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The interpretation, application and incorporation of international law into South Africa's domestic law by South African courts, within the framework of the South African Constitution

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Customary International Law is Law in South Africa — Now What? Analysing the Courts' Identification and Application of Customary International Law over the Last Decade*

1 INTRODUCTION

South Africa's Constitution provides that 'customary international law is law in the Republic' of South Africa, save when it conflicts with the Constitution or national legislation.¹ It is thus unsurprising that South African courts have, on occasion, been compelled to engage with customary international law. This chapter considers those engagements. The primary aim is to provide a descriptive account, which is systematic and analytical, of how South African courts approach the identification and application of customary international law and what role, if any, they perceived for themselves or play in the development of that law. The chapter focuses on the cases in the last decade (2011 to 2021) where South African courts have found it necessary to consider customary international law in some detail and in a way that was material to the Court's decision. I endeavour to identify how South African courts have engaged with customary international law, and I offer preliminary reflections on the process and some recommendations arising from this analysis.

The summary analysis, which is contained in Part 4, reveals, amongst other things, that South African courts and the parties that appear before them rely, almost exclusively, on subsidiary means for the identification of customary international law, with little attempt to engage with the primary evidence of general state practice and *opinio juris*, which are the constituent elements of customary international law. The South African courts' reliance on subsidiary means (such as scholarly writings) is not unusual,² and may partly be a consequence of the procedural and practical limitations faced by South African courts, which are discussed in Part 2.2. Thus, while the courts' reliance on subsidiary means is not itself necessarily of concern, it can be uncritical and limited in scope. This may be exacerbated by a general lack of consideration by South African courts of the ways in which they and the parties before them ought to approach (substantively and procedurally) the identification of customary international law within the South African legal context.

* This chapter was published as A Coutoudis, 'Customary international law is law in South Africa – now what? Analysing the courts' identification and application of customary international law over the last decade' (2023) 140 *SALJ* 53. The text remains as published, save that the abstract has been removed and minor editorial changes have been made primarily to ensure stylistic consistency within the thesis.

1 Section 232 of the Constitution of the Republic of South Africa, 1996 ('the Constitution').

2 See O Ammann, *Domestic Courts and the Interpretation of International Law: methods and means based on the Swiss Example* (2019) 280–281.

Given that the Constitution makes customary international law part of South Africa's domestic law, its courts cannot, and should not, shy away from it. The solution cannot be avoidance (a natural response when courts or parties are faced with uncertain, complex or unfamiliar areas of law).³ Instead, what is required is a more structured, rigorous, and certain approach to the identification and application of customary international law, within the range of what is legally appropriate and practically possible in South Africa's substantive and procedural law context. As we shall see in Part 5, this is necessary and valuable from a practical and a rule-of-law perspective (that is, it ensures legal credibility, certainty, predictability and coherence).⁴ This is why the International Law Commission ('ILC') has emphasised, in its detailed work on the identification of customary international law, that 'a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination as well as that of customary international law more broadly.'⁵ And, as the Constitutional Court has observed, when courts 'operate without map or navigation', they are 'vulnerable to whim or fancy',⁶ or, one might add, superficial engagement or even outright avoidance.⁷

2 CUSTOMARY INTERNATIONAL LAW AND SOUTH AFRICAN LAW

To analyse South African courts' approach to customary international law properly, it is necessary to begin by considering (a) the nature of customary international law and how it is identified and (b) how South African law treats customary international law.

2.1 Customary international law and its identification

Customary international law is one of the primary sources of international law. Its nature, formation and identification have engendered spirited and

3 See e.g. R Higgins, *Problems and Process: International Law and How We Use It* (1995) at 207.

4 As the Constitutional Court has observed 'uncertainty and unpredictability' are 'at variance with the rule of law, a linchpin of the Constitution': *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* 2022 (1) BCLR 46 (CC) para 118.

5 *Draft Conclusions on Identification of Customary International Law, with commentaries*, adopted by the International Law Commission ('ILC') at its seventieth session, (30 April-1 June and 2 July-10 August 2018), UN Doc A/73/10 (2018) 122. These are discussed in more detail in Part 2.

6 *Ruta v Minister of Home Affairs* 2019 (3) BCLR 383 (CC) para 22 (the court made this observation within the context of emphasising the rule of law function played by domestic precedent).

7 See C Greenwood, 'The Development of International Law by National Courts' in Tiyanjana Maluwa, Max du Plessis & Dire Tladi (eds), *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard* (2016) 195.

detailed academic debate, consideration and criticism.⁸ There has been significant discussion regarding whether the approach to the identification of customary international law has evolved.⁹ But attempts by scholars to propose new approaches to the identification of customary international law have not found favour with states or courts.¹⁰ Therefore, for present purposes, the chapter takes as its starting point that customary international law's constituent elements are: (i) general practice (of states), which (ii) is accepted (by those states) as law (*opinio juris*). These two elements also serve as the means by which customary international law is identified. This two-element approach (general practice coupled with *opinio juris*) is accepted by the International Court of Justice ('ICJ')¹¹ (even though it has been criticised for at times not always rigorously applying this approach),¹² is reflected in article 38(1) of the Statute of the ICJ,¹³ and is widely supported by states.¹⁴ This approach has recently been approved by the ILC in the set

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- 8 See A Roberts, 'Traditional and Modern Approaches to Customary International Law: a Reconciliation' (2001) 95 *AJIL* 757; R Kolb, 'Selected Problems in the Theory of Customary International Law' (2003) 50 *Netherlands International Law Review* 119; AT Guzman, 'Saving Customary International Law' (2005) 27 *Michigan Journal of International Law* 115; Mario Prost, *The Concept of Unity in Public International Law* (2012) 97–102; and Michael Wood, 'Concluding Observations' (2017) 19 *International Community LR* 156. For a useful and extensive bibliography of the academic writing in this area see, *Fifth Report on Identification of Customary International Law*, Addendum, UN Doc A/CN.4/717/Add.1 (2018).
 - 9 See the consideration of this issue by Michael Wood in his various reports as Special Rapporteur on the identification of customary international law: First report, UN Doc A/CN.4/663 (May 2013); Second report, UN Doc A/CN.4/672 (May 2014); Third report, UN Doc A/CN.4/682 (March 2015); Fourth report, UN Doc A/CN.4/695 (March 2016); and Fifth report, UN Doc A/CN.4/717 (March 2018): all available at https://legal.un.org/ilc/guide/1_13.shtml.
 - 10 ILC Draft Conclusions (note 5) 126 (conclusion 2, commentary para 4). See also Wood (note 8) 157, 'Pleas for a "modern" custom in which either a general practice or its acceptance as law would not be necessary ... were for the most part never more than an academic conceit among a few scholars. Such pleas gained no traction with States and no significant following among practitioners.'
 - 11 See *Jurisdictional Immunities of the State Case (Germany v Italy)* (Judgment) [2012] ICJ Reports 99 para 122; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Reports 95 para 148; *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)* (Judgment) [1969] ICJ Reports 3 para 77.
 - 12 See e.g. S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 *EJIL* 417; P Tomka, 'Custom and the International Court of Justice' (2013) 12 *Law & Practice of International Courts & Tribunals* 195; J Dugard and D Tladi, 'Sources of International Law' in J Dugard et al (eds), *Dugard's International Law* (5th ed, 2018) 33; S Yee, 'Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases' (2016) 7 *JIDS* 472, 479–87.
 - 13 Article 38(1)(b) refers to 'international custom, as evidence of a general practice accepted as law'. See Malcolm Shaw, *International Law* (9th ed, 2021) 62, and James Crawford, *Brownlie's Principles of Public International Law* (9th ed, 2019) 18–21.
 - 14 See ILC Draft Conclusions (note 5), commentary paras 1 and 4 to conclusion 2 at 125–126. See also Wood Second Report (note 9) paras 21 to 27, where Wood summarises the widespread support for the two-element approach in state practice, international court decisions, and the academic literature.

of sixteen 'conclusions' (in essence, principles), together with commentaries on those conclusions, on the identification of customary international law adopted by it in 2018 (to be described here (inclusive of the commentaries) as 'the ILC Draft Conclusions').¹⁵ The UN General Assembly congratulated the ILC on the completion of the ILC Draft Conclusions (which had entailed years of work guided by the ILC's Special Rapporteur on the topic, Sir Michael Wood)¹⁶ and resolved to bring 'them to the attention of States and all who may be called upon to identify rules of customary international law, and encourage[d] their widest possible dissemination'.¹⁷

While the ILC Draft Conclusions may not settle all debate as to how customary international law ought to be identified,¹⁸ they are as close as one is likely to come to a generally accepted approach or methodology.¹⁹ That being said, the ILC Draft Conclusions offer only a broad framework. They do not attempt to specify how that framework ought to be applied in every context or each specific case. Thus, they certainly do not attempt to deal with some of the practical and procedural issues that domestic courts may need to grapple with when approaching the identification of customary international law in their own unique domestic legal systems. This is an issue to which I will return in Part 5. Nevertheless, the ILC Draft Conclusions provide a useful prism through which to view the South African courts' engagement with customary international law. For this reason, it is helpful to summarise certain relevant principles that emerge from them.

15 ILC Draft Conclusions (note 5) 119–156.

16 For a traversal of the ILC's relevant programme of work and output in respect of the identification of customary international law, see https://legal.un.org/ilc/guide/1_13.shtml.

17 UNGA Resolution 73/203 of 20 December 2018, UN Doc A/RES/73/203.

18 See for instance M Hakimi 'Making Sense of Customary International Law' (2020) 118 *Michigan Law Review* 1487, who offers a highly sceptical critique of what Hakimi calls the 'rulebook' conception of customary international law embodied in the ILC Draft Conclusions. Yet, Hakimi's scepticism in respect of this approach to customary international law (notwithstanding its general acceptance by states and courts, on which see note 14 above), which can at best be seen as an academic outlier, has already elicited equally strident responses. Kevin Jon Heller is particularly critical of Hakimi's approach, noting that he 'disagree[s] with almost every word in Hakimi's article': KJ Heller 'Customary International Law Symposium: The Stubborn Tenacity of Secondary Rules' *Opinio Juris* (7 July 2020) available at <http://opiniojuris.org/2020/07/07/customary-international-law-symposium-the-primary-rules-of-cil-are-not-coming-to-save-us/>. Jean d'Aspremont, in his more theoretical work aimed at depicting 'the discursive splendour of customary international law', also questions Hakimi's rejection of a rules-based approach, inter alia, since '[c]ustomary international law, in all its dimensions, is thus construed as a matter of rules' and 'the idea of rules is inescapable in the discourse on customary international law': J d'Aspremont, *The Discourse on Customary International Law* (2021) 1, 138, 142, and generally 140–145. In any event, even Hakimi, accepts, at 1497, that, '[t]he ILC Conclusions are the most systematic and authoritative effort to date to articulate the secondary rules [for the identification of custom international law]'.

19 The ILC Draft Conclusions represent the considered outcome of the ILC's expert and rigorous programme of work on the topic over years (which involved detailed input from states) and the UN General Assembly passed a resolution endorsing the ILC Draft Conclusions (see notes 16 and 17 above).

First, the ILC Draft Conclusions affirm the two-element approach: to identify (or determine) 'the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).'²⁰ This entails 'two distinct, yet related, questions: whether there is a general practice, and whether such general practice is accepted as law.'²¹ Therefore, in essence, 'one must look at what States actually do and seek to determine whether they recognize an obligation or a right to act in that way.'²²

Secondly, in relation to the type of evidence that may demonstrate the existence of these two constituent elements of customary international law, the ILC Draft Conclusions provide two things:

- (i) Evidence of state practice can take the form of physical and verbal acts by states, as well as inaction, and would include, amongst other things, 'diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and *decisions of national courts*.'²³ The probative value of, and the weight to be attached to, different types of state practice is context-specific, and would have to be assessed given the particular circumstances at hand.²⁴
- (ii) The type of evidence which may demonstrate that there is acceptance as law (*opinio juris*) includes, but is not limited to, 'public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; *decisions of national courts*; treaty provisions; and conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference.'²⁵

We thus see that decisions of national courts are explicitly included in each element's evidentiary list. This is a reflection of the fact that since national courts are organs of their domestic states, their decisions, amongst a range of other evidence, may constitute evidence of their own state's practice and its *opinio juris*.

Thirdly, the two-element approach does not require only primary evidence of state practice and *opinio juris* to be consulted.²⁶ There are a variety of subsidiary means that one can consider 'in the process of determining the existence and content of rules of customary international law.'²⁷ These include 'written texts bearing on legal matters, in particular treaties,

20 Conclusion 2, ILC Draft Conclusions (note 5) 124.

21 Conclusion 2 commentary para 1 of the ILC Draft Conclusions *ibid* 125.

22 *Ibid*.

23 Conclusion 6 of the ILC Draft Conclusions *ibid* 133, emphasis added.

24 Commentary on conclusion 6, para 8 of the ILC Draft Conclusions *ibid* 134.

25 Conclusion 10(2) of the ILC Draft Conclusions *ibid* 140, emphasis added.

26 ILC Draft Conclusions *ibid* 142.

27 *Ibid*.

resolutions of international organizations and intergovernmental conferences, *judicial decisions* (of both international and national courts), and *scholarly works*.²⁸ As my analysis reveals, South African courts rely heavily on subsidiary means in determining customary international law — in particular, judicial decisions and scholarly works.

Fourthly, in respect of judicial decisions, the ILC Draft Conclusions emphasise that the decisions of *international* courts and tribunals ‘concerning the existence and content of rules of customary international law *are* a subsidiary means for the determination of such rules.’²⁹ By contrast, they indicate (with greater qualification) that regard ‘*may* be had, *as appropriate*, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.’³⁰ We thus see that national (domestic) court decisions, in addition to being a species of evidence of their own state’s practice or *opinio juris*, may, in appropriate circumstances, also constitute a subsidiary means for determining customary international law. As the analysis summarised in Part 4 reveals, South African courts generally refer to and rely on domestic decisions not as evidence of the relevant foreign state’s state practice or *opinio juris* but as a subsidiary means for determining customary international law. However, the ILC emphasises that some caution should be exercised when relying on domestic decisions as a subsidiary means for determining customary international law,³¹ given that: domestic courts operate in a domestic law context which may only incorporate international law in a particular and limited way; their decisions may reflect a specific national perspective; they may lack international law expertise; and they generally will have reached their decision absent hearing arguments from states.³²

Fifthly, of the various international courts and tribunals, whose decisions are a subsidiary means for identifying customary international law, the ILC Draft Conclusions underscore that ICJ’s decisions ‘*in particular*’ ‘are a subsidiary means for the determination’ of the rules of customary international law.³³ Express reference is made to ICJ decisions ‘in recognition of the significance of [the ICJ’s] case law and its particular position as the only standing international court of general jurisdiction.’³⁴

Sixthly, the ILC Draft Conclusions make clear that while the decisions of courts and tribunals dealing with the identification and application of customary international law may offer valuable guidance in identifying

28 Ibid, emphasis added.

29 Conclusion 13(1) of the ILC Draft Conclusions *ibid* 149, emphasis added.

30 Conclusion 13(2) of the ILC Draft Conclusions *ibid* 149, emphasis added.

31 Conclusion 13, commentary para 7, ILC Draft Conclusions *ibid* 150.

32 Ibid.

33 Conclusion 13(1) *ibid* provides: ‘Decisions of international courts and tribunals, *in particular of the International Court of Justice*, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules’ (emphasis added).

34 Commentary on conclusion 13, para 4 *ibid* 150.

customary international law, when it comes to assessing the value of these decisions, one needs, *inter alia*, to consider how those cases themselves determine the relevant customary international law position (and, in particular, ‘the extent to which it results from a thorough examination of evidence of an alleged general practice accepted as law’).³⁵ This is important in two respects. First, and most obviously, it highlights that when a South African court seeks to rely on a decision of an international or domestic court as a subsidiary means for determining customary international law, it ought to appraise critically whether the Court followed a suitably rigorous approach to the determination of the customary international law. Secondly, the natural corollary to the first point is that South African court decisions which themselves are not suitably rigorous in their determination of customary international law are less likely to be relied on (or will be given less weight) as a subsidiary means for determining customary international law. However, regardless of their rigour, they may still be considered as evidence of South Africa’s state practice or *opinio juris*.

Seventhly, the ILC Draft Conclusions similarly suggest a cautious approach to the use of scholarly writings as a subsidiary means. They identify three areas of potential concern. First, writers ‘do not always distinguish (or distinguish clearly) between the law as it is and the law as they would like it to be’ (in academic writing, *lex lata* may flow freely into *lex ferenda*, with little by way of express demarcation).³⁶ Secondly, scholarly ‘writings may reflect the national or other individual viewpoints of’ the scholar.³⁷ Therefore, the ILC recommends that when relying on scholarly writing to identify customary international law, one ought to ensure a fair representative sample is used that covers ‘the principal legal systems and regions of the world’.³⁸ Thirdly, because the quality of various scholarly works can vary greatly, the ILC has underscored the importance of assessing the strength and authority of the works consulted. In making this assessment one ought to consider ‘the approach adopted by the author to the identification of customary international law and the extent to which his or her text remains loyal to it’.³⁹ Therefore, in summary, selective and uncritical reliance on scholarly work is to be discouraged. As we discuss below, this is a particular concern in respect of how South African courts determine customary international law.

Eighthly, the ILC Draft Conclusions highlight that the ILC’s own work in respect of customary international law may also be a particularly valuable subsidiary means for determining customary international law, given its ‘unique mandate, as a subsidiary organ of the United Nations General Assembly, to promote the progressive development of international law and

35 Commentary on conclusion 13, para 3 *ibid* 149.

36 Commentary on conclusion 14, para 3 *ibid* 151.

37 *Ibid*.

38 Commentary on conclusion 14 para 4 *ibid* 151.

39 *Ibid*.

its codification; *the thoroughness of its procedures* (including the consideration of extensive surveys of State practice and *opinio juris*); and *its close relationship with the General Assembly and States* (including receiving oral and written comments from States as it proceeds with its work).⁴⁰

2.2 Customary international law in the South African legal system

2.2.1 How South African law treats customary international law

As with any domestic legal system, South African law dictates the terms on which international law in general, and customary international law in particular, 'comes into', or forms part of, its law.⁴¹ Section 232 of the Constitution provides that 'customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'⁴² Thus, customary international law is expressly (and automatically) incorporated into South Africa's domestic law.⁴³ The only exception is that customary international law conflicting with the Constitution or an Act of Parliament does not form part of South African law.⁴⁴ Therefore, in principle, in the absence of a conflict⁴⁵ with the Constitution or national legislation, customary international law is *de jure* part of South African law. No act of domestic transformation or incorporation by courts or the legislature is required. For this reason, South African courts are, perforce, required to identify customary international law and how they identify customary international law matters.

2.2.2 The procedural issues in relation to customary international law

Now that we have considered how, as a matter of substantive law, customary international law forms part of South African law, it is necessary to turn

40 ILC Draft Conclusions *ibid* 142–143, emphasis added. Of course, as the ILC itself is quick to point out at 143, '[t]he weight to be given to the Commission's determinations depends, however, on various factors, including the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output.' This suggests that reliance on the work of the ILC, as with any subsidiary source (such as court decisions or academic writings), should not be indiscriminate.

41 J Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Pocket Books of Hague Academy, 2014) para 272.

42 A similar provision was found in s 231(4) of South Africa's Interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993).

43 See *SADR and Another v The Owner and Charterers of the 'MV NM Cherry Blossom' and Others* 2017 (5) SA 105 (ECP) ('*Cherry Blossom*') para 24: 'customary international law is automatically incorporated into South African law unless it is inconsistent with the Constitution or an Act of Parliament' (emphasis added).

44 As the Constitutional Court held in the *Law Society of South Africa & Others v President of the Republic of South Africa & Others* 2019 (3) SA 30 (CC) ('*Law Society v President*') para 5, 'implicit [in the position created by s 232] is that consistency with our Constitution is a critical requirement for the acceptability and applicability of international law to our country.'

45 See the discussion on the possibility of conflict arising in Andreas Coutsoudis & Max du Plessis, 'We are all International Lawyers Now: the Constitution's International-Law Trifecta Comes of Age' (2019) 136 *SALJ* 433, 442.

our attention to how, procedurally, customary international law is dealt with by South African courts. Before the advent of constitutional democracy, South African courts generally treated customary international law as forming part of South African common law. Therefore, it was accepted that the courts would consider the content of customary international law as a question of 'law', which they would take judicial notice of, rather than as a question of fact that required proof by the tendering of expert evidence.⁴⁶ Under South Africa's constitutional dispensation, while the courts have not expressly addressed this procedural issue, it is evident that South African courts continue, consistent with section 232 of the Constitution (which makes customary international law 'law' in the Republic), to treat the determination of customary international law as a question of 'law', not a 'fact' to be proven.⁴⁷ The approach to customary international law can be contrasted with the approach to 'foreign law' (i.e. the domestic law of foreign countries). Unless the foreign law in question can be readily ascertained with sufficient certainty, a South African court will view the content of that foreign law to be a question of fact, which must be proved by tendering the evidence of an expert in that law.⁴⁸

Since customary international law is 'law' in South Africa (unlike foreign law), and therefore can be taken judicial notice of, this means, in practice, that the courts will not require parties to prove the existence of that customary international law as a matter of fact, by tendering expert evidence. The courts will, of course, receive and consider legal argument as to what that law is (as they do in respect of all law), and will then finally determine the law themselves. Thus, in the cases analysed below, the parties, in advancing submissions as to the relevant customary international law rule (usually in their written legal argument, but possibly also in their affidavits), referred the courts to various (mostly subsidiary) sources, such as international court decisions, foreign court decisions, academic writings, or the work of the ILC. (These sources may of course canvass relevant primary evidence of state practice or *opinio juris*.⁴⁹) However, there appears to be nothing preventing litigants, should they so choose, from themselves

46 *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C) at 237–8.

47 John Dugard & Andreas Coutsoudis 'The Place of International Law in South African Municipal Law' in Dugard et al (note 12) 68.

48 *MV Pasquale Della Gatta MV Filippo Lembo Imperial Marine Co v Deiulemar Compagnia di Navigazione Spa* 2012 (1) SA 58 (SCA) para 27: 'Foreign law is treated as a fact requiring to be proved by tendering the evidence of a witness who can speak to the contents of that law. However, such evidence is unnecessary where the law in question can be ascertained readily and with sufficient certainty without recourse to the evidence of an expert, because the court is then entitled to take judicial notice of such law.' This is as provided for in s 1(1) of the Law of Evidence Amendment Act 45 of 1988. See also *MV Alam Tenggara Golden Seabird Maritime Inc and Another v Alam Tenggara SDN BHD and Another* 2001 (4) SA 1329 (SCA) para 21.

49 See e.g. *Democratic Alliance v Minister of International Relations and Co-operation and Others* 2018 (6) SA 109 (GP) ('*DA v Minister of International Relations*') para 20; and see the summary in Part 4.

directly placing relevant primary evidence before the Court in relation to state practice or *opinio juris*. This evidence would simply be the basis from which the Court could draw its own final legal conclusions when identifying the relevant customary international law rule. This would not amount to seeking to 'prove' customary international law as a matter of fact or by way of expert evidence.

However, the courts have not made a clear or explicit pronouncement on these procedural issues. This leaves some uncertainty as to how this may work in practice, and what the limits are (particularly concerning the use of expert evidence). If a party wishes to strengthen its argument by filing an affidavit from a professor of international law who had undertaken research (whether previously, or specifically at the request of that party) into the relevant state practice and *opinio juris*, and could provide a report setting out their views as to what was the relevant customary international law rule, based on an assessment of the primary evidence of state practice and *opinio juris*, would a party be allowed to adduce such evidence? What if, instead of offering an opinion as to the content of the customary international law (i.e. drawing a conclusion from the state practice and *opinio juris*), the professor of international law was merely asked to conduct research into the state practice and *opinio juris*, and simply to curate and present that research before the Court, without expressly offering an opinion as to the content of customary international law arising from that research. Would that then be permissible?

In at least one pre-constitutional case, the Cape Provincial Division of the (then) Supreme Court expressly refused to accept an affidavit by an international law expert to prove what was the international law in respect of a certain issue, on the basis that that affidavit was 'neither necessary nor admissible', because it was 'the duty of this Court to ascertain and administer the appropriate rule of international law in this case'.⁵⁰ However, under South Africa's constitutional dispensation, the courts have not stated that they will never allow expert evidence regarding customary international law from being adduced. And it is hard to imagine what the objection could be should a party wish to obtain and adduce a report from a professor of international law that merely researches and marshalls the relevant state practice and *opinio juris* dealing with a particular customary international law rule, while refraining from offering an express opinion as to the content of customary international law. Moreover, it seems possible — although it is admittedly not certain — that South African courts might even be willing to receive evidence from an international-law expert who offers an opinion as to the content of customary international law, simply for the purposes of consideration, while not viewing such expert evidence as necessary, binding, or conclusive.

50 *South Atlantic Islands Development Corporation Ltd v Buchan* (note 46) 237–8.

Perhaps because of the uncertainty as to what is permissible, there is no reported case where parties have sought to place expert opinion evidence procured for litigation concerning customary international law before a court, nor has there been a case where parties have attempted to file a report that was limited to a mere setting out of the relevant state practice or *opinio juris*. However, in one recent case (*Cherry Blossom*), the High Court had regard to, and relied on, a legal opinion prepared by the then UN Under-Secretary-General at the request of the UN Security Council on relevant customary international law issues in relation to self-determination and exploitation of natural resources in a non-self-governing territory.⁵¹ The opinion was placed before the Court by one of the parties in their affidavits.⁵² But it was not an expert opinion procured for the purposes of the litigation; rather, it was a pre-existing opinion that formed part of the background to the matter.⁵³ The Court appeared to treat the opinion in much the same way as courts treat other subsidiary means for determining customary international law (such as international court decisions, the work of the ILC, or academic writings), effectively outsourcing the identification of customary international law to those subsidiary means.⁵⁴ Moreover, in practice, the Constitutional Court has also signalled some willingness to receive, in some form, international-law expertise to assist it in determining cases that raise issues of international law. This is discussed in Part 5.

So where does that leave us? What is certain is that South African courts do *not require* litigants to tender evidence to *prove* customary international law as a fact. What is uncertain is (i) the extent to which the courts will accept evidence as regards customary international law and (ii) whether the approach will differ under different circumstances (for instance, where there is considerable contestation, uncertainty or vagueness in respect of the customary international law rule at issue). That there is still ambiguity in respect of how, at a procedural level, the determination of customary international law is to be approached by and before South African courts, draws attention to the importance of the courts grappling with, and articulating explicitly, how they will — and how litigants should — approach the identification of customary international law. I shall also return to this issue in Part 5.

The way that South African courts determine customary international law should also be understood within the broader context of the South African procedural system. South Africa has an adversarial system, in contradistinction to an inquisitorial system.⁵⁵ The court is assigned ‘the role

51 *Cherry Blossom* (note 43) para 45: the opinion of Mr Hans Corell in respect of the exploitation of natural resources in Western Sahara.

52 Affidavits and written submissions in the matter are on file with the author.

53 *Cherry Blossom* (note 43) para 45.

54 *Ibid.* In the portion quoted by the Court, the opinion indicates that it was based on a consideration, *inter alia*, of the relevant state practice and *opinio juris* on the issues.

55 *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) at 595.

of neutral arbiter of the case presented.’⁵⁶ Therefore, the courts typically adopt no inquisitorial role. Their analysis is largely limited by the evidence and legal argument placed before them by opposing parties. In Part 5, we will consider how, in certain limited circumstances, the Constitutional Court has, nevertheless, indicated a willingness to conduct its own primary research, invited international law experts to make submissions to supplement those of the parties, and has requested further submissions from the parties before it.

3 SOUTH AFRICAN COURTS’ ENGAGEMENT WITH CUSTOMARY INTERNATIONAL LAW

Having considered, in broad terms, customary international law’s place in the South African legal system, and the pertinent features of that system, I move in Part 3 to analysing how South African courts engage substantively with customary international law.

To determine which cases warranted detailed analysis, the following methodology was adopted. First, the various main law reporting series⁵⁷ were analysed to identify cases in which the court considered customary international law, and did so because customary international law was material to the decision. Cases that merely make passing reference to customary international law (for instance, where the existence of a particular customary international law rule is merely taken for granted, is not an issue in dispute in the matter, or is mentioned *en passant*) and where customary international law has no material impact on the decision were not analysed in detail.⁵⁸ Similarly, cases that dealt only with other aspects of international law (in particular international agreements) and which did not require the court to consider customary international law were not considered in

56 *Four Wheel Drive Accessory Distributors CC v Rattan NO 2019* (3) SA 451 (SCA) paras 21 and 22; *Fischer & another v Ramahlele & others 2014* (4) SA 614 (SCA) (*‘Fischer’*) para 13. As the SCA, in *Fischer*, went on to note, there is a limited exception: ‘There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. *Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.*’ (Emphasis added.) See also *CUSA v Tao Ying Metal Industries 2009* (2) SA 204 (CC) para 68.

57 The South African Law Reports (SALR), the All South African Law Reports (All SA), and the Butterworth Constitutional Law Reports (BCLR). Further searches were done on www.saflii.org.za, to ensure that no unreported case that otherwise met the selection criteria were excluded. No cases were found that met the requirements, but was not reported in the SALR, All SA, or BCLR.

58 The cases excluded on this basis, for instance, include: *Tshabalala v S; Ntuli v S 2020* (3) BCLR 307 (CC), paras 93–94; *Sonke Gender Justice NPC v President of the Republic of South Africa and Others 2021* (3) BCLR 269 (CC) para 63; *S v Okah 2018* (4) BCLR 456 (CC) para 43 fn 68; *Ruta* (note 6) para 6; *Saidi & others v Minister of Home Affairs & others 2018* (7) BCLR 856 (CC) paras 31–34.

detail.⁵⁹ Secondly, where a particular case has traversed its way up South Africa's judicial hierarchy, the detailed analysis focused on the final and binding decision by the Constitutional Court or South Africa's penultimate appellate court, the Supreme Court of Appeal ('SCA'), where there was no subsequent appeal to the Constitutional Court. If a case involved a material consideration of customary international law by one of the various provincial divisions of the High Court, but the decision was not appealed, and therefore there was no SCA or Constitutional Court decision, then the High Court's decision was considered. Thirdly, to avoid overbreadth, to allow for a more detailed analysis, and to ensure a focus on the courts' more recent and current jurisprudence, the chapter focused on decisions in the last decade (ie 2011 to 2021).

Based on the above criteria, five cases were identified for detailed analysis. Two decisions are from the Constitutional Court, one from the SCA, and two from the High Court. In chronological order, those cases are as follows:

- (i) In *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & another* ('*National Commissioner v SALC*')⁶⁰ — the Zimbabwean torture docket decision — the Constitutional Court reviewed and set aside the South African Police Service's decision not to investigate alleged torture committed by Zimbabwean police in the run-up to the 2008 elections in Zimbabwe, after the South African Police Service had been presented with a 'docket' of evidence of the alleged torture collated by a regional human-rights organisation.⁶¹ In deciding the case, the Constitutional Court had to determine the relevant customary international law rules in relation to torture and universal jurisdiction.
- (ii) In *Minister of Justice and Constitutional Development & others v Southern African Litigation Centre & others* ('*Minister of Justice v SALC*')⁶² — the Al Bashir arrest case — the SCA held that the South African government acted unlawfully when it failed to arrest then Sudanese President Al Bashir while he was in South Africa and surrender him to the ICC.⁶³ In making this decision, the SCA needed to determine whether President Al Bashir enjoyed immunity under customary international law that prevented his arrest and surrender to the ICC.
- (iii) In *Cherry Blossom*⁶⁴ — the Western Sahara mining case — a full court (three judges) of the High Court granted an interdict preventing a foreign ship carrying phosphate mined in Western Sahara, a non-self-

59 See, for instance, *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC); *Government of the Republic of Zimbabwe v Fick & Others* 2013 (5) SA 325 (CC); *Minister Of Home Affairs v Tsebe* 2012 (5) SA 467 (CC); *Earthlife Africa Johannesburg & Another v Minister of Energy & Others* 2017 (5) SA 227 (WCC).

60 2015 (1) SA 315 (CC).

61 Ibid para 84, order 3.

62 2016 (3) SA 317 (SCA).

63 Ibid para 113, order 4.

64 *Cherry Blossom* (note 43).

governing territory, from leaving South Africa pending a trial to be brought in South Africa claiming ownership of the phosphate.⁶⁵ The application was instituted by the Polisario Front, the national liberation movement recognised by the UN as the representative of the people of Western Sahara, and the Saharawi Arab Democratic Republic, a state recognised by South Africa but not by the majority of the members of the United Nations, which claimed sovereignty over Western Sahara and ownership of the phosphate.⁶⁶ The application was opposed by the state-owned Moroccan mining company that had mined the phosphate.⁶⁷ In deciding the matter, the Court needed to determine whether state immunity under customary international law precluded the claim for the ownership of the phosphate (since, as argued by the state-owned Moroccan mining company, it required the Court to effectively determine that Morocco's de facto administration and law making for Western Sahara was unlawful and invalid), as well as the relevant customary international law principles in respect of self-determination and sovereignty over natural resources.

- (iv) In *DA v Minister of International Relations*⁶⁸ — the Grace Mugabe assault case — the High Court reviewed and set aside the Minister of International Relations' decision to recognise formally⁶⁹ the immunity of then Zimbabwean First Lady Grace Mugabe to prevent her from being prosecuted for an alleged assault committed while she was in South Africa.⁷⁰ The central issue in the case was whether, as a matter of customary international law, Grace Mugabe, as the spouse of a foreign head of state, also enjoyed personal immunity from foreign domestic prosecution.
- (v) In *Law Society v President*⁷¹ — SADC Tribunal suspension case — the Constitutional Court held that the President's participation in the decision by the SADC Summit⁷² to suspend the SADC Tribunal (a regional human rights tribunal) and his signature of the 2014 Tribunal Protocol, which limited the Tribunal's jurisdiction to exclude individual complaints, were unlawful and unconstitutional.⁷³ In determining the case, it was necessary for the Court to identify whether articles 18 and 26 of the Vienna Conven-

65 Ibid para 107, order 1.

66 Ibid paras 6, 7, 14, and 91.

67 Phosphates de Boucraa SA ('Phosboucraa') had mined the phosphate. It is a wholly-owned subsidiary of OCP SA, which the Moroccan government holds 94% of the shares in. OCP and Phosboucraa jointly opposed the application.

68 *DA v Minister of International Relations* (note 49).

69 There was some debate as to whether the Minister sought to 'confer' immunity on Grace Mugabe, or merely to 'recognise' immunity accorded under customary international law, but the Minister's counsel argued that the Minister only intended to recognise such immunity as provided by customary international law, and defended the decision on that basis; see *ibid* paras 42–3.

70 Ibid para 46, order 2.

71 *Law Society v President* (note 44).

72 The highest decision-making body of the Southern African Development Community ('SADC').

73 *Law Society v President* (note 44) para 97, orders 1.1 and 1.2.

tion on the Law of Treaties ('the Vienna Convention'), to which South Africa is not a party, formed part of customary international law.⁷⁴

Given that my investigation revealed that these cases are the best representations, in the last decade, of South African courts' material engagement with and determination of customary international law, I then analysed these cases to determine how the courts approached the identification (determination)⁷⁵ and application (in South African law) of customary international law, and, to the extent relevant, how the courts understood their role, if any, in relation to the development of customary international law. It is not possible, given considerations of length, and the desire to avoid prolixity, to reproduce that detailed study in this chapter.⁷⁶ However, the outcome of that analysis is summarised in Part 4.

While the detailed analysis was primarily focused on cases during the last decade, to contextualise this more recent jurisprudence, it was helpful to have regard to and compare this with the Constitutional Court's engagement with customary international law in its first decade and a half prior to 2011. During this period, there was limited substantive engagement with customary international law. *Kaunda*⁷⁷ is the main case from this period where the Court, in order to decide the matter, was required to, and did, most directly determine customary international law rules.⁷⁸ The Court was required to determine whether diplomatic protection included, in certain circumstances, an obligation on the state to exercise diplomatic protection on behalf of its nationals.⁷⁹ An analysis of this case reveals that the Court's approach shares similar features with the approach in the more recent cases that I analysed, and there has been no general change in the court's approach across the two periods. Therefore, in Part 4, when considering and summarising the patterns evident in the last decade, reference will also be made, where relevant, to *Kaunda*.

74 Article 18(a) requires a state 'to refrain from acts which would defeat the object and purpose of a treaty when...it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.' This was relevant in order to determine the effect of the President's signature of the 2014 Protocol. Article 26, which provides that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith', was relevant due to the alleged failure by the President, representing South Africa, to comply with the SADC Treaty.

75 'Identification' is the term used by the ILC for the process of determining customary international law, as can be seen in the Draft Conclusions where the terms 'identification' and 'determination' are used interchangeable, see ILC Draft Conclusions (note 5) commentary on conclusion 1 para 4 at 123.

76 The full study of each case from which this analysis is drawn is on file with the author.

77 *Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) ('*Kaunda*').

78 While in this period there were certain other cases where reference to customary international law was made, it was generally only in passing and not in a way that was material to the Court's determination of the case. These cases include *S v Basson* 2007 (3) SA 582 (CC) para 177 and *Harksen v President of the Republic of South Africa & Others* 2000 (2) SA 825 (CC) paras 26–27.

79 *Kaunda* (note 77) paras 23–29; the Court also had regard to the customary international law principles in relation to extraterritoriality (paras 38 to 45).

4 THE PATTERNS IN THE LAST DECADE OF MATERIAL ENGAGEMENT WITH CUSTOMARY INTERNATIONAL LAW

While the central cases that I identified and analysed involved different courts, various judges, and case-specific factual and legal nuances, one is able to discern broad patterns and trends in the South African courts' approach to customary international law.

First, South African courts generally identify the existence and content of customary international law by reference to (a) academic writers (predominately from South Africa or the United Kingdom, with a few exceptions),⁸⁰ (b) pronouncements by foreign courts (with the United Kingdom decisions being the most common)⁸¹ and international courts (particularly the ICJ),⁸² and (c) at times the work of the ILC.⁸³

Secondly, by and large, the courts do not identify international law by undertaking any thorough direct analysis of general state practice and

80 See *National Commissioner v SALC* (note 60) paras 25, 27, 28, 35, and 46; *Minister of Justice v SALC* (note 62) paras 61, 66, 67, 71, 72, 76 fns 63, 64 and 69, and para 93; *Cherry Blossom* (note 43) para 40 fn 10; *Law Society v President* (note 44) para 37. From the analysis of the five cases and the academic writers referred to, we see the following geographic spread: South Africa (including Erika De Wet, John Dugard, Max du Plessis, Dire Tladi, and Hannah Woolaver), the UK (Dapo Akande, Ian Brownlie, James Crawford, Christopher Greenwood, Hazel Fox & Phillip Webb, Roger O'Keefe, and Malcolm Shaw) and sometimes other European countries (Paola Gaeta, Louis Henkin, Claus Kieß, and Göran Sluiter) and the US (Thomas Weatherall). There is one reference to an author based in India (H O Agarwal in *National Commissioner v SALC* paras 27 and 28 (fns 19 and 22)). The authors are grouped mainly in the countries in which they are academically based at the timing of publication, although certain of them are not nationals of the countries in which they are based. In *Kaunda* (note 77) one sees reference to the work of UK academic writers (Brownlie, Martin Dixon & Robert McCorquodale, and Shaw), South African writers (Dugard and Gerhard Erasmus & Lyle Davidson), and one US writer (George Aldrich). See *Kaunda* paras 38 and 39 fns 18, 19 and 24 and para 43 fn 43 and in the minority judgment (per O'Regan J) paras 239 fns 44 and 45, and 240 fns 46 and 47.

81 See e.g. *National Commissioner v SALC* *ibid* para 35 fn 34; *Minister of Justice v SALC* *ibid* paras 66 fn 41, 70 and 71 fn 51–4; *Cherry Blossom* *ibid* paras 66 to 84. See also *DA v Minister of International Relations* (note 49) paras 22–35, where the Court, partly relying on the work of the ILC, had regard to three European decisions (from Switzerland, Belgium, and Austria) and four USA decisions in relation to immunity. The Court in *Law Society v President* *ibid* did not have regard to any foreign judgments in determining the customary international law in issue, rather it relied on ICJ decisions and writers (paras 36–38). See also *Kaunda* *ibid* paras 73–75, where the Court has regard to a UK decision and a German decision concerning judicial review of decisions in respect of diplomatic protection (albeit this appears more by way of comparative law analysis of domestic judicial control of government action, rather than determination of customary international law), and para 41, where the Court had brief regard to a Canadian decision in respect of the principles in relation to the extraterritorial application of domestic law.

82 See e.g. *National Commissioner v SALC* *ibid* para 46 fn 50; *Minister of Justice v SALC* *ibid* paras 67–8 and 70–1; *Cherry Blossom* *ibid* paras 37 and 40–41; *Law Society v President* *ibid* para 36; *DA v Minister of International Relations* *ibid* para 16 fn 16 and para 18 fn 19; *Kaunda* *ibid* para 23.

83 See *DA v Minister of International Relations* *ibid* paras 20, 33, and 34. See also *Kaunda* *ibid*, where the Constitutional Court considered the work of the ILC Special Rapporteur in relation to the issue of diplomatic protection.

opinio juris.⁸⁴ At best, they consider a few foreign court judgments. These, in principle, may constitute state practice (and possibly opinio juris), but only of the states of those foreign courts. In *DA v Minister of International Relations*, a limited selection of foreign decisions appear, to an extent, to have been used as evidence of state practice.⁸⁵ However, most often, foreign judgments appear primarily to be relied on as a subsidiary means for determining customary international law (much like scholarly writings and international court decisions) — given the context and limited manner in which they are used.⁸⁶ The courts also, at times, rely on surveys of state practice and opinio juris by others, in particular, the ILC, writers, and other courts.⁸⁷ The tendency to ‘outsource the determination of custom’ by reliance on the identification of customary international law in various subsidiary means, rather than by undertaking any direct analysis of the primary evidence of state practice and opinio juris, is also common with other (non-South African) domestic courts.⁸⁸ The one notable exception in the cases analysed is that in *National Commissioner v SALC*, the SCA⁸⁹ considered some foreign

84 See discussion and references at notes 80–83 above. One sees the predominant reliance on subsidiary means.

85 See *DA v Minister of International Relations* (note 49) paras 22–35, where the Court considered a handful of foreign judgments to see whether they recognise the immunity of family members of a head of state. While the Court analysed the decisions in a rigorous and critical manner, the Court made no attempt to conduct any general survey of state practice, or even consider a more representative sample of cases. Indeed, all the cases referred to are from Europe and the US.

86 For instance, in *National Commissioner v SALC* (note 60) para 35 fn 34, the Court identified the customary status of the prohibition against torture (and that it had attained the status of a peremptory norm) by relying on two UK decisions, a decision by the International Criminal Tribunal for Yugoslavia (‘ICTY’), and academic commentary. The cases upon which the Court relied on were two decisions of the UK House of Lords — *A and Others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71 para 33 and *Pinochet No 3* [2000] 1 AC 147 at 197–9 — and the ICTY’s decision in *Prosecutor v Furundzija* (Trial Judgment) IT-95-17/1-T (10 December 1998) paras 147–55. It does not discuss these cases, but merely cites them in a footnote (with reference to the relevant portions of each judgment’s consideration of the customary rule) as authority for the customary international law status of the prohibition of torture and that it has acquired the status of peremptory norm. See also *Cherry Blossom* (note 43) paras 66–84.

87 See *Kaunda* (note 77) paras 38–9 and 41; *DA v Minister of International Relations* (note 49) paras 33–4.

88 See C Ryngaert & D Siccama, ‘Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts’ (2018) 65 *Netherlands International LR* 1 who, at 24, note that domestic courts ‘tend to outsource the determination of custom to treaties, non-binding documents, doctrine, or international judicial practice. Sometimes, it appears that domestic courts simply assert, without citing persuasive practice authority, the existence of a customary norm.’

89 In *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2014 (2) SA 42 (SCA) paras 59–62, the SCA examined the relevant legislation and government policies in Canada, Denmark, France, Germany, and the UK. It also considered in paras 63–4 the approach under the African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes, EXP/MIN/Legal/VI, November–December 2011 and Princeton Principles on Universal Jurisdiction (2001).

states' legislation and policies that relate to universal jurisdiction, which the Constitutional Court took account of in its judgment.⁹⁰

Thirdly, the courts do not typically approach the identification of customary international law, and the use of subsidiary means, in a critical manner or with reference to any careful or detailed methodology. Thus, we see certain trends emerging:

- (i) The courts do not generally express any view as to what weight to give the various subsidiary means they consider. For instance, writers are often relied on as authority for the content of customary international law, but there is no discussion as to why certain writers are favoured over others, nor any consideration of whether these writers have themselves undertaken any detailed analysis of primary evidence.⁹¹
- (ii) The same holds true for the use of foreign courts' pronouncements on customary international law. The courts consider only a limited number of foreign decisions in general terms, rather than seeking to consider a comprehensive range, or even a representative sample.⁹² Moreover, there is no apparent engagement with why particular foreign courts' decisions are relied on, or whether, in those foreign courts' decisions, the foreign court had conducted any rigorous assessment, particularly of primary evidence, in respect of the relevant customary international law.⁹³
- (iii) Similarly, the courts have not in any (express) way indicated that they either cannot or should not consider primary evidence of state practice and *opinio juris*. In general, the courts simply do not consider primary evidence without indicating whether they believe this is unnecessary or simply not feasible. In fact, they rarely enunciate or consider the two-

90 *National Commissioner v SALC* (note 60) para 47.

91 See *Kaunda* (note 77) paras 38–9; *National Commissioner v SALC* *ibid* paras 25, 27, 28, 35 and 37; *Cherry Blossom* (note 43) paras 39 fn 9, 40 fn 10, 86 and 87; *Minister of Justice v SALC* (note 62) paras 67 fn 46, 71, 73, 76 fns 63–64, 82 fn 69 and fn 71.

92 See the significant reliance by the Court in *Cherry Blossom* *ibid* paras 66–81 on the UK Supreme Court decision of *Belhaj v Straw* [2017] UKSC 3 in relation to the principles of state immunity.

93 See *National Commissioner v SALC* (note 60) para 35 fn 34. On the importance of assessing these issues see ILC Draft Conclusions (note 5) commentary to conclusion 14 at 151, and discussed at notes 36–9 above.

element approach in detail.⁹⁴ Indeed, even when they reference the requirements for establishing customary international law or make statements indicative of being aware of these requirements, they seldom articulate any process to determine whether those requirements are met. Instead, they tend to avoid the need for such methodological rigour by (mostly) relying on (and treating as authoritative) the pronouncements as to the content of customary international law in subsidiary means.⁹⁵

Therefore, as discussed in Part 2.2.2, there has been little clarity in relation to what types of primary evidence or subsidiary means the Court would be willing to accept, require, or welcome if tendered, and what form this ought to take.

Fourthly, the courts' identification of customary international law is generally dictated by the nature of the submissions and evidence placed before the Court by the litigating parties.⁹⁶ This flows from the fact that, as I also discussed in Part 2.2.2, the courts must generally rely on the parties to make factual and legal submissions and to frame the issues in dispute. Consequently, where the content of a customary international law rule is in dispute between the parties, they are more likely to place a more comprehensive selection of at least subsidiary means for determination before the Court, in an attempt to persuade the Court to adopt their respective view of the proper identification of customary international law.⁹⁷ Thus, the

94 The one notable exception is *DA v Minister of International Relations* (note 49) at paras 16–21. For instance, in para 20, the Court emphasised that the Minister would not merely need to demonstrate a practice of states granting immunity to spouses of foreign heads of state, but also had to establish the concomitant *opinio juris*. As the Court made clear: 'evidence of what states have done on the ground may sometimes only demonstrate the existence of an *usus* but not necessarily that of an *opinio juris*. The latter understandably is much more difficult to establish.... Expressed differently, proof of the existence of an *usus* is a necessary but insufficient condition for the establishment of a custom. The Minister must go beyond simply identifying a practice (*usus*).' Compare, for instance, the *Minister of Justice v SALC* (note 62), where the SCA vaguely refers to a customary international law rule being established 'by its general acceptance by the international community of nations in their relations with one another as to the laws that govern that community' (para 74), and earlier where it suggests that for an international crime exception to immunity to develop it would require 'an established universal practice in the affairs of nations' (para 70).

95 See references at notes 80–3 above.

96 For instance, in *DA v Minister of International Relations* (note 49) para 20, the Court made it clear that what was considered was what was placed before the Court by the parties.

97 See for instance the SCA's consideration in *Minister of Justice v SALC* (note 62) of the various subsidiary means (particularly scholarly writings and international court decisions) in determining whether there was an international crime exception to customary international law, which was the primary issue in dispute in the matter. Those and other subsidiary means for determination were drawn to the SCA's attention by the parties and the amicus in detailed heads of argument on the issue (see para 69; heads of argument on file with the author). Similarly, see the Court's engagement with whether spouses of heads of state enjoy immunity in *DA v Minister of International Relations* (note 49), where the fact of such spousal immunity was the central issue in dispute in the matter (see para 20; heads of argument on file with the author).

courts' analysis tends to be somewhat more rigorous when dealing with areas of customary international law that are in direct dispute in the matter. In contrast, the courts tend more quickly to accept rules as forming part of customary international law when the rule is not an area of dispute between the parties before them.⁹⁸

Despite the courts generally being reliant on the parties' submissions, in one of the recent cases analysed, the Constitutional Court appeared willing (to a limited extent) to go beyond what the parties placed before it. In *Law Society v President* the Constitutional Court, in considering whether the Vienna Convention represented customary international law, considered the websites of South Africa's Parliament⁹⁹ and its Chief State Law Advisor,¹⁰⁰ which indicated an acceptance by these organs of the South African state that the provisions of the Vienna Convention formed part of customary international law.¹⁰¹ These websites were not drawn to the Court's attention by any of the parties (not in their affidavits, written legal submissions, or oral argument).¹⁰² This is an instance where it appears that the Constitutional Court (sans fanfare) conducted its own, rudimentary, research into publicly available primary evidence at least of South Africa's state practice or *opinio juris* to supplement the arguments and evidence placed before it by the parties.

Fifthly, when it comes to the application of customary international law, the courts acknowledged, as section 232 of the Constitution requires, that customary international law is automatically part of South African law,

98 For instance, this can be seen in *National Commissioner v SALC* (note 60) in relation to the Court's articulation of the general principles in relation to jurisdiction in international law (see paras 25, 27, and 28); and in *DA v Minister of International Relations* (note 49) in respect of the general principles of immunity of officials (para 18), where the Court merely stated the principles (which appeared to be a paraphrasing of general propositions likely drawn from a textbook), as contrasted with the Court's more detailed and rigorous consideration of the immunity of the spouses of heads of state, which was directly in dispute (paras 21–4).

99 The Court did not provide a reference to which portion of Parliament's website it had in mind, nor did it provide any specific website address. A search by the author of Parliament's website (www.parliament.gov.za) did not reveal any current reference to the Vienna Convention.

100 Although the Court did not refer to, or quote from, the relevant website, it is evident that it had in mind the following statement on the website of the Office of the Chief State Law Advisor: International Law: '[The Vienna Convention] is regarded as declaratory of customary international law and binds all states regardless of whether they are a party to it or not.' Available at <http://www.dirco.gov.za/chiefstatelawadviser/general.html>.

Cf e.g. *Gabčíkovo-Nagymaros Dam Case (Hungary v Slovakia)* [1997] ICJ Reports 7 para 46. There is no general consensus that the entire Vienna Convention codifies customary international law. Rather, what is generally accepted is that the main provisions of the Convention (or at least certain of them) form part of customary international law.

101 See *Law Society v President* (note 44) para 36.

102 The relevant papers are on file with the author.

save in instances of conflict with the Constitution or national legislation.¹⁰³ No act of transformation is required. The courts have accepted the natural meaning and purposive intent of section 232 without trying in any way to limit its effect so as to screen out customary international law from South African law. Quite the opposite. For instance, in *National Commissioner v SALC*, the Constitutional Court accepted that since torture is an international crime under customary international law,¹⁰⁴ section 232 automatically incorporated the international law crime of torture into South African law, without any requirement for transformation, domestication, or other action by the courts, the executive, or the legislature.¹⁰⁵ This automatic incorporation, as a consequence of section 232, would, by necessary implication, apply to all international crimes.

However, the courts have nevertheless made it plain that, customary international law will not form part of South African law where it conflicts with national legislation or the Constitution. And while the possibility of conflict is low,¹⁰⁶ in three of the recent cases the issue of a potential conflict emerged in some form.¹⁰⁷ In only one of those cases was the identified, and otherwise applicable, customary international law rule held to conflict with national legislation and, therefore, found not to form part of South African law.¹⁰⁸ In *Minister of Justice v SALC*, the SCA found that an applicable customary international law rule was in conflict with national legislation, and, therefore, not law in South Africa. The SCA interpreted the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ('the Implementation Act') as removing immunity for President Al Bashir in respect of both domestic prosecution in South Africa for international crimes (even though that issue was not directly before it) and arrest and surrender to the ICC (pursuant to an arrest warrant and request for

103 *Kaunda* (note 77) para 23; *National Commissioner v SALC* (note 60) paras 24 and 39–40; *Cherry Blossom* (note 43) para 33; *Minister of Justice v SALC* (note 62) para 103.

104 Both as a self-standing international crime and as species of crime against humanity, when committed as part of a widespread or systematic attack directed against any civilian population.

105 See *National Commissioner v SALC* (note 60) paras 37, 39, 40, and 77. See Andreas Coutsoudis & Max du Plessis, 'We Are All International Lawyers; Now What? Taking Seriously the Constitutional Injunction to Integrate International Law Obligations into South African Law' (2020) 10 *Constitutional Court Review* 155, 158–9. Cf the approach taken by the UK court in *R v Jones (Margaret)* [2007] 1 AC 136 in respect of the crime of aggression. See Coutsoudis & Du Plessis (note 45) 442.

107 *Minister of Justice v SALC* (note 62) para 103 fn 90; *DA v Minister of International Relations* (note 49) paras 36 and 40; *Law Society v President* (note 44) paras 38–40.

108 See *Minister of Justice v SALC* *ibid* para 103. The SCA effectively found that head of state immunity in respect of international crimes was not part of South African law in terms of section 232 since it conflicted with national legislation.

cooperation).¹⁰⁹ The Court was emphatic in finding that this meant that the Implementation Act ‘overrode’ customary international law.¹¹⁰

There is no case in South Africa where customary international law has ever been held to be in conflict with the Constitution. The possibility of such a conflict with the Constitution was considered and rejected by the Constitutional Court in *Law Society v President*.¹¹¹ In *DA v Minister of International Relations*, the amici curiae raised the possibility of a conflict with the Constitution, but the Court found that it was not necessary to determine the issue.¹¹²

Sixthly, the courts have made it clear, at least when they have directly expressed a view on this issue, that they do not believe they have any role to play in the development of customary international law.¹¹³ Yet, the courts have articulated no awareness that, because they are organs of the South African state, their decisions can and do have at least an indirect role in the development of international law, in that they may be considered as evidence at least of South African state practice, and perhaps *opinio juris*,¹¹⁴ or as a subsidiary means of identifying customary international law.¹¹⁵ It is unclear whether the courts appreciate this fact. The apparent lack of appreciation of the potential effect of their decisions is particularly striking in *Minister of Justice v SALC*. The SCA began by decrying any role for domestic

109 Ibid: ‘I conclude therefore that when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, *would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC* by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made’ (emphasis added).

110 Ibid.

111 In *Law Society v President* (note 44) para 39, the Court found that art 18 of the Vienna Convention, which the Court held was part of customary international law, was not in conflict with s 231(2) of the Constitution.

112 *DA v Minister of International Relations* (note 49) para 36. The Court found that it was not necessary to consider the merits of the amici’s argument that even if Grace Mugabe did enjoy customary international law immunity this was in conflict with the Bill of Rights and thus did not form part of South African law, because she was held not to enjoy immunity under customary international law.

113 See *Minister of Justice v SALC* (note 62) para 74 and *Cherry Blossom* (note 43) para 65. The strident view expressed by the SCA relying on the UK decision of *Jones v Saudi Arabia* [2006] UKHL 26 para 63, can merely as a point of comparison be contrasted with recent pronouncements of the majority in the Canadian Supreme Court in the *Nevsun* matter (‘Canadian courts, like all courts, play an important role in the ongoing development of international law. ... Understanding and embracing our role in implementing and advancing customary international law allows Canadian courts to meaningfully contribute, as we already assertively have, to the “choir” of domestic court judgments around the world shaping the “substance of international law”.’) See *Nevsun Resources Ltd v Araya* 2020 SCC 5 paras 70–2.

114 Georg Nolte, ‘How to Identify Customary International Law? On the Final Outcome of the Work of the International Law Commission (2018)’ *KFG Working Paper Series* no 37, 11.

115 See generally ILC Draft Conclusions (note 5) 149 and conclusions 6, 10, and 13. See also A Tzanakopoulos & CJ Tams ‘Introduction: Domestic Courts as Agents of Development of International Law’ (2013) 26 *LJIL* 531.

courts in the development of customary international law.¹¹⁶ However, the SCA's terse pronouncement on the issue may downplay, fail to adequately reflect, or demonstrate a lack of appreciation for the complex relationship between domestic court decisions and the formation and development of customary international law. First, as I have previously observed, it is at least accepted that (a) how a state's courts decide cases forms part of that state's practice which is one of the constituent elements of customary international law;¹¹⁷ and (b) domestic court decisions may be evidence of their state's *opinio juris*.¹¹⁸ Secondly, we have also seen that domestic court decisions may be used as a subsidiary means of establishing customary international law.¹¹⁹ Therefore, a domestic court's decision may be used by others when seeking to determine the existence and content of a customary international law rule. This is particularly true in contested or developing areas where there is significant disagreement as to the existence of a customary rule or its content.¹²⁰ Thirdly, new developments in customary international law must by definition start with a conscious or unconscious departure from the previous position, provided that the departure is then accepted by other states.¹²¹ The line between the law-breaker and the law-maker, or identifier and developer, is a very fine one indeed in customary international law.¹²² As one writer memorably stated: 'It is often said that the formation of custom requires at least three judgments: the first one is wrong; the second sets a trend; the third confirms the new rule.'¹²³

In this context, a remarkable feature of the *Minister of Justice* judgment is that, despite decrying any developmental role for domestic courts, the SCA then interpreted the Implementation Act, nevertheless, to be in conflict with and to override customary international law.¹²⁴ Thus, the SCA held that the head-of-state immunity that President Al Bashir enjoyed under customary international law had been removed by South Africa's legislation. The SCA

116 *Minister of Justice v SALC* (note 62) para 74, quoting from *Jones v Saudi Arabia* (note 113) para 63.

117 See ILC Draft Conclusions (note 5) 133, conclusion 6(2). See also *Jurisdictional Immunities* case (note 11) para 55, where the ICJ noted that '[i]n the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune', before listing further sources of state practice.

118 ILC Draft Conclusions *ibid* 140, conclusion 10(2).

119 ILC Draft Conclusions *ibid* 149, conclusion 13(2).

120 For instance, the ICC Appellate Chambers in the *Jordan* matter in relation to President Al Bashir, took note of 'the role of judicial pronouncements in confirming whether or not a rule of customary international law has as such 'crystallized'.' See *Judgment in the Jordan Referral re Al-Bashir Appeal* ICC-02/05-01/09-397 (6 May 2019) para 113). See also A Cassese, *International Law* (2nd ed, 2005) 160.

121 See Tzanakopoulos & Tams (note 115) 538 fn 31.

122 For instance, on the fine line dividing law interpretation and law development, see A Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 *Loyola of Los Angeles International and Comparative LR* 133, 135.

123 M Gavouneli, 'Germany v Prefecture of Voiotia' (Analysis) ILDC 287 (GR 2000) A6.

124 *Minister of Justice v SALC* (note 62) para 103 fn 90.

expressly recognised, albeit wearing its hat as an interpreter and applier of domestic law, that its decision was progressive and put South Africa on a course that is not consistent with existing customary international law. But the SCA appeared to imply that its approach may well be embraced by more states in the future.¹²⁵ That the SCA may have been intent on judicial development or even revolution (a 'commendable' 'departure' from the existing position in customary international law in a 'progressive', 'human rights'-favouring and impunity-ending direction)¹²⁶ is strongly suggested by its normative and legal defence of that departure by South Africa (on the Court's interpretation of its legislation) from the customary international law position in relation to head-of-state immunity.¹²⁷

5 REFLECTIONS ON WHERE WE ARE AND RECOMMENDATIONS FOR NAVIGATING THE ROAD AHEAD

In view of the broad trends that have been identified, some reflections and recommendations can be offered for navigating the way forward.

5.1 Erring in good company

It is useful to begin with a general comment. If, at times, and in some ways, South African courts have erred in their engagement with customary international law, then they err with good reason and in good company. Customary international law presents unique theoretical and practical challenges even for experienced international lawyers (be they academics, practitioners or judges), and has been endlessly debated, theorised and critiqued.¹²⁸ Even the ICJ, with its wealth and geographic breadth of international law knowledge and experience, has faced criticism in relation to the rigour with

125 Ibid.

126 Ibid.

127 Ibid.

128 See JP Kelly, 'The Twilight of Customary International Law' (2000) 40 *Virginia Journal of International Law* 449, 450; Roberts (note 8), 757; Guzman (note 8) 116–17, who points out that 'CIL is under attack from all sides. Some scholars complain that it is incoherent, others assert that it is irrelevant or a fiction, and virtually everyone agrees that the theory and doctrine of CIL is a mess'; Kolb (note 8) 130–6; and Prost (note 8) 100 who notes that, 'CIL remains a fundamentally contested terrain.' However, note the views of Omri Sender & Michael Wood, 'Custom's Bright Future: The Continuing Importance of Customary International Law', in CA Bradley (ed), *Custom's Future: International Law in a Changing World* (2016) who point out, at 369, that, '[w]hatever sceptics may think, customary international law is very much still with us. It has withstood the test of time, as well as significant political and doctrinal challenges, and remains both useful and credible. Abundant international practice as well as the ILC's current work on the "Identification of customary international law" suggest that the once-fashionable notion that custom is in crisis, in decline, or even "dead" was never much more than an academic (or political) conceit: it had no basis in reality, no support among states, and no following among practitioners.'

which it has approached the identification of customary international law. For example, it too at times outsources its analysis to the ILC.¹²⁹ There is little wonder, then, that South African courts, which are far from being specialist international law institutions, may have no training at all in the area, and will often be wholly or mostly reliant on the parties before them, may end up taking short-cuts, and may be less rigorous than is desirable. And, while it has not been possible in this chapter to offer any detailed analysis of how other domestic courts have engaged with customary international law, various writers have considered this in a wide range of different countries from different legal traditions.¹³⁰ It is evident that similar issues to those identified in this chapter in respect of South African courts have also been discerned in the approaches of courts of other countries (with the inevitable differences, distinctions, and exceptions).¹³¹

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- 129 See Talmon (note 12) 437 who notes, inter alia, that '[r]eference to the International Law Commission (ILC) is a favourite shortcut in establishing rules of customary international law. ... In light of the ILC's extensive review of state practice and opinio juris in its reports and commentaries, this simply may be an example of the Court outsourcing the inductive process to the Commission.'
- 130 For a limited selection see: CL Lim, 'The Constitution And The Reception Of Customary International Law: Nguyen Tuong Van v Public Prosecutor' 2005 *Singapore Journal of Legal Studies* 218; S Stirling-Zanda, 'The determination of customary international law in European courts (France, Germany, Italy, The Netherlands, Spain, Switzerland)' (2004) 4 *Non State Actors and International Law* 3; BMJ Szewczyk, 'Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions' (2014) 82 *George Washington LR* 1118; B Maripe, 'Giving Effect to International Human Rights Law in the Domestic Context of Botswana: Dissonance and Incongruity in Judicial Interpretation' (2014) 14 *Oxford University Commonwealth LJ* 251; VH Hegde, 'Indian Courts and International Law' (2010) 23 *LJIL* 53; SY Marochkin and VA Popov, 'International Humanitarian and Human Rights Law in Russian Courts' (2011) 2 *Journal of International Humanitarian Legal Studies* 216; J Fleuren, 'The Application of Public International Law by Dutch Courts' (2010) 57 *Netherlands International LR* 245; Lord Collins & Tom Cross, 'The law of international custom in the case law of the House of Lords and the United Kingdom Supreme Court' in *The Judge and International Custom* (2016) 160; JL Guzmán Dalbora, 'The Treatment of International Crimes in Chilean Jurisprudence: A Janus Face' (2010) 10 *International Criminal LR* 535; D Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (2011); P Staubach, 'The Interpretation of Unwritten International Law by Domestic Judges' in HP Aust and G Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (2016).
- 131 In addition to the various studies in note 130, see also Ryngaert & Siccama (note 88) 24 quoted at note 88; Van Alebeek, who suggests generally (albeit writing particularly in the context of immunity): 'There is no doubt that domestic immunity decisions often display a highly unsatisfactory knowledge of international law.' (R van Alebeek, 'Domestic Courts as Agents of Development of International Immunity Rules' (2013) 26 *LJIL* 559, 565); M Iovane, 'Domestic Courts Should Embrace Sound Interpretative Strategies in the Development of Human Rights-Oriented International Law' in A Cassese (ed), *Realizing Utopia: The Future of International Law* (2012) 612: 'Domestic courts have often sought confirmation of their conclusions about the existence and scope of customary law in earlier decisions by national and international courts on the same subject. In other words, they recognize the effectiveness of a given rule insofar as it is applied by other judges, and not in the repeated behaviour of a state.'

However, the answer to the difficulties and shortcomings in South African courts' engagement with customary international law cannot be, as at least one writer appears to suggest,¹³² that domestic courts ought to 'leave well enough alone' (i.e. seek to avoid customary international law). Customary international law is the business of domestic courts in general,¹³³ and South African courts in particular. Whether it is normatively desirable or not, in South Africa, the Constitution makes customary international law part of South Africa's domestic law. That is settled. Thus, South African courts cannot shy away from it any more than they can from any other area of domestic law that may appear legally or factually complex (intellectual property law, competition law, maritime law, and tax law, to name but a few). The solution is not avoidance, nor some unattainable methodological purity or perfection, but at least a more reflective and rigorous approach to the identification and application of customary international law, within the range of what is necessary, legally appropriate, and practically possible given South Africa's legal and procedural framework.¹³⁴

5.2 Concerns about the courts' reliance on subsidiary means

The South African courts' extensive reliance on subsidiary means to identify customary international law rules and their content is not *per se* an issue, nor is it surprising, but it nevertheless raises certain concerns. One would not generally expect a domestic court in an adversarial procedural system to be in a position to undertake any detailed primary analysis of state practice and *opinio juris*, save if and when the parties before it have undertaken the exercise of curating and laying this evidence before the Court. Thus,

132 A Boyle, 'International Law Before National Courts: Some Problems From a Common Law Perspective' (2004) 4 *Non-State Actors and International Law* 59. In raising for consideration 'the more theoretical question of whether national courts should apply customary law' (at 62), Boyle discusses a litany of reasons (including lack of expertise, and legitimacy) why they should not. See also Yi Shany, 'An Old House with New Bricks, or a New House of Old Cards? On National Courts, the International Rule of Law, and the Power of Legal Imagination' (2012) 4 *Jerusalem Review of Legal Studies* 50, 58: 'Due to their lack of institutional independence, poor levels of international law expertise or inadequate degrees of professionalism, some national courts may be perceived by outside observers as undesirable international rule of law agencies.'

133 PH Verdier and M Versteeg, 'International Law in National Legal Systems: An Empirical Investigation' (2015) 109 *AJIL* 514 at 528 note, after an extensive study covering over a hundred countries, and a particularly long period (1815–2013), that 'perhaps the most striking pattern that emerges from our data is that in virtually all states, CIL rules are in principle directly applicable without legislative implementation.... There are only a handful of countries that do not currently apply CIL directly in their domestic legal orders. These include countries such as Algeria, Iran, and Sri Lanka'.

134 See for instance, Ryngaert & Siccama (note 88) 25, who suggest that precisely because 'domestic courts, which function in a state governed by the rule of law, are supposed to identify and apply the law, regardless of the political ramifications of their decisions', 'a rigorous application of the two-elements approach to customary law identification by domestic courts is called for.'

the problem with the approach of South African courts is not their use of subsidiary means per se. The problem, as I have discussed above, is that the courts' use of those sources is often lacking in rigour,¹³⁵ and, therefore, can be *ad hoc* and at the mercy of the approach taken by the parties and their legal representatives in each case.¹³⁶ The courts have not sought to contemplate to which of a range of subsidiary means, where available, they will give preference, or what weight different sources will carry, and why. A few issues emerge:

- (i) While the courts have on a number of occasions relied on decisions of the ICJ (amongst other sources), and in one decision there was a passing recognition of the 'authoritative' nature of ICJ decisions,¹³⁷ they have not made clear whether, in principle, ICJ decisions are to be favoured over, for instance, any pronouncements by UK domestic courts (upon which South African courts regularly rely).¹³⁸
- (ii) One sees no indication that South African courts see the value or need to treat foreign court decisions with caution, nor the need, where available, to consider a wider range of decisions from different countries' courts. Foreign domestic courts may serve as subsidiary means to identify customary international law, but, as we have seen, they should be used with caution since they may be affected by their unique domestic legal framework and national perspective, they may lack international law expertise,¹³⁹ and their determination of a customary international law rule may be superficial.¹⁴⁰
- (iii) In respect of academic writers, while it is quite common for domestic courts to 'make sometimes copious reference to jurists' writings',¹⁴¹ when South African courts rely on academic writers, there is no consideration given as to which writers on the subject area are to be favoured or relied on, or why.¹⁴² Thus, there is undoubtedly scope, in line with ILC's recommendations in the Draft Conclusions, for the courts to be more careful to ensure that where they rely on writers, those writers have themselves done sufficient work to establish the customary international law on the basis of primary evidence, and to ensure that a range of scholarship is considered (especially from different regions, if possible).

135 See Part 4, third point.

136 See Part 4, fourth point.

137 See *Minister of Justice v SALC* (note 62) para 67.

138 See e.g. the reliance on UK decisions in *Minister of Justice v SALC* *ibid*, which are similarly quoted as apparently authoritative pronouncements on customary international law, alone or sometimes alongside international decisions (see paras 66 fn 41, 71 and 74). See also *National Commissioner v SALC* (note 60) para 35 fn 34.

139 ILC Draft Conclusions (note 5) 150, conclusion 14, para 7 of commentary, and see discussion in Part 2.1.

140 *Ibid* 149, para 3 of commentary on Draft Conclusion 13, and see discussion in Part 2.1.

141 Crawford (note 13) 40, who also notes that even the ICJ makes significant use of academic writings even if this does not always appear from the ICJ's actual judgments.

142 See references in note 80 above.

(iv) The reliance by South African courts in some cases on the ILC's work¹⁴³ is to be welcomed. Domestic courts do well to rely on the expertise and breadth of research of the ILC, where this is available, which should at least avoid the danger of establishing customary international law with reference only to limited subsidiary means for determination, and in the absence of the consideration of the relevant primary evidence.¹⁴⁴ However, while at times the courts have relied on the work of the ILC, South African courts have not suggested that they will generally seek to consider the ILC work when this is available (and if not, why not). Such a suggestion in a judgment would no doubt galvanise litigants and their legal representatives, in future cases, to seek out, where available, relevant ILC reports and place those before the courts.

5.3 Ways of moderating the adversarial limitations on courts

In Part 2.2.2 I noted that South Africa's adversarial system means that the courts primarily adjudicate the issues raised and evidence placed before them by the parties. As a consequence, South African courts are often reliant on, and limited by, the legal and factual submissions made by the parties. However, while this is normally the position, the Constitutional Court has demonstrated that the adversarial limitations on a court can be moderated in three ways, which courts ought to consider making use of when called upon to determine customary international law.

The first way is that the Constitutional Court has demonstrated in *Law Society v President* that it is able to conduct its own primary research and — unusually, given South Africa's adversarial system — is willing to do so when it thinks it is necessary to supplement what is placed before it by the parties. Moreover, the Court has shown that it will also undertake its own research into the case law and legislation of foreign countries when it conducts comparative research. For instance, in *H v Fetal Assessment Centre*,¹⁴⁵ the substantive issue before the Court was whether South Africa's common law may be developed to provide a child with the right to bring a 'wrongful life' claim.¹⁴⁶ The Court indicated that it conducted its own research in order to be in a position to set out how, in general terms, such claims were dealt with by foreign countries, and in some instances the rationale

143 See *Kaunda* (note 77) paras 25 – 9 and *DA v Minister of International Relations* (note 49) paras 33–4.

144 ILC Draft Conclusions (note 5) 142–3; See *Gabčíkovo-Nagymaros Project* (note 100) para 51; *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011 [2011] ITLOS Reports 10, 56 para 169; *Prosecutor v Elizaphan Ntakirutimana and Gérard Ntakirutimana* (Appeals Judgment) ICTR-96-10-A; ICTR-96-17-A (13 December 2004) (ICTR) para 51.

145 *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC).

146 The Court was determining the issue at the exception stage. Therefore, the Court did not need to reach a final conclusion as to whether to in fact develop the common law to recognise such a claim. See *ibid* para 48, read with paras 3–5, and 25–6.

therefor.¹⁴⁷ The countries included in this study came from Europe, Asia, the Middle East, North America and South America. The Court explained how it had conducted this research:

The methodology used in obtaining information includes an enquiry directed to the members of the Venice Commission. The Venice Commission (formally known as the European Commission for Democracy through Law) is an organisation of 68 member states – including those considered observers, associate members and of a special status (such as South Africa) – and acts as the Council of Europe’s advisory body on constitutional matters. It is composed of constitutional and international law experts, Supreme or Constitutional Court judges and members of national parliaments. Member states may submit constitutional law enquiries to the Venice Commission in order to solicit responses from other member states. The responding member states then set out the position in the law of that country.¹⁴⁸

That evidence was then tabulated in annexures to the judgment. It is evident from these annexures that in addition to information received from the Venice Commission, the Court, through its own research (no doubt enabled by the fact that the Court has more than 30 domestic and foreign legal researchers or ‘law clerks’¹⁴⁹), evidently also added further references in addition to those provided by the Venice Commission.¹⁵⁰ That the Constitutional Court was willing to undertake this exercise in respect of comparative domestic law (and has employed this approach on a number of occasions),¹⁵¹ suggests that the Court is indeed able, should it so choose (or believe it necessary) to conduct primary research, albeit mostly through a third party, when there is a need to determine customary international law rules. The Constitutional Court has not yet sought to request any assistance from the Venice Commission in relation to customary international law. However, as the above quote indicates, the Venice Commission is ‘composed of constitutional and *international law* experts’. Therefore, there

147 Ibid paras 33–47.

148 Ibid para 133.

149 See details of the Constitutional Court’s law clerk programme at <https://www.concourt.org.za/index.php/law-researchers/about-law-clerks>.

150 The Court indicated that it received response from twelve countries, but its table sets out details of relevant provisions of law from 23 countries (see *H v Fetal Assessment Centre* (note 145) para 33 fn 35 and Table A).

151 See more recently *Qwelane v South African Human Rights Commission & Another* 2021(6) SA 579 (CC) para 93 (in relation to ‘other jurisdictions’ positions on freedom of expression and hate speech prohibition’); and *Economic Freedom Fighters & another v Minister of Justice and Correctional Services & another* 2021 (2) BCLR 118 (CC) para 115 (in relation to the crime of incitement); *King NO v De Jager* 2021 (5) BCLR 449 (CC) para 59 fn 107 (in relation to freedom of testation).

appears no reason why, for instance, the Venice Commission¹⁵² could not be relied on, where the need arises, not merely to provide comparative law research, but research in respect of a customary international law issue. In fact, in 2011, the Constitutional Court of Peru requested the Venice Commission to submit an amicus brief in a case before the Court to deal with a series of questions in respect of crimes against humanity. This required the Venice Commission to provide research *inter alia* into state practice or opinio juris evidenced by various court decisions.¹⁵³ Naturally, the possible use of the Venice Commission is merely one avenue of potential direct research that the Court has employed on occasions to ensure that it had detailed evidence as to the comparative legal position across a number of jurisdictions. This demonstrates an ability and willingness to conduct primary research, or to draw on the assistance provided by authoritative bodies, that goes beyond the parties' legal submissions or papers, when the courts think it necessary to do so. And, while the Constitutional Court is better placed than any lower courts to conduct its own research, international efforts are being made to make evidence of state practice more easily accessible to those who are required to identify customary international law.¹⁵⁴ This could be drawn on not only by parties, but by courts too.

A second way that a perceived paucity in the submissions by parties on customary international law can be remedied is the one recently adopted by the Constitutional Court in respect of certain international treaty obligations and their interpretation. The issue arose in a case involving the question of whether the Court should rescind its previous judgment finding that former President Zuma should be imprisoned for 15 months for contempt of court.

152 In more recent decisions the Court when referring to the 'Venice Commission' has referred to 'the World Conference on Constitutional Justice (Venice Commission)'. And it thus appears that the requests, while still directed to the Venice Commission, may be dealt with by representatives on the World Conference, although, exactly how this is dealt with in practice is not clear from the Court's judgments (which suggest that the practice has stayed the same). The Venice Commission's assistance and cooperation with Constitutional Courts beyond its members grew into the World Conference on Constitutional Justice, for which the Venice Commission acts as the Secretariat. 'The World Conference on Constitutional Justice unites 118 Constitutional Courts and Councils and Supreme Courts in Africa, the Americas, Asia, Australia/Oceania and Europe. It promotes constitutional justice — understood as constitutional review including human rights case-law — as a key element for democracy, the protection of human rights and the rule of law (Art 1.2 of the Statute).' See https://www.venice.coe.int/WebForms/pages/?p=02_WCCJ and https://www.venice.coe.int/WebForms/pages/?p=01_Constitutional_Justice&lang=EN.

153 Venice Commission 'Amicus Curiae Brief on the case *Santiago Bryson de la Barra et al* (on crimes against humanity) for the Constitutional Court of Peru' (14–15 October 2011) CDL-AD(2011)041, available at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)041-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)041-e).

154 See ILC Secretariat Memorandum 'Ways and means for making the evidence of customary international law more readily available' (2019) UN Doc A/CN.4/710/Rev.1. By way of example see the detailed list of resources in Annex I to VI of the ILC Secretariat Memorandum, and the database prepared by the ICRC in relation to international humanitarian law, available at <https://www.icrc.org/en/document/update-customary-ihl-database>.

Mr Zuma had refused to comply with an order of the Constitutional Court requiring him to comply with a subpoena to appear as a witness in a commission of inquiry into large-scale corruption — evocatively known as ‘state capture’ — during his tenure as President.¹⁵⁵ Mr Zuma argued that ordering his direct imprisonment gave rise to a rescindable error in the Court’s judgment since the order violated his right to be free from arbitrary detention and to a fair trial. None of the parties had raised any international law issues in their affidavits, written submissions, or oral arguments.¹⁵⁶ However, after the hearing, the Court issued directions calling on all the parties to make submissions on specific questions of international treaty law. The Court wished to know whether these would assist the Court in interpreting the relevant rights in the Bill of Rights that were at issue (given that, as we have discussed, the Constitution requires courts when interpreting the Bill of Rights to have regard to international law). The Court specifically sought submissions on the implication of articles 9 and 14(5) of the ICCPR (to which South Africa is a party)¹⁵⁷ and decisions of the Human Rights Committee.¹⁵⁸ Although the Court issued the directions, the majority judgment dismissing Mr Zuma’s rescission application makes clear that the directions were issued at the behest of the minority.¹⁵⁹ The Court sought these further written submissions in respect of treaty law, not customary international law. But the point is that the Court considered itself at liberty to seek further submissions on an aspect of international law, even though the parties had not raised this issue or made any submissions in respect thereof. There is no reason, in principle, why a similar approach could not (and should not) be taken by the Court in relation to any issue of customary international law that has not been properly raised or dealt with by the parties (for instance, where the sources they rely on are too limited). And, in principle, there is similarly nothing stopping a High Court, in the exercise of its inherent power to regulate its own process,¹⁶⁰ from equally calling on parties to make further submissions on issues of customary international law, if the need arises.

The third way that courts could respond to any perceived paucity in the authorities or evidence placed before them is for the Court to invite relevant international law experts in academia or NGOs to place submissions before the Court on the relevant customary international law at issue in a case. There is nothing ground-breaking in this approach. The Constitutional

155 *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State & Others* 2021 (11) BCLR 1263 (CC) (*‘Zuma III’*).

156 The papers are on file with the author.

157 International Covenant on Civil and Political Rights (‘ICCPR’): Article 9 deals with the right to liberty and security of person, and art 14(5) provides for the rights of those convicted of a crime to have their conviction and sentence reviewed by a higher tribunal.

158 *Zuma III* (note 155) para 105 fn 81.

159 *Ibid.* The minority sought to rely, among other things, on South Africa’s obligations under the ICCPR, to hold that the Court’s prior judgment violated Mr Zuma’s constitutional rights and ought to be rescinded.

160 See s 173 of the Constitution.

Court has employed it, although it is rare. The Constitutional Court, in *Okah*, specifically issued directions calling upon certain international law experts and institutes to make submissions on the particular issue of international humanitarian law that faced the Court (which arose in the context where the Court was required to interpret domestic terrorism legislation in light of South Africa's international treaty obligations).¹⁶¹ Two institutions responded to that request and were joined as amici, and filed written submissions and made oral submissions.¹⁶² Furthermore, in *National Commissioner v SALC*, a number of international law experts applied for joinder as *amici curiae* in the Constitutional Court and made submissions concerning the customary international law issues facing the Court. Similarly, in *Minister of Justice v SALC* in the SCA, a number of NGOs with international law expertise sought admission as amici and made written and oral submissions to the SCA — although the Court did not believe all their international law submissions were relevant, and also refused certain of the NGOs formal admission as amici.¹⁶³ When the matter was appealed to the Constitutional Court (which appeal was ultimately withdrawn), further international law experts (including Professors John Dugard and Guénaél Mettraux) applied for admission as and were admitted as amici, and made submissions to the Court.¹⁶⁴

The practice of the Constitutional Court inviting international law experts (or institutions) to make submissions in a case, or such parties of their own accord seeking leave to be admitted as amici to make submissions, is to be welcomed, encouraged, and emulated. This is especially so in areas that occasion significant debate as to the identification and content of customary international law. Even though customary international law is viewed as a matter of law, of which, in principle, the Court can take judicial notice, and which is not required to be proved by expert evidence, properly identifying customary international law (as opposed, for instance, to interpreting the terms of a treaty) can entail significant practical difficulties. As James Crawford points out, difficulties arise in a system that views international law as 'law', of which judicial notice can be taken, because 'there is a problem involved in finding reliable information of international law, especially customary law, in the absence of resort to expert witnesses.'¹⁶⁵

161 *S v Okah* (note 58) para 15 fn 45. See also Coutsooudis & du Plessis (note 105) 194.

162 *S v Okah* *ibid* para 15 ('Shortly before the hearing, this Court directed that the papers be brought to the attention of certain persons and organisations with expertise in international law.')

163 *Minister of Justice v SALC* (note 62) paras 34–9.

164 Written submissions on file with the author.

165 Crawford (note 13) 52. See also Shaw (note 13) at 121 who, when commenting on the position in England, notes that 'English courts take judicial notice of international law, so that formal proof of a proposition does not need to be demonstrated (unlike propositions of foreign law which need to be proved as fact by evidence) and this itself has been a key factor in determining the relationship between international law and domestic law. Judges are deemed to know international law. In practice this means that *judges and lawyers trained in domestic law have had to grapple with the different sources of international law and the difficulties of this task have percolated through the relationship.*' (Emphasis added.)

5.4 The need for meaningful engagement about how to identify customary international law

Given what is set out above, it is time for the South African courts to engage meaningfully with the practical and principled issues of how they and parties before them should endeavour to identify customary international law. A meaningful engagement with these issues would go some way in ensuring that the identification of customary international law is approached in a sufficiently rigorous and critical manner. This should also ensure that the courts themselves and the parties appearing before them can better navigate what can be a particularly difficult aspect of international law. The need for courts to grapple with these issues in a South African context is important for practical and rule-of-law reasons. Absent a clear, predictable, and consistent approach to how customary international law generally ought to be identified by South African courts, (a) there may be a negative impact on the accuracy and quality of conclusions as to the content of customary international law; and (b) parties may be left uncertain about what is required of them when seeking to rely on customary international law, thus leading them either to avoid the issue, or not do enough to assist the Court in properly determining the content of customary international law. Therefore, a rigorous approach to the identification of customary international law (in conceptualisation and application) matters. Without this, customary international law, which is automatically part of South African law and binding, may simply come to mean whatever the Court or a practitioner may want it to mean,¹⁶⁶ and this may lead to incorrect, or at least poor-quality, decisions.¹⁶⁷ This is a concern not only for South African law, but for international law, and its coherence, more generally. If South African courts demonstrate a lack of methodological rigour, they may describe customary international law in ways that are at odds with other domestic and international courts. This would undermine the credibility of the South African courts' identification of customary international law, and may undermine the credibility of customary international law more generally.¹⁶⁸ And, as I noted earlier, decisions that are not suitably rigorous in their determination of customary international law are unlikely to be accorded much weight.¹⁶⁹

166 As Wood (note 8) at 157 argues: 'a structured and careful process of legal analysis and evaluation is required in order to ensure that only a rule of customary international law properly so called is identified.' See also Ryngaert & Siccama (note 88) at 25 and F Orrego Vicuña, 'Customary International Law in a Global Community: Tailor Made?' (2005) 38(148) *Revista de Estudios Internacionales* 22 at 38 who notes, amongst other things, that 'if rules of law are based on pure political acceptability and not on legal certainty, nothing will prevent "their use as apologies for tyranny."' (quoting from M Koskenniemi, 'The Politics of International Law' (1990) 1 *EJIL* 4, 27).

167 Ammann (note 2) 270.

168 ILC Draft Conclusions (note 5) 122.

169 Ibid at 149, para 3 of the commentary on draft conclusion 13, and the discussion of the implications of this in Part 2.1.

Moreover, as we have seen, when South African courts approach the cases presented before them, they are heavily reliant on the parties. If litigants know in advance what is expected of them if they wish to rely on customary international law, then they will better be able to ensure the relevant evidence or legal arguments are marshalled and placed before the Court. Similarly, if courts, and particularly the Constitutional Court or the SCA, were in successive judgments to grapple with the appropriate way to approach the identification of customary international law, then in subsequent matters, the courts would be less likely to determine customary international law in *ad hoc* (litigant-dependent), unreflective, or superficial ways.

It is equally of concern that a lack of a clear and certain approach to the identification of customary international law may also mean that despite being *de jure* part of South African law, customary international law may be eschewed for being too uncertain, complex, or vague to be relied upon (like uncharted territory, avoided for fear of getting lost).¹⁷⁰

Thus, in concrete terms, it would behove the South African courts to engage with and, if possible, clarify at least some of the following issues. Should parties place evidence before the Court, where they are able, in relation to the constituent elements of customary international law (state practice and *opinio juris*)? Alternatively, will the courts mostly be satisfied with subsidiary means for determining customary international law, given, among other things, the practical difficulties of a detailed traversing of primary evidence? If the former, in what instances would primary evidence be required or desirable? Should attempts be made to find subsidiary means that themselves conducted a thorough examination of the evidence of state practice and *opinio juris*? Should the subsidiary means relied upon be particularly diverse? Should any priority be given to some subsidiary means over others? Will a different or more rigorous approach be encouraged where the customary international law at issue is particularly contentious or uncertain? Will the courts allow a party to adduce expert evidence in respect of customary international law, even if such expert evidence is not

170 See e.g. the comments by J Brunnee & S Toope, 'A Hesitant Embrace: The Application of International Law by Canadian Courts' (2002) 40 *Canadian Yearbook of International Law* 3, 15–16 in the Canadian context: '[W]e suspect that the fluidity of custom and the challenges involved in determining whether a norm has acquired customary law status go a long way towards explaining the reluctance of senior Canadian courts to apply customary law.' See also Higgins (note 3) 207; Greenwood (note 7) 195.

viewed as dispositive of the content of customary international law? In what circumstances will this be allowed?¹⁷¹

Do all these issues need to be dealt with or resolved? No. Nor would one expect most of these issues to be resolved immediately or in one case. But the point is this: over almost thirty years of jurisprudence under a constitutional dispensation that automatically makes customary international law 'law' in South Africa, and where the courts accept that it is their duty to 'discer[n] the existing state of [that] law',¹⁷² the courts have made no attempts to give direct, let alone conclusive, answers to any of these questions.

Lest it be suggested that the call for South African courts to wrestle with these issues, in the hope that they are able to provide some methodological clarity or guidance (for litigants and other courts), is mere pedantry, an academic cavil, or a counsel of perfection, we should note that the SCA and the Constitutional Court often consider and set out how courts and parties ought to approach various areas of law and the interpretation of that law.¹⁷³ For instance, to draw attention to one pertinent example, the courts' predominately laissez faire approach to customary international law is in direct contrast with how South African courts have grappled with the roughly analogous determination of (domestic) customary law (sometimes referred to as 'indigenous law'). As with customary international law, the Constitution, expressly, but broadly, deals with the position of customary law in South Africa's legal system.¹⁷⁴ There are, of course, differences. The

171 For instance, in *Nevsun* (note 113) paras 98–9 the Canadian Supreme Court raised the question of whether, despite the fact that Canadian courts take judicial notice of international law as 'law', it might be appropriate to allow the use of certain types of evidence to demonstrate the existence of a 'new norm of customary international law'. The Court, however, found it unnecessary to reach any conclusions on this issue, because the relevant customary international law rule at issue in the case was well settled. The Court referred, inter alia, to the work of AW La Forest, 'Evidence and International and Comparative Law' in OE Fitzgerald (ed), *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006). La Forest said, at 389: 'There is no doubt that international law is relevant in our modern world and there is no question that international law is law and that proof thereof should not be required. However, the argument has been made that expert evidence may in fact assist the Court in its role of harmonizing international and domestic law.'

172 *Minister of Justice v SALC* (note 62) para 74.

173 See the SCA's articulation of the appropriate way to interpret contracts, legislation, and other documents, and the relevant evidence in that respect, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 17–26. This has been grappled with and consider in a range of cases, such as *Capitec Bank Holdings Limited & Another v Coral Lagoon Investments 194 (Pty) Ltd & Others* [2021] 3 All SA 647 (SCA) para 25ff. The proper approach to interpreting legislation, in order to give effect to rights in the Bill of Rights, is discussed in *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) paras 22–3 and *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another* 2009 (1) SA 337 (CC) paras 46, 47, 84, and 107.

174 Section 211(3).

Constitution gives courts the power to ‘develop’ (domestic) customary law in line with the Constitution’s Bill of Rights.¹⁷⁵ Moreover, domestic legislation specifically provides that courts may take judicial notice of customary law, as with foreign law, when it is clear and certain, but goes on to provide that the fact that judicial notice can be taken of customary law where this is clear and certain ‘shall not preclude any party from adducing evidence of the substance of a legal rule ... which is in issue at the proceedings concerned.’¹⁷⁶ Notwithstanding these differences, it is worthwhile noting, by way of comparison, that the Constitutional Court has consistently grappled with how customary law should be identified and established, and in so doing has provided significant guidance to lower courts and parties, answering, or at least engaging with, many of the types of questions raised above in relation to customary international law. This has occurred in a number of cases.¹⁷⁷ So, South African courts can and have grappled with and provided guidance in respect of how domestic customary law — an analogous unwritten and contested form of law, evidenced by practice — ought to be identified. Yet, we have seen nothing equivalent in relation to customary international law. That should change.

Much of the preliminary work to develop a systematic and rigorous approach to how to identify customary international law has already been undertaken by the ILC in its Draft Conclusions. As I noted earlier, the ILC

175 Section 39(2) of the Constitution provides that ‘when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

176 Law of Evidence Amendment Act 45 of 1988, s 1(2).

177 See e.g. *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) paras 109 and 152; *Mayelane v Ngwenyama* 2013 (8) BCLR 918 (CC) (‘*Mayelane*’) para 46, read with para 25; *Alexkor Ltd & Another v Richtersveld Community & Others* 2004 (5) SA 460 (CC) paras 53 and 54; *Shilubana and others v Nwamitwa* 2009 (2) SA 66 (CC) paras 44–8.

Draft Conclusions may not settle all academic debate.¹⁷⁸ But as a starting point, they are the closest that courts that are required to identify customary international law are likely to come to an authoritative and systematic, yet flexible and practical, framework that enjoys wide and general support.¹⁷⁹ Indeed, the ILC Draft Conclusions (including their commentaries) were expressly prepared with the aim of being of assistance to domestic courts (amongst others) tasked with identifying customary international law.¹⁸⁰ The UN General Assembly has encouraged their wide dissemination and use for precisely this purpose.¹⁸¹ In Part 2.1, I discussed some of the broad principles that the ILC Draft Conclusions establish. Of course, they do not deal with a number of domestic context-specific issues with which South African courts will need to grapple, particularly in relation to procedural and evidentiary matters and limitations, highlighted in the questions posed

178 See discussion at note 18 above. However, even Hakimi, who is particularly critical of the two-element approach to the identification of customary international law, accepts that the ILC Draft Conclusions are the ‘most systematic and authoritative’ exposition of the two-element approach (Hakimi (note 18) 1497). It is clear that the two-element approach enjoys wide and enduring support from states and courts. The alternatives proposed by scholars to the two-element approach have not been accepted by states or courts (see note 10). Indeed, as Heller (note 18) for instance notes in his critique of Hakimi’s approach, while she argues for dispensing with the accepted two-element (‘rulebook’) approach to the identification of customary international law she ‘never makes clear what a court should do when faced with the need to resolve a dispute over a customary rule’. Heller explains the problem with this example: ‘Consider a case before the ICJ. State A claims that the relevant customary rule is X. State B insists that the relevant customary is Y. How should the ICJ resolve that dispute? The traditional “rulebook” answer is that the Court must apply the secondary rules of CIL – the two-element theory – to determine which primary rule, X or Y, is valid and binding. That is what the ICJ has done in cases ranging from North Sea Continental Shelf to Nicaragua to Jurisdictional Immunities. The ICJ might get the rule wrong by misapplying the secondary rules. But unless it intends to throw up its hands, declare a *non liquet*, and send everybody home, it has to apply them.’ Thus, it is precisely because courts are enjoined to determine and apply the law (rather than act as political agents), and must operate within the constraints of the law and the rule of law (and indeed, as we have seen in South African, the Constitution provides that customary international law is ‘law in the Republic’), that it is necessary for them to properly apply the two-element approach (see Ryngaert & Siccama (note 88) 25, and more generally the discussion and authorities at note 166).

179 See note 19.

180 As Wood (note 8) at 156 noted in relation to the purpose of the ILC Draft Conclusions: ‘Together with their commentaries, the conclusions seek to offer concise and practical guidance to all those called upon to identify the existence and content of rules of customary international law, recognizing that such a task is increasingly of concern to those who are not necessarily specialists in public international law.’ Wood ‘Concluding Observations’. It is, therefore, not surprising that we already see evidence of the ILC Draft Conclusions being relied on by domestic courts (see e.g. *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2018] 1 All ER 662 paras 31–2, where the UK Supreme Court refers to and relies on the ILC Draft Conclusions (as there were after their first reading in 2016); and *R (on the application of Jimenez) v The First Tier Tribunal (Tax Chamber)* [2019] EWCA Civ 51 para 56, where the UK Court of Appeal relies on the final ILC Draft Conclusions).

181 UNGA Resolution 73/203 (note 17).

above. Nevertheless, the ILC Draft Conclusions bear the approval and imprimatur of the international community. If South African courts make use of the ILC Draft Conclusions as a framework, or at least a starting point, they will be well placed to approach the identification of customary international law in a way that is practical and credible within South Africa's domestic context.

Finally, given the discussion in Part 4 about the lack of awareness of the potential role played by domestic courts in the development of international law,¹⁸² whatever that role is or ought to be (a matter which is beyond the scope of this chapter), South African courts would do well to be more self-conscious of at least their potential role as agents in the development of customary international law.

6 CONCLUSION

It has been a long time since South African courts and the practitioners before them could, with vague indifference, ignore the import and reality of international law in general, and customary international law in particular. Customary international law is law in South Africa as much as tax law, contract law, or labour law. It may not be as frequently relevant and applicable as are many parts of domestic law, and courts and domestic legal practitioners may be less familiar with its contours and nuances. But it is precisely for these reasons that how courts, legal practitioners, and the parties they represent approach it matters more, not less. This chapter has sought to analyse and describe the topography of the South African courts' past engagement with customary international law. This has been done in order to provide tentative suggestions for how the road ahead ought to be navigated. We have seen that important issues of customary international law do and no doubt will continue to find themselves before South African courts for determination. Thus, customary international law cannot be avoided — nor should it be. However, we have also observed that the courts' engagement with customary international law would benefit from a more reflective, rigorous, and considered approach. It is accordingly past time that South African courts should consider coherently and systematically how they, and the parties appearing before them, ought, both procedurally and substantively, to approach the identification of customary international law. Customary international law is not some exotic and indeterminate set of rules from another legal system. It is part of South African law. The sooner it is fully treated as such, the better for courts, practitioners, litigants, and international law more generally.

182 See Part 4, sixth point. See also Iovane (note 131) 625: 'an innovative solution reached in the particular case may be spontaneously followed later by the international community as a whole, thus becoming a real customary rule'; Andreas Paulus, 'The Judge and International Custom' (2013) 12 *The Law and Practice of International Courts and Tribunals* 253, 265.