45 Provincial ordinances include the Nature and Environmental Conservation Ordinance 19 of 1974 as amended by proclamation 3 of 2011 (23 September 2011) (Eastern Cape Province), Nature Conservation Ordinance 8 of 1969 (Free State Province), Nature Conservation Ordinance 12 of 1983 as amended by Gauteng General Law Amendment Act 4 of 2005 (Gauteng province), and the Nature Conservation Ordinance 12 of 1983 (Mpumalanga). These invariably deal with hunting, harvesting, fishing, permitting and conservation of natural resources.

legalising trade⁴⁶ in Rhino horn directly conflict with the status of the Rhino under CITES. Similarly, before the incorporation of the Convention on Biological Diversity (CBD) through the National Environmental Management: Biodiversity Act in 2004,⁴⁷ the treaty was indirectly implemented by provincial nature conservation ordinances. No matter how ineffective such incidental incorporation of the underlying principles was; in reality the ordinances implemented some of the country's obligations in term of the CBD and CITES.⁴⁸

In other instances, municipal legislation or regulations existed prior to a treaty whose effect was to implement procedures and strategies later agreed on in a treaty. The environmental impact assessment (EIA) process was first formally implemented in South Africa through the Environment Conservation Act 73 of 1989⁴⁹ before the Rio Declaration of 1992 and popularisation of the concept at the international level. It had been practised in South Africa since the 1970s.⁵⁰ The development of an EIA regime drew more from the USA National Environmental Policy Act (NEPA) 1968,⁵¹ than international environmental law.⁵² This is unsurprising given that international environmental agreements are also mostly informed by state and regional communities' practices.⁵³

The South African constitutional system has always provided for the express incorporation of international environmental treaties. What emerged in 1996 was a further streamlining of the dualist legal system by the addition of faster and indirect, if somewhat ambiguous, processes for

46 A Taylor et al 'The viability of legalising trade in rhino horn in South Africa' Department of Environmental Affairs and Tourism, South Africa (2014)

47 National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA) specifically provides in section 5 that it was enacted to '[give] effect to ratified international agreements affecting biodiversity to which South Africa is a party, and which bind the Republic'.

48 Convention on Biological Diversity (CBD) (5 June 1992, 1760 UNTS 79). The hunting restrictions and controlled taking provisions essentially promoted the concept of sustainable use of biodiversity, which is amongst the objects of the CBD. In addition, legislation creating national parks enacted before the CBD convention directly promoted *in situ* conservation as now required by the treaty.

49 See generally M Kidd & F Retief 'Environmental assessment' in Strydom & King (n 1 above) 970 973 & 976 on the history of EIAs in South Africa.

50 Glazewski (n 38 above) 10 - 13; while the Rio Declaration is soft law, its principles have fundamentally shaped domestic developments on matters that may still not be legally provided for in international law. Thus the EIA process, while not enshrined in any general treaty, can be found in treaties focused on specific issues such as the Convention on Biological Diversity (n 48 above) art 14, and the United Nations Framework Convention on Climate Change (UNFCCC) (9 May 1992, 1771 UNTS 107) art 4 (1)(f).

51 Kidd & Retief (n 49 above) 975 - 977.

52 It is only recently in the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* ICJ (20 April 2010) (2010) ICJ Reports 14 that international law directly addressed EIA as a potential legally binding general principle.

53 Development of the precautionary principle, public participation Aarhus Convention, and polluter pays principle; see for instance JB Wiener 'Precaution' in Bodansky (n 38 above) 597, 599 on development of the precautionary principle; see also N de Sadeleer *Environmental principles: From political slogans to legal rules* (2002) 23.

the judiciary to rely on international environmental treaties when interpreting environmental rights.⁵⁴

Apart from the Constitutional framework for incorporation of international (environmental) law discussed in Chapter 1, in environmental law, the National Environmental Management Act (NEMA) provides for a process in terms of which the Minister of Environmental Affairs is required to monitor that treaties to which the South Africa is a part are incorporated or transformed and implemented and also recommend the ratification of treaties to which the country is not yet a part. One of the fundamental principles of environmental management in the NEMA is that '[g]lobal and international responsibilities relating to the environment must be discharged in the national interest'.⁵⁵ This is elaborately expressed in section 25⁵⁶ of the NEMA. This empowerment provision is potent in the hands of a Minister who is proactive in promoting the ratification and incorporation of relevant international environmental law treaties. This is crucial given the need to ensure that domestic regulation of environmental issues that often have international implications or that are inevitably shaped by international developments. This is a unique feature of environmental regulation. The commitment by South Africa to incorporating international environmental treaties into its domestic law whenever necessary and consistent with our Constitution and environmental laws is crucial. To date several treaties have been transformed into domestic law⁵⁷ while other principles of international environmental law have also found their way into our law through court decisions – whether or not the relevant treaty has been ratified.⁵⁸

54 See *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC); 2007 (6) SA 4 (CC) and *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) All SA 381 (A) cases analysed below.

55 n 37 above, sec 2(4) (n).

56 n 37 above, sec 25 '(1) Where the Republic is not yet bound by an international environmental instrument, the Minister may make a recommendation to...Parliament regarding accession to and ratification of an international environmental instrument, which may deal with the following: (a) available resources to ensure implementation, (b) views of interested and affected parties, (c) benefits to the Republic, (d) disadvantages to the Republic, ... (h) the respective responsibilities of all national departments involved, (i) the potential impact of accession on national parties, (j) reservations to be made, if any, and (k) any other matter which in the opinion of the Minister is relevant. (2) Where the Republic is a party to an international environmental instrument the Minister, after compliance with the provisions of sec 231 (2) and (3) of the Constitution, may publish the provisions of the international environmental instrument in the Gazette and any amendment or addition to such instrument. (3) The Minister may introduce legislation in Parliament or make such regulations as may be necessary for giving effect to an international environmental instrument to which the Republic is a party'.

57 Glazewski (n 38 above) 2 - 20, see list of ratified treaties in M van der Linde & L Feris (eds) *Compendium of South African environmental legislation* (2010) 678ff http://www.pulp.up.ac.za/pdf/2010_01/2010_01.pdf (accessed 20 April 2015).

58 See case analysis below.

Furthermore South Africa has taken a clear lead in Southern Africa in ensuring that domestic environmental regulation promotes the objectives of global regulation. This is confirmed by the efforts that South African courts and policy makers have made to incorporate and give legislative content even to emerging soft international law norms which, in some cases, are regarded as unsettled at the international level.⁵⁹

2.2 Incorporation of customary international environmental law (→ De Wet/Introduction)

As a source of international environmental law, customary law principles are directly applicable in South African law by virtue of section 232 of the Constitution. The section provides that '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'. The real paradox in this constitutional provision is the determination of when a principle of customary international environmental law is inconsistent with the Constitution or domestic legislation. Anyway is customary international law evocable by individual citizens? The constitutional provision incorporating customary international clearly shows that this source of international environmental law is automatically a source of law in South Africa without more. An interesting example is the case of *Fuel Retailers*, dealt with in detail in part 4 below where the Constitutional Court went to great lengths to interpret the principle of sustainable development, which in our view clearly has approximated the status of customary international law and is indeed included in many treaties in different variants.⁶⁰

Contestation of how, at the municipal level, states actually implement sustainable development is a separate matter as long as the countries agree that, as a matter of practice, it is desirable for them to promote sustainable development. Even if sustainable development has not met the criteria for customary international law, several international treaties in fact use this

59 P Sands *Principles of international environmental law* (2nd edn 2003) 266, these includes principles and concepts like sustainable development, the precautionary principle (approach), polluter pays principle etcetera made law by the NEMA (n 37 above) sec 2(4) and the Constitution (n 41 above) sec 24.

60 P Sands (n 59 above) 254 argues that: 'There can be little doubt that the concept of 'sustainable development' has entered the corpus of international customary law, requiring different streams of international law to be treated in an integrated manner.' But other authorities doubt this proposition, see V Lowe 'Sustainable development and unsustainable arguments' in A Boyle & D Freestone (eds) *International law and sustainable development: past achievements and future challenges* (1999) 30 who vehemently disputes any legal status for sustainable development, noting that it is 'hard to see that the concept of sustainable development can be regarded as having sufficient identifiable normative meaning to be capable of generating a self-contained norm of customary international law, no matter what its utility as a description of policy goals in international treaties might be. It lacks, in my view, a fundamentally norm creating character. The argument that sustainable development is a norm of customary international law, binding on and directing the conduct of states, and which can be applied by tribunals, is not sustainable'.

principle to inform the obligations that state parties undertook.⁶¹ For instance the UN Convention on Biological Diversity refers to the notion of 'sustainable use' of biological resources.⁶² Likewise the UN Framework Convention on Climate Change binds state parties to

protect the climate system for *the benefit of present and future generations of humankind*, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.⁶³ (emphasis added).

The phrase highlighted in this article lies at the core of the definition of the principle of sustainable development. Article 3(4) expressly provides that: '[t]he Parties have a right to, and should, promote *sustainable development*' thus creating a legal right. Magraw and Hakwe support that 'sustainable development' may be a legal principle depending on where it occurs in a treaty.⁶⁴ Either way therefore we argue that the principle of sustainable development is now a fundamental underpinning legal norm for international environmental law as manifested in many environmental treaties.⁶⁵ Nevertheless, there remains considerable debate on the exact scope of the concept, which leads some to contest this view. However, frustration with the difficulty of achieving and measuring sustainability is giving way to other ways of thinking such as resilience theory⁶⁶ and adaptive management.⁶⁷

In the *Advisory Opinion on the Legality of the Treaty on Nuclear Weapons*, Weeramantry J (in the minority) again opined that several principles of international environmental law have achieved the status of customary international law. These included the precautionary principle,⁶⁸ public trustee doctrine, intergenerational equity, preventative principle, public

61 United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Desertification Convention) (14 October 1994) art 5(d), of the Convention on Biological Diversity (n 48 above) arts 1, 8, 11, 12, 16, 17 & 18; UNFCCC (n 50 above) art 3(4); Convention for the Protection of the Marine Environment of the North-East Atlantic (22 September 1992, 2354 UNTS 67) art 1.

62 Convention on Biological Diversity (n 48 above) art 10 read with art 2 which defines 'Sustainable use' as 'the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations' <http://www.cbd.int/convention/text> (accessed 20 April 2015).

63 n 50 above, art 3(1); *Fuel Retailers* (n 54 above) para 47.

64 n 38 above, 623.

65 For an extensive analysis of this trend and treaties that directly or indirectly use the principle, see Sands (n 59 above) 253 & 269.

66 See generally CS Holling 'Resilience and stability of ecological systems' (1973) 4 *Annual Review of Ecology and Systematics* 1, 17.

67 C Arnold & L Gunderson 'Adaptive law and resilience' (2013) 43 *Environmental Law Reporter* 10426; RK Craig & MH Benson 'Replacing sustainability' (2013) 4 *Akron Law Review* 84.

68 UNFCCC (n 50 above) art 3(3); see also A Boyle 'Relationship between international environmental law and other branches of international law' in Bodansky (n 38 above) 127 arguing that 'environmental impact assessment, transboundary risk management and the precautionary principle or approach' are now customary international law norms.

participation, common heritage of mankind and the polluter pays principle. The judge stated that:

[T]hese principles of environmental law thus do not depend for their validity on treaty provisions. They are part of customary international law. They are part of the *sine qua non* for human survival. Practical recognitions of the principle that they are an integral part of customary international law are not difficult to find in the international arena.⁶⁹

All these principles now form part of binding South African environmental law, having been directly incorporated in section 2(4) of the NEMA.⁷⁰ To the extent that we argue that sustainable development may be customary international law, it has therefore shaped domestic developments in South Africa especially in the sphere of land use planning and EIA. Separately, other principles such as sovereignty over natural resources, freedom of the high seas⁷¹ and state responsibility⁷² have also informed the development of domestic marine law in South Africa (→ Vrancken).

What is clear from the practice in South Africa is that, given that customary principles of international law often apply between states, the country has relied on these principles to develop and shape domestic legislation governing transboundary and marine resources.

2.3 Soft law in international environmental law

While international 'hard' environmental law has influenced South African environmental law, a unique feature of environmental law is the significant role played by soft law instruments,⁷³ in the domestic development of environmental law. Soft law norms have influenced municipal law in the field of environmental law far more than any other field of international law. Given the complexity and controversy of most global environmental challenges, it was never going to be easy for the community of nations to conclude definitive legally binding international

69 *Nuclear Weapons Advisory Opinion* (1996) 35 ILM 809, as reported by E Heinze & M Fitzmaurice (eds) *Landmark cases in international law* (1998) 1339.

70 The principles in NEMA (n 37 above) sec 2(4) are also incorporated by reference in other environmental management legislation, for which see NEMBA (n 47 above) sec 7, Protected Areas Act 57 of 2003 sec 5(1) (a), Minerals and Petroleum Resources Development Act 28 of 2002 sec 37(1), Air Quality Act 39 of 2004 sec 5(2), Integrated Coastal Management Act 24 of 2008 sec 5(1).

71 International Convention for the Prevention of Pollution from Ships Act 66 of 1996; International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties Act 64 of 1987; South African Maritime Safety Authority Act 5 of 1998.

72 *Trail Smelter Arbitration case (United States v Canada)* Arbitral Tribunal, 3 UN Rep. International Arbitration Awards 1905 (1941), *Corfu Channel case (United Kingdom v Albania)* ICJ (15 December 1949) (1949) ICJ Reports (duty to warn of environmental hazards).

73 P Dupuy 'Formation of customary international law and general principles' in Bodansky et al (n 38 above) 458; Lowe (n 60 above) 30 argues that there is a very thin line between 'hard' and 'soft' law.

environmental treaties. Hence many controversial issues are left to the vicissitudes of non-binding soft law declarations and resolutions.

A number of international environmental treaties are ambiguous and subject to various interpretations and exceptions to the extent that their Achilles heel has been the difficulty of giving content and scope to the obligations assumed by state parties.⁷⁴ The on-going negotiations of a successor to the Kyoto Protocol is testimony enough of the difficulty of giving specific content to state obligations in environmental treaties. Partly because of this, states have found it comforting to sign onto soft law declarations and action plans that per se are not legally binding, as part of a lowest hanging fruit approach. South Africa has incorporated many soft law principles into its municipal environmental law both legislatively and through judicial interpretation (→ 4).⁷⁵

What is interesting in most cases where the courts have referred to the soft law principles is that despite the express constitutional provision for sustainable development and further elaboration in section 2(4) of the NEMA and other legislation, the courts insist on drawing on soft law instruments to give meaning and perspective to the principle of sustainable development and its effect on environmental regulation in the country (→ 4).⁷⁶ This certainly comports with the constitutional mandate for courts to take into account international law and customary law not inconsistent with the constitution in interpreting the bill of rights including sec 24 environmental rights.

2.4 The need for transformation of international environmental treaties

One cannot overemphasise the necessity of transformation or incorporation of international environmental law into municipal law. By their nature environmental problems not only transcend political boundaries, but more importantly the effects of contemporary global environmental law problems require multilateral concerted efforts in order to be effective. For instance, while small country measures to reduce greenhouse gas emissions and mitigate the impacts of climate change are important, by themselves these are insignificant. If measures to mitigate climate change are reported to be effective only in time periods of the order of fifty years one can understand this insignificance. The regulation of genetically modified organisms (GMOs) in a globalised world economy where agricultural produce and genetic material move seamlessly from one

74 A number of concepts morph from one status to another (general principle, normative concept, custom, legal obligations or rights) across treaties, declarations and cases.

75 Glazewski (n 38 above) 2 - 8ff; see also the use of soft law principles in *Fuel Retailers* (n 54 above).

76 *Fuel Retailers* and *Save the Vaal* cases (n 54 above).

country to another is ineffective without harmonisation of standards and biosafety laws and policies at a regional and international level.⁷⁷

Synergy, integration, harmonisation and the prevention of pollution-haven shopping,⁷⁸ all call for the transformation of international environmental law principles, norms and standards across nations. It is difficult to universalise some legal norms. This challenge should not prevent the universal adoption of principles aimed at promoting sustainable livelihoods, and saving the human race from ecological disasters without raising false alarms or promoting inequitable access to natural resources among countries. Harmonisation and regulatory integration is important in the Southern African and African context given the increasing importance of Foreign Direct Investment (FDI) for development as well as the resurgence of the scramble for Africa especially from the East.⁷⁹ The threat of environmental degradation and insatiable unsustainable extraction of natural resources for profits, that are often shipped abroad, requires regional communities to agree on effective environmental regulation while allowing needed but sustainable economic and social development activity.

International and regional legal mechanisms have a particular relevance to the regulation of natural resources because these resources and the environmental problems associated with their use or misuse, do not observe political boundaries drawn by people. Ecosystems⁸⁰ need to be understood holistically because a disruption in the natural equilibrium at one point in the ecosystem can have impact in an entirely different place. Some natural resources (like minerals) remain in one place but many others (such as air, water, mammals and birds) are a lot more fluid in their movement. So for example, pollution of the Limpopo River, which forms the boundary between South Africa and Zimbabwe, may have significant consequences for the downstream users of that river in Mozambique. In addition, humans often use natural landmarks, such as rivers and mountain ranges, to define political boundaries in a way, which does not make sense from an ecosystem management point of view. A river is typically located at the very centre of an ecosystem so using a river as a

77 South Africa has created a framework in the Genetically Modified Organisms Act for the use of GMO technology while most of her neighbours in the SADC region expressly prohibit the importation of genetically modified organisms.

78 A strategy where industry especially multinational corporations chose to do business in countries where environmental and pollution control regulations and standards are low and poorly enforced.

79 ME Margulis et al 'Land grabbing and global governance: critical perspectives' (2013) 10 *Globalizations* 1, 3 'Land grabbing is an important site of new transnational political struggles for authority and control over resources and governance. These struggles go beyond who should control the land, and are contests largely about what should be grown on it, how, by whom, for what markets, hence the future of global agriculture'.

80 For the historical development of the 'ecosystem concept' see D Tarlock 'Ecosystems' in Bodansky et al (n 38 above) 578. The ecosystem approach now permeates most biodiversity conservation treaties and domestic laws and policies such the CBD and the Biodiversity Act.

national border effectively carves up the ecosystem in a very artificial way. Legal instruments that cut across national boundaries are therefore particularly important in the environmental context.⁸¹ These have been developed but appear to face challenge in terms of compliance and enforcement against violations by riparian states.

2.5 National transformation of international environmental obligations

2.5.1 General principles of environmental law

The creation of a right that is not harmful to health and well-being in the South African Constitution in 1996 opened the doors to the domestication of international environmental law treaties that are aimed at promoting sustainable development and sustainable use of natural resources. The constitutional provision mandates the state to take legislative measures to promote the rights and to prevent pollution and promote conservation while allowing justifiable socio-economic development to take place. In implementing its constitutional obligation South Africa enacted the NEMA, the Mineral and Petroleum Resources Development Act (MPRDA), the National Water Act and other sectoral environmental legislation. What is unique about the NEMA is that as framework legislation it incorporates several principles of international environmental law, whether embedded in a treaty, customary principle or soft law declarations.⁸²

These general principles of environmental management in section 2 of the NEMA incorporate some principles which are still contested in international law. Subsequent media specific legislation discussed below continues this process, underpinned by adherence to the ecosystem approach⁸³ and integrated environmental management.⁸⁴ The NEMA, read together with the Specific Environmental Management Acts (SEMAS),⁸⁵ the National Water Act and the Minerals and MPRDA represent an integrated natural resources regulatory system. This system is heavily informed by the principles in section 2(4) of the NEMA which, as

81 These include the UN Convention on the Law of Non-Navigational Uses of International Watercourses (21 May 1997) and the SADC Protocol on Shared Watercourses (n 30 above).

82 *Fuel Retailers* (n 54 above) para 59.

83 Secretariat of the CBD convention defines this approach as 'a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way ... It recognizes that humans, with their cultural diversity, are an integral component of ecosystems' <http://www.cbd.int/ecosystem> (accessed 20 April 2015).

84 Defined in sec 23 of the NEMA (n 37 above) but largely borrowed from environmental management sciences where managing natural resources is supposed to be informed by an understanding that a holistic approach is necessary given the connectedness or integration of nature.

85 Listed in n 70 above.

discussed above, borrow heavily from hard and soft international law. Yet despite this apparently neat system, areas of fragmentation, inconsistency and regulatory conflict remain that impede the effective implementation of this domestic regime.⁸⁶

2.5.2 Biodiversity and nature conservation

Various statutes have been enacted to implement South Africa's obligations under biodiversity conservation and sustainable use international treaties. These statutes include general enactments and legislation aimed at conservation of specific species. The general legislation includes the National Environmental Management: Biodiversity Act⁸⁷ and the National Environmental Management: Protected Areas Act,⁸⁸ National Forests Act, National Heritage Resources Act,⁸⁹ the Marine Living Resources Act,⁹⁰ and the Antarctic Treaties Act.⁹¹ Arguably the Biodiversity Act incorporates several international obligations as mandated in section 5 of the Act. These include the CBD, CITES, and the 1971 Ramsar Convention on Convention on Wetlands of International Importance especially as Waterfowl Habitat.

The Biodiversity Act is one of the clearest cases of transformation on international environmental law into domestic law. The concepts, definitions, principles, objectives and strategies adopted in the domestic legislation are directly transposed from the CBD convention.⁹² Similarly, the National Heritage Resources Act is heavily informed and implements the Convention Concerning the Protection of the World Cultural and Natural Heritage.

2.5.3 Air quality, climate change and pollution control

While there are regional treaties on transboundary air pollution and

86 N Rossouw & K Wiseman 'Learning from the implementation of environmental public policy instruments after the first ten years of democracy in South Africa' (2004) 22 *Impact Assessment and Project Appraisal* 131 138.

87 n 47 above.

88 National Environmental Management: Protected Areas Act 57 of 2003 implementing protected area treaties and soft law instruments especially those developed by the IUCN on Protected Area classification and management strategies.

89 National Forests Act 84 of 1998, National Heritage Resources Act 25 of 1999 incorporating the Convention Concerning the Protection of the World Cultural and Natural Heritage (16 November 1972) <http://whc.unesco.org/archive/convention-en.pdf> (accessed 20 April 2015).

90 The Marine Living Resources Act 18 of 1998.

91 Antarctic Treaties Act 60 of 1996 implementing the Convention on the Conservation of Antarctic Marine Living Resources (1980) and the Agreed Measures for the Conservation of Antarctic Fauna and Flora (1964).

92 NEMBA (n 47 above) sec 2 (b) expressly provides that it was enacted, among other objects, 'to give effect to ratified international agreements relating to biodiversity which are binding on the Republic'. (emphasis).

multilateral treaties governing the effects of air pollution,⁹³ South Africa decided to enact a single piece of legislation that implements the country's obligations regarding air quality. The National Environmental Management: Air Quality Act is an omnibus Act at once regulating air quality and controlling air pollution. In 2011 regulations were proposed to regulate ozone-depleting substances in line with the Montreal Protocol.⁹⁴ An amendment bill to the Air Quality Act proposes to amend the Act to include a provision in sec 53 giving the Minister powers to make regulations

that are not in conflict with [the] Act, regarding (a) any matter necessary to give effect to the Republic's obligations in terms of an international agreement relating to air quality and climate change.

While this builds on section 25 of the NEMA, the inclusion of 'greenhouse gas' and 'ozone-depleting substances' in the Act can easily be used by the Minister to implement the country's international climate change obligations using the Air Quality Act and without specific climate change or ozone related legislation.⁹⁵ In addition section 50 regulates transboundary air pollution.

It is clear therefore that the Air Quality Act implements treaty obligations under some atmospheric, air quality and pollution control treaties.⁹⁶ South Africa, without specific climate change legislation, has already put in place statutory and policy measures to partly address the sources of greenhouse gases that cause climate change. These include the Long Term Mitigation Strategy,⁹⁷ National Climate Change Response White Paper 2011, proposed Carbon Tax Policy 2011, and the National Development Plan: Vision 2030. In addition the country has already been

93 The Convention on Long-range Transboundary Air Pollution (Geneva Convention on Transboundary Air Pollution) (13 November 1979, 1302 UNTS 217).

94 Proposed regulations regarding the phasing-out and management of ozone depleting substances in the Republic of South Africa *Government Notice* 12 in *Government Gazette* No. 33925 (14 January 2011).

95 The preamble of the National Environmental Management: Air Quality Act 39 of 2004 says that 'whereas atmospheric emissions of ozone-depleting substances, greenhouse gases and other substances have deleterious effects on the environment both locally and globally' confirming that the Act was enacted in the context of these international environmental challenges.

96 These include the Vienna Convention for the Protection of the Ozone Layer (22 March 1985) and the respective Montreal Protocol on Substances that Deplete the Ozone Layer (16 September 1987, 1522 UNTS 3), the UNFCCC (n 50 above) and its Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol) (11 December 1997, UN Doc FCCC/CP/1997/7/Add.1).

97 Scenario Building Team *Long Term Mitigation Scenarios: Scenario Document* (Department of Environment Affairs and Tourism, Pretoria, October 2007) http://www.erc.uct.ac.za/Research/publications/07Scenario_team-LTMS_Scenarios.pdf (accessed 20 April 2015).

sending country reports required under the FCCC the last of which was submitted in 2011.⁹⁸

There are other policies in the agricultural sector, waste management and energy that, read together with the Air Quality Act, all aim to either mitigate of, or promote adaptation to climate change impacts or the reporting and monitoring of state obligations under the FCCC. Whilst not comprehensive these laws and policies must be applauded as measures implementing the country obligations under the FCCC in circumstances where national social and economic imperatives are imposing enormous pressure on natural capital.

2.5.4 Water resources

While it has been more straightforward to incorporate international obligations on matters governing biodiversity, waste and air pollution, the international regulation of water resources and shared watercourses is far more complex and polycentric. The Constitution of South Africa enshrines the internationally recognised right of access to water.⁹⁹ The main water legislation the National Water Act was, amongst other things, enacted to create a new regime of water rights, dispensing with private water rights and promote equitable access.¹⁰⁰ It was also enacted to implement South Africa's international undertakings¹⁰¹ on integrated water resources management.¹⁰² In particular Chapter 10¹⁰³ of the National Water Act provides for international water management.¹⁰⁴

The Water Services Act also plays a fundamental role in the transformation of international norms and standards of water quality and access to water without express reference to such international norms and standards. Together with the National Water Act, this Act provides for the

98 Department of Environmental Affairs *South Africa's Second National Communication under the United Nations Framework Convention on Climate Change* (2011). The first report was submitted in 2000.

99 The Constitution (n 41 above) sec 27 (1)(b); UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No. 15: The Right to Water (arts. 11 and 12 of the Covenant)* (20 January 2003, E/C.12/2002/1), art 12(1); Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979, 1249 UNTS 13) art 14(2) (h); Convention on the Rights of the Child (CRC) (20 November 1989, 1577 UNTS 3) art 24(2)(c).

100 National Water Act 36 of 1998 sec 2 (a) - (f).

101 Including regional obligations eg SADC Protocol on Shared Watercourse Systems (1995).

102 National Water Act (n 100 above) sec 2 (1); Department of Water Affairs and Forestry (DWAF) *Blueprint for survival: National Water Resources Strategy for South Africa* (2004).

103 n 100 above, sec 102 - 108.

104 n 100 above, sec 102 indirectly informed by the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (n 81 above) in matters concerning transboundary and shared watercourses.

right of access to water and sanitation, all of which promotes the general standard of health recognised in international law.¹⁰⁵ South Africa is a water scarce country and has to take extra measures to ensure the sustainable management and use of water resources, as well as prevent water pollution and wastage. The fulfilment of the objects of the Water Services Act and the national Act are inextricably tied to an environmental not harmful to health and well-being in section 24 of the Constitution.¹⁰⁶ While adopting a modern system under the National Water Act was noble, the implementation of this international system of classification and management of water resources has proved a challenge for the government.¹⁰⁷

3 Application of international environmental law by the courts

Complementing the more formal incorporation of international environmental law in South Africa, the courts have been proactive in interpreting and applying environmental law in a way that embeds international environmental law principles and concepts. While insisting that an international treaty does not become law unless expressly incorporated as prescribed by the Constitution, South African courts have concomitantly applied the call in the Constitution to interpret the Bill of Rights in a manner consistent with international law and by referring to both international and foreign law where necessary to give meaning and content to novel concepts.

As mentioned above, section 233 of the Constitution provides that when interpreting legislation, the court *must* prefer any reasonable interpretation that is consistent with international law to any alternative interpretations, which are inconsistent with international law. In addition, when interpreting the Bill of Rights in particular, a court must consider international law and may consider foreign law.¹⁰⁸ As will be demonstrated below, the South African Constitutional Court regards the

105 Implementing the right to water in art 11 & 12 of the International Covenant on Economic, Social and Cultural Rights (CESCR) (16 December 1966, 993 UNTS 3) even before South Africa had ratified the convention; see further discussion of the *Mazibuko* case below for the court's reliance on international water and environmental jurisprudence.

106 n 41 above, sec 24 provides of 'rights to an environment not harmful' and 'well-being' – quite broad concepts that encompass access to water and food, hence sec 2 (a) WSA refers to the sec 24 environmental right expressly.

107 See discussion of water rights related cases below. It is impossible to distinguish the access to water jurisprudence from environmental sustainability law, as General Comment No 15 *The right to water* (arts 11 & 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/2002/11 (20 January 2003) clearly shows the connection between the right to the highest standard of health, right to food and right of access to water at the international level.

108 n 41 above, sec 39(2).

interpretation clauses to refer to binding as well as non-binding international instruments.

However, despite the existence of a constitutionally enshrined environmental right in South Africa, there has been relatively little litigation on the environmental right (in comparison to other rights in the Bill of Rights). This may be due to a number of factors including the way in which access to justice challenges play out in this sector, the technical subject matter of cases and the need for scientific experts, the fractured nature of the South African environmental regulatory system, the risk of being subjected to vexatious and frivolous litigation (so called SLAPP suits)¹⁰⁹ and the absence of quick, effective legal remedies for environmental harm.¹¹⁰

Nevertheless, in the litigation that has taken place, the area in which the South African courts have relied most on international environmental law as an interpretive aid, is in relation to sustainable development. A brief discussion of the use of international environmental law in relation to access to water is also included below.

3.1 Sustainable development

Perhaps the most important South African case from an international environmental law perspective is the Constitutional Court decision in *Fuel Retailers v DG Environmental Management, Mpumalanga*.¹¹¹ The case concerns the nature and scope of the obligations of environmental authorities when they make decisions that may affect the environment,

109 Strategic Litigation Against Public Participation (commonly referred to as a SLAPP suit) is a phenomena, which traces its origin primarily to the United States but has reared its head in South Africa in the environmental sector. Essentially, SLAPP suits are an abuse of litigation used by powerful and well-resourced parties in order to silence inconvenient criticism. Typically they take the form of allegations of defamation against environmental activists although large corporates are showing increasing creativity in their use of the threat of litigation. Although our courts have been highly critical of such abuse, a court judgment often provides little reassurance to activists faced with personalised and often quite vicious, attack. For a more detailed discussion see T Murombo & H Valentine 'SLAPP Suits: an emerging obstacle to public interest environmental litigation in South Africa' (2011) 27 *South African Journal on Human Rights* 82.

110 See Further J Dugard & A Alcaro 'Let's Work Together: environmental and socio-economic rights in the courts' (2013) 29 *South African Journal on Human Rights* 14; T Humby 'Reflections on the Biowatch Dispute - reviewing the fundamental rules on costs in the light of the needs of constitutional and/or public interest litigation' (2009) 1 *Potchefstroom Electronic Law Journal* 95; M Kidd 'Public interest environmental litigation: recent cases raise possible obstacles' (2010) 13 *Potchefstroom Electronic Law Journal* 27.

111 *Fuel Retailers* (n 54 above)

and, in particular, the interaction between socio-economic development and the protection of the environment.¹¹²

3.1.1 *Drawing from customary international environmental law*

Much of the majority judgment in *Fuel Retailers*, written by Ngcobo J, is devoted to exploring the development of the concept of sustainable development in international law, its application in South African law and finally its import and consequence for the case concerned.¹¹³ Ultimately the Court confirms that the definition of sustainable development contained in the NEMA incorporates two of the internationally recognised elements of the concept of sustainable development – namely the principle of integration of environmental protection and socio-economic development and the principle of inter-generational equity.¹¹⁴

The Court summarises the evolving elements of the concept of sustainable development which have emerged in international environmental law as including

the integration of environmental protection and economic development (the principle of integration); sustainable utilisation of natural resources (the principle of sustainable use and exploitation of natural resources); the right to development; the pursuit of equity in the use and allocation of natural resources (the principle of intra-generational equity); the need to preserve natural resources for the benefit of present and future generations (the principle of inter-generational and intra-generational equity); and the need to interpret and apply rules of international law in an integrated systematic manner.¹¹⁵

The Court emphasises that it is in the light of the developments in the international law of environment and sustainable development that the concept of sustainable development must be construed and understood in South African law.¹¹⁶

In addition to the NEMA definition of sustainable development, the Court goes on to affirm that the principles set out in Chapter 2 of NEMA (which provide the general framework within which environmental

112 The case involved an application to the environmental authorities for authorisation to develop a filling station in Mpumalanga. The proposed development was objected to on various grounds, including that the construction of the filling station would have an adverse impact on the environment. The environmental authorities granted authorisation for the construction of the filling station despite the objections to it.

113 L Ferris 'Sustainable development in practice: *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*' (2008) 1 *Constitutional Court Review* 235.

114 *Fuel Retailers* (n 54 above) para 59.

115 *Fuel Retailers* (n 54 above) para 51.

116 *Fuel Retailers* (n 54 above) para 56.

management and implementation decisions must be formulated) are also drawn from international experience.¹¹⁷

The Constitutional Court appears to adopt the position that the principle of sustainable development has attained the status of customary international law. The Court refers with seeming approval to the opinion of Vice-President Weeramantry in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, which adopts this stance.¹¹⁸ Note that the principle of sustainable development has already been incorporated into section 24 of the South African Constitution, as well as NEMA and other environmental legislation. The Court's reference to the customary international law principle of sustainable development is therefore as an interpretive guide, and in order to elaborate on the origin of the principle so as to highlight its significance in domestic EIA processes.¹¹⁹

3.1.2 Reference to soft law

In *Fuel Retailers*, the Court also looks to international soft law in deconstructing the meaning of 'economic and social development', which appears in the text of the environmental right in section 24 of the Constitution. Here the Court refers to the *Declaration on the Right to Development*¹²⁰ to explain that economic and social development is essential to the well-being of human beings.¹²¹

The Court also quotes from the Brundtland Report¹²² to explain the relationship between development and the environment. The Brundtland Report states that economics and ecology should be integrated in decision making and law-making processes not only to protect the environment, but also to protect and promote development.¹²³ The Court picks up this theme when it holds that the environment and development are inexorably linked as unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. The facilitation of development thus requires the protection of the

117 *Fuel Retailers* (n 54 above) para 59.

118 *Fuel Retailers* (n 54 above) para 54 citing his Separate Opinion at 207.

119 *Fuel Retailers* (n 54 above) para 46 - 50.

120 Declaration on the Right to Development adopted by General Assembly Resolution 41/128 (4 December 1986) <http://www.un.org/documents/ga/res/41/a41r128.htm> (accessed 4 May 2015). Article 1 asserts '[t]he right to development is an inalienable human right'. The Preamble describes development as 'a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population'.

121 *Fuel Retailers* (n 54 above) para 44.

122 Our Common Future: Report of the World Commission on Environment and Development (Brundtland Report) (1987) <http://www.un-documents.net/our-common-future.pdf> (accessed 20 April 2015).

123 n 122 above, *Fuel Retailers* (n 54 above) para 42 & 44.

environment, which cannot happen unless developmental decision-making pays attention to the costs of environmental destruction.¹²⁴

The articulation of sustainable development in the Brundtland Report was later applied to the issuing of mining licenses by the South African Supreme Court of Appeal in *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others*¹²⁵ when the Court held that in an application for a mining licence, the decision-maker must promote development which meets present needs without compromising the ability of future generations to meet their own needs.¹²⁶

Further reference to international soft law by the Constitutional Court in *Fuel Retailers* comes in the form of judicial reference to the Stockholm Declaration of the United Nations Conference on the Human Environment¹²⁷ (as the origin of the concept of sustainable development in international law), the Rio Declaration on Environment and Development¹²⁸ (as support for the proposition that the international community has reached a real consensus on sustainable development as a core principle of environmental protection) and the Johannesburg Declaration on Sustainable Development¹²⁹ (where sustainable development was reaffirmed as a world priority).

3.1.3 Taking guidance from international jurisprudence

Moreover the South African Constitutional Court also evidences its openness to drawing from the wisdom of international jurisprudence when, in *Fuel Retailers*, it refers to the decision of the International Court of Justice in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case¹³⁰ in affirming the importance of a sustainable development approach.¹³¹

124 *Fuel Retailers* (n 54 above) para 44.

125 *Save the Vaal* (n 54 above).

126 This case has been interpreted as establishing a precedent whereby, through analogy, principles of international environmental soft law can be directly legally enforceable in South Africa; see Fuggle & Rabie (n 1 above) 183.

127 The Declaration of the United Nations Conference on the Human Environment (the Stockholm Declaration) (16 June 1972, U.N. Doc. A/Conf.48/14/Rev.1) <http://www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503> (accessed 20 April 2015), *Fuel Retailers* (n 54 above) para 46.

128 The United Nations Conference on Environment and Development was held in Rio de Janeiro, Brazil on 3 - 14 June 1992, <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (accessed 20 April 2015). This Conference adopted among other instruments, the Rio Declaration on Environment and Development (the Rio Declaration) (14 June 1992, UN Doc. A/CONF.151/26 (vol. I)); *Fuel Retailers* (n 54 above) para 49 - 50.

129 United Nations Department of Economic and Social Affairs-Division for Sustainable Development Johannesburg Declaration on Sustainable Development 2002 para 5, <http://www.joburg.org.za/pdfs/johannesburgdeclaration.pdf> (accessed 20 April 2015); n 54 above, para 53.

130 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ (25 September 1997) (1998) ICJ Reports 88.

131 *Fuel Retailers* (n 54 above) para 54.

3.2 Access to water

Recourse to international law is again found in *Mazibuko and Others v City of Johannesburg and Others*,¹³² a case about the correct interpretation of section 27(1)(b) of the South African Constitution, which provides that everyone has the right of access to sufficient water. South African constitutionalism adopts an approach in terms of which the rights in the Bill of Rights should be viewed as connected and interdependent. Within this context, the right of access to water and the environmental right enjoy a particularly close relationship given the anthropocentric formulation and interpretation of the scope of environmental law in South Africa. The courts have often characterised the environmental right as a socio-economic right. Similarly the fulfilment of the right of access to water is directly dependent on the available, and sustainable management and use of water resources. The sustainable use of water resources is also impacted by infrastructure and development planning in terms of environmental and planning legislation such as the requirements for EIA.

In *Mazibuko*, the Court refers to article 2(1) of the International Covenant on Economic, Social and Cultural Rights¹³³ to buttress the approach of the South African Constitution to socio-economic rights, which is to characterise the state's obligation as one of 'progressive realisation' of such rights.¹³⁴ In a discussion of the notion of a minimum core of socio-economic rights, in which the Court confirms its rejection of this approach, the Court also refers to General Comment 3 of the United Nations Committee on Economic, Social and Cultural Rights¹³⁵ as the origin of the notion of minimum core.¹³⁶

3.3 Tendencies to accommodate and promote international standards and technologies beyond law

In the environmental context, recourse to practices and experience outside of national borders occurs not only with regard to the law, but also in relation to science. South Africa frequently looks to technologies, emission

132 *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).

133 International Covenant on Economic, Social and Cultural Rights (16 December 1966, 993 UNTS 3) art 2(1).

134 n 132 above, para 40.

135 General Comment 3 'The nature of States Parties' obligations (art 2(1))' Fifth Session, 1990, UN Doc E/1991/23.

136 *Mazibuko* (n 132 above) para 52. In General Comment 3, the United Nations Committee on Economic, Social and Cultural Rights stated in para 10 that: '[it] is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party'. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is prima facie, failing to discharge its obligations under the Covenant.

standards, environmental models and practical guidelines used elsewhere. For example in the *Fuel Retailers* case, the Court notes that the Gauteng Guidelines¹³⁷ that regulate the space between fuel stations (requiring a distance of three kilometres in urban areas and 25 kilometres in rural areas) was based on a review of international approaches.¹³⁸ A full discussion of the range of international models used in environmental management in South Africa is beyond the ambit of this chapter, but it is worth noting that South Africa looks for guidance beyond our borders in respect of more than just legal instruments and their interpretation.

4 Conclusion

Environmental law is a field where multilateralism is a prerequisite for effective global efforts to deal with transboundary and global challenges such as climate change, wildlife poaching, and the use of biotechnology. While South Africa has taken the lead in Africa in terms of developing a robust environmental regulatory regime, challenges still remain with implementation of the elaborate system. South Africa has ratified most of the key international environmental treaties and her constitution allows for transformation of international environmental law as well as direct application of customary international law. Environmental law and rights is one of the areas where South Africa has complied most with its international treaty obligations in terms of legislative transformation. The country has gone beyond formal transformation of international treaties by enacting legislation that incorporates soft law principles from declarations, decisions and resolutions of international bodies. The result is that even some environmental law norms and concepts, whose legal status is still questioned in international law such as sustainable development, have been given legal status in South Africa. In addition to legislative transformation South African courts have been proactive in using the Constitutional mandate to use international, foreign and customary law as interpretive beacons in deciding environmental cases. This willingness by the courts to use international environmental law is further supported by a preparedness to use soft law principles and norms.

137 Gauteng Provincial Government, Agriculture, Conservation, Environmental and Land Affairs EIA Administrative Guideline *Guideline for the Construction and Upgrade of Filling Stations and Associated Tank Installations* (2002).

138 n 54 above, para 74, the Guidelines indicate, for example, that in Dublin guidelines have been published which indicate that new petrol stations will generally not be permitted on national roads or adjoining residential areas and will only be considered in rural areas if they are in the immediate environs of rural villages; in Singapore existing filling stations located within one kilometre of an interchange are considered to be inappropriately located; in Germany filling stations should only be erected on rural roads where there is a clear need and there should be 25 kilometres between filling stations; and in Denmark drivers requiring high octane petrol will have access to a filling station within 30 kilometres.

The progressive stance taken by South Africa towards international environmental law however, masks domestic contradictions that sometimes affect the effectiveness of the environmental regulatory system. South Africa's social, economic and political context often requires the country to prioritise and focus on socio-economic development, poverty alleviation, and job creation – priorities that inevitably require the country to downplay or ignore sustainable land use planning and environmental regulation principles to which it has subscribed and legislated in domestic laws. Some of the environmental principles are often (misguidedly) seen as obstructions to the developmental agenda of the country and hence the poor compliance and enforcement record.

The ambiguity, lack of precision and vagueness of concepts borrowed from international environmental law have created problems in terms of giving these concepts content and scope that can guide environmental decision-makers and courts. However, relative to other African countries South Africa has advanced far ahead in terms of developing a system of environmental regulation that reflects and aligns with international developments.

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F: International human rights law

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1 Introduction

Human rights play an essential role in the constitutional order of Germany. Articles 1 to 19 of the German Constitution (Basic Law) contain a catalogue of human rights (fundamental rights) that are binding on the legislature, the executive, and the judiciary (article 1(3) Basic Law). Independent courts ensure the protection of these rights. Article 19(4) grants the right of recourse to courts to any person whose basic rights have been violated by public authorities. The right of recourse encompasses the right of individuals to seize the Federal Constitutional Court which, as the final arbiter, decides on the compatibility of acts by state authorities with fundamental rights.

This system of national human rights protection works well in practice and has great value in the eyes of German constituents. It has served as a model for other countries and is a good example for a successful legal export of human rights concepts.

The following contribution deals with the import of international human rights into the German legal system. It examines the significance of international human rights in the German fundamental-rights-centred legal system.

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2 Relevant international law obligations

2.1 The development of international human rights law

International human rights law is a fairly recent development.¹ Traditionally, international law was understood as regulating relations between states. Relations between states and individuals in contrast were considered to be part of the *domaine réservé* of states and therefore out of the reach of international law. Some international legal instruments were aimed at protecting individuals,² but individuals' legal position remained mediated by states. Individuals themselves were not recognised as right holders.

It is only under the impression of the barbarous acts committed by Nazi Germany 'which have outraged the conscience of mankind',³ that this state-centred perception of international law changed. The Universal Declaration of Human Rights (Universal Declaration), adopted by the United Nations' General Assembly in 1948, embodied a new approach and can be considered the starting point for the development of an international law of human rights. For the first time, an international instrument recognised inalienable rights of individuals vis-à-vis their government. These rights include political as well as social and economic rights. In the following years, the non-binding Declaration was complemented by binding human rights treaties at UN level (→ 2.2.1). After the war, in addition, regional human rights systems emerged in Europe, the Americas and Africa (→ 2.2.1).

Today, the body of international human rights law is substantial and the era of basic standard-setting can be considered to be over. From time to time discussions resurge about the need for further human rights treaties on specific topics, most recently in relation to the rights of older persons. The main challenge for the international law of human rights, however, is to ensure compliance with existing standards.⁴

2.2 Sources of international human rights law

The international law of human rights is made up, first and foremost, of a number of treaties at the universal and regional level (→ 2.2.1). Customary human rights law (→ 2.2.2) and soft law (→ 2.2.3) also play a role. A specificity of international human rights law is the existence of elaborate compliance control mechanisms. The decisions, views, observations and

¹ On the history of international human rights law see T Buergenthal 'Human rights' in R Wolfrum (ed) *Max Planck encyclopedia of public international law* (2013) paras 3ff.

² For examples see Buergenthal (n 1 above) paras 4ff.

³ Universal Declaration of Human Rights (10 December 1948, 217 A (III)) Preamble.

⁴ G Staberock 'Domestic implementation' in Wolfrum (n 1 above) para 4.

recommendations adopted in this context may also be considered a source of international human rights law (→ 2.2.4).

2.2.1 International human rights treaties

Universal treaties

Together with the Universal Declaration, two UN treaties constitute the 'International Bill of Rights': the International Covenant on Civil and Political Rights (ICCPR)⁵ and the International Covenant on Economic, Social and Cultural Rights (CESCR).⁶ The Covenants are complemented by a number of specific treaties that either further specify certain rights (the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁷ and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED)),⁸ aim to protect particularly vulnerable persons (the Convention on the Rights of the Child (CRC),⁹ the Convention on the Rights of Persons with Disabilities (CRPD)¹⁰ and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)),¹¹ or fight specific forms of discrimination (the Convention on the Elimination of All Forms of Racial Discrimination (CERD)¹² and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)).¹³ With the exception of CMW, Germany has ratified all of these treaties.¹⁴

5 International Covenant on Civil and Political Rights (ICCPR) (16 December 1966, 999 UNTS 171).

6 International Covenant on Economic, Social and Cultural Rights (CESCR) (16 December 1966, 999 UNTS 3).

7 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (10 December 1984, 1465 UNTS 85).

8 International Convention for the Protection of All Persons from Enforced Disappearance (CPED) (20 December 2006, 2716 UNTS 3).

9 Convention on the Rights of the Child (CRC) (20 November 1989, 1577 UNTS 3).

10 Convention on the Rights of Persons with Disabilities (CRPD) (13 December 2006, 2515 UNTS 3).

11 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) (18 December 1990, 2220 UNTS 3).

12 Convention on the Elimination of All Forms of Racial Discrimination (CERD) (7 March 1966, 660 UNTS 195).

13 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (18 December 1979, 1249 UNTS 13).

14 ICCPR: ratified on 17 December 1973, entry into force on 23 March 1976 (Bundesgesetzblatt 1973 II 1533); CESCR: ratified on 17 December 1973, entry into force on 3 January 1976 (Bundesgesetzblatt 1976 II 428); CERD: ratified on 16 May 1969, entry into force on 15 June 1969 (Bundesgesetzblatt 1969 II 962); CEDAW: ratified on 9 July 1985, entry into force 9 August 1985 (Bundesgesetzblatt 1985 II 647); CAT: ratified on 1 October 1990, entry into force 31 October 1990 (Bundesgesetzblatt 1990 II 247); CRC: ratified on 6 March 1992, entry into force 5 April 1992 (Bundesgesetzblatt 1992 II 121); CRPD: ratified on 24 February 2009, entry into force 26 March 2009 (Bundesgesetzblatt 2009 II 812); CPED: ratified on 24 September 2009, entry into force 23 December 2010 (Bundesgesetzblatt 2009 II 932). For a list of

Regional treaties

At the regional level, human rights treaties have been adopted in particular under the auspices of the Council of Europe (CoE), the Organization of American States (OAS) and the African Union (AU) (→ Chenwi).¹⁵ At the heart of each regional human rights system is a comprehensive human rights treaty, namely the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples' Rights (AChHPR). Other regional treaties complement the rights contained in the ECHR, ACHR and AChHPR, within the Council of Europe *inter alia* the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT),¹⁶ the European Social Charter (ESC)¹⁷ and the Convention on Action against Trafficking in Human Beings.¹⁸

Germany is party to the ECHR and has ratified most of the additional protocols to the Convention. Exceptions are: Protocol 7,¹⁹ which extends the list of rights protected under the Convention to include *inter alia* the right of aliens to procedural guarantees in the event of expulsion from the territory of a state, the right to appeal in criminal matters and the right not to be tried or punished twice; and Protocol 12²⁰ which provides for a general prohibition of discrimination. The recently adopted Protocol 15²¹ has been signed and will probably be ratified soon. Protocol 16 has not been signed for the time being.²² Both protocols do not contain additional substantive rights; they are part of the efforts to reform the European Court of Human Rights (ECtHR).²³ Germany has also ratified the above-

other human rights relevant treaties ratified by Germany see Core Document forming part of the reports of states parties – Germany, UN Doc HRI/CORE/1/Add.75/Rev.1 (2003) para 132.

- 15 Other regional organisations (in Europe the Organization for Security and Co-operation in Europe for example, for Africa see the chapter by Chenwi) are active in this field.
- 16 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (26 November 1987, ETS no 126).
- 17 European Social Charter (ESC) (18 October 1961, ETS no 35).
- 18 Convention on Action against Trafficking in Human Beings (16 May 2005, ETS no 197).
- 19 Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (22 November 1984, ETS no 117).
- 20 Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 2000, ETS no 177).
- 21 Protocol 15 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (24 June 2013, ETS no 213).
- 22 Protocol 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (2 October 2013, ETS no 214).
- 23 Protocol 16 (n 22 above) gives the ECtHR the competence to issue advisory opinions on request of the highest courts and tribunals of state parties and Protocol 15 (n 21 above) *inter alia* shortens the time limit within which an application must be made to the Court and adds a reference to the principle of subsidiarity and the doctrine of the margin of appreciation to the Preamble of the Convention.

mentioned CoE treaties.²⁴

European Union

In the European Union, the Charter of Fundamental Rights²⁵ is the primary reference document for human rights protection.²⁶ In application of article 6(1) of the TEU, the Charter has the rank of primary Union law. It is legally binding primarily for EU institutions, bodies, offices and agencies (article 51, paragraph 1 of the EU Charter). But in certain circumstances, national authorities may also be bound by the Charter, namely in cases in which they implement Union law. The exact meaning of the implementation of Union law in this context is still unclear. In the Åkerberg judgment, the ECJ has recently suggested a broad view of the Charter's scope of application; but this remains controversial (→ Hestermeyer).²⁷

Secondary European Union law has also become a source of human rights obligations for states. This is true in particular for instruments based on article 19 of the TFEU such as the Racial Equality Directive²⁸ and the Employment Equality Directive.²⁹

2.2.2 Customary human rights obligations

In spite of difficulties in identifying customary law in the field of human rights,³⁰ there is agreement today that many of the rights contained in the Universal Declaration form part of customary international law.³¹

24 ESC: Bundesgesetzblatt 1965 II 1261 & 1122 (Germany has signed the revised ESC, but has not ratified it); Convention against Trafficking: Bundesgesetzblatt 2012 II 1107; CPT: Bundesgesetzblatt 1989 II 946.

25 Charter of Fundamental Rights of the European Union (30 March 2010, OJ C83/389). On the Charter see S Kadelbach 'Charter of fundamental rights of the European Union' in Wolfrum (n 1 above).

26 It will be complemented by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (4 November 1950, ETS 5) once the EU accedes to the ECHR (see the Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (47+1(2013)008rev2)). On the accession see J Polakiewicz 'EU law and the ECHR: Will the European Union's accession square the circle? The draft accession agreement of April 5, 2013' (2013) 13 *European Human Rights Law Review* 592.

27 C-617/10 Åkerberg Fransson ECJ (26 February 2013) para 17ff.

28 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

29 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

30 On these difficulties see C Tomuschat *Human rights: Between idealism and realism* (2003) 37.

31 See HRC, General Comment 24, UN Doc CCPR/C/21/Rev.1/Add.6 para 8; ILA Committee on the Enforcement of Human Rights Law *Final Report on the status of the Universal Declaration of Human Rights in national and international law* (1994); RB Lillich 'The growing importance of customary international human rights law' (1995-1996) 25 *Georgia Journal of International and Comparative Law* 1, provides an overview of the different positions.

As Germany is state party to most international human rights conventions, customary human rights law does not play a substantial role in practice. Some authors, however, have relied on the status as customary law of many of the rights contained in human rights treaties to argue for a constitutional rank of these treaties in the German legal system (→ 4.1).

2.2.3 Soft law in the field of human rights

Soft law exists in the field of human rights in the form of numerous resolutions, recommendations and decisions by UN bodies or other international organisations such as the Council of Europe. Soft law by its nature is not binding on states. But it does have tremendous influence.³² It can be used to interpret the meaning of binding treaties and can be an indicator for the existence of customary international law.³³

2.2.4 Compliance control mechanisms as a specificity of international human rights law

A specificity of international human rights law is the existence of elaborate compliance control mechanisms at universal as well as at regional level.

Compliance control mechanisms at universal level

Compliance control mechanisms at universal level are either based directly on the UN Charter³⁴ or on treaties. Some mechanisms are of a political nature such as the Charter-based Universal Periodic Review carried out by the UN Human Rights Council, but most are legal mechanisms. All of the above-mentioned UN human rights treaties, for example, require states to submit periodical reports to a treaty body composed of experts which, in concluding observations or comments, sets out concerns regarding compliance.³⁵ Seven of these treaty bodies³⁶ may also consider complaints by individuals against those states that have accepted the individual complaint mechanism.³⁷ Although concluding observations and views

32 Tomuschat (n 30 above) 39.

33 On the legal effects of soft law see D Thürer 'Soft law' in Wolfrum (n 1 above) paras 26ff.

34 On the Charter-based compliance control see T Buergenthal 'Human rights' in Wolfrum (n 1 above) para 19.

35 ICCPR (n 5 above) art 40, CESCER (n 6 above) art 16, CPED (n 8 above) art 29, CRPD (n 10 above) art 35, CRC (n 9 above) art 44, CAT (n 7 above) art 19, CEDAW (n 13 above) art 18 & CERD (n 12 above) art 9.

36 For the CMW (n 11 above) the individual complaint mechanism has not yet entered into force.

37 Germany has accepted individual complaints for ICCPR (n 5 above) (25 August 1993), CEDAW (n 13 above) (15 January 2002), CRPD (n 10 above) (24 February 2009) and most recently CRC (n 9 above) (28 February 2013). For an overview of possibilities of individual complaints in the human rights system, see D Shelton 'Human rights, individual communications/complaints' in Wolfrum (n 1 above).

adopted by treaty bodies following an individual complaint are not binding on states,³⁸ they constitute an authoritative statement on the conformity of national law with treaty obligations and as such may not be easily disregarded.³⁹ The Human Rights Committee conceives the implementation of its views as part of the obligation of states in article 2, paragraph 3 of the ICCPR to provide an effective remedy for violations of the rights contained in the Covenant and emphasises that based on the principle of good faith in the observance of treaty obligations states have the duty to cooperate with the Committee.⁴⁰

Germany regularly complies with its reporting obligations under the named treaties. It has accepted the possibility of individual complaints with regard to all treaties with the exception of the CESC. ⁴¹ Individual complaints lodged against Germany have been rare.⁴² Most applications are declared inadmissible and only four human rights violations have been found.⁴³ Fear of an important number of individual applications, however, is the reason for the delay in the ratification of the Optional Protocol to the CESC in spite of Germany's strong involvement in the elaboration of the text. The executive's fears are a mass of individual applications with respect, in particular, to the prohibition of strikes by public servants in German law.⁴⁴ The Committee on Economic, Social and Cultural Rights has criticised Germany for a too extensive interpretation of 'the administration of the State' in article 8(2) of the CESC and has recommended that Germany ensure that civil servants who do not provide essential services have the right to strike.⁴⁵ The ECtHR's jurisprudence points in the same direction. German law is currently undergoing change

38 T Buergenthal 'The UN Human Rights Committee' (2001) 5 *Max Planck Yearbook of International Law* 341397; C Tomuschat 'Human Rights Committee' in Wolfrum (n 1 above) para 14; D Kretzmer 'Human rights, state reports' in Wolfrum (n 1 above) para 28; D McGoldrick *The Human Rights Committee – Its role in the development of the ICCPR* (1994) 151; M Nowak *CCPR commentary* (2005) article 5 OP para 39.

39 Buergenthal (n 38 above) 397; Tomuschat (n 38 above) para 14; Staberock (n 4 above) paras 10 & 11.

40 General Comment 33 (2008) UN Doc CCPR/C/GC/33 paras 14 & 15.

41 ICCPR (n 5 above) (25 November 1993), CERD (n 12 above) (30 August 2001), CEDAW (n 13 above) (15 January 2002), CAT (19 October 2001) (n 7 above), CRPD (n 10 above) (24 February 2009), CPED (n 8 above) (26 June 2012) and most recently CRC (n 9 above) (28 February 2013).

42 Fewer than 25 decisions have been adopted following individual complaints lodged against Germany, most of them by CCPR.

43 *Abichou* CAT (27 June 2013) CAT/C/50/D/430/2010; *TBB-Turkish Union in Berlin/Brandenburg* CERD (10 May 2013) CERD/C/82/D/48/2010; *M.G.* CCPR (23 July 2008) CCPR/C/93/D/1482/2006; *Gröninger* CRPD (4 April 2014) CRPD/C/11/D/2/2010.

44 Bundestagsdrucksache 17/9528 5.

45 CESR (24 September 2001) E/C.12/1/Add.68 paras 22 & 40; (12 July 2011) E/C.12/DEU/CO/5 para 20.

in this respect. On the basis of the ECtHR's jurisprudence, the German Federal Administrative Court in a recent judgment has called on the legislator to bring German law in line with Convention standards.⁴⁶

Compliance control mechanisms at the regional level

At the regional level, compliance control mechanisms are enhanced as all three regional systems have a human rights court that may issue final and binding decisions (the European Court of Human Rights, the African Court on Human and Peoples' Rights and the Inter-American Court of Human Rights). The Inter-American and the African system in addition have human rights commissions that investigate and screen claims of rights violations and also play a role in the court procedure.⁴⁷ In the Inter-American system, cases may only be brought before the IACtHR by the Inter-American Commission on Human Rights or states.⁴⁸ In the African system, access to the Court is open to the African Commission on Human and Peoples' Rights, states and African Inter-Governmental organisations and, in case the state against which the case is brought has made a separate declaration, NGO's with observer status before the ACommHPR as well as individuals.⁴⁹ In the European system, states and individuals may bring applications to the ECtHR.⁵⁰

Germany as a state party to the ECHR comes under the jurisdiction of the ECtHR. In 2012, 1494 applications were lodged against Germany before the ECtHR. In the years from 1959 to 2010, about 99 per cent of applications lodged against Germany were declared inadmissible or were struck out of the list of cases. A judgment was only issued in 1 per cent of the filed cases.⁵¹ Of these judgments 66 per cent found a Convention

46 Bundesverwaltungsgericht (27 February 2014) (2014) 67 *Neue Juristische Wochenschrift* 2218.

47 On the Inter-American Commission on Human Rights, see American Convention on Human Rights IACHR (22 November 1969) arts 34ff; for the mandate of the African Commission on Human and Peoples' rights, see African Charter on Human and Peoples' Rights (ACHPR) (Banjul Charter) (27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58) art 45.

48 IACHR (n 47 above) art 61 para 1.

49 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (10 June 1998) art 5. Seven states have made a declaration under art 5 para 3, art 34 para 6 of the Protocol.

50 ECHR (n 26 above) arts 33 & 34.

51 ECtHR 'Statistics on judgments by state, 1959-2010'. http://www.echr.coe.int/Documents/Stats_violation_1959_2010_ENG.pdf (accessed 15 April 2015) 18. For the period from 1959 to 2013 this corresponds in numbers to 263 judgments, 173 thereof finding a Convention violation, 67 finding no violation, 10 friendly settlements or striking out judgments and 13 other judgments. See ECtHR 'Violations by article and by state, 1959-2013' http://www.echr.coe.int/Documents/Stats_violation_1959_2013_ENG.pdf (accessed 15 April 2015).

violation.⁵² Over 50 per cent of judgments finding a Convention violation concerned the length of proceedings (article 6 of the ECHR). Ten per cent concerned the right to respect for private and family life (article 8), 9 per cent the right to liberty and security (article 5), 10 per cent the right to fair trial (article 6) and 20 per cent other rights.⁵³ The important number of applications concerning the length of proceedings is due to the fact that Germany did not have an effective remedy in place against excessive length of judicial proceedings. After a pilot judgment by the Court in 2010,⁵⁴ this situation was remedied by law in 2011 (→ 4.4.1). Subsequently, the Court declared new applications complaining about the length of judicial proceedings inadmissible for non-exhaustion of domestic remedies.⁵⁵ It is thus to be expected that the number of judgments against Germany that find Convention violations will decrease. In 2013, 6 judgments were issued in proceedings against Germany, 3 of them finding a Convention violation.⁵⁶

In Germany, activities with respect to compliance control are centred in the Federal Ministry of Justice and Consumer Protection in the hands of the Commissioner for Human Rights Issues. The Commissioner is the agent of the Federal Government to the ECtHR and is also in charge of handling individual complaint proceedings before UN treaty bodies for the Federal Government. In addition, the Commissioner compiles many of the periodic reports that have to be submitted to the UN treaty bodies.

3 Germany's participation in international lawmaking

In the light of recent German history it is a declared aim of German foreign policy to actively further the development of international human rights law and to serve as role model in the implementation of existing standards. Germany thus participates actively in international law-making in the field of human rights. Recent examples of strong German involvement include the preparations for CRPD and the Optional Protocol to CESCR.

In the same vein, Germany strives to reduce the number of reservations and declarations with respect to human rights treaties. In 2010, a controversial declaration made upon ratification of CRC was withdrawn, according to which the rights contained in the CRC were not directly applicable in Germany (→ 4.2). Germany maintains reservations/

⁵² ECtHR (n 51 above) 11.

⁵³ ECtHR (n 51 above) 4.

⁵⁴ *Rumpf v Germany* App no 46344/06 (ECtHR, 2 September 2010).

⁵⁵ For example *Schellmann and JSP Programmentwicklung GmbH & Co KG v Germany* App no 27366/07 (ECtHR, 10 July 2012).

⁵⁶ *Glien v Germany* App no 7345/12 (ECtHR, 28 November 2013); *HW v Germany* App no 17167/11 (ECtHR, 19 September 2013); *BB and FB v Germany* App nos 18734/09 & 9424/11 (ECtHR, 14 March 2013).

declarations to CCPR⁵⁷ and its first protocol,⁵⁸ CEDAW,⁵⁹ CAT⁶⁰ and CPED⁶¹ and to the first protocol to CRC.⁶² Concerning the ECHR,

- 57 '(1) Articles 19, 21 and 22 in conjunction with article 2(1) of the Covenant shall be applied within the scope of article 16 of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms. (2) Article 14(3)(d) of the Covenant shall be applied in such manner that it is for the court to decide whether an accused person held in custody has to appear in person at the hearing before the court of review (Revisionsgericht). (3) Article 14(5) of the Covenant shall be applied in such manner that: (a) A further appeal does not have to be instituted in all cases solely on the grounds the accused person having been acquitted by the lower court was convicted for the first time in the proceedings concerned by the appellate court. (b) In the case of criminal offences of minor gravity the review by a higher tribunal of a decision not imposing imprisonment does not have to be admitted in all cases. (4) Article 15(1) of the Covenant shall be applied in such manner that when provision is made by law for the imposition of a lighter penalty the hitherto applicable law may for certain exceptional categories of cases remain applicable to criminal offences committed before the law was amended.'
- 58 'The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2(a) to the effect that the competence of the Committee shall not apply to communications (a) which have already been considered under another procedure of international investigation or settlement, or (b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany (c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant.'
- 59 Declaration: 'The right of peoples to self-determination, as enshrined in the Charter of the United Nations and in the International Covenants of 19 December 1966, applies to all peoples and not only to those living 'under alien and colonial domination and foreign occupation'. All peoples thus have the inalienable right freely to determine their political status and freely to pursue their economic, social and cultural development. The Federal Republic of Germany would be unable to recognize as legally valid an interpretation of the right to self-determination which contradicts the unequivocal wording of the Charter of the United Nations and of the two International Covenants of 19 December 1966 on Civil and Political Rights and on Economic, Social and Cultural Rights. It will interpret the 11th paragraph of the Preamble accordingly.'
- 60 Art 3 – 'This provision prohibits the transfer of a person directly to a State where this person is exposed to a concrete danger of being subjected to torture. In the opinion of the Federal Republic of Germany, article 3 as well as the other provisions of the Convention exclusively establish State obligations that are met by the Federal Republic of Germany in conformity with the provisions of its domestic law which is in accordance with the Convention.'
- 61 Declarations: 'Article 16 - The prohibition of return shall only apply if the person concerned faces a real risk of being subjected to enforced disappearance. Regarding Art. 17 (2) (f) - Under German law it is guaranteed that deprivation of liberty is only lawful if it has been ordered by a court or – in exceptional cases – subsequently authorized by a court. Article 104 para 2 of the Basic Law (Grundgesetz) expressly provides: 'Only a judge may rule upon the permissibility or continuation of any deprivation of liberty. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay'. Article 104 para 3 of the Basic Law provides that a person who has been provisionally arrested on suspicion of having committed a criminal offence 'shall be brought before a judge no later than the day following the arrest'. In the event that a person is being held arbitrarily in contravention of article 104 of the Basic Law, anyone can bring about a judicial decision leading to that person's release by applying to the competent Local Court for his/her immediate release. If the person concerned has been detained beyond the time limit permissible under the Basic Law, the court has to order that person's release pursuant to section 128 (2), first sentence, of the Code of Criminal Procedure (Strafprozessordnung, StPO). Article 17 para 3 – In the case of an involuntary placement of sick persons by a custodian or a person having power of attorney, the information required under letters (a) to (h) is known to the court which authorizes the placement. The court can

Germany does not have any reservations, but has made a number of declarations concerning certain additional protocols.⁶³

4 Incorporation of international human rights obligations into the German legal order

4.1 Germany's mitigated dualism

Neither the ECHR nor the UN human rights treaties oblige states to accord

ascertain the information required under letters (a) to (h) at any time through the custodian or person having power of attorney; the information is then included in the case-file. This information is also to be regarded as records within the meaning of article 17 para 3. Regarding article 18 – Under German law, all persons with a legitimate interest are entitled to obtain information from the court files. The restrictions provided for in German law for the protection of the interests of the person concerned or for safeguarding the criminal proceedings are permissible pursuant to article 20 para 1 of the Convention. Regarding article 24 para 4 – It is clarified that the envisaged provision on reparation and compensation does not abrogate the principle of state immunity.'

62 Declaration: 'The Federal Republic of Germany declares that it considers a minimum age of 17 years to be binding for the voluntary recruitment of soldiers into its armed forces under the terms of article 3 paragraph 2 of the Optional Protocol. Persons under the age of 18 years shall be recruited into the armed forces solely for the purpose of commencing military training. The protection of voluntary recruits under the age of 18 years in connection with their decision to join the armed forces is ensured by the need to obtain the consent of their legal guardian and the indispensable requirement that they present an identification card or passport as a reliable proof of their age.'

63 First Protocol, declaration with respect to article 2 upon ratification: 'The Federal Republic of Germany adopts the opinion according to which the second sentence of article 2 of the (First) Protocol entails no obligation on the part of the State to finance schools of a religious or philosophical nature, or to assist in financing such schools, since this question, as confirmed by the concurring declaration of the Legal Committee of the Consultative Assembly and the Secretary General of the Council of Europe, lies outside the scope of the Convention for the Protection of Human Rights and Fundamental Freedoms and of its Protocol.'

Protocol no 6, declaration at time of ratification: 'In connection with the deposit of the instrument of ratification to Protocol No 6 of 28 April 1983 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty I have the honour to declare on behalf of the Government of the Federal Republic of Germany that, in its view, the obligations deriving from Protocol no 6 are confined to the abolition of the death penalty within the Protocol's area of application in the respective State and that national non-criminal legislation is not affected. The Federal Republic of Germany has already met its obligations under the Protocol by means of article 102 of the Basic Law.'

Protocol no 7 at time of signature: '(1) By "criminal offence" and "offence" in articles 2 to 4 of the present Protocol, the Federal Republic of Germany understands only such acts as are criminal offences under its law. (2) The Federal Republic of Germany applies article 2(1) to convictions or sentences in the first instance only, it being possible to restrict review to errors in law and to hold such reviews in camera; in addition, it understands that the application of article 2.1 is not dependent on the written judgment of the previous instance being translated into a language other than the language used in court. (3) The Federal Republic of Germany understands the words "according to the law or the practice of the State concerned" to mean that article 3 refers only to the retrial provided for in sections 359 et seq. of the Code of Criminal Procedure. (cf *Strafprozessordnung*).'

a specific status to the treaties in their national law.⁶⁴ Nevertheless, UN treaty bodies have expressed the view that domestic law should ensure that UN treaties take precedence over ordinary laws.⁶⁵ The CRC has gone so far as to recommend that Germany consider the incorporation of CRC into the Basic Law.⁶⁶

Customary human rights law is incorporated into the German legal system through article 25 of the Basic Law. Like all other international treaties, human rights treaties are incorporated into national law by a *Zustimmungsgesetz* (→ Vöneky/Wolfrum). As a consequence, they have the status of an ordinary federal law. They trump earlier federal laws and laws enacted by the *Länder*. In theory, however, higher-ranking law such as the Constitution as well as posterior law may deviate from the rights contained in these treaties. To avoid that consequence, several authors have argued for a supra-legislative or even constitutional rank of the ECHR in the German norm hierarchy,⁶⁷ but so far there is no consensus on this question and the Constitutional Court has explicitly declared that the ECHR does not have constitutional status.⁶⁸ It has, however, based on the openness of the German Constitution to international law, accepted for the first time in 1987 that the ECHR may be taken into account in the interpretation of the constitutional fundamental rights.⁶⁹

The Constitutional Court clarified the significance of this jurisprudence in the *Görgülü* judgment in 2004.⁷⁰ In this case, the ECtHR had found a violation of article 8 of the ECHR because German courts had refused a natural father custody of and access rights to his child born out of wedlock which was in the care of foster parents.⁷¹ The Strasbourg Court held that Germany was under an obligation to make it possible for the applicant at least to have access to his child. In further proceedings at

64 Staberock (n 4 above) para 20; P-M Dupuy 'International law and domestic (municipal) law' in Wolfrum (n 1 above) para 122. Seibert-Fohr argues for an obligation to provide the CCPR with constitutional rank, see A Seibert-Fohr 'Domestic implementation of the International Covenant on Civil and Political Rights pursuant to its article 2 para 2' (2001) *Max Planck Yearbook of United Nations Law* 399 439ff.

65 See for example CRC (31 January 2014) UN Doc CRC/C/DEU/CO/3-4 para 10.

66 CRC (26 February 2004) UN Doc CRC/C/15/Add. 226 para 10(a).

67 F Hoffmeister 'Die Europäische Menschenrechtskonvention als Grundrechtsverfassung und ihre Bedeutung in Deutschland' (2001) 40 *Der Staat* 349 367ff; JA Frowein 'Das Bundesverfassungsgericht und die Europäische Menschenrechtskonvention' in W Fürst et al (eds) *Festschrift für Wolfgang Zeidler* (1987) 1763 1768ff.

68 BVerfG Case 2 BvR 1481/04 (14 October 2004) 111 *Entscheidungen des Bundesverfassungsgerichts* 307, translation available http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html (accessed 15 April 2015) para 31.

69 BVerfG Case 2 BvR 589/79 *inter alia* (26 March 1987) (1987) 74 *Entscheidungen des Bundesverfassungsgerichts* 358 370.

70 BVerfG Case 2 BvR 1481/04 (n 68 above). On the judgment see F Hoffmeister 'Germany: Status of European Convention on Human Rights in domestic law' (2006) 4 *International Journal of Constitutional Law* 722; H Sauer 'Die neue Schlagkraft der gemeineuropäischen Grundrechtsjudikatur' (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 35.

71 *Görgülü v Germany* App no 74969/01 (ECtHR, 26 February 2004).

national level following the ECtHR judgment the Naumburg Court of Appeal revoked an interim measure by a lower court that had granted the applicant the right to see his son on a weekly basis for as long as proceedings remained pending. It considered that German courts were not bound by decisions of the ECtHR.⁷² On the constitutional complaint of the applicant, the Constitutional Court quashed the decision of the Naumburg Court of Appeal. It confirmed that

the guarantees of the Convention influence the interpretation of the fundamental rights and constitutional principles of the Basic Law. The text of the Convention and the case-law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law ...

In practice this means that 'as long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to interpretation in accordance with the Convention'.⁷³

According to the Constitutional Court, all state authorities, including the courts, have a constitutional duty to take into account the Convention and relevant jurisprudence by the ECtHR. This obligation is based on article 1(2) together with article 59(2) of the Basic Law and thus is of constitutional nature. It is therefore possible, as recognised by the Constitutional Court for the first time in *Görgülü*, to base a constitutional complaint on the allegation that a state authority did not properly take into account an ECtHR judgment.⁷⁴

The *Görgülü* judgment has been lauded as sending an important signal for a better implementation of the ECHR in Germany. This message has been blurred however by certain passages that emphasise the limits on the openness of the Basic Law to international law:

The Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the German constitution. There is therefore no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law of international agreements, provided this is the only way in which a violation of fundamental principles of the constitution can be averted.⁷⁵

72 Oberlandesgericht Naumburg Case 14 WF 64/04 (30 Juni 2004) (2004) 31 *Europäische Grundrechte Zeitschrift* 598.

73 BVerfG Case 2 BvR 1481/04 (n 68 above) para 62.

74 BVerfG Case 2 BvR 1481/04 (n 68 above) para 63.

75 BVerfG Case 2 BvR 1481/04 (n 68 above) para 35.

Other passages emphasise the limits on the effects of international judgments by calling on courts to make sure that the incorporation of a judgment by the ECtHR does not violate constitutional law:

German courts must give precedence to interpretation in accordance with the Convention. The situation is different only if observing the decision of the ECHR, for example because the facts on which it is based have changed, clearly violates statute law to the contrary or German constitutional provisions, in particular also the fundamental rights of third parties. 'Take into account' means taking notice of the Convention provision as interpreted by the ECHR and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law.⁷⁶

The strong wording used by the Court in this context was read by some as an invitation to open revolt against the Strasbourg court and as a reaction to the ECtHR's *von Hannover* judgment where the ECtHR differed from the opinion of the Federal Constitutional Court.⁷⁷ In a later judgment on preventive detention, however, the Constitutional Court, while reaffirming the principle of the German Constitution's last word, has used much less confrontational language and emphasised the idea of an open dialogue between itself and the ECtHR:

The domestic effects of judgments by the ECtHR are not limited ... to a duty to take into account, for the Basic Law aims ... to avoid conflict between international obligations of the Federal Republic of Germany and national law. The openness of the Basic Law to international law thus expresses an understanding of sovereignty which not only opposes international and supranational integration; it presupposes and expects it. Against this background, the German Constitution's 'last word' does not exclude an international and European dialogue of courts but rather constitutes its normative foundation.⁷⁸

76 BVerfG Case 2 BvR 1481/04 (n 68 above) para 62: '[...] German courts must give precedence to interpretation in accordance with the Convention. The situation is different only if observing the decision of the ECHR, for example because the facts on which it is based have changed, clearly violates statute law to the contrary or German constitutional provisions, in particular also the fundamental rights of third parties. "Take into account" means taking notice of the Convention provision as interpreted by the ECHR and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law.'

77 See Hoffmeister (n 67 above) 729; E Lambert Abdelgawad & A Weber 'The reception process in France and Germany' in H Keller & A Stone Sweet (eds) *A Europe of rights* (2008) 137. This interpretation was dominant in newspaper articles on the decision, see the references in Sauer (n 70 above) 38 note 9.

78 BVerfG Case 2 BvR 2365/09 *inter alia* (4 May 2011) (2011) 128 *Entscheidungen des Bundesverfassungsgerichts* 326 para 89. On this judgment see U Volkmann 'Fremdbestimmung – Selbstbehauptung – Befreiung' (2001) 56 *JuristenZeitung* 836; M Payandeh & H Sauer 'Menschenrechtskonforme Auslegung als Verfassungsmehrwert: Konvergenzen von Grundgesetz und EMRK im Urteil des Bundesverfassungsgerichts zur Sicherungsverwahrung' (2012) 34 *Juristische Ausbildung* 289; A Zimmermann 'Grundrechtsschutz zwischen Karlsruhe und Straßburg' (2012) 31ff; M Andenas & E Bjorge 'Preventive detention' (2011) 105 *American Journal of International Law* 768.

This case was particularly delicate: Prior to the ECtHR judgment the Constitutional Court had held that the legislation that eliminated a ten-year maximum period for preventive detention not only for the future but also for old cases was constitutional.⁷⁹ The ECtHR then held these same provisions to be incompatible with the ECHR. When seized with the question again after the ECtHR judgment, the Constitutional Court did not decline review on the basis of the principle of finality of Constitutional Court decisions, but held that ECtHR decision constituted legally relevant changes that allowed a new decision by the Constitutional Court. It then came to the conclusion that the legal provisions criticised by the ECtHR were incompatible with the German Constitution.

The Federal Constitutional Court has clarified in recent decisions that the principles developed in the *Görgüglü* decision also apply to other international human rights treaties.⁸⁰

4.2 Legislative implementation

Where national law is incompatible with provisions of an international human rights treaty, national legislation is necessary to implement the treaty.⁸¹ Implementing legislation may also be necessary if a treaty explicitly requires legislation (for example, specific criminal law provisions and remedies). Positive obligations inherent in human rights treaties may also trigger the need for legislation. Legislation that is adopted to implement a decision of a human rights treaty body will be dealt with separately (→ 4.4).

In Germany, when the executive proposes the law that allows ratification of an international treaty, it summarises the treaty concerned, explains how the provisions are implemented in German law and examines if German law is compatible with the treaty.⁸² Legislative practice with respect to human rights treaties suggests that these are only ratified if the executive and the majority parties are convinced that national law conforms with the treaty and does not require changes. This conviction is sometimes held even in the face of broad opposition. Whereas the opposition parties and all experts consulted by Parliament for instance held that the ratification of the European Convention against Human Trafficking made legislative changes necessary, the majority maintained their conviction that domestic law was already consistent with

79 BVerfG Case 2 BvR 2029/01 (5 February 2004) (2004) 108 *Entscheidungen des Bundesverfassungsgerichts* 133.

80 For the CRPD BVerfG Case 2 BvR 882/08 (23 March 2011) (2011) 128 *Entscheidungen des Bundesverfassungsgerichts* 282 369 para 52. For the CRC see BVerwG Case 1 B 22.10 (10 February 2011).

81 On the need for implementing legislation see Staberock (n 4 above) paras 23 & 24.

82 See for example Bundestagsdrucksache 16/12592 for CPED.

the Convention and that the proposed changes were not mandatory, but would only further the realisation of Convention rights.⁸³

In two cases (CRC and CAT), Germany has made a declaration to the effect that amendments of national law were not required to implement the treaty.⁸⁴ The declaration made upon ratification of CRC also stated that the Convention did not apply directly in Germany.⁸⁵ In spite of the Government's opinion that CRC standards were implemented in Germany and that no amendments or reforms were necessary,⁸⁶ the *Länder* feared that German courts would force implementing measures on them in certain cases and exerted pressure on the Federal Government to make the said declaration.⁸⁷ In 2010, the declaration was withdrawn.

Sometimes, the assessment whether legislative amendments are necessary changes over time as the example of CRPD shows: Whereas the executive initially was of the opinion that German law already fulfilled all of the requirements of the Convention,⁸⁸ it now recognises the need for further legislation. This is evident in the different action plans at federal and *Länder* level that contain ambitious goals and implementation measures. Several states have stated the need for an all-encompassing review of existing statutes, some have already conducted this review and the *Land* Berlin has asked the monitoring mechanism (→ 4.5.1) for a review of all state legislation as to its conformity with CRPD.⁸⁹ If the measures proposed in the different action plans are adopted, they will lead

83 See Bundestagsdrucksache 17/10165.

84 CAT: '[...] In the opinion of the Federal Republic of Germany, article 3 as well as the other provisions of the Convention exclusively establish State obligations that are met by the Federal Republic of Germany in conformity with the provisions of its domestic law which is in accordance with the Convention.'; CRC: '[...] The Federal Republic of Germany also declares that domestically the Convention does not apply directly. It establishes state obligations under international law that the Federal Republic of Germany fulfils in accordance with its national law, which conforms with the Convention.'

85 The legal relevance of this declaration has been commented on divergently. Some authors consider the declaration to be irrelevant according to international law (RA Lorz & H Sauer 'Kinderrechte ohne Vorbehalt' (2011) 16 *MenschenRechtsMagazin* 5 6; A Lorz *Der Vorrang des Kindeswohls nach Art. 3 der UN-Kinderrechtskonvention in der deutschen Rechtsordnung* (2003) 25ff) Other qualify the declaration as a reservation (A Zimmermann 'Neuere Entwicklungen zum Verhältnis zwischen dem UN-Abkommen über die Rechte des Kindes und nationalem Familienrecht' (1996) *Praxis des internationalen Privat- und Verfahrensrechts* 167 173) that is incompatible with the Vienna Convention on the Law of Treaties (W Ullmann 'Verfassungs- und völkerrechtliche Widersprüche bei der Ratifikation der UNO-Kinderrechtskonvention' (1991) 38 *Zeitschrift für das gesamte Familienrecht* 898 899; J Wolf 'Ratifizierung unter Vorbehalten' (1991) 24 *Zeitschrift für Rechtspolitik* 374 378. See also E Peter 'Der Vorrang des Kindeswohls' (2005) 43 *Archiv des Völkerrechts* 257 261ff).

86 Bundestagsdrucksache 12/42, 32.

87 See Lorz & Sauer (n 85 above) 5.

88 Deutsches Institut für Menschenrechte 'Expertise für ein Artikelgesetz zur Umsetzung der UN-Behindertenrechtskonvention im Land Berlin' (2013) http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Expertise_fuer_ein_Artikelgesetz_zur_Umsetzung_der_UN_Behindertenrechtskonvention_im_Land_Berlin_01.pdf (accessed 18 May 2015) 4.

89 Deutsches Institut für Menschenrechte (n 88 above) 5.

to substantive changes in German law. They imply for instance a major overhaul of the current education system. Insofar, the action plans are an encouraging sign for the willingness in Germany to adopt legislation to implement international human rights treaties even if this involves systemic changes and means breaking with traditions.

As noted before, Germany regularly complies with its reporting obligations under the different UN treaties and is in constant dialogue with the respective treaty bodies about necessary legislative amendments or desirable new legislation to further the realisation of treaty rights. Practice has shown, however, that the non-binding pronouncements by UN treaty bodies do not *per se* lead to the adoption of new legislation in Germany. New legislation is either passed when binding European Union law or binding pronouncements of the ECJ or the ECtHR oblige Germany to do so or when the social climate has developed in such a way that public opinion demands adoption of a specific law. A comprehensive anti-discrimination legislation covering in particular discrimination in the private sector for example had long been called for by CERD.⁹⁰ For years, there were discussions about the adoption of such a law, but it was only after binding EU legislation created the need for a law, that the Anti-Discrimination Act was adopted in 2006. This situation has been addressed by UN treaty bodies. CEDAW in particular has expressed concern that the Convention has not received the same degree of visibility and importance as regional legal instruments, particularly EU directives, and that it is not cited regularly as legal basis for legislation for the elimination of discrimination against women.⁹¹ The legitimacy of this concern notwithstanding, it should not be inferred that recommendations are irrelevant for Germany. They serve as a basis for discussion, and are an important tool for NGOs active in the field to influence public opinion and exert pressure on the Government to initiate reform.⁹²

4.3 The role of courts in the implementation of international law

For years, references to international human rights treaties by German courts were a rare occurrence.⁹³ This was due not only to a lack of knowledge on the part of judges but also to the conviction that the detailed human rights catalogue of the Basic Law already ensured such a strong human rights protection that it was not imaginable that international

⁹⁰ See for example CERD (23 April 1997) UN Doc CERD/C/304/Add.24 para 20.

⁹¹ CEDAW (30 January 2004) UN Doc CEDAW/C/2004/I/CRP.3/add.6/Rev.1 para 26.

⁹² In this sense see Kretzmer (n 38 above) para 28.

⁹³ B Simma et al 'The role of German courts in the enforcement of international human rights' in B Conforti & F Francioni (eds) *Enforcing international human rights in domestic courts* (1997) 71 72f. For the ECtHR see R Uerpman *Die Europäische Menschenrechtskonvention und die deutsche Rechtsprechung* (1993).

instruments could go beyond that standard.⁹⁴ This changed in the middle of the 1990s. Since then, the number of references to the ECHR and the ECtHR has grown exponentially.⁹⁵ But not only the quantity, the quality of references has changed as well. Today, more and more courts rather than merely referring to the ECHR analyse the ECtHR's jurisprudence in detail and explain extensively how the jurisprudence is to be applied to the specific circumstances of the case.⁹⁶ Not in every case is the jurisprudence of the Court followed,⁹⁷ but in general the ECHR and the Court's jurisprudence do serve as a normative point of reference for German courts.⁹⁸

The positive trend in the reference to the ECHR by German courts is not mirrored with respect to UN human rights treaties, however. As a matter of fact, UN human rights treaties are still rarely referred to by German courts.⁹⁹ There are exceptions¹⁰⁰ – the CRPD in particular has been referred to in a number of recent court decisions.¹⁰¹ But very often, UN human rights treaties are not mentioned at all. Even courts that refer to the ECHR tend to ignore them. In the already mentioned proceedings on the right to strike for civil servants for instance, courts have extensively reviewed the ECtHR's jurisprudence on this question,¹⁰² but have not even mentioned the CESCR, although the Committee on Economic, Social and Cultural Rights has repeatedly stated that the prohibition by Germany of strikes by public servants other than those who provide essential services is not compatible with article 8 of the CESCR.¹⁰³

If UN human rights treaties are mentioned, courts often conclude that they are irrelevant for the case at hand. With regard to the CRPD courts have held, for example, that the federal *Zustimmungsgesetz* only

94 Simma et al (n 93 above) 107ff.

95 C Walter 'Nationale Durchsetzung' in R Grote & T Marauhn *EMRK/GG Konkordanzkommentar* (2013) para 3. See also Institut International des Droits de l'Homme *Die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte im Bundesgerichtshof und Bundesverfassungsgericht* (2012) <http://www.iidh.org/upload/files/Bericht%20komplett%207.pdf> (accessed 15 April 2015).

96 The Federal Constitutional Court has explicitly stated that ECtHR judgments have to be taken into account not only in the concrete case decided by the Court, but also in parallel cases, see BVerfG Case 2 BvR 2365/09 (n 78 above) para 89.

97 For a detailed analysis of the jurisprudence of federal courts see Walter (n 95 above) paras 8ff.

98 Walter (n 95 above) para 47.

99 This has been the object of criticism by UN treaty bodies, see for example CESCR (24 September 2001) UN Doc E/C.12/1/Add 68 para 13.

100 See for example BVerfG Case 1 BvL 10/10 & 1 BvL 2/11 (18 July 2012) (2012) 31 *Neue Zeitschrift für Verwaltungsrecht* 1024 1026; BVerwG Case 1 B 22.10 (n 80 above).

101 V Aichele 'Die UN-Behindertenrechtskonvention in der gerichtlichen Praxis' (2011) *Anwaltsblatt* 727 728ff. Most recently BAG Case 6 AZR 190/12 (19 December 2013) (2014) 69 *Arbeit und Arbeitsrecht* 112.

102 BVerwG Case (27 February 2014) (n 46 above); Oberverwaltungsgericht Nordrhein-Westfalen 3d A 317/11.0 (7 March 2012) (2012) 31 *Neue Zeitschrift für Verwaltungsrecht* 890; Verwaltungsgericht Düsseldorf Case 31 K 3904/10.0 (15 December 2010) (2011) 59 *Arbeit und Recht* 74.

103 CESCR (12 July 2011) UN Doc E/C.12/DEU/CO/5 para 20.

incorporates the parts of the treaty into German law that concern competencies of the federal state and that the *Länder* would need to adopt their own laws to incorporate the treaty into the law of the *Land*.¹⁰⁴ This jurisprudence has been the subject of critical reviews.¹⁰⁵ It has been held to be inconsistent with the jurisprudence of the German Constitutional Court. The *Zustimmungsgesetz* obliges all state authorities to apply the treaty irrespective of whether the federation or the *Länder* have jurisdiction in the areas covered by the treaty.¹⁰⁶ Who has jurisdiction only becomes relevant if legislation needs to be adopted to implement the treaty.

Another argument German courts often use to explain why a UN human rights treaty is irrelevant is the absence of directly applicable provisions. With reference to article 2 of the CESCR, some German courts have thus stated the view that the Covenant does not contain self-executing rights.¹⁰⁷ German administrative courts have denied the self-executing nature of CRPD provisions in view of article 4, paragraph 2 of the CRPD.¹⁰⁸ So far, superior courts have not answered this question authoritatively for these two treaties.¹⁰⁹ The restrictive position of courts with respect to direct application of treaties has been commented on critically. Most authors have argued that the question of direct application cannot be decided for a treaty as a whole but has to be examined on a case-by-case basis for each right separately.¹¹⁰ The provisions that were the

104 See for example Hessischer Verwaltungsgerichtshof (12 November 2009) (2010) 23 *Neue Zeitschrift für Verwaltungsrecht Rechtsprechungs-Report* 602; Oberverwaltungsgericht Lüneburg Case 2 ME 278/10 (16 September 2010); BVerwG Case 6 B 52/09 (18 January 2010) para 8.

105 See for example Monitoring-Stelle zur UN-Behindertenrechtskonvention 'Stellung der Behindertenrechtskonvention innerhalb der deutschen Rechtsordnung und ihre Bedeutung für behördliche Verfahren und deren gerichtliche Überprüfung' (2010) http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/stellungnahme_der_monitoring_stelle_z_un_behindertenrechtskonvention_zur_stellung_der_behindertenrechtskonvention_innenhalb_der_dt_rechtsordnung.pdf (accessed 15 April 2015) 10ff; V Aichele (n 101 above) 730 with further references; J von Bernstorff 'Anmerkung zur innerstaatlichen Anwendbarkeit ratifizierter Menschenrechtsverträge' (2011) *Recht der Jugend und des Bildungswesens* 203 206ff.

106 Von Bernstorff (n 105 above) 207. For a different opinion see U Fastenrath & T Groh 'Artikel 59' in Friauf & Höfling (eds) *Berliner Kommentar zum Grundgesetz* (2010) para 99; E Riedel 'Im Zweifel Inklusion: Zuweisung an eine Förderschule nach Inkrafttreten der BRK' (2010) 29 *Neue Zeitschrift für Verwaltungsrecht* 1346.

107 See for example Verwaltungsgerichtshof Baden-Württemberg Case 9 S 2163/90 (17 December 1991) (1993) *Zeitschrift für das gesamte Familienrecht* 828; Verwaltungsgerichtshof Baden-Württemberg Case 10 S 1666/90 (31 March 1992) (1993) 6 *Neue Zeitschrift für Verwaltungsrecht Rechtsprechungs-Report* 83; Verwaltungsgerichtshof Nordrhein-Westfalen Case 15 A 1596/07 (9 October 2007) (2007) 122 *Deutsches Verwaltungsblatt* 1442.

108 See for example Hessischer Verwaltungsgerichtshof Case 7 B 2763/09 (12 November 2009) (2010) 63 *Die öffentliche Verwaltung* 325.

109 See BVerwG Case 6 C 8.09 (15 December 2010) para 30 which does not answer the question of the self-executing nature of Covenant rights. But see BVerwG Case 1 B 22.10 (n 80 above) para 4 which recognises the direct applicability of the CRC.

110 Lorz & Sauer (n 85 above) 7; Simma et al (n 93 above) 86; Riedel (n 106 above) 1347.

object of the decisions are generally held to be self-executing.¹¹¹ In addition, it has been pointed out that direct application of a treaty and the use of a treaty in the interpretation of national law should be distinguished and that the latter application does not require the strict criteria for direct applicability to be fulfilled.¹¹²

Recent years have seen a positive trend in the number of references to the ECHR even if there is still room for improvement. UN human rights treaties in contrast play only a marginal role in German jurisprudence. The main reason for this situation certainly is the existence of the detailed human rights catalogue in the Basic Law. There is also still a lack of knowledge and expertise about international human rights treaties in German courts. Hopefully, this situation will improve. The executive in any case has deployed considerable efforts to make international human rights treaties more accessible (→ 4.5.3). In addition, *amicus curiae* briefs by the national human rights monitoring mechanisms seem to be an efficient way to draw the courts' attention to the significance of international human rights treaties for their proceedings (→ 4.5.1).

4.4 Implementation of decisions by international human rights treaty bodies

The following section examines how decisions of international human rights treaty bodies against Germany that find a human rights violation are implemented. The focus is on judgments by the ECtHR. So far, only four decisions by UN human rights treaty bodies have found a treaty violation by Germany. Although UN treaty bodies' decisions are non-binding, the German Government has made clear that Germany intends to cooperate with treaty bodies in the implementation of their decisions. This position has been followed through in the recent *TBB* case¹¹³ even if strong reservations have been voiced with respect to the conclusions CERD has come to.¹¹⁴

If a ECtHR judgment affords just satisfaction (article 41 of the ECHR) to the applicant, Germany is bound by international law to pay the required sum to the applicant. This is done by the Federation's executive.

111 For art 24 CPED Monitoring-Stelle zur UN-Behindertenrechtskonvention (n 105 above); Von Bernstorff (n 105 above) 203; Riedel (n 106 above) 1347ff. See also P Masuch 'Die UN-Behindertenrechtskonvention anwenden!' in C Hohmann-Dennhardt et al (eds) *Festschrift für Renate Jaeger: Grundrechte und solidarität* (2011) 245.

112 Aichele (n 101 above) 730.

113 n 43 above.

114 See Bundestagsdrucksache 18/60 (18 November 2013) 3; M Payandeh 'Die Entscheidung des UN-Ausschusses gegen Rassendiskriminierung im Fall Sarrazin' (2013) 67 *JuristenZeitung* 980; C Tomuschat 'Der "Fall Sarrazin" vor dem UN-Rassendiskriminierungsausschuss' (2013) 40 *Europäische Grundrechtszeitschrift* 262.

In the relationship between the Federation and the *Länder*, the *Lastentragungsgesetz* determines how costs are to be divided.¹¹⁵ If the Convention violation emanates from the sphere of a *Land*, the Federation may recover the sum from the *Land*.

Following a ECtHR judgment in which the ECtHR finds a Convention violation, the state has the obligation according to article 46 of the ECHR to put an end to the violation and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*).¹¹⁶ The respondent state is free to choose the means by which it discharges the obligation. In a few cases, the Court has nevertheless ordered concrete measures to be taken by the state to fulfil its obligation under article 46.¹¹⁷ To deal with repetitive cases, the Court has developed the pilot judgment technique.¹¹⁸ The Court uses a pilot judgment to identify a structural problem in a state and order specific measures to be taken by the state to remedy the situation.

Whether legislation is required to put an end to the Convention violation and make reparation for its consequences depends on the nature of the violation. As a general rule, legislation will not be required if the violation is the result of the interpretation of a law that does not sufficiently take into account the ECHR. The judgment can then be implemented by interpreting the law in conformity with Convention standards.¹¹⁹ If the law's wording itself clearly contravenes the Convention and does not give domestic courts the possibility to interpret the provision in conformity with the Convention, a legislative amendment becomes necessary.¹²⁰ In Germany, in addition, constitutional requirements have to be taken into account when deciding on the need to implement by legislation. Under German constitutional law, the principles of democracy and the rule of law require that the legislator itself enacts all provisions that are relevant for the realisation of fundamental rights and may not leave the determination of these provisions to the executive or the courts.¹²¹ How detailed the legislator needs to be depends on how close the relevant cases are related to fundamental rights. In its decision on preventive detention for example,

115 On the *Lastentragungsgesetz* see N Wenzel 'Artikel 41' in U Karpenstein & FC Mayer *EMRK* (2012) 60.

116 J Meyer-Ladewig *EMRK* (2011) art 46 para 25.

117 See for example the above-mentioned *Görgülü* judgment (n 71 above) para 64. For other examples see M Breuer 'Artikel 46' in Karpenstein & Mayer (n 115 above) paras 9ff.

118 The technique was used for the first time by the Court in *Broniowski v Poland* App no 31443/96 (ECtHR Grand Chamber, 22 June 2004). On the pilot judgment technique see Breuer (n 117 above) paras 20ff; D Haider *The pilot-judgment procedure of the European Court of Human Rights* (2013).

119 Meyer-Ladewig (n 116 above) art 46 para 39.

120 C Grabenwarter & K Pabel *Europäische Menschenrechtskonvention* (2012) 104; Breuer (n 117 above) para 34; JA Frowein 'Artikel 46' in JA Frowein & W Peukert *Europäische Menschenrechtskonvention* (2009) para 7; Meyer-Ladewig (n 116 above) art 46 para 41.

121 BVerfG Case 1 BvR 402/87 (27 November 1990) (1991) 83 *Entscheidungen des Bundesverfassungsgerichts* 130 (Josefine Mutzenbacher) para 38.

the Constitutional Court has held that preventive detention has such repercussions on the right to personal freedom that legislation must determine all essential areas of executive and court action.¹²²

4.4.1 *Legislative implementation of decisions by a human rights treaty body*

The German *Bundestag* has adopted a number of laws to implement decisions of the ECtHR. These include:¹²³

- a law to strengthen the legal position of biological, non-legal fathers in the field of access and information rights;¹²⁴
- an amendment of the Federal Hunting Act in order to allow property owners to oppose hunting on their premises for ethical reasons;¹²⁵
- new rules on the execution of preventive detention orders and on the execution of prison sentences where preventive detention has been ordered or reserved;¹²⁶
- an amendment of the Civil Code to allow fathers of children born out of wedlock to obtain joint parental custody without consent of the mother;¹²⁷
- establishment of a legal remedy in the event of excessive length of judicial proceedings;¹²⁸

122 BVerfG Case 2 BvR 2365/09 *inter alia* (n 78 above) para 110.

123 For examples see also Lambert Abdelgawad & Weber 'The reception process in France and Germany' in Keller & Stone Sweet (n 77 above) 133ff.

124 *Anayo v Germany* App no 20578/07 (ECtHR, 21 December 2010).

125 The Gesetz zur Änderung jagdrechtlicher Vorschriften (Bundesgesetzblatt 2013 I 1386) was adopted to implement *Herrmann v Germany* App no 9300/07 (ECtHR Grand Chamber, 26 June 2012). See action report of DD (2013)853 (12 July 2013) http://www.coe.int/t/dghl/monitoring/execution/Themes/Add_info/GER-ai_en.asp (accessed 15 April 2015).

126 The Gesetz zur Neuordnung der Sicherungsverwahrung und zu begleitenden Regelungen (Bundesgesetzblatt 2010 I 2300), the Gesetz zur Therapie und Unterbringung psychisch gestörter Gewalttäter (Bundesgesetzblatt 2010 I 2300) and corresponding provisions at the level of the Länder (for an overview see action report DD (2013)1188 (26 September 2013) <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2391178&SecMode=1&DocId=2072220&Usage=2> (accessed 15 April 2015)) were adopted to implement *Mücke v Germany* App no 19359/04 (ECtHR, 17 December 2009) and 11 other judgments concerning the retroactive extension of preventive detention, or retroactive preventive detention orders.

127 *Zaunegger v Germany* App no 22028/04 (ECtHR, 3 December 2009).

128 The Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren (Bundesgesetzblatt 2011 I 2302) was adopted to implement *Sürmeli v Germany* App no 75529/01 (ECtHR Grand Chamber, 8 June 2006) and *Rumpf v Germany* (n 54 above).

- a law to eliminate the unequal treatment under the law of succession of children born outside marriage as compared with children born within marriage conveying in particular a statutory right of inheritance to children born outside of marriage in respect of their fathers and their parental relatives;¹²⁹
- a law ensuring that in criminal proceedings, costs for an interpreter may only be imposed on the accused by the court if the accused incurred them unnecessarily by his own fault or in another culpable manner;¹³⁰ and
- an amendment of the Child Benefits Act to ensure foreigners with a temporary residence permit are entitled to child benefits.¹³¹

So far, all ECtHR judgments that necessitated legislation have been implemented. In some cases, this has been done reluctantly. The most blatant example is the law establishing a legal remedy in the event of excessive length of judicial proceedings. The law was only adopted after the Court issued its first and only pilot judgment against Germany. After the *Sürmeli* judgment in 2006 it was clear that a remedy was required in German law for cases in which judicial proceedings take too long.¹³² A draft law had already been introduced in 2005, but the *Bundestag* refused to adopt the law and the draft was abandoned in 2007.¹³³ In March 2010, the Government introduced a new draft. In view of the long implementation period and the uncertainty about the fate of the new draft, however, the ECtHR issued a pilot judgment against Germany on 2 September 2010 and held that Germany must introduce without delay, and at the latest within one year from the date the judgment becomes final, a remedy in the national legal system in order to align it with Convention standards.¹³⁴ The pilot judgment was a strong blow as it was incompatible with Germany's commitment of being exemplary in the implementation of human rights standards. The judgment therefore became an important incentive to pass legislation which was finally done on 24 November 2011.

129 The Zweites Gesetz zur erbrechtlichen Gleichstellung nichtehelicher Kinder, zur Änderung der Zivilprozessordnung und der Abgabenordnung (Bundesgesetzblatt 2011 I 615) was adopted to implement *Brauer v Germany* App no 3545/04 (ECtHR, 28 May 2009).

130 Gesetz zur Regelung des Geschäftswerts bei land- oder forstwirtschaftlichen Betriebsübergaben und zur Änderung sonstiger kostenrechtlicher Vorschriften (Bundesgesetzblatt 1989 I 1082) art 2 was adopted to implement *Öztürk v Germany* App no 8544/79 (ECtHR, 21 February 1984).

131 The Gesetz zur Anspruchsberechtigung von Ausländern wegen Kindergeld, Erziehungsgeld und Unterhaltsvorschuss (Bundesgesetzblatt 2006 I 2915) was adopted to implement *Niedzwiecki v Germany* App no 58453/00 (ECtHR, 25 October 2005) and *Okpisz v Germany* App no 59140/00 (ECtHR, 25 October 2005).

132 In fact, it had been clear since the judgment issued against Poland in *Kudła v Poland* App no 30210/96 (ECtHR Grand Chamber, 26 October 2000) that ECHR (n 26 above) art 13 requires States to provide for an effective remedy capable of affording redress for the unreasonable length of judicial proceedings.

133 On the history of the adoption of law establishing a legal remedy in the event of excessive length of judicial proceedings see C Steinbeiß-Winkelmann & G Ott *Rechtsschutz bei überlangen Gerichtsverfahren* (2012) Einführung paras 62ff.

134 *Rumpf v Germany* (n 54 above) para 73.

Reluctance of parliamentarians is particularly strong when the jurisprudence of the ECtHR differs from the Federal Constitutional Court's jurisprudence. In 2009, the judgments of the ECtHR holding that the German system of preventive detention was incompatible with the ECHR was met with outrage in Germany. Popular press raged about 'dangerous criminals having to be released',¹³⁵ and politicians stated that not the ECtHR but the German Constitutional Court was the leading authority in Germany and that the German Constitution must have the last word.¹³⁶ In the end, however, legislation was adopted.

4.4.2 Implementation of decisions by a human rights treaty body by the courts

An important obstacle to courts implementing decisions of human rights treaty bodies is the principle of finality of judgments. Although states are not obliged under the ECHR to provide for the possibility of reopening procedures,¹³⁷ the reopening of procedures is possible under German law following an ECtHR judgment. Since 1998, an ECtHR judgment is recognised as a reason allowing for the reopening of criminal procedures.¹³⁸ Since 2006, civil and all other kinds of court procedures may be reopened following an ECtHR judgment.¹³⁹ Reopening of procedures is only possible, however, with respect to the individual case decided by the ECtHR.¹⁴⁰ A reopening in similar cases is not possible. German law does not provide for the possibility of reopening procedures in case of a decision by a UN human rights treaty body either. An ECtHR judgment also has repercussions on the binding nature of judgments of the Federal Constitutional Court: The Constitutional Court has held that a ECtHR decision has the same effects as a legally relevant change of facts or law.¹⁴¹ Lower courts may thus disregard the former decision of the

135 See heading of the daily newspaper 'Bild' of 12 July 2010: 'Diese Schwerverbrecher muss die Justiz laufen lassen.'

136 See for example statement by the Bavarian Minister of Justice Beate Merk in D Hipp 'Streit über Sicherungsverwahrung: Im Zweifel für die Dauerhaft' *Spiegel Online* (8 February 2011) <http://www.spiegel.de/panorama/justiz/streit-ueber-sicherungsverwahrung-im-zweifel-fuer-die-dauerhaft-a-744298-7.html> (accessed 15 April 2015).

137 Meyer-Ladewig (n 116 above) Artikel 46 para 28. For an obligation Frowein (n 120 above) para 15. The Council of Europe Committee of Ministers has invited states to provide for the possibility of re-examination of cases though, see Recommendation (2000) 2 of 19 January 2000.

138 Code of Criminal Procedure sec 359 no 6.

139 Code of Civil Procedure sec 580 no 8: 'An action for retrial of the case may be brought: ... 8. where the European Court of Human Rights has established that the European Convention for the Protection of Human Rights and Fundamental Freedoms or its protocols have been violated, and where the judgment is based on this violation.' This provision is applicable in other procedures as well. Their procedural codes refer to Code of Civil Procedure sec 580 no 8, see for example *Arbeitsgerichtsgesetz* sec 79 sentence 1 for labour court procedures, sec 179(1) *Sozialgerichtsgesetz* for social court procedures, *Verwaltungsgerichtsordnung* sec 163(1) for administrative court procedures.

140 Breuer (n 117 above) para 70.

141 BVerfG Case 2 BvR 2365/09 (n 78 above) para 82.

Constitutional Court¹⁴² and the Constitutional Court may decide on the issue again.

Since the Federal Constitutional Court's judgments *Görgülü* and on preventive detention, the role of the courts in implementing ECtHR judgments has become clearer. Courts have to take the ECtHR decision into account, but the Constitutional Court has emphasised that they should not schematically apply it. This is particularly true in so-called multipolar fundamental rights situations in which the fundamental rights of two persons have to be weighed against each other.¹⁴³ Typical examples are family law cases such as the *Görgülü* case in which the right to family life of different family members are in conflict or press cases such as the *Von Hannover* case in which freedom of the press has to be balanced with freedom of expression. In those cases, the party that was not successful in the proceedings at national level brings the case to Strasbourg, but the other party that was successful in the proceedings at national level is not necessarily involved. It has the possibility, according to article 36, paragraph 2 of the ECHR, to participate in the proceedings as a third party, but this does not always happen. It is thus not guaranteed that its legal interests are properly represented at the level of the ECHR.

With regard to these cases, the Constitutional Court held:

Precisely in cases in which national courts, as in private law, have to structure multipolar fundamental rights situations, it is always important that various subjective legal positions are sensitively weighed against each other, and if there is a change in the persons involved in the dispute or a change in the actual or legal circumstances, this weighing up may lead to a different result. There may therefore be constitutional problems if one of the subjects of fundamental rights in conflict with another obtains an ECHR judgment in his or her favour against the Federal Republic of Germany and German courts schematically apply this decision to the private-law relationship, with the result that the holder of fundamental rights who has 'lost' in this case and was possibly not involved in the proceedings at the ECHR would no longer be able to take an effective part in the proceedings as a party.¹⁴⁴

The same concerns may be voiced with respect to decisions by UN treaty bodies. Contrary to the ECHR system, rules of procedure of UN treaty bodies do not provide for the possibility of third parties to participate in the proceedings before the UN human rights treaty body. This procedural inequality is enhanced – even if only in the perception of the party concerned – if the treaty body is a specialised one that does not decide on the basis of a comprehensive human rights treaty such as the ICCPR but on a treaty with a focus on a specific category of human rights (for example

142 See Kammergericht Berlin Case 9 W 128/04 (29 October 2004) (2005) 58 *Neue Juristische Wochenschrift* 605 606.

143 Critical Meyer-Ladewig (n 116 above) art 46 para 34.

144 BVerfG Case 2 BvR 1481/04 (n 74 above) para 50.

elimination of racial discrimination or elimination of discrimination against women).¹⁴⁵

To ensure that both parties to a multipolar human rights situation are represented in the proceedings before the ECtHR, Germany has adopted two important measures. Very often, the other party of a multipolar human rights situation does not know that proceedings are pending in Strasbourg. It is not informed by the Court and thus cannot participate in the proceedings on the basis of article 36 of the ECHR. To minimise this obstacle, the Commissioner for Human Rights Issues at the Federal Ministry of Justice and Consumer Protection has developed the practice of informing the other party of a multipolar human rights situation about the pending proceedings and the possibility to participate in them.¹⁴⁶ As the legal aid scheme administered by the ECtHR only covers applicants, but not third parties, many third parties have not made use of this possibility in view of the costs involved. To overcome this obstacle, the German *Bundestag* has recently adopted a law on legal aid for third parties in proceedings before the ECtHR.¹⁴⁷

4.5 Other means of implementation

4.5.1 National monitoring mechanisms

International law recommends and encourages the creation of independent national human rights institutions as a means to enhance compliance. Standards for such institutions are laid down in the UN principles relating to the Status of National Institutions (Paris Principles).¹⁴⁸ Recent human rights treaties go a step further and require the creation of specific national mechanisms for the implementation of the rights contained in the respective treaty.

The German Institute for Human Rights

The German Institute for Human Rights¹⁴⁹ was established in 2001 on the basis of a resolution of the German *Bundestag*. It operates in the legal form of a non-profit association and has been accredited with A-status according to the Paris Principles by the International Coordinating Committee. It is funded by the state, but acts independently. It has the task to promote and

¹⁴⁵ See the criticism expressed with regard to the *TBB* decision by CERD (n 43 above).

¹⁴⁶ See Wenzel (n 115 above) para 11.

¹⁴⁷ Gesetz zur Einführung von Kostenhilfe für Drittbetroffene in Verfahren vor dem Europäischen Gerichtshof für Menschenrechte of 20 April 2013 (Bundesgesetzblatt 2013 I 829).

¹⁴⁸ UNGA Res 48/134 (20 December 1993) UN Doc A/RES/48/134. See also Council of Europe Committee of Ministers Recommendation (97)14 (30 September 1997).

¹⁴⁹ See the *Deutsches Institut für Menschenrechte* website for information available at <http://www.institut-fuer-menschenrechte.de> (accessed 15 April 2015).

protect human rights through information, documentation, research, human rights education, policy advice for representatives of politics and society, international cooperation with other national human rights institutions and human rights bodies of the EU, the CoE, the OSCE and the UN. It does not have a mandate to deal with individual cases, a fact that has been criticised by UN treaty bodies.¹⁵⁰ The International Coordinating Committee has in addition emphasised the need for a stronger legal basis for the Institute.¹⁵¹ After long discussions and controversies, the basis has finally been laid for this recommendation to be followed in the near future.¹⁵²

Treaty-based monitoring mechanisms

According to article 33, paragraph 2 of the CRPD, member states shall establish an independent mechanism to promote, protect and monitor implementation of the Convention. In 2009, a monitoring mechanism for CRPD was created within the German Institute of Human Rights.¹⁵³ The mechanism *inter alia* monitors the implementation measures adopted at the level of the federation and the *Länder*, gives *amicus curiae* statements in court cases that concern questions of fundamental importance to the implementation of CRPD, consults with organisations active in the field of rights of people with disabilities and gives expertise to state institutions on the implementation of the Convention.

According to article 17 of the Optional Protocol to the Convention against Torture (OPCAT), states shall establish an independent national preventive mechanism for the prevention of torture at the domestic level. At a minimum it shall have the power to examine the treatment of persons deprived of their liberty in places of detention regularly, make recommendations to the relevant authorities and submit proposals and observations concerning existing or draft legislation (article 20). As the vast majority of cases of deprivation of liberty in Germany fall within the competence of the *Länder*, a double structure was needed. The National Agency for the Prevention of Torture (*Nationale Stelle zur Verhütung von Folter*)¹⁵⁴ encompasses the Federal Agency for the Prevention of Torture (*Bundesstelle zur Verhütung von Folter*) and the Joint Commission for the Prevention of Torture (*Länderkommission zur Verhütung von Folter*). The

150 See for example CESCR (24 September 2001) UN Doc E/C.12/1/Add.68 para 12; CESCR (12 July 2011) UN Doc E/C.12/DEU/CO/5 para 8; CRC (31 January 2014) UN Doc CRC/C/DEU/CO/3-4 para 18.

151 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights *Report and Recommendations of the Session of the Sub-Committee on Accreditation* (3-6 November 2008) <http://nhri.ohchr.org/EN/AboutUs/ICC/Accreditation/Pages/SCA-Reports.aspx> (accessed 15 April 2015) 7.

152 Bundestagsdrucksache 18/4421 (24 March 2015).

153 Monitoring-Stelle zur UN-Behindertenrechtskonvention <http://www.institut-fuer-menschenrechte.de/monitoring-stelle.html> (accessed 15 April 2015).

154 <http://www.nationale-stelle.de> (accessed 15 April 2015).

Federal Agency was established by an Administrative Order of the Federal Ministry of Justice on 20 November 2008¹⁵⁵ and is responsible for deprivations of liberty under the jurisdiction of the Federation, namely at detention facilities of the Federal Armed Forces (*Bundeswehr*), the Federal Police (*Bundespolizei*) and customs authorities. The Joint Commission operates on the basis of a *Staatsvertrag* of 25 June 2009¹⁵⁶ and is responsible for deprivations of liberty under the jurisdiction of the *Länder*, namely at prisons, facilities of the state police, facilities for the detention of persons awaiting deportation, closed child and youth welfare facilities, homes for the elderly and long-term care homes. CAT has criticised the lack of sufficient staff, financial and technical resources.¹⁵⁷

4.5.2 Human Rights impact assessment in the legislative process

Implementation of human rights treaties is likely to be greatly enhanced if the compliance of draft laws with international human rights is verified. UN treaty bodies have thus called on Germany to provide for a comprehensive and institutional human rights impact assessment in the legislative process.¹⁵⁸ The Council of Europe as well has recommended member states to ensure that there are appropriate and effective mechanisms in place at national level for systematically verifying the compliance of draft laws with the ECHR in the light of the case-law of the Court.¹⁵⁹

Germany does not have a comprehensive pre-legislative scrutiny mechanism designed specifically to ensure the compliance of draft laws with international human rights. But draft legislation and regulations are generally reviewed by the Federal Ministry of Justice and Consumer Protection with respect to their compliance with higher-ranking law. This includes not only constitutional and European Union law, but also international law, in particular the UDHR and the ECHR.¹⁶⁰

4.5.3 Accessibility

A major impediment to the implementation of international human rights in the domestic legal system is the lack of knowledge in the legal

¹⁵⁵ Bundesanzeiger no 182 4277.

¹⁵⁶ Reprinted *inter alia* in Gesetzblatt Baden-Württemberg of 7 December 2009 681.

¹⁵⁷ CAT (12 December 2011) UN Doc CAT/C/DEU/CO/5 para 13. The German Institute for Human Rights has also called for reforms see P Follmar-Otto *Die Nationale Stelle zur Verhütung von Folter fortentwickeln!* (2013).

¹⁵⁸ See for example CESCR (24 September 2001) UN Doc E/C.12/1/Add.68 para 14.

¹⁵⁹ Committee of Ministers Recommendation (2004) 5 of 12 May 2004 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights.

¹⁶⁰ Federal Ministries' Joint Rules of Procedure (*Gemeinsame Geschäftsordnung der Bundesministerien*) art 46; Handbook of Legal Drafting (*Handbuch der Rechtsförmlichkeit*) Part A.3 sec 8.

community about these treaties.¹⁶¹ In recent years, the German Government has enhanced its efforts to make international human rights, and in particular the ECHR, more accessible.¹⁶² Decisions by the UN treaty bodies and the ECtHR issued against Germany, reports submitted by Germany to UN treaty bodies, and the corresponding concluding observations are translated and distributed to the ministries and courts and are accessible via the website of the Federal Ministry of Justice and Consumer Protection. In addition, the Federal Ministry of Justice and Consumer Protection publishes a yearly report on ECtHR jurisprudence in cases against Germany and the implementation of ECtHR jurisprudence in Germany¹⁶³ and another report on important ECtHR jurisprudence in cases against other states.

German-language literature on the ECHR has abounded in recent years. It includes, *inter alia*, two commentaries addressed to legal practitioners and a commentary comparing the ECHR guarantees with the fundamental rights of the German Constitution.

5 Conclusion

Fundamental rights form the core of the German legal system. This fundamentally informs the way international human rights are implemented in Germany. For a long time, international human rights lacked visibility at the domestic level. The legal community was not sufficiently aware of these instruments. But the main reason was the more or less outspoken conviction of courts and public authorities that the German Constitution provided such an expansive protection of fundamental rights that it could not be topped by any international instruments.

In the last two decades this perception has changed. The Federal Constitutional Court has laid the foundations for a better implementation of international human rights in national law. The ECHR in particular has thus become a point of reference for courts. Major judgments issued against Germany in recent years have been the object of extensive scientific analysis and political debate.

161 Tomuschat (n 30 above) 124. With respect to Germany in particular see CESCR (12 July 2011) UN Doc E/C.12/DEU/CO/5 para 7; CEDAW (12 February 2009) UN Doc CEDAW/C/DEU/CO/6 para 22.

162 On these efforts see Lambert Abdelgawad & Weber 'The Reception Process in France and Germany' in Keller & Stone Sweet (n 77 above) 155.

163 This report is made by the executive to Parliament, see A Wittling-Vogel 'The role of the legislative branch in the implementation of the judgments of the European Court of Human Rights' in A Seibert-Fohr & ME Villiger (eds) *Judgments of the European Court of Human Rights – Effects and implementation* (2014).

UN human rights treaties still do not have the same degree of visibility and importance in Germany as the ECHR. The ICCPR in particular is overshadowed by the ECHR not only with respect to the number of individual applications but also with respect to references by German courts and legislative acts. This situation is unlikely to change. Whereas non-compliance with the ECHR and the ECtHR's jurisprudence engenders the risk of a binding ECtHR judgment against Germany, the HRC only issues non-binding views. In addition, the ECtHR's jurisprudence is more elaborate than that of the HRC not only because of the sheer number of judgments but also in view of their extensive reasoning. This facilitates implementation of the Convention guarantees. It is to be expected, however, that UN human rights treaties that focus on a specific aspect of human rights protection such as CRC and CRPD will gradually gain importance in Germany.

To ensure a better visibility of international human rights in Germany additional efforts in ensuring accessibility of international instruments and providing training to all relevant actors in the legal community are required. An additional promising tool is *amicus curiae* briefs by the national human rights monitoring mechanisms – so far they have proven to be very efficient in making courts aware of the existence of international human rights instruments and their requirements. Finally, even if the Federal Constitutional Court has found a way to ensure the precedence of international human rights treaties in the German legal system in spite of their rank as ordinary laws, the implementation of international human rights in Germany would be greatly enhanced if international human rights treaties would be accorded constitutional status. Unfortunately, however, this is not likely to happen in the near future.

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CHAPTER 12

INTERNATIONAL HUMAN RIGHTS LAW IN SOUTH AFRICA

*Lilian Chenwi**

1 Introduction

The importance of human rights is underscored in the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), which not only includes a comprehensive Bill of Rights in Chapter 2 of the Constitution but also includes provisions, such as sections 39(1) and 233, on the important role of international (human rights) law in the interpretation of these rights, and section 37(4), on ensuring consistency between legislation enacted during a state of emergency with South Africa's relevant obligations under international law. The pertinent constitutional provisions have enabled the courts to invoke international human rights norms and decisions when interpreting and enforcing the rights in the Constitution.

Such a system of national protection of human rights is important because the 'effective protection of human rights must come from within the state'.¹ The international human rights system requires states to comply with their obligations by 'either observing national law (constitutional or statutory) that is consistent with international norms, or making the international norms themselves part of the national legal and political order'.² South Africa is unquestionably formally committed to international human rights law and it is important that this translates to its effective implementation at the domestic level.

This chapter examines the import of international human rights law in the South African legal order. Issues considered include the relevant international human rights law obligations, the extent to which these obligations have been incorporated and implemented in the domestic legal

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1 P Alston & R Goodman *International human rights* (2013) 1047.

2 As above.

order, any challenges in their implementation and the role of the courts in applying and developing international human rights law in South Africa.

2 Relevant regional human rights law obligations

2.1 The development of human rights law in Africa

The notion of ‘human rights’ in Africa, as Bience Gawanas explains, ‘has strong roots in the struggle against colonialism and apartheid’.³ Since colonialism and apartheid resulted in gross and systematic human rights violations and the oppression of people, African states and peoples used human rights standards to substantiate their struggle against colonialism and apartheid.⁴ However, the development of human rights can be traced back to traditional African societies or pre-colonial times. As Frans Viljoen observes, ‘there is little doubt that “human rights” (but perhaps not “human rights law”) existed in traditional (pre-colonial Africa)’.⁵ He distinguishes human rights from human rights law as follows: the former refers to moral claims that can be invoked while the latter refers to ‘the manifestation of these claims in positive law’.⁶ The focus of this section is on the latter – human rights law.

The development of human rights law in Africa can be traced from the years preceding the formation of the Organization of African Unity (OAU),⁷ the predecessor to the African Union (AU).⁸ The call for the adoption of ‘an African Convention on Human Rights’ was first made in 1961 at a conference in Lagos, Nigeria under the theme of ‘the Rule of Law’ where African jurists participated.⁹ The call was, however, not heeded to, as can be seen from two instruments subsequently adopted. First, the OAU Charter, which only made reference to the Universal Declaration of Human Rights of 1948 (Universal Declaration) and the need for member states to give ‘due regard’ to it,¹⁰ and the Charter contained weak references to ‘health, sanitation and nutritional cooperation’.¹¹ Notwithstanding this, the OAU’s focus on self-determination and decolonisation resulted in recognition of rights.¹²

3 B Gawanas ‘The African Union: Concepts and implementation mechanisms relating to human rights’ in A Bösl & J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009) 136.

4 Gawanas (n 3 above) 136 - 137.

5 F Viljoen *International human rights law in Africa* (2nd edn 2012) 4.

6 Viljoen (n 5 above) 3.

7 The OAU was established in 1963, with the adoption of the OAU Charter.

8 The AU was established in 2000 with the adoption of the adoption of the AU Constitutive Act.

9 Viljoen (n 5 above) 411.

10 Charter of the Organization of African Unity (OAU Charter) (25 May 1963) Preamble & art 2(1)(e).

11 OAU Charter (n 10 above) art 2(2)(d).

12 Viljoen (n 5 above) 157.

Second, the Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 (African Refugee Convention), which South Africa acceded to on 15 December 1995, failed to include explicit human rights provisions that refugees could enforce against states. Whether the African Refugee Convention is in fact a human rights instrument and thus a source of international human rights law is debatable.¹³

Despite this disenchanting state of human rights law in the 1960s, as seen in section 2.2 below, human rights law in Africa has developed, with the adoption of treaties at both the regional and sub-regional levels. In addition, there is the existence of soft law that includes specific references to human rights that can be enforced against states as well as duties on states and individuals.

2.2 Sources of human rights law in Africa

The sources of human rights law in Africa can be found in both binding and non-binding instruments. Treaty law has become an important source of human rights law in Africa. There is also increasing recognition of soft law as a source of human rights law.¹⁴ Furthermore, bodies have been established to oversee implementation of human rights treaties in Africa and to enforce the standards in the treaties in cases of violations. The jurisprudence, concluding observations and recommendations of these bodies, in addition to treaties, are relevant sources of human rights law obligations.

Though the focus in the subsections below is on African regional and sub-regional treaties, it should be noted that international human rights treaties are also a source of human rights obligations and relevant to African states, as they are parties to various international human rights treaties. This chapter does not go into any further discussion on international human rights treaties as a source of international human rights law and obligations, as it has been considered in the chapter by Nicola Wenzel in this book.

It should, however, be noted in relation to South Africa that though it was one of the states that abstained from voting on the adoption of the Universal Declaration, it has subsequently, following its transition to democracy, ratified various international human rights treaties. These include:

- the International Covenant on Civil and Political Rights of 1966 (CCPR) – ratified on 10 December 1998;

13 See F Viljoen 'The African regional human rights system' in C Krause & M Scheinin (eds) *International protection of human rights: A textbook* (2009) 504.

14 Viljoen (n 5 above) 22.

- the International Covenant on Economic, Social and Cultural Rights of 1966 (CESCR) – ratified on 12 January 2015;
- the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (CERD) – ratified on 10 December 1998;
- the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW) – ratified on 15 December 1995 (South Africa also ratified the Optional Protocol to CEDAW on 18 October 2005);
- the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 1984 (CAT) – ratified on 10 December 1998 (South Africa also signed the Optional Protocol to CAT on 20 September 2006 but is yet to ratify it);
- the Convention on the Rights of the Child of 1989 (CRC) – ratified on 16 June 1995 (South Africa also acceded to the Optional Protocol to CRC on the sale of children, child prostitution and child pornography (OPSC) on 30 June 2003 and ratified the Optional Protocol to the CRC on the involvement of children in armed conflict (OPCA) on 24 September 2009); and
- the Convention on the Rights of Persons with Disabilities of 2006 (CRPD) – ratified on 30 November 2007.

2.2.1 African regional human rights treaties

African regional treaties have been adopted, which are not just a source of human rights law in Africa but also highlight the human rights law obligations of states. With regard to obligations, though I focus in this section on highlighting the general obligations clauses in the treaties identified because the clauses require states to incorporate human rights law in the domestic legal order, it must be emphasised that there are also specific obligations in relation to specific rights.

The African Charter on Human and Peoples' Rights of 1981 (African Charter), though seen by some as 'still relatively weak'¹⁵ with a "minimalist" approach to rights,¹⁶ is a turning point in terms of the development of international human rights law in Africa. The Charter is unique in its recognition of the indivisibility of human rights and group rights, amongst other unique features. The African Charter makes explicit reference to the general obligations of states in relation to the rights contained therein,¹⁷ human and peoples' rights (civil, political, economic, social, cultural and peoples' rights)¹⁸ and to the duties of individuals.¹⁹ States are obliged to 'recognise the rights, duties and freedoms' guaranteed

15 See for example W Kälin & J Künzli *The law of international human rights protection* (2009) 47.

16 Viljoen (n 5 above) 215.

17 African Charter on Human and Peoples' Rights (Banjul Charter) (27 June 1981, CAB/LEG/67/3 rev.5, 21 ILM 58 (1982) art 1.

18 n 17 above, arts 1 - 26.

19 n 17 above, arts 27 - 29.

in the Charter and 'adopt legislative or other measures to give effect to them'.²⁰ Thus, states have an obligation to incorporate the rights and obligations in the Charter into their domestic legal order. States are further required to ensure equality in the enjoyment of the rights and freedoms.²¹ South Africa ratified the African Charter on 9 July 1996, and is therefore required to comply with these obligations. The African Charter also includes measures of safeguard, and establishes and stipulates the mandate of the African Commission on Human and Peoples' Rights (African Commission), as a supervisory body of the Charter.²² The Commission in its jurisprudence, concluding observations, resolutions and other documents adopted has further clarified the human rights obligations of states.

In 1990, the African Charter on the Rights and Welfare of the Child (African Children's Charter) was adopted, with explicit references to rights pertaining to children²³ and correlating state obligations²⁴ as well as the duties of children²⁵. States have an obligation to 'recognise the rights, freedoms and duties' in the African Children's Charter and 'to adopt such legislative and other measures as may be necessary to give effect' to its provisions.²⁶ They are required to discourage any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the Charter.²⁷ South Africa is obliged to comply with these obligations, as it ratified the African Children's Charter on 7 January 2000. The African Children's Charter also provides for the establishment of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) to oversee its implementation.²⁸

In relation to the rights of women, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted in 2003 (African Women's Protocol), with the African Commission having the responsibility to oversee its implementation.²⁹ States are obliged to adopt 'appropriate legislative, institutional and other measures' aimed at eliminating discrimination against women in all its

20 African Charter (n 17 above) art 1.

21 African Charter (n 17 above) art 3.

22 n 17 above, arts 30 - 44.

23 See for example African Charter on the Rights and Welfare of the Child (African Children's Charter) (11 July 1990, CAB/LEG/24.9/49) arts 3 - 18.

24 n 23 above, art 1, is the general clause on state obligation and specific obligations are also provided in relation to specific rights as well as specific groups of children such as children in armed conflicts (art 22), refugees (art 23) and children of imprisoned mothers (art 30).

25 n 23 above, art 31.

26 n 23 above, art 1.

27 African Children's Charter (n 23 above) art 1(3).

28 n 23 above, arts 32 - 45.

29 See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) (11 July 2003) arts 2 - 24, in relation to specific rights guaranteed in the Protocol.

forms.³⁰ They are required to 'include in their national constitutions and other legislative instruments ... the principle of equality between men and women'.³¹ States are further required to adopt and effectively implement legislative and other measures aimed at promoting and protecting women's rights.³² South Africa ratified the African Women's Protocol on 17 December 2004 and thus incurs these obligations.

Other treaty law, though most of which are not per se human rights specific instruments, are also sources of human rights law and obligations in Africa.³³ These include: the African Youth Charter of 2006 – ratified by South Africa on 28 May 2009; the OAU Convention on the Prevention and Combating of Terrorism of 1999 (African Terrorism Convention) – ratified by South Africa on 07 November 2002; Protocol to the OAU Convention on the Prevention and Combating of Terrorism of 2004 (African Terrorism Protocol) – ratified by South Africa on 25 March 2007; African Convention on the Conservation of Nature and Natural Resources of 2003 (Revised African Conservation Convention) – ratified by South Africa on 23 April 2013; and the African Convention on Preventing and Combating Corruption of 2003 (African Corruption Convention) – ratified by South Africa on 11 November 2005.

2.2.2 African sub-regional (SADC) human rights treaties

Sub-regional instruments, as mentioned above, are also a source of human rights law and obligations, though their reach is limited in comparison to the reach of regional instruments or United Nations instruments. Of relevance to South Africa are instruments adopted by the Southern African Development Community (SADC), as South Africa is a member state of SADC (joining it in August 1994). Human rights is one of the principles according to which SADC members have to act, as explicitly stipulated in the Treaty of the Southern African Development Community (SADC Treaty) of 1992, as amended in 2001.³⁴ Its inclusion has been attributed to the 'denial of human rights' experienced by Southern African countries more than their other African counterparts.³⁵ Observance of human rights has also been subsequently included as one of the criteria for membership.³⁶ SADC member states are required to 'take all steps necessary to ensure the uniform application of this Treaty' and 'accord this

30 African Women's Protocol (n 29 above) art 2(1).

31 African Women's Protocol (n 29 above) art 2(1)(a).

32 See for example, African Women's Protocol (n 29 above) arts 3(4), 4(2), 5 & 13.

33 These instruments, or in some instances relevant human rights parts, including some relevant soft law (eg declarations) are reproduced in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (5th edn 2013) 90 - 179.

34 Treaty of the Southern African Development Community (SADC Treaty) (17 August 1992, 32 ILM 116, 5 AJCL 418) art 4(c).

35 Viljoen (n 5 above) 483.

36 As above.

Treaty the force of national law'.³⁷ The implication of this provision is that member states have to give effect to the SADC treaty in their domestic legal order.³⁸ Also, people should be able to invoke the treaty in domestic courts, though this has generally not necessarily been the case due to non-compliance with the provision by member states.³⁹ South Africa acceded to the SADC Treaty on 29 August 1994, and is therefore required to give effect to the treaty in its domestic legal order.

In addition to the SADC Treaty, an important treaty that is a source of human rights law and obligations is the SADC Protocol on Gender and Development of 2008 (SADC Gender Protocol), which South Africa ratified in August 2011. States parties are required to 'harmonise national legislation, policies, strategies and programmes with relevant regional and international instruments related to the empowerment of women and girls for the purpose of ensuring gender equality and equity'.⁴⁰ They have to put in place 'necessary strategies, policies and programmes', 'enshrine gender equality and equity in their Constitutions' by 2015, and 'implement legislative and other measures' in order to protect the rights of women.⁴¹

Other SADC instruments with implications for human rights, and which can serve as a source of human rights law and obligations, include: the SADC Protocol on Education and Training of 1997, under which states have an obligation to maximise the effective use of 'existing regional expertise, institutions and other resources for education and training',⁴² amongst others; and the SADC Protocol on Health of 1999, which requires states to, amongst other principles and obligations, 'co-operate in addressing health problems and challenges facing them through effective regional collaboration and mutual support'.⁴³ South Africa is a signatory to both Protocols.⁴⁴

Generally, references to human rights in SADC instruments have been described as 'opaque and framed in overarching general terms with only limited references to specific international human rights treaties and other sources of international human rights law'.⁴⁵ The general human rights

37 SADC Treaty (n 34 above) art 6(4) & (5).

38 G Erasmus 'What has happened to the protection of rights in SADC' (2012) *TRALAC Trade Brief 2* (No S12TB01/2012). See also F Cowell 'The death of the Southern African development Community Tribunal's human rights jurisdiction' (2013) 13 *Human Rights Law Review* 155.

39 Erasmus (n 38 above) 2.

40 SADC Protocol on Gender and Development (Gender Protocol) (17 August 2008) arts 1(a) & 3(b).

41 See for example SADC Gender Protocol (n 40 above) arts 1(c), 4(1), 4(2), 7, 8(1), 8(4) & 8(5).

42 SADC Protocol on Education and Training (8 September 1997) art 2(c).

43 SADC Protocol on Health (18 August 1999) art 3.

44 See Department of International Relations and Cooperation 'Southern African Development Community (SADC)' <http://www.dfa.gov.za/foreign/Multilateral/africa/sadc.htm> (accessed 5 May 2015).

45 Cowell (n 38 above) 156.

references, however, resulted in the SADC Tribunal (established under the SADC Treaty) assuming a human rights mandate and subsequently deciding human rights and related cases.⁴⁶ In addition to applying the SADC Treaty and other SADC protocols, the Tribunal, in developing its jurisprudence, could apply 'applicable treaties, general rules and principles of public international law and any rules and principles of the law of States'.⁴⁷ The SADC Tribunal was thus a useful mechanism for enforcement of human rights treaties and standards until its suspension in August 2010,⁴⁸ a decision that has implications for the domestic enforcement of SADC treaties, protocols and declarations. While its suspension does not affect the validity of the SADC treaties and standards, it undermines their effective enforcement as there is currently no judicial body at the SADC sub-regional level to oversee implementation and ensure access to a remedy in cases of rights violations. Its suspension would have the effect of allowing 'the erosion of human rights in southern Africa to become entrenched'.⁴⁹

2.2.3 *Compliance control mechanisms as a specificity of human rights law*

As observed by Wenzel in her chapter in this book, '[a] specificity of human rights law is the existence of elaborate compliance control mechanisms at universal and regional levels'. National compliance control mechanisms are also relevant in complementing the universal and regional mechanisms. Wenzel goes further to elaborate on the compliance control mechanisms at the universal level and, to a limited extent, the African level. This section therefore focuses mainly on issues not dealt with by Wenzel in relation to the African regional level.

As mentioned in section 2.2.1 above, African regional human rights treaties make provision for the establishment of treaty bodies that oversee the implementation of the treaties and are able to consider complaints and assess state compliance through regular reports submitted to the bodies. While the African Commission and the African Children's Committees' decisions are non-binding, the African Court on Human and Peoples' Rights (African Court) issues binding decisions. As seen subsequently in section 4.6.2, at the time of writing, very few cases have been brought against South Africa before these bodies (one case before the African

46 The human rights cases were against Zimbabwe and are considered in Viljoen (n 5 above) 492 - 493.

47 Protocol on SADC Tribunal and Rules thereof (7 August 2000) art 21(a) & (b).

48 For further reading on the suspension of the SADC Tribunal, see M Makonese 'The SADC Tribunal conundrum – lawyers look to the African Court for direction' (2013) *De Rebus* 13 <http://www.saflii.org/za/journals/DEREBUS/2013/13.html> (accessed 5 May 2015).

49 B Freeth 'The suspension of the SADC Tribunal has serious implications for human rights in the region' (2011) <http://www.mikecampbellfoundation.com/page/sadc-tribunal-suspension-implications-for-human-rights> (accessed 5 May 2015).

Commission, which was unsuccessful and two before the African Court, which could not be considered for lack of jurisdiction. In that section, I also consider two cases brought against South African before the UN Human Rights Committee). On compliance with reporting obligation, despite state reporting being an important strategy to ensure compliance with international human rights norms, South Africa faces a considerable challenge in complying with its reporting obligations to human rights bodies and mechanisms.⁵⁰

A compliance control mechanism at the African regional level, which is similar in nature to the Universal Periodic Review Mechanism (UPR),⁵¹ considered briefly by Wenzel in her chapter, is the African Peer Review Mechanism (APRM). Like the UPR, the APRM is of a political nature. The APRM deals with a range of governance activities, human rights being one of the components.⁵² Once a state becomes a member of the APRM, the first country review – referred to as the ‘base review’ – is done within eighteen months. Periodic reviews are then undertaken every two to four years. States can also request that they be reviewed, for example, in situations of early signs of imminent political or economic crisis in a country. South Africa’s first review commenced in 2005 and was completed in 2006. One of the strengths of South Africa stemming from the APRM process was the existence of a political environment that is conducive to a good framework for the protection of human rights but translating the ideals into practice was noted as a challenge.

With regard to the sub-regional (SADC) level, the SADC Tribunal is also referred to in section 2.2.2 above, as a compliance control mechanism which has unfortunately been disbanded. There was no case against South Africa before the tribunal was disbanded but there has been a decision by a South African court regarding enforcement of one of the Tribunal’s decisions against Zimbabwe (→ De Wet/International Decisions).

At the national level, the South African Human Rights Commission (SAHRC) is key in relation to national compliance control mechanisms. Its mandate is to ‘promote respect for human rights and a culture of human rights’, ‘promote the protection, development and attainment of human

50 For further discussion on this, see generally, ME Olivier ‘Compliance with reporting obligations under international law: Where does South Africa stand?’ (2006) 31 *South African Yearbook of International Law* 179; and L Chenwi ‘Revisiting South Africa’s reporting obligations under human rights treaties and peer review mechanisms: Baby strides grinding to a halt?’ (2013) 37 *South African Yearbook of International Law* 187 - 216.

51 It should be noted that South Africa was one of the first countries to be reviewed under the UPR. South Africa was reviewed on 15 April 2008 but it failed to take its obligation seriously as it did not submit a state report prior to the interactive dialogue as required. However, South Africa later took its obligation seriously as it submitted a state report for its second review, which took place on 31 May 2012. For further reading on South Africa’s review under the UPR, see Chenwi (n 50 above) 209 - 213.

52 The APRM discussion here draws from Chenwi (n 50 above) 213 - 215.

rights', and 'monitor and assess the observance of human rights' in the Republic'.⁵³ Relevant organs of state are also required to report yearly to the Commission on measures taken to realise the rights to 'housing, health care, food, water, social security, education and the environment'.⁵⁴ The SAHRC's role has been further recognised in South Africa's declaration to the CERD. Upon ratification of the CERD, South Africa entered a declaration, while recognising the competence of the Committee on the Elimination of Racial Discrimination (CERD Committee) to receive complaints of violations of rights in the CERD, indicating that

the South African Human Rights Commission is the body within the Republic's national legal order which shall be competent to receive and consider petitions from individuals or groups of individuals within the Republic's jurisdiction who claim to be victims of any of the rights set forth in the Convention.⁵⁵

In addition to the SAHRC, activities in relation to compliance control, at some stage in the implementation process of human rights treaties, cuts across various departments, as it is seen as a cooperative process. However, some departments such as the Department of International Relations and Cooperation and the Department of Justice and Constitutional Development play a leading role, with the latter responsible for the compilation of most of the periodic reports to human rights treaty bodies as well as the Department of Women, Children and Persons with Disabilities responsible for reports relating to the vulnerable groups that the Department focuses on.

3 South Africa's participation in international human rights law-making

Apartheid policy resulted in South Africa's isolation from the international community (→ De Wet/Introduction). This policy was contrary to international human rights norms, as it was centred on the denial of human rights and racial discrimination and segregation. For four decades, up until 1990, conflict between South Africa and the international community and international law was ripe as a result of its practice of apartheid.⁵⁶ Strangely though, South Africa did, unintentionally, contribute to the development of international (human rights) law, as can be seen from the treaty and customary rules that emerged, to promote racial equality, human rights and decolonisation, in response to

53 The Constitution of the Republic of South Africa, 1996, sec 184(1).

54 The Constitution (n 53 above) sec 184(4).

55 Reservations and declarations under the CERD are available at United Nations treaty collection website https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (accessed 5 May 2015).

56 J Dugard 'International law and the South African Constitution' (1997) 1 *European Journal of International Law* 77.

apartheid.⁵⁷ Apartheid policy brought serious human rights abuses to the attention of the international community and drew its attention to the need for international law to protect rights.

South Africa's transition into democracy and the constitutional protection of human rights, however, saw a change in South Africa's attitude towards international law – a move from seeing it as a threat to the state, to viewing it as one of the cornerstones of the new democracy.⁵⁸ Also, the new government, unlike the apartheid government, 'was eager to be active internationally'.⁵⁹ South African constitutions prior to 1993 did not mention the place of international law or international human rights law in the South African legal order. The interim Constitution was thus a turning point, as far as human rights are concerned, in relation to the country's role on the international stage regarding human rights. It was thus 'clear that international law is to play a greater role in the new South African legal order, particularly in the field of human rights law'.⁶⁰ This was reinforced by the final Constitution. With its constitutional commitment to human rights and preoccupation with human rights issues, South Africa swiftly became a party to several human rights treaties such as the African Refugee Convention and the African Charter. South Africa now participates in international human rights law-making instead of unintentionally contributing to it through policies that are contrary to human rights.

In assessing South Africa's participation in international human rights law-making, it is important to consider its participation in the negotiation and drafting processes of human rights treaties or other processes through which states contribute to the development of international human rights law, its treaty-practice, how it engages with various treaty regimes and how South African human rights standards have influenced provisions in human rights treaties as well as the reservations or declarations made to treaties. It should be restated that South Africa is a party to the treaties mentioned above as well as other human rights related treaties.

Tiyanjana Maluwa has observed that 'South Africa has made positive contributions to the processes by which African states have contributed to the development of international law and international institutions',

57 See 'An assessment of South Africa's policy and practice pertaining to human rights since 1994' <http://www.thepresidency.gov.za/docs/pcsa/irps/olivier.pdf> (accessed 5 May 2015).

58 Dugard (n 56 above) 77.

59 J Barber 'The new South Africa's foreign policy: Principles and practice' (2005) 81 *International Affairs* 1082.

60 J Dugard 'The role of international law in interpreting the bill of rights' (1994) 10 *South African Journal on Human Rights* 210.

including participating in the 'elaboration and adoption' of treaties.⁶¹ This observation is based on a study that assesses the participation of South Africa in international law making processes in Africa, including a consideration of human rights treaties that South Africa is state party to. In relation to South Africa's contribution at the African regional level, Maluwa cites South Africa's 'pivotal role in the deliberations leading up to the adoption of the Sirte Declaration'.⁶² This Declaration gave birth to the Constitutive Act establishing the AU. At the deliberations, there were differences in opinion on the nature of the AU but South Africa was one of the key players in the consultations and debates in order to ensure that these differences do not undermine the goal, which was support for the AU.⁶³ South Africa is also one of the states that initiated the New Partnership for Africa's Development, which has as one of its objectives, the promotion and protection of human and peoples' rights within African countries and in the region.⁶⁴ At the SADC region, South Africa assumes a leadership role and has championed the activities of SADC in relation to norm-creation and standard-setting through the adoption of protocols on various issues, including human rights related issues.⁶⁵ South Africa is seen as the driving force behind SADC's agenda for the promotion of human rights, the rule of law, democracy and peace within the sub-region.⁶⁶

In terms of participation in the elaboration and adoption of treaties, it should be noted that the Constitution assigns the power to negotiate international treaties to the national executive.⁶⁷ With this power, the executive has sought to play a significant role in the elaboration of treaties. Recent human rights treaties that have been adopted are instructive in this regard. For example, South Africa played a key role in the elaboration and adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights of 2008 (Optional Protocol to the CESCR),⁶⁸ which also illustrates how South Africa's human rights jurisprudence was useful in the drafting process and influenced provisions in the Protocol. In particular, South Africa's socio-economic rights jurisprudence was instrumental in informing some of the discussions in

61 T Maluwa 'The African Union, the Southern African Development Community, and the new partnership for Africa's development: Some observations on South Africa's contribution to international law-making and institution-building in Africa, 1994-2004' (2004) 29 *South African Yearbook of International Law* 22.

62 n 61 above, 10.

63 Maluwa (n 61 above) 10.

64 Maluwa (n 61 above) 13.

65 Maluwa (n 61 above) 12.

66 Maluwa (n 61 above) 12.

67 n 53 above, sec 231(1).

68 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Resolution adopted by the General Assembly (OP-ICESCR) (5 March 2009, A/RES/63/117) South Africa has sadly not signed or ratified the OP-ICESCR.

relation to the content of the Optional Protocol.⁶⁹ In fact, one of the provisions in the Protocol – the framing of article 8(4)'s reasonableness standard – was informed by South Africa's jurisprudence. As confirmed by Bruce Porter,

wording was taken from the *Grootboom* decision of the South African Constitutional Court, where that Court first described its approach to reasonableness review in relation to the right of access to adequate housing in article 26 of the South African Constitution.⁷⁰

He adds that

[t]he incorporation of wording from the *Grootboom* judgment suggests, as does the drafting history, that just as the South African Constitutional Court has incorporated jurisprudence from the CESCER into its own domestic jurisprudence, so has South African jurisprudence now informed the text of an international human rights instrument.⁷¹

In addition to participating in treaty making processes at the UN level, South Africa's assumption of two terms as a non-permanent seat in the Security Council – from 2007 to 2008 and from 2011 to 2012 – presented an opportunity for it to contribute to international human rights law-making. The Security Council assumes the role of international law-maker, as through its enforcement powers, it adopts legally binding normative resolutions.⁷² South Africa's assumption of its first term was thus 'widely hailed as a momentous achievement for South Africa, signifying South Africa's newly-assumed leadership position in international relations and human rights'.⁷³ This was, however, followed by criticisms relating to some positions it took, especially where human rights were at issue.

Thus, despite the above contributions by South Africa to international human rights law-making, its attitude has, however, been inconsistent, with it adopting certain positions that are questionable. For example, South Africa's vote against a UN Security Council resolution on the basis that the situation in Myanmar was not a threat to international peace and security, despite the fact that there were gross human rights violations in Myanmar.⁷⁴ Bluntly put, South Africa, arguably, viewed the gross human rights violations in the case as an internal issue. As a general principle, and

69 See for example, Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its second session, UN Doc E/CN.4/2005/52 (2005) para 21 confirming that cases from South Africa was cited.

70 B Porter 'The reasonableness of article 8(4) – Adjudicating claims from the margins' (2009) 27 *Nordic Journal of Human Rights* 49.

71 n 70 above, 50.

72 J Dugard *International law: A South African perspective* (4th edn 2011) 488.

73 D Tladi 'Strict positivism, moral arguments, human rights and the Security Council: South Africa and the Myanmar vote' (2008) 8 *African Human Rights Law Journal* 24.

74 See Tladi (n 73 above) 23, 25 & 26 - 27.

irrespective of where they occur, human rights violations should be condemned by the international community, including the taking of necessary action to prevent further violations.⁷⁵ Though this position is contested as Dire Tladi illustrates in his article,⁷⁶ it thus raises concern in terms of inconsistent behaviour on the part of South Africa in international settings in relation to addressing serious human rights violations/issues. One could also, arguably, see South Africa's non-prevention of the abolition of the SADC Tribunal, as another example of inconsistent behaviour, especially bearing in mind the decision by a South African court regarding the enforcement of the Tribunal's decision against Zimbabwe (→ De Wet/International Decisions).

Furthermore, South Africa, infrequently, maintains reservations and declarations to some human rights treaties. For example, one of the reservations made by South Africa to the African Women's Protocol has been an issue of concern. The African Commission has thus asked South Africa to '[c]onsider lifting the reservation made on article 6(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa'.⁷⁷ Article 6(d) of the Protocol provides:

States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

...

(d) every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised;

South Africa's reservation reads:

The Republic of South Africa makes a reservation and will consequently not consider itself bound to the requirements contained in article 6(d) that a marriage shall be recorded in writing and registered in accordance with national laws in order to be legally recognised. This reservation is made in view of the provision of section 4(9) of the Recognition of Customary Marriages Act, 1998 (Act No 120 of 1998), which stipulates that failure to register a customary marriage does not affect the validity of that marriage, and is considered to be a protection for women married under customary law.

While the reservation is justifiable in terms of protecting 'women married under customary law', it is problematic in that South Africa, through the reservation and its reliance of domestic legislation, has invoked its domestic law in order not to comply with a treaty obligation, contrary to

⁷⁵ Tladi (n 73 above) 36.

⁷⁶ See generally Tladi (n 73 above).

⁷⁷ African Commission Concluding observations and recommendations on the first periodic report of South Africa, 31st ordinary Session (2005) para 29 (African Commission CO: South Africa).

article 27 of the Vienna Convention on the Law of Treaties of 1969 (VCLT).⁷⁸

South Africa's ratification of the ICESCR, though plausible considering the considerable delay in ratification, comes with it an issue of concern. South Africa has entered a declaration in relation to the right to education (specifically articles 13 and 14 of the ICESCR), which reads: 'The Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in article 13(2)(a) and article 14, within the framework of its National Education Policy and available resources.'⁷⁹ Considering the absence of a blanket application of 'progressive realisation' to the right to education in the Constitution, with the right 'to a basic education, including adult basic education' not subject to progressive realisation as seen from the phraseology,⁸⁰ a blanket declaration as intended could have the effect of limiting the effective enforcement of this right, and its entitlements. Any declaration under the ICESCR that is interpreted and applied in a way that limits this right will be contrary to South Africa's constitutional and international human rights commitments.

4 Incorporation and implementation of international human rights law in South Africa

The need for incorporation and how incorporation should take effect in terms of section 231 of the Constitution have been considered in this book (→ De Wet/Introduction). I therefore do not go into a detailed discussion on the process of incorporation but focus here, mainly, on whether international human rights obligations have in fact been incorporated into the South African legal order and the extent of their implementation. It should be noted that South Africa follows both a dualist and monist approach, in relation to the incorporation of customary and treaty human rights law, as seen from sections 231 and 232 of the Constitution.

4.1 International human rights treaties

A flexible approach is adopted by international human rights treaties in relation to their incorporation into domestic law, so that the particular circumstances of each state can be taken into account. Treaties normally

78 Vienna Convention on the Law of Treaties (the Vienna Convention) (23 May 1969, 1155 UNTS 331) art 27 provides that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

79 See United Nations, Reference: C.N.23.2015.Treaties-IV.3 (Depositary Notification), International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966 – South Africa: Ratification, <https://treaties.un.org/doc/Publication/CN/2015/CN.23.2015-Eng.pdf> (accessed 19 January 2015).

80 n 53 above, sec 2(91).

require states to use appropriate means, including the adoption of legislation and other measures when incorporating a treaty into domestic law.⁸¹ Section 231(4) of the Constitution requires the incorporation of treaties into domestic law through national legislation, with the exception of self-executing treaties. South Africa has ratified various human rights treaties at both the UN and African regional level, which 'have either been domesticated through specific domestic legislation, or through already enacted legislation that accommodates the principles contained in the instruments'.⁸² This section focuses on looking at the incorporation of key human rights treaties (at both the UN and African regional level that have been ratified by South Africa) and the obligations in them into South African domestic law and any challenges or unique characteristics in this regard.

It should be emphasised from the outset that South Africa's track record on implementation of human rights treaties is poor, with no database on treaties implemented, making it difficult to ascertain the extent to which treaties have been implemented, those that have been fully or partially implemented. Generally, South Africa's state reports to relevant treaty bodies do not adequately address this question either. Without the necessary detailed information, it is difficult to accurately classify the treaties as fully or partially implemented. Thus instead of categorising the subsequent sections into treaties that have been fully or partially implemented or treaties not implemented, I have focused on looking at key treaties at African and UN levels to see what information is available on their implementation.

4.1.1 Implementation of key African regional treaties

In terms of incorporation and implementation of regional human rights obligations, the African Charter and the African Women's Protocol have been partly incorporated into various legislative provisions on human rights and women rights.⁸³ A noteworthy aspect relates to the African Charter. The African Commission has commended South Africa for guaranteeing 'more rights than those guaranteed in the African Charter, including for example, the right to sports and leisure' and for using the

81 See for example International Covenant on Economic, Social and Cultural Rights (CESCR) (16 December 1966, UNTS 993) art 2(1); African Charter (n 17 above) art 1.

82 See 'South Africa's country report to the Human Rights Council's universal periodic review mechanism: 15 April 2008' para 18 http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/ZA/A_HRC_WG6_1_ZAF_1_E.pdf (accessed 5 May 2015). The report also lists the various human rights treaties South Africa has ratified (see for example paras 10 & 14 of the report).

83 AG Assefa 'The impact of the African Charter and Women's Protocol in South Africa' in *The impact of the African Charter and Women's Protocol in selected African states* (2012) 164 - 165.

Charter 'in its bilateral as well as multi-lateral relations, including on issues of negotiations'.⁸⁴ It has, however, also noted that South Africa faces 'difficulties in ensuring the effective enjoyment of the rights in the Charter'.⁸⁵ While South Africa has generally made efforts to 'create awareness on the principles and provisions of the African Charter', a number of groups are not adequately informed of the Charter or the Commission and it is not clear how legislative and policy measures that have been put in place to give effect to the Charter have contributed to rights enhancement.⁸⁶

4.1.2 *Implementation of key UN treaties*

In addition to African regional treaties, South Africa, as noted above, has also ratified various UN treaties and has worked towards incorporating and implementing the obligations in those treaties into the domestic legal order. For example, in relation to the CAT, though the Constitution prohibits torture and cruel, inhuman and degrading treatment or punishment, it has taken South Africa over a decade to finally incorporate this treaty into its domestic legal system. The delay in incorporation resulted in the 'absence of a specific offence of torture, as well as of a definition of torture', including 'the absence of clear legal provisions in ... domestic legislation ensuring that the absolute prohibition against torture is not derogated from under any circumstances', an issue that the Committee against Torture had been concerned about.⁸⁷ Recently, the Prevention of Combating and Torture of Persons Act 13 of 2013 (Torture Act) was adopted, which is aimed at giving effect to South Africa's obligations under the Convention against Torture. The Preamble to the Act recognises South Africa's obligations under this treaty and particularly its obligation to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'. The specific obligations in relation to torture that South Africa seeks to give effect to in terms of the treaty are:

- (i) dignity and peace in the world;
- (ii) the promotion of universal respect for human rights and the protection of human dignity;
- (iii) that no one shall be subjected to acts of torture;⁸⁸

However, in its initial report to the Committee against Torture, South Africa highlighted challenges it faces in relation to the implementation of the CAT, including the issue of overcrowding in prisons, which

⁸⁴ n 77 above, paras 16 & 17.

⁸⁵ African Commission CO: South Africa (n 77 above) para 27.

⁸⁶ n 77 above, paras 20, 23 & 28.

⁸⁷ Committee against Torture Concluding observations on the initial report of South Africa, UN Doc CAT/C/ZAF/CO/1 (2006) paras 13 & 14.

⁸⁸ Prevention of Combating and Torture of Persons Act 13 of 2013 sec 2(1)(a).

undermines its 'efforts to comply with international norms and standards regarding safe custody and offender rehabilitation programmes'.⁸⁹ A challenge for South Africa that has limited its ability to effectively implement the CAT is ensuring that its justice system is 'respectful of human rights in general, and of the provisions of the [CAT] in particular'.⁹⁰

South Africa incorporated the CEDAW by adopting specific legislation.⁹¹ On the incorporation of the CEDAW, the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) has noted its concern that 'neither the Constitution nor other relevant legislation of the State party embodies the principle of substantive equality between women and men, or prohibits direct and indirect discrimination against women in accordance with article 1 of the [CEDAW]'.⁹² Still on the question of incorporation of the treaty, the CEDAW Committee urged South Africa 'to fully incorporate into [relevant legislation] the principle of equality between women and men in accordance with article 2(a) of the Convention, as well as to prohibit discrimination on the basis of sex, in line with article 1 and other relevant provisions of the Convention'.⁹³ The CEDAW Committee also noted a 'general lack of awareness of the Convention and its Optional Protocol [in the country], in particular among the judiciary and other law enforcement officials'; and the fact that 'women themselves are not aware of their rights under the Convention, or of the complaints procedure under the Optional Protocol, and thus lack the necessary information to claim their rights'.⁹⁴ Other challenges to implementation of the CEDAW include 'weak institutional capacity' of the relevant government department, compounded by 'inadequate human, financial and technical resources';⁹⁵ and 'the persistence of patriarchal attitudes and deep-rooted stereotypes concerning women's roles and responsibilities that discriminate against women and perpetuate their subordination within the family and society'.⁹⁶

89 South Africa: Initial report to the Committee against Torture, UN Doc CAT/C/52/Add.3 (2005) para 89.

90 Committee against Torture CO: (2006) para 12.

91 CEDAW Committee Concluding observations on the combined second, third and fourth periodic report of South Africa, UN Doc CEDAW/C/ZAF/CO/4 (2011) para 14 (CEDAW Committee CO: South Africa)

92 n 91 above, para 14.

93 n 91 above, para 15.

94 n 91 above, para 12.

95 CEDAW Committee CO: South Africa (n 91 above) para 18.

96 CEDAW Committee CO: South Africa (n 91 above) para 20.

In relation to the CRC, South Africa adopted the Children's Act 38 of 2005, aimed at incorporation and implementation of CRC.⁹⁷ One of the challenges to its full incorporation and implementation, as observed by the Committee on the Rights of the Child (CRC Committee), is the fact that 'law, and in particular customary law, still does not fully reflect the principles and provisions of the Convention'.⁹⁸ There is also the need to harmonise legislation so that it is in line with the CRC.⁹⁹

On the incorporation of the CRPD and South Africa's compliance with it, there is 'no specific national legal framework' for the CRPD, despite the obligation in article 33 of the CRPD requiring states to establish legal and administrative frameworks for the promotion, protection and monitoring of the CRPD as well as focal points and coordination mechanisms for its implementation.¹⁰⁰ Helene Combrinck has observed that the lack of a specific national legal framework for the CRPD weakens its effect in South Africa and 'without a legal framework, the Convention could at most be used by the courts for interpretive guidance'.¹⁰¹

In addition to the examples mentioned above, it should be noted that the considerable delay in reporting under the ICCPR (South Africa's first report is still pending since its ratification of the treaty in 1998), raises questions regarding the extent of its enforcement. Though much of the rights in the ICCPR are constitutionally incorporated, conformity of relevant pieces of legislation with the ICCPR is questionable. For example, during South Africa's second review under the UPR, a concern was raised regarding the conformity of the Protection of State Information Bill with ICCPR, particularly in relation to the 'excessive penalties for publication of classified information and the inclusion of a public interest defence' in the Bill.¹⁰²

4.2 Customary international human rights law

Customary international law would be a useful source of international human rights law and obligations as it fills in the gap that is created by the

97 The Children's Act also gives effect to other international documents such as the Hague Convention on Inter-country Adoption of 1993 and the Hague Convention on International Child Abduction of 1980. The preamble to the Act also explicitly refers to the African Children's Charter, CRC and the Universal Declaration, amongst other international documents.

98 CRC Committee Concluding observations to the initial report of South Africa, UN Doc CRC/C/15/Add.122 (2000) para 10 (CRC Committee CO: South Africa).

99 Parliamentary Monitoring Group 'South Africa's compliance with UN conventions on rights of persons with disabilities and rights of the child: Input by civil society' (2011), <https://pmg.org.za/committee-meeting/12656/> (accessed 5 May 2015).

100 As above.

101 As above.

102 Human Rights Council Report of the Working Group on the universal periodic review: South Africa, UN Doc. A/HRC/21/16(2012), para 124, Recommendation 124.101.

non-universal application of human rights treaties.¹⁰³ However, its importance in the field of human rights has been less due to the difficulties in determining custom with regard to the relationship between states and individuals.¹⁰⁴ Section 232 of the Constitution provides for direct incorporation of customary international law into South African legal order, 'unless it is inconsistent with the Constitution or an Act of Parliament'.¹⁰⁵ However, the relevance of customary international law has been negligible in practice (→ De Wet/Introduction).

4.3 Soft law in the field of human rights

Human rights soft law can be either in the form of resolutions or declarations from international or African organisations or bodies. They are generally not legally binding and hence do not create legal obligations on states, except where they reflect customary international law or are resolutions adopted by the UN Security Council acting under Chapter VII of the UN Charter. South Africa can incorporate resolutions into municipal law through legislation.¹⁰⁶ Otherwise, they serve as interpretative guide as explained below. While there is currently legislation permitting the President of South Africa to incorporate resolutions of the UN Security Council into domestic law, the legislation is not yet in force.¹⁰⁷

4.4 Legislative reception of international human rights law

'Legislative' in this section is used in two ways. The first understanding of the term relates to the influence of international human rights law in the Constitution and national legislation. The second understanding relates to the legislative body's (that is, parliament's) reception of international human rights law.¹⁰⁸

103 Viljoen (n 5 above) 29.

104 As above.

105 The direct incorporation of a customary international law principle into South African legal order is confirmed in *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC) (hereafter *SALC*), where the Constitutional Court held: 'Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm' (para 37).

106 Dugard (n 72 above) 61.

107 See Application of Resolutions of the Security Council of the United Nations Act 172 of 1993. The incorporation is to take the form of a proclamation of the resolution in the Government Gazette.

108 The information on South African parliament and international human rights law is drawn from L. Chenwi 'Using international human rights law to promote constitutional rights: The (potential) role of the South African parliament' (2011) 15 *Law, Democracy and Development* 320.

4.4.1 *The Constitution*

The Constitution and other pieces of legislation have either drawn from or made references to international human rights law. The Constitution, for example – the Bill of Rights in particular – is receptive to international human rights law in that it is not only ‘drawn entirely from several human rights instruments’ such as the Universal Declaration, the CESC and the International Covenant on Civil and Political Rights of 1966 (CCPR), but it also incorporates international human rights concepts such as the indivisibility and interdependence of rights.¹⁰⁹ Redson Kapindu observes as regards the socio-economic rights provisions in the Constitution that ‘the provisions of the [CESC] highly influenced the guarantees of these rights under the Constitution, both in terms of language and content’.¹¹⁰ Kapindu also cites Sandra Liebenberg, who observes as follows:¹¹¹

A perusal of the relevant minutes and memoranda prepared during the drafting process reveals the strong influence of international law on the drafting of the relevant sections protecting socio-economic rights. For example, the concepts of progressive realisation and resource availability in sections 26 and 27 were based on article 2 of the International Covenant on Economic, Social and Cultural Rights, 1966 (the ICESCR). According to the Technical Committee, this formulation has the dual advantage of facilitating consistency between South Africa’s domestic law and international human rights norms, and directing the courts towards a legitimate international resource for the interpretation of these rights.

The Constitutional Court has also observed that ‘[t]he internal evidence of the Constitution itself suggests that the drafters were well informed regarding provisions in international, regional and domestic human and fundamental rights instruments’.¹¹²

In addition to sections 231 and 232 already mentioned above, sections 37(4), 39 and 233 of the Constitution validate the reception of international human rights law in South Africa.

4.4.2 *National legislation*

Kapindu has considered the influence of international law in the development, interpretation and implementation of national legislation in

109 See PE Andrews ‘Incorporating international human rights law in national constitutions: The South experience’ in RA Miller & RM Bratspies (eds) *Progress in international law* (2008) 840, where this point is made.

110 RE Kapindu *From the global to the local: The role of international law in the enforcement of socio-economic rights in South Africa* (2009) vii.

111 n 110 above, 3 - 4.

112 *Bernstein & Others v Bester NO & Others* 1996 (2) SA 751 (CC) para 106.

the area of housing, health, social security and labour, which illustrates national legislation's reception of international human rights law.¹¹³ In the area of labour, for example, the Labour Relations Act 66 of 1995 states that the provisions of the Act must be interpreted 'in compliance with the public international law obligations of [South Africa]'.¹¹⁴ Based on 'the references to international law in the purposes of the legislation as expressed in the long title, the preamble as well as the operative provisions of the Act', Kapindu argues that the Act 'transforms the general international law on labour relations, particularly applicable [International Labour Organization] Conventions, into South African domestic labour law'.¹¹⁵ Also, the Employment Equity Act 55 of 1998 requires that its provisions be interpreted 'in compliance with the international law obligations of the Republic, in particular those contained in International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation'.¹¹⁶

Similar accommodation and promotion of international human rights law are found in legislation in, for example, the areas of equality and non-discrimination and refugees. The Preamble to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 recognises that, in addition to constitutional obligations,

South Africa also has international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination. Among these obligations are those specified in the Convention on the Elimination of All Forms of Discrimination [a]gainst Women and the Convention on the Elimination of All Forms of Racial Discrimination.

Accordingly, one of the objectives of the Act is

to facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.¹¹⁷

Furthermore, the Act should be interpreted in the light of 'international law, particularly the international agreements referred to in section 2 and customary international law'.¹¹⁸ The Refugees Act 130 of 1998 states that the 'Act must be interpreted and applied with due regard to' international

¹¹³ n 110 above, 30 - 36.

¹¹⁴ Labour Relations Act 66 of 1995 sec 3(c).

¹¹⁵ n 110 above, 31. Note that one of the explicit purposes of the Act is 'to give effect to obligations incurred by [South Africa] as a member state of the International Labour Organisation' (sec 1(b)).

¹¹⁶ Employment Equity Act 55 of 1998 sec 3(d).

¹¹⁷ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, sec 2(h).

¹¹⁸ Promotion of Equality and Prevention of Unfair Discrimination Act (n 117 above) sec 3(2)(b).

conventions or agreements.¹¹⁹ The provision explicitly refers to the Convention Relating to the Status of Refugees of 1951, the Protocol Relating to the Status of Refugees of 1967, and the African Refugee Convention, the Universal Declaration as well as 'any other relevant convention or international agreement to which [South Africa] is or becomes a party'.

Furthermore, some policy documents require that legislation be compliant with international standards. For example, the Commission for Gender Equality's Strategic Plan 2008-2013 requires that 'national legislation and policy frameworks comply with all international gender-based violence instruments/protocols to which the South African government is a signatory'.¹²⁰ It further requires the development and implementation of 'a system to ensure that all legislation passing through Parliament and provincial legislatures is scrutinised from a gender equality perspective and complies with relevant adopted international, regional and sub-regional declarations and frameworks'.¹²¹

4.4.3 *Parliament*

Generally, national parliaments play an important role in not only the integration of international human rights instruments and standards within the domestic human rights system but also the translation of the ideals in treaties into concrete actions and benefits. Their role in 'promoting conformity between domestic legislation and the principles and provisions' of treaties has been acknowledged, with specific reference to the CRC example.¹²²

Parliaments' reception to international law can thus be illustrated in two ways. First, through the role it plays in the incorporation of treaties into domestic law, as stipulated in section 231 of the Constitution. Second, parliament can ensure the effective implementation of rights and obligations in international human rights treaties that South Africa has ratified, when exercising its legislative, budgetary and oversight functions. It can review existing and new legislation in terms of its compliance with international human rights law or use international human rights law in scrutinising governmental action or engage with government or relevant bodies on South Africa's compliance with treaties that it has ratified. South African parliament's reception of international human rights law can thus

119 Refugees Act 130 of 1998 sec 6(1).

120 Commission for Gender Equality, *Strategic plan 2008-2013* 35 http://www.gov.za/sites/www.gov.za/files/cge%20strategic%20plan_0.pdf (accessed 5 May 2015).

121 Commission for Gender Equality (n 120 above) 41.

122 MS Pais 'The role of parliament in fulfilling the Convention on the Rights of the Child' Statement by the UN Special Representative of the Secretary General on Violence against Women (2010) 2.

be seen from instances where it has established committees to oversee the implementation of international human rights treaties.

An example in this regard is the establishment, in 1996, of the Joint Committee on the Improvement of Quality of Life and Status of Women, as an Ad Hoc Committee and later a Standing Committee, with a mandate to ensure improvement in the quality of life of women in South Africa through monitoring and overseeing the implementation of the CEDAW, the Beijing Platform for Action and other applicable international instruments. This Committee played an instrumental role in the development of legislation on domestic violence and sexual offences against women. Another example is parliament's engagement with the Commission on Gender Equality on the extent of South Africa's compliance with CEDAW as well as human rights soft law such as the 1995 Beijing Platform for Action.¹²³ Parliament has also been involved in activities aimed at ensuring that South Africa complies with its commitments with regard to the Millennium Development Goals (MDGs).¹²⁴

While there are some examples illustrating parliament's reception of international human rights law, parliament's use of international human rights law is however limited. It is unclear what the precise reasons for this limited use are, but this could be partly attributed, and arguably so, to lack of knowledge of the precise contents and obligations in the human rights treaties. The uncertainty as regards the partial or full domestication of some treaties could be a contributing factor. Notwithstanding, this poor implementation record is of concern considering that there are opportunities within the mandate of parliament to improve the implementation of human rights treaties at the domestic level. The UN Committee on the Elimination of Discrimination against Women has seen the legislative, budgetary and oversight functions of parliament as being at the heart of the implementation of principles and rights in international human rights treaties.¹²⁵ The Inter-Parliamentary Union has thus called on parliaments to take appropriate action at the national level to ensure that 'the provisions of national laws and regulations are harmonised with the norms and standards contained in [international] instruments with a view to their full implementation'.¹²⁶

123 The examples are drawn from Chenwi (n 108 above) 324 - 325.

124 Chenwi (n 108 above) 326 - 327.

125 Committee on the Elimination of Discrimination against Women 'National parliaments and the Convention on the Elimination of All Forms of Discrimination against Women' (nd) para 4 <http://www2.ohchr.org/english/bodies/cedaw/docs/statements/Parliamentarians.pdf> (accessed 5 May 2015).

126 Inter-Parliamentary Union 'Strong action by national parliaments in the year of the 50th anniversary of the Universal Declaration of Human Rights to ensure the promotion and protection of all human rights in the 21st century' Resolution adopted at the 100th Inter-Parliamentary Conference (Moscow, 11 September 1998) para 1(iii).

4.5 The role of South African courts in applying and developing international human rights law

4.5.1 *The obligation to consider international human rights law as an interpretative guide*

The recognition given to international law in the South African Constitution and the subsequent interpretation given to the relevant provisions by the courts are unique and noteworthy characteristics of the Constitution and the approach of the courts in applying international law. The attitude of the courts changed dramatically since 1994, especially following the new constitutional order and the provisions on international law contained in the Constitution.

The Constitution requires South African courts to consider international law, and the courts have accordingly invoked both binding and non-binding international human rights law when interpreting and enforcing rights in the Constitution. Section 39 of the Constitution requires the consideration of international law in the interpretation of the Bill of Rights. Section 233 goes further, by requiring courts to give preference to 'any reasonable interpretation of [a] legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'. South African courts can, therefore, not disregard international human rights law.

The Constitutional Court has thus held that 'where applicable, public international law in the field of human rights *must* be considered'.¹²⁷ This would include both binding and non-binding international human rights law, to be used 'as tools of interpretation'.¹²⁸ The Constitutional Court also held as follows:

International agreements and customary international law accordingly provide a framework within which [the bill of rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of [the bill of rights].¹²⁹

See also Inter-Parliamentary Union '50th anniversary of the Universal Declaration of Human Rights' Resolution adopted by the Inter-Parliamentary Council at its 161st session (1997) para 3(ii).

¹²⁷ *Bernstein* (n 112 above) para 133 (emphasis added).

¹²⁸ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 35. The case concerned the constitutionality of the death penalty.

¹²⁹ As above (footnotes omitted).

The above was later confirmed by the Court in a subsequent case, but with a qualification in relation to the weight to be given to a rule of international law. The Court held that 'relevant international law can be a guide to interpretation'; however, 'the weight to be attached to any particular principle or rule of international law will vary' and 'where the relevant principle of international law binds South Africa, it may be directly applicable'.¹³⁰

It is evident that the Constitutional Court has adopted a liberal approach by also relying on non-binding instruments. This could have implications for the standing of non-binding decisions against South Africa in the domestic legal order. This is because, while decisions of UN and African monitoring treaty bodies, for example, are not per se binding, it opens the possibility for an argument that the Constitution (through section 39 and the way it has been interpreted by the courts) obliges the courts, as well as the government, to at least give them some due consideration.

International human rights obligations can thus be applied by the courts either directly or indirectly. But how have the courts fared in this regard? The subsequent section considers examples of instances in which the courts have accommodated or promoted international human rights law.

4.5.2 Tendencies to accommodate and promote international human rights law in the jurisprudence of South African courts

Based on the obligation placed on the courts in sections 39 and 233 of the Constitution, the courts have accommodated, as well as promoted, international human rights law in their jurisprudence. As John Dugard rightly observes, 'the Constitutional Court and ordinary courts have shown a great willingness to be guided by international human rights law'.¹³¹ The focus has, however, been treaties, jurisprudence, soft law (general comments of treaty bodies, particularly those at the UN level, with the exclusion of African Commission resolutions as well as decisions), and some references to writings on international human rights law. Exploration of customary international law in the interpretation of the Bill of Rights is lacking. Notwithstanding this limitation, in incorporating international human rights law in interpreting the Bill of Rights, the Constitutional Court, for example, as Andrews observes, 'has spawned an

130 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC) para 26.

131 n 72 above, 63.

international human rights jurisprudence that continues to be cited in many jurisdictions'.¹³²

An example can be seen in the *Grootboom* case, where the Constitutional Court considered international human rights law – the CESCER and soft law (general comments from the relevant treaty body) in particular – when interpreting the right to adequate housing, guaranteed in section 26 of the Constitution. The Court held that the extent to which the provisions of the CESCER can be a guide to interpreting section 26 of the Constitution is to be determined by considering the differences between the applicable provisions in the CESCER and the Constitution.¹³³ The differences pointed out by the Court related to the phrasings of the relevant provisions. The CESCER refers to 'a *right to adequate housing*' and section 26 of the Constitution refers to 'a *right of access* to adequate housing'; the CESCER also refers to the obligation of states 'to take *appropriate* steps', including legislative measures, and section 26 of the Constitution refers to South Africa's obligation 'to take *reasonable* legislative and other measures'.¹³⁴ The Court also considered relevant general comments of the Committee on Economic, Social and Cultural Rights (Committee on ESCR), noting amongst other things that the Committee 'has helpfully analysed [progressive realisation] in the context of housing'.¹³⁵ The Court found the Committee's analysis to be useful in relation to understanding the scope of the obligations of states and 'helpful in plumbing the meaning of "progressive realisation" in the context of [the South African] Constitution'.¹³⁶ It then concluded that '[t]he meaning ascribed to the phrase is in harmony with the context in which the phrase is used in [the South African] Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived'.¹³⁷

The Court was, however, not that accommodating of the Committee on ESCR's position in relation to the notion of minimum core content of rights. Though the *amici curiae* in the *Grootboom* case requested that the right to have access to adequate housing in the Constitution be interpreted as including an immediate enforceable minimum core obligation on the state, the Court rejected this, on the basis that the needs and opportunities for the enjoyment of the right have to be determined first and the fact that groups are differently situated, with varying social needs, makes such a determination impossible in the present case.¹³⁸ With the recent

132 n 109 above, 845. Andrews adds that 'the international human rights legal literature constantly references the transformative human rights jurisprudence of the South African Constitutional Court'.

133 *Grootboom* (n 130 above) para 28.

134 As above.

135 *Grootboom* (n 130 above) para 29 - 33, 45.

136 *Grootboom* (n 130 above) para 45.

137 *Grootboom* (n 130 above) para 45.

138 n 130 above, paras 27 - 29 & 32 - 33.

ratification of the CDESCR, and once it comes into force and is incorporated into domestic law, whether the Court adopts a similar position in post-ratification cases is a matter of wait and see.

The Constitutional Court also considered the jurisprudence of the European Court of Human Rights (ECtHR), the European Commission on Human Rights (EComHR) and the UN Human Rights Committee (HRC) in finding corporal punishment to be unconstitutional on the basis that it violates the prohibition of cruel, inhuman and degrading treatment or punishment guaranteed in the Constitution, the wording of which 'conforms to a large extent with most international human rights instruments'.¹³⁹ The Court, despite noting that '[i]nternational forums offer very little guidance with regard to the meaning to be given to each word, individually', relied on the relevant general comment of the HRC and the jurisprudence of the EComHR and ECtHR in understanding the meaning of the words '*cruel, inhuman and degrading*'.¹⁴⁰ The Constitutional Court has also found the Convention on the Rights of the Child of 1989 (CRC), the ICCPR and the African Children's Charter to be relevant interpretative sources for constitutional provisions relevant to the question of the rule of primogeniture.¹⁴¹ The Supreme Court of Appeal has relied on the CRC as well as UN Standard Minimum Rules for the Administration of Juvenile Justice, in holding that special consideration should be given to a juvenile offender.¹⁴²

The Labour Court has also applied international human rights law in deciding whether soldiers have a right to form a workers' union specifically for soldiers. The Court first recognised the fact that the 'Constitution accords international law a particular status and requires the application of international law when interpreting South African legislation', based on what the term 'employee' in the Labour Relations Act means.¹⁴³ The Labour Court referred to International Labour Organisation instruments and jurisprudence as well as the International Convention on the Rights of all Migrant Workers and Members of their Families of 1990.¹⁴⁴ In relation to the importance of the recommendations and conventions of the International Labour Organization in interpreting the rights in the Constitution, the Constitutional Court has held that they are 'one of the oldest existing international organisations, are important resources for

139 *S v Williams* 1995 (3) SA 632 (CC) paras 21, 26 & 27. The international instruments that the Court cited were art 5 of the Universal Declaration, art 7 of the CCPR, art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms & art 5 of the African Charter.

140 *Williams* (n 139 above) para 27.

141 *Bhe v Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC) para 55.

142 *Director of Public Prosecutions v P* 2006 (3) SA 515 (SCA) paras 15 - 16.

143 *Discovery Health Limited v Commissioner for Conciliation, Mediation and Arbitration & Others* 2008 (7) BLLR 633 (LC) paras 1 & 38.

144 *Discovery Health Limited* (n 143 above) paras 42-47.

considering the meaning and scope of “worker” as used in section 23 of our Constitution’.¹⁴⁵

Other examples of the Constitutional Court’s accommodation and promotion of international human rights law include using the obligations of South Africa under the Convention against Torture and the CRC to support the prohibition of corporal punishment in schools;¹⁴⁶ considering South Africa’s obligation to prosecute torture under the Convention against Torture, amongst others, in holding that South Africa has an obligation to investigate torture allegations in Zimbabwe (→ Gevers);¹⁴⁷ and invoking the African Charter in several judgments.¹⁴⁸ As regards the latter, Viljoen observes that the African Charter was invoked ‘mostly as a mere confirmation of existing constitutional provisions’.¹⁴⁹ For example, the Constitutional Court has used article 5 of the African Charter to validate the point that the prohibition of cruel, inhuman and degrading treatment or punishment in the Constitution is similar to provisions in international human rights treaties.¹⁵⁰ Despite some references to the African Charter in some judgments, its neglect is very evident in other judgments.¹⁵¹ Though the Court has invoked international human rights law as an interpretation guide, in some cases, however, employing international law might be ‘irrelevant or marginal’ in determining the constitutionality of legislation.¹⁵² Further, the courts have not only relied on international treaties but also relied on international human rights norms/soft law and jurisprudence.¹⁵³ Though the references to international human rights law in the jurisprudence of the courts is plausible, as observed by Kapindu, ‘there remains a lot of room for improvement in the analysis and interpretation of international law in constitutional (and more particularly, Bill of Rights) jurisprudence’.¹⁵⁴ Also, in their reliance on international human rights law, the courts have been sightless in relation to human rights law from the jurisprudence and soft law of relevant bodies at the African regional level. Where the African

145 *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 para 25.

146 *Christian Education of South Africa v Minister of Education* 2000 (4) SA 757 (CC) paras 13 & 40.

147 *SALC* (n 105 above) paras 35 & 38 - 39.

148 These judgments are considered in Viljoen (n 5 above) 538 - 541.

149 n 5 above, 538.

150 *Williams* (n 139 above) para 21.

151 Viljoen (n 5 above) 538 - 539, considers cases such as *AZAPO v President of the RSA* 1996 (4) SA 671 (CC) & *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), amongst others, which illustrate non-reference or under-utilisation of the African Charter (merely as background reference).

152 See Andrews (n 109 above) 851 - 851, where this is considered further with reference to case law.

153 In relation to norms, Dugard (n 74 above) 351 cites the example of *Prince v President of the Law Society, Cape of Good Hope* 2002 (2) SA 794 (CC) paras 104, 116 & 141 where the Constitutional Court considered international norms on freedom of religion, which it found not to outweigh the international law obligations of South Africa in terms of suppressing drug abuse.

154 n 110 above, 27.

Charter, for example, had been incorporated, it did not have any significant impact on the outcome of the case,¹⁵⁵ apart from merely serving as an interpretative guide.

4.6 Jurisprudence of international and African regional human rights bodies on South Africa's implementation of international human rights law

South Africa's reception to international human rights law can be seen through the jurisprudence by international and African regional human rights bodies that relate to South Africa, particularly what the bodies say about South Africa's compliance with and incorporation of international human rights norms. South Africa's reaction to the jurisprudence is also important in relation to its reception of international human rights norms, particularly where it is found to be in violation. There is, however, very limited jurisprudence from these bodies concerning South Africa.

4.6.1 Jurisprudence of African regional bodies

The African Commission was faced with a case against South Africa – *Prince v South Africa* (ACHPR)¹⁵⁶ – concerning the right to freedom of religion and its limitations; in particular, whether the use of cannabis, as part of a religious practice of the Rastafari faith, should be accommodated by the state. The challenge thus related to South Africa's failure to accommodate an exemption for sacramental use of cannabis by Rastafarians and whether it amounted to violations of relevant African Charter provisions. The African Commission found the restrictions and possession of the use of cannabis to be 'reasonable as they serve a general purpose and that the Charter's protection of freedom of religion [in article 8 of the Charter] is not absolute'.¹⁵⁷ It was thus found to be 'a legitimate limitation on the exercise of the right to freedom of religion within the spirit of article 27(2) cum article 8 [of the Charter]'.¹⁵⁸ The Commission was further of the view that because

the limitations are of general application, without singling out the complainant and his fellow Rastafari but applying to all across the board, they cannot be said discriminatory so as to curtail the complainant's free exercise of his religious rights.¹⁵⁹

155 Assefa (n 83 above) 167.

156 *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004).

157 *Prince* (n 156 above) para 43.

158 As above.

159 *Prince* (n 156 above) para 44.

The Commission did not also find a violation of the right to occupational choice in article 15 of the Charter,¹⁶⁰ and the rights to dignity and cultural life in articles 5 and 17(2) of the Charter, respectively.¹⁶¹

Of particular importance in the decision is the Commission's view on the principles of subsidiarity and margin of appreciation. It held that these principles underlie the African Charter, and 'establish the *primary* competence and duty of the respondent state to promote and protect human and peoples' rights within its domestic order'.¹⁶² The Commission did not support South Africa's 'implied restrictive construction of these two doctrines relating to the role of the African Commission', observing as follows:

Whatever discretion these two doctrines may allow member states in promoting and protecting human and peoples' rights domestically, they do not deny the African Commission's mandate to guide, assist, supervise and insist upon member states on better promotion and protection standards should it find domestic practices wanting. They do allow member states to primarily take charge of the implementation of the African Charter in their respective countries. In doing so, they are informed by the trust the African Charter has on member states to fully recognise and give effect to the rights enshrined therein. What the African Commission would not allow, however, is a restrictive reading of these doctrines, like that of the respondent state, which advocates for the hands-off approach by the African Commission on the mere assertion that its domestic procedures meet more than the minimum requirements of the African Charter.¹⁶³

4.6.2 Jurisprudence of UN bodies

The above case was subsequently taken to the UN Human Rights Committee – *Prince v South Africa* (HRC)¹⁶⁴ – which, like the African Commission, did not find a violation. The Human Rights Committee, in its decision, found South Africa to be compliant with the relevant provisions in the ICCPR. The Committee noted in particular that:

[T]he failure of the State party to grant Rastafarians an exemption to its general prohibition of possession and use of cannabis is, in the circumstances of the present case, justified under article 18, paragraph 3, and accordingly finds that the facts of the case do not disclose a violation of article 18, paragraph 1.¹⁶⁵

¹⁶⁰ *Prince* (n 156 above) paras 45 - 46.

¹⁶¹ *Prince* (n 156 above) paras 47 - 49.

¹⁶² *Prince* (n 156 above) paras 50 - 52. Emphasis added.

¹⁶³ *Prince* (n 156 above) para 53.

¹⁶⁴ *Prince v South Africa* (2007) AHRLR 40 (HRC 2007) UN Doc CCPR/C/91/D/1474/2006 (2007).

¹⁶⁵ *Prince* (n 164 above) para 7.3. Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR) (16 December 1966, 999 UNTS 171) reads: 'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include

Also, though the Committee found ‘that a general prohibition of possession and use of cannabis constitutes an unreasonable justification for the interference with’ rights under article 27 of the ICCPR, a violation was not found in the case based on the facts.¹⁶⁶ The Committee held that ‘the failure of the State party to provide an exemption for Rastafarians does not constitute differential treatment contrary to article 26’, considering that ‘the prohibition is based on objective and reasonable grounds’.¹⁶⁷

In a subsequent case, before the Human Rights Committee, against South Africa – *McCallum v South Africa*¹⁶⁸ – concerning the treatment of persons in detention, South Africa was found to be in breach of the ICCPR and international standards. The complaint raised the problem of ‘severe beatings and other ill-treatment’ during detention, ‘exposure to inhuman and degrading conditions of detention’, denial of access to medical care, and South Africa’s failure to effectively investigate allegations of ill-treatment and incommunicado detention of the complainant.¹⁶⁹ South Africa was not willing to cooperate with the Human Rights Committee in this case, and thus did not submit information to the Committee despite being requested to do so.¹⁷⁰ This non-compliance by South Africa is significant as it relates to the question of the standing of the Committee’s finding before South African national courts (mentioned earlier), and whether such non-compliance can be challenged before South African national courts with reference to section 39 of the Constitution and its interpretation by the Constitutional Court. It also relates to the question of the weight that the state is constitutionally mandated to give to such decisions, despite their non-binding nature. As mentioned earlier, the Constitutional Court’s liberal approach by relying on non-binding instruments opens the possibility for an argument that the Constitution (through section 39 and the way it has been interpreted by the courts) obliges the state to at least give such decisions some due consideration.

South Africa was found to be in violation of article 7 of the ICCPR prohibiting ‘torture or to cruel, inhuman or degrading treatment or

freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.’

166 *Prince* (n 164 above) para 7.4. Article 27 of the ICCPR reads: ‘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.’

167 *Prince* (n 164 above) para 7.5. Article 26 of the ICCPR reads: ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

168 Communication 1818/2008, *McCallum v South Africa* (2010) AHRLR 21 (HRC 2010) UN Doc CCPR/C/100/D/1818/2008 (2010).

169 *McCallum* (n 168 above) paras 3.1, 3.2, 6.2, 6.4 & 6.8.

170 *McCallum* (n 168 above) para 4.

punishment¹⁷¹ alone and read together with article 10(1) requiring that 'persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'¹⁷² and article 2(3) on access to a remedy in cases of rights violations.¹⁷³ South Africa was required: to 'provide the [complainant] with an effective remedy, including a thorough and effective investigation of the [complainant's] claims falling under article 7, prosecution of those responsible and full reparation, including adequate compensation'; to ensure that the complainant 'be treated with humanity and with respect for the inherent dignity of the human person and should benefit from appropriate health care'; and 'to prevent similar violations in the future' in terms of its human rights obligations.¹⁷⁴ South Africa has failed to implement the decision, with only partial implementation in relation to investigation of the allegations; and the government has been unreceptive to a civil challenge that would result in the complainant getting the necessary relief.¹⁷⁵

In addition to the above, two cases¹⁷⁶ have been brought before the African Court on Human and Peoples' Rights against South Africa. However, the cases could not be considered, on the basis of lack of jurisdiction, as South Africa has not entered the necessary declaration empowering non-governmental organisations or individuals to bring cases before the Court.¹⁷⁷

5 Conclusion

Human rights are at the core of South Africa's policies and practice. Despite the negative impact that the legacy of apartheid continues to have

171 *McCallum* (n 168 above) paras 6.5, 6.6 & 6.7.

172 *McCallum* (n 168 above) paras 6.8 & 7.

173 *McCallum* (n 168 above) paras 6.7, 7 & 8.

174 *McCallum* (n 168 above) para 8.

175 See 'McCallum v South Africa: Follow up (as of July 2011)' <http://ccprcentre.org/doc/OP1/Follow%20Up/FU%20SUM%201818%20South%20Africa.pdf> (accessed 5 May 2015); 'South Africa: OMCT calls for the effective implementation of the decision of the Human Rights Committee for acts of torture and other forms of ill-treatment' 26 November 2012 <http://www.omct.org/monitoring-protection-mechanisms/statements/south-africa/2012/11/d22041> (accessed 5 May 2015).

176 See Communication 002/2012 *Delta International Investments S.A., A.G.L. de Lange v South Africa* (30 March 2012) concerning allegations of torture and violation of the rights to dignity, non-discrimination, information, property and privacy guaranteed in the African Charter as well as South Africa's Constitution; and Communication 004/2012 *Emmanuel Joseph Uko and Others v South Africa* (30 March 2012) concerning allegations of violations of various provisions in the African Charter, African Children's Charter and ICCPR. Both cases can be accessed at <http://www.african-court.org/en/index.php/2012-03-04-06-09-25/new-acquisitions/2-home/189-application-no-004-2012-emmanuel-joseph-uko-and-others-v-the-republic-of-south-africa> (accessed 5 May 2015).

177 See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (9 June 1998) art 34(6) read with art 5(3).

on the full implementation of human rights treaties, South Africa has made significant efforts towards incorporating and implementing these treaties.

During apartheid, South Africa was not a party to various international human rights instruments and its human rights record was quite poor. But this situation changed from 1994 with South African's transition to democracy, its adoption of a constitution recognising human rights, and ratification of human rights treaties, amongst others. South Africa now participates in international human rights law-making instead of unintentionally contributing to it through policies that are contrary to human rights. The courts and other bodies in South Africa are now placed in a position to invoke and incorporate international human rights norms in promoting constitutional rights. However, the analysis and interpretation of international law in constitutional matters needs to improve, and further reliance made on international human rights law from the African region.

Effective domestication or incorporation, including through national legislation where required, is however crucial to ensure that human rights treaties ratified by South Africa are given due weight as well as become more visible. The absence of clear information on the extent of domestication, arguably, limits the extent to which human rights treaties are utilised. Effective incorporation of these treaties would enhance their implementation within the South African legal order.

Though South Africa has gone further to make significant contributions to international human rights law-making and legislative reception to international human rights law is generally plausible, its attitude has been inconsistent, with the government adopting positions that are questionable from a human rights perspective, and taking its human rights commitments into consideration. The adoption of a consistent approach that upholds human rights is crucial to South Africa's effective implementation of human rights norms and standards. Linked to this inconsistent attitude is the question of compliance with obligations, especially reporting obligations and human rights decisions of treaty bodies. Compliance with these obligations and decisions would facilitate implementation of the relevant international human rights treaties and human rights in general.

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G: International criminal law

CHAPTER 13

INTERNATIONAL CRIMINAL LAW IN GERMANY

*Kirsten Schmalenbach**

1 Germany's relevant international criminal law obligations

1.1 The development of international criminal law

It is a well-known fact that Germany's history is closely tied to the development of international criminal law, at least if the early 20th century is believed to be the point in time when the legal existence of crimes under international law gained universal acceptance. Indeed, all indications of pre-WWI individual criminal responsibility under international law have to be critically assessed with respect to the international law character of the domestically applied criminal rules.¹ It is, however, safe to say that the 1919 Versailles Peace Treaty is the first international treaty that established international criminal responsibility for war crimes in its articles 227 to 230. This novelty was not favourably received by German authorities, the judiciary or the public; rather it was considered part of the penalties imposed on the defeated German Reich by the Allied and Associated Powers. Reluctantly, war crimes trials were held in 1921 to try alleged German war criminals of WWI before the Supreme Court of the German Reich in Leipzig. It therefore comes as no surprise that the few convictions based on the German Criminal Code carried the stigma of 'token justice'.²

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1 Some writers argue that individual criminal responsibility for war crimes dates back to the middle ages also referring to the natural law theories of *Grotius* and *Vattel*, see E van Sliedregt *Individual criminal responsibility in international law* (2012) 4 with further references.

2 G Werle 'Deutschland und das Völkerstrafrecht: Zeitgeschichtliche Perspektiven' in F Jeßberger & J Geneuss (eds) *Zehn Jahre Völkerstrafgesetzbuch: Bilanz und Perspektiven eines 'deutschen Völkerstrafrechts'* (2013) 23.

Nevertheless, the Versailles Peace Treaty laid the foundation of modern international criminal law that was seized on after WWII in the 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (1945 Agreement). The 1945 Agreement and its annex, the Charter of the International Military Tribunal at Nuremberg (IMT Charter), ratified by 20 states, established an international military tribunal (article 1), whereas the IMT Charter enumerated and defined the punishable crimes under international law: crimes against peace, war crimes and crimes against humanity (article 6). The official position of defendants that could give rise to an immunity defence was not considered as freeing them from responsibility or mitigating punishment (article 7). Built upon the IMT Charter, the Allied Control Council adopted on 20 December 1945 the Control Council Law 10 (CCL 10) for future war crimes trials in the four occupying zones, on the basis of which inter alia twelve subsequent criminal trials before US military tribunals took place in Nuremberg between 1945 and 1949.

The significant ‘innovation’ of CCL 10 was that the law gave up the link between crimes against humanity and a war (compare article 6(c) of the IMT Charter) to the effect that crimes against humanity could be charged even if committed outside and in the absence of an armed conflict.³ Both the Nuremberg and Tokyo trials significantly contributed to the development of international law not only by substantiating its legal foundations, but also by universally reinforcing the idea of individual responsibility under international law. Even though the two tribunals remained the only examples of international criminal justice for the five decades that followed, their legacy did not fade. The end of the east-west paralysis in the 1990s paved the way for the international community to reactivate the long dormant idea of international individual responsibility. It needed, however, the atrocities in the former Yugoslavia and in Rwanda to rapidly put these ideas into practice. The Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) adopted by the Security Council under Chapter VII in 1993 and 1994 respectively, build upon the international crimes identified by the IMT-Charter but expand and redefine them. The rich jurisprudence of these *ad hoc* tribunals partly suffers from methodological shortcomings and ‘judicial creativity’ in its search for the required criminal rules of customary international law (→ 1.2.2).⁴ In retrospect, the jurisprudence will nevertheless give, like the Nuremberg and Tokyo judgments, evidence for the legal existence of these rules. That is at least true for the vast majority of conditions identified by

3 Note, however, that some of the US Military tribunals operating under CCL 10 read the nexus requirement into CCL 10, KJ Heller *The Nuremberg Military Tribunals and the origins of international criminal law* (2012) 383.

4 See with regard to crimes against humanity L van den Herik ‘Using custom to reconceptualize crimes against humanity’ in S Darcy & J Powderly (eds) *Judicial creativity at the international criminal tribunals* (2010) 80ff.

the tribunals within the scope of the three relevant categories of international crimes: war crimes, crimes against humanity and genocide.

A few details however, may provoke judicial disagreement on methodological grounds with the ICTY's or ICTR's perceptions. For example, the complex joint criminal enterprise concept of the ICTY met some resistance from the Extraordinary Chambers in the Courts of Cambodia (ECCC).⁵ The benches of the ECCC are composed of Cambodian and international judges who apply both international and domestic criminal law. Established in 2004, the Chambers are commonly classified as one of the 'hybrid courts'⁶ that are characterised by a varying mix of national and international components, be it the composition of the bench or the substantive and procedural criminal laws applied. Whereas the ECCC became first and foremost infamous for inappropriate governmental interference, other hybrid tribunals significantly contributed to the development of international criminal law. The Special Court of Sierra Leone (SCSL), set up in 2002, was the first international criminal tribunal that established the criminal responsibility of political leaders under customary law for their part in the recruitment of child soldiers.⁷ The far reaching legal impact of these judgments is illustrated by the International Criminal Court (ICC) which considers the SCSL's case-law as suited to potentially assist the ICC in the interpretation of the relevant provisions of the Rome Statute [article 8 paragraph 2(b)(xxvi)].⁸

In contrast, it remains to be seen whether the highly creative decision of the Special Tribunal for Lebanon (STL) (2006) on the customary law nature of the crime of terrorism⁹ will be taken up by other tribunals, not least because the Lebanon Tribunal is so far the only international criminal court that treats terrorism as an independent crime under international law.¹⁰ In any case, the identification of customary international criminal law has gradually lost its topicality since the ICC started work in 2002. The first permanent international criminal court in world history carries out criminal procedures on the basis of the Rome Statute, an international

5 *Public Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise* ECCC Pre-Trial Chamber (20 May 2010) 002/19-09-2007-ECCC/OCIJ (PTC38) para 77.

6 Other denominations are mixed courts, internationalised courts of domestic-international courts, compare SMH Nouwen 'Hybrid Courts' The Hybrid category of a new type of international crimes courts' (2006) 2 *Utrecht Law Review* 190 192.

7 *Prosecutor v Sam Hinga Norman* SCSL Appeals Chamber (31 May 2004) SCSL-2004-14-AR72(E) para 53.

8 *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* ICC Trial Chamber I (14 March 2012) ICC-01/04-01/06 para 603.

9 *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* STL Appeals Chamber (16 February 2011) STL-11- 01/I/AC/R176bis.

10 At the ICTY terrorism has been treated as a violation of the laws or customs of war under the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute) (25 May 1993, 32 ILM 1159) art 3, see further *Prosecutor v Stanislav Galić* ICTY Trial Chamber (5 December 2004) IT-98-29-T paras 63ff and *Prosecutor v Stanislav Galić* Appeals Chamber (30 November 2006) IT-98-29-A paras 86ff.

treaty that codifies in great detail the relevant criminal procedural rules and substantive provisions on war crimes, crimes against humanity and genocide. In addition, many ICC states parties introduced criminal provisions into their domestic laws modelled after the Rome Statute in order to fulfill their primary responsibility to prosecute under the Rome Statute's complementary principle (articles 15 to 19 of the ICC Statute). In the event that the 2010 Kampala amendment to the Rome Statute passes its last hurdles and enters into force, the international crime of aggression could, as the fourth category of crimes (article 5 of the Rome Statute), give rise to international criminal proceedings more than 70 years after the Nuremberg trials.

1.2 Relevant sources of international criminal law

1.2.1 *International treaties*

Prima facie, international treaties are the ideal source of international criminal law provided that they establish and define in precise and definite language not only the individual criminal responsibility but also the relevant elements of the various crimes. For centuries, however, international treaties dealt with inter-state relations alone. Under this precondition, most notably in the field of international humanitarian law, the treaties are not themselves the basis of the criminal responsibility but require a rule under international customary law that adds that component to the prohibitions stipulated by the treaties.¹¹ Some treaties impose on state parties the obligation to introduce and prosecute specific international offences in their domestic legal system, for example article 146 of the GC IV (graves breaches). In these cases the individual criminal responsibility of the perpetrator is established directly by the international treaty regime¹² to the effect that international criminal tribunals may directly apply the respective treaty law as the proper source of international criminal law provided that their statutes refer to the relevant treaty provisions or copy their wording. As a fall back strategy, the courts and tribunals may nonetheless take recourse to identical customary norms so

11 D Akande 'Sources of international criminal law' in A Cassese et al (eds) *The Oxford companion to international criminal justice* (2009) 48; see also *Prosecutor v Stanislav Galić* ICTY Appeals Chamber (30 November 2006) IT-98-29-A para 83.

12 Several writers state that grave breaches entail individual criminal responsibility, eg T Meron *The humanization of international law* (2006) 102; G Werle *Principles of international criminal law* (2009) 359; other writers argue that the GC originally made a distinction between grave breaches and war crimes which over time, however, disappeared, especially with a view to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I) (8 June 1977, 1125 UNTS 3) art 85(5) that provides that 'grave breaches (...) shall be regarded as war crimes', MD Öberg 'The absorption of grave breaches into war crimes' (2009) 91 *International Review of the Red Cross* 163 167.

as to ensure that the criminal offence indeed existed and was legally binding at the time of the alleged wrongdoing.¹³

International treaties as a proper source of international criminal law became more significant with the creation of international criminal tribunals, given that these entities are first and foremost bound by their respective statutes and were themselves established by international treaties (for example IMT Charter, Rome Statute, Treaty on the Establishment of the Special Court of Sierra Leone). Even the two *ad hoc* criminal tribunals established by mandatory Security Council resolutions¹⁴ are based on an international treaty, *id est* the UN Charter from which the SC Resolutions derive their legally binding force (article 25 of the UN Charter). Thus, the *ad hoc* tribunals analogously apply the rules of international treaty interpretation (article 31 and the following articles of the VCLT) in order to delineate their statutory limitations.¹⁵ Whether, however, the constituent treaty instruments of the international tribunals may serve as the primary source of the individual criminal responsibility depends not only on the content of the treaty and Security Council resolutions respectively but also on the *nullum crimen sine lege* principle. Under that principle a person is only criminally responsible for conduct that was prohibited as an international criminal offence at the time when the conduct occurred and which was accessible and foreseeable.¹⁶ Consequently, the constituent treaty instruments may be derogated by this human rights principle to the effect that the tribunal must take recourse to international customary law if it is statutorily allowed to do so. Conversely, the ICC is bound to primarily apply its Statute and the Elements of Crime (article 21, paragraph 1(a) of the ICC Statute) in a non-retroactive manner (article 24 of the ICC Statute). That does not mean that the ICC Statute aims at creating new substantive international criminal law.¹⁷ Taking up recognised customary and treaty rules on the three categories of international crimes (war crimes, crimes against humanity, genocide), the Statute's substantive rules first and foremost define the Court's jurisdiction. Having said that, the ICC must not disregard the

13 See eg *Prosecutor v Kordić and Čerkez* ICTY Appeals Chamber (17 December 2004) IT-95-14/2-A para 75, stipulating that if a crime constitutes a grave breach of the Geneva Conventions it constitutes a crime *qua custom*.

14 ICTY established by UNSC Res 827 (25 May 1993) and ICTR established by UNSC Res 955 (8 November 1994).

15 *Prosecutor v Aleksovski* ICTY Appeals Chamber (24 March 2000) IT-95-14/1-A para 98, see generally: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* Advisory Opinion ICJ (22 July 2010) (2010) ICJ Reports 403 para 94; J Powderly 'Judicial Interpretation at the Ad Hoc Tribunals' in S Darcy & J Powderly (n 4 above) 32ff.

16 See Universal Declaration of Human Rights (UDHR) (10 December 1948) art 11; International Covenant on Civil and Political Rights (ICCPR) (16 December 1966, 999 UNTS 171) art 15; European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, ETS 5) art 7; GC III art 99(1); GC IV art 67 & API (n 12 above) art 75(4)(c).

17 O Triffterer & K Ambos *Commentary on the Rome Statute of the International Criminal Court* (2008) Part 1 para 60.

provisions of the Statute with the argument that they do not reflect established customary or treaty law (article 21 of the ICC Statute).

1.2.2 Customary law

Even though customary international law is a source of law that is associated with legal uncertainty, it has been the most relevant source of international criminal law so far, at least in part because the ICC's treaty based case law has only slowly gained pace. All other international criminal tribunals (the ICTY, ICTR, SCSL, ECCC and STL) applied or still apply the relevant rules of customary international law that impose criminal responsibility. The identification and application of unwritten criminal provisions met many methodological challenges, especially at the early stage of international criminal justice.¹⁸ The tribunals were torn between methodological conservatism that put emphasis on the existence of longstanding state practice accepted as law (*opinio iuris*) and less strict approaches. The latter is content with verbal manifestations of *opinio iuris*, as

principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where state practice is scant or inconsistent.¹⁹

Irrespective of whether this argument can pass the human-rights test *nullum crimen sine lege*,²⁰ a reading of international judgments soon reveals that international criminal tribunals rarely work by the books when identifying and labelling state practice and *opinio iuris*. Plus, many later judgments use preceding judgments as authority for the existence of settled customary law. It is in that regard that international criminal tribunals

18 The applied methods have met considerable critique in the legal literature, see eg W Schabas 'Customary law or "judge-made" law: Judicial creativity at the UN Criminal Tribunals' in J Doria et al (eds) *The legal regime of the International Criminal Court* (2009); I Bantekas 'Reflections on some sources and methods of international criminal and humanitarian law' (2006) 6 *International Criminal Law Review* 121ff.

19 *Prosecutor v Kupreškić et al* ICTY Trial Chamber (14 January 2000) IT-95-16 para 527. Also the ICRC concluded that '[i]t appears that international courts and tribunals on occasion conclude that a rule of customary international law exists when that rule is a desirable one for international peace and security or for the protection of the human person, provided that there is no important contrary *opinio iuris*.' J-M Henckaerts & L Doswald-Beck *Customary international humanitarian law Volume I: Rules* (2005)

20 Also often discussed together with the *nullum crime* principle (no crime without law), the *nullum poena sine lege* principle (no punishment without law) has a different scope of protection because it deals with the legality of the actual punishment or penalty itself. For the discussion of whether the statutes of international criminal tribunals or the ICC Statute with their rather general reference to penalties (cf arts 77ff ICC Statute; art 24 ICTY Statute and its Rule 101) met the requirement of the *nullum poena* principle see G Endo 'Nullum Crimen Nulla Poena Sine Lege principle and the ICTY and ICTR' (2002) *Revue québécoise de droit international* 205; S Dana 'Beyond retroactivity to realizing justice: A theory on the principle of legality in international criminal law sentencing' (2009) 99 *Journal of Criminal Law & Criminology* 857.

were furthermore willingly using the ICC Statute for their determination of customary international law, which in 1998 was commonly considered a reflection of existing international criminal law.

1.2.3 General principles of law

General principles of law *in foro domestico* constitute a recognised international legal source (article 38, paragraph 1 lit c of the ICJ Statute) that fill the void in cases where gaps in treaty and customary law prevent the judges from passing a verdict because of a lack of law (compare article 21, paragraph 1 lit c of the ICC Statute). In the Furundžija case, the ICTY considered it necessary 'to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws'.²¹ Because of their widespread recognition in different legal systems, general principles of law are transposed *mutatis mutandis* to the international level with due consideration of the specifics of international criminal law and proceedings.²² However, general principles of law derived from the domestic legal order generally concern basic legal principles, such as *res judicata* or *pacta sunt servanda*. It seems questionable, if these abstract principles could ever achieve the required level of certainty in a criminal law context. In contrast to general principles in *foro domestico*, principles of international (criminal) law are inherent to the international legal system and reflect its underlying values and standards. It is one of the contested aspects of the Furundžija judgment that the ICTY Trial Chamber took recourse to 'the respect for human dignity'²³ as a principle of international law in order to define the international crime of rape after it ascertained that the relevant domestic criminal laws unfortunately too diverse to be of any help.²⁴ To establish individual criminal responsibility on the basis of a catch-all principle derived from human rights obligations, however, is contrary to the human rights principle *nullum crimen sine lege*, if only because human rights obligations are addressed to states alone.

1.2.4 Soft law

Generally speaking, legally non-binding documents such as UN General Assembly (GA) Resolutions cannot be a source for individual criminal responsibility irrespective of how many state representatives backed the resolution. However, ever since the General Assembly unanimously confirmed the Nuremberg Principles in its Resolution A/RES/95, its

21 Furundžija ICTY Trial Chamber (10 December 1998) IT.95.17/1 para 177.

22 Furundžija case (n 21 above) para 178.

23 Furundžija case (n 21 above) para 182.

24 D Akande 'Sources of international criminal law' in Cassese (n 11 above) 52; F Raimondo 'General principles of law, judicial creativity, and the development of international criminal law' in Darcy & Powderly (n 4 above) 56.

formal statements are used as evidence for the *opinio iuris* amongst states that a certain crime is punishable under international law. That is legally sound in principle. If, however, the establishment of a rule of customary international criminal law is reduced to this kind of evidence without the backing of any substantial and uniform state practice, the non-binding GA resolutions gain legal value through a methodological back door, a process that would be inconceivable under domestic criminal law.

1.2.5 Judicial decisions

As a rule, judicial decisions are no source of international (criminal) law but a source to determine the content of the law as paragraph 1 of article 38 of the ICJ Statute states in no uncertain terms. That is valid for national judicial decisions as well as international judgments. From an international law perspective, however, national judicial decisions often have a double function: on the one hand, they may indicate the existence of certain rules of international (criminal) law, on the other hand, they count as evidence of state practice accepted as law (article 38, paragraph 1 lit b of the ICJ Statute).

In contrast, judgments of international courts and tribunals are solely a means for the determination of rules of international law without having legally binding *erga omnes* effects. When article 21, paragraph two of the ICC authorises the Court to apply principles and rules of law as interpreted in its previous decision, it acknowledged the importance of consistent case-law without obliging the ICC to adhere to them. The wording of the provision seems to reject a system of binding precedents even between the different levels of review (Pre-Trial Division, Trial Division and Appeals Division).²⁵ In contrast the ICTY considers that the *ratio decidendi* of decisions of the Appeals Chambers are binding on Trial Chambers, whereas the Appeals Chamber should follow its previous decisions unless departure is necessary for cogent reasons in the interests of justice.²⁶ It goes without saying that judgments of one international criminal tribunal are not binding on other international tribunals, even though they may give legal guidance. The SCSL, for example, considers the case-law of the ICTY of 'persuasive value'.²⁷ That is all the more valid for national criminal courts that apply international criminal law for example under the complementary principles of the ICC Statute (article 17 of the ICC Statute).

25 See further W Schabas *The international criminal court: A commentary on the Rome Statute* (2010) art 21, 394ff.

26 *Aleksovski* ICTY Appeals Chamber (24 March 2000) IT-95-14/1-A paras 92 - 113.

27 *Eg Prosecutor v Sesay* SCSL Trial Chamber (2 March 2009) SCSL-04-15-T para 48.

1.3 German contribution to and participation in international criminal law making

After Nuremberg, it was testing for Germany to come to terms with international criminal justice. The reasons for that are multidimensional: the taste of victor's justice, the contested legitimacy of the military tribunal or the critique of crimes against humanity as retroactive justice. However, the German government reversed its long-standing negative stance on this topic in the 1990s following the fall of the Iron Curtain and German reunification.²⁸ This repositioning was not triggered by the prosecution of state-decreed crimes committed by the East German border guards after reunification, but rather by the war atrocities in the former Yugoslavia. It is noteworthy, though, that German judges acknowledged the Nuremberg principles for the first time in the context of the border *Schießbefehl*.²⁹ Not only had Germany overcome the post-world war wariness and resistance to the prosecution of international crimes within its domestic legal order, it also actively supported the ICTY by extraditing the Bosnian Serb *Dusan Tadić* in 1995 on the request of the tribunal after the alleged perpetrator was taken into custody by German authorities and charged with genocide by a German criminal court.³⁰

Later, Germany actively participated in the 1998 negotiations of the ICC Statute in Rome within the like-minded states group. One of the goals pursued in the negotiations was the automatic and universal jurisdiction of the future international criminal court.³¹ The German delegation within the like-minded group fought successfully against the 'optional jurisdiction model' along the lines of the ICJ Statute and pressed home automatic jurisdiction (article 12, paragraph 1 of the ICC Statute). In contrast, the German delegation could not convince the other plenipotentiaries of its highly progressive universal jurisdiction approach that would have given the new court jurisdiction over crimes irrespective of where the alleged crime had been committed and which nationality the alleged perpetrator has (see now article 12, paragraph 2 of the ICC Statute).³²

Germany signed the ICC Statute on 10 December 1998 and ratified the document on 11 December 2000, becoming the 25th state party of the ICC. In the process of becoming a member to the ICC, the opinion gained

28 G Werle 'Deutschland und das Völkerstrafrecht: Zeitgeschichtliche Perspektiven' in Jeßberger & Geneuss (n 2 above) 23 31ff.

29 BGH Case 5 StR 111/94 (20 March 1995) 41 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 101 109.

30 A Marschik 'The politics of prosecution' in TLH McCormack & GJ Simpson (eds) *The law of war crimes: National and international approaches* (1997) 65 76.

31 K Schmalenbach 'Germany's contribution to the development of international criminal law, international disarmament law, and the law of bioethics' (2003) 47 *German Yearbook of International Law* (2003) 226 232.

32 See HP Kaul 'Der Beitrag Deutschlands zum Völkerstrafrecht' in C Safferling & S Kirsch (eds) *Völkerstrafrechtspolitik: Praxis des Völkerstrafrechts* (2014) 51 71.

ground that Germany should adapt its criminal legal system to the ICC Statute in a comprehensive manner. Two years later, in 2002, the German parliament passed the German Code of Crimes against International Law (CCIL) in the second and third reading.³³ Apart from the fact that the code partly exceeds and partly restructures the ICC Statute (→ 2.2.1), it is taken by several states as a model for the implementation of international criminal law within their own domestic legal order.

2 Incorporation of international criminal law obligations into the German legal order

2.1 Incorporation of customary international criminal law through article 25 of the Basic Law

Article 25 of the Grundgesetz (GG) aims at generally adopting customary international law and general principles of law into the German legal order in order to reconcile domestic law with unwritten rules of international law.³⁴ Through this provision, customary international criminal law find its way into the German legal order with the content developed by the international community of states and identified by international criminal tribunals. On the surface, the reader of article 25 of the GG can easily get the impression that the authors of the Basic Law especially had customary international criminal law such as the Nuremberg Principles in mind when drafting the wording of the provision. This impression is fostered by article 25's reference to general rules of international law that 'directly create rights and duties for the inhabitants of the federal territory'.³⁵

Irrespective of the authors' original vision of the Basic Law, German criminal courts have never and are not likely to charge alleged war criminals on the basis of customary criminal law. The reason for this restraint lies in article 103, paragraph 2 of the GG which stipulates that an act may be punished only if it was 'defined by a law' as a criminal offence. The principle of legal clarity and certainty expressed in article 103, paragraph 2 of the GG is clearly at odds with the unwritten offences under customary international law. Even though article 15, paragraph 2 of the ICCPR and article 7, paragraph 2 of the ECHR – having the Nuremberg Principles in mind – emphasise the right of states parties to try persons on the basis of unwritten general principles of law, German criminal courts cannot invoke this human rights endorsement. The duly transformed human rights treaties (article 59, paragraph 2 of the GG) have the rank of

33 Parliamentary Documents (Bundestagsdrucksache) 14/8524 & 14/8892; Bundesgesetzblatt 2002 I 2254.

34 BVerfG Case 2 BvM 1/78 (13 December 1977) (1978) 46 *Entscheidungen des Bundesverfassungsgerichts* 343 403f.

35 For the English translation of the German text see <https://www.btg-bestellservice.de/pdf/80201000.pdf> (accessed 18 May 2015).

statutory law within the German legal order whereas the incorporated criminal rules of customary international law (article 25) have an intermediate rank between constitutional law and statute law. Consequently, the imperative constitutional demand of article 103, paragraph 2 of the GG prevails over both, the human rights endorsement of customary international criminal law and the respective customary rules. Even international criminal tribunals do not rely on the so called Nuremberg clause of article 15, paragraph 2 of the ICCPR and article 7, paragraph 2 of the ECHR as an exception to the scope of application of *nullum crimen sine lege*. They hold the view that unwritten customary international criminal law is accessible and foreseeable enough to pass the human rights test.³⁶

As a matter of fact, the growing international case-law minimises the issue of foreseeability despite contradictory judgments and methodological weaknesses. Yet, the constitutional demand of legal certainty is taken very seriously by the German Federal Constitutional Court so that criminal courts have never risked having their verdicts annulled by the Constitutional Court for unconstitutional convictions. Even in cases of crimes perpetrated on the territory of the former Yugoslavia that concerned offences under international criminal law, the German criminal courts applied the German Criminal Code until 2002 (the date when German Code of Crimes against International Law took effect, → 2.2.2).³⁷ Having said that, apart from the crime of genocide (former section 220a of the StGB)³⁸ no substantive provisions of the German Criminal Code covered international crimes. The consequence was that the specific wrong of the international war crimes were not always reflected in the convictions for 'ordinary' crimes such as murder and rape.³⁹ In addition, the German Criminal Code did not allow criminal courts to exercise universal jurisdiction over crimes that would be crimes against humanity under international law. These lacunae were the principal motivating factor for the German government's campaign for the German Code of Crimes against International Law (CCIL)⁴⁰ and subsequently submitting the draft law for parliamentary approval. However, the main goal of the legislature was not to comply with customary international criminal law but to bring

36 See eg *Prosecutor v Hadžihasanović* ICTY Appeals Chamber (16 July 2003) IT-01-47-AR 72 para 34: 'accessibility does not exclude reliance being placed on a law which is based on custom'.

37 Novislav Djajić was held guilty of complicity in 14 cases of murder (German Criminal Code art 211) and in one case of attempted murder by the Supreme Court of Bavaria Case 3 St 20/96 (*Public Prosecutor v Djajić*) (23 May 1997). See C Safferling 'Public Prosecutor v Djajić' (1998) 92 *American Journal of International Law* 528ff.

38 Repealed by enactment of the CILC Act (Völkerstrafgesetzbuch) Bundesgesetzblatt 2002 I 2254.

39 G Werle 'Völkerstrafrecht und geltendes deutsches Strafrecht' (2000) 55 *JuristenZeitung* 755 756.

40 See Act to Introduce the Code of Crimes against International Law of 26 June 2002 <http://www.mpicc.de/shared/data/pdf/vstgbleng2.pdf> (accessed 18 May 2015).

Germany into full compliance with the ICC Statute and the complementarity principle enshrined in it (→ 2.2.2).

2.2 Transformation of international treaties that contribute to international criminal law

2.2.1 Statutes of *ad hoc* and special tribunals

Even though the Statutes of the ICTY and ICTR are not international treaties but annexed to SC Resolution 827 (1993) and 955 (1994), their legally binding force is ordered by and thus linked to the UN Charter (article 25 of the UN Charter). German parliamentary approval of the ratification of the UN Charter in 1973 entailed not only the authorisation to deposit the instrument of ratification but also established the legal validity of the UN Charter within the German legal order at the level of federal statutory law (article 59, paragraph 2 of the GG). Furthermore, all subsequent secondary acts of UN organs, especially mandatory Security Council resolutions, automatically find their way into the German legal order in the wake of the 1973 UN Charter Ratification Act without requiring separate acts of parliamentary approval on a case-by-case basis.

The legal effect of SC Resolution 827 (1993) and 955 (1994) within the German legal order effectuated by the 1973 UN Charter Ratification Act implies that the obligation of German authorities to cooperate with the ICTY⁴¹ and ICTR⁴² in the investigation and prosecution of suspects does not require a separate piece of domestic legislation. In practice, however, the wording of the Security Council resolutions and the annexed statutes (article 29 of the ICTY Statute and article 28 of the ICTR Statute) was not regarded as a proper legal basis for extraditions of suspects and deferrals of national proceedings to the ICTY or ICTR from the beginning. That would have been manifest in any extraditions of German nationals to the *ad hoc* tribunals given that until 2000, the German Constitution prohibited such acts (→ 2.2.3).⁴³ However, even the extradition of the Bosnian national *Duško Tadić* and the transfer of his case to the ICTY on the latter's request in November 1994 was regarded as not legally allowed without a German law on ICTY co-operation. The reason for this strict stand was that the SC Resolution leaves it entirely to the member states as to how they implement the obligation to cooperate with the *ad hoc* tribunals. Thus, the national authorities need domestic legal authorisation to

41 See UNSC Res 827 (25 May 1993) UN Doc S/RES/827 para 4.

42 See UNSC Res 955 (8 November 1994) UN Doc S/RES/955 para 2.

43 Bundesgesetzblatt 2000 I 633; on the legal situation at that time see K Schmalenbach 'Die Auslieferung mutmaßlicher deutscher Kriegsverbrecher an eine internationale Gerichtsbarkeit' (1998) 36 *Archiv des Völkerrechts* 285.

perform specific acts that necessarily intervene in the suspect's constitutional human rights.⁴⁴

The German parliament responded to this situation and adopted two acts that have almost identical language, the 1995 ICTY Cooperation Act⁴⁵ and the 1998 ICTR Cooperation Act.⁴⁶ In contrast, no cooperation acts have been passed in order to give the German authorities the legal option to cooperate with the SCSL, the ECCC or the SCL. It was envisaged to provide an answer to the question of how to deal with possible requests when the situation occurs, putting aside the fact that Germany is not obliged under international law to cooperate with the above mentioned tribunals as long as the Security Council does not back their co-operation requests under Chapter VII.

2.2.2 Motives for the special transformation of the ICC Statute into the German legal order

On 4 December 2000, the German parliament adopted the Act that granted parliamentary consent to the ratification of the ICC Statute (article 59, paragraph 2 of the GG).⁴⁷ In accordance with the German mitigating dualism, the ICC Ratification Act authorises German authorities and courts to apply the ICC Statute like all other statutory laws under the condition that the ICC Statute is suitable to be directly applied, for example, in the context of ICC cooperation requests or German criminal proceedings. Unsurprisingly, there was broad agreement that the ICC Ratification Act does not render specific German legislation redundant even though the Ratification Act faithfully reproduces the ICC Statute in its authentic languages of English, French and adds the official German translation. The motives for the ICC Cooperation Act⁴⁸ more or less follow the reasoning that had brought about the ICTY and ICTR Cooperation Acts (→ 2.2.1). As with the ICTY and ICTR, the ways and means of how to comply with the duties under ICC's Statute have to be arranged by states parties themselves (compare article 88 of the ICC Statute). Consequently, the national legislator must provide for the details and assure the constitutionality of national cooperation measures. One required detail was the amendment of the German Code of Criminal Proceedings to the effect that German authorities would henceforth be

44 D Stroh 'State cooperation with the international criminal tribunals for the former Yugoslavia and for Rwanda' (2001) 5 *Max Planck Yearbook of United Nations Law* 249 269.

45 Federal Law Gazette I (1995) 485.

46 Federal Law Gazette I (1998) 843.

47 Bundesgesetzblatt 2000 II 1393.

48 Bundesgesetzblatt 2002 I 2144; the ICC Cooperation Act is one law of several within a package of laws (ICC Statute Implementation Act of 17 July 1998 [Bundesgesetzblatt 2002 I 2144]) which aims at bringing the German legal order into conformity with the ICC Statute. The Code of Crimes under International Law (CCIL) is not part of this package but was enacted in the same year.

allowed to transfer a suspect to the ICC instead of putting him or her on trial in Germany.

The governmental decision to design a German international criminal code is more complex. From a domestic law perspective, the direct application of the ICC Statute within criminal proceedings before German courts – *id est* the domestic utilisation of a document that is designed to be exclusively applied and substantiated by an international body – conflicts with the constitutional principle of legal certainty and clarity enshrined in article 103 of the GG and, as essential components of the rule of law, in article 20 of the GG.⁴⁹ The continued application of the 1998 version of the German Criminal Code was not expedient given that it did not meet all the standards of the complementarity principle. The complementarity principle of the ICC Statute (article 17, paragraph 1 of the ICC Statute) acknowledges the priority of the criminal jurisdiction of states parties provided that they are willing and able to carry out the investigations and the prosecutions of crimes which are within the jurisdiction of the ICC. The principle neither demands that crimes stipulated in the ICC Statute are mirrored in national criminal codes nor that domestic prosecutions are carried out in precise accord with the ICC Statute.⁵⁰

However, prosecuting crimes against humanity (article 7 of the ICC Statute) as ‘ordinary’ offences such as homicide (section 211 of the StGB) can easily fail the complementarity test given that the crime of homicide does not necessarily mirror the crucial characteristics of the crime according to article 7 of the ICC Statute, which is a widespread or systematic attack directed against a civilian population.⁵¹ True, that issue could have been easily solved by amending the German Criminal Code. However, the German government wanted to contribute to international criminal law in a comprehensive manner that exceeds what is simply necessary to prevent an ‘inability’-verdict by the ICC. It was agreed that established customary international criminal law goes beyond the international crimes of the ICC Statute.⁵² In addition, Germany considered the broad application of the principle of universal jurisdiction essential for the effectiveness of the decentralised system of international criminal justice that first and foremost takes place in domestic court rooms, and only complementarily in The Hague.

49 G Werle & F Jeßberger ‘International criminal justice is coming home: The new German Code of Crimes Against International Law’ (2002) 13 Criminal Law Forum 191 200; H Satzger *Internationales und Europäisches Strafrecht* (2012) sec 17 para 13.

50 H Duffy & J Huston ‘International obligations and constitutional considerations’ in C Kreß & F Lattanzi (eds) *The Rome Statute and domestic legal orders* (2000) 29 32; Werle & Jeßberger (n 49 above) 194.

51 Explanatory note regarding the draft law, Bundesrats Drucksache 29/02 of 15 January 2002, reprinted in SR Lüder & T Vormbaum (eds) *Materialien zum Völkerstrafgesetzbuch* (2002) 23 & 25.

52 Explanatory memorandum (n 51 above) 23.

In codifying what Germany considers the current state of general international criminal law, a German international crimes code would give written evidence of state practice in the sense of article 38, paragraph 1(b) of the ICJ Statute and thus promote the worldwide acceptance and development of international criminal law and humanitarian law. In general, pooling the relevant international crimes in one single code was considered conducive for universally raising the profile of international criminal law and its specifics.⁵³ These were the main reasons why the German government promoted the special translation of the three categories of international crimes under the ICC Statute into a comprehensive German Code of Crimes against International Law that defines the international offences in German and thereby fully adapts them into the German legal system and German legal thinking.

2.2.3 German Code of Crimes against International Law

The German Code of Crimes against International Law (CCIL) entered into force on 30 June 2002, one day before the ICC Statute. The CCIL is divided into two substantial parts: the section on general provisions of the CCIL (*Allgemeiner Teil*) consolidates rules and common elements that are applicable to all crimes that are listed and defined in the section on special provisions of the CCIL (*Besonderer Teil*), that is war crimes, crimes against humanity and genocide. This bipartite statutory arrangement is typical for German codes.

The CCIL section on general provisions does not reinvent the wheel but refers to the section on general provision of the Criminal Code unless there are special provisions in sections 1, 3-5 of the CCIL (section 2 of the CCIL). The CCIL general provisions stipulate four special rules that derogate in case of conflict with those of the Criminal Code: Section one of the CCIL determines the criminal jurisdiction of German courts by declaring the principle of universality applicable to all international crimes that fall within the scope of the CCIL, provided that the relevant crime is punishable with not less than one year of imprisonment (so called serious criminal offences). This limitation of the universality principle excludes minor offences under command responsibility,⁵⁴ *id est* the violation of the duty to supervise (section 13 of the CCIL) and the omission to report an international crime (section 14 of the CCIL).

It is noteworthy that the CCIL applies a very broad concept of the universality principle by explicitly stressing that German criminal jurisdiction does not require a domestic nexus. By codifying a broad

53 C Safferling 'Zehn Jahre Völkerstrafgesetzbuch' (2012) *Juristische Ausbildung* 481.

54 The distinction between 'serious criminal offences' and 'minor criminal offences' is made in art 12 of the German Criminal Code. The CCIL maintains this distinction and treats the crimes under secs 13 and 14 CCIL as minor offences, see also Explanatory memorandum (n 51 above) 26.

concept of the universality principle, the legislator deliberately overturns the restrictive universality approach of the German Federal High Court in Criminal Matters requiring a 'legitimising connecting factor'.⁵⁵ Section 1 of the CCIL, however, does not go as far as allowing proceedings under the principle of universality *in absentia* of the accused person. According to section 230 of the Criminal Proceeding Code applied in conjunction with section 2 of the CCIL, the main hearing and the conviction of the defendant for crimes under the CCIL is only allowed if he or she is present.

Whereas section 1 of the CCIL is a purely jurisdictional provision, sections 3 to 5 focus on particular elements of international crimes that distinguish them from ordinary crimes. Section 3 of the CCIL regards 'acting upon order' as a special case of the ordinary mistake of law (section 17 of the Criminal Code): if someone commits an international crime in execution of a military order, he or she acts without guilt under the condition that the order was not manifestly unlawful and he or she did not realise that the order was unlawful (section 3 of the CCIL). In contrast, an ordinary mistake in law (section 17 of the Criminal Code) requires for innocence that the mistake of law was unavoidable, which is a stricter standards than that of section 3 of the CCIL.⁵⁶ The latitude given to those who act upon order comes at the expense of those who give orders, though. The enhanced responsibility of military commanders and other superiors is regulated in section 4 of the CCIL, which introduces a special model of attribution for the purpose of international criminal law. Those with command authority are bound to prevent their subordinates from committing an international crime. The provision on the responsibility of superior military commanders is supplemented by section 13 of the CCIL on the violation of the duty to supervise and section 14 of the CCIL on the intentional omission to report a crime punishable under the CCIL. Apart from acting upon orders and the responsibility of superiors, the CCIL overrides the general part of the Criminal Code on limitation periods in respect to offences. All serious criminal offences within the scope of the CCIL do not come under the statute of limitations. A notable exception is the minor offences pursuant to section 13 (violation of the duty to supervise) and section 14 (omission to report) due to the minor gravity of the offences.

Where the special rules of the general part of the CCIL are not applicable, recourse is taken to the general part of the German Criminal Code (section 2 of the CCIL). Accordingly, the provision on the foundation of 'ordinary' criminal liability (omission, intent, error, lack of criminal capacity et cetera), principles and secondary participants (abetting, aiding et cetera), sanctions (term of imprisonment et cetera) and the provisions on sentencing are applicable to all international crimes

55 BGH Case 3 StR 215/98 (30 April 1999) (*Jorgić*) reprinted in (1999) 19 *Neue Zeitschrift für Strafrecht* 396ff.

56 Safferling (n 53 above) 482.

punishable under the CCIL. The applicability of the general rules for ordinary crimes to international crimes is based on sound reasoning. The general principles contained in articles 22 to 33 of the ICC Statute do not deviate significantly from the German Criminal Code, with one exception that makes the German legislation stricter than the ICC Statute.⁵⁷ The language of article 30, paragraph 1 of the ICC Statute names as mental elements ‘intent’ and ‘knowledge’, requiring that the offender deliberately engaged in the conduct and meant to cause the outcome or is at least aware that the outcome would occur in the ordinary course of events. In the *Lubanga* case, the Trial Chamber I reasoned that: ‘The plain language of the Statute, and most particularly the use of the words “will occur” in article 30(2)(b) as opposed to “may occur”, excludes the concept of *dolus eventualis*.’⁵⁸ In contrast, the *mens rea* provision, section 15 of the Criminal Code, uses – according to the prevailing German doctrine – the term ‘intention’ as a generic term that includes so called ‘conditional intent’ (*dolus eventualis*). This is not the place to decide whether this first ICC judgment only indicates terminological confusion based on different dogmatic backgrounds or whether the discrepancy is of substantial importance. In either case, the principle of complementarity (article 17, paragraph 1 of the ICC Statute) does not require the strict reproduction of the Statute’s provisions and case law.

The section on special provisions of the CCIL covers the three international crimes that are so far punishable under the ICC Statute: war crimes (section 8), crimes against humanity (section 7) and genocide (section 6). The provision on genocide was already part of the Criminal Code and German legislators were satisfied to move the former section 220a of the Criminal Code to section 6 of the CCIL without substantially changing the wording.⁵⁹ Given that the language of the former section 220a of the Criminal Code is based on article 2 of the Genocide Convention, as is the language of article 6 of the ICC, the new section 6 of the CCIL mirrors the Genocide definition of the ICC Statute. Likewise, section 7 of the CCIL on crimes against humanity is closely modelled on article 7 of the ICC Statute but with some minor deviations. For example, article 7, paragraph 1(d) of the ICC Statute considers the deportation or forcible transfer of population a crime against humanity, whereas section 7, paragraph 1 No 4 of the CCIL refers to ‘a person’ deported or forcibly transferred to another area. This extension of the offence is in conformity with the Elements of Crimes that assist the ICC in the interpretation of the Statute. In addition, the undertaking to synchronise section 7, paragraph 1(4) of the CCIL with the Elements of Crime brought about the provision

⁵⁷ Werle & Jeßberger (n 49 above) 202.

⁵⁸ *Prosecutor v Thomas Lubanga Dyilo*, Case No ICC-01/04-01/06, Trial Chamber I, Judgment of 14 March 2012 (on appeal) para 1011.

⁵⁹ According to CCIL sec 6 it suffices that the perpetrator kills *one* member of a group or forcibly abducts *one* child of a group to another group to be convicted of genocide if the other requirements are met. In contrast Criminal Code former sec 220a used the plural form ‘members of a group’ and ‘children of a group’.

that the deportation or forced transfer must be contrary to the general rules of international law. What appears to be a necessary substantiation may cause in practice some issues under article 103 of the GG (principle of legal certainty) given that it is far from obvious under which conditions international law prohibits deportations or transfers. The attempts of the German government to define the international legal situation in their explanatory memorandum to the CCIL law may be out-dated sooner or later.⁶⁰ On the other hand, the principle of legal certainty was named as the reason for deleting apartheid (article 7, paragraph 1(j) of the ICC Statute) as a distinct crime against humanity.⁶¹ Instead, section 7, paragraph 5 of the CCIL introduces the special intent to maintain an institutionalised regime of systematic oppression and domination by one racial group (apartheid regime) that, in connection with one of the listed crimes against humanity leads to an increase of penalty. The diverse types of war crimes are regulated in sections 8 to 11 of the CCIL. German legislators considered article 8 of the ICC Statute confusingly structured and introduced an alternative concept: Three provisions are devoted to a specific subject or object of protection: war crimes against persons (section 8), war crimes against property and other rights (section 9) and war crimes against humanitarian operations (section 10). Section 11 deals with war crimes involving the use of prohibited methods of warfare whereas section 12 focuses on war crimes involving employment of prohibited means of warfare. Apart from the desire to construe the categories of war crimes in a more manageable fashion than article 8 of the ICC Statute, the CCIL makes another forward-looking correction: as far as international law permits, sections 8 to 11 merge war crimes in international and non-international armed conflicts for the purpose of international criminal liability with the consequence that the scope of civil war crimes are gradually expanded. In this regard, the CCIL follows a path already pioneered by the ICTY.⁶²

2.2.4 Necessary constitutional adjustments

Becoming a member of an international organisation with the power to prosecute and convict individuals (which is therefore a supranational organisation) requires for many states constitutional amendments because criminal jurisdiction is a sovereign power that is constitutionally allocated to state authorities. The German Constitution, however, provided through paragraph 1 of article 24 of the GG the necessary means to become a member of the ICC by transferring the required sovereign powers to the Court. That does not mean, however, that German Basic Law was conducive to the extradition of German nationals to the ICC. The

⁶⁰ Explanatory note (n 51 above) 36.

⁶¹ Explanatory note (n 51 above) 39.

⁶² *Prosecutor v Tadić*, ICTY Appeals Chamber, Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72, paras 97 & 119.

correction of article 16, paragraph 2 of the GG that prohibited this kind of cooperation with the ICC was more than overdue, given that Germany was already obliged under the UN Charter to extradite German nationals to the ICTY and the ICTR. The amendment of article 16, paragraph 2 of the GG was adopted on 29 November 2000,⁶³ five days prior to the parliament's approval of the ICC Ratification Act. The extradition of German nationals to an international court is now permitted under the safeguard conditions that the act is prescribed by law⁶⁴ and the international court observes the rule of law.⁶⁵

3 The role of German courts in applying and developing international criminal law

3.1 Direct and indirect reference to international criminal law

As already pointed out, the direct application of the international conventional law such as the Geneva Conventions and their Additional Protocols or the ICC Statute within domestic criminal proceedings failed at the constitutional hurdle of article 103, paragraph 2 of the GG, which is highly demanding concerning the legal certainty of criminal law provisions.⁶⁶ That is all the more valid for customary international criminal law as identified by the ICTY and ICTR (→ 2.1). Before the CCIL entered into force, German criminal courts had made direct references to international treaties such as the Geneva Conventions in order to verify Germany's treaty obligations established by international agreements to prosecute international crimes under the universality principle. Only under this condition section 6, No 9 of the Criminal Code permits the exercise of German jurisdiction over acts committed abroad.⁶⁷

Using section 6 No 9 as a bridge into the realm of international law, German criminal courts dealt in detail with the elements of international war crimes and the respective international jurisprudence, pointing out that the defendant was punishable under international law for war crimes even though the conviction had to be based on 'ordinary' crimes under the German Criminal Code (for example 'deprivation of liberty' pursuant to section 239, paragraph 2 and 'dangerous bodily injuries' pursuant to former section 223a of the Criminal Code). Prior to the CCIL the gravity

⁶³ Bundesgesetzblatt 2000 I 1633.

⁶⁴ Gesetz über die internationale Rechtshilfe in Strafsachen, sec 9a (Auslieferung und Verfahren vor internationalen Strafgerichtshöfen) introduced 21 July 2012 by amending law (Bundesgesetzblatt 2012 I 1566).

⁶⁵ For details see K. Schmalenbach 'Verbot der Auslieferung und des Entzugs der Staatsangehörigkeit' in HJ Papier & D. Merten (eds) *Handbuch der Grundrechte in Deutschland und Europa* vol V chapter 122 paras 69ff.

⁶⁶ For details see C. Roxin *Strafrecht, allgemeiner Teil* Vol 1 (2006) chapter 5 paras 7ff.

⁶⁷ BGH Case 3 StR 372/00 (21 February 2001) (*Sokolović*) reprinted in (2001) 21 *Neue Zeitschrift für Strafrecht* 658 660f.

of international crimes was only reflected in former section 220a applied in conjunction with section 6, No 1 of the Criminal Code (universal jurisdiction over the international crime of genocide). In contrast, crimes against humanity below the threshold of genocide – punishable as ‘ordinary crimes’ – did not fall under the universality principle pursuant to section 6 of the Criminal Code.

The peculiarities of the German legal situation gave rise to a certain judicial creativity in German Criminal Courts which labelled ‘crimes against humanity’ as genocide. This may be the reason why the Supreme Court in Criminal Matters⁶⁸ ruled that the destruction of a ‘social’ group constitutes an act of genocide. This interpretation is, however, at odds with what the ICTY and the ICJ⁶⁹ considers an act of genocide, namely the physical or biological destruction of the group. In *Prosecutor v Radislav Krstić* the ICTY considered the Federal Supreme Court’s definition and rejected it on the basis of *nullum crime sine lege*.⁷⁰ It is to be assumed that under the CCIL, the Federal Supreme Court will abandon the broad perception of what constitutes an act of genocide in favour of section 7 of the CCIL (crimes against humanity). Another issue German criminal courts faced when applying former section 220a of the STGB (crime of genocide) in pre-CCIL times was the understanding of genocidal intent as described by the phrase ‘intention to destroy ... a ... group’. It is striking how the decisions make only scant references to ICTY jurisprudence but are dominated by efforts to bring the interpretation in line with the general German criminal code doctrine. Having said that, the result of that effort was in line with ICTY jurisprudence: If it could not be proven beyond reasonable doubt that the accused acted with intention to destroy the group or part of it, he was not held responsible as the principal offender. However, participation under German criminal law does not require that the aiders and abettors have special genocidal intent themselves, as long as they simply know about the perpetrator’s genocidal intent.⁷¹

68 BGH Case 3 StR 215/98 (30 April 1999) (*Jorgić*) (n 55 above) 401.

69 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ (26 June 2007) (2007) ICJ Reports 43 para 190.

70 *Prosecutor v Radislav Krstić*, ICTY Trial Chamber (2 August 2001) IT-98-33-T para 580.

71 BGH Case 3 StR 372/00 (*Sokolović*) (n 67 above) 660f affirming the findings of the High Regional Court Düsseldorf of 29 November 1999 (unpublished). The reasoning is in line with the jurisprudence of the ad hoc tribunals, see eg *Prosecutor v Radislav Krstić*, ICTY Appeals Chamber (19 April 2004) IT-98-33-A para 140.

In summary it can be said that the few pre-CCIL judgments of German criminal courts dealing with international crimes all but one⁷² concerned the genocide in Bosnia and Herzegovina in the years 1992 to 1995. In 2013, Schäfer counted a total of nine judgments passed by the Federal Supreme Court in Criminal Matters as the court of last resort, which amounts to 0.3 per cent of the Court's workload.⁷³

3.2 Application of German International Criminal Code

Only one criminal proceeding has been carried out on the basis of the CCIL in the period from July 2002 (the date the CCIL entered into force) to the publishing of this book. One of the reasons for this insignificant number is the procedural safeguard mechanism of section 153(f) the German Criminal Procedural Code that aims at preventing the German criminal system being overburdened with unfeasible international investigations.⁷⁴ The Federal Public Prosecutor may abstain from prosecuting international crimes pursuant to sections 6 to 16 CCIL even if the universality principle (section 1 of the CCIL) would be applicable. The broader public became aware of the existence of the CCIL – and its limitations under section 153(f) German Criminal Procedural Code – when a criminal complaint was filed in 2004 against US Secretary of Defense Donald Rumsfeld et al in connection with war crimes committed by US Soldiers in the Iraqi prison Abu Ghraib. The Federal Public Prosecutor decided in 2005 that the complaint was not to be pursued because there was no evidence that the US law enforcement authorities were not going to prosecute the alleged offences.⁷⁵ The subsequent proceeding to force criminal prosecution was rejected as inadmissible. The Federal Public Prosecutor took the same negative decision concerning a criminal complaint geared towards the US prison in Guantanamo Bay, this time because he was of the opinion that German investigations would not be successful in the given case.⁷⁶

72 The most recent case concerned the 1994 genocide in Rwanda: the High Regional Court Frankfurt am Main rendered a judgment on 18 February 2014 against Onesphore R for aiding of genocide and sentenced him to 14 years' imprisonment. Given that the case concerned the 1994 genocide in Rwanda, the court applied former sec 220a Criminal Code, OLG Frankfurt am Main Case 5-3 StE 4/10 - 4 - 3/10 (18.2.2014); the OLG judgment has been partially annulled by the Federal Court of Justice (BGH) on the grounds that the OLG erred in points of law when convicting Onesphore R for only aiding genocide, case 3 St R 575/14 (21.5.2015).

73 J Schäfer 'Die Rechtsprechung des Bundesgerichtshofs zum Völkerstrafrecht' in C Safferling & S Kirsch (eds) *Völkerstrafrechtspolitik: Praxis des Völkerstrafrechts* (2014) 237 243.

74 Parliamentary Documents (Bundestagsdrucksache) (n 33 above) 37.

75 Safferling (n 53 above) 484; see also R Hannich 'Die praktische Anwendung des Völkerstrafgesetzbuches aus der Sicht des Generalbundesanwalts beim Bundesgerichtshof' (2007) 2 *Zeitschrift für Internationale Strafrechtsdogmatik* 507.

76 C Kreß 'Nationale umsetzung des Völkerstrafgesetzbuches' (2007) 2 *Zeitschrift für Internationale Strafrechtsdogmatik* 515 520.

Another prominent example for preliminary criminal investigations of war crimes (section 8 of the CCIL) that prematurely ended with the Federal Public Prosecutor's decision to close the proceedings is the Kunduz case. A German military officer of the international ISAF force in Afghanistan had ordered air strikes against two stolen fuel trucks which resulted in the death of many Afghans, some of whom were possibly civilians. The Federal Public Prosecutor based his suspension decision on two grounds: first, the order did not constitute a war crime because it was not the goal of the air strikes to kill civilians. In this context, the Federal Public Prosecutor interpreted the term 'civilians' restrictively, arguing that part-time combatants ('farmers by day and fighters by night') cannot be regarded as civilians in the sense of section 11 of the CCIL (war crimes) as long as they had not clearly and finally disengaged from their continuous combat function. This restrictive interpretation deviates from the ICRC's official position regarding common article 3 of the Geneva Conventions.⁷⁷ Even the ICTY has ruled that being a member of an armed group is not sufficient indication that a civilian is directly participating in hostilities for the purposes of targeting them with lethal force.⁷⁸ The second reason the Federal Public Prosecutor provided to justify the suspension of the investigation proceedings in the Kunduz case was only of domestic relevance: if an act does not constitute an international crime pursuant to sections 6 to 11 CCIL but on the contrary is in accordance with international humanitarian law, this situation excludes the possibility to prosecute the act as an 'ordinary' crime under the German Criminal Code.⁷⁹

The one criminal proceeding in which the CCIL has been applied and a formal judgment has been given concerned crimes against humanity and war crimes allegedly committed in the Democratic Republic of Congo. The judgment in the main proceedings against *Ignaz and Straton M* before the High Regional Court of Stuttgart is not expected to commence before end of 2014. From the international criminal law perspective, the *habeas corpus* proceeding initiated by the defendant before the Federal Supreme Court produced interesting clarifications of the scope of commander responsibility, which is regulated in greater detail in sections 4, 13, 14 CCIL than in article 28 of the ICC Statute.⁸⁰ According to the Federal Supreme Court, a bona fide commander or superior cannot be determined on the basis of the formal legal situation but on the factual existence of

77 See N Melzer *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law* (2009) 73.

78 *Prosecutor v Halilovic*, Trial Chamber, IT-01-48-T, 16 November 2005 para 34.

79 Safferling (n 53 above) 485.

80 K Ambos *Treatise on International Criminal Law* (2013) 206ff.

enforcement powers.⁸¹ Another aspect of the decision that is of relevance for international criminal law is the question of the commander's actual intent. The Federal Supreme Court tried to take due consideration of the characteristic of international crimes and the command hierarchy regularly involved. Accordingly, the court was quite generous with regard of the required knowledge of the commander. It is not required that the commander has knowledge of time, place and execution of the criminal act of his subordinates but it suffices that he has knowledge of the 'nature of the offence'. The exact meaning of this phrase will hopefully illuminate future case law under the CCIL.

3.3 Application of immunity rules

It is striking that the CCIL does not contain a provision dealing with jurisdictional immunities. The explanatory notes to the CCIL draft seems to indicate that the German legislator did not consider it necessary to introduce a separate norm equivalent to article 27 of the ICC Statute:⁸² immunities bestowed upon German members of government and parliament can be revoked on a case by case basis; general provisions on the international jurisdictional immunity of foreign officials can be found in the German Judicial Service Act (*Gerichtsverfassungsgesetz*, GVG) which applies to CCIL proceedings, too. According to section 20(2) of the GVG, German criminal courts have no jurisdiction over natural persons that are exempted from German jurisdiction pursuant to the general rules of international law or on the basis of international agreements or other relevant legislation. Interestingly enough, the question of immunity has not specifically been addressed in the cases against US Secretary of Defense Donald Rumsfeld et al by the Federal Public Prosecutor, who denied jurisdiction on the basis that precedence must be given to US law enforcement (see 3.2). By contrast, in the case against the former President of the People's Republic of China, Jiang Zemin, the Public Prosecutor explicitly refused to initiate preliminary investigations on basis of Jiang Zemin's 'functional' immunity as a former head of state, placing particular importance on the ICJ's Arrest Warrant Case.⁸³ Irrespective of whether the Federal Public Prosecutor is reluctant to initiate CCIL cases that could cause diplomatic turmoil, the GVG immunity provision does not prevent Germany from cooperating with international criminal tribunals. According to section 21 of the GVG, immunities

81 BGH Case AK 3/10 (17 June 2010) reprinted in 55 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 157ff; for an analysis of the decision see G Werle 'Einleitung Völkerstrafgesetzbuch' in W Joecks & K Mießbach (eds) *Münchener Kommentar zum Strafgesetzbuch Band 6/2, Nebenstrafrecht III Völkerstrafrecht* (2009) para 54.

82 Explanatory note (n 51 above) 30.

83 *Decision of the Federal Public Prosecutor*, 24 June 2005, 3 ARP 654/03-2.

shall not stand in the way of execution of a request for transfer of a person in custody and for mutual judicial assistance communicated by an international criminal court established by a legal instrument that is binding on the Federal Republic of Germany.

In the light of the ICC's extensive interpretation of article 27 of the ICC Statute and the marginalisation of article 98 of the ICC Statute, in the event of Security Council referrals,⁸⁴ article 21 of the GVG paves the way for the transfer of (former) head of states and other immunity bestowed dignitaries of non-ICC member states, provided that the ICC prosecutor is willing to risk diplomatic turmoil.

4 Assessment and conclusion

The German attitude towards international criminal law fundamentally changed in the 1990s as evidenced by its active support of the *ad hoc* tribunals coupled with its enthusiastic contribution to the creation of the ICC Statute. The direct application of the rules of international criminal law, however, failed constitutional hurdles, first and foremost the principle of legal certainty and clarity (article 103 of the GG). Consequently, German courts dealing with international crimes committed in the former Yugoslavia and Rwanda applied domestic criminal law. Even so it is fair to say that the courts never lost sight of the characteristics of international crimes, the pre-CCIL jurisprudence is dominated by efforts to harmonise German legal doctrine with international demands without bending the German Criminal Code. Currently, it is unforeseeable whether German criminal courts will in the future focus on ICC case law when applying the CCIL or whether they will tread their own path in international criminal law.

After 12 years of the CCIL the inevitable stock taking starts with the finding that the CCIL has been positively perceived as a model example for a sound and solid legal basis for domestic prosecution of international crimes. The Code takes due account of its template, the ICC Statute, without confining itself to a copy-paste approach. The CCIL is, as *Jeßberger* and *Gneuss* put it, a balancing act between the accurate translation of international criminal law on the one hand and the strict observation of constitutional demands on the other hand.⁸⁵ Apart from the possible future insertion of the crime of aggression, the CCIL does not require rework for the foreseeable future. However, the ubiquitous praise of the

84 ICC Pre-Trial Chamber II, Case No. ICC-02/05-01/09, *Situation in Darfur, Sudan, The Prosecutor v Al Bashir, Public Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*, 9 April 2014 para 29.

85 F Jeßberger & J Geneuss 'Zum Stand des "deutschen Völkerstrafrechts" zehn Jahre nach Inkrafttreten des Völkerstrafgesetzbuches' in F Jeßberger & J Geneuss (eds) *Zehn Jahre Völkerstrafgesetzbuch. Bilanz und Perspektiven eines "deutschen Völkerstrafrechts"* (2013) 293 294.

CCIL is naturally clouded by critical remarks that first and foremost chafe at the marginal numbers of cases dealt with under the CCIL. Apart from several investigation proceedings only the joint case of *Ignace* and *Straton M* (Congo) has entered the stage of a main proceeding.⁸⁶ Whereas the investigation practice of the Public Prosecutor reveals a cautious attitude that obviously aims at discouraging 'political' criminal complaints, the one main trial against *Ignace* and *Straton M* is a lesson learned with regard to costs, time, effort, complex evidentiary problems as well as excessive demands on the German judges involved. However, the difficulties that the CCIL is facing reduce the criminal code not to a mere symbolic document. It is a well-known fact that the prosecution of international crimes that were committed abroad is not a standard procedure but a time- and effort-consuming business as the dragging start of the ICC's operational work so clearly demonstrated. The mere existence of the CCIL is a clear signal that Germany is no safe haven for alleged perpetrators of international crimes.⁸⁷ Furthermore, it provides a solid basis for the Public Prosecutor and for German criminal courts to gradually realise the legislator's wish to contribute effectively to the international criminal justice system.

86 For a complete statistic at the occasion of the tenth anniversary of the CCIL (2012) see deutsche Bundestagsdrucksache vom 7.11.2012, BT-Drs. 17/11339.

87 Jeßberger & Geneuss (n 85) 304.

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CHAPTER 14

INTERNATIONAL CRIMINAL LAW IN SOUTH AFRICA

Christopher Gevers*

1 Introduction

South Africa's relationship with international criminal law is, at best, complex.¹ It might even be called 'schizophrenic'.² At the level of *principle*, South Africa has committed itself firmly to the ideal of 'international justice' for human rights atrocities. Yet, its own transition to democracy in the 1990s involved the provision of amnesty to individuals who committed gross human rights violations – some of which may well amount to international crimes. This was a clear exception to what was fast-becoming *the* norm, if not *a* norm of international law, insofar as addressing such crimes: trial and punishment.³ When it comes to the *enforcement* of this principle, South Africa has 'flip-flopped' at both an international and domestic level. It was a key participant in the drafting of the *Rome Statue of the International Criminal Court* and the establishment of the ICC, but in recent times it has aligned itself with growing hostility towards the ICC on the continent. That being said, even this position is full of contradiction and prevarication. South Africa's decision to support the expansion of the Court's jurisdiction to include the crime of aggression in 2010, when the hostility towards the ICC amongst African states was at its zenith; or its support for the referral of Libya to the International Criminal Court in February 2011⁴ and then its decision to vote for the deferral of the investigation just four months later,⁵ are but two examples.

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1 For the purposes of this paper, 'international criminal law' is defined as the prosecution of genocide, war crimes and crimes against humanity by domestic and international courts. On the question of definitions see further C Gevers, 'Introduction to international criminal law' in G Kemp (ed) *Criminal law of South Africa* (2013) Chapter 46.

2 SR Ratner 'Schizophrenias of international criminal law' (1998) 33 *Texas International Law Journal* 237.

3 In the sense of a binding legal obligation.

4 See SCR 1970 (2011).

5 See African Union, Decision on the Implementation of the Assembly Decisions on the International Criminal Court (30 June - 1 July 2011).

Moreover, notwithstanding its initial ‘exceptionalism’, South Africa has over the past decade adopted some of the most progressive legislation for the prosecution of international crimes by its courts. However, in the so-called ‘Zimbabwe Torture case’ the relevant South African authorities dragged their feet in respect of the implementation of these laws (and then had those feet held to the fire by the courts for failing to do so).⁶ All the while, during the course of this debacle (which is ongoing), South Africa passed more implementing legislation regarding international crimes (viz the Implementation of the Geneva Conventions Act 8 of 2012); successfully prosecuted its first ‘universal jurisdiction’ case⁷ (albeit related to terrorism) and opened an investigation into alleged crimes against humanity committed in Madagascar. What is more, this idiosyncratic approach to international criminal law is also reflected in the *substance* of its domestic implementing legislation – which is unclear and at times contradictory insofar as jurisdiction, definitions of crimes, modes of responsibility, immunity and the initiation of investigations are concerned. Then, finally, there are lingering doubts over status of customary international *criminal* law in South Africa and the potential for direct application thereof.

The charge that South Africa’s approach to international criminal law is schizophrenic, both in principle and practice, requires two qualifications. The first is that, these misgivings notwithstanding, South Africa has made considerable strides towards the creation of a legal framework for the domestic enforcement of international criminal law, more than most states and certainly any other African state. This should be acknowledged up front. The second is that international criminal law lacks coherence *generally*, at a number of levels. In fact, international criminal law has *itself* been accused of being schizophrenic: Ratner, for example, has pointed out its ‘arbitrary schisms’ in the manner in which it assigns individual criminal responsibility to certain human rights violations and not others.⁸ The same can be said of the application of these rules at the international level, as Boas notes ‘varying structures and practices across war crimes tribunals can lead to a sense of incoherence, which in turn

6 See *Southern Africa Litigation Centre and Another v National Director of Public Prosecutions and Others* 2012 (3) All SA 198 (GNP); *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2014 (2) SA 42 (SCA); and *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC).

7 See *S v Okah* (SS94/11) [2013] ZAGPJHC 85 (20 March 2013), brought under the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (which came into effect on 20 May 2005).

8 See Ratner (n 2 above) 238.

raises questions of legitimacy'.⁹ Nor is it clear that coherence is desirable at an international level.¹⁰

Against this background, this chapter will examine and discuss the incorporation of international criminal law norms and obligations under South African law. In order to do so, it begins by placing these developments in historical perspective.

2 The relevant international legal obligations in historical perspective

2.1 The development of international criminal law: An African perspective

As my colleague has usefully set out the general historical picture in her chapter (→ Schmalenbach), I will only add a few remarks about the role that African states and institutions have played in the 'development' of international criminal law.¹¹

African states, for reasons well-known, were not engaged in the formative stages of the international criminal law project. During the negotiation of the Versailles Peace Treaty – which 'laid the foundation of modern international criminal law' (→ Schmalenbach) – African states were not represented.¹² Similarly, the London Charter that established the Nuremberg Tribunal was negotiated and signed by European and American 'Great Powers',¹³ and the Tribunal it created was constituted, managed and funded by those states. While the General Assembly

9 G Boas 'What is international criminal justice?' in G Boas et al (eds) *International criminal justice: Legitimacy and coherence* (2013) 11.

10 Simpson notes: 'One answer to [the] problem is to bemoan the absence of coherence ... and insist that institutional or judicial pronouncements be brought into conformity with each other: either through institutional or normative heitachy, or horizontal judicial deference. The other is to welcome fragmentation as a sign of increasing sophistication. International criminal justice seems poised between the two, and this may reflect the lawyer's inbuilt preference for uniformity (or generality and consistency) on one hand, and fierce professional independence and sense of institutional autonomy on the other.' G Simpson 'International criminal justice and the past' in Boas et al (n 9 above) 127.

11 'Development' implies a somewhat linear process; however the history of ICL has been anything but. See WA Schabas 'The banality of international justice' (2013) 11 *Journal of International Criminal Justice* 545 and P Akhavan 'The rise, and fall, and rise, of international criminal justice' (2013) 11 *Journal of International Criminal Justice* 527.

12 Notably South Africa, as a Dominion of the British Empire who contributed to the war effort, was represented and signed the Covenant of the League of Nations as a 'Member of the League' (but not a 'State Member').

13 United Nations Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement) (8 August 1945, 82 UNTC 280) available at: <https://www1.umn.edu/humanrts/instree/1945a.htm> (accessed 18 May 2015). The agreement was later 'ratified' by other states, including Ethiopia, pursuant to article 5 thereof.

unanimously adopted the Nuremberg Principles in 1946¹⁴ – adding some democratic legitimacy to the project – that body looked very different at that stage (the ‘decolonization’ of Africa was yet to take place). The independence of most African states over the next few decades enabled them to participate fully within the international legal order, but their inclusion came at a time when international criminal law had entered its ‘dark ages’. During this period, there were no *international* trials (attempts in 1980 to establish an international tribunal to punish the crime of *apartheid* failed), and the small number of *domestic* trials that did take place did so in Europe (viz the Barbie Trial) and the Middle East (the Eichmann Trial).¹⁵ The ‘participation’ of newly independent African states in the project during this period was limited to the ratification of existing international criminal law-related treaties (such as the Geneva Conventions and the Genocide Convention), and the drafting of three new treaties (the two Additional Protocols to the Geneva Conventions and the Apartheid Convention).

However, when the international criminal law project was awoken from its Cold War slumber during the ‘long 1990s’,¹⁶ African states were better placed to participate in its renewal. Similarly, the project, which for so long had turned its gaze away from crimes committed in Africa, quickly made up for lost time (and has been very busy on the continent since). For

14 United Nations ‘Affirmation of the principles of international law recognised by the Charter of the Nurnberg Tribunal’ A/RES/95(I) 11 December 1946.

15 While African states were not engaged in the project’s formative stages due to colonialism, Africa (and colonialism) was by no means absent from these moments. In fact, colonialism has made persistent and uncomfortable appearances from the project’s outset. Beginning with Justice Radhabinod Pal’s fierce anti-colonial dissent at the *International Military Tribunal for the Far East*. Amongst other things, Justice Pal was concerned about the ‘history of colonial domination by the Western powers’, and questioned the ‘moral authority of Great Britain, a colonial power, to pass judgement on the defeated colonial policies of Japan’ (see U Kei ‘Pal’s “dissentient judgment” reconsidered: some notes on postwar Japan’s responses to the opinion’ (2007) 19 *Japan Review* 220). The *unwritten* dissent at Nuremberg was not as much about the colonial past, as it was about the colonial present. As Mutua notes: ‘The irony of Nuremberg, and the White men who created it, was that the adjudicating states either condoned (or practiced as official policy) their own versions of racial mythologies: Britain and France violently put down demands for independence in “their” colonies in Africa and Asia while the United States denied its citizens of African descent basic human rights.’ (M Mutua ‘Never again: Questioning the Yugoslav and Rwanda Tribunals’ (1997) 11 *Temple International & Comparative Law Journal* 170 - 171) The uncomfortable question of ‘colonial crimes’ again emerged during the trials of World War II crimes in France four decades later. The Barbie trial, at the instigation of the defence, became about ‘colonialism and France’s moral standing’ (A Kaplan ‘On Alain Finkielkraut’s ‘Remembering in Vain’: The Klaus Barbie trial and crimes against humanity’ (1992) 19 *Critical Inquiry* 79). Be this as it may, for now colonialism remains a collective sin, for which many are and nobody is responsible, for which law has offered very little expiation, and ICL nothing. See further C Gevers ‘International criminal law and individualism: an African perspective’ in Schwobel (ed) *Critical approaches to international criminal law* (2014) 221-245.

16 The period beginning in 1989 and ending around 2003. A Rasulov, ‘New approaches to international law: Images of a genealogy’ in Beneyto, KM & Kennedy, D (eds) *New approaches to international law: The European and the American experiences* (2012) 152.

their part, African states were at the forefront of the creation of the first permanent international criminal court.¹⁷ As Mochochoko notes:¹⁸

Contrary to the view that the ICC was shoved down the throats of unwilling Africans who were dragged screaming and shouting to Rome and who had no alternative but to follow their Western Masters under threat of withholding of economic aid if they did not follow, the historical developments leading up to the establishment of the court portray an international will of which Africa was a part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community.

Not only did 43 African states participate in Rome in 1998, those that did pushed for a strong and independent court, including calling for the ICC to 'be the judge of its own jurisdiction', to 'operate without being prejudiced by actions of the Security Council' and for 'the independence of the Prosecutor and his [sic] functions ...[to] be guaranteed'.¹⁹ This support during the drafting process continued after Rome. Shortly thereafter the African Commission on Human and Peoples' Rights called on all African states to sign and ratify the Rome Statute, as well as 'take all necessary legislative and administrative steps to bring national laws and policies into conformity with the statute'. To date, 34 African states have obliged by ratifying the Statute.

However, the participation of Africa states within the Rome Statute is not the only, or perhaps the most telling, exemplar of the continent's normative commitment to international justice. That distinction lies with article 4(h) of the African Union's Constitutive Act, which proclaims as a founding principle 'the right of the Union to *intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity*'.²⁰ In its *Report on Universal Jurisdiction*, the AU's Office of Legal Counsel noted that article 4(h) 'provides the basis of the practice of the African Union on universal

17 See F Bensouda & H Jallow 'International criminal law in an African context' in M du Plessis (ed) *The African guide to international criminal justice* (2008) 15.

18 See P Mochochoko 'Africa and the International Criminal Court' in E Ankumah & E Kwakwa *African perspectives on international criminal justice* (2005). See also Bensouda & Jallow (n 17 above) 16.

19 Dakar Declaration for the Establishment of The International Criminal Court (6 February 1998) <http://www.iccnw.org/documents/DakarDeclarationFeb98Eng.pdf> (accessed 18 May 2015). It was later endorsed by the 34th Assembly of Heads of State and Government of the OAU, meeting at Ouagadougou in June 1998. See African Commission on Human and Peoples' Rights *Resolution on the Ratification of the Treaty on the International Criminal Court*, adopted at its 24th Ordinary Session from 22 - 31 October 1998 in Banjul, the Gambia.

20 It went further, adding: 'To comply with this provision, and to avoid the consequences of intervention under article 4(h), those African states that have not done so should be encouraged to adopt national legislation and other measures aimed at preventing and punishing war crimes, genocide and crimes against humanity.' Office of the Legal Counsel of the African Union *Report on Model Law* (2012) paras 40 - 41.

jurisdiction over war crimes, genocide and crimes against humanity'. This has been reflected at a sub-regional level as well.²¹

Despite these promising beginnings, the relationship between African states and the project's flagship the ICC has soured in recent times. The reasons for this deterioration are numerous, the three most prominent being: (i) antagonism regarding cases being pursued against 'high-profile' Africans (First, Mr al Bashir of The Sudan and more recently senior Kenyan politicians),²² (ii) the ICC's failure to pursue non-African cases; and (iii) concerns regarding the perceived abuse by domestic (European) prosecutors and judges of the principle of universal jurisdiction to target other 'high-profile' Africans.²³ These, together with other concerns, have created a perception of bias on the part of the ICC, and the international criminal law project more generally.

The merits of these of concerns are discussed elsewhere,²⁴ however their immediate effect has been to cast a shadow over the relationship between the Court and its biggest (and to date only) client. Aside from the general air of mistrust, the tangible results of these concerns have included:

- A proposed amendment to article 16 of the *Rome Statute* that grants the UN General Assembly a residual right to defer proceedings before the ICC in the name of international peace and security;²⁵
- A number of decisions from the African Union Assembly ordering its members not to cooperate in the arrest and surrender of first President al Bashir and then Muammar Qadhafi,²⁶ which has resulted in the censure of the ICC in respect of Malawi, Chad, the DRC and others;²⁷

21 See the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination (29 November 2006) chapter III.

22 See M du Plessis & C Gevers 'Making amend(ment)s: South Africa and the International Criminal Court from 2009 to 2010' (2010) 34 *South African Yearbook of International Law* 1 and M du Plessis & C Gevers 'Another stormy year for the International Criminal Court and its work in Africa' (2011) 35 *South African Yearbook of International Law* 163.

23 See *The AU-EU Expert Report on the Principle of Universal Jurisdiction* (16 April 2009, 8672/1/09-REV 1) and C Jalloh 'Universal jurisdiction, universal prescription? A preliminary assessment of the African Union perspective on universal jurisdiction' (2001) 21 *Criminal Law Forum* 1.

24 For a useful overview see 'Is the International Criminal Court (ICC) targeting Africa inappropriately?' *UCLA/ICC forum on Human Rights and International Criminal Law* <http://iccforum.com/africa> (accessed 18 May 2015).

25 The proposal was dutifully raised by South Africa at the 9th ASP in New York in 2010. However, due to lack of support (including from other African states present) it was consigned to a Working Group on amendments – where it remains. On this see Du Plessis & Gevers (n 22 above) 1.

26 African Union *Decision On The Implementation Of The Assembly Decisions On The International Criminal Court*, Doc EX.CL/670(XIX), adopted at the 17th Ordinary Session of the African Union, 30 June -1 July 2011, para 6.

27 *Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court With Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir* (ICC-02/05-01/09) (Pre-Trial Chamber I) (12 December 2011); *Décision rendue en application de l'article 87-7 de le Statut de Rome concernant le refus de la République du Tchad d'accéder aux demandes de coopération délivrées par la Cour*

- The adoption of an *AU Model National Law on Universal Jurisdiction* 'to provide for the exercise ... of universal jurisdiction over international crimes and for connected matters and to give effect to its obligations under international law',²⁸ and,
- The drafting of an amendment to the *Protocol on the African Court on Human and Peoples' Rights* (the African Court) that grants that Court jurisdiction over a range of international crimes, creating a 'African Criminal Court' of sorts.²⁹

While the first two developments will most likely be viewed as a step backwards for international criminal law in Africa, the latter two hold considerable promise. The *AU Model National Law on Universal Jurisdiction* is a progressive draft law insofar as the prosecution of international crimes is concerned, including making presence a requirement only of trial and, by implication, not investigation or arrest proceedings. Similarly, while some remain skeptical of the idea of an 'African Criminal Court', and no doubt significant challenges remain to be addressed in this regard,³⁰ in principle a regional court is a welcome addition to the available mechanisms for prosecuting international crimes.

2.2 South African contributions to and participation in the development of international criminal law

Since 1994, South Africa has been at the forefront of much of Africa's engagement with international criminal law outlined above: both positive and negative. South Africa participated actively at Rome in 1998, ratified the Rome Statute in 2000, and two years later it became the first African country to implement the Rome Statute domestically (its legislation has since become a model for other African countries).³¹ A South African judge, Navanethem Pillay, was elected to serve on the inaugural bench and assigned to the Appeals Division and a number of South Africans also hold key positions in the Office of the Prosecutor.

On the negative side, while its position has not always been a model of clarity, South Africa has for the most part towed the AU's increasingly

concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09) (Pre-Trial Chamber I) (13 December 2011). See further D Tladi 'The ICC decisions on Chad and Malawi: An cooperation, immunities, and article 98' (2013) 11 *Journal of International Criminal Justice* 199.

28 African Union Model National Law on Universal Jurisdiction over International Crimes sec 1.

29 See M du Plessis 'Implications of the AU decision to give the African Court jurisdiction over international crimes' *ISS Paper 1* <http://www.issafrica.org/publications/papers/implications-of-the-au-decision-to-give-the-african-court-jurisdiction-over-international-crimes> (accessed 18 May 2015).

30 For a discussion of these challenges see M du Plessis 'A new regional International Criminal Court for Africa?' (2012) 25 *South Africa Journal of Criminal Justice* 286.

31 See M du Plessis 'South Africa's implementation of the ICC Statute: An African example' (2007) 5 *Journal of International Criminal Justice* 460.

hostile line insofar as ICC is concerned. In fact, it was South Africa that was tasked with proposing a controversial amendment to the Rome Statute at the Assembly of States Parties in 2010. More recently, South Africa's (now former) Deputy-President Kgalema Motlanthe put the country's support firmly behind the AU's proposal for an 'African Criminal Court', arguing that 'Africa needs its own court, vested with universal jurisdiction over the three core international crimes of genocide, crimes against humanity and war crimes'.³² The main justification given for this 'African Criminal Court' was 'the perception that the ICC is biased against Africans'.³³ The Deputy-President stated that while 'the ICC is an indispensable international judicial organ ... [it] can best serve African judicial interests in the context of the principle of complementarity'.³⁴ Complementarity in this sense is broader than that contained in the Rome Statute, in that it holds that the ICC should yield to *both* domestic and regional criminal trials, whereas the Rome Statute only recognises the former. In this regard it is worth noting that even in Rome in 1998 the African position was that complementarity should include regional trials.

South Africa's contribution to the development of international criminal law at a domestic level has (unsurprisingly) also been a mixed bag. It got off to a bad start:

Following the country's transition to democracy, in the new Parliament adopted the Promotion of National Unity and Reconciliation Act³⁵ (the TRC Act) in 1995. The aim of the TRC Act was *inter alia* to 'provide for the investigation and the establishment of as complete a picture as possible of the ... gross violations of human rights committed ... within or outside the Republic, emanating from the conflicts of the past'. In order to facilitate truth-telling, the TRC process offered civil and criminal amnesty 'to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective'.³⁶

However, the TRC's offer of amnesty came at a time when there was a growing recognition that certain international crimes – including war crimes and crimes against humanity – must *as a matter of international law* be punished by states.³⁷ Certainly the atrocities committed during apartheid – those subject to amnesty under the TRC Act – made good

32 Public Lecture by Deputy President Kgalema Motlanthe at the University of Pretoria, Tshwane, Gauteng (31 March 2014) <http://www.thepresidency.gov.za/pebble.asp?relid=17119> (accessed 18 May 2015).

33 As above.

34 As above.

35 Promotion of National Unity and Reconciliation Act 34 of 1995 (TRC Act).

36 n 35 above, Preamble; the actual period was 'from 1 March 1960 to the cut-off date contemplated in the Constitution.'

37 While the existence of a general customary international obligation to punish such crimes remains controversial, at the very least there are (and were at the time) treaty-based obligations to punish war crimes and genocide (under certain conditions). All four of the Geneva Conventions 1949 contain a common article setting out an

candidates for such crimes. The system of apartheid, for one, was classified as a crime against humanity under the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid,³⁸ and many of the atrocities routinely committed under apartheid (murder, forced disappearances, forced removal, torture, etcetera) are listed as 'underlying acts' of this crime.³⁹ Further, arguably the level of violence during apartheid, both in South Africa and other frontline states, at times could be classified as amounting to an armed conflict (be it international and/or non-international), making human rights violations committed during this period potential war crimes. The Constitutional Court itself has accepted that *at certain points* South Africans were engaged in an armed conflict, and that war crimes were committed.⁴⁰

It was not long until the Constitutional Court had to address the question of South Africa's past crimes and present obligations. In *AZAPO v President of the Republic of South Africa* the Constitutional Court faced a challenge to the TRC Act by victim's families on the basis that *inter alia* 'the state was obliged by international law to prosecute those responsible for gross human rights violations and that the provisions of [the TRC Act] ... which authorised amnesty for such offenders constituted a breach of international law'.⁴¹ In rejecting the challenge the Court dismissed the suggestion that struggle against apartheid could, at any point, be classified

obligation either to prosecute individuals alleged to have committed or ordered the commission of war crimes, regardless of their nationality; or to 'hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case'. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I) (12 August 1949, 75 UNTS 31) art 49. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces (Geneva II) (12 August 1949, 75 UNTS 85) art 50; Geneva Convention relative to the Treatment of Prisoners of War (Geneva III) (12 August 1949, 75 UNTS 135) art 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV) (12 August 1949, 75 UNTS 287) art 146. See also United Nations Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948, 78 UNTS 277) arts I, II, IV, VI and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ (26 February 2007) (2007) ICJ Reports 2.

38 International Convention on the Suppression and Punishment of the Crime of Apartheid (30 November 1973, 1015 UNTS 244) art 1 states: 'The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.'

39 It would be very easy to show that these crimes met the contextual requirements of being widespread and/or systemic. See the Rome Statute of the International Criminal Court (Rome Statute) (17 July 1998) art 7.

40 See discussion of *S v Basson* 2005 (1) SA 171 (CC) (hereafter *Basson I*) and *S v Basson* 2007 (3) SA 582 (CC) (hereafter *Basson II*) below.

41 *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015, para 25.

as an *armed conflict* – whether international⁴² or non-international.⁴³ It did so in a footnote. The scant legal reasoning underpinning its conclusion was far from unassailable.⁴⁴ However, the upshot of *AZAPO* was that as there was no armed conflict in South Africa, crimes committed during this period could not be considered war crimes. Remarkably, the Court did not even address the question of crimes against humanity.

The inadequacies of the Constitutional Court's approach to the issue of apartheid-era crimes has haunted its attempts to address the question in subsequent cases. In the first of two cases involving Wouter Basson, the head of the apartheid government's chemical weapons programme, the Constitutional Court remarked that '[i]t is ... clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes'.⁴⁵ What is more, the Court accepted that 'international law obliges the state to punish crimes against humanity and war crimes'. These remarks, albeit *obiter dictum*, are difficult to reconcile with the finding in *AZAPO* that crimes committed under apartheid could not constitute war crimes as South Africa was not engaged in an international or non-international armed conflict. Nor does the Court's acceptance that (i) apartheid was a crime against humanity, and (ii) South Africa is under an obligation to prosecute such crimes, sit well with its failure to even consider the question of crimes against humanity in *AZAPO*.

The Constitutional Court again addressed the issue in its second consideration of Mr Basson's case, this time it went further. In *S v Basson II*⁴⁶ the Court – in a rambling, difficult to decipher passage that included

42 *AZAPO* (n 41 above) 'The Geneva Conventions of 1949 apply only to cases of "declared war or of any armed conflict which may arise between two or more of the High Contracting Parties." (No High Contracting Parties were involved in the South African conflict).' It also summarily dismissed the argument that article 1(4) of Additional Protocol I cannot be used to 'escalate' the conflict as that instrument 'was never signed or ratified by South Africa during the conflict and no such "declaration" was deposited with that Council by any of the parties to the conflict' (footnote 29).

43 As far as non-international armed conflicts are concerned, the Court held 'it is doubtful whether [Additional Protocol II] ... it applies at all (see article 1(1) to Protocol II) but if it does, it actually requires the authorities in power, after the end of hostilities, to grant amnesty to those previously engaged in the conflict.' *AZAPO* (n 41 above) footnote 29.

44 See JC Dugard 'Is the truth and reconciliation process compatible with international law? An answered question?' (1997) 13 *South African Journal of Human Rights* 258.

45 *Basson I* (n 40 above) para 37.

46 n 40 above.

historical⁴⁷ and moral excursions⁴⁸ – found that regardless of the characterisation of the conflict in question, the conduct Mr Basson had been accused of ‘grossly transgressed even the most minimal standards of international humanitarian law’.⁴⁹ In other words, it amounted to war crimes.⁵⁰ Although the Court focused its attention mainly on the crimes committed against ‘hundreds of South-West Africa People’s Organisation (SWAPO) captives’ in Namibia, the Court’s findings cannot be limited to such crimes; Mr Basson was also charged with crimes committed against members of the ANC (and others) in South Africa and beyond. It is also worth pointing out that in law there is no difference between the nature of the conflicts against the ANC and against SWAPO. At first blush *both* these conflicts could be classified as either non-international armed conflicts (under common article III or APII) or article 1(4) API ‘international armed conflicts’ (that is, against colonialism/occupation). Certainly neither was a classic international armed conflict (that is, between two states). This is because under international humanitarian law the *parties* to the conflicts are determinative of its status, and not its *locale*. Nor, by the Court’s reasoning in *Azapo*, can the conflict against SWAPO be escalated by operation of article 1(4) of Common Article II as South Africa was not a party to it (and SWAPO did not lodge the appropriate declaration). Therefore, while the conflict against the ANC and that against SWAPO might be different *types* of non-international armed conflicts, in general terms the same corpus of war crimes applies to both. The only remaining distinction between the two conflicts relates to their ‘scale’ – whether or not they are armed conflicts as opposed to internal disturbances. This is a significant question which requires detailed discussions relating to specific instances of violence under apartheid, which is well beyond the scope of this chapter. Suffice it to say, insofar as *AZAPO* is concerned, the Court did not go into any analysis of the sort and simply dismissed it in respect of the apartheid-era *generally*. More importantly, the Court’s findings in *AZAPO* cannot be territorially limited, they apply equally to crimes committed beyond the borders (including

47 n 40 above, para 172; noting: ‘War by its very nature is brutal. It involves the intentional and frequently cruel killing of human beings, using all the force that a state can muster. Yet the law declares firmly that all is not fair in love and war. Since ancient times throughout the globe humanity has imposed limits on what can be done in the course of armed conflict. Legal constraints on the manner in which war could be conducted were found in a diverse range of cultural traditions from antiquity onwards and established the basis for the adoption of universally accepted norms of conduct in times of war.’

48 n 40 above, para 173; noting that ‘legal rules, however weak and defective, introduce a modicum of humanity into utterly inhuman conduct’ and ‘they serve as a moral and political yardstick by which public opinion and non-governmental groups and associations can appraise if, and to what extent, States misbehave.’

49 n 40 above, para 179.

50 n 40 above, para 184; the Court notes: ‘Given the extreme gravity of the charges and the powerful national and international need to have these issues properly adjudicated, particularly in the light of the international consensus on the normative desirability of prosecuting war criminals, only the most compelling reasons would have justified the SCA in exercising its discretion to refuse to rule on the charges.’

those committed against SWAPO) as the TRC Act was not territorially limited.⁵¹

The result is that it is difficult to reconcile the Constitutional Court's finding in *AZAPO* – to the effect that the Geneva Conventions of 1949 and its Protocols did not apply to the conflict in South Africa – with its subsequent findings, on two occasions, that war crimes *of some description* were committed during that time. It is also difficult to square the Court's twin assertions that crimes against humanity were committed in South Africa during apartheid and that South Africa was under an *international obligation* to prosecute such crimes, with the failure of the Court in *AZAPO* to even consider such crimes.⁵² Of course, these antinomies did not unsettle the finding of *AZAPO*, nor the TRC which had safely completed its work before the *Basson* cases. They do however mean that, despite all the hype regarding the TRC, democratic South Africa got off to an ignominious start insofar as the prosecution of international crimes is concerned.

After this rocky start, over the past decade South Africa has made important strides insofar as the domestic prosecution of international crimes is concerned. Beginning with the adoption of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, which not only provides for universal jurisdiction to be exercised over international crimes by South African courts, but also – in some commentators' views – discarded the diplomatic immunity of state officials accused of such crimes, despite a contemporaneous ruling by the International Court of Justice that such immunities continue to apply regardless of the crime in question.⁵³ Then, in 2012, South Africa became the first country to adopt implementing legislation for the various 1949 Geneva Conventions and their Protocols *after* the incorporation of the 1998 Rome Statute of the International Criminal Court. In doing so, South Africa granted its courts universal jurisdiction (albeit belatedly) over the 'grave breaches' of the Geneva Conventions and made novel contributions to the law relating to modes of responsibility.

These laws (discussed below) are far from perfect, but they place South Africa at the front of the trend towards domestic prosecutions of international crimes.

51 In the TRC Act human rights violations were defined as 'violation of human rights ... which emanated from conflicts of the past and *which was committed during the period 1 March 1960 to the cut-off date within or outside the Republic*, and the commission of which was carried out, advised, planned, directed, commanded or ordered, by any person acting with a political motive.' See further *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others* 2000 (1) SA 113 (SCA).

52 Whether or not there is such an obligation, and its scope, remains contentious. The point is though, that the Court *itself* found such an obligation exists under international law in *Basson*.

53 See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ (14 February 2002) (2002) ICJ Reports 3.

3 Incorporation of international criminal law into the South African legal order

3.1 The statutory framework

3.1.1 *The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*

South Africa ratified the Rome Statute on 27 November 2000 and in order to give effect to its provisions passed the Rome Statute Act in 2002.⁵⁴ The Rome Statute Act has two main purposes. The first is to establish a comprehensive cooperative scheme for South Africa *vis-à-vis* the International Criminal Court – pursuant to article 88 of the Rome Statute.⁵⁵ The second, more interesting perhaps, aim of the Rome Statute Act is to provide a statutory basis for *domestic* prosecution of crimes against humanity, genocide, and war crimes before a South African court, in line with the ‘principle of complementarity’.⁵⁶ It is worth noting that South Africa was not *obliged* under the Rome Statute to create the necessary conditions for domestic prosecutions, it *elected* to do so.⁵⁷ Be that as it may, in doing so it elected to create a very strong regime to bring ‘persons who commit such atrocities to justice ... in a court of law of the Republic in terms of its domestic law *where possible*’.⁵⁸

The starting point is section 4(1) of the Rome Statute Act which provides that ‘[d]espite anything to the contrary in any other law in the Republic, any person who commits a [international] crime, is guilty of an offence’.⁵⁹ The international crimes referred to in the Act are genocide,

54 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. For an overview see M du Plessis (n 31 above) 460.

55 n 39 above, art 88 states: ‘States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.’

56 See the Rome Statute (n 39 above) Preamble and art 17.

57 Contrary to what is often suggested, ‘complementarity’ does not entail an *obligation* for states to prosecute crimes domestically. It is in fact a principle of *admissibility* that prevents the ICC from hearing a case when states are dealing with the matter. Nor does the Rome Statute contain such an obligation. Notwithstanding, commentators continue to suggest such and more recently the Supreme Court of Appeal agreed: ‘By way of its enactment of the Rome Statute Act, the South African legislature complied with its obligations as a State Party to the Rome Statute to take measures at national level and to ensure national criminal jurisdiction over the crimes set out in the Rome Statute’ *Southern African Human Rights Litigation Centre (SCA)* (n 6 above) para 43.

58 Rome Statute Act (n 54 above) Preamble. Section 3 of the Act defines as one of its objects the enabling: ‘as far as possible and in accordance with the principle of complementarity ... the national prosecuting authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances.’

59 This provision establishes the *prescriptive* jurisdiction over such crimes, notably without reference to territory.

crimes against humanity and war crimes.⁶⁰ Further, the Rome Statute's definitions of these 'core crimes' are incorporated directly into South African law through a schedule appended to the *Rome Statute Act*.⁶¹ As discussed below, the Rome Statute Act did not include, or incorporate, the modes of liability provided for in the Rome Statute, some of which are peculiar to international law. In order to remedy these omissions, South African courts will have to turn to analogous domestic modes of liability – such as aiding and abetting and the common purpose doctrine – when it comes to prosecutions under the Act. However, not all international modes of liability have domestic counterparts (that is, the doctrine of command responsibility).

There are four grounds upon which jurisdiction may be exercised over international crimes by South African courts under the Rome Statute Act: territoriality, nationality, passive personality and under the universality principle. The first three grounds are fairly unremarkable, excepting that nationality and active personality jurisdiction may be founded on citizenship *or if the person concerned (either the perpetrator or victim respectively) is 'ordinarily resident in the Republic'*.⁶² It is the fourth ground – that of universal jurisdiction – that will generate the most legal and political interest (and already has).⁶³

Section 4(3)(c) of the Rome Statute states that:

In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits [an ICC] crime outside the territory of the Republic, is deemed to have committed that crime within the territory of the Republic if ... *that person, after the commission of the crime, is present in the territory of the Republic.*

This provision contemplates an exercise of jurisdiction by South African courts over international crimes when none of the 'traditional' connecting factors – such as the nationality of the accused or victim or the location of

60 See the Rome Statute Act (n 54 above) sec 1.

61 n 54 above, schedule 1. While the Rome Statute Act incorporates the definitions of these crimes into South African domestic law, neither the Rome Statute Act nor Schedule 1 refers specifically to the ICC Elements of Crimes. There is nothing, however, which prevents a South African court from having regard to these were it to be involved in the domestic prosecution of an ICC offence. Notably, section 2 of the Rome Statute Act states that South African courts must consider and, where appropriate, apply 'conventional international law, and in particular the [Rome] Statute.'

62 n 54 above, sec 4(3)(b) & (d) respectively. It's also worth pointing out that that South Africa, as a common law country, does not routinely exercise such jurisdiction.

63 One might point out that the fourth ground – universal jurisdiction – subsumes the others, making them somewhat superfluous.

the crimes – are present, in other words it contemplates so-called *universal jurisdiction*.⁶⁴

Despite no end of academic attention, the concept of universal jurisdiction remains controversial in terms of *inter alia* its origin, doctrinal basis, the crimes covered, the conditions under which it is exercised, and whether or not it is mandatory or voluntary. Unfortunately, debates regarding universal jurisdiction (with few exceptions) have provided more heat than light.⁶⁵ I have argued elsewhere that, as far as the Rome Statute Act is concerned, section 4(3)(c) *alone* does not provide for universal jurisdiction, it must be read together with section 4(1) which provides for the *prescriptive jurisdiction* of South Africa over the crimes in question. As a result, to the extent that universal jurisdiction can be *conditional*,⁶⁶ it is enforcement and/or adjudicative jurisdiction that is made conditional on the presence of an accused under the Rome Statute Act.⁶⁷ The real issue is the point at which presence is required in order for such jurisdiction to be exercised (that is, at the time of the opening of an investigation or the issuance of an arrest warrant or, eventually, the trial of a person).

As discussed below, the Constitutional Court recently considered the proper interpretation of the Rome Statute Act, but its findings focussed mainly on the issue of whether the presence of a suspect was a requirement *for the initiation of an investigation* under the Rome Statute Act.⁶⁸

64 According to *The Princeton Principles on Universal Jurisdiction* (2001) principle 1(1): 'universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.' A preferred definition is that offered by O'Keefe, who defines it as: 'the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct.' R O'Keefe 'Universal jurisdiction: Clarifying the basic concept' (2004) 2 *Journal of International Criminal Justice* 735 745.

65 One such exception is O'Keefe (n 64 above) 735.

66 Arguably, conditional *universal* jurisdiction is a misnomer. When formulated properly, universal jurisdiction is 'a species of jurisdiction to prescribe.' In contrast, the debate between so-called 'pure' versus 'conditional' universal jurisdiction turns on the question of enforcement and adjudicative jurisdiction (ie to arrest and detain, to prosecute, try and sentence, and to punish). As the two are logically and legally independent, some scholars posit that enforcement jurisdiction is legally irrelevant for the purpose of properly exercising universal jurisdiction. As O'Keefe notes: 'The lawfulness of a state's enforcement of its criminal law in any given case has no bearing on the lawfulness of that law's asserted scope of application in the first place, and vice versa' O'Keefe (n 64 above) 741. Similarly, this is true of other grounds of extraterritorial jurisdiction (viz. nationality and passive personality). As a result, these scholars argue that the 'pure' versus 'conditional' universal jurisdiction debate is a policy rather than substantive legal one, driven by 'practical prudence, or as a result of political pressure, rather than as a matter of law'. R Cryer et al *An introduction to international criminal law and procedure* 56; O'Keefe (n 64 above) 741.

67 For an elaboration of this argument see C Gevers 'Southern African Litigation Centre and Another v NDPP and Others: Note' (2013) 130 *South African Law Journal* 293.

68 *Southern African Human Rights Litigation Centre and Another (CC)* (n 6 above). The Constitutional Court upheld the decision of the Supreme Court of Appeal, to the effect that 'the SAPS are empowered to investigate the alleged offences *irrespective of whether or not the alleged perpetrators are present in South Africa*' *Southern African Human Rights*

As far as the vexed question of immunity is concerned, the Rome Statute Act provides that notwithstanding:

[A]ny other law to the contrary, including customary and conventional international law, the fact that a person ... is or was a head of State or government, a member of a government or parliament, an elected representative or a government official ... is neither – (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime.⁶⁹

Most commentators have interpreted this provision as removing personal immunity before South African courts.⁷⁰ Dugard and Abraham argue that section 4(2)(a) of the ICC Act represents a choice by the legislature not to follow the ‘unfortunate’ *Arrest Warrant* decision, ‘of which it must have been aware’.⁷¹ While section 232 of the Constitution makes customary international law part of South African law, it does so only to the extent that it is not ‘inconsistent with the Constitution or an Act of Parliament’. Therefore, if the Rome Statute Act is interpreted as removing immunity *ratione personae* then it would do so notwithstanding the customary international law obligations on South Africa to observe it.

However, in the alternative, one could argue that section 4(2)(a) is modelled on article 27(1) of the Rome Statute – which deals with the irrelevance of official capacity as a defence or as a ground for the reduction of sentence – and not article 27(2), which deals with personal immunity.⁷² If this is the case, then section 4(2)(a) of the ICC Act effectively removes *functional* immunity of persons, but leaves *personal* immunity intact.⁷³ One argument that might be raised in favour of the interpretation of this section adopted here is based on the interpretive presumption contained in section 233 of the Constitution, which states: ‘When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’. The counter argument to this might

Litigation Centre (SCA) (n 6 above) para 3.2.1. This was an appeal from the decision of the North Gauteng High Court to set aside the decision of the SAPS (and the NPA) not to open an investigation into crimes against humanity on the basis that *inter alia* the SAPS incorrectly concluded that they could not open an investigation without a suspect being present in the Republic. See discussion below at section 4.

⁶⁹ n 54 above, sec 4(2)(a).

⁷⁰ Du Plessis notes: ‘In terms of the Act, South African courts, acting under the complementarity scheme, are thus accorded the same power to ‘trump’ the immunities which usually attach to officials of government as the International Criminal Court is by virtue of article 27 of the Rome Statute.’ Du Plessis (n 31 above) 474.

⁷¹ See JC Dugard & G Abraham ‘Public international law’ (2002) *Annual Survey of South African Law* 166.

⁷² n 39 above, art 27(2) states: ‘Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.’

⁷³ See further C Gevers ‘Immunity and the implementation legislation of South Africa, Uganda and Kenya’ in K Ambos & O Maungandize (eds) *Power and prosecution: Challenges and opportunities for international criminal justice in Sub-Saharan Africa* (2013) 85 - 118.

be a teleological one, to the effect that customary international law personal immunity is contrary to spirit, purport and object of South Africa's Constitution.

In terms of the procedure to be followed, the Rome Statute Act provides that '[n]o prosecution may be instituted against a person accused of having committed a[n] [international] crime without the consent of the National Director [of Public Prosecutions (NDPP)]'.⁷⁴ If the NDPP declines to prosecute a person under the ICC Act, the Director-General for Justice and Constitutional Development must be provided with the full reasons for that decision, because he or she is then obliged to forward the decision, together with reasons, to the Registrar of the ICC in The Hague. In order to fulfil these obligations, the NPA established a 'Priority Crimes Litigation Unit' (PCLU), headed by a Special Director of Public Prosecutions.⁷⁵ The Special Director has two powers: to 'head the Priority Crimes Litigation Unit'; and to 'manage and direct the investigation and prosecution of crimes contemplated in the [ICC Act] ...'. In this way, the Unit is tasked specifically with dealing with the ICC crimes set out in the ICC Act, and the Special Director that heads the PCLU is empowered to 'manage and direct the investigation' of such crimes. If the PCLU opens an investigation and issues a warrant of arrest, and the suspect is arrested, then the matter will move to the prosecution stage.

Further, the Act requires that an appropriate, specialised, High Court must be designated to hear cases brought under the Act. The Act, however, does not provide any specific trial procedure or punishment regime for domestic courts, so it can be assumed that the regular trial procedure for a criminal trial will be followed and that the court will be empowered to pass any of the sentences regularly imposed.

3.1.2 *The Implementation of the Geneva Conventions Act 8 of 2012*

In 2012 South Africa became the first country to implement the Geneva Conventions *after* the implementation of the Rome Statute, when Parliament adopted the Implementation of the Geneva Conventions Act.⁷⁶ It did so a mere sixty years after South Africa acceded to the 1949 Geneva Conventions.⁷⁷ According to its Preamble, the Act's purpose is two-fold: (i) to enact the Geneva Conventions and Protocols additional to those Conventions into law; and (ii) to ensure the prevention and

⁷⁴ n 54 above, sec 5(1).

⁷⁵ Appointed in terms of National Prosecuting Authority Act 32 of 1998 sec 13(1)(c).

⁷⁶ Geneva Conventions Act 8 of 2012 hereinafter 'the Geneva Conventions Act' or 'the Act.' For an overview see C Gevers, M du Plessis & A Wallis 'Geneva Conventions Act: Sixty years in the making, better late than never?' (2012) *African Yearbook of International Humanitarian Law* 185-200.

⁷⁷ South Africa acceded to the four 1949 Geneva Conventions in 1952, and the 1977 Additional Protocols on 21 November 1995. For a discussion of South Africa's reasons for not implementing the Conventions sooner, see generally Gevers et al (n 76 above).

punishment of grave breaches and other breaches of the Conventions and Protocols. The first aim is accomplished by annexing the Conventions in full to the Act, and providing that '[s]ubject to the Constitution and this Act, the Conventions have the force of law in the Republic'.⁷⁸ The second was accomplished by creating a war crimes regime for prosecuting 'breaches' of the Geneva Conventions in South African courts, notwithstanding that fact that the 'grave breaches' regime of the 1949 Geneva Conventions' and its Protocols has already *in substance* been implementing through the *Rome Statute Act*.⁷⁹ In addition, the 'grave breaches' now form part of customary international law and therefore, by operation of section 232 of the Constitution, are already part of South African law. This raises the question of whether the Geneva Conventions Act has any use in light of the more *substantively* expansive Rome Statute Act and, if it does, how the two pieces of legislation are to interact. We will return to these questions further below.

The Geneva Conventions Act criminalises two categories of offences: 'grave breaches' and 'other offences'. The former category is made up of the first-order war crimes contained in the 1949 Geneva Conventions and its 1977 Protocol I.⁸⁰ Notably, these crimes can only be committed in an *international armed conflict*, between two states.⁸¹ In addition to this, the Geneva Conventions Act 2012 criminalises the contravention of any *other* provision not covered by the 'grave breaches' regime.⁸² This 'catch-all' category of offences opens up the possibility of a second set of war crimes being prosecuted under this Act: war crimes committed in *non-international armed conflict*.⁸³ This is so because included in this 'catch-all' category of offences would be Common Article III – which covers violations

78 n 76 above, sec 4(1).

79 The grave breaches regime served as the basis for article 8(2)(a) and 8(2)(c) of the Rome Statute.

80 According to the Geneva Conventions Act (n 76 above) sec 5(2) a 'grave breach' means a breach referred to in article 50 of the First Convention, article 51 of the Second Convention, article 130 of the Third Convention, article 147 of the Fourth Convention, or article 11 or 85 of Protocol I. Notably, when Additional Protocol I was drafted, it was decided that breaches of its provisions would not attract criminal liability.

81 Or foreign occupation. See Common Article II of the 1949 Geneva Conventions (n 37 above) and art 1 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (8 June 1977, 1125 UNTS 3).

82 The Act states that '[a]ny person who within the Republic contravenes or fails to comply with a provision of the Conventions not covered by subsection (2), is guilty of an offence.'

83 During the Portfolio Committee hearing into the Bill, submissions were made in favour of extending the 'grave breaches' regime to *non-international armed conflicts* as well. Although the Committee appeared supportive of these submissions, it ultimately declined to amend the Bill accordingly. Notably, in *Basson I* (n 40 above) para 175 the Constitutional Court noted that '*since the 1930s the distinction between international and internal armed conflict has become more and more blurred and international legal rules had increasingly emerged to regulate internal armed conflict.*' See also the Court's remarks at para 179.

committed in 'armed conflicts not of an international character'⁸⁴ – as well as similar provisions in Additional Protocol II.

The Geneva Conventions Act provides for differing jurisdictional regimes for these two categories of offences. 'Grave breaches' are subject to 'universal jurisdiction' – they can be prosecuted by South African courts regardless of where they are committed.⁸⁵ Notably, this 'universal jurisdiction' provision differs from that found in the Rome Statute Act discussed above in that it does not contain a so-called 'presence requirement'. In contrast, 'other' offences under the Geneva Conventions Act – including non-international war crimes – are not subject to universal jurisdiction. These offences are subject to the 'traditional' jurisdictional bases of territoriality⁸⁶ and nationality,⁸⁷ but not passive personality jurisdiction (that is, based on the victim's nationality).

Another notable feature of the Geneva Conventions Act is the enigmatic section 7(4), which states:⁸⁸ 'Nothing in this Act must be construed as precluding the prosecution of any person accused of having committed a breach under customary international law before this Act took effect.'

While welcome in principle, this operation of this provision is potentially confusing: it confirms that prosecutions can take place in respect of crimes committed *before* the Act came into force, but it does not give any indication how this might take place.

84 In the *Nicaragua Case* the ICJ held that: 'Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity'. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* ICJ (27 June 1986) (1986) ICJ Reports 14 para 218.

85 The Geneva Conventions Act (n 76 above) sec 5(1) states that '[a]ny person who, whether within or outside the Republic, commits a grave breach of the Conventions, is guilty of an offence.' Sec 7(1) states: 'Any court in the Republic may try a person for any offence under this Act in the same manner as if the offence had been committed in the area of jurisdiction of that court, notwithstanding that the act or omission to which the charge relates was committed outside the Republic.'

86 Geneva Conventions Act (n 76 above) sec 5(3) states: 'Any person who within the Republic contravenes or fails to comply with a provision of the Conventions not covered by subsection (2), is guilty of an offence.'

87 Section 5(4) states: 'Any citizen of the Republic who outside the Republic contravenes or fails to comply with a provision of the Conventions not covered by subsection (2), is guilty of an offence'. The Act does not, *contra* the Rome Statute Act, extend its nationality jurisdiction to persons 'ordinarily resident' in the Republic. See the Rome Statute Act (n 54 above) sec 4(3)(b).

88 During the public hearings on the Geneva Conventions Act submissions were made to the Portfolio Committee on Defense and Military Veterans proposing that the Act specifically provide for 'retrospective application' of its provisions. They recommended that South Africa follow the Canadian approach and leave the date of application to be determined by a Court. The Committee rejected this approach, and appears to have inserted section 7(4) instead.

One possible avenue would be to interpret section 7(4) of the Act as a ‘retrospectivity clause’ that provides for the retrospective application *of the Act* until the point at which the breach in question became a breach under customary international law. This interpretation is supported by its reference to a *breach* of customary international law, a term that is particular to the Geneva Conventions. However, given the general interpretive presumption against retrospective application, such a provision would likely be formulated in express positive terms, and not ‘defensively’ (as section 7(4) is). Furthermore, this section differs considerably from the examples of such ‘retrospective application’ provisions given during the public hearings on the Act – in particular those of Canada and the United Kingdom – which the drafters were open to follow should they have wanted to provide for the retrospective application *of the Act*.

Another possible interpretation of section 7(4) is that this provision recognises that South African courts are empowered to prosecute customary international law crimes without implementing legislation, under customary international law. Textually, this provision could be interpreted as heading off any suggestion that the Geneva Conventions Act limits or curtails the prosecution of war crimes under some other piece of legislation or the common law. The only other relevant *legislation* is the ICC Act. However, insofar as that Act is concerned this interpretation is both unnecessary – as nothing in the Act suggests it is meant to limit other prosecutions – and redundant – as the Geneva Conventions Act already addresses this issue, noting that its provisions ‘must not be construed as *limiting, amending, repealing or otherwise altering* any provision of the [ICC Act]’.⁸⁹ That only leaves using common law for such prosecutions, or more specially ‘customary international law ... as the basis in itself for a prosecution under the common law’. Notably, a plain reading of the text of section 7(4) – which refers to the ‘*prosecution of any person accused of having committed a breach under customary international law*’ – supports this interpretation.

Another notable feature of the Geneva Conventions Act is that it introduces specialised modes of liability for international crimes.⁹⁰ First, section 5 of the Act provides for responsibility by way of *direct perpetration* of breaches of the Convention. Second, section 6 of the Act incorporates the doctrine of command responsibility into our law. That section provides that a ‘military superior officer’⁹¹ is guilty of an offence if (i) forces under his or her effective command, authority and control (ii) commit a ‘grave

⁸⁹ n 76 above, sec 19.

⁹⁰ In this respect the Geneva Conventions Act goes further than the Rome Statute Act – but not as far as the Rome Statute proper.

⁹¹ Notably, the term ‘military superior officer’ includes a military superior officer and a person holding a superior civil position. The Geneva Conventions Act (n 76 above) secs 6(4)(a) & (b).

breach' or an ordinary breach,⁹² (iii) the superior knew, or in the circumstances ought to have reasonably known, that his or her subordinates were committing such a breach,⁹³ and (iv) failed to take the necessary steps to prevent and/or punish said breach.⁹⁴ Section 6(1)(c) further specifies that the failure to take necessary steps means failure to 'exercise effective command, authority and control over the forces',⁹⁵ 'take all necessary and reasonable measures within his or her power to prevent or repress the commission of any breach or offence',⁹⁶ or 'submit the commission of the breach or offence ... to the competent authorities for investigation and prosecution'.⁹⁷

Notably, the liability of the military superior officer under this provision arises irrespective of *where* the 'breach' in question was committed by the subordinate.⁹⁸ This creates the potential for an anomalous situation where a superior is held criminally liable for an 'ordinary breach' by a subordinate outside the Republic, for which that subordinate cannot be prosecuted.⁹⁹ This is not likely to materialise insofar as South Africa's armed forces are concerned as in the ordinary course subordinates would be citizens (thereby fulfilling the personality-based ground of jurisdiction).¹⁰⁰ However, it is not inconceivable that a foreign citizen will fall under the *de facto* if not *de jure* control of a South African commander during the course of a multi-national military operation, such as an African Union or United Nations peacekeeping mission. In any event, the commanders of foreign armed forces will be bound under this provision. In addition to this, section 6(2) provides for criminal liability for any person who was 'under a duty' to prevent the commission of a breach of the Convention at the relevant time.¹⁰¹ This is a novel and potentially expansive provision – it will remain to be seen how the courts give effect to it.

92 Geneva Conventions Act (n 76 above) sec 6(1)(a).

93 Geneva Conventions Act (n 76 above) sec 6(1)(b).

94 Geneva Conventions Act (n 76 above) sec 6(1)(c).

95 Geneva Conventions Act (n 76 above) sec 6(1)(c)(i).

96 Geneva Conventions Act (n 76 above) sec 6(1)(c)(ii).

97 Geneva Conventions Act (n 76 above) sec 6(1)(c)(iii).

98 The section 5 territorial limitations would not be applicable to military superior officers who, in terms of section 5(1)(a), fail to exercise the necessary control to prevent a breach of the Conventions 'whether within or outside the borders of the Republic'. Furthermore there is no indication whether the nationality of a military superior officer will determine the application of the Act.

99 This 'anomaly' could be remedied by interpreting section 6 as incorporating the territorial limits of section 5(3) and (4).

100 Defence Act 42 of 2002 sec 52(4)(a) provides that '[n]o person may enrol in the Regular Force [of the South African National Defence Force] unless he or she is a citizen'.

101 The Geneva Conventions Act (n 76 above) sec 6(2) makes it an offence for '[a]ny person, whether within or outside the borders of the Republic, who fails to act when under a duty to do so in order to prevent the commission of' a breach of the Conventions. Similarly, a plain reading of this section suggests that the jurisdictional limits applicable to 'ordinary breaches' of the Conventions – see sections 5(3) and (4) – do not apply when an offence contemplated in section 6 is committed: ie when persons are found to be 'under a duty' to prevent the commission of a breach of the Conventions.

While the introduction of command responsibility into our law is a positive development, on the whole the Act is somewhat under-inclusive insofar as modes of liability are concerned. The glaring omission in this regard being forms of indirect participation or ‘accessorial liability’ (such as aiding and abetting or procuring the commission of an offence), notwithstanding the fact that such liability has been accepted as part of international law since the trial at Nuremberg.¹⁰² More recently, the principles of accessorial liability for international crimes were codified in the Rome Statute of the International Criminal Court.¹⁰³ Similarly, the ICRC’s Model Law on the Geneva Conventions and the relevant legislation of numerous foreign jurisdictions provide for criminal responsibility for any person who ‘commits or *aids, abets or procures any other person to commit*’ a breach of the Geneva Conventions and the 1977 Additional Protocols.¹⁰⁴ In addition, the Geneva Conventions Act also does not include the ‘joint criminal enterprise’ doctrine as a mode of liability.¹⁰⁵

That being said, the omission of certain modes of liability from the Geneva Conventions Act is clumsy but not fatal, as the Act empowers courts to consider and apply international law (both convention and

102 As Cassel notes: ‘Since Nuremberg there has been no question that accomplices, including those who aid and abet crimes, are responsible under international criminal law. The Nuremberg Charter imposed individual responsibility on accomplices participating in the formulation or execution of a common plan or conspiracy to commit’ a crime enumerated within the Charter. Although the Nuremberg Tribunal limited application of this provision to crimes against peace and did not apply it to other crimes, the International Law Commission (‘ILC’) of the United Nations in 1950 articulated Nuremberg Principle VII as follows: ‘Complicity in the commission of a crime against peace, a war crime, or a crime against humanity ... is a crime under international law.’ D Cassel ‘Corporate aiding and abetting of human rights violations: Confusion in the courts’ (2008) 6 *Northwestern Journal of International Human Rights Law* 307.

103 n 39 above, arts 25(3)(c) & (d). A number of other international instruments also criminalize the conduct of a person who contributes to the commission of a crime. See the Statute for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY Statute) (UN Doc. S/25704) art 7(1); Statute of the International Criminal Tribunal for Rwanda (ICTR Statute) (UN Doc. S/RES955) art 6(1); United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (10 December 1984, 1465 UNTS 85) art 4; International Convention on the Suppression and Punishment of the Crime of Apartheid (30 November 1973, 1015 UNTS 243) art III(b); Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (7 September 1956, 266 UNTS 3) art. 6; Convention on the Prevention and Punishment of the Crime of Genocide (The Genocide Convention) (9 December 1948, 78 UNTS 277, 280) art III(e).

104 ICRC Model Law Geneva Conventions (Consolidation) Act secs 3(1), 4(1) & (2) thereof. See, for example the implementing legislation in Ghana, Namibia, the United Kingdom, New Zealand, Australia, Sri Lanka, India and Canada. See also art 17 of Rwanda’s *Law No. 33bis* 2003.

105 See the Rome Statute (n 39 above) art 25(3)(d).

customary) and comparable foreign law, which should lead to the incorporation of further 'international' modes of liability as required.¹⁰⁶

3.2 South Africa's 'mitigated dualism': Customary international (criminal) law under the Constitution of the Republic of South Africa, 1996

In addition to these legislative avenues, the potential exists for the prosecution of international crimes through the *direct* application of customary international law by South African courts. In this regard section 232 of the Constitution, states: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' As customary international law itself criminalizes certain conduct, this raises the possibility of bringing prosecutions in South African courts by the *direct* application of customary international law (without requiring a statutory criminal framework such as the Rome Statute Act or the Geneva Conventions Act).

In *S v Basson* the Constitutional Court recognised this potential, although it ultimately left the question open, noting:¹⁰⁷

For the purposes of this case it is not necessary to enter into controversies surrounding the existence of universal jurisdiction for crimes against humanity and war crimes, and a concomitant duty to prosecute. We have not found it necessary to consider whether customary international law could be used either as the basis in itself for a prosecution under the common law, or, alternatively, as an aid to the interpretation of section 18(2)(a) of the Riotous Assemblies Act.

However, in the recent case of *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another*, the Constitutional Court explicitly endorsed the direct application of customary international law through section 232 of the Constitution, 1996, noting:¹⁰⁸

¹⁰⁶ n 76 above, sec 3 provides: 'In addition to the Constitution and the law, any court in the Republic hearing any matter arising from the application of this Act must also consider and, where, appropriate, may apply – (a) conventional international law; (b) customary international law; and (c) comparable foreign law'. This provision – included following submissions by civil society – is modelled on section 2 of the Rome Statute Act. This raises broader issues of whether South Africa Courts could extend the Act's criminal scope by interpretation using this provision, taking into account subsequent developments in international law. The Geneva Conventions came into force 62 years ago. They have thus been frequently interpreted and applied by both domestic and international courts and over time have developed considerably. Those developments could be a useful source of legal rules and principles for consideration and application by a South African court seized with a case under the Geneva Conventions Act.

¹⁰⁷ n 40 above, fn 147.

¹⁰⁸ *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 37.

Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require states, even in the absence of binding international treaty law, to suppress such conduct because “all states have an interest as they violate values that constitute the foundation of the world public order”. Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm.

The Court went on to extend this finding to crimes against humanity generally, finding:¹⁰⁹

In effect, torture is criminalised in South Africa under section 232 of the Constitution and the Torture Act whilst torture on the scale of crimes against humanity is criminalised under section 232 of the Constitution, the Torture Act and the ICC Act.

Furthermore, as noted above, it is possible to interpret section 7(4) of the Geneva Conventions Act as implicitly recognising the *direct* application of customary international (criminal) law by South African courts.

The *direct* application of customary international (criminal) law raises concerns the principle of legality, as well as the retroactive application of law. It also places the additional burden on those seeking to prosecute an accused for a crime in breach of customary international law to prove that the crime(s) in question were crimes under customary international law *at the relevant time*. As such, it is unlikely that it will be employed when there are available statutory alternatives (such as the Rome Statute Act and the Geneva Conventions Act). That said, there are circumstances where those avenues are not available. For one, prosecutions could be brought in respect of all customary international law crimes, including the crime of aggression which is not prosecutable under the existing statutory framework. Furthermore, in a South African context, given the suggestion in *S v Basson* that both war crimes and crimes against humanity were committed under apartheid, but these crimes cannot be prosecuted under the Rome Statute Act which only applies prospectively from 2002, this possibility arises for prosecuting such crimes by *direct* application. At the very least the crimes against humanity of murder and persecution have been recognised as forming part of customary international law since the post-World War II Nuremberg and Tokyo Trials. Furthermore, it is by now incontrovertible that the 1949 Geneva Conventions’ grave breaches regime forms part of customary international law.¹¹⁰ Significant legal (and political) challenges present themselves in respect of such a course of

¹⁰⁹ *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 39.

¹¹⁰ Extensive case law and academic opinion is available to this effect. For example the International Court of Justice (ICJ) concluded that in light of the broad accession to the Conventions and the fact that the denunciation clauses contained in the Conventions have never been invoked the customary nature of the Conventions cannot be denied. The ICJ took the view that rules created by the Geneva Conventions ‘are to

action, nevertheless the suggestion that the prosecution of apartheid-era crimes, *as international crimes*, is notionally possible under South African law is a powerful one.

3.3 Compliance with decisions and judgment of international criminal courts and tribunals (ICTY, ICTR, ICC)

South Africa did not adopt any specific legislation to enable it to cooperate with the ICTY or the ICTR. In fact, South Africa's Application of Resolutions of the Security Council of the United Nations Act – which facilitates the implementation of Security Council resolutions in South Africa – has never been proclaimed into law, partially because of concerns over its constitutionality.¹¹¹ It seems that an amended Act that addresses these concerns will be put before Parliament in the near future (→ Tladi). However, until that time there is no basis for South African courts to cooperate with the ICTY or the ICTR.

As noted above, the Rome Statute Act establishes a comprehensive cooperative scheme for South Africa *vis-à-vis* the International Criminal Court – pursuant to article 88 of the Rome Statute. The provisions relating to cooperation with the ICC can be found in Chapter 4 of the Act, and provide for cooperation with the ICC in terms of arrest and surrender of persons, the provision of judicial assistance to the ICC and provide for offences in domestic law for interference with the administration of justice.

4 The role of South African courts in applying and developing international criminal law

Until recently the seminal international criminal law cases in South Africa were unfortunately the *AZAPO* and *S v Basson* decisions. However, this changed dramatically with the *SALC* decisions.

The *SALC* case involves an administrative review of the decision by the National Prosecuting Authority, on the advice of the South African Police Service, not to institute an investigation into a docket submitted to the

be observed by all states whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.' *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion ICJ (8 July 1996) (1996) ICJ Reports 257 para 79. This finding was endorsed by the Constitutional Court in *S v Basson II* (n 40 above) paras 171 - 174.

¹¹¹ Application of Resolutions of the Security Council of the United Nations Act 172 of 1993 sec 1(1) states: 'The State President may by proclamation in the *Gazette* declare that any resolution taken by the Security Council of the United Nations under the provisions of the Charter of the United Nations shall apply in the Republic to the extent specified in the proclamation, as from a date so specified, and such resolution shall be implemented in the Republic in such manner as the State President may so determine.'

NPA in March 2008 by the Southern Africa Litigation Centre (SALC).¹¹² The docket contained allegations of crimes against humanity committed in Zimbabwe in 2007.¹¹³ On the basis of the docket the SALC had requested the NPA to investigate and if necessary prosecute the perpetrators under the Rome Statute Act. This was the first and so far the only occasion South African courts have had to consider the Rome Statute Act and, although it does not involve a prosecution (yet), it nonetheless significantly altered the international criminal justice landscape in South Africa.

The case has produced three judgments; in the High Court, the Supreme Court of Appeal (SCA) and the Constitutional Court. These judgments will prove important for the application of ICL in domestic courts, *both* in South Africa and abroad, and accordingly deserve further scrutiny.

4.1 The High Court

The North Gauteng High Court handed down judgment in May 2012.¹¹⁴ In short, the Court found that the states's failure to open an investigation was unlawful and unconstitutional, and ordered the SAPS to 'do the necessary expeditious and comprehensive investigation', and then for the NPA to take its decision anew.¹¹⁵ The judgment is confused and confusing

112 The decision was challenged under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and the principle of legality.

113 The docket contained evidence of acts of torture committed in Zimbabwe following a raid on Harvest House – the headquarters of the opposition Movement for Democratic Change – on 28 March 2007. The docket further alleged that the torture was *systematic*, and took place as part of *an attack against the civilian population, pursuant to a State policy*: the hallmarks of crimes against humanity (see the Rome Statute (n 39 above) art 7). The docket named senior security and government officials that it alleged bore individual criminal responsibility for these crimes under the doctrine of superior responsibility (see the Rome Statute (n 39 above) art 28(b)). According the docket, these individuals frequented South Africa regularly on both official and personal business. On this basis SALC requested the NDPP to investigate, and if necessary prosecute, these crimes under section 4 of the Rome Statute Act on the basis of universal jurisdiction.

114 See *Southern Africa Litigation Centre and Another* (GNP) (n 6 above). For a discussion of the judgment see See G Werle & PC Bornkamm 'Torture in Zimbabwe under Scrutiny in South Africa: The judgment of the North Gauteng High Court in *SALC v. National Director of Public Prosecutions*' (2013) 11 *Journal of International Criminal Justice* 659 and C Gevers 'Southern African Litigation Centre and Another v NDPP and Others: Note' (2013) 130 *South African Law Journal* 293.

115 More specifically, the Court found that the decision taken by the NPA in 'refusing and/or failing to accede to the First Applicant's request that an investigation be initiated under the *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002, into acts of torture as crimes against humanity committed by certain named perpetrators in Zimbabwe' was unlawful, inconsistent with the Constitution and therefore invalid (para 33.1). In light of 'South Africa's international law obligations as recognised by the Constitution', the Court ordered the Police's 'Priority Investigation Unit' (in cooperation with the NPA) to 'do the necessary expeditious and comprehensive investigation of the crimes alleged in the torture docket' (para 33.5). Having done so, the National Prosecuting Authority must then decide whether or not to institute a prosecution.

in parts,¹¹⁶ but it stands apart from the later SCA decision in the breadth of issues it covers. The High Court made a number of important findings on a broad range of issues, including:

- South Africa is under an unqualified obligation to investigate and prosecute international crimes under both international and domestic law ‘as far as possible’.
- The Rome Statute Act’s ‘presence’ requirement (section 4(3)(c)) ‘dealt with the *jurisdiction of the court* to try someone *after an investigation*’,¹¹⁷ there was no such requirement for investigations.¹¹⁸
- The threshold for the initiation of an investigation under the Rome Statute Act was the same as that under the Rome Statute itself, namely whether ‘a *reasonable basis exists for doing an investigation*’.¹¹⁹
- Finally, as far as political considerations are concerned, ‘when an investigation under the ICC Act is requested ... political considerations or diplomatic initiatives, are not relevant at that stage having regard to the purpose of the ICC Act’.¹²⁰

The Court’s first and second findings – on (i) *the obligation to investigate international crimes* and (ii) *the requirement of presence* – were the most compelling, both in the context of this case and the prosecution of international crimes more generally. In finding that South Africa was under an *international* obligation to prosecute such crimes ‘whenever possible’, the Court re-iterated the position of the Constitutional Court in *S v Basson*, the latter however being made *obiter dictum*.¹²¹ Similarly, while the basis for doing so was unclear, the Court’s finding that presence was not a requirement for an investigation offered some clarity on the enigmatic section 4(3) of the Rome Statute Act.¹²² Finally, it is worth

116 In this regard the SCA noted (para 31): ‘It is with respect, difficult to discern a consistent thread in the reasoning of the court below’.

117 *Southern Africa Litigation Centre and Another* (GNP) (n 6 above) para 32.

118 The Court also noted that ‘[c]hapter 2 of ... [the Rome Statute Act] deals with jurisdiction of South African courts in respect of crimes, and makes a crime against humanity a crime under South African domestic law. Section 4(1) has no requirement of presence’ (emphasis added). *Southern Africa Litigation Centre and Another* (GNP) (n 6 above) para 21.

119 *Southern Africa Litigation Centre and Another* (GNP) (n 6 above) para 31.

120 As above. The Court added however: ‘Such considerations may become relevant at a stage when the First Respondent would have to decide whether or not to order a prosecution, but even at that stage the purpose of the Rome Statute Act, and South Africa’s commitment thereto, remain relevant considerations that have to be taken into account’.

121 In *Basson 1* (n 40 above) para 37 the Constitutional Court noted: ‘[I]nternational law obliges the state to punish crimes against humanity and war crimes’. However, this statement by the Constitutional Court is not without qualification. See Gevers (n 114 above) 300.

122 The Court found that it would be absurd for an investigation into crimes under the Rome Statute Act was conditional on the presence of the accused and thus would begin only when the suspect is present and must end automatically if he or she leaves the Republic, even if only for a short time. While the absurdity of this position is compelling, the Court’s decision ultimately leaves open the question of the purpose and scope of section 4(3)(c).

noting that the issues on appeal were narrower, focusing on the first three, which means that the High Court findings on (iv) remains undisturbed.

4.2 The SCA

In November 2013 the Supreme Court of Appeal unanimously rejected an appeal by the Police and the NPA against the judgment of the High Court.¹²³ It began by noting that, as far as it could ascertain, 'this case is the first in which the question of South Africa's competence to investigate crimes against humanity has arisen directly'.¹²⁴

The nub of the case for the SCA was the correct interpretation of section 4(3) of the ICC Act, which governs the jurisdiction of South African courts to prosecute these crimes, and the antecedent question of when the SAPS have the power to initiate an investigation of an alleged offender. Here, the SCA reached the same conclusion as the High Court, but in a more direct manner. It reasoned as follows:

- First, it expressly accepted the distinction between *prescriptive*, *enforcement* and *adjudicative* jurisdiction.¹²⁵ The SCA noted that while 'international law traditionally recognises several bases for [*prescriptive*] jurisdiction' which are (save one) not *territorially* limited, 'a state's capacity to *enforce* and *adjudicate* over its domestic laws is severely restricted to its own territory, absent the consent of a foreign state'.
- Second, the SCA discussed the principle of universality, in terms of which states are empowered to proscribe conduct that is recognised as '[threatening] the good order not only of particular states but of the international community as a whole' (para 39). According to the Court, in such instances the 'basis for jurisdiction is not tied to the state's territory or some other traditional connecting factor, but is rather grounded in the universal nature of the offence committed'.
- Third, the Court turned to the interpretation of the Rome Statute Act, which it described as 'the fulcrum upon which the present appeal turns'. In this regard the SAPS re-iterated the argument that 'for the purposes of s 4(3)(c) a crime could not be considered to have been committed until and unless the alleged perpetrator set foot on South African soil'.¹²⁶ The Court rejected this argument as 'patently fallacious'.¹²⁷ The Court found that South Africa exercises *prescriptive* jurisdiction (that is criminalises the conduct) – by way of section 4(1) read with the definitions of 'crimes against humanity' and Part 2 of Schedule 1 of the Rome Statute Act – 'at the time of its commission, regardless of where and by whom it was committed'.¹²⁸

123 *Southern African Human Rights Litigation Centre* (SCA) (n 6 above).

124 *Southern African Human Rights Litigation Centre* (SCA) (n 6 above) para 32.

125 *Southern African Human Rights Litigation Centre* (SCA) (n 6 above) paras 32 - 34.

126 *Southern African Human Rights Litigation Centre* (SCA) (n 6 above) para 50.

127 *Southern African Human Rights Litigation Centre* (SCA) (n 6 above) para 51.

128 As above.

- Fourth, having found that the conduct in question (if proven) would amount to a crime under the Rome Statute Act *at the time of its commission*, the SCA went on to consider the ‘investigative competence’ of the police in relation to crimes under the Rome Statute Act. After considering the Constitution¹²⁹ and the relevant legislation¹³⁰ – and the silence of the ICC Act on the question of extraterritorial investigations notwithstanding – the SCA found that ‘it is clear that the [Police] ... [have] the competence to initiate an investigation into conduct criminalised in terms of the Act which had been committed extra-territorially’.¹³¹

Having found that the police are ‘*empowered* to investigate the alleged offences irrespective of whether or not the alleged perpetrators are present in South Africa’, the SCA went on to consider whether – on the facts of the case at hand – the police were ‘*required* to initiate an investigation’. The SCA went on to find, on the facts, that the SAPS were *required* to investigation into the allegations of torture.¹³²

4.3 The Constitutional Court

In October 2014 the Constitutional Court upheld the decision of the SCA, finding that the SAPS were not *only* empowered to investigate the alleged crimes, they were under a *duty* to do so, arising from ‘the Constitution read with the ICC Act’ and international law.¹³³ The decision is somewhat ‘hit and miss’, with the Court *on the whole* reaching the correct legal conclusion but doing so in a conceptually confusing (and at times legally assailable) manner. The Court’s key findings concern: (i) jurisdiction in international law; (ii) the ‘presence requirement’ under the ICC Act (and international law); and (iii) the obligation to investigate international crimes.

The Court began its discussion of ‘jurisdiction in international law’ by distinguishing between three different forms of jurisdiction – *prescriptive*, *adjudicative* and *enforcement* jurisdiction – placing investigations under the

129 See the Constitution of the Republic of South Africa, 1996, sec 205(3).

130 The South African Police Services Act 68 of 1995 and the National Prosecuting Authority Act 32 of 1998.

131 *Southern African Human Rights Litigation Centre* (SCA) (n 6 above) para 55. The Court was quick to add however, that ‘the exercise of *enforcement* jurisdiction is limited to within a state’s own territory’, and therefore ‘the competence to investigate only persists within South Africa’s borders, absent the consent or co-operation of foreign states’.

132 *Southern African Human Rights Litigation Centre* (SCA) (n 6 above) para 3.2.2. In para 67 of its judgment, the SCA state that the facts that led them to this conclusion included the reality that on the evidence the state’s officials themselves ‘appear to recognise that the case they were presented with was not entirely without foundation and was deserving of further and better investigation’; that there were ‘eyewitness accounts concerning the torture allegations that appear, at least on their face, to be corroborated by medical doctors and records and they appear to dovetail with information gathered by other organisations’; and that the investigations by the SAPS ‘concerning visits to the country by the alleged perpetrators do not discount entirely the possibility of future visits’.

133 *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 55.

adjudicative category.¹³⁴ This conceptual disaggregation of jurisdiction is to be welcomed as a means to bring clarity to the use of this oft-used but ill-defined term.¹³⁵ Unfortunately, the Court did not utilise this distinction to its fullest extent, abandoning it at key points in the judgment, and misconceiving it at others.¹³⁶ The Court proceeded to set out a rather unfortunate exposition of the Permanent Court of International Justice's (PCIJ) infamous *Lotus* passage on the 'territorial limits of jurisdiction', to the effect that it 'allows states to exercise prescriptive, adjudicative and enforcement jurisdiction solely within the confines of their territory'.¹³⁷ While there is considerable disagreement amongst international lawyers about whether *Lotus* is a correct statement of the law (either as it was then, or as it is now), and slightly less agreement on precisely what the PCIJ was saying in *Lotus*, I would venture that most would agree it was not this.¹³⁸ Firstly, what the PCIJ appeared to say in *Lotus* was that there is a distinction *in law* between a state '[exercising] its power in any form in the territory of another State',¹³⁹ and 'a State ... exercising jurisdiction in its own territory, *in respect of any case which relates to acts which have taken place abroad*'.¹⁴⁰ This distinction, I would argue, is given expression in the distinction between forms of jurisdiction: the first passage refers to *enforcement jurisdiction* and the second refers to *prescriptive* and *adjudicative* jurisdiction. The Court acknowledges this distinction initially, but then concludes that all three can be exercised 'solely within the confines of [a State's] territory', eliding them once more.

Second, and more importantly, insofar as the conduct described in the second passage is concerned – which I have suggested refers to *prescriptive* and *adjudicative jurisdiction* – the PCIJ stated that '[f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules'.¹⁴¹ This is what is so controversial about *Lotus*, it appears to grant states wide-ranging discretion in respect of how they 'extend the application of their

134 *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 25.

135 Unfortunately the Court did not make use of this disaggregation throughout the judgment and it is conceptually less clear in parts as a result.

136 See for example *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 67, where the Court notes: '[T]he SAPS took the view that South African courts would have no jurisdiction to adjudicate upon crimes committed in Zimbabwe by and against Zimbabwean nationals without there being any bases for jurisdiction (*rationes jurisdictionis*). The reasoning of the SAPS in this regard cannot be faulted but it is a matter pertaining to enforcement jurisdiction in relation to prosecutions and not investigations.' This finding appears to conflate adjudicative and enforcement jurisdiction.

137 *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 26. See *The Case of the SS Lotus (France v Turkey)* (Judgment) [1927] PCIJ Rep Series A No 10.

138 Reydam's notes that 'it appears that every condemnation of the *Lotus* judgment can be juxtaposed with a competing pronouncement defending it'. L. Reydam's *Universal jurisdiction: International and municipal legal perspectives* (2004) 14.

139 Reydam's (n 138 above) 18.

140 Reydam's (n 138 above) 19.

141 Reydam's (n 138 above) 19.

laws' (that is, *prescriptive jurisdiction*) and 'the jurisdiction of their courts' (that is, *adjudicative jurisdiction*). But this is, just about, the *opposite* of what the Constitutional Court says the PCIJ said in *Lotus*, which was that it 'allows states to exercise prescriptive, adjudicative and enforcement jurisdiction *solely within the confines of their territory*'.¹⁴² One might add that the quoted passage, while inconsistent with what the PCIJ *actually said* in *Lotus*, is in fact consistent with the Constitutional Court's previous jurisprudence on jurisdiction, which was to accept (*contra Lotus*) that jurisdiction (in all three forms) is ordinarily territorially limited, and can only be exercised extraterritorially in limited exceptional circumstances (generally relating to the *nature* of the crime).¹⁴³ In fact, in *Kaunda* the Court acknowledged (without deciding on the matter) that *Lotus* 'has been criticised by a substantial number of authorities'.¹⁴⁴

Be that as it may, the Court's unfortunate exposition of *Lotus* is not carried through into the analysis of universal jurisdiction which, in substance, revives the distinction between the three forms of jurisdiction. The Court found, in essence that, while *enforcement jurisdiction* 'is confined to the territory of the state seeking to invoke it', *prescriptive* and (in some circumstances) *adjudicative* jurisdiction can be applied 'universally' (that is, outside the territory of the state).¹⁴⁵ What we are left wondering, however, whether the general rule for exercising *prescriptive* and *adjudicative* jurisdiction extraterritorially is 'permissive' (as per what *Lotus* actually said) or must be based on a specific ground or *rationes jurisdictionis*, as the Constitutional Court's previous jurisprudence and the surrounding analysis in the judgement suggests.¹⁴⁶

Finally, the judgment proceeds to set out three general principles that should be observed 'in order for universal jurisdiction to comply with the dictates of international law' according to international law scholars, namely: (i) a substantial and *bona fide* connection between the subject-matter and the source of the jurisdiction; (ii) the principle of non-intervention in the domestic or territorial jurisdiction of other states; and (iii) 'elements of accommodation, mutuality and proportionality'. It is not necessary to consider these 'general principles' in detail, suffice it to say that they are based on selected and, in one instance, outdated academic writings and their legal basis is highly disputable.¹⁴⁷

142 The case of the *SS Lotus* (n 137 above) para 26.

143 See *Basson II* (n 40 above) para 223 and *Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para 40.

144 *Kaunda* (n 143 above) para 39.

145 *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 29.

146 See especially *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 27, which lists four specific 'grounds or bases', recognised by international law, 'on which domestic criminal jurisdiction may be founded', and para 67 (discussed *infra*).

147 For example, the judgment cites the 5th edition of *Brownlie's principles of public international law*, which came out in 1998. The text is now in its 8th edition.

The second key finding by the Court concerns whether the ‘presence’ of a suspect is required in order for an investigation into international crimes to commence, under either international law or the ICC Act (or both). First, the Court set out to address the ‘proper interpretation’ of section 4 the ICC Act ‘which regulates the jurisdiction of South African courts in respect of international crimes’.¹⁴⁸ Here, the Court could have followed the SCA and conceptually separated jurisdiction into its three constituent powers and found that section 4(1) of the ICC Act concerns *prescriptive* jurisdiction, section 4(3)(c) (which contains the presence requirement) concerned *enforcement* jurisdiction (and *adjudicative* jurisdiction lies somewhere in between). However, taking a more circuitous and at times confusing route, the Court decided that ‘section 4(3) sets the jurisdictional limits of South African courts’, but ‘it is silent on the circumstances under which our country has the duty to investigate international crimes committed outside of our territory’.¹⁴⁹ Therefore, in light of this silence, the lack of consensus amongst international lawyers that *it* requires presence (and some evidence that it does not),¹⁵⁰ and sundry ‘policy’ reasons in favour of rejecting presence as a requirement,¹⁵¹ the Court concluded that:

the exercise of universal jurisdiction, for purposes of the investigation of an international crime committed outside our territory, may occur in the absence of a suspect without offending our Constitution or international law.¹⁵²

One might suggest that this is not really, as promised,¹⁵³ a ‘proper interpretation of the provisions of section 4 of the ICC Act’ – rather it avoids interpreting that section by saying that investigations are not covered by it. In particular, we are not sure which of the three ‘jurisdictions’ are engaged by section 4(3) (and therefore require presence). While this conceptual conflation of all three powers is of little consequence in this case, it may lead to confusion in other cases, or at later stages in proceedings. For example, it will need to be clarified at which point *prescriptive* jurisdiction is asserted, that is, at the point when the crime is committed (under section 4(1), or at the point when the suspect enters South African territory (under section 4(3))). Support for both propositions can be found in the following passage:¹⁵⁴

Section 4(1) creates crimes and punishment. Section 4(3) sets limits to universal jurisdiction. When a person commits an envisaged crime outside of

¹⁴⁸ *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 41.

¹⁴⁹ *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 43.

¹⁵⁰ The Court cited a 2005 Resolution of the *Institut de Droit Internationale* and the Rome Statute’s separation of the investigation and prosecution phases of criminal proceedings. See *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 46.

¹⁵¹ See *Southern African Human Rights Litigation Centre* (CC) (n 6 above) paras 48 - 49.

¹⁵² *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 47.

¹⁵³ See *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 41.

¹⁵⁴ *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 42.

the Republic our courts will have jurisdiction only if at least one of the connecting factors is present.

Furthermore, the Court avoids directly interpreting the 'presence' requirement (under section 4(3) or *perhaps* international law) by consigning it the 'more advanced stage of criminal proceedings'¹⁵⁵ (that is, 'prosecution' or 'trial' phase, where a 'court' is involved), however we are left in the dark as to when this stage commences. For example, the Court (reviving the conceptual categories) concludes:

South Africa may, through universal jurisdiction, assert prescriptive and, to some degree, adjudicative jurisdiction by investigating the allegations of torture *as a precursor to taking a possible next step against the alleged perpetrators such as a prosecution or an extradition request.*

Does this mean that 'the next step' commences with the decision to prosecute or, if necessary, seek extradition? If so, then we are left with the anomalous situation where our law requires a suspect's presence in order to request extradition? What about arrest warrants? Are these part of the investigatory phase or the prosecution phase? Or, even more complicated, 'search warrants'¹⁵⁶ issued by a court, but presumably part of the investigation phase? Does the Court have the 'jurisdiction' to issue such without the presence of a suspect?

The final – and potentially most far-reaching – finding by the Court concerned the 'duty on the SAPS to investigate international crimes'.¹⁵⁷ After considering the relevant provision of the Constitution,¹⁵⁸ the SAPS Act,¹⁵⁹ the NPA Act¹⁶⁰ and the Rome Statute Act, the Court found that the SAPS does not only have the *power* to investigate alleged international crimes, it has a *duty* (or obligation) to do so.¹⁶¹ In doing so it also relied on the existence of an international *obligation* to do so. The question of whether an international obligation to prosecute international crimes under international law exists (and under what circumstances) is a matter of some debate amongst international lawyers.¹⁶² Previously in *S v Basson* the Constitutional Court noted that 'international law obliges the state to

155 *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 47.

156 See the Criminal Procedure Act 51 of 1977 chapter II.

157 It is worth noting that in its judgment the Court uses the terms 'duty' and 'obligation' interchangeably – which is somewhat confusing at times and not beyond reproach.

158 n 129 above, sec 205.

159 n 129 above, secs 16(1), 16(2)(iA), 17C(1) & 17D(1)(a).

160 n 129 above, secs 13(1)(c), 24(3) & 24(7).

161 *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 55.

162 See Gevers (n 114 above) 301.

punish crimes against humanity and war crimes',¹⁶³ but this statement was not without qualification.¹⁶⁴

Therefore, the Court's conclusion that there is in fact an unqualified 'international obligation to investigate international crimes' is remarkable in itself. It is made more so by the manner in which it was arrived at, not on the basis of custom evidenced by the practice of states or the *erga omnes* nature of the prohibition on international crimes, but on the basis of the Preamble of the Rome Statute. More specifically, the exhortation that 'it is the *duty* of every State to exercise its criminal jurisdiction over those responsible for international crimes'¹⁶⁵ (The Court later raises conventional and *erga omnes* arguments to ground the obligation to prosecute torture,¹⁶⁶ however these are independent of the general obligation is located in the Rome Statute). Furthermore, this is not a 'territorial' obligation to prosecute (that is, an obligation that exists only in respect of crimes committed on the state's territory). To the contrary, the Court held that not only is it engaged in respect crimes committed abroad, but also that it 'is most pressing in instances where those crimes are committed ... within the territory of countries that are not parties to the Rome Statute, because to do otherwise would permit impunity'.¹⁶⁷

Having set out a very broad obligation on states to prosecute, the Court added that 'the universal jurisdiction to investigate international crimes is not absolute', and proceeded to set out two limitations in this regard. The first 'limiting principle'¹⁶⁸ is actually made up of two distinct principles: 'subsidiarity' and 'non-intervention'. The *principle of subsidiarity* 'requires that ordinarily there must be a *substantial and true connection between the*

163 *Basson 1* (n 40 above) para 37.

164 As the author has noted elsewhere: 'First, it was made *obiter*. Second, the two references offered by the Court in support of this obligation undermine its force somewhat. The first, an academic article by the eminent John Dugard, merely speaks of a "*possible obligation*" on states to prosecute crimes against humanity, and concludes that there is "a *prima facie* case for an obligation to prosecute". (J Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question' (1997) 13 *South African Journal of Human Rights* 258 264). The second, a passage in the ICTY's *Prosecutor v Tadić* decision, leaves open the question of whether there is an *obligation* on states to prosecute war crimes, concentrating only on the *right* of states to do so. See *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (The Prosecutor v Dusko Tadić)* 1995 ICTY No. IT-94-1-AR72 (2 October 1995) para 71. Third, in the context of the preceding discussion by the Constitutional Court in *Basson*, it is possible to limit this finding to a *territorial* obligation to prosecute such crimes: the Court was considering the "constitutional obligation upon the state to prosecute those offences *which threaten or infringe the rights of citizens ...*" (para 32). As such, in the aftermath of *Basson* the obligation on South Africa to prosecute international crimes (as recognised by our courts) was both tentative and possibly territorially limited.' Gevers (n 114 above) 299.

165 *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 31.

166 *Southern African Human Rights Litigation Centre* (CC) (n 6 above) paras 37-38.

167 *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 32.

168 *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 63.

subject-matter and the source of the jurisdiction'.¹⁶⁹ In terms of the *principle of non-intervention*,

investigating international crimes committed abroad is permissible only if the country with jurisdiction is unwilling or unable to prosecute and only if the investigation is confined to the territory of the investigating state.¹⁷⁰

The second 'limiting principle' is *practicability*, which requires that a state 'consider whether embarking on an investigation into an international crime committed elsewhere is reasonable and practicable in the circumstances of each particular case'.¹⁷¹ This, according to the Court, requires considering *inter alia* (i) whether the investigation is likely to lead to a prosecution and accordingly whether the alleged perpetrators are likely to be present in South Africa on their own or through an extradition request; (ii) the geographical proximity of South Africa to the place of the crime and the likelihood of the suspects being arrested for the purpose of prosecution; (iii) the prospects of gathering evidence which is needed to satisfy the elements of a crime; and (iv) the nature and the extent of the resources required for an effective investigation.¹⁷² This, it concludes, is ultimately a question of whether the SAPS acted *reasonably* in opening or declining to open an investigation.

We are not given any legal authority for these two 'limitations' on the exercise of universal jurisdiction, although the first is clearly inspired by the Rome Statute's 'principle of complementarity'. Such authority would be difficult to find in international law. For one, the Rome Statute's 'unwilling and unable' test is clearly intended to guide the International Criminal Court's proceedings and not domestic proceedings taken pursuant to the principle of complementarity. The second principle might be conceived as a limitation imposed under domestic, constitutional law (particularly insofar as the inclusion of the 'reasonableness' test is concerned), but the Court did not lay a foundation for this conclusion. Better to assume that these are the Court's own views on the subject, along the line of 'policy' guidelines. Seen as such, they represent practicable and novel guiding principles for the exercise of this potentially expansive power by the SAPS and the NPA.

The Court proceeded to apply these principles to the facts of the case, and in particular the reasons given by the SAPS for not opening an investigation. In doing so the Court emphatically rejected the 'political effects' reason advanced by SAPS, noting:¹⁷³

169 *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 61 (own emphasis).

170 As above.

171 As above.

172 *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 64.

173 *Southern African Human Rights Litigation Centre* (CC) (n 6 above) para 74.

The cornerstone of the universality principle, in general, and the Rome Statute, in particular, is to hold torturers, genocidaires, pirates and their ilk, the so-called *hostis humani generis*, the enemy of all humankind, accountable for their crimes, wherever they may have committed them or wherever they may be domiciled. *An approach like the one adopted by the SAPS in the present case undermines that very cornerstone. Political inter-state tensions are, in most instances, virtually unavoidable as far as the application of universality, the Rome Statute and, in the present instance, the ICC Act is concerned.*

Having done so, the Court concluded that the SCA decision was correct and that ‘on the facts of this case the torture allegations must be investigated by the SAPS’.¹⁷⁴ Adding that South Africa ‘must take up [its] rightful place in the community of nations with its concomitant obligations’, lest it becomes ‘a safe haven for those who commit crimes against humanity’.¹⁷⁵

5 Assessment/Conclusion

At a domestic level, over the past ten years South Africa has comprehensively incorporated international criminal law into its domestic legal order and, with a little help from the courts, looks set to operationalise it fully over the next few years. However, there are some lingering questions about the domestic implementing legislation that need to be addressed in order to make sure this process is successful.

As noted above, South Africa’s idiosyncratic approach to international criminal law has generally permeated its implementing legislation. In fact, closer examination reveals no less than six discrepancies between the Rome Statute Act and the Geneva Conventions Act that are likely to create confusion and may undermine their operation.

First, there is considerable overlap between the war crimes covered by the Geneva Conventions Act and those covered by the Rome Statute Act: the latter all but subsuming the former. This opens up the question of which of the two will be applied and why. What is more, there are potentially *three* different definitions of non-international armed conflict to be applied, with varying ‘thresholds’: the lowest being that of ‘Common Article III crimes’; followed the Rome Statute Act, which requires a conflict to be ‘protracted’;¹⁷⁶ followed by the highest threshold contained in ‘Additional Protocol II’.

¹⁷⁴ *Southern African Human Rights Litigation Centre (CC)* (n 6 above) para 80.

¹⁷⁵ As above.

¹⁷⁶ Rome Statute (n 39 above) art 8(2)(f) effectively defines international armed conflicts as ‘armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.’

Second, the two pieces of legislation provide for different jurisdiction regimes over the same subject matter. The jurisdictional regime under the Rome Statute Act is more extensive than that of the Geneva Conventions Act: the former provides for universal jurisdiction over all war crimes (both international and non-international), whereas the latter provides for such jurisdiction only in respect of 'grave breaches'. Further, while both provide for universal jurisdiction over 'grave breaches', the Geneva Conventions Act makes no mention of the 'presence' of the accused, whereas the Rome Statute Act does (at some point in proceedings). To the extent that it is determined that this presence requirement is interpreted as a limitation on the prosecution of crimes under universal jurisdiction, this limitation will not apply in respect of 'grave breaches' prosecuted under the Geneva Conventions Act.

Third, while the Rome Statute Act does not contain any modes of liability, the Geneva Conventions Act takes a patchwork approach: incorporating some ICL-specific modes of liability and omitting others, and then adding a new one. As a result, Prosecutors may have to choose between using one of these two prosecutorial regimes in circumstances where one provides for a better jurisdictional bases, and the other provides for a more appropriate mode of liability.

Fourth, the Rome Statute Act (on one, widely held view) removes the personal immunity of heads of states and diplomats insofar as prosecutions under that Act are concerned. The Geneva Conventions Act makes no mention of immunity. This, again, might place prosecutors in tactical dilemmas when it comes to prosecuting high-ranking officials. It also casts doubt over whether South Africa, customary international law obligations notwithstanding, has decided not to afford such immunity for international crimes – a position with potentially significant consequences for our relations with other states and hence not one that should be mired in uncertainty.

Fifth, while the Rome Statute Act sets out specific procedures for prosecutions carried out under its authority – including a requirement that the NDPP sign off on any prosecution – the Geneva Conventions Act does not have an equivalent regime. As a result, it is presumably left up to 'ordinary' prosecutors to bring cases under the Geneva Conventions Act, which not only creates potential conflicts in prosecutorial policy, but does not consider that fact that such prosecutions requires specialised skills and resources.

While South Africa continues to support the 'international criminal justice' project at the international level, it does so in a manner than creates confusion and at times attracts undue criticism. What is needed is a clear, comprehensive statement of South Africa's position, one that separates the *principled* wheat, from the *political* chaff. In this regard the recent speech by the Deputy-President – outlining the country's concerns over the ICC's

focus on Africa and setting out the country's support for the 'African Criminal Court' – is to be welcomed. It is hoped that this transparency and engagement on this issue will continue.

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H: Regional integration

CHAPTER 15 THE IMPLEMENTATION OF EUROPEAN UNION LAW IN GERMANY

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1 The EU

European Union (EU) law differs substantially from most of the legal regimes that are studied in this volume. Even though the EU was, at its origin, an international organisation set up under public international law, it has since evolved into a regime *sui generis* that is commonly referred to as being 'supranational', located somewhere at the midway point between an international organisation and a federal state. The legal regime of the EU has a stunning impact on member states: studies put the percentage of German federal legislation influenced by EU law at 38,6 per cent or even over 80 per cent.¹ Part of the secret of the success of EU law lies in the way in which it is implemented, which is different from the manner of implementation of other rules of international law.

Given the peculiar characteristics of the EU, this chapter first has to provide an overview over the EU as an organisation and define the notion of 'EU law', setting out the different sources of law of this supranational regime (→ 1). Unlike, in general, international law, EU law itself imposes rules on its implementation within member states. These rules will be described next, in particular the doctrines of supremacy of EU law, of direct application, of interpretation in conformity with EU law and of member state liability for violations of their obligations under EU law (→ 2). In a third step the contribution will describe the role of courts in the

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1 Quantifying the impact of EU law is, it should be noted, a highly dubious exercise and the numbers should be taken with more than a grain of salt. In one respect they are correct, however, namely that there is a significant impact of EU law on German law. The figure of 38,5% refers to an average of all domestic sectors of German legislation from 2002 to 2005, the number of 84% refers to the years 1999 to 2004 and seems to rely on a simple count of EU legislative acts and German legislative acts. For a good summary of such studies see V Miller 'How much legislation comes from Europe' (13 October 2010) *House of Commons Library Research Paper* 10/62.

implementation of EU law. Again, due to the particularity of the system it will focus on the EU itself, that is, on the courts of the EU, namely on the Court of Justice of the European Union (CJEU) established by the EU treaties and, in particular, the two types of actions most relevant to the implementation of EU law, the preliminary reference procedure and infringement proceedings (→ 3). The rules imposed by a supranational regime on the implementation of its norms are of limited value, however, if ignored by its member states. Hence, the contribution will then describe how the German legal order reacted to the demands imposed on it by the EU, ultimately accepting the claims of the supranational order (→ 4). The chapter is concluded by a short assessment (→ 5).

1.1 The development of the EU

After the Second World War Europe had to re-found itself both economically and morally. In the lifetime of one generation the continent had seen two wars on an unprecedented scale, the killing and maiming of millions, the indescribable crimes of Nazi Germany and the horrifying destruction unleashed by modern technological warfare. The old order based on a balance of power of sovereign nation states had failed spectacularly.²

In 1950 the French foreign minister, Robert Schuman, submitted a proposition that proved capable of healing the rifts that ran through the continent and divided, in particular, its two main powers France and Germany: to submit the control of the – at that time – critical national industries of the coal and steel sector to an authority jointly managed by the participating states. The proposition had been conceived by the French cognac merchant turned statesman Jean Monnet, who had run joined resource management schemes with the British government during the war.³ Favourably received by Germany's chancellor Konrad Adenauer, the plan was put into motion with the establishment of the European Coal and Steel Community (ECSC) by six states (Germany, France, the Benelux countries and Italy) by the Treaty of Paris in 1951.⁴ The scope of European integration was significantly enlarged in 1957 by the Treaties of Rome, which founded the European Economic Community⁵ and the European Atomic Energy Community.⁶ These initial treaties set in motion an integration project of surprising impetus. The treaties provided for an

2 See HA Kissinger *Das Gleichgewicht der Großmächte* (1986); W Friedmann *The changing structure of international law* (1964).

3 J Monnet *Mémoires* (2007).

4 Treaty Establishing the European Coal and Steel Community (18 April 1951, 261 UNTS 140).

5 Treaty Establishing the European Economic Community (25 March 1957, 298 UNTS 3).

6 Treaty Establishing the European Atomic Energy Community (25 March 1957, 298 UNTS 259).

'ever closer' union of the member states, fusing what was once three Communities into one Union⁷. Numerous countries acceded to the EU.

1.2 The EU today

Today, the European Union comprises 28 member states with a population of over 500 million people, extending from Portugal to Bulgaria and from Greece to Finland. The foundation of its legal order is based on three treaties that, functionally, can be referred to as 'constitutional': the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights (Charter), along with amending treaties, accession treaties and protocols. Those treaties provide for an organisational setup including a Parliament elected by the citizens of the Union by direct universal suffrage,⁸ the European Council uniting the heads of state or government of the member states⁹ and the Council consisting of representatives of member states at the ministerial level,¹⁰ the European Commission as the executive branch of the EU promoting the general interest of the Union (including ensuring the application of the treaties, of measures adopted by the EU and the application of Union law)¹¹ as well as the Court of Justice of the European Union (CJEU), which confusingly is a term that comprises several courts, namely the Court of Justice as the highest court – often referred to as the ECJ¹² – the General Court and specialised courts, currently only one, namely the Civil Service Tribunal.¹³ Roughly speaking, Parliament and Council are the legislature, the Commission the executive and the Court the judiciary of the Union.

1.3 EU competences

As a supranational organisation the EU does not enjoy unfettered competences in all fields. Quite to the contrary it may only act within the powers conferred upon it. Only where the treaty grants the EU competences may the EU take measures (principle of conferral).¹⁴ Such competences are usually shared, allowing the EU to legislate and adopt legally binding acts but also permitting member state legislation 'to the

7 The European Union itself was set up by the Treaty on European Union (TEU) [1992] OJ C191/1. The ECSC expired on 23 July 2002, 50 years from its entry into force, see art 97 of the ECSC. The Community structure was abandoned in the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1. The most recent consolidated version of the TEU can be found in [2012] OJ C326/13.

8 TEU (n 7 above) art 14.

9 TEU (n 7 above) art 15.

10 TEU (n 7 above) art 16.

11 TEU (n 7 above) art 17.

12 For simplicity's sake I will use the abbreviation ECJ.

13 TEU (n 7 above) art 19.

14 TEU (n 7 above) art 5(2).

extent that the Union has not exercised its competence'.¹⁵ However, EU competences can also be exclusive, allowing only the Union to legislate (or conclude international agreements) and excluding member states from doing so unless empowered by the Union or for the implementation of Union acts.¹⁶

Unfortunately the treaties do not contain a concise list of the EU's competences, as one is accustomed to in federal constitutions.¹⁷ Instead, provisions attributing powers to the EU are scattered throughout the treaties. They provide for Union policies and actions in such diverse fields as the internal market, the free movement of goods, agriculture and fisheries, the free movement of persons, services and capital, an area of freedom, security and justice, transport, competition, taxation, the approximation of laws, economic and monetary policy, employment, social policy et cetera.¹⁸ Two of the Union's legal bases for action have proven to be particularly broad. According to article 114 of the TFEU the EU may 'adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market', that is, measures harmonising national law to guarantee the functioning of the internal market.¹⁹ Secondly, under article 352 of the TFEU the EU shall 'adopt the appropriate measures' if EU action 'should prove necessary ... to attain one of the objectives set out in the Treaties' even absent an explicit provision of the necessary power. These extraordinary grants of powers along with the fact that the ECJ has accepted a teleological interpretation of several of the competences of the EU ensure a large field of competences for the EU. The competences are, in theory, reined in by the famous 'principle of subsidiarity', according to which the EU shall, 'in areas which do not fall within its exclusive competence ... act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States'.²⁰ To what extent the principle of subsidiarity successfully limits the competences of the EU is up to debate.

15 Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47 art 2(2).

16 TFEU (n 15 above) art 2(1). For other types of competences see TFEU art 2.

17 With respect to legislation, see the US Constitution art 1 sec 8; the South African Constitution, 1996 art 44 and Schedule 4 & the German Basic Law arts 73 & 74.

18 TFEU (note 15 above) part three.

19 To gain an impression of the breadth of measures permitted under this heading see Cases C-350/92 *Spain v Council* [1995] ECR I-1985; C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8491; C-380/03 *Germany v European Parliament and Council* [2006] ECR I-11573; C-436/03 *European Parliament v Council* [2006] ECR I-3733; C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453.

20 TEU (n 7 above) art 5(3). See also the principle of proportionality, under which 'the content and the form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties' TEU art 5(4). For a brief description of EU competences see R Schütze *An introduction to European law* (2012) 59 - 82; K Lenaerts & P Van Nuffel *European Union law* (3rd edn 2011) 112 - 116.

1.4 Sources of EU law

EU law first of all comprises the agreements between member states that set up and govern the Union, generally referred to as ‘primary’ Union law. The most important treaties today, as I have already mentioned, are the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights (Charter).

The second body of EU law consists of the norms adopted by the EU itself according to the rules of the treaties (‘secondary’ Union law). The volume and scope of the legislative activity of the EU is enormous: hardly an area of law is untouched by the more than 1000 regulatory acts the EU passes yearly.²¹ According to article 288 of the TFEU the institutions of the EU can adopt ‘regulations, directives, decisions, recommendations and opinions’.²² Finally, the EU is also empowered to conclude international agreements.²³ This contribution will limit itself to discussing EU regulations and directives, measures that can roughly be compared to laws of nation states, as well as treaties concluded by the EU. Regulations are, according to article 288 TFEU, acts of general application binding in their entirety and directly applicable in all member states. They thus do not need to be transposed into member state law. Instead, the authorities of the member states apply and thus implement regulations directly. A directive, in contrast,

shall be binding, as to the result to be achieved, upon each member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.²⁴

Directives thus need to be transposed into national law and are, at least in principle, not directly applicable.

As additional sources of law, general principles of EU law have played (and still play) a significant part in the development of the legal regime – before the entry into force of the Charter, human rights were applicable as general principles. At times, scholars also mention the category of tertiary EU law, that is, legal acts passed under powers granted to an EU institution by secondary law.

21 According to its legal database eurlex the EU passed more than 1000 regulations and more than 50 directives in 2012.

22 So-called ‘atypical’ acts are not listed in TFEU (n 15 above) art 288.

23 TFEU (n 15 above) art 216.

24 TFEU (n 15 above) art 288.

2 The implementation of EU law according to its own rules

Unlike international law, which generally does not establish how its rules have to be implemented, the effect of EU law in the national legal orders of member states is not left to the whim of those states. Rather, EU law itself contains rules on its effects in national legal orders. Some of these are contained in the treaties: As already mentioned, article 288 of the TFEU states that regulations are directly applicable in all member states without them having to pass any implementing act. Most of these rules, however, were developed in the case law of the ECJ through its jurisdiction to give preliminary rulings under article 267 of the TFEU. That procedure will be discussed later on in this chapter, much like the reaction of the German national legal order to the innovative approach taken by the ECJ. Suffice it to say for the moment that the rules of EU law on the effect of that law in the various national legal orders have largely been accepted by member states.

This chapter cannot describe in detail all doctrines that govern the implementation of EU law. I will have to limit myself to the four that, arguably, have been most decisive for the effectiveness of that legal regime: the doctrines of direct effect, of supremacy, of interpretation in conformity with EU law and what has become known as the *Francovich* doctrine.

2.1 The doctrine of direct effect of EU law

Traditionally, two alternative approaches govern the application of international law in national legal orders: ‘monism’ according to which international law and national law form one legal order, and ‘dualism’, under which international legal rules stem from a different legal order and have to be transposed or made applicable by national law to become applicable by the institutions of states.²⁵ Countries decide for themselves which of these schools they intent to follow. In practice – as amply demonstrated by the other chapters of this volume – most (if not all) countries follow a much more nuanced approach combining elements of monism and dualism. But the question whether a legal rule stemming from an international treaty has become part of the national legal system is only the first one that has to be tackled before it can be applied by national courts or executive agencies. Even where that is the case, the rule can only be applied if it is ‘directly applicable’, which commonly requires an

25 Different states apply different approaches to transpose treaty law: some consider a treaty to be incorporated into national law upon parliamentary approval of the treaty, others require substantive implementing legislation and then apply that legislation as national law. The following discussion focuses on the first group of states. See on this and the following issues K. Kaiser ‘Treaties, Direct Applicability’ in R. Wolfrum (ed) *Max Planck encyclopedia of public international law* (2013).

examination both of the intent of the parties to an international treaty and of the content of the rule at issue, which has to be sufficiently concrete and unconditional to be regarded as providing for rights. Whether a treaty is directly applicable or not is, again, a matter of national law, but it involves a question of treaty interpretation.²⁶ A national court thus has to determine both whether a rule stemming from international law is directly applicable and the consequences of this determination under national law.

At the time the EU was founded it was not clear to what extent the manner of application of EU law would differ from these classic doctrines on the application of international law. When the EU finally departed from them, it was not because of an explicit mandate in the treaties, but because of decisions by the Court of the Union, the ECJ. The case that established the doctrine of direct effect of EU law in member states, *Van Gend & Loos*,²⁷ is arguably the most famous case of the Court,²⁸ despite its (at first sight) rather technical and out-of-date facts concerning tariffs between EU member states, now long abolished.²⁹ In 1960, the Dutch company *Van Gend & Loos* imported ureaformaldehyde from Germany into the Netherlands. It was charged an import duty of 8 per cent *ad valorem*. However, on 1 January 1958, the date when the EEC Treaty (the predecessor to the TFEU) went into force, the product had been subject to a mere 3 per cent import duty. The company attacked the tariff hike in court, relying on article 12 of the EEC Treaty that provided that member states may not increase customs duties in the trade between them.³⁰ The Dutch court that had to rule on the case was of the opinion that to resolve the case it needed to decide whether

Article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a State can, on the basis of the article in question, lay claim to individual rights which the courts must protect.

It referred that question to the ECJ.³¹

The ECJ took a revolutionary approach and did not limit itself to interpreting the provision of EU law to see whether its content was (in theory) capable of direct application, but it also held that it was EU law

26 See Kaiser (n 25 above) and M Cremona 'The judgment – framing the argument' in CJEU (ed) *50th anniversary of the judgment in Van Gend en Loos 1963-2013* (2013) 23–26.

27 Case 26/62 *Van Gend & Loos* [1963] ECR I.

28 The Court itself organised a seminar on the 50th anniversary of the case. Its proceedings were published as CJEU (ed) *50th Anniversary of the Judgment in Van Gend en Loos 1963-2013* (2013).

29 Tariffs between member states were abolished in 1968. EEC Treaty arts 8, 13 & 14, Decision 66/532/EEC of the Council of 26 July 1966 [1966] OJ 165/2971.

30 In fact the tariff hike was due to another international obligation of the Netherlands – under the Benelux customs union, an issue neglected by the ECJ. See Cremona (n 26 above).

31 The national court referred a second question, which will not be discussed in this contribution.

itself rather than the national law of member states that determined when a provision of EU law has direct effect³² and thus creates 'individual rights which national courts must protect'. It reasoned that the EU

constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States, but also their nationals.

The ECJ had imposed the doctrine of direct effect of (certain) provisions of the EU treaties on member states³³ – and it was from now on up to the ECJ to decide whether or not a provision of the treaties has direct effect. The implications of the judgment for the implementation of EU law were enormous: no longer could member states decide for themselves whether or not to implement a treaty provision. Even where they had abstained from implementing a provision of the treaties, that very provision could be invoked in litigation and it was left to the courts – in particular to the ECJ via the preliminary reference proceedings – to decide whether the provision could be applied directly or not. As Christian Tomuschat wrote: '*Van Gend en Loos* has dethroned the governments of the Member States as the masters of the implementation process under the integration treaties.'³⁴ We know today that the outcome of the case was far from assured: the ruling had been opposed not only by the participating member states and the Advocate General of the case, but also by the reporting judge and the ruling was decided on by a four to three majority.³⁵

2.1.1 Primary EU law

Van Gend & Loos established the doctrine of direct effect with respect to provisions of the EU treaties. Such provisions can be invoked by individuals in their relationship with the Union and national authorities, that is, 'vertically', where they are 'clear and unconditional and not contingent on any discretionary implementing measure'.³⁶ These conditions have, arguably, been handled in a rather lenient manner so that – as one commentator puts it – almost all treaty prohibitions have direct

32 The notion of direct effect can be distinguished from that of direct applicability. See JA Winter 'Direct applicability and direct effect' (1972) 9 *Common Market Law Review* 425.

33 One could argue that the case to rule on the principle was chosen well, as the Dutch Constitution provided explicitly in its article 66 that '[s]tatutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons, entered into prior or subsequent to the enactment of such statutory regulation', so that the Court's decision did not change much substantially for the legal order at issue in the case. Translation in: P Pescatore '*Van Gend en Loos*, 3 February 1963 – A view from within' in M Poiars Maduro & L Azoulai (eds) *The past and future of EU law – The classics of EU law revisited on the 50th anniversary of the Rome Treaty* (2010) 3.

34 C Tomuschat 'Introduction' in CJEU (n 26 above) 49 50.

35 P Gori 'Souvenirs d'un survivant' in CJEU (n 26 above) 29 30.

36 Case 44/84 *Hurd v Jones* [1986] ECR 29, para 47; Lenaerts & Van Nuffel (n 20 above) 810ff.

effect.³⁷ Amongst the provisions having direct effect are the fundamental (market) freedoms provided for in EU law: the free movement of goods (articles 28, 30, 34 of the TFEU), persons (articles 45 and 49 of the TFEU), services (article 56 of the TFEU) and capital (article 63 of the TFEU) as well as the fundamental rights provided for in the Charter (article 51 of the Charter). It should be pointed out, however, that the Charter contains both rights and principles and recent case law puts into doubt whether the latter really have direct effect.³⁸

The invocation of treaty provisions in a ‘horizontal’ relationship, that is, between individuals, is significantly more problematic and has been the subject of much discussion. The Court has provided for such a horizontal direct effect of treaty provisions in some cases only. Thus, the rules on competition (articles 101 and 102 of the TFEU) have been held to apply horizontally.³⁹ Similarly, some of the fundamental freedoms provided for in the treaty have been considered to also prohibit obstacles resulting from the exercise of legal autonomy by associations or organisations of private law as well as the collective regulation of gainful employment, self-employment and the provision of services.⁴⁰ Finally, the perennial question of the application of fundamental rights between private parties arises also in EU law and led to rulings finding in favour of such an application with respect to some rights, such as the prohibition of unequal pay in article 157 of the TFEU.⁴¹ However, particularly with respect to the Charter the discussion about the application of fundamental rights between private parties can hardly be regarded as over and has recently featured prominently in *Association de médiation sociale*.⁴²

2.1.2 Regulations

Regulations are part of the body of secondary law of the Union. They are, hence, not drafted by member states, but rather – as part of Union ‘legislation’ – by the bodies of the Union. The question of whether or not they have direct effect in member states is, unlike with the EU treaties, explicitly resolved by the treaties themselves: Regulations are, according to article 288 of the TFEU and as I have already stated, binding in their entirety and directly applicable in all member states. Implementing legislation by member states is not necessary and, indeed, not permitted to

37 Schütze (n 20 above) 117.

38 Case C-176/12 *Association de médiation sociale* (not yet published) paras 45 & 48.

39 Lenaerts & Van Nuffel (n 20 above) 811

40 Cases C-94/07 *Raccanelli* [2008] ECR I-5939, para 44; C-438/05 *International Transport Workers' Federation* [2007] ECR I-10779, para 33; C-281/98 *Angonese* [2000] ECR I-4139, para 32; C-415/93 *Bosman* [1995] ECR I-4921, para 83; 36/74 *Walrave* [1974] ECR 1405, para 18; On the incomplete character of this jurisprudence: C Krenn ‘A missing piece in the horizontal effect ‘jigsaw’: Horizontal direct effect and the free movement of goods’ (2012) 49 *Common Market Law Review* 177.

41 Case 43/75 *Defrenne* [1976] ECR 455, paras 39 & 40.

42 Case C-176/12 *Association de médiation sociale* (n 38 above).

the extent that it creates an obstacle to the direct effect of the regulation.⁴³ The administrative and judicial machinery of member states is called upon to apply regulations directly, without having (or being allowed) to wait for implementing legislation.

2.1.3 Directives

Directives are another means of the Union to pass rules of general application. They are the Union's measure of choice for harmonising member states' law and are probably the most significant legislative tool of the Union. The question whether they have direct effect is far thornier than with respect to regulations.

At first sight, the treaties again offer a rather simple answer. According to article 288 of the TFEU directives merely prescribe a certain result that member states have to achieve. It is up to member states to implement the directive, that is, transpose it into national law. Which method and form they choose to do so, is up to them.⁴⁴ In practice, the discretion of member states is not as large as the provision seems to indicate. Member states are under an obligation to implement directives,⁴⁵ which generally contain rather detailed provisions that member states have to adopt in their implementation,⁴⁶ directives also give a deadline until when they have to be implemented,⁴⁷ and the case law of the ECJ has clarified that 'the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty'.⁴⁸ Nevertheless, the basic fact remains: directives are addressed to member states and have to be implemented by them. As a matter of principle and *prima facie* directives thus do *not* have direct effect. Neither the administrative bodies of member states, nor their courts are called upon to apply directives that have not been transposed into national law.

However, the rule against direct effect of directives is no longer absolute. The denial of direct effect of directives could, in certain situations, lead to a state benefiting from violating EU law. A state that

43 Case 39/72 *Commission v Italy* [1973] ECR 101, para 17. At times regulations require some additional implementing measures to put them into practice and member states are, then, under an obligation to adopt the national measures necessary to give effect to the regulation. See eg Cases C-313/99 *Mulligan a. o.* [2002] ECR I-5719, paras 46ff; C-166/12 *Časta* not yet published, para 22; Case C-166/12 *Časta* not yet published, Opinion of AG Cruz Villalón, para 53.

44 TFEU (n 15 above) art 288.

45 TFEU (n 15 above) art 291.

46 M Nettesheim in T Oppermann et al (eds) *Europarecht* (5th edn 2011) 124 - 127.

47 European Parliament, Council, Commission, Interinstitutional Agreement on better law-making [2003] OJ C321/1 para 33. The timeline is, in the words of the document 'as short as possible and ... generally does not exceed two years'.

48 Cases C-151/12 *Commission v Spain* not yet published, para 26; C-281/11 *Commission v Poland* not yet published; C-50/09 *Commission v Ireland* [2011] ECR I-00873 para 46.

fails to implement a directive granting rights to individuals within the relevant deadline clearly violates its obligations under EU law. Even so, when the individual attempts to rely on the rights granted in the directive in national court, the state escapes liability, as the directive cannot be invoked in national courts due to the lack of implementing legislation.⁴⁹

The ECJ decided not to tolerate this outcome⁵⁰ and has ruled that provisions of directives *can* indeed have direct effect, despite the apparent wording of the treaties. However, such direct effect is subject to three conditions. First of all, the deadline for the transposition of the directive must have expired. Secondly, the provisions must ‘appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise’⁵¹ and thirdly the directive can only be invoked by individuals against the state, that is, ‘vertically’. It cannot be invoked in litigation between private parties, that is, ‘horizontally’.⁵² Even though the case law can attain an almost dizzying degree of complexity – particularly as to the latter condition that has given rise to much discussion and, arguable, some exceptions⁵³ – these basic rules established by the Court still apply.

2.1.4 Treaties

The final source of EU law that this contribution will discuss is treaties that the EU itself has concluded.⁵⁴ The Lisbon treaty has clarified a number of issues in this respect: First of all, it is now clear that the EU itself is endowed with legal personality (article 47 of the TEU) and can thus act internationally. Second, the EU’s competence to conclude agreements, which the ECJ had – before – already deduced from the EU’s internal competences,⁵⁵ has now been included in the treaties explicitly. According to article 216 of the TFEU the EU may conclude international agreements. In some areas the EU even has an exclusive competence to do so (art. 3 of the TFEU), significantly this includes the

49 Case 148/78 *Ratti* [1979] ECR 1629 para 22.

50 Note that this was not the Court’s original argument, however. Schütze (n 20 above) 122.

51 Cases C-425/12 *Portgás* not yet published, para 18; C-323/12 *E. ON Global Commodities (before E.On Energy Trading)* not yet published, para 56; C-319/12 *MDDP* (not yet published) para 47.

52 Case C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3325 paras 24 & 25.

53 See only Cases C-555/07 *Küçükdeveci* [2010] ECR I-365; C-144/04 *Mangold* [2005] ECR I-9981; C-443/98 *Unilever* [2000] ECR I-7535; C-194/94 *CIA Security International v Signalson and Securitel* [1996] ECR I-2201; E Howard ‘ECJ advances equality in Europe by giving horizontal direct effect to directives’ (2011) 17 *European Public Law* 729; P Cabral & R Neves ‘General Principles of EU Law and Horizontal Direct Effect’ (2011) 17 *European Public Law* 437; R Mastroianni ‘On the distinction between vertical and horizontal direct effects of community directives: What role for the principle of equality?’ (1999) 5 *European Public Law* (1999) 417; Schütze (n 20 above) 123 - 128.

54 See for this section Lenaerts & Van Nuffel (n 20 above) 861 - 884.

55 Case 22/70 *Commission v Council (‘AETR’)* [1971] ECR 263.

conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping and subsidies.⁵⁶

Many treaties do, however, include areas of both EU and member state competences, so that both the EU and the member states will have to ratify the treaty (mixed agreements). Treaties signed by the EU become part of EU law.⁵⁷ They are, according to article 216(2) of the TFEU 'binding upon the institutions of the Union and on its Member States'. The EU gives such treaties considerable weight: In the hierarchy of sources in the EU legal order they rank in-between primary and secondary law.⁵⁸

Given that the EU is a subject of public international law and signs treaties in its own right, it also has to implement such treaties. It can do so by using its regulatory tools such as directives to introduce the substance of the treaty into the EU legal order. Where the EU fails to do so with respect to a treaty it has ratified, the question arises whether provisions of the treaty can have direct effect within the EU order, that is, whether individuals may rely on provisions of the treaty before the courts (and administrations) of the EU and member states. The ECJ has decided that this is the case if according

to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.⁵⁹

Where a treaty falls into the exclusive competence of the EU, it is exclusively the EU that decides whether or not the provisions of that treaty have direct effect.⁶⁰

Implementation of international agreements becomes particularly tricky in the case of mixed agreements. As both the EU and its member states have ratified those agreements, they are all under an obligation to abide by them – and hence will have to implement them, each in the scope of its respective competences.

56 TFEU (n 15 above) art 207, see also TFEU art 3(2).

57 Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641.

58 Case C-308/06 *Intertanko* [2008] ECR I-4057.

59 Case 12/86 *Demirel* [1987] ECR 3719.

60 Case C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland* not yet published. For a critique of the interpretation of the exclusive competences by the ECJ in that case see H Hestermeyer 'The notion of "trade-related" aspects of intellectual property rights: From world trade to EU law – and back again' (2013) 44 *International Review of Intellectual Property and Competition Law* 925.

2.2 The doctrine of supremacy of EU law

The doctrine of direct effect significantly reduces the importance of member state action for the implementation of EU law. Even absent any implementing measures, some provisions of EU law can be invoked in and have to be applied by member states. However, in and of itself the doctrine encounters an important limit: it does not resolve possible conflicts between EU law and member state law – a particularly difficult issue if the member state passes legislation contradicting an EU provision *after* that provision came into force. Traditional doctrine would indicate that at least in that case member state courts and administrations have to apply the national law under the *lex posterior* principle. Would that principle continue to apply in EU law?

The ECJ had to tackle the issue one year after its groundbreaking ruling in *Van Gend & Loos* and, in 1964, issued a second stunning, though perhaps no longer surprising, ruling that would become a central part of the genome of EU law. The facts of the case were somewhat peculiar: In 1962 Italy nationalised the production and distribution of electricity, creating the *Ente Nazionale Energia Elettrica* (ENEL). Flaminio Costa was a shareholder of one of the affected companies, Edison Volta, and used litigation over an electricity bill he owed to ENEL to challenge the validity of the nationalisation law, arguing that it infringed the EU treaties. Under Italian doctrine any such violation would have been irrelevant: Italy had ratified the treaties by an ordinary statute, the treaties hence had the status of ordinary law and thus the same status as the very act nationalising the electricity company. Any conflict between the treaties and that act would have to be resolved in favour of the later act, which was the nationalising law.⁶¹ The ECJ, however, considered this outcome as unacceptable for EU law. It conceded that it had no power to rule on the *validity* of national law. It could, however, rule on the interpretation of the treaties and considered that

the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as [Union] law and without the legal basis of the [Union] itself being called into question.⁶²

Accordingly, from the perspective of EU law, the autonomous nature of the legal system of the EU justifies that EU law enjoys supremacy over national law. The ECJ has consistently applied the principle of supremacy

61 N Fennelly 'The European Court of Justice and the doctrine of supremacy: *Van Gend en Loos*; *Costa v ENEL*; *Simmenthal*' in M Poiars Maduro & L Azoulai (eds) *The past and future of EU law* (2001).

62 Case 6/64 *Costa v Enel* [1964] ECR 1141.

even in the absence of any treaty rule. The principle has been affirmed in a declaration annexed to the Lisbon treaty.⁶³

The daring claim of supremacy of EU law raises three important follow-up questions. The first of them relates to the scope of supremacy: Does EU law really claim that *every* rule of EU law – even if it is only a rule of secondary law – is supreme over *every* rule of member state law, even the most important constitutional provision? The second and third questions are of a somewhat more procedural nature and relate to the precise consequences of supremacy. Are national rules that conflict with EU law void? And who decides on the issue – particularly bearing in mind that some member states have established a centralised system of judicial review in which only the constitutional court is permitted to declare a national law void?

With regard to the first question, the ECJ took a categorical stance: the threat to the consistency of EU law as an autonomous body of law does not depend on the nature of the rules at stake. Even allowing a member state's constitution to overrule EU secondary law would constitute an unacceptable danger to the uniformity and efficiency of EU law in the whole Union. Accordingly, all EU law prevails over all national law – even if a constitutional provision such as a fundamental right is at stake.⁶⁴

In its subsequent case law the ECJ also clarified the effect of the supremacy of EU law, answering the second and third questions mentioned. Thus, national law contradicting EU law is not void, but rendered inapplicable.⁶⁵ The obligation to set aside national law in conflict with EU law applies to national courts and all other public bodies of their own motion without them having to seize the ECJ or wait for a national constitutional court decision.⁶⁶

It should be pointed out that despite its long-standing case law on both direct effect and supremacy, some difficult issues concerning the interplay of these two doctrines still await further clarification. Thus, it seems not entirely clear whether direct effect is a precondition for supremacy or whether national courts can set aside national law that conflicts with EU

63 Declaration no 17. An explicit inclusion of the principle of supremacy in the treaty text had been proposed in the failed Constitutional Treaty.

64 Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para 3; Schütze (n 20 above) 136 - 138.

65 Case 106/77 *Amministrazione delle finanze dello Stato v Simmenthal* [1978] ECR 629, para 17; Joined Cases C-10/97 to 22/97 *Ministero delle Finanze v IN.CO.GE.'90 a. o.* [1998] ECR I-6307, paras 20 & 21. See Schütze (n 20 above) 140 - 143.

66 Cases 106/77 *Amministrazione delle finanze dello Stato v Simmenthal* [1978] ECR 629; 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839, para 31; C-555/07 *Küçükdeveci* [2010] ECR I-365, paras 53 - 55; see Lenaerts & Van Nuffel (n 20 above) 757 - 759.

law even though there is no directly applicable EU law that would have to be applied determining the outcome.⁶⁷

2.3 The doctrine of interpretation in conformity with EU law

A third astonishingly effective tool for implementing EU law is the doctrine of interpretation of national law in conformity with EU law. The ECJ has consistently held that member states are under an obligation⁶⁸ to construe national law in conformity with Union law.⁶⁹ The doctrine has gained particular relevance for directives, as the interpretation of national law in conformity with a directive also furthers the goal of achieving ‘the result sought by the directive and consequently comply[ing] with the third paragraph of article 288 TFEU’.⁷⁰ The potential of an interpretation in conformity with EU law is significant: first of all it allows national courts to avoid potential conflict of national law with EU law and the consequent obligation not to apply the national provisions in question. Of course, the doctrine also significantly strengthens the effect of EU law beyond that already achieved by the doctrines already discussed: national law can and must be interpreted in accordance with EU law even where EU law would not be directly applicable (for example, in the case of the horizontal application of a directive not implemented into national law within the applicable deadline).⁷¹

Even though the scope of the doctrine is significant, it is not unlimited. National courts must

do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it⁷²

but they still have to respect general principles and thus may not interpret national law *contra legem*⁷³ or violate the principles of legal certainty, legality and the prohibition of retroactivity.⁷⁴

67 See eg Case C-144/04 *Mangold* [2005] ECR I-9981, Opinion of AG Tizzano, para 106; M Dougan ‘When worlds collide! Competing visions of the relationship between direct effect and supremacy’ (2007) 44 *Common Market Law Review* 931.

68 TEU (n 7 above) art 4(3).

69 See eg Cases 157/86 *Murphy v An Bord Telecom Eireann* [1988] ECR 673, para 11; C-106/89 *Marleasing* [1990] ECR I-4135 para 8; Case C-144/04 *Mangold* [2005] ECR I-9981, Opinion of AG Tizzano, para 117.

70 Case C-282/10 *Dominguez* published in the digital collection, para 24.

71 Schütze (n 20 above) 128 - 132.

72 Cases C-282/10 *Dominguez* published in the digital collection, para 27; C-212/04 *Adeneler a. o.* [2006] ECR I-6057, para 111.

73 Cases C-282/10 *Dominguez* published in the digital collection para, 25; C-268/06 *Impact* [2008] I-2483 para 100.

74 Lenaerts & Van Nuffel (n 20 above) 757.

2.4 Member state liability for violations of their obligations under EU law

The doctrines described above will lead to an application of EU law where member states have failed to take action to bring their national legal system into full compliance with EU law and, at times, even where member states have passed legislation contradicting EU law. In a way, they thus constitute implementation of EU law ‘through the back-door’ – in the absence of any implementing action by the national legislature. It is not difficult to see that such doctrines have their limits. At times, member states will fail to live up to their obligations under EU law and the above doctrines will not provide for an appropriate remedy.

Just such a case came before the ECJ with *Francovich*, decided in 1991. The case involved various Italian lawsuits by employees claiming wages from their employers who were insolvent. In theory, EU law prescribed a mechanism for just such cases in a directive that guarantees employees a minimum level of protection under Union law in the event of the insolvency of their employer. Italy, however, had failed to implement the directive, and had, indeed, already lost an infringement proceeding (an enforcement tool that will be explained later on) brought against it by the Commission.⁷⁵ The first question the national court put to the ECJ inquired whether the directive could be held to have direct effect. The ECJ, however, found against such direct effect: even though the provisions of the directive were

sufficiently precise and unconditional as regards the determination of the persons entitled to the guarantee and as regards the content of that guarantee ... [t]hose provisions do not identify the person liable to provide the guarantee.⁷⁶

However, the ECJ did not leave the plaintiffs without redress. It held that member states can be liable for loss and damage resulting from a breach of their obligations under Union law, arguing that

[t]he full effectiveness of [Union] rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of [Union] law for which a Member State can be held responsible ... It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of [Union] law for which the State can be held responsible is inherent in the system of the Treaty.⁷⁷

⁷⁵ Case 22/87 *Commission/Italy* [1989] ECR 143.

⁷⁶ Joined Cases C-6/90 and C-9/90 *Francovich a. o.* [1991] ECR I-5357, para 26.

⁷⁷ Joined Cases C-6/90 and C-9/90 *Francovich a. o.* [1991] ECR I-5357, paras 33 & 35.

The conditions for member state liability established by the ECJ – and somewhat refined in later case law⁷⁸ – are the following:

the rule of [EU] law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.⁷⁹

For many member states that principle constituted a novelty: even though the liability of states is widely recognised, many national systems did not (and indeed do not), as a rule, provide for such liability where the legislature has failed to act or where judges have failed to apply the applicable law properly.⁸⁰ The significance of liability under this doctrine should probably not be exaggerated. Nevertheless, the doctrine established in *Francovich* is yet another puzzle piece enhancing the implementation of EU law by threatening to render member states liable for violating their obligation to implement EU law.

3 The role of the ECJ in applying EU law

The preceding presentation of the characteristics of EU law that are most pertinent to the implementation of the provisions of that legal system within member states has pointed to one of the most peculiar features of the development of EU law: Much of the development of EU law was driven by decisions of the ECJ.⁸¹ The Court and its proceedings thus become another important focal point for our inquiry. Two types of proceedings before the ECJ are of particular importance for our topic: references for preliminary rulings and infringement proceedings (or ‘actions for failure to fulfil obligations’). While the former have provided the ECJ with numerous opportunities to progressively develop EU law and have successfully established a truly cooperative relationship between national courts and the ECJ conducive to the effective implementation of EU law, the latter provide a tool for the Commission, guardian of the implementation of EU law, to force member states to take action and comply with their obligation to implement and comply with EU law.

⁷⁸ Schütze (n 20 above) 174 - 177.

⁷⁹ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany and The Queen v Secretary for Transport, ex parte Factortame a. o.* [1996] ECR I-1029, para 51.

⁸⁰ CD Classen in T Oppermann et al (eds) *Europarecht* (5th ed 2011) 238.

⁸¹ The topic is a perennial favourite with legal academics. See only J Weiler ‘The transformation of Europe’ (1991) 100 *Yale Law Journal* 2403; K Walter *Rechtsfortbildung durch den EuGH* (2009); A Stone Sweet *The judicial construction of Europe* (2004); K Alter *Establishing the supremacy of European law* (2001).

3.1 References for preliminary rulings

No other instrument of EU law can claim to have played a more significant role in the construction of that system as a truly supranational legal system than the preliminary reference procedure before the ECJ.⁸² The basic provision governing this peculiarly EU law type of action is article 267 TFEU, which states:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court ...

The provision establishes a procedure of considerable genius: *every* member state court has the right to refer questions on the interpretation or the validity of a provision of EU law to the ECJ, if such questions are raised in the course of national proceedings. EU law thus does not establish a judicial hierarchy in which the ECJ is a court of final appeal. Neither does EU law establish a particular EU remedy for enforcing EU law with the ECJ as an enforcer of that remedy.⁸³ Rather, it is the member state courts that decide the concrete case at hand and they have to apply EU law to do so (even if only in the form of national law implementing EU law). Where they have to interpret EU law they may, in the case of courts handling cases in the last instance they must, refer a question of interpretation of EU law to the ECJ. The ECJ then renders a judgment solely with respect to the relevant question of interpretation of EU law. Given the scope and depth of EU law such questions can arise in numerous fields – and given that member state courts have an obligation to interpret national law in conformity with EU law they can and often do arise even where member state courts formally apply national law. It is hence not

82 For a short introduction see Schütze (n 20 above) 150 - 164; for an excellent exhaustive treatment see C Naômé *Le renvoi préjudiciel en droit européen: Guide pratique* (2010).

83 Rather EU law limits itself to stating that in enforcing rights granted in EU law national remedies cannot be less favourable than similar actions of a domestic nature and may not make it impossible to exercise the rights (principles of equivalence and effectiveness). Case 33/76 *Rewe v Landwirtschaftskammer für das Saarland* [1976] ECR 1989 para 5; Schütze (n 20 above) 165 - 170.

surprising that roughly two thirds of the ECJ's caseload consists of references for a preliminary ruling.⁸⁴

The genius of the provision lies in its establishing a truly cooperative relationship between member state courts and the ECJ. Only the court of last instance for a case has a legal obligation to refer relevant questions to the ECJ⁸⁵ – other member state courts may voluntarily refer questions. Where they decide to do so, for example, because they consider the jurisprudence of their superior court as being in violation of EU law, ECJ jurisprudence ensures that the Court strives to give them an answer that assists them in resolving the case at hand, showing significant deference as to the admissibility of the question and willingness to reformulate preliminary questions asked in a manner that is either not admissible or fails to capture an important issue of EU law. The voluntary character of many of the references ensured compliance with the ECJ's rulings even before the position of the Court was as entrenched as it is today: after all, the very fact that a member state court referred a question showed its willingness to comply with the ECJ's ruling. Given the importance of the preliminary reference procedure it is hardly surprising that the ECJ has consistently defended lower court's right to submit references for a preliminary ruling.⁸⁶

3.2 Actions for failure to fulfil obligations

The second type of proceeding that has to be mentioned when describing the implementation of EU law is the so-called 'action for failure to fulfil obligations' or 'infringement proceedings' under articles 258 to 260 of the TFEU.⁸⁷ Those provisions allow both the Commission and other member states to commence proceedings before the ECJ if they consider that a member state has failed to fulfil an obligation under the treaties, such as the obligation to implement primary and secondary EU law. In practice, it is almost always the Commission that starts such proceedings, having been made aware of a relevant treaty violation by individuals, companies or member states and taken the – discretionary⁸⁸ – decision to commence proceedings. The Commission usually attempts to resolve any compliance issue with member states by negotiations. Where such attempts fail (or drag on), it gives notice to the member state concerned, receives observations by the member state and – if not satisfied – delivers a reasoned opinion that sets a deadline for the member state to comply. Where the

84 The Court's statistics show that 450 of 699 new cases in 2013 were references for a preliminary ruling, 161 were appeals and 72 were direct actions. CJEU *Annual Report 2013*.

85 On the limits of that obligation see Case 283/81 *CILFIT v Ministero della Sanità* [1982] ECR 3415.

86 Cases 166/3 *Rheinmühlen Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33; C-173/09 *Elchinov* [2010] ECR I-8889.

87 See for this section Classen (n 80 above) 216 - 220.

88 Case 247-/87 *Star Fruit v Commission* [1989] ECR 291 para 11.

member state concerned fails to do so, the Commission may commence proceedings before the ECJ.⁸⁹

In its judgment in an action for failure to fulfil obligations the ECJ declares that a member state has failed (or has not failed) to fulfil the pertinent obligation of EU law.⁹⁰ At times, however, the mere declaration of a violation of EU law was not sufficient to make a member state take the necessary measures to ensure compliance with its obligations. The treaties hence now allow the Court to impose a lump sum or penalty payment on the member state.⁹¹ The Commission proposes such sanctions in its application. It has published criteria for determining an appropriate sanction taking into account the seriousness of the infringement, its duration and the need to ensure that the penalty is a deterrent to further infringements.⁹² Penalties can be significant and painful: in a recent case the Commission suggested a daily penalty payment of € 256 819 for each day after the ruling until the member state complies with the judgment.⁹³

Even though the enforcement of EU law through infringement proceedings suffers from some defects – for example, the discretion of the Commission to commence such proceedings allowing not only for significant political pressure by member states but also for the possibility of a change in the Commission's position – the possibility of sanctions clearly provides some bite to the mere bark of a declaration of an infringement by the Court. Actions for failure to fulfil obligations constitute an important element of the implementation machinery of EU law.

4 Incorporation of EU law from the perspective of the German legal order

How did the German legal system respond to the EU system's claims, given the extraordinary scope of such claims – such as the doctrines of direct effect and supremacy?⁹⁴ Constitutionally, Germany was well prepared for participating in a strong supranational organisation. Its 1949

89 TFEU (n 15 above) art 258.

90 See eg Case C-305/09 *Commission v. Italy* [2011] ECR I-3225. The annual statistics of the CJEU show that declarations of infringements by the Court are a common occurrence. Thus, in 2013 the Court declared 40 infringements and dismissed 23 cases.

91 Such penalties usually require a second infringement proceeding, but not in case of an action brought by the Commission for failure to fulfil the obligation to notify measures transposing a directive adopted under a legislative procedure see art 260(2) & (3) TFEU. The two types of penalty can be combined. Case C-304/02 *Commission v France* [2005] ECR I-6263.

92 *Communication from the Commission – Application of Article 228 of the EC Treaty*, SEC/2005/1658, as amended and updated.

93 The case concerns Italy's failure to manage waste adequately in the Campania region. See European Commission 'Environment: Italy referred back to Court over waste management in Campania, Commission asks for fines' *Press release IP/13/575* 20 June 2013.

94 For reasons of space this is the only question that can be treated in this section.

Constitution referred to as ‘*Grundgesetz*’ (Basic Law) allowed the Federal Republic to transfer sovereign powers to intergovernmental organisations through statutes in its article 24(1). Nowadays the Basic Law explicitly provides for German Membership in the EU. Article 23(1) of the Basic Law states:

With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by the Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of article 79.⁹⁵

In subsequent paragraphs the article contains detailed provisions, for example, on the participation of the two houses of German parliament, *Bundestag* and *Bundesrat*, and of the German states in the European Union.

The wording shows that the German Basic Law offers a radically different conceptualisation of the European Union than the ECJ in its jurisprudence: According to the Basic Law the EU owes its very existence to a transfer of power from the German nation state to the EU. This is, at least theoretically, a far cry from the truly autonomous legal system the ECJ describes. It entails the claim, as one commentator puts it ‘to take the final decisions about the destination of a community. It prevents accepting the supremacy of EU law without boundaries and conditions’.⁹⁶ This fundamental difference in opinion is at the root of a judicial discussion between the German Constitutional Court (*Bundesverfassungsgericht*) and the ECJ that started in the 1960s and in the course of which the German Court has handed down a significant number of decisions that have attracted the attention of EU law scholars.⁹⁷

⁹⁵ Quoted from the translation provided by the Deutscher Bundestag <https://www.btg-bestellservice.de/pdf/80201000.pdf> (accessed 18 May 2015).

⁹⁶ Nettesheim (n 46 above) 152.

⁹⁷ See in particular BVerfG Case 1 BvR 248/63 & 216/67 (18 October 1967) (1968) *Neue Juristische Wochenschrift* 348 (*Verfassungsbeschwerde gegen Verordnungen des Rates und der Kommission der EWG*); BVerfG Case 2 BvL 52/71 (29 May 1974) (1975) 37 *Entscheidungen des Bundesverfassungsgerichts* 271 (*Solange I*); BVerfG Case 2 BvL 6/77 (29 July 1979) (1980) 52 *Entscheidungen des Bundesverfassungsgerichts* 187 (*Vielleicht*); BVerfG Case 2 BvR 197/83 (22 October 1986) (1987) 73 *Entscheidungen des Bundesverfassungsgerichts* 339 (*Solange II*); BVerfG Case 2 BvR 2134/92 & 2 BvR 2159/92 (12 October 1993) (1994) 89 *Entscheidungen des Bundesverfassungsgerichts* 155 (*Maastricht*); BVerfG Case 2 BvL 1/97 (7 June 2000) (2001) 102 *Entscheidungen des Bundesverfassungsgerichts* 147 (*Bananenmarkt*); BVerfG Case 2 BvE 2/08 *inter alia* (30 June 2009) (2010) 123 *Entscheidungen des Bundesverfassungsgerichts* 267 (*Lissabon*); BVerfG Case 2 BvL 1/97 (6 July 2010) (2011) 126 *Entscheidungen des Bundesverfassungsgerichts* 286 (*Honeywell*) as well as a string of decisions handed down in the context of various Euro-related measures, the last of which was handed down on 18 March 2014 and led

It would go too far to try to summarise this discussion in the limited space available.⁹⁸ Similarly, I shall refrain from criticising recent cases that have stretched the admissibility criteria for individual constitutional complaints under German law – usually handled restrictively to cope with an impressive caseload – beyond all recognition. It should suffice for our purposes to point out that in its most recent case law the German Constitutional Court has pointed out that under the Basic Law the Court maintains the power to control the constitutional limits of integration, which includes a control of both whether the limits relating to the constitutional identity of Germany (mentioned in articles 23(1) and 79(3) of the Basic Law) have been respected and whether acts passed by the EU were within the EU's competences or *ultra vires*, which according to the Constitutional Court is the case if there has been a qualified violation of the competences of the EU and requires a reference of the act to the ECJ for a preliminary ruling before declaring that the EU has acted *ultra vires*.⁹⁹

Besides and beyond this highly publicised struggle, however, the German Constitutional Court has, in principle, not objected to the mentioned doctrines of EU law. In fact, it has contributed to further strengthening the role of the ECJ. In this respect the Constitutional Court's jurisprudence on the right of an individual to have her or his matter decided by the judge assigned to it by law has to be mentioned (article 101 of the Basic Law). With a view to the *obligation* of courts of last instance in a case to submit questions of European Law by way of a reference for a preliminary ruling to the ECJ under article 267 of the TFEU, the Constitutional Court has, in principle, recognised that a violation of this obligation by a German court can be challenged as being a violation of article 101 of the Basic Law.¹⁰⁰ Even though the level of scrutiny in that respect is rather low and violations are limited to cases in which a court's decision not to refer a question is arbitrary¹⁰¹ the Constitutional Court was under no obligation to provide for this additional remedy strengthening EU law.¹⁰²

to the first preliminary reference of the Constitutional Court: Case C-62/14 *Gauweiler a. o.* (pending).

98 For a summary of the early developments in English see Alter (n 81 above) 64 - 123.

99 BVerfG Case 2 BvE 2/08 (*Lissabon*) (n 97 above); BVerfG Case 2 BvL 1/97 (*Honeywell*) (n 97 above).

100 BVerfG Case 2 BvR 197/83 (*Solange 2*) (n 97 above) 366; BVerfG Case 2 BvR 687/85 (8 April 1987) (1988) 75 *Entscheidungen des Bundesverfassungsgerichts* 223 233; BVerfG Case 2 BvL 12/88 *inter alia* (31 May 1990) (1991) 82 *Entscheidungen des Bundesverfassungsgerichts* 159 192.

101 BVerfG Case 2 BvL 1/97 (*Honeywell*) (n 97 above).

102 See J Kokott *et al* 'Die Pflicht zur Vorlage an den Europäischen Gerichtshof und die Folgen ihrer Verletzung' (2006) 61 *JuristenZeitung* 633.

5 Assessment/conclusion

EU law is, indubitably, a particular case when it comes to the implementation of international law in national systems. Over the years and with significant impetus provided by the ECJ, the Union has evolved beyond a mere international organisation and is commonly referred to as a 'supranational' organisation, somewhere between an international organisation and a traditional nation state.

It is the law of the EU itself that has developed the doctrines that today guarantee the effective implementation of EU law: direct effect, supremacy, interpretation in conformity with EU law, state liability. Procedurally, implementation is guaranteed by references to the ECJ for a preliminary ruling and actions for failure to fulfil obligations before the same Court.

Despite apparent and highly publicised resistance by the German Constitutional Court the German legal system has accepted the relevant rules of EU law. In fact, the supposed resistance by the German Constitutional Court is, for practical purposes, overrated: the Court certainly insists on its role as supreme guardian of the German Constitution and as such argues that it has the final say on whether or not the EU has overstepped its competences. It also recognises, however, that such a finding cannot be arrived at lightly. Decades of proliferating EU decision-making have, thus, not yet led to a ruling in which the Court actually considered the Union to have acted *ultra vires* – though the recent first reference by the Court to the ECJ inscribes itself in a list of cases in which the Court seems to have considered such a finding. It is part of the peculiar perception bias of legal scholarship that so much scholarship has focused on the supposed tension between the ECJ and the German Constitutional Court, when indeed the vast majority of cases seem to have caused no problem whatsoever. In fact, one number alone suffices to demonstrate the extent to which the integration of EU law in the German legal system has become a normality: From its inception to 2013 almost a fourth of all new references to the ECJ for a preliminary ruling were referred by German courts.¹⁰³

103 2050 of 8282 cases; see CJEU *Annual Report 2013* (n 84 above) table 19.

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CHAPTER 16 THE IMPLEMENTATION OF AFRICAN UNION LAW IN SOUTH AFRICA

*Bonolo Ramadi Dinokopila**

1 Introduction

African Union (AU) member states' continued insistence on the protection of their sovereignty thus far continues to be a hindrance to the integration process in Africa. This is despite the rhetoric that Africa is willing to unite in order to assert its place and role in the international community. This chapter will argue that the implementation of norms and obligations emanating from the AU is important to the integration process in Africa and elsewhere. It is further argued that the successful domestication of regional obligations and adoption of uniform laws is critical to the AU integration process. Despite the thin line of demarcation between the two, this chapter proffers an insight into the implementation of AU law in South Africa as opposed to South Africa's compliance with AU law. It does so by ascertaining whether South Africa has taken any measures to implement AU law in its municipal laws. The chapter also highlights that the absence of AU mechanisms that monitor the implementation of norms and obligations emanating from this level has resulted in the minimal domestication of AU obligations. In the event that there is implementation of AU obligations, it is fragmented and at times lacks the necessary force that may have been intended by the crafters of those regional instruments. It is therefore important that the AU adopt measures that will ensure that obligations at the regional level are translated into domestic laws.

Following this introduction, the chapter briefly discusses the history of the AU with particular emphasis on the transformation of the Organisation of African Unity (OAU) into the AU. This section will also be a discussion of the normative and institutional framework of the AU.

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The third section will be a discussion and assessment of the nature and content of sources of AU law such as treaties, declarations, resolutions, recommendations and decisions that arise from the judicial and quasi-judicial institutions of the AU. This section will be followed by a discussion of the incorporation of AU law into the South African legal order. The fifth section of this chapter will be a discussion of measures that could be put in place to address issues relating to the lack of implementation of AU laws within national jurisdictions. This will be followed by a conclusion and recommendations.

2 The AU in context

2.1 From the OAU to the AU

Over the years there has been focus on Africa's integration process and its possible impact on Africa's socio-economic development.¹ This interest has been generated, to a large extent, by the transformation of the now defunct OAU into the AU and efforts by the Pan-Africanist movement to create a more unified Africa. One major task that Pan-Africanism set for itself was to see Africa free from the prejudices that were brought along by colonialism.² Pan-Africanism was and still remains a movement that is aimed at ensuring equality across all divides, be it equality in social status, political equality or economic equality.³ Pan-Africanism was thus an agitation for political, economic independence and cultural unity amongst Africans.⁴

It is therefore safe to conclude that the OAU was borne out of increased pressure – or at the very least the desire – on African leaders to rid the continent from colonialism, racism and apartheid. The creation of the OAU is also due, to a larger extent, to the fact that some of the African leaders – such as Kwame Nkrumah – 'had already been closely involved in the Pan-African movement, and associated their own achievement of

- 1 BO Fagbayibo 'A supranational African Union? Gazing into the crystal ball' (2008) 3 *De Jure* 493; unpublished: BO Fagbayibo 'A politico-legal framework for integration in Africa: exploring the attainability of a supranational African Union' unpublished LLD thesis, University of Pretoria, 2009 <http://upetd.up.ac.za/thesis/available/etd-10092010-143207> (accessed 18 July 2012).
- 2 J Nyerere 'A United States of Africa' (1963) 1 *Journal of Modern African Studies* 1.
- 3 T Muriithi 'Institutionalizing Pan-Africanism: Transforming African Union values and principles into policy and practice' *Institute for Security Studies (ISS)* occasional paper 143 (June 2007) 1.
- 4 DZ Poe *Kwame Nkrumah's contribution to Pan-Africanism: An Afrocentric analysis* (2003) 13; K Mathews 'Renaissance of Pan-Africanism: the AU and the new Pan-Africanists' in J Akokpari et al (eds) *The African Union and its institutions* (2008) 27. The development of Pan-Africanism has been sufficiently catalogued elsewhere and this chapter does not in any way seek to repeat the history of Pan-Africanism. It appears that alongside the growth of Pan-Africanism and the increasing pressure on African leaders to forge links, there was a gradual movement towards acceptance, albeit limited, of the apparent need to establish some form of unity by African leaders.

independence with broader aspirations to continental liberation and union'.⁵ Despite the fact that the OAU Charter does not expressly refer to Pan-Africanism, it nonetheless gives credence to arguments pertaining to the 'reincarnation' of Pan-Africanism'. This is so because it finds its foundations in the hopes and ideals that can be identified with those of the Pan-Africanism movement.⁶ Even though it was generally agreed by African leaders that there was a great need for unity amongst African states, there existed serious disagreements as to the very nature of that unity.⁷ The OAU was a compromise between those who wanted instantaneous African unity, on the one hand, and those who believed that such a radical approach was not prudent and advocated for a 'cautious and pragmatic, or even slow, evolutionary process', on the other.⁸

The OAU was thus formed on 25 May 1963 as the 'first Pan-African intergovernmental organisation taking the form of a loose association (a 'United Africa of Independent States')'.⁹ Despite the fact that the OAU was a loose association of sovereign African states,¹⁰ it embraced the principle of Pan-Africanism and sought mainly to liberate Africans from colonialism and racial discrimination.¹¹ Additionally, the OAU was established to promote common understanding amongst Africans, cooperation amongst states in the light of the spirit of togetherness as well as advancing peoples' interest in all spheres of human development.¹² For the most part the OAU was criticised by many as ineffectual and as having failed to foster the very same integration that it was formed to achieve. The OAU was criticised for its inability to save Africa from poverty, conflict and excessive human rights violations.¹³

Much of the criticism levelled against the OAU was necessitated by the inability of the body to deliver what it promised to bring: liberation, peace and development in Africa.¹⁴ It is beyond doubt that the most prominent barrier to complete integration through the OAU was the authoritarian, dictatorial and non-accountable rule that was then prevalent amongst

5 C Clapham *Africa and the international system: The politics of state survival* (1996) 106.

6 F Viljoen *International human rights law in Africa* (2nd edn 2012) 151.

7 T Maluwa 'From the organization of African Unity to the African Union: Rethinking the framework for inter-state cooperation in Africa in the era of globalisation' (2009) 9 *University of Botswana Law Journal* 11.

8 As above; T Murithi *Introduction: contextualising the debate on a Union government of Africa* http://mercury.ethz.ch/serviceengine/Files/ISN/104959/ichaptersection_single_document/89fef234-85f2-4069-9670-4d255bbe3c47/en/M140CHAP1.pdf (accessed 2 May 2015).

9 Viljoen (n 6 above) 162.

10 As above.

11 Charter of the Organization of African Unity (OAU Charter) (25 May 1963) Preamble.

12 n 11 above, preamble; Murithi (n 3 above) 2.

13 T Mkandawire 'Rethinking Pan Africanism' Paper delivered at the first conference of intellectuals from Africa and the Diaspora, Dakar Senegal (6 - 9 October 2004) quoted in Maluwa (n 7 above) 12; Viljoen (n 6 above) 163 - 164.

14 Clapham (n 5 above) 116.

African leaders.¹⁵ The OAU was rightly described by Nyerere as a 'committee of dictators',¹⁶ and was stifled by many factors, chief amongst them the unwillingness of African leaders to cede their autonomy to a united and supra-national Africa.¹⁷ The OAU has been perceived as a failed project especially in addressing issues related to human rights. This is due to the entrenchment of the principle of non-interference in the internal affairs of states in its founding instrument and to the failure of the OAU Charter to make specific reference to human rights.¹⁸ African leaders could not stay oblivious to the fact that there was, over the decades since the establishment of the OAU, an increasing need to establish an effective intergovernmental body that will address the problems that continue to bedevil Africa.¹⁹

It is in the light of this realisation and perhaps out of the efforts of the late Libyan leader Muammar Gadhafi, that on 8 and 9 September 1999 African leaders met in Sirte, Libya to discuss the formation of the United States of Africa as a union of African states.²⁰ The Sirte extraordinary session of the OAU Assembly saw the adoption of the Sirte Declaration by the African leaders. This Declaration called for the establishment of the AU and for the speedy establishment of the Pan-African Parliament (PAP).²¹

It is the adoption of the Constitutive Act of the African Union (AU Constitutive Act) on 11 July 2000, replacing the OAU Charter that has been hailed as a milestone in so far as integration in Africa is concerned.²² The AU which was officially inaugurated in 2002 in Durban, South Africa, offered a new beacon of hope to the continent. As a successor to the OAU, it was seen by some as a panacea to the problems that continued to haunt Africa.²³ It was a closer step to some form of African unity that was envisaged by the likes of Kwame Nkrumah.

The AU Constitutive Act reflects a marked improvement and acknowledgment of the importance of principles relating to good governance, human rights and the rule of law to the overall integration

15 EO Ijeoma 'Re-thinking Pan-Africanism: Dilemmas and efforts towards African integration' (2007) 42 *Journal of Public Administration* 185.

16 As above.

17 CE Welch Jr 'The Organisation of African Unity and the promotion of human rights' (1991) 29 *The Journal of Modern African Studies* 535.

18 Ijeoma (n 15 above) 185.

19 Maluwa (n 7 above) 10.

20 K Kindiki 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal' (2003) 3 *African Human Rights Law Journal* 99.

21 As above; para 8(ii) Sirte Declaration (signed at the fourth Extraordinary Session of the OAU Assembly of African Heads of State and Government, 9 September 1999).

22 Maluwa (n 7 above) 14; Murithi (n 8 above) 3; Viljoen (n 6 above) 164; NJ Udombana 'A harmony or a cacophony? The music of integration in the African Union treaty and the New Partnership for Africa Development' (2002) 13 *Indiana international and Comparative Law Review* 228.

23 Murithi (n 8 above) 3.

process in Africa.²⁴ Of particular relevance is that the transition – from the OAU to the AU – brought along renewed hope for effective human rights promotion and protection in Africa. This is so because, unlike the OAU, one of the objectives of the AU as espoused in its Constitutive Act is the promotion and protection of human rights in Africa in accordance with the African Charter on Human and Peoples' Rights (African Charter).²⁵ As discernible from its principles, the AU envisioned the acceleration of political and socio-economic integration,²⁶ greater unity and solidarity between the African countries and the peoples of Africa.²⁷ Further, the AU maintained its commitment to defending the sovereignty, territorial integrity and independence of its member states.²⁸ The overall purpose of the AU is to promote solidarity, cooperation and support amongst African countries and as such it can be perceived as an attempt to bring to life the ideals of Pan-Africanism.²⁹

The shift from treating state sovereignty as sacrosanct to allowing intervention in other states to avert human rights abuses creates hope that the AU will not fail Africans as the OAU did. This shift is captured by inclusion of the right of African states to intervene in member states in instances where there are war crimes, genocide and crimes against humanity.³⁰ As already indicated, this was not the case under the OAU. Most importantly, the commitment to principles of human rights and stronger regional integration by the AU member states is likely to prevent a repeat of the OAU episode of indifference to human rights abuses.

The aims of the AU as espoused under the AU Constitutive Act however are likely to be undermined by the absence of concerted efforts to implement the AU laws and obligations. The failure to implement the AU laws and obligations is also a threat to regional integration in Africa. The discussion below focuses on the AU's institutional and normative framework with particular emphasis placed on their relevance to the implementation of AU laws and obligations.

24 Viljoen (n 6 above) 164.

25 As above; K Stefiszyn 'The African Union: Challenges and opportunities for women' (2005) 5 *African Human Rights Law Journal* 361.

26 Constitutive Act of the African Union (AU Constitutive Act) (11 July 2000) art 3(c).

27 AU Constitutive Act (n 26 above) art 3(a).

28 AU Constitutive Act (n 26 above) art 3(b).

29 Murithi (n 8 above) 3.

30 AU Constitutive Act (n 26 above) art 4(h); see generally B Kioko 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) 85 *International Review of the Red Cross* 807; M Kunschak 'The African Union and the right to intervention: Is there a need for UN Security Council authorisation?' (2006) 31 *South African Yearbook of International Law* 195; D Kuwali 'The end of humanitarian intervention: Evaluation of the Union's right of intervention' (2009) 19 *African Journal on Conflict Resolution* 41.

2.2 The AU's institutional and normative framework

The institutional makeup of the AU is as set out under article 5 of its Constitutive Act. The article-5 organs of the AU are: the PAP, the Assembly of the AU, the Executive Council, the Court of Justice (which will eventually be merged with the African Court on Human and Peoples' Rights), the Commission, the Permanent Representatives' Committee, the Specialised Technical Committees, the Economic, Social and Cultural Council (ECOSOCC)³¹ and the financial institutions.³² There is general debate as to the allocation or separation of power within the AU and therefore disagreements as to how such allocation of power should be captured by the AU organogram.³³ This debate is outside the purview of the present discussion.

In addition to the above institutions there are those which can be referred to as AU treaty-based institutions, namely: the African Commission on Human and Peoples' Rights (African Commission), the African Court on Human and Peoples' Rights, the AU Peace and Security Council and the Committee of Experts on the Rights and Welfare of the Child (African Children's Rights Committee). These bodies are established under separate treaties from the AU Constitutive Act. These are bodies aimed at monitoring the implementation of the rights established under the African Charter and other AU human rights treaties.

The executive organs of the AU have been identified as consisting of the AU Commission, the AU Assembly, the Executive Council, the Peace and Security Council and the Permanent Representatives' Committee.³⁴ In a nutshell, these are the organs which are mandated to implement the policies, decisions and laws of the AU.³⁵ The Executive organs of the AU are assisted by the Specialised Technical Committees in the execution of their functions. They are identified as such because they are responsible for exercising what traditionally would be referred to as the executive functions of the AU.

The traditional and indeed narrow understanding of the role of the legislature is that it is the branch of government that only makes laws. Viljoen has, in relation to the AU's legislative role, adopted an expansive interpretation of the 'AU legislative role' to refer 'to both the adoption of

31 Viljoen has described the ECOSOCC as the 'fourth branch' of the AU's institutional structure. The ECOSOCC was established as an 'advisory' organ made up of members of civil society. The ECOSOCC is largely designed to make room for greater participation of the ordinary African people in the decision-making processes. See Viljoen (n 6 above) 206.

32 AU Constitutive Act (n 26 above) art 5(1)(a) - (j).

33 See generally: OI Nzewi 'The role of the Pan-African Parliament in African regionalism (2004-2006): An institutional perspective' unpublished Phd thesis, University of Pretoria, 2009 198; Viljoen (n 6 above) 170.

34 Viljoen (n 6 above) 179.

35 Viljoen (n 6 above) 179 - 204.

binding standards (“law-making”) and to the expression of “advisory” views and recommendations (elaboration of “soft law” norms).³⁶ It is within that context that he identifies the AU Assembly Heads of State and Government (AU Assembly or the Assembly), the Permanent Representatives’ Committee (PRC) and the PAP as ‘the AU organs principally responsible for legislation’.³⁷ The PAP is an addition to the legislative bodies of the AU, with the potential to bring about substantial changes to the power dynamics within the AU. The dominant legislative bodies are at present the AU Assembly, which makes decisions and adopts legally binding instruments for the AU, and the PRC.³⁸

The AU Assembly, which is composed of the Heads of State and Government, is considered as the ‘supreme organ’ of the AU.³⁹ This may be because it is in fact the decision-making body of the AU as it is mandated to determine the policies of the AU.⁴⁰ Further, the AU Assembly is also responsible for the adoption of the AU’s budget,⁴¹ monitoring the implementation of policies and decisions of the AU by all member states,⁴² giving directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace,⁴³ and the AU Assembly is responsible for considering and taking decisions on reports and recommendations from the other organs of the AU.⁴⁴ Most importantly the AU Assembly is responsible for the adoption of legally binding instruments for the AU.⁴⁵

The AU Executive Council, which is composed of Ministers of Foreign Affairs or other ministers designated by the governments, is responsible for the coordination of the activities of the AU.⁴⁶ It is also mandated to take decisions on policies in areas of common interest to the member states⁴⁷ and to monitor the implementation of policies that have been formulated by the AU Assembly.⁴⁸ The Peace and Security Council, which – amongst others – promotes peace, security and stability in Africa, is, according to article 5 of the Protocol relating to the Establishment of the Peace and Security Council of the AU, composed of 15 Members elected on the basis of equitable regional representation and rotation.

36 Viljoen (n 6 above) 171.

37 As above.

38 Viljoen (n 6 above) 183.

39 AU Constitutive Act (n 26 above) art 6(2).

40 AU Constitutive Act (n 26 above) art 9.

41 AU Constitutive Act (n 26 above) art 9(1)(f).

42 AU Constitutive Act (n 26 above) art 9(1)(e).

43 AU Constitutive Act (n 26 above) art 9(1)(g).

44 AU Constitutive Act (n 26 above) 9(1)(b).

45 Viljoen (n 6 above) 172.

46 AU Constitutive Act (n 26 above) art 13(1).

47 As above.

48 AU Constitutive Act (n 26 above) art 13(2).

3 The African Union's normative framework: Formal sources of AU law

Compared to the European Union (EU), it is usually rare to find the use of the term African Union Law by scholars and other AU stakeholders. This might be due to several factors such as the fact that the body of treaties, recommendations and judgements produced by the AU are not considered as automatically taking precedence over national law. This factor on its own, and possibly an understanding that law should be automatically binding as is the case at the domestic level, has ensured little usage of the term AU law. This is even more so as the AU Constitutive Act does not expressly state or describe these instruments as sources of AU law. Nevertheless to simplify the comparison with EU law the term AU law has been adopted in this chapter.

It has been rightly remarked that Africa's perspectives on international law may be discerned from various sources.⁴⁹ Cole identifies these sources to include norms emanating from the continent as may be found under the treaties and other documents of the AU, global norms and the legal activity of states and the AU.⁵⁰ It is the first source (treaty norms), as identified by Cole, which perhaps embodies the obligations and norms that may be considered as binding or as law per se to AU member states. Also, the traditional sources of international law perhaps provide one with an idea of what could be the sources of AU law.⁵¹ To that end, sources of AU obligations include the treaties that have been adopted by the AU, AU Assembly Declarations, AU Assembly Decisions, recommendations of the African Commission and of the Committee of Experts on the Rights and Welfare of the Child as well as decisions of the African Court on Human and Peoples' Rights.⁵² The following discussion sets out in detail these sources of AU law.

3.1 AU treaties

Since the times of the OAU right down to the AU, Africa has seen the adoption of a plethora of treaties. Apart from the founding documents of the AU and the related protocols, treaties that have been adopted by the

49 See generally R Cole 'Africa's approach to international law: Aspects of the political and economic denominators' in AA Yusuf (ed) *African Yearbook of International Law* (2013) 288.

50 n 49 above, 289.

51 Vienna Convention on the Law of Treaties (the Vienna Convention) (23 May 1969, 1155 UNTS 331) art 38.

52 Please note that the African Court of Justice is currently not operational. It is envisaged that it will never be operational and will be replaced by the African Court of Justice and Human Rights. At the moment the African Court on Human and Peoples' Rights is the one which is operational.

AU can be categorised into those which establish institutions of the AU,⁵³ human rights treaties⁵⁴ and treaties that are geared towards addressing issues that are of great concern in the continent.⁵⁵ As would be expected, the nomenclature of these regional agreements varies and in general they are identified as protocols, conventions, charters, pacts, treaties and agreements. There is no indication that the name attached to a particular regional agreement makes it less important than the other. For example, the African Charter on Democracy, Elections and Governance has received enough attention in the same fashion as the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa (Protocol on the Rights of Women).

These agreements embody regional norms.⁵⁶ Just as is the case with other agreements between states, these treaties are only binding on the state when they have been ratified. While the norms that come about as a result of these treaties are binding at the regional level, whether they are binding law internally within a member state is dependent on whether the member state in issue has a monist or dualist legal system. For South Africa, it is the latter (→ *De Wet/Introduction*). South Africa has to date ratified most of the AU treaties. Considering the general reluctance of states to ratify treaties, this is very impressive. What is important though is not the number of treaties that a country has ratified but the extent to which the state has implemented these treaties. This is because the level of compliance of the member state with the AU obligations is critical not only to the citizens of the member state but also to the integration process in Africa. It is important to note here that most of these instruments place a duty on the member state to implement such obligations contained under that instrument. Member states are also under an obligation to avoid taking measures that are contrary to the object and purpose of these agreements.

53 Agreements that establish institutions within the AU include the Statutes of the Economic, Social and Cultural Council, Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol) (9 June 1998), Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament (27 June 2014), Protocol on the Statute on the African Court of Justice and Human Rights (27 June 2014) and the Protocol on the Peace and Security Council (15 February 2013).

54 These include the African Charter on Human and Peoples' Rights (the Banjul Charter) (27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58), Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (11 July 2003), AU Convention Governing Specific Aspects of Refugee Problems in Africa (10 September 1969, CAB/LEG/24.3), African Charter on the Rights and Welfare of the Child (African Children's Charter) (11 July 1990, CAB/LEG/24.9/49) and the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (23 October 2009).

55 These include the OAU Convention on the Prevention and Combating of Terrorism (14 July 1999), the African Union Convention on the Prevention and Combating of Corruption (11 July 2003), African Union Non-Aggression and Common Defense Pact (31 January 2005), Charter for African Cultural Renaissance (24 January 2006), African Youth Charter (2 July 2006), and the African Charter on Democracy, Elections and Governance (30 January 2007).

56 See generally Cole (n 49 above) 289.

3.2 Declarations

In addition to the treaties that have been identified above, there are several declarations that have emanated from the AU. Just as is the case with some of the treaties of the AU, these declarations are usually adopted by the AU in reaction to certain events or in an attempt by African Leaders to signify their concern about a certain event. The Declaration on Unconstitutional Changes of Government (2000) is an example of a declaration that was adopted by the AU to express Africa's concern and disdain for unconstitutional changes of government. Some of the declarations are for the purposes of affirming previously held positions and are adopted for the purposes of encouraging member states to take their obligations seriously.⁵⁷ Some of these declarations are now regarded as providing guidance to member states on measures that need to be taken with respect to certain issues or obligations. The Declaration on the Principles Governing Democratic Elections in Africa (2002) has provided AU member states with the yardstick for conducting free and fair elections. At international law, declarations constitute soft law, as they do not produce any fully fledged rules of AU law. These instruments can be described as having impact, even if negligible, at the AU level and are most likely to 'harden into custom or become the basis of a treaty'.⁵⁸ In the end, however it is clear that these instruments do not result in any binding obligations on South Africa.

3.3 Decisions

True to its name, the African Court on Human and Peoples' Rights is considered as being able to pass decisions that are considered binding. The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol) provides that once the parties are notified of the decision they are supposed to proceed with the implementation of the decision of the Court.⁵⁹ States have undertaken, under the Court Protocol, to comply with the judgments of the Court in all matters that they are parties to.⁶⁰ According to article 33 of the Rules of the Court, cases may be submitted by the African Commission on Human and Peoples' Rights, State Parties and African Intergovernmental Organizations. Individuals or NGOS may only submit cases where the state party concerned has accepted that jurisdiction. South Africa has currently not accepted that jurisdiction.

57 Kigali Declaration (8 May 2003), Grand Bay Declaration (16 April 1999), Solemn Declaration on Gender Equality on Africa (8 July 2004).

58 D Harris *Cases and materials on international law* (2010) 63.

59 Court Protocol (n 53 above) art 29.

60 n 59 above, art 30.

It is apposite to point out that the Court is still in its nascent stages and we are yet to see whether South Africa will implement all decisions of the Court including those in which the Court found for those who lodged a complaint against South Africa. Even though the Court has to date handed down a few decisions,⁶¹ only two cases involved or were filed against South Africa.⁶² There was no determination on the merits of the two cases as they were dismissed because the Court did not have jurisdiction over the complaints pursuant to article 5(3) and 34(6) of the Court's Protocol. The two provisions provide that individual access to the Court is only permissible in the event that a declaration is made to the effect that the Court can receive individual communications filed against the concerned member state. Decisions of the African Court do and will in the future provide a point of reference as regards the interpretation of AU law. The importance of this development to the integration process cannot be ignored.

3.4 Recommendations

Some of the institutions forming the African human rights system can only make recommendations to member states following a determination of communications placed before them for consideration. While they are usually termed as decisions, their appropriate nomenclature is perhaps recommendations as they are in the true sense of the word just recommendations. That is, the African Commission and the Committee of Experts on the Rights of the African Child do not pass any binding 'decisions'. This is well captured by Viljoen and Louw when they highlight that 'it is generally accepted that the findings under the African Charter are not legally binding on parties to a dispute ...'.⁶³ The Commission can only make 'recommendations' to states parties as opposed to 'orders' or judgements.⁶⁴ Even though these recommendations are not binding, they are considered as being persuasive and despite the fact that there is no principle of binding precedent at that level, they are consistently referred to in subsequent matters. To that extent, they provide a constant source of enunciation of the rules that exist under the various AU treaties and other documents. The literature surrounding recommendations of the quasi-judicial bodies of the AU consistently laments the lack of enforceability of these recommendations.⁶⁵ What is clear though is the fact that, despite the lack of enforceability, they are still important to the African human rights system.

61 See generally <http://www.african-court.org/en/> (accessed 11 May 2015).

62 *Delta International & Others v The Republic South Africa*, Application 002/2012; *Emmanuel Joseph Uko & Others v The Republic of South Africa* Application 004/2012.

63 See generally F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *American Journal of International Law* 12 - 13.

64 Viljoen & Louw (n 63 above) 2.

65 As above.

4 Incorporation of AU law into the South African legal order

4.1 Rules relating to the implementation of AU law within the national order

At present there is no implementation mechanism in Africa that differs from one that is currently available for general international law. The absence of mechanisms that ensure that AU obligations are sufficiently incorporated into the domestic law and to implement any recommendations or decisions by the judicial or quasi-judicial organs of the AU defeats the objectives of the integration process in Africa. The status quo epitomises the gravitation of the AU towards intergovernmental status as opposed to supranationality, the latter forever remaining a distant dream. As has been rightly noted by Fagbayibo, the AU will only become a supranational organisation once it adopts uniform laws and enforces such laws at the national level.⁶⁶ It is well established that the implementation of international law is largely dependent on the willingness of the state to incorporate its obligations within its national legal order.

Currently, AU law is thus implemented much like general international law. There is no international regulation as to how member states are supposed to implement their international obligations. There are generally two methods of incorporating international obligations. These are usually known as the monist and dualist approach to international law.⁶⁷ When it comes to treaties, South Africa follows a dualist regime (→ De Wet/Introduction). What is clear though, under international law, is that a member state cannot invoke the deficiencies of its national laws in defence to a claim relating to its breach of international obligations and its obligations under treaties.⁶⁸ Further to the above, it appears that there is a general duty on the part of states to bring their domestic laws in conformity with their international law obligations.⁶⁹ However, international law leaves it to member states or parties to treaties to implement them in any manner that they deem appropriate so long as they are in full compliance with their relevant international obligations. This freedom has resulted in a situation where there is no uniformity in the implementation of international obligations by states. Even within the boundaries of this freedom, the AU has not made an attempt to adopt guidelines on minimum standards of adherence to AU treaties and obligations. Such

⁶⁶ BO Fagbayibo (2008) (n 1 above) 499.

⁶⁷ RF Oppong 'Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems in Africa' (2006) 30 *Fordham International Law Journal* 297.

⁶⁸ Vienna Convention (n 51 above) art 27.

⁶⁹ Vienna Convention (n 51 above) art 26.

guidelines will no doubt provide a yardstick for ascertaining whether a member state has taken sufficient steps to domesticate AU obligations.

It is unfortunate that the approach under the AU, with respect to the implementation of AU obligations, is that which obtains under general international law. Under the AU, great latitude is given to states when it comes to the implementation of AU obligations and the result is poor implementation of AU obligations. A very significant observation is that to enable a proper implementation of AU obligations at the national level, the AU must itself be committed to the implementation of these obligations for the benefit of the peoples of Africa. It appears that the only time when we will witness the proper or wholesale implementation of AU obligations is when the AU is a supranational organisation. Of course, the African Charter,⁷⁰ the OAU Convention on the Prevention and Combating of Terrorism,⁷¹ the African Children's Charter⁷² and other AU instruments have provisions pointing to the duty of member states to implement the obligations arising from such treaties. Unfortunately, this is as far as these instruments go in so far as their implementation is concerned.⁷³ In practice and contrary to the obligations of member states under the various treaties, the rest is perhaps left to the member states to pick and choose which obligations are worth implementing. This anomaly remains a great hindrance to the integration process in Africa.

It is important to highlight that it appears that it will take some time before we can see the adoption of uniform laws in Africa. The PAP, which was seen as possibly heralding an end to problems such as the absence of implementation of AU obligations has been side-lined by those in control of the future of the AU. The PAP is yet to be conferred with legislative powers by the AU and it is envisaged that once that happens, the continental Parliament will legislate for and on behalf of the continent. When that happens, the AU will be a supranational body or at the very least, will be able to pass laws that will be directly binding on the member states.

4.2 South Africa, the AU and the monist-dualist paradigm

As already mentioned in the previous chapters (→ De Wet/Introduction), the manner in which international law principles are incorporated into South Africa is mainly through the enactment of legislation unless their

⁷⁰ African Charter (n 54 above) art 1.

⁷¹ Convention on Combating of Terrorism (n 55 above) art 4(2).

⁷² African Children's Charter (n 54 above) art 1(1).

⁷³ See generally M Killander 'Legal harmonization in Africa: Taking stock and moving forward' (2012) 47 *The International Spectator: Italian Journal of International Affairs* 92 also highlighting that '... the powers given to the organs of African intergovernmental organizations to monitor implementation of their decisions are limited'.

provisions are self-executing.⁷⁴ While this is the main approach to the domestication of international legal obligations in South Africa, there are variations of how the domestication is actually carried out. As highlighted by De Wet (→De Wet/ Introduction), this may include instances where an Act of Parliament is enacted to domesticate an international treaty or a particular treaty may be included as a schedule to an Act of Parliament. Being a dualist state when it comes to treaties and monist when it comes to customary international law, the incorporation of international law within its domestic legal order is consistent with the practice of many states. South Africa thus has the latitude to decide the manner according to which it is going to implement international law or AU law within the domestic sphere.

South Africa's approach is in fact consistent with the approach of many AU member states. As aforementioned, under the AU member states are given the latitude to decide the manner according to which they will implement AU laws. This is not however to say that the failure of the member states to incorporate AU obligations will be condoned by, for example, the African Commission or the African Court on Human Rights in a matter where South Africa is sued before the Court. While failure to implement AU law within the national legal order will not be a defence before these bodies, it is not helpful to ordinary Africans as legal protection is in most instances sought and granted at the national level. All is lost where national laws are inconsistent with the state's obligations under international law as they almost nullify the efforts made by intergovernmental organisations such as the AU.

While it is clear that South Africa's approach to the domestication of AU laws is consistent with the approach that has been adopted at regional level, which is in effect of choosing which obligations to implement, it is interesting to ascertain the manner according to which AU obligations have been incorporated into national law. This is done in cognisance of the fact that there are various ways according to which international legal obligations have been and are incorporated into South Africa law. The discussion also attempts to draw to the attention of the architects of the AU that there is need to keep track of whether there are concerted efforts by member states to domesticate regional obligations and the manner according to which AU obligations are treated at the domestic level. While it may not be apparent, the domestication of regional obligations promotes the integration process in the continent as it creates room for easier adoption of uniform laws. This chapter cannot measure the extent to which South Africa has complied with its obligations in all areas of AU law, but it will use examples to highlight the approach by South Africa in domesticating AU law.

74 As above; see generally *Azanian Peoples Organisation (AZAPO) v President of the RSA* 1996 (4) SA 671 (CC); *Hugh Glenister v the President of the RSA* 2011 (3) SA 347 (CC) para 89.

4.3 Examples of the incorporation of AU law into South African law

4.3.1 *The incorporation of AU human rights obligations into South African law*

There are various human rights treaties or instruments that have been adopted by the AU. These include the African Charter which is the main human rights treaty of the AU and embodies the aspirations of Africa as regards the promotion and protection of human rights in the continent. article 1 of the African Charter provides that member states 'shall undertake to adopt legislative or other measures ...' to give effect to the rights enshrined in the African Charter. How the state party proceeds to implement the provisions of the charter is within the discretion of the state. The implementation of the African Charter both in terms of domestication and the extent of implementation vary from one country to another.

In the 2011 study that was carried out by the Centre for Human Rights on the implementation of the African Charter and the Protocol thereto on the Rights of Women in selected African States,⁷⁵ it came to light that the implementation of the obligations arising from the Charter differed, and in some cases extremely, from country to country. The study found out that in some instances the African Charter was superior to national legislation,⁷⁶ while in some instances it was the opposite.⁷⁷ The study also revealed that some countries have adopted pieces of legislation giving effect to the provisions of the African Charter. An example of such legislation is the Nigerian African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.⁷⁸ In the case of South Africa, it was noted that there was no explicit domestication of the provisions of the African Charter or the Women's Protocol.⁷⁹ However, there were various provisions of the Constitution and other pieces of legislation that correspond to the provisions of the African Charter and the African Women's Protocol.⁸⁰

The implementation of human rights obligations in Africa is monitored by the African Commission on Human Rights through its state reporting procedure provided for under the African Charter.⁸¹ The process

75 Centre for Human Rights 'Country Reports October on the implementation of the African Charter and the Protocol thereto on the Rights of Women in selected African States' (2011) http://www1.chr.up.ac.za/images/files/research/impact_african_charter/Report%20African%20Charter%20Project%20OXFAM%20final.pdf (accessed 2 May 2015).

76 Centre for Human Rights (n 75 above) 5.

77 As above.

78 Centre for Human Rights (n 75 above) 156.

79 Centre for Human Rights (n 75 above) 208.

80 Centre for Human Rights (n 75 above) 206 - 208.

81 n 70 above, art 62.

promotes dialogue between the Commission and the member state in relation to the implementation of the state's obligations under the African Charter. A reading of South Africa's First Periodic Report on the African Charter, which was submitted in 2005, confirms the erratic implementation of the African Charter as highlighted above.⁸² It also confirms the fact that the approach within the AU is that the member state is best placed to know how to implement a particular treaty.

It is surprising that the concluding observations by the Commission on the first periodic report by South Africa did not make reference to the approach that has been taken by South Africa in the implementation of the African Charter.⁸³ This could be indicative of the fact that the Commission is not so much concerned with the manner according to which the African Charter is implemented. The approach confirms the absence of concerted efforts at AU level to have a systematic approach to the implementation of AU obligations. This is despite the fact that a well-structured approach to the implementation of AU obligations would enable all stakeholders to be able to easily identify good practices and challenges to the domestication of AU obligations. The approach by the Commission also means that there is no uniform standard and consequently the yardstick according to which all member states are supposed to implement the obligations under the African Charter. At the very least, there should be an indication of the preferable method of incorporating AU obligations by member states if at all there is commitment to integration and supranationalism.

4.3.2 The incorporation of AU environmental law obligations into South African law

The reluctance by South Africa to domesticate AU obligations is also apparent in the domestication of AU obligations relating to the environment. The right to a satisfactory environment enshrined in the African Charter has missed direct application because of the absence of enabling legislation.⁸⁴ The same applies to the provisions dealing with the environment enshrined in the Treaty Establishing the African Economic Community, the AU Constitutive Act⁸⁵ and the African Convention on the Conservation of Nature and Natural Resources (1968/2003) (→ Chamberlain & Murombo). While section 24 of the South African Constitution may be interpreted as incorporating the AU obligations

82 South Africa's First Periodic Report.

83 Concluding Observations and Recommendations on the First Periodic Report of the Republic of South Africa, Thirty-Eighth Ordinary Session, 21 November - 5 December 2005, in Banjul, The Gambia, Consideration of Reports submitted by States Parties under the Terms of article 62 of the African Charter on Human and Peoples' Rights.

84 KSA Ebeku 'The right to a satisfactory environment and the African Commission' (2003) 3 *African Human Rights Law Journal* 149.

85 As above.

relating to the environment, the words of De Wet are apposite when she points out that:

Section 24(a) of the Constitution is broad and carries considerable potential meaning. Sections 24(b)(i) to (iii) list a number of positive state obligations such as the duty to prevent pollution and ecological degradation. These obligations are, however, without any detail. In principle, therefore, the added value of internationally-recognised positive obligations lies in clarifying the text and scope of section 24(a) as well as in concretising the obligations listed in section 24(b).⁸⁶

This clarification and concretisation can be done by way of enabling legislation and through the South African courts' interpretation of domestic provisions corresponding with the AU obligations. What is clear is that there is a need for a more direct incorporation of AU laws relating to the environment in South Africa.

4.3.3 The implementation of the AU declarations, recommendations and decisions of the AU judicial and quasi-judicial bodies

To date there has been no communication filed against South Africa before the African Court on Human Rights and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) that was decided against South Africa. It thus remains to be seen whether South Africa will fall within a group of countries that implement the decisions of the judicial and quasi-judicial bodies of the AU.

With respect to AU declarations, while states are generally not bound by declarations that have been adopted at the international or regional level, it could be argued that they have a moral obligation to support and implement these declarations. For the reason that they are not binding but only persuasive, it is very difficult to ascertain whether AU declarations are being deliberately implemented or they are implemented in the course of implementing other AU and international obligations in South Africa. Declarations are usually couched in general terms making it difficult and sometimes even unnecessary to deal with questions of their implementation. What is clear though is the absence of a mechanism that promotes these declarations and encourages states like South Africa to infuse them in their implementation of their various obligations.

It is appreciated that the domestication of South Africa's obligations under the African Charter or any other instrument will not transform the AU into a supra-national body overnight. It will no doubt be part of an important contribution to the process of legal harmonisation in Africa. It

⁸⁶ E de Wet 'The meaning of certain substantive obligations distilled from international human rights instruments for constitutional environmental rights in South Africa' (2010) 2 *African Human Rights Law Journal* 345.

is through such efforts and the role of other AU institutions such as the African Court on Human Rights and eventually, the African Court of Justice and Human Rights that the AU will push for the attainment of what has been described by Weiler, in the context of the EU, as normative supranationalism.⁸⁷ According to him this normative supranationalism entails 'the relationships and hierarchy which exists between the EU policies and legal measures on one hand, and competing policies and legal measures of member states on the other'.⁸⁸ It has been rightly observed by Fagbayibo that:

In gauging the existence of normative supranationalism within an organisation, the legal inquiry should be based on whether – in respect of specific areas of common interest and competence – the policies and laws of such an organisation have direct effect in member states; the laws of the organisation are superior to the laws of the member states and member states are pre-empted from enacting contradictory legislation. While the answer to these questions is affirmative in the case of the EU, the AU is yet to attain such feat.⁸⁹

4.4 The role of the courts in the implementation of AU obligations in South Africa

The role of the South African judiciary in the implementation of AU obligations is as aptly captured by the discussion of the previous chapters on the implementation of international law in South Africa. Suffice it here to point out that section 39 of the Constitution obliges courts to consider international law in their interpretation of the Bill of Rights. Section 239(1) as read with section 233 of the Constitution imposes a duty on the courts to interpret domestic legislation in accordance with international law, AU law included.

For example, the Constitutional Court has on several occasions interpreted the Bill of Rights in accordance with the provisions of the African Charter. The Constitutional Court in *Dawood and Another v Minister of Home Affairs and Others*,⁹⁰ made reference to article 18 of the African Charter. The case concerned the invalidation of the Aliens Control Act 96 of 1991. The Court in this case relied on the Charter's provision dealing with South Africa's obligation to protect the family and proceeded to hold that it was unconstitutional for the provisions of the Act in issue to force a non-citizen spouse of a South African to leave the country.⁹¹ The African Charter was also referred to in *S v Williams and Others*⁹² wherein

87 JH Weiler 'The community system: The dual character of supranationalism' (1981) 1 *Yearbook of European Law* 271.

88 Weiler (n 87 above) 271; see also Fagbayibo (2008) (n 1 above) 493.

89 Fagbayibo (2008) (n 1 above) 496.

90 *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC)

91 *Dawood* (n 90 above) paras 29 - 30.

92 *S v Williams* 1995 3 SA 632 (CC).

the Court relied on article 5 of the African Charter when abolishing corporal punishment in South Africa. The Constitutional Court has relied on the provisions of the African Charter to hold that the imposition of corporal punishment on juveniles was inhuman and degrading.⁹³ There are other cases in which the African Charter⁹⁴ has been cited by the South African courts indicating the interpretation of domestic laws in accordance with the AU obligations.⁹⁵ Despite these judicial pronouncements, Viljoen is of the opinion that there has been little use of the African Charter in South Africa.⁹⁶

The South African judiciary may also be instrumental in the enforcement of the judgments of the African Court on Human Rights. Even though member states have undertaken to respect the decisions of the Court, there is always a possibility of reluctance on the part of the member states to implement the decision of the African Court on Human Rights. There is no telling which group South Africa will fall into. In the event that there is reluctance from the South African government to implement the decisions of the African Court on Human Rights, it is comforting to note that the South African judiciary will most likely be available to enforce these decisions.⁹⁷

5 Closing the implementation gap

5.1 The internationalisation of constitutions of AU member states

The poor implementation of AU laws and obligations continues to be a major challenge to any regional efforts towards supranationalism. The poor implementation of the obligations that arise out of the AU is due to many factors such as the absence of political will, weak peoples' participation in the decision-making processes of the AU and the generally weak and elitist nature of leadership in the region. Chief amongst these factors is the clear unwillingness of African states 'to cede any part of this

93 *S v Williams* (n 92 above) para 21.

94 *Samuel Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC); *Bhe v Magistrate Khayelitsha* 2005 (1) SA BCLR 1 (CC); *Richard Gordon Volks No v Ethel Robinson and Others* 2005 (5) BCLR 446 (CC); *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

95 See generally OC Okafor *The African human rights system, activist forces, and international institutions* (2007) 155 - 219.

96 F Viljoen 'Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa' (1999) 42 *Journal of African Law* 112.

97 See generally T Mutangi, 'Executing judgments of the SADC Tribunal rendered under its human rights - related jurisdiction by utilising the foreign judgments (registration and enforcement) procedure: prospects and challenges' (10 August 2011) <http://ssrn.com/abstract=1907891> or <http://dx.doi.org/10.2139/ssrn.1907891> (accessed 2 May 2015).

[sovereignty] authority for the common good of the continent'.⁹⁸ Despite that AU obligations have not been entirely domesticated by many of the member states, there is no strong mechanism for monitoring, generally, the implementation of AU obligations. To the exception of state reporting procedures under the African Charter and the African Children's Charter there is no strong commitment to ensuring that the states translate their obligations into national laws. Even for these two, most member states have either failed to submit their reports entirely or there are outstanding reports for review. Further, the follow-up mechanism of these bodies is not sufficient to suggest that there is a marked difference – as regards implementation of AU obligations – between member states which submitted reports to these bodies. In fact, Viljoen and Louw have concluded that the absence of a follow-up provision in the African Charter 'can be described as a factor that has inhibited state compliance with the Commission's recommendations'.⁹⁹

As highlighted above, the rules as regards the domestication of AU obligations into national law are no different from those that exist at an international level. The onus is on the state to implement these obligations. Further, the manner according to which member states should implement these obligations is at the discretion of the member state. The absence of a more formalistic approach to the implementation of AU obligations has resulted in the limited implementation of the otherwise beneficial laws. That is why the domestication of the AU instruments by South Africa is rather limited. This has also resulted in the absence of uniformity which continues to hamper the integration process in Africa. Even in instances where Africa has recorded small victories, such as in areas of economic integration, we are still faced with problems of fragmentation and differences when it comes to the implementation of such laws. Some of the problems that continue to hinder the integration process in Africa include issues of political and institutional constraints.¹⁰⁰ Further, the Continent has a problem of duplication of Regional Economic Communities (RECs)¹⁰¹ with the rules of the various RECs conflicting or in some instance entailing competing obligations.¹⁰² It is acknowledged that states are influenced by many factors in their implementation of their international obligations and these include political, economic and socio-

98 R Ajulu 'The African Union: The challenges of implementation' (2002) 17 *Global Insight* 2.

99 Viljoen & Louw (n 63 above) 17.

100 See generally A Geda & H Kebret 'Regional economic integration in Africa: A review of problems and prospects with a case study of COMESA' <http://www.soas.ac.uk/economics/research/workingpapers/file28853.pdf> (accessed 2 May 2015).

101 See generally A Hammerstad 'Domestic threats, regional solutions? The challenge of security integration in Southern Africa' (2005) 31 *Review of International Studies* 69; M Chingono & S Nakana, 'The challenges of regional integration in Southern Africa' (2009) 3 *African Journal of Political Science and International Relations* 396.

102 Study commissioned by GTZ *Regional economic communities in Africa: A progress overview* (2009) 10 http://www2.gtzt.de/wbf/4tDx9kw63gma/RECs_Final_Report.pdf (accessed 3 May 2015).

cultural factors. However, and considering that the implementation of these obligations is for the betterment of Africans, member states should not be reluctant to implement AU obligations.

Concomitantly, there should be effective mechanisms put in place that monitor the implementation of these obligations. It has been rightly pointed out that 'the aim of enhancing legal certainty and predictability is still the main driving force of international harmonisation efforts'.¹⁰³ The AU Commission on International Law (AUCIL)¹⁰⁴ and the African Peer Review Mechanism (APRM)¹⁰⁵ have so far proven to be totally insufficient to address this anomaly. The former is responsible for the promotion of the progressive development of the international law in Africa and the codification of international law with the latter being a voluntary exercise where members of the AU subject themselves to assessment by other member states on issues of democracy, good governance and socio-economic development. Some actors at the AU level, such as the African Commission, National Human Rights Institutions (NHRIs) and civil society, are intent on reaching a point where the norms and obligations agreed to at the regional level are enthusiastically carried out or implemented at the national level. What is clear though is the fact that the AU will continue to be faced with the challenge of transforming its commitments into reality. Member states will continue to be reluctant to implement their obligations at the domestic level and will continue to fuel the irrelevance of the AU to ordinary Africans.

AU member states should address issues relating to the incorporation of international law, and by necessary extension AU obligations, within the domestic order. Constitutions of some AU member states, such as Botswana, do not make reference to international law. In fact, in those countries international law is used as an interpretative tool only in instances where there is ambiguity in a piece of legislation.¹⁰⁶ It has been pointed out that the African Charter has been mentioned in the Constitutions of about 23 member states and has been incorporated in only four constitutions.¹⁰⁷ The internationalisation of constitutions has the effect of making 'customary international law directly binding; give both treaties and customary international law superior authority to local

103 JAE Faria 'Future directions of legal harmonisation and law reform: Stormy seas or prosperous voyage' (2009) 14 *Uniform Law Review* 5.

104 Viljoen (n 6 above) 178.

105 See generally: Unpublished: M Killander 'The role of the African Peer Review Mechanism in inducing compliance with human rights' unpublished LLD thesis, University of Pretoria, 2009 7.

106 This is the position in Botswana also. See generally EK Quansah, 'An examination of the use of international law as an interpretative tool in human rights litigation in Ghana and Botswana' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 46 - 48.

107 T Ginsburg et al 'Commitment and diffusion: how and why national constitutions incorporate international law' (2008) 1 *University of Illinois Law Review* 208.

legislation, even if adopted later; and specifically incorporate particular human rights treaties'.¹⁰⁸ AU obligations are supposed to be a 'precommitment' device and are supposed to be a communication to the world that member states are 'serious about their promises'.¹⁰⁹ Evidence however suggests that this is not the case as AU member states continue to adopt the dualist approach to international law. As already evidenced by the discussion above, South Africa has explicit provisions dealing with the use of international law within the domestic arena. While international law might be applicable in South Africa, the use of such instruments is limited especially in instances where no piece of legislation has been adopted to give effect to a regional treaty. In fact the position in South Africa obtains in most internationalist constitutions in Africa. For South Africa, there is still room for improvement in so far as the implementation of AU norms and obligations is concerned. It is suggested that South Africa should adopt a more direct implementation of these obligations.

5.2 Conferring legislative powers on the Pan-African Parliament

Another solution to the implementation deficit of AU obligations is to empower the Pan-African Parliament (PAP) to legislate for Africa. This approach will not be without challenges but history has shown that it can be done and once it is done, it is most likely to succeed.

The Pan-African Parliament (PAP) is an important and welcome addition to the AU institutions. The PAP is one of the institutions of the African Union (AU) that is both dependent on and indicative of the course and extent of integration in Africa. Its future evolution will indicate whether Africa's leadership is ready to commit to the ideal of having a truly continental supranational body. At the same time its growth into a legislative body is inextricably linked to the AU's possible but by no means inevitable development into a supranational, rather than a mere intergovernmental institution. The otherwise deliberately delayed transformation of the AU into a supranational body perhaps explains why the PAP is not being transformed into a full legislative body. At the moment, there is no political will on the part of the member states to cede some of their control to the AU and concomitantly, no political will to confer the Parliament with legislative powers. The PAP was perhaps designed to fail due to the fact that it was established with no direct elections, absence of any legislative powers and no control over its budget.

¹⁰⁸ As above.

¹⁰⁹ Ginsburg (n 107 above) 212, also highlighting that 'a precommitment means 'becoming committed, bound or obligated to some course of action or inaction or to some constraint on future action ... to influence someone else's choices.'

The attainment of legislative powers by the PAP entails that states relinquish their sovereignty to allow the PAP to legislate for them and on their behalf. That is likely to be objectionable to some member states as conferring legislative powers on the PAP would be tantamount to welcoming interference from the AU into their domestic affairs, and by necessary implication, other member states. One needs to appreciate that the issue of sovereignty is still at the heart of African leadership and statecraft. Most decisions taken at the regional level to some extent demonstrate the unwillingness on the part of African leaders to relinquish their powers to a body such as the PAP. Unwillingness by states to cede their sovereignty is probably one of the most important factors that have limited the harmonisation of laws, implementation of AU obligations, integration process in Africa and the growth of the AU into a supranational body that it should ideally be.¹¹⁰ As it has been rightly noted,

the political importance of national sovereignty is both a crucial factor and hurdle in the establishment of transnational entities, for African states and their political leaders, sovereignty has always been paramount, and therefore the prospect of integration based on the ceding of sovereignty powers to a supranational entity is dismal.¹¹¹

Sovereignty entails that states have the ultimate control and final decision-making power to govern themselves and those within their territory.¹¹² The costs of over-adherence and abuse of state sovereignty in Africa have been considered in detail elsewhere.¹¹³ The establishment of the Parliament is also an indication of the community's commitment to the eventual adoption of single laws that will govern the entire continent and a departure from over-adherence to state sovereignty. The commitment that will be made by African states if the PAP is conferred with legislative powers will no doubt lie in direct conflict with the conception of state sovereignty by most African leaders.¹¹⁴ One of the envisaged functions of the PAP will be to evolve into a legislative body of the AU that will be one of the engines of facilitating regional integration through the harmonisation of policies and laws.

110 M Welz 'The Africa Union: Integration vs sovereignty' (undated) 1 http://www.unileipzig.de/~ecas2009/index.php?option=com_docman&task=doc_download&gid=1549&Itemid=24 (accessed 3 May 2015).

111 O Nzewi 'Rapid or incremental change: Assigning greater legislative powers to the Pan African Parliament' *Research Report 123, Centre for Policy Studies Johannesburg* (2010) 9.

112 OA Hathaway 'International delegation and state sovereignty' (2008) 71 *Law and Contemporary Problems* 116.

113 JI Herbst 'A new approach to sovereignty in Africa' (2001) 21 *SAIS Review of International Affairs* 219; L Henkin 'That S word: Sovereignty, and globalization, and human rights, et cetera' (1999-2000) 68 *Fordham Law Review* 1; SN Grovogui 'Regimes of sovereignty: International morality and the African condition' (2002) 8 *European Journal of International Relations* 315.

114 Nzewi (n 111 above) 9.

Judging by the commitment exhibited by African states towards integration in Africa, one can safely conclude that the PAP might not easily attain legislative powers. The success of the PAP is definitely dependent on cooperation between states, regional legislative bodies and, to a large extent, other international actors. However, cooperation 'requires that the actions of separate individuals or organisations – which are not in pre-existent harmony – be brought into conformity with one another through a process of policy coordination'.¹¹⁵ In essence, this means that AU member states will have to adjust their laws and policies so as to accommodate the work of the PAP.

5.3 The potential role of the African Court of Justice and Human Rights

It is expected that once the African Court of Justice and Human Rights becomes operationalised, it will play a major role in the affairs of the AU and in strengthening regional integration in Africa.¹¹⁶ While the merger of the African Court on Human Rights and the African Court of Justice has been criticised by many, it appears that the AU member states are steadfast in establishing the merged Court. The African Court of Justice and Human Rights will deal with cases relating to the interpretation of the AU Constitutive Act, decisions, regulations, all acts, and directives of the organs of the AU.¹¹⁷ Pending the entry into force of the Protocol Establishing the African Court of Justice and Human Rights we can only comment on the potential that the Court holds for integration in Africa. This is brought around by the fact that the significant role played by the European Court of Justice (ECJ) in the case of the European Union.

Once the merged Court becomes operational it will be able to receive communications from state parties to the 2008 Protocol to the African Charter on the Establishment of the African Court of Justice and Human

115 RO Keohane 'Cooperation and international regimes' in R Little & M Smith (eds) *Perspectives on world politics* (2007) 81.

116 For a detailed discussion on the merger of the African Court on Human and Peoples' Rights and the African Court of Justice see F Viljoen 'AU Assembly should consider human rights implications before adopting the Amending Merged Court Protocol' (posted 23 May 2012) <http://africlaw.com/tag/african-court-on-human-and-peoples-rights/> (accessed 2 May 2015); CM Peter 'The proposed African Court of Justice-jurisprudential, procedural, enforcement problems and beyond' (1993) 1 *East African Journal of Peace and Human Rights* 117; NJ Udombana 'An African Human Rights Court and an African Union Court: A needful duality or a needless duplication' (2003) 28 *Brooklyn Journal of International Law* 811. The List of Countries which have signed, ratified/ acceded to the Protocol on the Statute of the African Court of Justice and Human Rights, downloaded from the web-site of the African Union (www.africa-union.org) as at 3 November 2014 showed that as at that date 30 States had signed the Protocol. Only five States had ratified/ acceded and deposited their instruments of ratification with the African Union Commission (AUC) which are Benin, Burkina Faso, Congo, Libya and Mali.

117 Protocol to the African Charter on Human and Peoples' Rights on the Statute of the African Court of Justice and Human Rights (1 July 2008) art 28(a) - (h).

Rights (Merged Court Protocol), the African Commission on Human Rights, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), African National Human Rights Institutions, non-governmental organisation and individuals.¹¹⁸ It is hoped that it is this access to the Court, by various actors in Africa, which will enhance and encourage member states to move towards the adoption of uniform laws.

The Court is billed to play a crucial role in integration process in Africa and implementation of AU law within the national jurisdictions. This is largely going to be through the interpretation of AU law and the development of doctrines that will eventually be uniform in Africa. It is expected that the decisions that will be handed down by the Court will strengthen the intra and extra AU institutional relations thus creating more room for regional integration. It has been pointed out that, in relation to the EU:

With the passing of time, the ECJ has become the architect of ever more numerous institutional innovations, transforming and constitutionalising the Treaty architecture, and amending both the horizontal (inter-institutional) and the vertical (EC – Member States) division of powers in equal measure.¹¹⁹

The Court is also most likely to influence the manner according to which AU laws will be implemented within the member states. This is likely to take place as and when the Court makes pronouncements on matters that are placed before it for determination by AU organs, individuals and member states. The Court presents a better opportunity for the AU member to ensure compliance with AU law under the direction and supervision of a judicial organ with the power to make legally binding decisions. While this is dependent on such factors as the willingness of member states to allow individual access to the Court, it remains an important eventuality to the process of integration in Africa. That way, the Court will enhance prospects of transforming the AU from an intergovernmental organisation into a supranational organisation.

6 Concluding remarks

The domestication of AU obligations into national law by AU member states is generally weak. This can be explained by the general reluctance of some of the member states to domesticate the various treaties that they are party to. Another possible explanation to the weak implementation of AU obligations at the national level is that the AU has so far not created a

¹¹⁸ n 117 above, art 30.

¹¹⁹ H De Waele 'The Role of the European Court of Justice in the integration process: A contemporary and normative assessment' (2010) 6 *Hanse Law Review* 5.

strong system that encourages the domestication of AU obligations. In countries where there is an attempt to implement AU obligations, as is the case with South Africa, it turns out that the implementation of AU obligations is rather fragmented. In South Africa there is no direct implementation of AU obligations as evidenced by South Africa's implementation of the African Charter. Instead of a wholesale domestication of the Charter, it is apparent that the approach has been to indirectly domesticate the provisions of the Charter. This is consistent with the approach that has been adopted at the AU level where great latitude is given to states when it comes to implementation of AU obligations. The end result of this approach has been little to no implementation of AU obligations. The integration process in Africa has, as a result, been greatly stalled.

States do have a role to play in the implementation of AU obligations and they should be encouraged, in the main, to implement the AU obligations. The internationalisation of their constitutions is one of the methods suggested if there is to be an improvement in the implementation of AU obligation. South Africa has already shown that this is possible with the challenge being that it nonetheless remains a dualist state. Finally, it is also suggested that great thought and attention by the AU should be given to the PAP with a view to conferring it with powers to legislate for Africa. That way member states will be immediately bound by the laws that are adopted at the AU level offering Africans better protection against exploitation and massive human rights violations.

Over and above the suggested means of encouraging the implementation of AU law at the domestic level, it is very necessary that the AU should consider adopting guidelines on minimum standards of adherence to AU treaties and obligations. Such guidelines will assist in ensuring the uniform application of AU law at national level.

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I: International judicial decisions

CHAPTER 17

THE STATUS OF INTERNATIONAL JUDICIAL DECISIONS IN THE GERMAN LEGAL ORDER

*Matthias Herdegen**

1 Introduction

1.1 The international setting for judicial rulings: Binding effect upon parties and authoritative guidance on interpretation

International law, as a rule, refrains from addressing the status of judicial rulings and the decisions of other treaty bodies in domestic law and only addresses compliance by state parties.¹ Thus, under article 59 of the Statute of the International Court of Justice (ICJ), '[t]he decision of the Court has no binding force except between the parties and in respect of that particular case'.² Likewise, under article 94 of the UN Charter, '[e]ach Member State of the United Nations undertakes to comply with the decision of the ICJ in any case to which it is a party'. Thus, only states which are parties to a case before the ICJ strictly have to comply with its decisions. Similarly, the European Convention on Human Rights obliges the contracting states to abide by the final judgment of the European Court of Human Rights in any case to which they are parties (article 46(1)).

Particular considerations apply to decisions of international criminal tribunals like the International Criminal Court and the International Criminal Tribunals for former Yugoslavia and Rwanda (now integrated into the International Residual Mechanism for Criminal Tribunals) which have direct effect on individuals under international law. The exercise of investigational powers under the Rome Statute of the International

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1 M Herdegen *Völkerrecht* (14th edn 2015) sec 22 paras 1ff.

2 See also C Brown 'article 59 of the Statute of the International Court of Justice' in A Zimmermann et al *Statute of the International Court of Justice: A commentary* (2nd edn 2012) paras 1ff.

Criminal Court³ may exceptionally have direct effect under domestic law and even be qualified as an exercise of transferred powers (article 24(1) of the Basic Law).⁴

Under the prevailing dualist model, decisions of the ICJ or other international courts have no direct effect in domestic law and do not bind national courts or national authorities, unless domestic law provides otherwise. This causes particular problems in federal states, in which the central government has no constitutional power or displays no willingness to order compliance with international rulings by their federal states. In any case non-compliance by the competent organs engages the international responsibility of the state concerned.⁵

For contracting states which are not parties to a case, judicial rulings provide guidance on the interpretation of treaties and the status of other rules of international law. The decisions may even be considered a kind of anticipated practice of state parties in terms of article 31(3)(b) of the Vienna Convention on the Law of Treaties,⁶ at least with respect to those states which have submitted to the jurisdiction of the court or tribunal under the relevant treaty.⁷ This jurisdiction implies a mandate to provide authoritative, albeit not binding interpretation of the relevant treaty. States may, however, opt for a different interpretation.

Problems arise when national courts challenge an interpretation adopted by an international court or another treaty body. From an international perspective, domestic courts may, in accordance with the constitutional division of powers, exercise any margin of interpretation

3 The Rome Statute of the International Criminal Court (the Rome Statute) (17 July 1998) Part IX (arts 86 - 102).

4 Basic Law art 24(1): 'The Federation may by a law transfer sovereign powers to international organisations'. (Official translation Deutscher Bundestag 2010).

5 *LaGrand (Germany v United States of America) Provisional Measures*, ICJ Order (3 March 1999) (1999) ICJ Report 9 para 28: 'Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States.'

6 The Vienna Convention on the Law of Treaties (the Vienna Convention) (23 May 1969, 1155 UNTS 331) art 31(3): 'There shall be taken into account, together with the context: ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation ...'.

7 M Herdegen *Völkerrecht* (n 1 above) sec 15 paras 30 - 32; M Herdegen 'Interpretation in international law' in R Wolfrum (ed) *Max Planck encyclopedia of public international law* vol VI (2012) 260ff; see also International Law Association, Human Rights Committee, Berlin Conference (2004) *Final report on the impact of findings of the UN Human Rights Treaty Bodies* para 20 <http://www.ila-hq.org/en/committees/index.cfm/cid/20> (accessed 27 May 2015).

bestowed on state parties. If they do so, domestic judgments classify as state practice and may even entail state responsibility. German courts usually follow the interpretation of treaty bodies when applying international agreements. This deference is always tested whenever international courts engage in judicial activism in reaching a treaty interpretation which strays far from the initially prevailing understanding.

A category *sui generis* are judicial decisions in supranational systems which have direct effect in domestic law. Thus, preliminary rulings of the European Court of Justice (ECJ) under article 267(3) of the TFEU on the interpretation or validity of EU law are directly binding on the national courts in the concrete case. They also provide authoritative guidance for all member states and their organs.⁸

The understanding of certain agreements, in particular human rights treaties, as a 'living instrument' and the 'evolutive' or extensive interpretation flowing from such understanding⁹ make the status and the legal effect of the rulings of international courts and the findings of non-judicial treaty bodies a salient issue in legal systems which are receptive to international norms and the ensuing obligations.

1.2 Different scenarios

Three different situations must be distinguished as to the domestic effect of international rulings:

- decisions binding upon Germany as party in a particular case;
- decisions not directly affecting Germany, that is, rendered in a case *inter alia*, under an agreement on jurisdiction to which Germany is a party; and
- decisions on international norms under jurisdictional agreements to which Germany is not a party.

1.3 The domestic impact of international rulings

Even if, under international law, decisions of international courts do not have immediate effect in domestic law, they may generate obligations whose implementation directly affects judicial and administrative proceedings or calls for legislative adjustments of the domestic legal order.

Under German law, the domestic impact of international rulings is immediate when compliance affects legal relations under German law. This holds particularly true for decisions of the European Court of Human

8 B Wegener 'Article 267' in C Callies & M Ruffert *EUV/AEUV* (4th edn 2011) para 47. Treaty on the Functioning of the European Union (TFEU) (13 December 2007, 2008/C 115/01).

9 See M Herdegen 'Interpretation in international law' in R Wolfrum (n 7 above) 260ff.

Rights finding a violation of the European Convention on Human Rights by Germany's legislative, administrative or judicial organs. They establish an obligation to redress the violation and, if necessary, to make adjustments in the domestic legal order.¹⁰ In exceptional cases, the European Court of Human Rights issues a mandatory ruling which orders a specific administrative or judicial measure (like the release of the applicant¹¹ or the reinstatement of a senior judge).¹² In the case of endemic violations, 'pilot judgments' under article 61 of the Rules of Court,¹³ the European Court of Human Rights may even order to remedy a structural deficiency (for example, undue delays in judicial proceedings) through legislation.¹⁴

Decisions by the International Court of Justice may even touch upon subjective rights of individuals, especially with respect to human rights or to consular relations.¹⁵ In the *Avena* case, the International Court of Justice held that in case of a violation of the rights to be informed of possible consular assistance under article 36(1)(a) of the Vienna Convention on Consular Relations, contracting states must establish mechanisms 'to permit review and reconsideration of these national cases'.¹⁶ This means that a foreign defendant must have a remedy under national law if criminal proceedings violated his rights to consular assistance. Even decisions on the scope of state immunity¹⁷ or the delimitation of land and maritime boundaries¹⁸ may have an impact on proceedings before German courts or determine German legislation.

Arbitral awards under investment treaties¹⁹ do not directly affect legal rights and obligations under domestic law, because treaties on investment protection operate on the international plane and establish obligations under international law. Still, arbitral awards constitute authoritative statements on the treatment of foreign investors under international

10 J Polakiewicz *Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte* (1993) 63ff; C Grabenwarter & K Pabel *Europäische Menschenrechtskonvention* (5th edn 2012) 101ff; D Harris et al *Law of the European Convention on Human Rights* (2nd edn 2009) 871ff; FG Jacobs et al *The European Convention on Human Rights* (5th edn 2010) 496ff.

11 *Assanidze v Georgia* (2004) 39 EHRR 32.

12 *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR, 9 January 2013).

13 ECHR *Rules of Court* (1 July 2014) http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (accessed 27 May 2015).

14 *Rumpf v Germany* App no 46344/06 (ECtHR, 2 September 2010).

15 *LaGrand (Germany v United States of America) Provisional Measures*, ICJ Order (3 March 1999) (1999) ICJ Reports 9.

16 *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Judgment (31 March 2004) (2004) ICJ Reports 12ff para 121.

17 *Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening)* ICJ Judgment (3 February 2012) (2012) ICJ Reports 99.

18 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and The Netherlands)* ICJ Judgment (20 February 1969) (1969) ICJ Reports 3.

19 See *Vattenfall AB and Others v Germany* ICSID Award (11 March 2011), Case no ARB/09/6; *Vattenfall AB and Others v Germany* ICSID Case no ARB/12/12 (pending).

agreements which have been incorporated into German law by parliamentary assent.

Provisional measures usually require administrative or judicial action. Compliance thus affects the domestic legal order, even if it only determines the exercise of discretionary powers of the executive or judicial branch.

2 The constitutional setting: Dualism with deference to international rulings

The German Constitution does not explicitly address the status of international judicial decisions. The Basic Law, however, proclaims the goal of Germany being a member of good standing in the international community (Preamble), recognises 'inviolable and inalienable human rights' (article 1(2)), accords special rank to general rules of international law (article 25) and regulates the parliamentary assent to treaties (article 59(2)). In addition, the Basic Law dedicates a long article to the European integration (article 23).

German case law and constitutional doctrine have traditionally adopted a form of deferential dualism. According to this model, international law and domestic law form two distinct, but intertwined bodies of law.²⁰ The application of domestic law must be guided by the constitutional objective to comply as far as possible with Germany's international obligations and ensure harmony between domestic law and international law. In this sense the German constitutional order is receptive to international law (*völkerrechtsfreundlich*).²¹ In particular, there is a presumption that the legislator intends to act in conformity with the international obligations of Germany.²²

20 German Constitutional Court Case 2 BvR 1481/04 (14 October 2004) 111 *Entscheidungen des Bundesverfassungsgerichts* 307 318: 'The Basic Law is clearly based on the classic idea that the relationship of public international law and domestic law is a relationship between two different legal spheres and that the nature of this relationship can be determined from the viewpoint of domestic law only by domestic law itself; this is shown by the existence and the wording of article 25 and article 59(2) of the Basic Law.' (Official translation provided by the Court at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2004/10/rs20041014_2bvr148104en.html para 34).

21 German Constitutional Court Case 2 BvR 2115/01 *inter alia* (19 September 2006) (2007) 60 *Neue Juristische Wochenschrift* 499; A Nußberger 'Die Europäische Menschenrechts-konvention' in J Isensee & P Kirchhof (eds) *Handbuch des Staatsrechts* vol X (3rd edn 2013) sec 209 paras 5ff; M Herdegen (n 1 above) sec 22 para 9.

22 German Constitutional Court Case 2 BvR 589/79 *inter alia* (26 March 1987) 74 *Entscheidungen des Bundesverfassungsgerichts* 358 370.

The status of international treaties in the German hierarchy of norms flows from the legislative act of assent which brings the treaty into effect in domestic law (article 59(2) of the Basic Law).²³ Accordingly, treaties have the rank of federal legislation (→ Wolfrum).

However, the European Convention on Human Rights enjoys a privileged status, in the light of the constitutional commitment to 'inviolable and inalienable human rights as foundation of every human community of peace and justice in the world'. This commitment is more than a mere programmatic declaration, but has an important operative function. It supports the deference to the European Convention on Human Rights and the case law of the European Court of Human Rights when applying domestic law including the fundamental rights.²⁴ Accordingly, the rights and freedoms under the European Convention guide the interpretation not only of ordinary laws, but also of the German Basic Law. Thus the German Constitutional Court held:

The Basic Law's substantial focus on Human Rights becomes apparent in article 1(2) of the Basic Law with its commitment of the German people to inviolable and inalienable human rights. Article 1(2) of the Basic Law assigns special protection to the core of Human Rights guarantees. In conjunction with article 59(2), this protection forms the basis of the constitutional obligation to use the European Convention on Human Rights in its tangible form as interpretative guidance even when applying the fundamental rights of the Basic Law itself.

Although article 1(2) of the Basic Law does not accord a constitutional rank to the European Convention of Human Rights, this provision is more than a non-binding programmatic declaration. It establishes a maxim for the interpretation of the Basic Law and makes it clear that the fundamental rights of the Basic Law are to be understood as an expression of human rights and have included these as a minimum standard ...²⁵

Under well-established case-law, the European Convention serves as an important source of interpretation for the German Constitution.²⁶ Thus the European Convention, in its actual stage of development, is of crucial relevance especially for interpreting fundamental rights and the constitutional principle of the *Rechtsstaat*.²⁷ A minority opinion even qualifies the European Convention on Human Rights with its court in Strasbourg as a supranational system to which Germany has transferred

23 M Nettesheim 'Art 59' in M Herdegen et al (eds) *Maunz & Dürig, Grundgesetz Kommentar* (2013) paras 181ff.

24 M Herdegen 'Art 1(2)' in Herdegen et al (n 23 above) paras 41 & 48f.

25 German Constitutional Court Case 2 BvR 2365/09 *inter alia* (4 May 2011) 128 *Entscheidungen des Bundesverfassungsgerichts* 326 369.

26 German Constitutional Court Case 2 BvR 589/79 *inter alia* (n 22 above) 370; see also German Constitutional Court Case 2 BvR 1481/04 (n 20 above) para 30.

27 German Constitutional Court Case 2 BvR 589/79 *inter alia* (n 22 above) 370; see also German Constitutional Court Case 2 BvR 1481/04 (n 20 above) paras 32 & 38.

sovereign rights under article 24(1) of the Basic Law (and which in so far would be comparable to the European Union).²⁸

Under the Basic Law (article 20(3)), the executive and judiciary bodies are bound by the law and legislative enactments (*Recht und Gesetz*). The binding effect extends to international treaties to which the legislative bodies duly assented. The European Convention forms part of 'the law' in terms of article 20(3) of the Basic Law which is binding upon all courts and executive bodies.²⁹ The same holds true for other international agreements. This deference to international obligations extends, by implication, to judicial rulings which interpret and concretise international norms binding upon Germany.

3 The unfulfilled constitutional mandate: Adherence to a comprehensive and obligatory international jurisdiction (article 24 (3) of the Basic Law)

Article 24(3) of the Basic Law³⁰ mandates that Germany joins a system of comprehensive and obligatory international jurisdiction (arbitration). In the absence of a truly compulsory system of judicial dispute settlement, this mandate still remains unfulfilled.

Still, the submission of Germany to the 'compulsory' jurisdiction under article 36(2) of the Statute of the International Court of Justice is an important approximation to the constitutional mandate. In my view, this justifies special respect of decisions under the compulsory jurisdiction of the International Court of Justice, similar to the compliance with rulings of the Court of Justice of the European Union under article 23(1) of the Basic Law (in conjunction with the European treaties). In consequence, such decisions of the International Court of Justice would only be trumped by the intangible core of the constitutional order.

28 C Walter 'Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozess' (1999) 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 961.

29 German Constitutional Court Case 2 BvR 1481/04 (n 20 above) paras 30, 45 & 47.

30 Basic Law art 24(3): 'For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive and compulsory international arbitration.' (Official translation Deutscher Bundestag 2010).

4 The domestic effects of international rulings in the light of the underlying norms of international law

4.1 Determination of the status by the agreement establishing jurisdiction

The decisions of international courts partake in the status of the underlying international norms and the deference which these norms may claim under constitutional law. As a rule, this status will depend on the agreement which establishes the jurisdiction of the international court. Accordingly, the Constitutional Court held that

the legal effect of the decisions of an international court that was brought into existence under an international agreement is determined according to the content of the incorporated international agreement and the relevant provisions of the Basic Law as to its applicability.³¹

This means that the decision of an international court will have the rank of federal legislation, when the agreement establishing jurisdiction was ratified domestically by the legislative bodies under article 59(2)(1) of the Basic Law.

4.2 Inherent reservation: Fundamental principles of the Constitution

The deference to international law and to the decisions of international courts is not unqualified. The Constitutional Court held the international decisions concretising treaty obligations may be disregarded by the legislative branch if the international rulings conflict with fundamental principles of the Constitution:

The Basic Law aims to integrate Germany into the legal community of peaceful and free States, but does not waive the sovereignty contained in the last instance in the German constitution. There is therefore no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law of international agreements, provided this is the only way in which a violation of fundamental principles of the constitution can be averted.³²

31 German Constitutional Court Case 2 BvR 1481/04 (n 20 above) para 39 (Official translation as provided by the Court).

32 German Constitutional Court Case 2 BvR 1481/04 (n 20 above) para 35 (Official translation as provided by the Court).

The notion of ‘fundamental’ constitutional principles is rather ambiguous. It suggests a differentiation between constitutional norms. This reservation certainly covers the intangible core of the German Basic Law, which even sets absolute limits to constitutional amendments under article 79(3) of the Basic Law. Beyond the intangible core of the Basic Law, there are, however, other constitutional principles including the fundamental rights which may trump the deference to international law, if they cannot be construed in harmony with international obligations of Germany. The Federal Administrative Court held that the entrenchment of traditional principles of the civil service (article 33(5) of the Basic Law) contains a prohibition for all office holders to go on strike and that this prohibition does not allow an interpretation in conformity with the jurisprudence of the European Court of Human Rights.³³

Decisions of the European Court of Justice call for a special consideration. German authorities and courts may only disregard them if they are *ultra vires* (→ 7.3) or violate the intangible principles of the Basic law.

5 Application of international treaties as interpreted by international courts and other treaty bodies

Under domestic law, the main impact of the decisions of international courts lies in the guidance they provide for German courts and administrative authorities in applying international treaties. Such rulings may claim particular deference if they are directly binding upon Germany, because non-compliance may trigger state responsibility. However, German courts will also duly consider judicial rulings in cases in which Germany is not a party. The same applies to advisory opinions and other decisions of a non-binding nature. To some degree, non-binding findings of other, non-judicial treaty bodies also offer interpretative guidance, even though their status under domestic law has been discussed less extensively. It seems that interpretation by non-judicial bodies, like the supervisory commissions under the UN Human Rights treaties, cannot claim the same authority as judicial rulings under international as well as under domestic law. Apart from the different status in international law, certain latitude in interpretation often affects the authority of non-judicial Human Rights bodies and the deference shown by domestic courts.

33 Federal Administrative Court Case 2 C 1.13 (27 February 2014) 149 *Entscheidungen des Bundesverwaltungsgerichts* 117 paras 57ff.

5.1 Judicial guidance by international courts and due consideration by German courts

5.1.1 *The European Court of Human Rights*

It is a well-established principle that German courts will apply international treaties as interpreted by competent international courts and tribunals set up under these agreements. The classical example is the European Convention on Human Rights which the European Court of Human Rights qualifies as a 'living instrument' and applies in terms of 'evolutive interpretation'.³⁴

For decades, the Federal Constitutional Court has upheld the principle of deference to the European Convention on Human Rights as applied by the European Court of Human Rights. This Constitutional Court recognises the claim of the European Court to dynamic interpretation when it defers not only to the contents, but also to the 'stage of development' of the Convention by the Court in Strasbourg:

When interpreting the Basic Law, the contents and the stage of development of the European Convention on Human Rights will have to be considered, as long as it does not result in a limitation or a diminution of the protection of fundamental rights accorded by the Basic Law, an effect, which the Convention itself wants to exclude (article 60 ECHR). Thus and insofar, the jurisprudence of the European Court of Human Rights serves as an interpretative guidance for determining the content and the scope of application of the fundamental rights and the principle of the rule of law under the Basic Law.³⁵

The Federal Administrative Court even qualifies the European Court of human rights as the 'authentic interpreter' of the European Convention.³⁶

This deference to the interpretation by the European Court of Justice vests the Court in Strasbourg with quasi-constitutional functions. Nowadays, the understanding of fundamental rights under the Basic Law is closely intertwined with the evolutive interpretation of the European Convention on Human Rights. This holds particularly true in context with the right to privacy, the right to family life and the freedom of speech. Like the jurisprudence of the Constitutional Court, the case law of the Strasbourg Court has cut deeply into horizontal relations amongst private persons in civil and labour law.³⁷

³⁴ *Mamatkulov and Abdurasulovic v Turkey* (2005) 41 EHRR 494.

³⁵ German Constitutional Court Case 2 BvR 589/79 *inter alia* (n 22 above) 370.

³⁶ Federal Administrative Court Case 2 C 1.13 (n 33 above) para 45.

³⁷ *Von Hannover v Germany* (2005) 40 EHRR 1; *Axel Springer v Germany* (7 February 2012) ECHR 2012-I 351; *Obst and Schüth v Germany* ECHR App nos 425/03 and 1620/03 (ECtHR, 23 September 2010).

5.1.2 *The International Court of Justice*

The German Constitutional Court has extended the deferential approach to decisions of the International Court of Justice under agreements on jurisdiction to which Germany is a party.

In context with the violation of the right to consular assistance under the Vienna Convention on Consular Relations in criminal proceedings, the Constitutional Court held that the Basic Law requires German courts duly to consider the case law of the International Court of Justice on the subjective rights of foreign defendants flowing from the Vienna Convention:

The Basic Law programmatically commits all German public authorities to international cooperation (article 24 of the Basic Law) and the European integration (article 23 of the Basic Law) and subjects them to binding international treaty law (article 20(3) in conjunction with article 59(2) of the Basic Law) as well as international customary law (article 20(3) in conjunction with article 25 of the Basic Law). It flows from the 'receptiveness' of the Basic Law to international law [*Völkerrechtsfreundlichkeit*], that it has to be applied and interpreted in a way that no conflicts with the international obligations of the Federal Republic of Germany occur. Therefore, German courts are obliged directly by the Constitution to consider judicial decisions of international courts which have jurisdiction over Germany and take them into account.³⁸

This means, in practice, that a violation of the right to consular assistance and the corresponding information is a ground for appeal on points of law.³⁹

In a more recent decision,⁴⁰ the German Constitutional Court confirmed this approach and held that German courts have the constitutional duty to duly consider the jurisprudence of the International Court of Justice and other international courts, when interpreting treaties. A court deviating from the interpretation of an international court must be able to rely on forceful arguments under international law.

5.1.3 *'Normative guidance' by international courts*

In this respect, the German Constitutional Court assumes that the international courts like the European Court of Human Rights and the International Court of Justice provide 'normative guidance' beyond a specific case for the interpretation of treaties when and insofar as Germany

³⁸ German Constitutional Court Case 2 BvR 2115/01 (n 21 above) 40.

³⁹ German Constitutional Court Case 2 BvR 2115/01 (n 21 above) 502 - 504.

⁴⁰ German Constitutional Court Case 2 BvR 2485/07 *inter alia* (8 July 2010) (2011) 64 *Neue Juristische Wochenschrift* 207.

is subject to their jurisdiction.⁴¹ This guidance is thus not limited to international rulings which refer to the object of the controversy before the domestic courts.

The approach of the Constitutional Court was met with criticism as far as it extends the normative guidance by the International Courts of Justice's rulings beyond the binding effect of a judgment on Germany as a party.⁴² However, the authority of international courts entrusted with settling controversies about the scope of international obligations calls for a high degree of deference to rulings which establish a precedent or confirm an established line of jurisprudence.⁴³ Disregard of international rulings always implies the risk of conflicts and state responsibility for non-compliance with international obligations as construed by international courts.

When deferring to rulings of the European Court of Human Rights, the German Constitutional Court rightly justifies the function of orientation and guidance to the European jurisprudence with their impact on the interpretation of the European Human Rights Convention in general and with the prevention of conflicts between domestic rulings and international obligations of Germany:

In applying the European Convention on Human Rights as interpretative guidance, the Constitutional Court takes the decisions of the European Court of Human Rights into account even if they are not dealing with the same subject-matter. This is based on the general functions of providing orientation and guidance the European Court of Human Rights is empowered to give and that is not limited to single case decisions (See regarding the orientation BVerfGE 111,307 [320], [...]). The domestic effects of judgments of the European Court of Human Rights thus are not exhausted by an obligation of consideration that is limited to the underlying facts of the specific case and derived from articles 20(3) in conjunction with 59(2) Basic Law. Because, considering the factual effect of international courts' rulings as setting precedents, the Basic Law seeks to avoid conflicts between Germany's international obligations and its national law (See BVerfGE 109, 13 [23 f.]; 109, 38 [50]; 111, 307 [318; 328], ...).⁴⁴

The German Constitutional Court reserves due consideration as a direct constitutional mandate to rulings of international courts which have jurisdiction over Germany.⁴⁵ This jurisdictional link should be critically

41 German Constitutional Court Case 2 BvR 2115/01 (n 21 above) 501; German Constitutional Court Case 2 BvR 2485/07 *inter alia* (n 40 above) 208.

42 See KF Gärditz 'The Vienna Convention on Consular Relations case – German Federal Constitutional Court decision on the failure to provide consular notification' (2007) 101 *American Journal of International Law* 627 633.

43 M Payandeh 'Die verfassungsrechtliche Stärkung der internationalen Gerichtsbarkeit; Zur Bindung deutscher Gerichte an Entscheidungen des Internationalen Gerichtshofes' (2007) 45 *Archiv des Völkerrechts* 244 250ff.

44 German Constitutional Court Case 2 BvR 2365/09 *inter alia* (n 25 above) 368.

45 German Constitutional Court Case 2 BvR 2115/01 (n 21 above) 501.

reconsidered. Even if Germany had not submitted to the jurisdiction of the International Court of Justice or another international court, their interpretation of treaties binding on Germany should be taken into account by German courts. However, in this case, the German constitution calls for a lesser degree of deference for this international 'judicial guidance'.

5.2 Guidance by findings of non-judicial UN treaty bodies

Non-judicial treaty bodies supervising compliance work mainly on the basis of non-binding instruments like general comments or reports on specific topics or the situation in particular states. Under special treaty arrangements, individual or collective complaints, for example, before the UN Human Rights Committee or the UN Committee on the Elimination of Racial Discrimination may lead to quasi-judicial, but non-binding findings. So far the recommendations and findings of UN treaty bodies have not played a pivotal role in German case law. However, the German Federal Court of Justice referred to the interpretation of article 6 of International Covenant on Civil and Political Rights (ICCPR) by the UN Human Rights Committee in the criminal proceedings on shootings at the inter-German Wall by soldiers of the German Democratic Republic.⁴⁶ In a more recent decision on the tuition fees for higher education, the Federal Administrative Court considered the alleged violation of article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights (CESCR). The Court referred to the General Comments of the UN Committee on Economic, Social and Cultural Rights as an 'important tool for the interpretation of the CESCR'.⁴⁷ On the other hand, the communication of the UN Committee on the Elimination of Racial Discrimination in the *Sarrazin* case⁴⁸ was barely noticed by the German public. In this case German public prosecutors decided not to initiate criminal proceedings against the author of the most controversial, allegedly racist comments on Muslim immigrants because his statements were covered by the freedom of speech under the Basic Law. The UN Committee, however, found that this decision not to prosecute violated the UN Convention on the Elimination of Racial Discrimination. It is very unlikely that the German constitutional doctrine or German courts will be guided by this rather unbalanced punitive approach to public controversies.⁴⁹

46 Federal Court of Justice Case 5 StR 370/92 (3 November 1992) 39 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 1 20.

47 Federal Administrative Court Case 6 C 16.08 (29 April 2009) 134 *Entscheidungen des Bundesverwaltungsgerichts* 1 para 48.

48 CERD *TBB-Turkish Union in Berlin/Brandenburg v Germany* Communication no 48/2010 (26 February 2013) UN Doc. CERD/C/82/D/48/2010.

49 For a critical analysis see M Payandeh 'Die Entscheidung des UN- Ausschusses gegen Rassendiskriminierung im Fall Sarrazin' (2013) 68 *Juristen Zeitung* 980; C Tomuschat 'Der "Fall Sarrazin" vor dem UN-Rassendiskriminierungsausschuss' (2013) 40 *Europäische Grundrechte- Zeitschrift* 262.

6 The constitutional mandate to comply with judicial decisions binding upon Germany

The obligation to comply with judicial decisions which are directly binding upon Germany flows from the relevant international agreement incorporated into the domestic legal order as part of the 'law and enactments' in terms of article 20(3) of the Basic Law which bind the executive and the judicial branch.⁵⁰ In conjunction with the receptiveness of the constitutional order to international law (*Völkerrechtsfreundlichkeit*), German courts have a general obligation to apply domestic law in a way that conforms as far as possible with the *dispositif* of such international rulings.

Under constitutional law, the difference between due consideration of international judicial rulings which are directly binding on Germany on the one hand and the deference to other decisions of courts with jurisdiction over Germany on the other hand seems to be gradual. The difference essentially lies in the degree of binding concretisation of international agreements with respect to a specific situation and the preemption of interpretative margins.

6.1 Disregard of conflicting domestic norms

Under this constitutional mandate of compliance, German courts must disregard all conflicting norms which are inferior in rank to federal legislation, including all laws of the *Länder*. This rule of conflict evades all problems which arise in some federal systems, for example, in the United States, with the occasionally blatant non-compliance with international judicial rulings by state authorities.⁵¹ A declaration by state authorities 'The world court has no standing in Texas',⁵² meant to defy the International Court of Justice, has no parallel in Germany. Furthermore, under the *lex posterior* rule the mandate of compliance under a treaty trumps all legislation adopted before Germany's parliamentary assent to the treaty.

50 German Constitutional Court Case 2 BvR 1481/04 (n 20 above) paras 45ff; German Constitutional Court (n 21 above) 501 - 502.

51 US Supreme Court *Medellín v Texas* (2008) 552 US 491; *Case Concerning Avena and Other Mexican Nationals (Mexico v USA)* ICJ Judgment (31 March 2004) (2004) ICJ Reports 12.

52 Office of the Governor of Texas referring to the *Medellín Case* *Houston Chronicle* 16 July 2008.

6.2 The application of German law in the light of international rulings

The principle of due consideration of the decisions of international courts means that German courts must apply German law including incorporated international law in the light of international rulings. The obligation to duly consider relevant international rulings is violated when a German court does not consider these rulings at all or passes over them without serious grounds.⁵³ In context with judgments of the European Court of Human Rights binding upon Germany, the Constitutional Court requires that the German courts consider the international decision in an 'active reception process'.⁵⁴

This means that German courts are not expected to apply the rulings of international courts mechanically without consideration of the legal context under the Basic Law and ordinary legislation. In context with the European Convention on Human Rights, the second Division (Senate) of the Constitutional Court seems to indicate that the consideration of the Convention and of its interpretation by the European Court of Human Rights in terms of an 'active reception process' is a rather complex judicial task, when it explains what it means to take the Convention as interpreted by the European Court into account in relation to a concrete situation which is before a German court:

'Take into account' ('*berücksichtigen*') means taking notice of the Convention provision as interpreted by the European Court of Human Rights and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law. In any event, the Convention provision as interpreted by the European Court of Human Rights must be taken into account in making a decision; the court must at least duly consider it. When the facts have changed in the meantime or a different situation arises on the facts, the courts will need to determine what, in the view of the European Court of Human Rights, constituted the specific violation of the Convention and why a changed factual situation does not permit it to be applied to the case. Here, it will always be important how taking account of the decision takes in the system of the field of law in question. On the level of federal law, the Convention does not automatically have priority over other federal law, in particular if in the given context it has not already been the object of a decision of the European Court of Human Rights.⁵⁵

This formula suggests a high complexity which is greatly reduced by the constitutional tenet that German law must be interpreted in deference to

53 German Constitutional Court Case 2 BvR 1481/04 (n 20 above) paras 62f; Nußberger (n 21 above) para 13.

54 German Constitutional Court Case 2 BvR 1481/04 (n 20 above) para 48; German Constitutional Court Case 2 BvR 2365/09 *inter alia* (n 25 above) 37; C Grabenwarter & K Pabel (n 10 above) 20.

55 German Constitutional Court Case 2 BvR 1481/04 (n 20 above) para 62 (Official translation provided by the Court).

international treaties, with the European Convention on Human Rights even guiding the interpretation of the Basic Law. The Constitutional Court, however, subjects this maxim to two qualifications:

- (1) The interpretation of German law in conformity with the Convention and with other treaties must keep within 'applicable methodological standards'; and
- (2) In multipolar relationships the legal rights of third parties must be respected, if they remained outside the focus of the international ruling.

In those terms, the Constitutional Court states:

As long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to interpretation in accordance with the Convention. The situation is different only if compliance with the decision of the European Court of Human Rights, for example because the facts on which it is based have changed, clearly violates conflicting statute law or German constitutional provisions, in particular the fundamental rights of third parties.⁵⁶

We shall see that these conditions in favour of methodological standards and third parties, apparently adding even more complexity, are no substantial impediment to an effective implementation of international rulings, at least as a general rule. In the end, decisions of the European Court of Human Rights have a domestic impact quite similar to decisions of the Constitutional Court on complaints against judicial rulings.

6.3 The methodological reservation

According to the German Constitutional Court, the German courts must apply domestic law in conformity with the European Convention on Human Rights as interpreted by the European Court of Human Rights, as far as 'applicable methodological standards leave scope for interpretation and weighing of interests'.⁵⁷ A 'methodically acceptable' interpretation⁵⁸ is opposed to an interpretation *contra legem*. The reservation in favour of 'the confines of a methodically sustainable interpretation' also applies to other treaties.⁵⁹

It must be doubted that this reservation has much practical relevance. Constitutional doctrine has so far failed to develop any generally accepted and operable criteria for 'applicable methodological standards'. In context with the application of German law in conformity with not directly

56 German Constitutional Court Case 2 BvR 1481/04 (n 20 above) para 62 (Official translation as provided by the Court).

57 As above.

58 German Constitutional Court Case 2 BvR 1481/04 (n 20 above) para 32; German Constitutional Court Case 2 BvR 2365/09 *inter alia* (n 25 above) 371.

59 German Constitutional Court Case 2 BvR 2115/01 (n 21 above) 501.

applicable EU law (where the same reservation applies), the Constitutional Court seems to recognise a corridor of interpretation whenever anybody anywhere and anytime voiced an academic interpretation which is somehow in line with EU law as ultimately interpreted by the European Court of Justice.⁶⁰ Especially the fundamental rights of the German constitution or constitutional principles like the principle of the *Rechtsstaat* leave ample corridors of interpretation which can easily accommodate conformity with human rights treaties⁶¹ or other agreements on individual rights.⁶²

The judicial activism which the Constitutional Court has displayed over years in developing the scope and contents of fundamental rights and other constitutional norms indicates that, in principle, accommodation of an 'evolutive' understanding of the European Convention will meet with little methodological obstacles. The same applies to the jurisprudence of the Federal Court of Justice. In several cases, the Federal Court of Justice abandoned previous rulings on the clear meaning of statutes in civil law meant to implement EU directives and discovered ambiguity of the statutes in order to apply them in conformity to subsequent rulings of the European Court of Justice on the interpretation of the directive.⁶³

However, conflicts between the rights of individuals protected under the Basic Law might in the long run present specific challenges to constitutional interpretation in conformity with European rulings.

Another difficult area is the jurisprudence of international courts which conflict with established principles of state organisation whose modification German courts reserve to the legislative branch. One salient issue is the right of civil servants to go on strike, which the European Court of justice has read into freedom of association under article 9 of the European Convention.⁶⁴ This right conflicts with traditional principles governing the civil service under article 33(5) of the Basic Law, which prohibit strikes by civil servants at least according to the prevailing constitutional doctrine. The Federal Administrative Court held that these principles might allow for some adjustment in favour of a strike by civil servants without regulatory authority and without powers as to security and public order, but reserved this adjustment to the legislative branch.⁶⁵

60 German Constitutional Court Case 2 BVR 2661/06 (6 July 2010) 16 12 *Entscheidungen des Bundesverfassungsgerichts* 268 307; M Herdegen *Europarecht* (16th edn 2014) sec 10 para 28.

61 German Constitutional Court Case 2 BvR 2365/09 *inter alia* (n 25 above) 371; German Constitutional Court Case 2 BvR 1481/04 (n 20 above) paras 48 - 53.

62 Eg the Vienna Convention on Consular Relations, German Constitutional Court Case 2 BvR 2115/01 (n 21 above); German Constitutional Court Case 2 BvR 2485/07 *inter alia* (n 40 above) 207.

63 Federal Court of Justice Case VIII ZR 200/05-1 (26 November 2008) 179 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 27.

64 *Yapi-Yol Sen v Turkey* App no 68959/01 (ECtHR, 21 April 2009).

65 Federal Administrative Court Case 2 C 1.13 (n 33 above) paras 57ff.

6.4 Multipolar relationships

Compliance with judicial rulings on human rights may become difficult and complex, when they pronounce on legal relations between individuals or other private entities which are no party to the bipolar proceedings before the international court. Examples are rulings of the European Court of Human Rights against Germany in controversies over parental custody,⁶⁶ parental rights of access,⁶⁷ or the dismissal of employees.⁶⁸ In these multipolar constellations national courts must protect the legal rights of third parties which usually were not represented in the bipolar international proceedings, that is, before the European Court of Human Rights.⁶⁹ In such situations, national courts must try to establish a fair balance between competing subjective rights, always having regard to the international ruling.⁷⁰ As a rule, there will be no conflict with previous decisions of the European Court of Human Rights as long as the national judge accords sufficient weight to the right of the successful applicant before the European Court. In any case the binding effect of international rulings is limited by the facts considered by the international court.

7 The constitutional mandate of harmonising the application of domestic law with decisions of international courts

7.1 Relationship of judicial ‘cooperation’

The supremacy of European law over national law, claimed as absolute by the European Court of Justice⁷¹ has always generated tensions with the German Constitutional Court which insists on the preservation of the principles that form the ‘core’ of the German Constitution (*Identitätskontrolle*),⁷² as well as on the control of acts of the European Union including decisions of the European Court of Justice as to the underlying powers under the European Treaties (*ultra vires-Kontrolle*).⁷³ The German Constitutional Court proclaimed a relationship of

66 *Görgülü v Germany* App no 74969/01 (ECtHR, 26 February 2004); *Zaunegger v Germany* App no 22028/04 (ECtHR, 3 December 2009).

67 *Elsholz v Germany* App no 25735/94 (ECtHR, 13 July 2000).

68 *Obst and Schüth v Germany* App nos 425/03 & 1620/03 (ECtHR, 23 September 2010).

69 German Constitutional Court Case 2 BvR 2365/09 *inter alia* (n 25 above) 371; A Nußberger (n 21 above) para 16.

70 German Constitutional Court Case 2 BvR 1481/04 (n 20 above) para 57; see A Nußberger (n 21 above) para 13.

71 Case 106/77 *Simmmenthal II* [1978], ECR 629.

72 German Constitutional Court Case 2 BvE 2/08 *inter alia* (30 June 2009) 123 *Entscheidungen des Bundesverfassungsgerichts* 267 340.

73 German Constitutional Court Case 2 BvE 2/08 *inter alia* (n 72 above) 353; see for an analysis of the *ultra vires* control K Schneider ‘Der ultra-vires Maßstab im Außenverfassungsrecht’ (2014) 139 *Archiv des öffentlichen Rechts* 196.

cooperation between the two courts (*Kooperationsverhältnis*).⁷⁴ This formula not only implies an endeavour to establish harmony, but also a challenge to the absolute supremacy of EU law. It assumes that both courts operate as the highest judicial authority within their respective spheres.

This model of cooperation also extends to the relationship with other international courts. This holds particularly true for the European Court of Human Rights, in the light of its quasi-constitutional function for the fundamental rights within the European Union and within state parties of the European Convention. The concept of judicial cooperation rests on a dynamic understanding of international regimes as the European Convention on Human Rights and their development by international courts and on the elasticity of the German Constitution:

The receptiveness of the Basic Law to international law [*Völkerrechtsfreundlichkeit*] thus expresses an understanding of sovereignty that does not oppose integration in international and supranational relations and their development, but, on the contrary, requires and expects it. In this context the 'last word' of the German Constitution does not impede an international and European dialogue between the courts, but serves as its normative basis.⁷⁵

7.2 Harmonisation of results, not of interpretative steps

It is entirely a matter of domestic law how national courts achieve compliance with the rulings of international courts. In particular, national courts need not follow the interpretative path which underlies the international ruling. An instructive example is the decision of the German Constitutional Court on the retroactive prolongation of preventive detention. Initially the German Constitutional Court had qualified the preventive detention of criminal offenders as a measure different from 'punishment' and had allowed the extension of the detention beyond the term applicable at the moment when the crime was committed.⁷⁶ In *M v Germany*, the European Court had qualified preventive detention under German law as 'punishment' in terms of article 7(1) of the European Convention on Human rights and found that retroactive extension of such measure violated the Convention.⁷⁷ In the light of this judgment, the German Constitutional Court revised its own case law and held retroactive detention to be unconstitutional. Whilst maintaining its previous interpretation that preventive detention did not amount to 'punishment' in terms of the constitutional counterpart of article 7 of the European Convention (article 103(2) of the Basic Law), the German Constitutional

⁷⁴ German Constitutional Court Case 2 BvR 2134/92 *inter alia* (12 October 1993) 89 *Entscheidungen des Bundesverfassungsgerichts* 155 175.

⁷⁵ German Constitutional Court Case 2 BvR 2365/09 *inter alia* (n 25 above) 369.

⁷⁶ German Constitutional Court Case 2 BvR 2029/01 (5 February 2004) 109 *Entscheidungen des Bundesverfassungsgerichts* 133.

⁷⁷ *M v Germany* App no 19359/04 (ECtHR, 17 December 2009) [2009] ECR VI-169.

Court relied on the protection of legitimate expectations in context with privation of liberty. The German Constitutional Court emphasised the need of harmonised results as opposed to the harmonised interpretation of convention clauses and constitutional provisions dedicated to the protection of the same right or freedom.⁷⁸

From this perspective of harmonious results, the German Constitutional Court calls for a kind of transformation of the treaty interpretation by the European Court of Human Rights which re-constructs (re-thinks) the international ruling in the constitutional context:

The consideration of the European Convention on Human Rights as interpretative guidance for the interpretation of the Basic Law is focused on results – as is the European Convention on Human Rights itself with respect to domestic implementation within the member States: The aim is not a schematic parallelisation of different constitutional notions but the prevention of human rights violations.

The elimination or prevention of a human rights violation might often be easier to achieve, if the national law is harmonised in accordance with the European Convention of Human Rights. But from the perspective of public international law this is not mandatory: The Convention leaves it to its members States in which way they fulfil their obligation to comply with the Convention (see BVerfGE 111, 307 (318) ...⁷⁹

7.3 The *ultra vires* exception

Constitutional case law denies recognition of and compliance with decisions of EU organs including rulings of the European Court of Justice, if they are *ultra vires*, in terms of exceeding the powers of the European Union under the European treaties in a ‘sufficiently qualified’ manner.⁸⁰ In order to establish a ‘sufficiently qualified’ excess of powers, an act of EU bodies must violate treaty standards manifestly and considerably affect the balance of powers between the European Union and its member states.⁸¹ The underlying rationale refers to the confines of democratic legitimacy as flowing from the legislative assent to the European Treaties.⁸² In a request for a preliminary ruling, the German Constitutional Court indicated that the announced programme of the European Central Bank on the unlimited purchase of Government bonds was an *ultra vires* act.⁸³ This rationale may be applied, *mutatis mutandis*, to an over-extensive interpretation of other treaties such as the European Convention on Human Rights which strays

78 German Constitutional Court Case 2 BvR 2365/09 *inter alia* (n 25 above) 370.

79 As above.

80 German Constitutional Court Case 2661/06 (n 60 above) 304.

81 German Constitutional Court Case 2 BvR 2365/09 *inter alia* (n 25 above) 370; German Constitutional Court Case 2 BvR 2728/13 *inter alia* (14 January 2014) 134 *Entscheidungen des Bundesverfassungsgerichts* 366 paras 23ff & 37ff.

82 German Constitutional Court Case 2 BvR 2134/92 *inter alia* (n 74 above) 207.

83 German Constitutional Court Case 2 BvR 2728/13 *inter alia* (n 81 above).

all too far from parliamentary assent to the relevant agreement. The Federal Administrative Court of Germany once challenged the dynamic interpretation of article 3 of the European Convention on Human Rights in favour of illegal immigrants facing miserable living conditions or threats from private groups in their home country as being *ultra vires*.⁸⁴ In practice, it will be difficult to argue that the European Court of Human Rights so far disregarded established criteria of treaty interpretation that it 'manifestly' exceeded the limits of its jurisdiction, especially if other Convention states or their supreme courts have not raised a similar challenge.

7.4 The procedural dimension of decisions of international courts

7.4.1 *Constitutional complaints referring to disregard of international decisions*

Individuals and private entities may, in context with an alleged violation of fundamental rights, seek redress against disregard of international judicial decisions through a constitutional complaint before the Constitutional Court.⁸⁵ Thus, a defendant may complain that his fundamental rights with respect to due process were violated by a conviction because the criminal courts had not adequately considered the jurisprudence of the International Criminal Court on the right to consular assistance.

7.4.2 *Exceptions to the principle of res iudicata*

If a judgment subsequently found to be in violation of the European Convention on Human rights has become final, *res iudicata* may bar effective redress of the violation. In 1998 the German Parliament responded to this dilemma and inserted an exception to *res iudicata* into the German Code of Criminal Procedure (StPO). Under section 359 No 6 of the StPO, a criminal procedure may be reopened despite a final judgment if the European Court of Human Rights has found a violation of the European Convention on Human Rights and if the judgment is based on that violation. Since 2006 the Code of Civil Procedure (ZPO) allows a similar action for restitution (section 580 No 8 of the Code of Civil procedure).

⁸⁴ See on the question of the expulsion of illegal aliens with regard to art 3 of the Convention: Federal Administrative Court Case 9 C 38.96 (15 April 1997) 104 *Entscheidungen des Bundesverwaltungsgerichts* 265 274ff.

⁸⁵ German Constitutional Court Case 2 BvR 1481/04 (n 20 above) para 63; German Constitutional Court Case No 2 BvR 2115/01 (n 21 above).

7.4.3 Exception to the binding effect of rulings of the Constitutional Court

In the case on the retroactive extension of preventive detention, the Constitutional Court admitted an exception to the binding force of its own rulings and admitted a constitutional complaint, in order to revise a previous ruling in the light of a decision of the European Court of Human Rights.⁸⁶

8 Conclusion

The German approach does not pretend to ensure perfect harmony between the decisions of international courts and the domestic legal system and the administration of justice by national courts. Still, it ensures a high degree of concordant interpretation of treaties and other international norms. It demonstrates that dualism deferential to international rulings can provide a solid basis for compliance and effective implementation.

Receptiveness of its domestic courts to international obligations coupled with sensitivity to interpretative corridors enhances the role of the state as an active partner in the dialogue on the construction and development of treaties and other international norms. A considerable number of international rulings build on national case law, rights, principles and values which find a counterpart on international level. The decision of the European Court of Human Rights in the *Vinter* case on lifelong imprisonment and the prospect of release which reflects the approach of the German Constitutional Court⁸⁷ is just one example of an inter-judicial dialogue.

The remaining conditionality for full deference to international rulings is linked to democratic legitimacy flowing from assent to international agreements, methodological plausibility and the protection of third parties. If handled with prudence, it may serve a dialogue which rests not only on judicial authority within the respective legal order, but also on the strength of judicial argument.

⁸⁶ German Constitutional Court Case 2 BvR 2365/09 *inter alia* (n 25 above) 364 para 82.

⁸⁷ *Vinter and Others v UK* App nos 66069/09, 130/10 and 3896/10 (ECtHR Grand Chamber, 9 July 2013) paras 69 - 71 & 113.

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CHAPTER 18 THE STATUS AND EFFECT OF INTERNATIONAL JUDICIAL DECISIONS IN THE SOUTH AFRICAN LEGAL ORDER

Erika de Wet

1 Introduction

In stark contrast to the German legal system (→ Herdegen), the status and effect of international judicial decisions did not receive attention by the South African courts or doctrine until 2013. The Constitution is silent on the standing of judicial decisions by international bodies that are binding on the Republic. Similarly, there is no parliamentary legislation in place that regulates the matter in a comprehensive fashion. This gap in the domestic legal order is a result of South Africa's international isolation during the Apartheid era that lasted from 1948 to 1994 (→ De Wet/Introduction). It is only since 1994 that the Republic has ratified treaties that provide for international dispute resolution mechanisms with the competence to adopt binding decisions against the state for violations of international law.

Of particular relevance are decisions of the African Court of Human and Peoples' Rights (→ Chenwi), the International Tribunal on the Law of the Sea (→ Vrancken), decisions generated by the dispute settlement mechanism of the World Trade Organization (→ Schlemmer), as well as those of the (currently suspended) Southern African Development Community (SADC) Tribunal (→ 2). South Africa has not yet accepted the compulsory jurisdiction of the International Court of Justice (ICJ) as provided for in article 36(2) in the Statute of the ICJ.¹ However, South Africa has ratified various international treaties that provide for referral of disputes pertaining to the application and interpretation of the treaty in question to the ICJ (in accordance with article 36(1) of the ICJ Statute).

If South Africa was a party to a contentious case before any of the above mentioned judicial bodies, it would be bound by international law

¹ For the text of the ICJ Statute (26 June 1945, 3 Bevans 1179) see www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (accessed 20 April 2015).

to give proper effect to the decision of the body in question. By refraining from doing so or where any of the organs of state were to give inadequate effect to the decision, the Republic would be in violation of international law and would trigger international state responsibility.

In this context it should be mentioned that South Africa is also party to the Rome Statute of the International Criminal Court (→ Gevers), which has been enacted in domestic law by means of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. Section 32 of this Act provides for a specific domestic procedure for the enforcement of prison sentences imposed on individuals by the International Criminal Court (ICC). In line with this procedure the Republic – if designated by the ICC in accordance with article 103 of the ICC Statute as the state where a person has to serve a sentence of imprisonment – has to inform the ICC whether it accepts or refuses the designation. Where the designation has been accepted, the person in question has to be assigned to a prison in the Republic, once the International Criminal Court has issued a warrant for his or her detention. Such a warrant is to be deemed a valid warrant for the purposes of section 6 of the Correctional Services Act 111 of 1998.

Section 32 of the International Criminal Court Act is a rare instance in which the legislature has regulated in some detail the effects of a decision of an international judicial organ in the Republic. The decisions of the ICC are nonetheless somewhat different from those of the other judicial bodies mentioned above, as they are not concerned with the determination of state responsibility, but individual international criminal responsibility. A decision by the ICC to designate a particular country for the purpose of the enforcement of a prison sentence is taken in a spirit of cooperation and is not aimed at determining a state's violation of international law. Section 32 of the International Criminal Court Act can therefore not serve as a model for the implementation of international judicial decisions concerned with state responsibility.

Thus far South Africa has not been faced with a binding decision directed against the country itself by any of the judicial bodies whose jurisdiction it has accepted. As will be illustrated (→ 3), a complaint against South Africa before a WTO panel was withdrawn in 2008, after South Africa and Indonesia had reached a friendly settlement. The only international decision that has thus far been handed down against the Republic concerned a non-binding decision of the United Nations Human Rights Committee (→ Chenwi). From the perspective of international law, the Republic was not under any obligation to give effect to the decision. However, as illustrated in earlier chapters South Africa's constitutional dispensation obliges courts to take into account all international law – whether binding or non-binding – when interpreting the Bill of Rights. This follows from section 39(1)(b) of the Constitution of the Republic of South Africa, 1996 (→ Chenwi; De Wet/Introduction). The question thus arises

whether the Constitution itself would oblige South Africa to also give effect to non-binding international judicial decisions against the Republic (→ 3).

The most prominent development regarding the status and effect of international judicial decisions occurred in 2013, when South Africa was confronted with the enforcement of a binding judgment issued by the SADC Tribunal against Zimbabwe. In this decision the Constitutional Court identified the common law as the appropriate vehicle for enforcement. Given the potential importance of this decision for the future development of a doctrine pertaining to the status and effect of foreign judicial decisions, it will be discussed with some detail (→ 2). In addition, international judicial decisions (notably non-binding ones) are sometimes indirectly enforced by means of an international law friendly interpretation of domestic legislation (→ 3).

2 Enforcement of binding international judicial decisions through the common law

In 2008 the SADC Tribunal handed down a judgment against Zimbabwe in what became known as the *Campbell* case.² It concerned the expropriation practices of the Zimbabwean government and the disproportionate impact thereof on white farmers in the country. The SADC Tribunal concluded that the expropriation under the circumstances amounted to discrimination on the basis of race and that Zimbabwe had to pay fair compensation to the applicants.³

In accordance with article 32(3) of the Protocol on the SADC Tribunal, the decisions of the Tribunal are binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the states concerned. This broad wording implies that although the decision itself was directed only at Zimbabwe, other SADC member states have a role to play in its enforcement. More concretely, article 32(1) determines that the law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the state in which the judgment is to be enforced shall govern enforcement.⁴ Article 32(2) also determines that the states and institutions

² *Mike Campbell (Pvt) Ltd & Others v Zimbabwe* (2008) AHRLR (SADC 2008).

³ See extensively E de Wet 'The rise and fall of the Tribunal of the Southern African Development Community: Implications for dispute settlement in Southern Africa' (2013) 28 *ICSID Review* 1ff.

⁴ For the text of the Protocol on SADC Tribunal and Rules thereof (7 August 2000) see <http://www.sadc.int/documentspublications/show/Protocol%20on%20the%20Tribunal%20and%20Rules%20thereof%20%282000%29> (accessed 20 April 2015). See also E de Wet 'The case of *Government of the Republic of Zimbabwe v Louis Karel Fick*: First step towards developing a doctrine on the status of international judgments within the domestic legal order' (2014) 17 *Potchefstroom Electronic Law Journal* 554.

of the Community shall take forthwith all measures necessary to ensure the execution of decisions of the Tribunal.

Subsequent to the unsuccessful attempts at registering and enforcing the *Campbell* decision in Zimbabwe,⁵ both the merits decision of 28 November 2008 and the non-compliance decision of 5 June 2009⁶ were successfully registered in accordance with article 32(3) of the SADC Protocol in the South African High Court, with the purpose of confirming the cost order of the Tribunal against Zimbabwe.⁷ The domestic legal basis for registration was the Foreign Civil Judgments Act 32 of 1988 and the Recognition of Foreign Arbitral Awards Act 40 of 1977.

With the registration of the cost order in South Africa the way was paved for enforcing the judgment by means of attaching Zimbabwean property for execution of the cost order. In this particular instance, the enforcement of the SADC Tribunal's judgment faced in particular two obstacles. The first concerned that of the potential immunity of Zimbabwean property from execution. The second (and for the purposes of this chapter more relevant) obstacle related to the uncertainty as to whether the South African rules of civil procedure for the enforcement of foreign judgments indeed also covered judgments of international courts and tribunals (as anticipated by article 32(1) of the Protocol on Tribunal).

Subsequent to the registration of the SADC Tribunal's decision in South Africa, the High Court ordered the attachment of Zimbabwean property in Cape Town which was rented for commercial purposes at the time.⁸ This was done in accordance with section 14(3) of the South African Foreign States Immunities Act 87 of 1981, which exempts property of a foreign state that is used for commercial purposes from immunity for the purposes of execution. This decision of the High Court was subsequently confirmed on appeal by the South African Supreme Court of Appeal (SCA) in September 2012 and ultimately by the Constitutional Court in June 2013 in what became known as the *Fick* case.⁹

Despite the fact that Zimbabwe could not rely on immunity from jurisdiction to prevent the enforcement of the SADC Tribunal's judgment in South Africa, it remained disputed whether South African civil procedure for the enforcement of foreign judgments indeed also

5 De Wet (n 3 above) 10 - 12.

6 See *Campbell* decision (n 2 above) and *Campbell v Republic of Zimbabwe (Contempt of Court Ruling)* Case No SADC (T) 03/2009.

7 *Louis Karel Fick and Two Others against the Government of the Republic of Zimbabwe* North Gauteng High Court, Pretoria, Case no 3106/07 (13 January 2010) unreported (on file with author).

8 *Republic of Zimbabwe v Sherriff of Wynberg North and Others* Case no: 2009/34015 (22 November 2011) unreported (on file with the author).

9 *Government of the Republic of Zimbabwe v Fick* (657/11) [2012] ZASCA 122; *Government of the Republic of Zimbabwe v Louis Karel Fick* 2013 (5) SA 325 (CC); see also De Wet (n 4 above) 557.

encompassed enforcement of international judgments originating from an international tribunal. The Constitutional Court confirmed that the Enforcement of Foreign Civil Judgments Act 32 of 1988 was not the appropriate vehicle for enforcing international judgments, as it *inter alia* only applied to Magistrates' Courts. As a result the common law remained the only possible avenue through which the Tribunal's decisions could be enforced in South Africa.¹⁰

Under the South African common law, a 'foreign judgment' had to meet certain conditions in order to be enforced. These notably included that the court which pronounced the judgment had jurisdiction to entertain the case; that this judgment was final and conclusive; that enforcement would not be contrary to public policy; that the judgment was not obtained by fraudulent means; that the judgment did not involve the enforcement of a penal or revenue law of the foreign state; and that enforcement of the judgment was not precluded by the provisions of the Protection of Business Act 99 of 1978.¹¹

After concluding that the cost order of the SADC Tribunal met these criteria,¹² there was still the issue of whether it amounted to a 'foreign judgment' as recognised by the South African common law. Thus far the common law on the enforcement of civil judgments had only developed to a point where it provided for the execution of judgments made by domestic courts of a foreign state. It did not encompass the enforcement of international judgments such as a cost order of the SADC Tribunal.¹³ However, by relying on those clauses in the Constitution that committed South Africa to its obligations under international law and to an international-law friendly interpretation of domestic law, the Constitutional Court came to the conclusion that the common law had to be developed in a manner that allowed for the decision of the SADC Tribunal to be interpreted (and subsequently enforced) as a 'foreign judgment'.¹⁴

The Constitutional Court underscored that South Africa, in accordance with section 231 of the Constitution, became a party to those SADC instruments which obliged the country to give effect to decisions of the SADC Tribunal. In addition, the values and rights underpinning the SADC Treaty as amended includes the rule of law which is also entrenched in the South African Constitution, *inter alia*, through the right to access to courts guaranteed in section 34.¹⁵ When courts were confronted with interpreting any of the rights in the Bill of Rights in the Constitution (such as access to courts), section 39(1)(b) required them to

10 *Fick* (SCA) (n 9 above) para 35 - 37.

11 *Fick* (SCA) (n 9 above) para 38.

12 *Fick* (SCA) (n 9 above) para 47 - 50.

13 *Fick* (SCA) (n 9 above) para 53; *De Wet* (n 4 above) 558.

14 *De Wet* (n 4 above) 558 - 559.

15 *Fick* (SCA) (n 9 above) para 59 - 60.

consider international law.¹⁶ Moreover, section 39(2) demanded that when interpreting any legislation, and when developing the common law or customary law, courts had to promote the spirit, purport and objects of the Bill of Rights. In this context one also had to consider that the development of the common law in order to facilitate the enforcement of foreign judgments in South Africa was driven by the need to ensure that lawful judgments were not evaded with impunity by any state or person. If the cost order of the SADC Tribunal were not enforced, the right of access to courts in the Constitution would ring hollow.¹⁷

The cumulative effect of these considerations justified the development of the common law in a manner that construed the words 'foreign courts' to include the SADC Tribunal. Thereby the right of access to South African courts to facilitate the enforcement of the Tribunal's cost order was granted.¹⁸ In principle, the Constitutional Court's willingness for using the common law as a tool for enforcing international decisions in South Africa is to be welcomed. Even so, a word of caution is called for in relation to the equation of international decisions with foreign decisions for purposes of domestic enforcement. In this particular instance such equation was necessitated by the circumstances of the case, notably the wording of article 32(1) of the Protocol on the SADC Tribunal. However, generally speaking it is unusual for treaties regulating the competencies of international tribunals to determine that their decisions shall be treated as 'foreign judgments' on the domestic level.¹⁹

This relates to the fact that the recognition and enforcement of a 'foreign judgment' can be denied where it would result in a violation of public policy. The public policy exception is well-established in the conflicts of law context, including where the enforcement of other *national* jurisdictions are at stake. However, it does not fit in a regime based on public international law such as the SADC regime, where states cannot use their domestic law as an excuse for not implementing their international obligations.²⁰ In this instance the binding character of the international obligations concerns the decisions of the SADC Tribunal. The public policy exception implied by article 32 of the Protocol on the Tribunal could therefore undermine the binding nature of the decisions of the Tribunal from the perspective of public international law – if it allowed principles of

16 *Fick* (SCA) (n 9 above) para 66; De Wet (n 4 above) 559.

17 *Fick* (SCA) (n 9 above) para 54, 62; De Wet (n 4 above) 559 - 560.

18 *Fick* (SCA) (note 9 above) para 62, 69; De Wet (n 4 above) 560.

19 De Wet (n 3 above) 11; De Wet (n 4 above) 560.

20 See the Vienna Convention on the Law of Treaties (the Vienna Convention) (23 May 1969, 1155 UNTS 331) art 27 available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> (last accessed 20 April 2015). See also De Wet (n 4 above) 560 - 561.

domestic law to prevent the recognition and enforcement of foreign judgments.²¹

In the current instance the public policy exception was not raised and the Constitutional Court in passing noted that enforcement of the cost order would not be in contravention of public policy.²² If this argument had been raised, the most appropriate solution from the perspective of public international law would have been to assume that South Africa's domestic public policy itself attached overriding weight to the country's international treaty obligations and binding decisions of international tribunals resulting from such obligations. It remains to be seen whether domestic courts will in future tend to treat all decisions of international courts and tribunals as foreign decision for the purpose of enforcement, or whether they will find other creative ways for interpreting the common law in order to give domestic effect to international court decisions.

3 Enforcement of non-binding international decisions through international law friendly interpretation

For the purpose of the present analysis non-binding decisions can be divided into two categories. The first concerns judicial decisions which are only binding on the parties to the dispute such as those by the ICJ, ITLOS, WTO panels and Appellate Body, as well as the African Court of Human and Peoples' Rights. To the extent that South Africa is not a party to the dispute in question, the judicial decision would not formally be binding on it. Even so, the non-binding judicial decision may influence South Africa's legislative, executive and court practice. If South Africa were to ignore the judicial decision in question, the country could in future find itself embroiled in a dispute before the same international judicial body for a similar violation of international law.

The Constitutional Court has shown itself aware of this reality in the case of *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (the *SCAW* decision), which was decided in 2010.²³ This case concerned South Africa's international obligations on tariffs and trade

21 In De Wet (n 3 above) 11 - 12 this author elaborated on the fact that it was exactly this notion of public policy in conflict of laws which was relied on by the Zimbabwean High Court to deny registration and enforcement of the Campbell decision. The Court submitted that a recognition and enforcement of the Tribunal's decision in the *Campbell* case would be manifestly incompatible with the land reform programme foreseen in the Zimbabwean Constitution. See also *Gramara (Private) Limited and Another v The Republic of Zimbabwe* Case No 5483/09 (26 January 2010). See also De Wet (n 4 above) 561 - 562.

22 *Fick* (SCA) (n 9 above) para 39.

23 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC).

which arose from the so called Anti-Dumping Agreement, that is, the WTO Agreement on Implementation of article VI of the General Agreement on Tariffs and Trade 1994 (→ Schlemmer). These obligations are given effect to in the domestic legal order by notably the International Trade Administration Act 71 of 2002 and the Anti-Dumping Regulations,²⁴ which regulate the imposition of anti-dumping duties or other trade remedies (→ Schlemmer).

In the *SCAW* case the Constitutional Court was confronted with the interpretation of the duration of anti-dumping duties by the South African authorities on a United Kingdom firm. At issue was the protraction of the anti-dumping period beyond the fixed period of five years by means of a so-called sunset review. A sunset review implies that before the five year period expires, a member of the domestic industry could (and in this instance had) requested a review with the aim of extending the anti-dumping duties. In particular, the question arose whether the anti-dumping duties remained in force for as long as the judicial review was pending, which could imply several years²⁵ (→ Schlemmer).

The Constitutional Court emphasised that section 233 of the Constitution required that domestic legislation regulating the duration of anti-dumping duties had to be interpreted in accordance with international obligations. According to the Court, these obligations required anti-dumping duties to cease as early as possible and to remain in force only for so long as it is necessary to counteract dumping that is harmful to the domestic market.²⁶ Taking into account the wording of articles 11.3, 11.4 and 5.10 of the Anti-Dumping Agreement, the Court concluded that the request of a sunset review may only protract the anti-dumping duties for an additional 18 months.²⁷ A more elastic interpretation would lead to a routine breach of international obligations on account of the inability of the domestic authorities to engage in judicial review within a reasonable time.²⁸

In coming to this conclusion, the Court also referred to a WTO panel decision involving Mexico, according to which the requirement that investigations had to be completed within 18 months was mandatory.²⁹ Combined with this fact, South Africa had faced a complaint by Indonesia

24 *Government Gazette* GG 25684, GN 3197, 14 November 2003; *SCAW South Africa* (n 23 above) 2.

25 *SCAW South Africa* (n 23 above) para 75.

26 *SCAW South Africa* (n 23 above) para 79 - 81.

27 *SCAW South Africa* (n 23 above) para 27ff.

28 *SCAW South Africa* (n 23 above) para 80.

29 'Mexico – Definitive countervailing measures on olive oil from the European Communities' WT/DS341/R, 40-1 paras 7.117-7.123; *SCAW South Africa* (n 23 above) para 85 fn 85, available at www.wto.org/english/docs_e/legal_e/24-scm.pdf (accessed 20 April 2015). It should be noted that the investigations at issue concerned those relating to the imposition of countervailing measures under art 11.11 of the Agreement on Subsidies and Countervailing Measures.

before the WTO in 2008 that also concerned the country's continued imposition of anti-dumping duties, while allegedly not complying with the time-limits for sunset reviews in accordance with the Anti-Dumping Agreement.³⁰ South Africa subsequently terminated the anti-dumping duties on imports of uncoated wood free white A4 paper from Indonesia, after which Indonesia withdrew its request for consultations in November 2008³¹ (→ Schlemmer).

The Court's restrictive interpretation of the duration of anti-dumping duties seems to have been influenced by a concern that South Africa may otherwise be in breach of its international obligations. This in turn could result in consultations at the WTO level, or even a binding decision by a WTO panel against the Republic. In order to prevent this from happening, the Court interpreted the domestic legal framework that regulated the effect of sunset reviews on the duration of anti-dumping duties with due regard to WTO judicial decisions against other states and a friendly settlement in which South Africa had been involved.

As far as the status of international decisions which are in themselves non-binding are concerned, it is unclear what effect the courts are prepared to attribute to them. Previous chapters have referred to the fact that section 39(1)(b) of the Constitution obliges courts to take into account also non-binding international law when interpreting the Bill of Rights (→ Chenwi; De Wet/Introduction). However, the Constitutional Court has also indicated that the weight accorded to any particular international law principle as a guideline for interpretation question will vary.³² This suggests that although the constitutional dispensation obliges courts to take non-binding international law principles – which would include non-binding judicial decisions – into *consideration*, they are not obliged to *follow* them.

The only existing non-binding judicial decision against South Africa at the time of writing was that of *McCallum v South Africa*.³³ In this instance the United Nations Human Rights Committee found South Africa to be in breach of the International Covenant on Civil and Political Rights of 1966, due to ill-treatment of prisoners during detention. The South African authorities were not willing to cooperate with the Human Rights Committee in this case, and thus did not submit information to the Committee despite being requested to do so (→ Chenwi). The status of this decision in the domestic legal order has not yet been challenged before the

30 'South Africa - Anti-dumping measures on uncoated woodfree paper' Dispute WT/DS374/1, available at www.wto.org/english/tratop_e/dispu_e/cases_e/ds374_e.htm (accessed 20 April 2015); *SCAW South Africa* (n 23 above) para 85 fn 85.

31 *SCAW South Africa* (n 23 above) para 85 fn 85.

32 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC) para 26.

33 *McCallum v South Africa* (2010) AHRLR 21 (HRC 2010), UN Doc. CCPR/C/100/D/1818/2008 (2010).

courts. As mentioned, it is unlikely that section 39(1)(b) obliges the courts to follow this decision. Similarly, it is unlikely that section 39(1) of the Constitution contains a constitutional obligation on the Executive or Legislature to cooperate with a non-binding international judicial body, as this section only concerns the interpretational role of domestic courts and tribunals. Even so, a progressive interpretation of the international law friendliness embodied in the Constitution would imply that cooperation with non-judicial bodies and acceptance of its jurisprudence should at least be considered by all state organs. In addition, a reasoned explanation should be given where this cannot be done.

4 Assessment

The above analysis reflects that the status and effect of international judicial decisions in the South African legal order is still very much uncharted territory. In 2013 the courts were for the first time confronted with the enforcement of a binding international decision. Despite the absence of a comprehensive legislative framework for enforcement of such decisions, a creative and international law friendly interpretation of the common law facilitated enforcement in the case in question. Until such a time as the legislature adopts a statutory framework that enables the enforcement of a broad range of binding international judicial decisions that have consequences for the state responsibility of South Africa, the common law will remain the only available option avenue for their enforcement. The courts will thus have to decide on an ad hoc basis if and to what extent the common law is a suitable vehicle for enforcement in a particular case.

International judicial decisions which are formally not binding on South Africa but are likely to impact the scope of its state responsibility in future, can find their way into the domestic legal order through international law friendly interpretation of domestic legislation and executive practice. South Africa's constitutional dispensation further encourages a favourable consideration by the courts of those non-binding judicial decisions that has no bearing on the country's international state responsibility. All things considered, however, a clear doctrine on the status and effects of international judicial decisions in the domestic legal order is still in the making.