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The impact of international treaties on South African law post 1996

by

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As approved by Postgraduate Studies Committee

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Declaration

I, Kayla-Jayne Cameron, declare that this research report is my own, unaided work. It is submitted in partial fulfilment of the requirements for the degree Masters of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. This research report has not been submitted before for any degree or examination at this or any other university.

I have submitted my research report to Turnitin and have attached the report to my submission.

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Firstly, to my parents. Thank you for your unconditional love and support throughout my academic career. You two are my pillar of strength. This paper is dedicated to both of you.

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Philippians 4: 13 – I can do all things through Christ, who gives me strength. All glory be to God for the opportunity to study at the prestigious University of the Witwatersrand and for the successful completion of my master's degree.

Abstract

This research report considers the position of international treaties—referred to as international agreements in the South African Constitution—in the South African legal system, following the enactment of the final Constitution. This research report investigates the Constitution's legal framework regarding the incorporation of international agreements into South African municipal law. It also examines matters relating to withdrawal from international agreements, the effects of international agreements ratified by Parliament but not incorporated into national law, and the importance of international agreements when interpreting national legislation and human rights. This research is of particular interest as prior to the final Constitution, no South African constitution provided a framework for incorporating international agreements into national law. While a framework now exists for incorporation of international agreements in South African national law, several issues still surround the incorporation of international agreements into national law, as will become evident throughout this research report.

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1. Introduction

A treaty is a written international agreement between states and governed by international law.[1] Treaties can be embodied, either in a single instrument, or in two or more interconnected instruments.[2] Treaties are the cornerstone of international law and its enforcement in states worldwide. In the South African legal context, the term 'treaty' is synonymous with an international agreement.[3] For the purposes of this research report, the term 'international agreement' will be used.

The incorporation of international law into a state's national law is complex, particularly where friction concerning one legal system prevailing over the other occurs.[4] International law and national law have varying determinations, which are guaranteed to sow discord.[5] While states have been more receptive to incorporating international law into their national legal systems, the incorporation process is not without its challenges. For example, during the apartheid era, South Africa was apprehensive about international law having an unfettered effect on its domestic legal system.

South Africa's position on international law, particularly in relation to international agreements, has undergone positive changes since the implementation of the interim Constitution[6] and, ultimately, the final Constitution.[7] South African courts have always applied principles and rules of customary international law as if they were part of South African law. However, before 1994,[8] the incorporation of international agreements into law was not as simple. Before 1994, the executive held all the power regarding the incorporation of

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[1]The Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1115 UNTS 331 art 2(1)(a).

[2] Ibid.

[3] Directive for the Conclusion of International Agreements <http://www.dirco.gov.za/chiefstatelawadvicer/documents/directive_conclusion_international_agreements_2019.pdf> 2019.

[4] V Morina, F Korenica & D Doli 'The relationship between international law and national law in the case of Kosovo: A constitutional perspective' (2011) 9 *International Journal of Constitutional Law* 274, 279.

[5] Ibid.

[6] Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution).

[7] The Constitution of the Republic of South Africa, 1996.

[8] J Dugard, M Du Plessis, T Maluwa & D Tladi *Dugard's International Law: A South African Perspective* 5 ed (2018) 62.

international agreements into national law.[9] The legislature played no role in the process, besides enacting legislation to give effect to international agreements.[10] Consequently, few international agreements were incorporated into national law.

The Constitution of the Republic of South Africa, 1996, aims to ensure that international law is considered alongside national law, giving the courts the right to utilise international law whenever pertinent. Section 231 of the Constitution is particularly relevant for this research report in so far as it provides guidance on incorporating international agreements into national law. As is evident throughout this research report, the constitutionalisation of international law has not resolved all complications concerning the incorporation of international agreements into South Africa's national law.

As a point of departure, this research report will outline the identified research problems and explain the primary question the research sought to address. The research report will then determine whether the constitutional provisions applicable to international agreements have successfully advanced the position of such agreements in South African law. Finally, the research report will conclude with the findings and recommendations for this study.

1.1 Research problem and background

While South Africa has been significantly more receptive to international law since 1994 and has now been given international law a special place in the national legal order,[11] incorporating of international law into the national legal system still presents numerous challenges, often revolving around the incorporation, withdrawal, and classification of international agreements. This research report investigates the challenges surrounding the incorporation, withdrawal, and classification of international agreements, and proposes solutions to reduce the risk of their recurrence.

The extensive provision of section 231 of the Constitution, 1996, has had an undeniably positive impact on the incorporation of international agreements into national law. Section 231 has contributed to the expeditious incorporation of many international agreements into law. It

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[9] s 6(2)(e) of the Republic of South Africa Constitution Act 110 of 1983.

[10] *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) 161 C–D.

[11] *Glenister v President of the Republic of South Africa* 2011 (3) 347 (CC) para 97.

represents a transition from before and during the interim Constitution era, which was characterised by an excessively cumbersome incorporation process, resulting in the translation of very few international agreements into South African domestic law.[12] In line with the foundational democratic principle of the separation of powers, section 231 has also ensured that the process of incorporating international agreements into national law is transparent and accountable by withholding from the executive the exclusive power to attend to international agreements.[13]

While section 231 is pragmatic, it is not without its faults, and has been subjected to extensive criticism. Section 231—specifically subsection (3) and (4) which concern international agreements of a technical, administrative and executive nature, and self-executing provisions of international agreements, respectively—has presented multiple challenges relating to its interpretation. These complications will be addressed in this research report and will be demonstrated through case law.

As many international agreements regarding international human rights law require expeditious enactment, they contain a self-executing provision. An international agreement containing a self-executing provision allows for the agreement to become municipal law in a country without incorporating such agreement into law. The only requirement for an international agreement that contains a self-executing provision to be considered a source of law in South Africa is that it is not contrary to an Act of Parliament or the Constitution.[14]

South Africa's Constitution recognises self-executing provisions in section 231(4), but the concept is a subject of debate amongst South African scholars.[15] In addition, section 231(3) has been a topic of discussion regarding the distinction between international agreements of an administrative, executive or technical nature, and international agreements requiring ratification or accession.[16] This research report will examine the differentiating views of scholars on both section 231(3) and (4), together with the decisions of the national courts.

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[12] N Botha 'Incorporation of treaties under the Interim Constitution: A pattern emerges' (1995) 20 SAYIL 196.

[13] Dugard et al (note 8 above) 72.

[14] s 231(4) of the Constitution.

[15] E Ngolele 'The content of the doctrine of self-execution and its limited effect in South African law' (2006) 31 *SAYIL* 153; N Botha 'Treaty making in South Africa: a reassessment' (2000) 25 *SAYIL* 69.

[16] *Earthlife Africa Johannesburg v Minister of Energy* 2017 (5) SA 277 (WCC).

The negotiation and signing of international agreements, amongst other tasks, is the responsibility of the national executive.[17] The approval of international agreements is the duty of both the National Assembly and the National Council of Provinces, unless it is of an administrative, technical or executive nature.[18] The Constitution clearly provides for this procedure to be followed, but does not specify when an international agreement will become binding in South Africa, or whether the government is obligated to incorporate into national law international agreements that have been assented to. In order to provide clarity on these two matters, this research report will consider case law and the legal literature.

The Constitution is clear regarding the different responsibilities of the executive and the legislature pertaining to incorporating international agreements into national law. However, it does not specify explicitly which branch of government is responsible for withdrawal from international agreements. This research article will address, with reference to recent jurisprudence and legal literature, the uncertainty around withdrawal from agreements and the correct procedure identified by the courts in this regard.

Finally, to showcase the domestic implications of international agreements, this research report will consider the position of such agreements ratified by Parliament but not incorporated into national legislation. Despite not being law in the Republic, unincorporated international agreements are not without significance. This will become evident when case law on the matter is examined in this research report.

1.2 Research question and objective

This research report is aimed at interrogating the effectiveness of the constitutional framework for incorporating international agreements into South African national law. In addition, the report aims to provide clarity on the constitutional provisions concerning international agreements. Therefore, the overarching research question this report will clarify is: *How effective have the provisions of the Constitution of 1996 been at advancing the implementation of international agreements in South Africa?*

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[17] s 231(1) of the Constitution.

[18] Ibid s 231(2).

1.3 Methodology

The research methodology entailed mainly desktop research, and utilised both primary and secondary sources of law. The primary sources were primarily South African case law and legislation, such as the Constitution, among others. The secondary sources comprised government guidelines, scholarly journal articles, and books, and provided clarity and extensive commentary on the constitutional provisions and case law that are the subject of this study.

2. Evaluating the current position of international agreements in South Africa

2.1 An analysis of section 231(2) of the Constitution

When evaluating the current position of international agreements in South Africa, section 231(2) of the Constitution is of key importance. This subsection provides that: '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).' Various uncertainties surrounding section 231(2) have become a topic of heated debate amongst academics.[19]

The Republic of South Africa is not automatically bound to an international agreement once Parliament has approved it. Binding the country to an international agreement is a three-step process. However, it is impossible for the Constitution to cover every minute detail, which explains the absence of any reference to the exchange or deposit of an instrument of ratification of acceptance, approval or accession.[20] The deposit of an instrument of ratification is the final step to ratifying an international agreement. Formal international agreements—those that are not of an administrative, technical or executive nature—will always require an instrument of ratification to be deposited with the depositary of an agreement to demonstrate a country's commitment to the agreement.[21] Depositing a ratification instrument communicates to other contracting states that South Africa consents to being bound by said agreement at an

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[19] F Sucker 'Approval of an International Treaty in Parliament: How Does Section 231(2) 'Bind the Republic'?' (2013) V *Constitutional Court Review* 417.

[20] The Vienna Convention on the Law of Treaties (note 1 above) art 16.

[21] 'Practical Guide and Procedures for the Conclusion of International Agreements' < http://www.dirco.gov.za/chiefstatelawadvicer/documents/conclusionofagreements.pdf>.

international level.[22] It is the duty of the national executive, and not of Parliament, to deposit the instrument of ratification with the depositary.

Uncertainty exists regarding whether the Republic is bound to an international agreement that has been ratified but not incorporated into national law at the international level only, or both internationally and domestically. This uncertainty was revealed in the *Glenister case*,[23] where the minority and majority were divided on how an international agreement ratified by Parliament, but not domesticated into municipal law, binds South Africa. The minority in the case took the stance that an international agreement ratified by Parliament binds South Africa on the international stage only and cannot be a source of rights and obligations domestically.[24] The majority, however, asserted that under ratified international agreements, parties have both international and domestic obligations.[25]

The view of the minority is, in fact, correct, whereas the view of the majority dismisses the fact that international agreements must be incorporated into the national legal system before they can be considered a source of rights and obligations.[26] While ratified international agreements that have not undergone an act of incorporation are not law in South Africa, this does not imply that these agreements do not affect South African law. Their effects are discussed below.

2.2 An analysis of section 231(3) of the Constitution

Section 231(3) of the Constitution states that '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 or National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.' The main intention of section 231(3) may be viewed as easing Parliament's workload by not troubling them with routine matters. While this subsection is expedient, it is not without flaws.[27] This subsection lacks clarity regarding the

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[22] *Glenister* (note 11 above).

[23] Ibid.

[24] Ibid para 92.

[25] Ibid para 189.

[26] s 231(4) of the Constitution.

[27] J Dugard International Law: A South African Perspective 4 ed (2011) 417.

classification of an international agreement of this nature, and the unspecified time period before which such an agreement is to be tabled before Parliament.

The predominant case concerning the classification of international agreements of a technical, executive or administrative nature is *Earthlife Africa*.[28] The core issue in this case was an intergovernmental agreement between Russia and South Africa regarding nuclear procurement and co-operation, which was entered into by the executive and tabled before Parliament.[29] The applicant, Earthlife Africa, sought to have the court review the Minister of Energy's decision to table the intergovernmental agreement before Parliament in terms of section 231(3).[30] This would require determining whether the intergovernmental agreement was, in fact, of a technical, executive or administrative nature, and whether the tabling before Parliament was constitutional. The court found that, despite not expressly providing for approval by Parliament, the agreement could not be classified as an international agreement under section 231(3), and tabling the agreement before Parliament was unconstitutional.[31]

Section 231(3) must take on an extremely narrow interpretation to include only standard agreements that in no way require the specialised attention of the two houses of Parliament. The court provided a clear explanation of what can be classified as an agreement of an administrative nature. The court made reference to 'run-of-the mill' agreements that are 'of a routine nature, flowing from the daily activities of governmental departments.'[32] The court identified three indicators to ascertain whether the agreement was procedural: the degree of specificity of the agreement; the recurring use of categorial language; and the ambit and importance of key elements forming the foundation of the agreement.[33] The intergovernmental agreement contained many key provisions demonstrating that the agreement was not of a common, everyday nature. The preamble alluded to 'a strategic partnership'[34] regarding nuclear power, which suggests the agreement was not just one of co-operation between the two

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[28] *Earthlife Africa* (note 16 above).

[29] Ibid para 7.

[30] Ibid.

[31] Ibid para 146.

[32] Ibid para 114.

[33] Ibid para 109.

[34] Ibid para 108(1).

countries but included the construction of new nuclear power plant units in South Africa by 2030.[35] Employing such language attests to the intention of the intergovernmental agreement.

The court emphasised that when the executive binds the Republic to an international agreement without parliamentary approval, the procedure accompanying parliamentary approval is not followed.[36] The Constitution, which is founded on a democratic society, allows for public participation in the National Assembly by facilitating public involvement in legislative and other processes of the Assembly and its committee.[37] Nuclear energy produces radioactive waste, which can be dangerous to humans and the environment if not handled, transported, stored, and disposed of correctly.[38] Given the potential danger of nuclear energy to human health, the public's opinion on the construction of nuclear power plants should have been considered before binding the Republic to such an agreement. One of the founding values of the Constitution is an open and accountable democratic government.[39] This founding value is not fulfilled when an agreement is merely tabled before government and the longer parliamentary approval process is not followed. The Court observed that should there be any doubt about whether an agreement falls under section 231(2) or 231(3), following the more onerous process of parliamentary approval—i.e. section 231(2)—would be more suitable.[40] Therefore, an international agreement can only be debated and scrutinised by the legislature if the process in section 231(2) is followed.

The *Earthlife Africa case* certainly clarifies what can be classified as an agreement of a technical, executive or administrative nature, and confirms that the court's strict approach was warranted. The court's ruling that the tabling of the intergovernmental agreement before Parliament was irrational owing to the nature of the agreement reveals the strict limitations on which types of agreements can fall under section 231(3). The court stated that the particulars,

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[35] *Earthlife Africa* (note 16 above) para 108(2).

[36] Ibid para 114.

[37] s 59(1)(a) of the Constitution.

[38] 'Nuclear explained: Nuclear power and the environment' <https://www.eia.gov/energyexplained/nuclear/nuclear-power-and-the-environment.php> [2021].

[39] s 1(d) of the Constitution.

[40] *Earthlife Africa (*note 16 above) para 137.

including the wording used, and the ramifications of the agreement were of such a nature that clearly required it to be examined and debated by the legislature.[41]

It appears from the *Earthlife Africa* ruling that one can ascertain the true nature of an international agreement in several ways: first, by engaging with the language employed by the drafters of the international agreement; second, by exploring the potential impact of the international agreement on human health and the environment;[42] and third, by considering that the South African government afforded Russia favourable tax incentives for the construction of the nuclear power plants.[43]

It is crucial that agreements that are not of a standard, routine nature appear before and are approved by Parliament, no matter the circumstances. To dismiss the parliamentary approval process undermines constitutional values, which cannot transpire in a democratic society—it is unethical and a breach of the public's trust in the government. The court in the *DA v Minister of International Relations case* observed that when Parliament approves international agreements, it does so on behalf of the people of South Africa as its chosen representative.[44] The people of South Africa put their trust in government to follow the correct procedures and the intentional wrongful act of classifying an international agreement of this nature under section 231(3) is a significant example of misleading the public.

The court's interpretation of both section 231(2) and section 231(3) is in line with South Africa's constitutional disposition. The democratic principles of the separation of powers, a participatory democracy, and an accountable government shine through in the court's decision, illustrating South Africa's commitment to protecting its democracy.

The ambiguity in section 231(3) regarding the timing for tabling of agreements before Parliament is problematic. The section refers to a 'reasonable time period',[45] which is open to interpretation and can, in some situations, be exploited. An example of the misuse of the reasonable time period provision came to the fore in the *Earthlife Africa case*. Not only did the

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[41] *Earthlife Africa* (note 16 above) para 116.

[42] Ibid para 44.

[43] Ibid para 108(10).

[44] *Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP) para 52.

[45] s 231(3) of the Constitution.

applicants contest the Russia-South Africa intergovernmental agreement, but they called into question South Africa's intergovernmental agreements with both the United States (US) and South Korea. The agreements with the US and South Korea involved the cooperation of peaceful usage of nuclear energy, but did not address the procurement of nuclear power, allowing the agreements to be treated as routine. South Africa signed the agreement with the US on 25 August 1995[46] and with the Republic of Korea (South Korea) on 8 October 2010.[47] Given that the US agreement was entered into over two decades before it was tabled before Parliament, and the agreement with South Korea was entered into five years before it was tabled by the Minister of Energy, the applicant argued that neither agreement was binding on the Republic of South Africa and that the tabling was unconstitutional.[48] The court declared that the tabling before Parliament by the Minister exceeded a reasonable time period and concluded that the tabling of both agreements after such an extended time violated the provisions of the Constitution.[49] The tabling of both international agreements before Parliament were declared unlawful and unconstitutional.[50]

Section 231(3) of the Constitution establishes a procedure whereby the state is bound by a specific category of international agreements without Parliament's approval.[51] Certain requirements need to be fulfilled for the employment of section 231(3) to be lawful, one of which is that the international agreement must be tabled before Parliament within a reasonable time frame. The court stated that the word 'must' plainly demonstrates a prerequisite for the lawful application of section 231(3).[52]

While a reasonable time period is not specific, it appears that the intention of the drafters of the Constitution was that the Constitution be read in conjunction with materials such as legislation. The Interpretation Act[53] is an important piece of legislation, which aims to consolidate laws

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[46] *Earthlife Africa* (note 16 above) para 21(11.1).

[47] Ibid para 21(11.2).

[48] Ibid para 11.

[49] Ibid para 129.

[50] Ibid para 146 (1.2.1 – 1.2.2).

[51] Ibid para 126.

[52] Ibid.

[53] Act 33 of 1957.

relating to the interpretation of statutes.[54] According to the Interpretation Act, when a person is empowered to develop rules or regulations, copies of such rules or regulations must be laid upon the tables of both houses of Parliament within fourteen days after publication.[55] Following this line of thinking, the national executive needs to table international agreements of a technical, executive or administrative nature within two weeks for the agreements to be binding on the Republic. This is a logical interpretation of the phrase 'reasonable time period' because when the executive binds the Republic, the Republic automatically incurs duties and responsibilities. Therefore, Parliament should be made aware of the country's duties and responsibilities as soon as possible to ensure that all obligations of the agreement are met, and it should not take up to a decade to table an international agreement before Parliament.

Earthlife Africa is the only case that has dealt directly with section 231(3), but similar cases are bound to arise in the future.[56] In a country with an immense backlog at the courts, similar cases could be prevented if proper procedure is followed. It is clear from the *Earthlife Africa case* that the parties exploited the apparent ambiguity of this clause in section 231(3), extending it beyond its prescribed limits. While allowing Parliament to concentrate on more pressing issues is beneficial, it is crucial that section 231(3) is applied in good faith by the executive for those issues that are not inherently administrative.

2.3 An analysis of section 231(4) of the Constitution

Section 231(4) introduced the concept of self-executing international agreements to the South African legal system, a notion met with hesitancy from South African academics.[57] Section 231(4) stipulates that an international agreement becomes law in the Republic when it is enacted into law by national legislation, save for self-executing international agreements approved by Parliament and that are not in conflict with an Act of Parliament or the Constitution. As contested by the minority in the *Glenister case*, approval of an international agreement by Parliament does not amount to such agreement becoming law in the Republic.[58] An official act of incorporation is required to transform international agreements into national

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[54] Interpretation Act (note 53 above) s1.

[55] Ibid s 17.

[56] Dugard et al (note 8 above) 74.

[57] W Scholtz 'A few thoughts on article 231 of the South African Constitution' (2004) 29 *SAYIL* 202, 216.

[58] *Glenister* (note 11 above) para 95.

law. Similarly, the court in the *Azapo case*[59] stated that international conventions and agreements do not become part of South African law until and unless they are incorporated into municipal law by legislative enactment.[60]

The legal effect of section 231(4) is that an international agreement cannot become a source of rights and obligations until it is enacted into national legislation.[61] Accordingly, an individual cannot rely on the rights owed to them by an international agreement in national courts until such agreement is enacted into South African law. International agreements that require an act of incorporation do not contain a self-executing provision.

Agreements containing a self-executing provision are defined in international terms as automatically becoming a part of domestic law without applying a method of incorporation.[62] This means that such international agreements, bar those in conflict with an Act of Parliament or the Constitution, are directly applied and adjudicated in national courts.

The concept of self-executing international agreements was adopted from the US Constitution. The notion has been met with scepticism by American academics for many years, with McDougal asserting over 50 years ago that 'the term self-executing treaties is meaningless and should be dropped from our vocabulary'.[63] While some South African academics have expressed hesitancy about the self-execution of international agreements, others have been more receptive to the idea. Botha argued that the self-executing proviso was injudiciously taken over from American law 'without any regard to its suitability to the South African context.'[64] In contrast, Ngolele[65] and Olivier[66] vouched for self-executing international agreements in South African law, in particular the self-execution of international human rights agreements.

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[59] *Azanian People's Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC).

[60] Ibid para 26.

[61] *Glenister* (note 11 above) para 92.

[62] A Stemmet 'The Influence of Recent Constitutional Developments in South Africa Between International Law and Municipal Law' (1999) 33 *The International Lawyer* 47, 59.

[63] M McDougal 'Remarks at the Annual Meeting of the American Society of International Law' (1951) 45 *American Society of International Law* 101, 102.

[64] N Botha (note 12 above) 91.

[65] E Ngolele (note 15 above).

[66] M Olivier 'Exploring the doctrine of self-execution as enforcement mechanisms of international obligations' (2000) 27 *SAYIL* 99.

Various cases surrounding self-executing international agreements have emerged in South Africa, which courts have viewed through different lenses. The *Quagliani case* is arguably the most widely cited case regarding the position of self-executing international agreements in municipal law.[67] The court, in this case, questioned whether the extradition agreement between the US and South Africa entered into in 1999 was part of South African law, as it had not been incorporated into municipal law by national legislation. The applicants argued that their arrest and subsequent detention in the US in terms of the extradition agreement, 1999, were unlawful. They alleged that the agreement was invalid as it had not been incorporated into South African municipal law in the correct manner.[68] Therefore, the question arose whether the extradition agreement could be viewed as self-executing.

The court asserted that the complex nature of the self-executing proviso in section 231(4) is foreign to the South African legal system.[69] The court argued that the concept was 'hard to understand' within the South African context,[70] and held that the agreement at issue had not been validly assimilated into national law, and was not self-executing. The court based its finding on the plain language of section 231(4) and claimed that 'from a reading of the plain words of the section it is not possible to have a statute in terms of which any number of international agreements concluded will have the force of law in the Republic.'[71] The court claimed that 'the plain language of section 231(4) requires the enactment of every new international agreement into law, meaning a new act of Parliament for all international agreements that have been ratified.'[72]

The court's dismissal of self-executing international agreements marks a return to the pre-final Constitution era in which South Africa strictly adhered to the dualist approach regarding the incorporation of international agreements. Given that all agreements needed to be incorporated into municipal law by legislative process,[73] many ratified agreements did not become part of

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[67] *Nello Quagliani v President of the Republic of South Africa* Transvaal Provincial Division (unreported case no 959/04) [2008] TPD (18 April 2008).

[68] Ibid para 2.

[69] Ibid para 13.

[70] Ibid.

[71] Ibid para 18.

[72] Ibid.

[73] *Pan American World Airways* (note 10 above) para 28.

South African law. The enactment of international agreements into national law is a painstakingly slow process, often hindering the essential purpose of international agreements. In some instances, agreements are required to come into operation immediately to achieve their objective, and cannot be subjected to the lengthy process of incorporation. The self-executing proviso included in section 231(4) facilitates those agreements requiring expeditious enactment, suggesting that the court's total disregard of the concept was imprudent.

The court took a different stance in the *Goodwin case*,[74] which was heard in the same year as *Quagliani* and concerned the identical extradition agreement. While the issue in the *Goodwin case* was whether the extradition agreement was invalid as it was not signed by the President himself, the court asserted that the extradition agreement had been correctly incorporated into national law.[75]

Both cases focused solely on the validity of the extradition agreement and not on the validity of its transformation into national law. However, they have prompted numerous discussions amongst academics regarding the interpretation of section 231(4), specifically the notion of self-executing agreements.[76] It is unfortunate that the courts did not elaborate further on the issue of self-executing agreements, which is in dire need of authority. Many academics have attempted to piece together the puzzle through critical analysis of the subject. Scholtz and Ferreira[77] claimed that in *Quagliani*,[78] the court took an archaic approach known as the 'intention of the drafters of the Constitution', rather than the purposive approach identified by the Constitutional Court in *Makwanyane*.[79] The court in *Makwanyane* emphasised that when confronted with the complexities of interpretation, applying the literal meaning of the Constitution's provisions is inadequate.[80] The court stated that: 'constitutional interpretation unavoidably involves more than the determination of the literal meaning of particular

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[74] *Goodwin v Director-General Department of Justice and Constitutional Development Transvaal Provincial Division* (unreported case number 21142/08) [2008] TPD (23 June 2008).

[75] Ibid para 15.

[76] W Scholtz & G Ferreira 'The interpretation of section 231 of the South African Constitution: a lost ball in the high weeds!' (2008) 41 CILSA 324

[77] Ibid 331.

[78] *Quagliani* (note 67 above).

[79] *S v Makwanyane* 1995 (3) 391 (CC).

[80] Ibid para 9.

provisions.'[81] Law is a complex field; nothing in the legal world operates in isolation, including the highest law of the land. Applying their minds by accessing other legal sources could have equipped the court in *Quagliani*[82] to better understand the intention of the drafters of the Constitution. Instead, the court's conservative interpretation of section 231(4) represented a lost opportunity for shedding light on the concept of self-executing international agreements.

While the courts have failed to provide an explanation of self-executing agreements in the South African context, from reading the South African constitutional provision[83] and the US constitutional provision[84] it is clear that the South African approach to self-executing agreements differs sightly. The US' definition of a self-executing agreement reads "a treaty of which the provisions are automatically, without any formal act of incorporation, part of domestic law and therefore enforceable by municipal courts."[85] Dugard suggests a more suitable definition for the South African legal system that is "a treaty becomes self-executing where there is no need to adapt domestic law in order for provisions of a treaty, to be applied directly."[86] Similarly, Ngolele puts forward that South African municipal law must have the capability to allow for the self-execution of international agreements so as to not obstruct the application of thereof.[87] In the US, international agreements are applied directly without any prerequisites and immediately become national law. However, South African law requires that before a self-executing agreement becomes municipal law, it must be ensured that it is not in conflict with an Act of Parliament or the Constitution. South Africa's adaption of the concept of self-executing agreements is in line with its constitutional framework. This invalidates the argument that the concept of self-executing treaties was inappropriately taken from the US.

The constant avoidance and criticism of self-executing agreements is unjustified. For the South African legal system to keep abreast of the fast-paced developments of the law, it will have to

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[81] *S v Makwanyane* (note 79) para 9.

[82] *Quagliani* (note 67 above).

[83] s 231(4) of the Constitution.

[84] Art VI cl 2.

[85] Scholtz & Ferreira (note 76 above) 332.

[86] J Dugard *International Law: A South African Perspective* 3ed (2005) 62.

[87] Ngolele (note 15 above).

undergo uncomfortable, yet vital, transitions. The self-execution mechanism is efficient in ensuring that international agreements requiring immediate implementation to fulfil their purpose become national law without delay. Currently, only a handful of cases based on self-executing agreements exist. This may be because Parliament is wary that the classification of an international agreement as self-executing can be abused in the same way as the classification of international agreements of a technical, administrative or executive nature has been. Despite reservations surrounding self-executing international agreements, it is a subject that is bound to come before the courts in the near future. It is hoped that the courts will provide thorough guidance on self-executing agreements in South Africa without dismissing the topic as has been done in the past.

2.4 An analysis on the withdrawal from international agreements

As the Constitution omitted provisions regarding the withdrawal of international agreements, including which branch of government would be responsible, the courts have been left to grapple with the matter. Recently, the Gauteng Division of the High Court had the opportunity to pronounce on the matter.[88] The main issue in the *DA v Minister of International Relations case* was the withdrawal of South Africa from the Rome Statute of the International Criminal Court[89] (the Rome Statute).[90] The national executive signed the Rome Statute on 17 July 1998 and on 27 November 2000, with the approval of Parliament, deposited the instrument of ratification of the Statute with the depositary. The Rome Statute was incorporated into national legislation with the enactment of the Implementation of the Rome Statute of the International Criminal Court Act.[91] The Act provides a framework for the national prosecutions of international crimes, namely genocide, crimes against humanity, war crimes, and crimes of aggression. The Act demonstrates South Africa's commitment to work with the International Criminal Court to bring the perpetrators of such crimes to justice.

South Africa's withdrawal from the Rome Statute emerged out of government's failure to arrest and surrender to the International Criminal Court, Sudan's President, Omar al-Bashir, when he visited the country in 2015. Two warrants for al-Bashir had been issued by the International

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[88] *DA v Minister of International Relations* (note 44 above).

[89] (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

[90] *DA v Minister of International Relations* (note 44 above) para 1.

[91] Act 27 of 2002.

Criminal Court for war crimes, genocide, and crimes against humanity. As the South African government had committed itself to carrying out the obligations of the Statute through the Act, the state had a duty to arrest and surrender perpetrators of international crimes.[92] Following government's failure to arrest al-Bashir, the Southern Africa Litigation Centre, a non-governmental organisation, brought an urgent application before the Gauteng Division of the High Court seeking an order that the failure was inconsistent with the Constitution and was invalid.[93] The Minister of Justice and Constitutional Development, the respondent in the case, attested that al-Bashir should not be arrested on account of his immunity in terms of customary international law.[94] This is inconsistent with the Implementation Act, which expressly states that immunity afforded to someone as head of State is not a defence against any crimes they are alleged to have committed.[95] The Court declared that the government's failure to arrest al-Bashir was inconsistent with the Constitution and was invalid.[96] The Minister then appealed this ruling to the Supreme Court of Appeal, which confirmed that the government's failure to act was unlawful.[97]

In 2016, the national executive made a decision to withdraw immediately from the Rome Statute, signing a notice of withdrawal and depositing it with the United Nations Secretary-General.[98] The notice of withdrawal included an explanatory note referring to the 2015 al-Bashir incident.[99] The Minister of International Relations and Cooperation then informed both houses of Parliament of the executive's decision and the reasons for its decision.[100] In addition, the Minister informed Parliament of his intention to table a Bill repealing the Implementation of the Rome Statute of the International Criminal Court Act.[101] The applicant in the *DA v*

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[92] Implementation Act (note 91 above) s 4.

[93] *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* 2015 (5) SA 1 (GP) para 4.

[94] Ibid para 21.

[95] s 4(2)(a)(i) of the Implementation Act (note 91 above).

[96] *SALC v Minister of Justice* (note 93 above) para 2(1).

[97] *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* [2016] 2 ALL SA 365 (SCA) para 133(4)(1).

[98] *DA v Minister of International Relations* (note 44 above) para 4.

[99] Ibid.

[100] Ibid para 5.

[101] Ibid.

Minister of International Relations case promptly applied for a court order declaring the withdrawal from the Rome Statute unconstitutional and invalid.[102] The applicants also sought an order to have the respondents rescind the notice of withdrawal and terminate the process of withdrawal under the proper procedure, as prescribed by the Rome Statute.[103]

The court aptly resolved uncertainty around the withdrawal from an international agreement. It explained that if an international agreement is not of an administrative, executive or technical nature, it requires parliamentary approval. The antithesis of this would be that parliamentary approval is required when withdrawing from an international agreement that does not fall under section 231(3) of the Constitution. While the national executive has the mandate to deposit an instrument of ratification, it can only do so after obtaining Parliament's approval to bind the Republic. Therefore, it would be illogical to assume that the executive would be permitted to deposit a notice of withdrawal to the United Nations Secretary-General without the necessary approval from Parliament.[104] The court declared that when the Constitution, or a statutory provision, confers upon someone or a branch of government the power to do something, it is predictable that those in the position have the power to undo something.[105] In addition, the court asserted that section 231(2) creates a social contract between the people of South Africa and the national legislature and executive.[106] Thus public participation is an essential component of the parliamentary approval process of international agreements. It would be untenable for the executive to assume that it could withdraw from the Rome Statute inconspicuously, without informing the public of its intentions. Before the executive can withdraw from the Rome Statute, the public must first approve of such withdrawal, as it would mean that their rights and obligations in terms of the Statute would be terminated.[107]

Interpretation goes hand-in-hand with logic; a logical thought process can lead to the correct interpretation of either the Constitution or an Act of Parliament. The court—through its sound interpretation of the Constitution—clearly articulated the position of the withdrawal from

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[102] *DA v Minister of International Relations* (note 44 above) para 6.

[103] Rome Statute (note 89 above) art 127(1).

[104] *DA v Minister of International Relations* (note 44 above) para 71.

[105] *Masetlha v President of the Republic of South* 2008 (1) SA 566 (CC) para 68.

[106] *DA v Minister of International Relations* (note 44 above) para 52.

[107] Ibid.

international agreements in the *DA case*. While no case law exists regarding withdrawal from international agreements of an administrative nature, an orthodox interpretation of section 231(3) would suggest that the withdrawal from such agreements would not require prior parliamentary approval, provided notice of withdrawal is tabled before Parliament within a reasonable period. Despite the transparent nature of the correct procedure for withdrawal from international agreements, the Minister, who, in his high position ought to have known the process to be followed, appears to have tried to mislead Parliament and the public by distorting the meaning in the Constitution.

The Interpretation Act clearly provides that where the law confers upon someone the power to create rules, regulations or by-laws, this includes the power to rescind, revoke, amend or change such regulations, unless a contrary intention of the law is apparent.[108] It is clear upon the first reading of section 231(1) and (2) that the Constitution did not anticipate any antithetical intention of the provision.

Furthermore, if an international agreement has been incorporated into national legislation, the piece of legislation which gave effect to the agreement would first need to be repealed.[109] Just as it is the legislature's duty to enact legislation, it is also the legislature's duty to repeal legislation. Owing to the doctrine of separation of powers—an underlying principle of the Constitution—all branches of government are required to act within the powers conferred upon them. Therefore, having the executive take on this role constitutes an infringement of the powers of the legislature.

2.5 Analysis of ratified international agreements not incorporated into national law

Section 231(4) of the Constitution states that 'any international agreement becomes law in the Republic when it is enacted into law by national legislation', unless it contains a self-executing provision. Owing to the drawn-out process of enacting legislation in South Africa, many international agreements ratified by Parliament do not reach the incorporation stage. Although not law in the country, these international agreements are not without worth to the South African legal system.

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[108] s 10(3).

[109] *DA v Minister of International Relations* (note 44 above) para 53.

First, ratified international agreements that have not been incorporated into national law serve as an interpretation mechanism. These agreements assist in interpreting national legislation whenever necessary. Section 233 of the Constitution places a duty on the courts to interpret legislation in accordance with international law, which includes those agreements that have not been incorporated into law. *S v Okah*[110] illustrates the use of ratified international agreements in interpreting national legislation. Mr Okah, a citizen of Nigeria and a permanent resident of South Africa, had been charged with 13 counts of terrorism under the Protection of Constitutional Democracy against Terrorist and Related Activities Act.[111]

In interpreting whether the Act had extra-territorial jurisdiction, the Constitutional Court made reference to international agreements that South Africa had ratified. The court noted that the Act fulfils a number of international agreements,[112] which denote that South Africa is obligated to combat terrorism and try perpetrators of terrorism, irrespective of where the terrorist attack occurred.[113] As South Africa had agreed to be a member state of the International Convention for the Suppression of Terrorist Bombings[114] and the International Convention of the Suppression of Terrorist Financing,[115] it had agreed to participate in the fight against terrorism, whether internationally or transnationally.[116] While South Africa has not incorporated these conventions into national law, the state committed itself to fulfil its obligations. Therefore, interpreting the Act as having limited jurisdiction would be in conflict with South Africa's international duties prescribed by these conventions.

Second, ratified international agreements that have not been incorporated into national law can be used to challenge the validity of legislation. The Constitution confers upon the courts the right to review legislation,[117] thus allowing them to challenge their validity. The *Glenister case*[118] exemplified ratified international agreements being invoked to challenge the

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[110] 2018 (4) BCLR 456 (CC).

[111] 33 of 2004.

[112] Ibid para 36.

[113] Ibid.

[114] (adopted 15 December 1997, entered inro force 23 May 2001) 2149 UNTS 256.

[115] (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197.

[116] *S v Okah* (note 110 above) para 37.

[117] s 172.

[118] *Glenister* (note 11 above).

constitutionality of legislation. The legislation in question was the South African Police Service Act,[119] which brought into existence the Directorate for Priority Crime Investigation (the DPCI). The Act established the DPCI as a specialised unit to combat corruption in the country. However, the DPCI lacked independence, which is a fundamental element of any legitimate anti-corruption unit. Because the DPCI was under the surveillance of the national executive, it was not disparate from the South African government. Non-independence of an anti-corruption unit has the potential to incite maladministration of the country's resources and to perpetrate fraud.[120]

At the time the Act came into force, South Africa had ratified several international and regional conventions aimed at combating corruption. South Africa had ratified the United Nations Convention Against Corruption,[121] the African Union Convention on Preventing and Combating Corruption,[122] and the Southern African Development Community Protocol Against Corruption.[123] All these conventions place a duty on South Africa to establish an anti-corruption unit that is appropriately independent.[124] As corruption can lead to human rights violations, particularly violations of social and economic rights, the Constitution requires the courts to consider international law when interpreting these rights.[125]

The court concluded that the South African Police Service Act was unconstitutional. In reaching its decision, the court considered South Africa's obligation under international agreements to establish an independent anti-corruption entity, an obligation that was not fulfilled. In addition, the court stated that an anti-corruption unit that lacks autonomy is in breach of section 7(2) of the Constitution.[126]

These two court cases illustrate the effects of ratified but unincorporated international agreements on the domestic front. While these agreements are not law in the country, they

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[119] 57 of 2008.

[120] *Glenister* (note 11 above) para 166.

[121] (adopted 31 October 2003, entered into force 14 December 2005) 2379 UNTS 41.

[122] (2004) 43 *ILM* 5.

[123] (adopted 14 August, entered into force 6 July 2005).

[124] *Glenister* (note 11 above) para 192.

[125] s 39(1)(b).

[126] *Glenister* (note 11 above) para 193.

influence the country's law. The constitutional requirement that when courts are interpreting legislation, they are to prefer an interpretation that is consistent with international law also solidifies the importance of these agreements in South Africa's legal order.[127]

2.6 Human rights international agreements in the South African legal system

International human rights agreements do not need to be incorporated into South African law and, in some cases, do not even have to be ratified by South Africa to be used as an interpretation mechanism. The Constitution stipulates that South African law is to be interpreted to conform to international human rights. Section 39(1)(b) ensures that when a matter involves the interpretation of the Bill of Rights, international law must be considered. This is a clear illustration of South Africa's commitment to international human rights.

The landmark case of *Makwanyane*,[128] although heard before the enactment of the 1996 Constitution, delineates the sources of international law that can be used as tools of interpretation. The court explained that international agreements and customary international law provide an appropriate framework in which the Bill of Rights can be analysed and understood.[129] Evaluating and comprehending both international law and customary international law can facilitate the correct interpretation of the Bill of Rights.[130]

The case of *Law Society v President of the Republic of South Africa*,[131] heard in 2019 in the Constitutional Court, illustrates the commitment of the South African courts to interpret the Bill of Rights in accordance with international law and customary international law. The court alluded to the valuable role international law had played in the establishment of South Africa's successful democracy,[132] adding that international law is needed in the development and enrichment of South Africa's constitutional democracy.[133]

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[127] s 233 of the Constitution.

[128] *S v Makwanyane* (note 79 above).

[129] Ibid para 35.

[130] Ibid.

[131] 2019 (3) BCLR 329 (CC).

[132] Ibid para 4.

[133] Ibid.

The case focused on the Southern African Development Community (SADC) and its role in helping individuals to bring disputes against SADC member states. This ensures justice is served to individuals whose rights are violated by member states, instead of allowing their state to act on behalf of them to receive reparation. The case related to a Protocol the President of South Africa negotiated and signed in 2014, which was aimed at stripping the SADC Tribunal of its jurisdiction to hear matters brought before it by individuals.[134]

South Africa has acceded to the SADC Treaty,[135] which promotes democratic rights, the observation of human rights, and the rule of law.[136] However, it has not been incorporated into national law. The treaty, which was amended in 2001, allowed for the establishment of a tribunal to settle disputes regarding the application and interpretation of the treaty.[137] The tribunal's purpose was to guarantee that both states and individuals would have recourse to a dedicated dispute resolution forum in the event that a member state compromised the SADC's development.[138]

The case began in the High Court, where the Law Society of South Africa launched an application to challenge the decision to suspend the operations of the tribunal in so far as the decision related to the President of South Africa.[139] The situation emanated from the Zimbabwean government's decision to start a land and agrarian reform programme, which meant landowners would lose their land without compensation.[140] The only way those who had been deprived of their land could seek reparation was to bring their case before the tribunal, as the Zimbabwean courts had been stripped of their jurisdiction over land disputes.[141] The tribunal had decided that Zimbabwe had contravened the treaty and was to abide by the order of the tribunal, which it declined to do.[142] Owing to this failure of the Zimbabwean government,

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[134] *Law Society v President of RSA* (note 131 above) para 7.

[135] Treaty of the Southern African Development Community (1993) 32 *ILM* 116.

[136] Ibid art 4(c).

[137] Ibid art 14.

[138] *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 2.

[139] *Law Society of South Africa v President of the Republic of South Africa* [2018] 2 All SA 806 (GP) para 1.

[140] *Law Society v President of RSA* (note 131 above) para 10.

[141] Ibid para 11.

[142] Ibid para 13.

the SADC Summit, of which the South African President was a part, had to make a binding decision on the matter.[143]

However, instead of facilitating the enforcement of the aggrieved persons' human rights, the Summit withdrew the tribunal's jurisdiction, through the 2014 Protocol, to hear matters brought before it by individuals.[144] This meant that member states would not be held accountable for their human rights violations. The High Court declared unconstitutional the conduct of the President in relation to his involvement in the 2014 Protocol.[145]

The Constitutional Court arrived at the same conclusion as the High Court, that the President's decision to participate in and sign the Protocol was constitutionally invalid, unlawful and irrational.[146] In reaching its decision, the court made reference to South Africa's customary international law obligations under the Vienna Convention on the Law of Treaties[147] and South Africa's international obligations under the SADC Treaty.

The President was party to depriving South African citizens and citizens of other member states access to justice at a regional level relating to their disputes involving human rights violations. The advancement of human rights and freedoms is a fundamental value of South Africa's democracy.[148] When signing the Protocol, the President acted in a manner deemed inconsistent with the spirit, purport and object of the Bill of Rights. Depriving people of their right to access the tribunal to seek justice is a violation of human rights.[149] When interpreting the right to access courts in the Bill of Rights,[150] the court took a broad approach, ruling that the right to access courts and tribunals was not limited to those situated in South Africa.[151] South Africa agreed to allow individuals the right of access the tribunal when it acceded to the treaty. The

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[143] *Law Society v President of RSA* (note 131 above) para 13

[144] Ibid.

[145] Ibid para 72.

[146] *Law Society v President of RSA* (note 139 above) para 93.

[147] Vienna Convention on the Law of Treaties (note 1 above) art 18 & art 24.

[148] *Law Society v President of RSA* (note 131 above) para 85.

[149] Ibid.

[150] s 34 of the Constitution.

[151] *Law Society v President of RSA* (note 131 above) para 84.

Law Society case confirms that the right to access to justice under section 34 of the Constitution is to be interpreted in line with international human rights law. [152]

Both the *Makwanyane case*[153] and *Law Society case*[154] demonstrate the vast scope of section 39(1)(b) to include both binding and non-binding international human rights law. These two cases have revealed that courts should not only limit section 39(1)(b) to international human rights law, but should also include the work of United Nations human rights mechanisms and regional human rights mechanisms.[155] The findings made by the United Nations Human Rights Council, the Inter-American Commission on Human Rights, and the African Commission on Human and People's Rights have assisted immensely in the promotion and protection of international human rights.[156]

The South African courts have acknowledged their willingness to be guided by international human rights norms when interpreting the Bill of Rights. The Constitution displays an unwavering commitment to aligning South African law with international human rights law. The South African government has also expressed its commitment to taking practical steps to ensure the realisation of international human rights for all people, not only its citizens.[157] South Africa's devotion to international human rights must remain at the forefront of all decisions taken by the national legislature and the national executive.

3. Conclusion, findings and recommendations

3.1 Conclusion

This study demonstrated that while South Africa has been significantly more receptive to international law since 1994, and has now given international law its rightful place in the national legal order, challenges remain relating to incorporating international law into the national legal system. This study has shown that these challenges often revolve around the incorporation, withdrawal, and classification of international agreements. This research report

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[152] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 8.

[153] *S v Makwanyane* (note 79 above).

[154] *Law Society v President of RSA* (note 131 above).

[155] *S v Makwanyane* (note 79 above) para 35.

[156] I Bantekas & L Oette International Human Rights Law and Practice 3 ed (2020) 162-166, 243-286.

[157] 'South Africa's Candidature to the United Nations Human Rights Council' <http://www.dirco.gov.za/docs/2022/unhrccandidature2023-2025.pdf> [2022].

investigated the challenges surrounding the incorporation, withdrawal, and classification of international agreements, and proffered solutions to ensure a coherent and seamless adaption of international norms in the South African national legal system.

3.2 Findings

The central focus of this research report was to examine the effectiveness of the constitutional framework for incorporating international agreements into South African municipal law. Following an extensive investigation into the constitutional framework for the incorporation of international agreements into national law, various findings were made.

This research report focused primarily on section 231 of the Constitution, which concerns the incorporation of international agreements into South African national law. In terms of section 231(2) of the Constitution, this report determined that international agreements ratified by Parliament but not incorporated into national law can only establish binding obligations for South Africa at an international level and cannot require any domestic obligations. The study found that ratified international agreements can only enforce domestic obligations once they have been incorporated into national law. This presents a massive challenge within the context of international agreements that South Africa has ratified but failed to domesticate into national law.

This research report analysed the classification of international agreements of a technical, administrative or executive nature, as well as the timeframe before which such agreements are required to be tabled before Parliament. Regarding the classification of international agreements, this report concluded that only those agreements that are routine and do not require the specialised attention of Parliament can be classified as administrative. Owing to the absence of a specified time limit for tabling administrative agreements before Parliament, this research report established that the national executive has exploited this lack of clarity by taking decades to table agreements before Parliament, in the process depriving Parliament of its oversight rule. To avoid this type of abuse, the research report highlighted the need for a set timeframe to table international agreements before Parliament.

This research report examined the position of self-executing international agreements in the South African legal context. It found that despite South African academics' hesitancy towards the concept of the self-executing international agreements, some academics recognise that including a self-executing provision allows an international agreement requiring immediate

implementation to forego the onerous process of incorporation into national law. While self-executing international agreements have received limited exposure in the South African context, the courts should be more receptive towards such agreements.

This report also investigated the position the South African legal system takes when withdrawing from international agreements. Given the Constitution's silence regarding withdrawing from international agreements, this report investigated the issue. It concluded that the withdrawal process is a mirror image of the process of entering into international agreements—the national executive is not permitted to withdraw from any international agreement that is not of a technical, executive or administrative nature without prior parliamentary approval.

Penultimately, this research report considered the position of international agreements ratified by Parliament but not incorporated into South African domestic law. It concluded that although international agreements that have only been ratified are not law in the country, such agreements can be used to interpret national legislation while also serving as a mechanism to test the validity of national legislation. This is contrary to the belief that an international agreement can only influence domestic law once such agreements have been incorporated into national law.

Finally, this research report examined the standing of international human rights agreements in the South African legal system. The importance of international human rights agreements in South African law was demonstrated through the finding that these agreements do not need to be ratified by Parliament, nor do they need to be incorporated into domestic law to be utilised as an interpretative mechanism. All rights in the Bill of Rights are capable of being interpreted through the lens of international agreements, irrespective of whether South Africa is party to such agreements.

3.3 Recommendations

It is vital for the national executive to distinguish accurately between agreements of a technical, executive or administrative nature and agreements requiring parliamentary approval. To obviate the subversion of the parliamentary process, very few international agreements should be viewed as routine. Parliament should approve most international agreements entered into by the national executive, particularly those that have a significant impact on the public, including significant implications for the national treasury. This will prevent irregularities regarding the

content of international agreements and ensure that the South African public, through its duly elected representatives, is involved in the law-making process, including international norms impacting the public.

A time limit should be set to avoid any abuse by the national executive in delaying the tabling of international agreements before Parliament. Unless a specified time limit is confirmed, international agreements could be in operation for years without any form of parliamentary oversight. Such a situation negates the separation of powers principle, which is crucial for checks and balances in the governance of the country. To prevent any unscrupulous conduct by the national executive, a maximum of six months should be allowed for tabling international agreements before Parliament.

The painstakingly long process of incorporating an international agreement into national law often obscures the purpose of an international agreement. Many international agreements require expeditious enactment to fulfil their objective, which could be rendered less effective should there be inordinate delays. Importantly, the state needs to implement a new strategy to ensure that it does not take a decade or more to incorporate international agreements into national law. Establishing a system that ranks the importance and urgency of the incorporation of international agreements will ensure that those agreements requiring expeditious enactment are attended to timeously.

Finally, courts need to be more receptive towards the concept of self-executing international agreements by providing interpretative guidance. Utilising this constitutional provision will ensure timeous implementation of certain international norms, especially in the human rights arena, and given the state's reticence to enact legislation implementing international agreements.

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