Justice Sachs and the use of international law by the Constitutional Court: Equity or expediency?

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It is trite that before the negotiation of the Interim Constitution,[1] and more particularly, the Constitution of the Republic of South Africa,[2] international law had little practical impact in South African law in general, or in the courts.[3] Such principles as were considered and occasionally applied by the courts, were those of English law,[4] or were apologist attempts by a failing – and largely hostile – government.[5] The courts' application of international law was subject to so wide a range of municipal exceptions that it was largely unrecognisable as an expression of the views of the international community which it was intended to reflect and serve.[6] In legal training too, international law occupied a place on the periphery which, in turn, meant that at the bar, the side bar, and indeed on the bench, knowledge of this branch of the law was limited and idiosyncratic in the main.

Although it was to be expected that international law would play a role in the new constitutional dispensation, the eventual extent of this role came as a

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[1]The Constitution of the Republic of South Africa Act 200 of 1993, the 'Interim Constitution'.

[2]Originally known as The Republic of South Africa Constitution Act 108 of 1996, it came into operation on 1996-02-14. It was subsequently 'renamed' as the Constitution of the Republic of South Africa. For the sake of convenience, the two constitutions will be distinguished by their dates.

[3]Dugard *International law: A South African perspective* (2005) (3rd ed); Botha 'The coming of age of international law in South African law' (1992/3) 18 *SAYIL* 36.

[4]Booysen 'Volkereg en sy verhouding tot die Suid-Afrikaanse reg'; Dugard (n 3) ch 3.

[5]One thinks, in particular, of the endless reliance on art 2(7) of the UN Charter long after it had lost any provenance in international law.

[6]Booysen (n 4) above; Dugard (n 3) above. Within the South African context of the time, this of course applied only to customary international law as it was clearly settled that treaties had to be legislatively transformed to find any application in municipal law. The application of customary law, although deceptively liberal at first glance, was subject, inter alia, to contrary legislation, to the invidious 'act of state' doctrine, to the common law, and to precedent. In practical terms, therefore, customary law too was virtually never applied.

surprise to many – not least those who regarded themselves as international lawyers.[7] With this sudden 'international law friendly'[8] dispensation, and South Africa's virtually instant about-turn in its relations with the 'outside world' and particularly with Africa which resulted in the conclusion of a myriad of treaties,[9] came the country's first court designed specifically as the specialist court for matters constitutional.[10]

It was a disappointment to many – and remains to my mind an anomaly that has not yet been fully addressed – that the first bench of the Constitutional Court included no traditional international law specialist.[11] Indeed, Justice Sachs who took up his place on this first bench is, given his life experience and certain of his work while in exile, the closest we came to an internationalist. He was someone who had, in a sense, 'lived' international law through his work in the liberation struggle.[12] However, as I am sure Justice Sachs would be the first to acknowledge, this was largely in a specialised aspect of international law, namely international human rights law. But there is more to international law than human rights, vital though this branch may be. And this the Constitution acknowledges with the 'hard law' provisions of, most notably, section 231 (treaty negotiation, conclusion and municipal application) and section 232 (the role of customary international law), alongside the 'softer' interpretation provisions in section 39, and possibly section 233.[13]

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[7]See eg, Fergusson-Brown 'Teaching public international law in South Africa' (1994) *CILSA* 52; Booysen 'International law as a university course' (1996) 21 *SAYIL* 147, and Botha 'Teaching international law in South Africa ten years into democracy' (2004) 29 *SAYIL* 244.

[8]In a Constitution running to some 243 sections, international law features heavily in the preamble and in no fewer than eleven separate sections – far and away the most 'featured' single aspect in the Constitution. See too Strydom 'The international law "openness" of the South African Constitution' in Carpenter (ed) *Suprema lex: Essays on the Constitution presented to Marinus Wiechers* (1998).

[9]In the period of 1989-90 during which there were murmurings of change but no concrete developments, the country concluded 16 bi-treaties, 9 of which were with the so-called 'independent states' created by South Africa which carried no international recognition. There were 5 multilateral treaties, all with neighbouring states and addressing the essential bread-and-butter issues such as the Southern African Customs Union, where states had little choice but to cooperate with their 'dominant neighbour' – see 'Treaties and Literature' (1989/90) 15 *SAYIL* 298. By contrast, in 2009, no fewer than 53 bi-lateral and 3 multilateral treaties were signed, ratified or acceded to – see 'Treaties and Literature' (2009) 34 *SAYIL* 304.

[10]Established in 1994, the court commenced with its work in February 1995.

[11]Professor John Dugard, South Africa's foremost internationalist, although among the candidates, failed to 'make the cut'. Judge Richard Goldstone who has, since retiring from the court, gone on to become an internationalist – albeit controversial – had shown no particular interest in international law at the time of his appointment.

[12]For a personal account of Justice Sachs's life and work in exile see *The strange alchemy of life and law* (2009).

[13]Section 233 is headed 'Application of international law', and reads: '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'. Although a

So, what did we have at the dawn of our new democracy, and what was facing Justice Sachs as he took his seat on the Constitutional Court bench to decide the fate of Makwanyane and his co-applicants languishing on death row. The judges were faced with a new Constitution, in what was essentially a new country, with a new set of judges, required to apply – or at least consider – what was for many a new and foreign 'international law regime'.[14] For all intents and purposes a *tabula rasa* or blank canvas, waiting for the first brush strokes of South Africa's success or failure as a democratic state.[15]

An assessment of the approach of the court, or of a particular judge for that matter, can be made only through its, or in this case his, judgments. Within the scope of an article of this length, this is well-nigh impossible and one's choice must therefore be somewhat arbitrary – if not downright random. In considering Justice Sachs and international law, this becomes all the more problematic in that he has, surprisingly, delivered the court's judgment in only one of the 'big international law' cases with which the court has had to deal. And this is a case that stumbled over the finishing line barely two months ago! In the others, Justice Sachs has either concurred in the judgment of the court, or delivered far briefer separate judgments.[16]

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number of commentators have interpreted this provision as no more than an embodiment of the presumption that the state does not intend to violate its international law obligations (see Strydom n 8 above), and this element is certainly there, the provision is far more insidious and far-reaching. There are several clear indications in the wording of the section that it is far 'stronger' than an interpretation 'option' as in s 39 of the Bill of Rights. Its opening reference to 'any' legislation, immediately broadens the scope of international law in our municipal law. Further by providing that a court must 'prefer' the interpretation which is supported by international law, the legislature has in fact mandated the application of the 'international interpretation' in the application of all South African legislation. Significantly, s 39 requires that the courts need only 'consider' international law, while in s 233, it must be preferred. Practitioners appear reluctant to use this section, and the courts have not as yet referred to it in any significant way. See the discussion of the *Azapo* case below.

[14]This is in fact acknowledged by Justice Sachs in *S v Mhlungu* 1995 7 BCLR 793 (1995 3 SA 867) (CC) when he states:

> We are a new court, established in a new way, to deal with a new Constitution. We should not rush to lay down sweeping and inflexible rules governing our mode of analysis. We need to develop an appropriately South African way of dealing with our Constitution, one that starts with the Constitution itself, acknowledges the way it came into being, its language, spirit, style and inner logic, the interests it protects and the painful experiences it guards against, its place in the evolution of our country, our society and our legal system, and its existence as part of a global development of constitutionalism and human rights.

[15]I must here be forgiven a flight of whimsy in that the canvas analogy is not without significance to Justice Sachs and his contribution to the court. One of his duties as 'founding member' of the court was the decoration of the court. This he did – on a shoestring – by assembling the formidable and highly symbolic collection of South African art which can be seen in the court precinct. The most poignant work in the collection is Judith Mason's 'Blue Dress' and it forms the cover for Justice Sachs's work in (n 12).

[16]*Harksen v President RSA* 2000 5 BCLR 478; 2000 2 SA 825 (CC) which involved an interpretation of section 231 of the Constitution dealing with the negotiation, conclusion, ratification and municipal application of treaties, *Mohamed v President RSA* 2001 7 BCLR 685; 2001 3 SA 893 (CC) which dealt with disguised extradition, deportation and delivery of an individual to a state which practises

As appears from the title of this presentation, I will be looking at Justice Sachs's work – and more broadly, that of the Constitutional Court – from two angles in an attempt to identify (if not resolve) certain anomalies which have concerned me over the years. First, as an exercise in equity – that which is 'fair' – a concept which in 'hard law' terms has traditionally not formed a valid basis for judgments in South African municipal courts. It is in this area, clearly, that the 'free-flowing', non-legalistic approach which is the persona of Justice Sachs emerges most clearly in the human rights debate.

Secondly, and more critically, is the question of expediency. The judge and the court decide in a certain way, either because it suits the country (ruling party?) at that point in our history, or simply because it makes the court's task easier. In either event, but more so in my view in the latter, the court has been highly circumspect in examining international law.

Inevitably, we must start our journey at the very beginning with *S v Makwanyane*[17] in which Judge President Chaskalson set the precedent for the role of international law as an interpretive tool for the rights in chapter 3 of the then (1993) Constitution. The court held:

> In the context of section 35(1)[18] public international law would include non-binding as well as binding law … [which]… provide a framework within which Chapter 3[19] can be evaluated and understood.[20]

Authority for this statement is given as John Dugard, and at this reference Dugard is discussing article 38(1) of the Statute of the International Court of Justice. Thus binding and non-binding international law is therefore made up of treaties[21] (both those specifically binding on South Africa and others), customary international law,[22] general principles of law,[23] and judicial decisions and legal opinion.[24] The judge further cautioned, in this context, that:

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the death penalty, *Van Zyl v Government of the RSA* 2005 11 BCLR 1106 (T)*; Kaunda v President RSA* 2004 10 BCLR 1009; 2005 4 SA 235) (CC) and *Von Abo v President of the Republic of South Africa* 2009 10 BCLR 1052 (CC) all of which dealt with diplomatic protection; *Azanian Peoples Organisation (AZAPO) v President of the RSA* 1996 8 BCLR 1015 (1996 4 SA 672) (CC) which dealt with impunity for gross violation of human rights under the apartheid regime.

[17]*S v Makwanyane* 1995 6 BCLR 665 (CC); 1995 3 SA 391 (CC).

[18]*Makwanyane* was decided under the 1993 Constitution where s 39 of the 1996 Constitution was s 35 – in all material aspects the two constitutions coincide on this section.

[19]The Bill of Rights, ch 2, under the 1996 Constitution.

[20]At 686 D-F.

[21]Article 38(1)(a) of the Statute: 'international conventions, whether general or particular, establishing rules expressly recognised by the contesting states'.

[22]Article 38(1)(b) of the Statute: 'international custom, as evidence of a general practice accepted as law'.

[23]The Statute in fact speaks of 'general principles of law "recognised by civilised nations"'; the latter part of this 'definition', having proved controversial over the years, is generally omitted.

[24]Article 38(1)(d) reads: 'subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law'.

> We can derive assistance from public international law … but we are in no way bound to follow it.[25]

A fairly orthodox interpretation, therefore, of how international law should be interpreted and applied in the context of the current section 39 of the Constitution. This has become the '*Makwanyane* mantra' repeated with effect – despite its technical inaccuracies which emerge from an holistic reading of the Constitution[26] – in virtually every consideration of human rights in international law since.

Justice Sachs, as did each of the eleven judges, delivered a separate but concurring judgment, and it is from this that we must attempt to distil his approach to international law in the court's first judgment. In *Makwanyane*, the judge's allusions to international law are fleeting. We find that '[r]eference in the Constitution to public international law [sections 35(1) and 231] underlies our common adherence to internationally accepted principles'[27] but when interpreting section 35 'we need an amplitude of vision'.[28] This, with due respect, does not say much on its own, and is in any event embedded in a discourse on indigenous law. It does provide, however, the first glimmerings of what was to come later … that our law is made up of many and varied sources, none subordinate to the other, and that the common law (and so much of what has traditionally been private law and/or mercantile law), indigenous law, and indeed international law, together form the essential context in which the Constitution is to be applied.[29]

In the next case, *S v Mhlungu*,[30] the accused were charged with murder and other crimes committed in April 1993. Between the serving of the initial indictment in March 1994 and the correct indictment in English in May 1994, the interim Constitution came into operation. The question before the court was how to interpret section 241(8) of the Constitution which reads:

> (8) All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this

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[25]Paragraph 39.

[26]As indicated by Olivier in Olivier and Botha 'Ten years of international law in the South African courts: Reviewing the past and assessing the future' (2004) 29 *SAYIL* 42 at 74, this is in fact an over simplification of the situation. If s 39 is read with ss 231 and 232, it is clear that when the court – even in a s 39 investigation – is faced with an incorporated treaty, or one that is self-executing, it must apply and not merely consider the treaty. Likewise, where there is a rule of customary international law which does not conflict with the Constitution or an Act of parliament, it too is law and must be applied.

[27]Paragraph 18.

[28]Paragraph 19.

[29]For an instance where traditional private law delictual liability was interpreted in the light of international law see the judgment by Ackerman J in *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995; 2001 4 SA 938 (CC).

[30]*S v Mhlungu* (n 14) above.

> Constitution had not been passed: Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such commencement such proceedings shall be brought before the court having jurisdiction under this Constitution.

A classic procedural provision, therefore. However, when reading Sachs's separate judgment, we find ourselves a far cry from the '*Makwanyane* mantra'. Justice Sachs declares:

> Instead of seeing Chapter 3 [and we must recall that this includes peremptory reference to international law] as a contextual aid to [the] interpretation [of section 241(8) of the Constitution in this case], I regard it as an equal part of the text to be interpreted[31] … [and further] …
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> A textual construction which harmonises different provisions within the overall design of the Constitution is generally to be preferred to one which, however coherent within its own terms, produces disharmony.[32]

The case also saw direct reference to the Vienna Convention on the Law of Treaties,[33] while the effect of the European Union on the interpretation of treaties is supported by reference to a leading English case on international law.[34]

Lastly, in this section, mention must be made of *Kaunda v President RSA*,[35] indeed one of the leading cases involving international law decided by the Constitutional Court. Here a group of South African mercenaries arrested in Zimbabwe en route for Equatorial Guinea where they were reportedly to carry out a coup to topple the government of that country, attempted to persuade the court to issue a *mandamus* against the South African government compelling it to act diplomatically on their behalf to secure their return to South Africa and protect their human rights. In a brief separate judgment, Justice Sachs finally comes out and says it:

> The values of our Constitution and the human rights principles enshrined in international law are mutually reinforcing, interrelated and, where they overlap, indivisible. It would be a strange interpretation of our Constitution that suggested that the adherence by the government in any of its activities to the foundational norms that paved the way to its creation was merely an option and not a duty.[36]

This phase in Justice Sachs's work in the Constitutional Court is what I choose to term the 'equity' in the title to this paper. If one compares the hesitant first encounter with international norms in *Makwanyane* – a setting of the artist's palette to return to our earlier 'Sachs-ian' metaphor – with the immediately preceding passage from *Kaunda* – a striking portrait emerges in which international law is no

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[31]Paragraph 106.
[32]Paragraph 108.
[33]Paragraph 119 n 30.
[34]Paragraph 122 n 20.
[35](N 16). For a full analysis of this case see Olivier 'Diplomatic protection – right or privilege' (2005) 30 *SAYIL* 238.
[36]Paragraph 74.

longer superimposed on the canvas of our law, but is woven into its very fabric. International law is no longer a tool, it is the essence of the human rights principles in the Constitution, which one must remember, extend far beyond the parameters of the Bill of Rights to permeate, through the founding principles of the preamble,[37] the entire tenor of the democracy the Constitution creates. International law is indeed no longer a tool – it is the foundation on which our constitutional endeavour must rest – the 'universally accepted standard' against which our domestic law must stand or fall. The option of considering international law – so long approached mechanistically – is no longer an option, but a duty to ensure that the law we apply is that which is fair and equitable to all levels of society, and indeed reflects what is fair for international society as well. In the liberal and creative strokes Justice Sachs has brought to the human rights debate in the South African courts, we see the work of the artist – the philosophical thinker on these things. Its value is without question.

However, as I indicated at the outset, there is more to international law – and the international law provisions in the Constitution and before the Constitutional Court – than the broad strokes, or even the fibre, of human rights, essential though they may be to the overall picture. There are also the individual figures which need international law to give them clear and legally valid definition within our municipal law. At some point, the ephemeral shading must give way to the hard outline, and concrete terms must be given concrete expression.

It is here, through the *Azapos,* the *Harksens,* and the *Quaglianis,* that hard international law comes into play and demands concrete answers: What is an international agreement? What is the status of the Vienna Convention on the Law of Treaties? Can a victim be deprived of his civil claim to compensation from the perpetrator of gross violations of human rights under whom he has suffered? What is a self-executing treaty? It is this aspect of international law in which the court as a whole, and Justice Sachs most recently, has shown a curious reticence in engaging with international law issues thrown up by the Constitution, but falling outside of the socio-economic rights context (in their application if not always in their spirit). It is here where I feel that equity has given way to expediency, in both instances which will be considered, at a cost to the applicants in the cases. The two cases I will be considering briefly are *Azapo* where, as indicated in the previous section, Justice Sachs did not deliver the judgment of the court, but in which he acquiesced; and *Quagliani* in which, in the nick of time before his retirement and this Conference, Justice Sachs delivered the judgment of the court in an international law case of considerable importance to our jurisprudence as a whole.

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[37]The preamble to the 1996 Constitution, provides in part: 'We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'.

Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa[38]

Azapo, in particular, although an early case, I find difficult to reconcile with the unitary or monistic approach to international law identified above which is apparently intended to inform all aspects of rights. Indeed, *Azapo* was the quintessential 'South African rights' case. We had suppressed masses subjected to apartheid atrocities, we had what has come to be seen as a model 'guts-spilling-catharsis' in the form of the Truth and Reconciliation Commission – all the ingredients of a case calling out for fairness and justice for a previously oppressed and violated people.

But, at the very heart of the case, we find the Promotion of National Unity and Reconciliation Act 34 of 1995 (the Act), a piece of transitional legislation adopted to give expression to the post-amble of the 1993 Constitution.[39] The Act states in its preamble, inter alia:

> … SINCE it is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future;
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> AND SINCE the Constitution states that the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society;

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[38](N 16). The case is fully analysed by Motala 'The Constitutional Court's approach to international law and its method of interpretation in the "*Amnesty decision*": Intellectual honesty or political expediency?' (1996) 21 *SAYIL* 29; and by the same author in 'Promotion of National Security and Reconciliation Act, the Constitution and international law' (1995) 28 *CILSA* 338.

[39]'National Unity and Reconciliation: This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.'

> AND SINCE the Constitution states that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization;
>
> AND SINCE the Constitution states that in order to advance such reconciliation and reconstruction amnesty shall be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past ...

In achieving these lofty goals, however, the Act continues in section 20(7)(a) to provide:

> No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence.

The constitutionality of the Act was challenged in that it deprived, through section 20(7)(a) cited above, the victims of gross human rights violations of a civil or criminal remedy and, for our purposes, the provision violated the customary international law duty resting on the state to prosecute gross human rights violations. The case is notable in its highly restricted interpretation and use of international law, in stark contrast to the pattern we saw above. The issue of whether the 1949 Geneva Conventions and the 1977 Protocols to these Conventions should not have been regarded as binding customary law, fell by the wayside to the strict interpretation based on their not having been incorporated under article 231(3) – of the 1993 Constitution.

In a judgment in which Justice Sachs concurred, Mohamed J stated:

> International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only to the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law.[40]

No consideration was given to the possibility that as a codification of customary international law, the Geneva Conventions would in fact be binding on South Africa. The judge was adamant that as the Geneva Conventions had, as treaties, not been incorporated, they were not binding. Although an argument can possibly be made for this approach in strictly literalist terms, in a case so suffused with the most basic of human rights from the perspective of the majority of the South African population, it seems strangely out of place and Justice Sachs's acquiescence in the judgment, unexpected in the light of his general approach to human rights.[41]

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[40]Paragraph 26 of the judgment. The judge is here clearly articulating no more than the presumption of statutory interpretation that the state does not intend to violate its international obligations.

[41]Of course the provisions now embodied in s 233 of the 1996 Constitution would have precluded this decision had the case been heard under the 1996 Constitution. As the court would have been

The solution of course, lies in the fact that at that juncture in the history of South Africa's liberation struggle and its stumbling steps to democracy and stability, it would simply have been too risky to have found otherwise and still have hoped for any meaning to emerge from the truth and reconciliation process. This approach, although clearly expedient, can possibly be justified as a limitation to the rights of the masses as expressed in the Bill of Rights.

And this brings us to the final judgment I will consider, and which is also the sole decision in the current context where Justice Sachs delivered the judgment of the court. And the other judges ... they just nodded.

President of the RSA v Nello Quagliani; President of the RSA v Stephen Mark Van Rooyen and Laura Vanessa Brown; Steven William Goodwin v Director-General, Department of Justice and Constitutional Development [42]

More important for our purposes, is the *Quagliani* case, not only because it was delivered this year (2009), but also because it represents 'hard international law' and illustrates both the reticence I referred to above (in Justice Sachs's clear reluctance to engage with the concept of self-execution), and possibly is also an expedient judgment (in that a contrary finding – and only one of two was possible – would have meant that South Africa's extradition arrangements with some fourteen countries would be called into question which could, in turn, result in claims against the state for wrongful surrender, and open South Africa to the dubious status of a 'safe' extradition state[43]).

As with the majority of the international law cases that have served before the Constitutional Court, *Quagliani* involved extradition. In two cases, the first against Nello Quagliani (fraud), and the second against Mark van Rooyen and Vanessa Brown (a husband and wife team wanted in the United States for offering fake stem-cell treatment to critically ill patients), the United States requested extradition on the basis of the 1999 South Africa/United States extradition treaty. In a judgment where the two cases were heard together by consent, Preller J found in the North Gauteng

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compelled to 'prefer' – therefore apply – any interpretation of the Act which accorded with international law, over any other which did not. Section 20(7) clearly does not accord with international law.

[42][2009] ZACC 1.

[43]In the firing line here would be the extradition treaties signed with Algeria (2001), Argentina (2007), Australia (1998), Canada (1998), China (2001), Egypt (2001), India (2003), Iran (2004), Lesotho (2001), and Nigeria (2002). In addition, South Africa became party to the European Convention on Extradition in 2003, thereby terminating its extradition arrangements – largely inherited from Britain through the extension to South Africa as a British Colony – of early British treaties with all member states of the EU. This too would be in jeopardy. So too, would the SADC Protocol on Extradition which was signed in 2002 and entered into force in 2006 be under threat.

Division of the High Court,[44] that extradition treaties are not self-executing; that the treaty in question had not been incorporated as required by section 231(4) of the Constitution; and therefore, that the treaty in question could not be applied by a South African court and the extradition request could not go forward.[45]

The third case in this 'American Trilogy', *Goodwin,*[46] also served before the North Gauteng High Court. Stephen Goodwin (part of the infamous Fidentia scam), who had been arrested in the United States at South Africa's request and was awaiting extradition to South Africa, was sought by South Africa on the basis of the same 1999 treaty. Here Ebersohn AJ came to the opposite conclusion in a somewhat confusing (and confused) judgment. Although holding no more than that extradition treaties 'may even be said to be self-executing',[47] he found that the treaty had been 'incorporated' by the terms of the Extradition Act[48] (with the Criminal Procedure Act thrown in for good measure). Extradition proceedings could therefore proceed.

It is clear from this that the Constitutional Court was faced with two diametrically conflicting judgments from a single division of the High Court delivered within weeks of one another. This alone, one would imagine, should justify a careful consideration of the legal principles involved.

All three cases went to the Constitutional Court and a single judgment, *Quagliani,* was delivered by Justice Sachs, with all the judges of the court concurring.[49] There are three principal arguments in the application:

- That the treaty was not properly concluded on the basis of section 231 of the Constitution read with section 2(1)(a) of the Extradition Act 67 of 1962;
- That mandates required by the voting representatives in the National Assembly and the National Council of Provinces in terms of section 231(2) of the Constitution were defective; and
- As the treaty had not been incorporated under section 231(4) of the Constitution, it was unenforceable in South African municipal law.

Justice Sachs's reasoning and findings on the first two questions do not bear on the theme of the current discussion. Therefore, they will not be considered

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[44]At that stage, still the Transvaal Provincial Division of the High Court, the name of the court has been changed to the North Gauteng Division by the Renaming of the High Courts Act 30 of 2008 Proclamation R13 of 2009 *GG* 31948 of 2009-02-23.

[45]*Nello Quagliani v President of the RSA and 6 Others Case 28214/06 TPD 18.4.2008;* and *Steven Mark Van Rooyen and Laura Brown v President of the RSA and 7 Others Case* 959/04 TPD 18.4.2008 (unreported). For a full discussion of this case see Ferreira and Scholtz 'The interpretation of section 231: A lost ball in the high weeds' (2008) *CILSA* 41 and Botha 'Extradition, self-execution and the South African Constitution: A non-event' (2008) 33 *SAYIL* 253.

[46]*Steven William Goodwin v Director-General Dept of Justice and Constitutional Development Case* 21142/08 TPD 23.6.2008 (unreported) and see Ferreira and Scholtz and Botha (n 45).

[47]Paragraph 13 of the judgment.

[48]Act 67 of 1962.

[49]For a full discussion of this case see Botha 'Rewriting the Constitution: The "strange alchemy" of Justice Sachs, indeed!' (2009) 34 *SAYIL* 253.

further in the present context, save for one important point. Justice Sachs was prepared (and correctly so) to find that the provisions of section 2(1)(a) of the Extradition Act[50] should be read against the *necessarily overriding* provisions of section 231(1) of the supreme Constitution which places the conclusion of treaties in the hands of the national executive. In this situation it was held that the Constitution prevails and that the treaty had been validly concluded.[51]

However, it is in answering the third question posed – ie in his treatment of section 231(4) of the Constitution – that both judicial reticence in confronting international law issues, and expediency in deciding cases may, it is submitted, be discerned.

Section 231(4), under the general rubric of 'International agreements', provides for the municipal application of treaties concluded by the national executive (in terms of section 231(1)), and binding on South Africa internationally by approval by resolution in both the National Assembly and the National Council of Provinces (section 231(2)). The section reads:

> 231(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.

First, as will emerge presently, I have some difficulty with the judge's decision that it was 'unnecessary to consider the question whether the agreement should be regarded as self-executing'.[52] This, in my view, is indicative of the Constitutional Court again[53] shying away from a consideration of a vital international law concept[54] which, however misguided its introduction may have been,[55] is part of the

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[50]The section reads that the President concludes extradition treaties, and the argument on behalf of the applicants was that as the treaty had been concluded by the Minister of Justice on the strength of Presidential authority, the treaty had not been validly concluded. The treaty, which was concluded to replace the 1947 extradition treaty between the United States and the then Union of South Africa, was negotiated in 1998; the Minister of Justice was requested to obtain presidential approval for the treaty and for the Minister of Justice to sign it; this permission was granted by way of Presidential Minute in 1999; the Minister of Justice signed the treaty on South Africa's behalf in terms of this permission in 1999; in 2001, the acting Minister of Foreign Affairs signed the instrument of ratification bringing the treaty into operation; also, in 2001, the Minister of Justice published notice of the conclusion of the treaty – attaching a copy – under s 2(3)*ter* of the Extradition Act.

[51]Paragraph 22 and see (n 49).

[52]Paragraph 37.

[53]See Southwood 'Constitutionality of the extradition process' (2000) 25 *SAYIL* 260.

[54]There are of course those who would argue that this is a municipal law issue and not one of international law at all. Furthermore, it is an American municipal law issue. This cannot be accepted despite the fact that it is indeed municipal law which must provide for the application of the concept of self-execution, the nature of the treaty concerned, falls squarely within the international sphere.

[55]Van der Vyver 'Universal jurisdiction in international criminal law' (1998) 23 *SAYIL* 107 describes it as 'entirely nonsensical'; Dugard *International law: A South African perspective* (2005) (3rd ed) 62;

Constitution and is in urgent need of authoritative pronouncement – as can be seen from the conflicting decisions with which the court was faced. Self-execution, although raised here in the context of extradition, is of course potentially applicable to all treaties to which South Africa is or becomes a party.

Analysing the relationship between section 231(4) of the Constitution and the Extradition Act which, as the judge pointed out, provides the framework for according municipal application to extradition treaties, he again emphasised that he saw no need to discuss self-executing treaties.[56] On my reading of the judgment this is based largely on two considerations. First, the reciprocal basis of extradition treaties under the Extradition Act – and probably under extradition law in general, although here it must be acknowledged that a once-off extradition (though not based on treaty) is of course possible in our law – but this is a separate question. And secondly, on the basis of section 2(3)(a) of the Extradition Act, which provides that extradition agreements will be of no force and effect until agreed to by parliament.

Sachs correctly indicates that once agreed to by parliament, the treaty embodies 'a binding obligation of international law'.[57] In other words, the requirements of section 231(1) and (2) will have been met, and there will therefore be reciprocal rights and duties as required by the Act. The fact that due to a technical problem in South Africa (if one can term the domestication of treaties a technical problem), South Africa cannot for the time being extradite to the United States as the operation of the Extradition Act is required for this process, does not detract from the reciprocal undertaking although it may raise other questions of treaty law. There is, however, nothing to stop South Africa from requesting extradition from the United States as this is done on the international level without engaging the South African Extradition Act. So the extradition of *Goodwin* could go ahead – as was recognised by the United States when Goodwin attempted to block his extradition in a United States' court.[58] The United States clearly regarded the treaty as binding and effective – even as an exercise in one-way traffic. Basically, the court advised Goodwin to fight his battles with South African municipal law in his own forum – which is what he is now doing – and obliquely advised South Africa to get its house in order.

The key problem here, is what exactly is intended by section 2(3)(a) of the Extradition Act. The section reads under the general heading of 'Extradition agreements':

Strydom (n 8) 93, who describes the result of the introduction of self-execution into our law as 'somewhat farcical'; Botha in Hollis, Blakeslee and Ederington (eds) *National treaty law and practice* (2005) 581.

[56]Paragraph 37.

[57]Paragraph 42.

[58]'If Respondent (Goodwin) has a constitutional challenge to the South African Government's interpretation of its laws, it should raise that challenge in a South African court, not here' – cited at para 16 of the Ebersohn judgment in *Goodwin* (n 46) above.

(3) No such agreement or designation or any amendment thereof, or revocation of the designation, shall be of any force or effect –
(a) until the ratification of, or accession to, or amendment or revocation of such agreement or designation has been agreed to by Parliament.'

This section was inserted into the Extradition Act in 1996,[59] at a time when South Africa was still under the provenance of the 1993 Constitution. It represents one of those rare occasions where the Department of Justice and Constitutional Development managed to 'jump the gun' and amend the Extradition Act to bring it in line with the incorporation provisions in the 1993 Constitution. This provision reads:

231 Continuation of international agreements and status of international law
(1) All rights and obligations under international agreements which immediately before the commencement of this Constitution were vested in or binding on the Republic within the meaning of the previous Constitution, shall be vested in or binding on the Republic under this Constitution, unless provided otherwise by an Act of Parliament.
(2) Parliament shall, subject to this Constitution, be competent to agree to the ratification of or accession to an international agreement negotiated and signed in terms of section 82(1)(i).
(3) Where Parliament agrees to the ratification of or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution.
(4) The rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic.

This anomaly was pointed out by various authors more than five years ago.[60] In short, the purpose of section 2(3)(a) is not to affect the binding force of the treaty on the international plane – as embodied currently in section 231(2) of the Constitution – but rather to effect its municipal application as currently reflected in section 231(4) of the Constitution, and previously embodied in section 231(3) of the Interim Constitution.

The 'expressly so provides' clause, in section 231 of the 1993 Constitution, was abandoned in the 1996 Constitution (how wisely, is a moot point) which sees a return to the 'legislate or die' approach from our common law background.[61] However, for reasons best known to themselves, the Constitution drafters added a rider to section 231(4) introducing the American concept of the 'self-executing treaty'.

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[59]Extradition Amendment Act 77 of 1996, s 2(d).
[60]See Dugard (n 55) above 214 and Botha (n 55).
[61]As articulated before, the adoption of either of the democratic Constitutions in *Pan American World Airlines Incorporated v SA Fire and Accident Insurance Company* Ltd 1965 3 SA 150 (A), and reiterated in the *Azapo* judgment (n 38) above.

Therefore the position at present is that in terms of the supreme law of the land, the Constitution – which must surely by any reasoning trump the Extradition Act, and this is in fact recognised by Sachs J in his dismissal of the applicants' arguments under section 231(1) and section 2 of the Extradition Act emphasised above – there are only two ways in which a treaty can become part of the law of the land:

- First, by legislative enactment as per the first 'part' of section 231(4) – and in the case under discussion, all conceded that this had not happened.
- Second, if the treaty is found to be self-executing it is law in South Africa without any incorporation/transformation.

There are simply no other options available. Had the judge not been so absolute in his conviction that there was no call for him to consider self-execution, one could perhaps have reasoned round the finding. This would have necessitated the court's analysing what exactly is intended by self-execution in the South African context. This could then have led to the conclusion that the standard, and to my mind meaningless, definition of a self-executing treaty as a treaty which requires no legislative enactment to be applied by the courts,[62] can mean that if there is legislation in place which allows for the application of the treaty, the treaty is self-executing and no incorporation/transformation is required. This is, however, not really an examination of the municipal application of the treaty, but rather of the nature of self-execution – and this Justice Sachs repeatedly found was unnecessary.

With this in mind, I simply cannot agree with Justice Sachs when he declares that an examination of self-execution was unnecessary in this case. It was in fact vital for the simple reason that if the treaty were found to be self-executing, Quagliani, Van Rooyen and Brown would have been on their way to prison (or at least to stand trial) in the United States. If the treaty were found not to be self-executing, here they would stay in a 'safe haven' until such time as the Act had been amended to reflect the current constitutional dispensation. Granted that Goodwin would, on the reasoning offered above, be on his way home to 'face the music' either way!

Conclusion

There can be little doubt that when it comes to human rights and their internationalisation within the context of the Bill of Rights and section 39 of the 1996 Constitution in particular, Justice Sachs has left a liberal and thoughtful patina on the canvas of South Africa's post-apartheid legal landscape. However, when it comes to the individual 'hard law' international provisions, the approach of the Constitutional Court as a whole – and that of Justice Sachs in his one opportunity to etch the detail of international law within the South African context

[62]The 'classic' – if meaningless – formulation originated in *Foster and Elam v Nielson* 27 US 2 PET 253 (1829).

– has been, at best, disappointing. The promise of a branch of law which the judge himself has classified as 'mutually reinforcing, interrelated and ... indivisible' remains shrouded in the general patina of human rights jurisprudence without emerging in the photo-realism demanded by one of the foundations of any legal system: the need for legal certainty and predictability.