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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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1 INTRODUCTION

Some thirty years ago, in a decisive break with and rejection of its apartheid past — a past where it was an international law pariah — South Africa adopted a new Constitution. As a consequence, an important feature of the Constitution is its integrative (or open) approach to international law.¹ It is thus unsurprising that during the last three decades of constitutional democracy, South African courts have, with increasing regularity, found it necessary to consider and apply treaties (including as aids to the interpretation of the Bill of Rights and legislation).² Given this application of treaties, which has become an ever more embedded feature of the courts’ jurisprudence,³ this chapter provides a systematic descriptive analysis of how South African courts approached the interpretation of the treaties

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1 In particular, see the Constitution of the Republic of South Africa, 1996 (‘Constitution’) ss 39(1)(b), 198(c), 199(5), 231(4), 232, and 233 (which followed on from the openness to international law of the Interim Constitution, which came into force in 1994). See discussion in Chapter 3, Parts 3.3.2.1–3.3.2.2; *Minister of Justice and Constitutional Development & others v Southern African Litigation Centre & others* 2016 (3) SA 317 (SCA) para 63.

2 Chapter 3. The Constitution refers to ‘treaties’ as ‘international agreements’, but in this chapter, I use the term ‘treaty’. See art 2 of the Vienna Convention on the Law of Treaties.

3 Chapter 3.

they applied over the last half-decade (2018 to 2023).⁴ Undertaking this analysis at this juncture makes sense and is important: one would now, three decades into South Africa's post-apartheid regime (pursuant to South Africa's international-law-integrative Constitution), expect its courts to have settled on some general approach to the interpretation of treaties, which ought to be reflected in the recent case law. Rather than focusing on one or two cases, or only the last year, it is useful to consider all the cases where treaty law was applied over a manageable period since this better allows for general trends to be identified and assessed and avoids paying undue attention to cases that may be exceptions. For this reason the period 2018–2023 was selected.

Plainly, the Constitution's openness to international law compels its courts not only to be willing to apply international law in appropriate cases but also to determine international law properly when doing so.⁵ But the question is: do they determine international law properly?⁶ In this chapter, I undertake a systematic descriptive assessment of the approach to the interpretation of treaties, so as to make critical proposals for charting the way ahead in light of that assessment.

In order to situate the chapter's descriptive account of the courts' approach to the interpretation of treaties, I begin in Part 2 by considering how treaties ought to be interpreted. I do so with particular regard to cus-

4 The exact period under consideration (2018–2023) is six years, which is approximately half a decade. I will refer to this period as the 'last half-decade' in this chapter. There has not been a systematic scholarly analysis of the approach to the interpretation of treaties in the cases decided over this period. Some previous scholarly works have, since the advent of South Africa's constitutional democracy, considered how its courts approach the interpretation of treaties in general or in relation to specific cases at various points. Examples of this previous scholarship include: J Dugard, 'South Africa', in D Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009); N Botha, 'Justice Sachs and the Interpretation of International Law by the Constitutional Court: Equity or Expediency?' (2010) 25 *SA Public Law* 235; H Woolaver, 'Judicial Enforcement of International Decisions against Foreign States in South Africa: The Case of *Government of the Republic of Zimbabwe v Louis Karel Fick and others*' (2015) 6 *Constitutional Court Review* 217; D Tladi, 'Interpretation of Treaties in an International Law-Friendly Framework: The Case of South Africa' in H Aust & G Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (2016); D Tladi, 'The Interpretation and Identification of International Law in South African Courts' (2018) 135 *SALJ* 708; A Coutsooudis & M 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; D Tladi, 'The Constitutional Court's Judgment in the SADC Tribunal Case: International Law Continues to Befuddle' (2020) 10 *Constitutional Court Review* 129.

5 Coutsooudis & du Plessis *ibid* at 188–95.

6 For an analysis of the South African courts' general failure to determine customary international law (the other main source of international law) properly during the period 2011 to 2021, see Chapter 2. In Chapter 3, which focussed on the evolving approach to the application of unincorporated treaties, while no general descriptive account of the courts' approach to treaty interpretation was undertaken, one issue identified was the need for a rigorous approach to the interpretation of unincorporated treaties when applying them (Chapter 3, Part 5.4).

tomary international law's rules for the interpretation of treaties, as codified in the Vienna Convention on the Law of Treaties ('Vienna Convention'). In Part 3, based on a detailed consideration of the courts' jurisprudence over the last half-decade, I delineate a number of pertinent features of South African courts' approach to treaty interpretation. This reveals that the courts' approach to treaty interpretation has generally not been methodologically rigorous from an international law perspective. Courts, with some notable exceptions, particularly in the most recent cases, tend to ignore or fail (expressly and implicitly) to use international law's interpretative rules and the material made applicable by these rules. The courts' approach is often superficial — more akin to assertion than interpretation — and inconsistent. It fails to account properly for the obligation flowing from the Constitution to use international law's interpretative rules, which, as customary international law, form part of South African law and, therefore, must be applied.⁷ Thankfully, one observes some ad hoc and partial exceptions, particularly in the Constitutional Court's more recent jurisprudence.

Given these features or trends, in Part 4, I make a series of recommendations for navigating the road ahead to ensure that, as South Africa starts its fourth decade of constitutionally-enshrined integration of international law, treaty law's interpretative neglect does not continue.

2 HOW SHOULD TREATIES BE INTERPRETED?

Before considering how South African courts have interpreted treaties over the last half-decade, it is necessary to say something about how treaties ought to be interpreted. No document is self-interpreting. Its meaning must be ascertained. This is particularly true of treaties: agreements between nation states that are often the product of years of careful diplomatic negotiation, which are sometimes evocatively described as 'disagreements reduced to writing'.⁸ Therefore, as with any legal system,⁹ or indeed any system faced with the interpretation of a written text, international law has developed hermeneutical processes and rules (or 'tools') to give meaning to the agreements between states. In general, international law's approach to the interpretation of treaties has been codified in the Vienna Convention.¹⁰ It is well established that articles 31 and 32 of the Vienna Convention ('the Vienna rules') reflect

⁷ The Constitution s 232, read with s 165(2), see discussion in Part 2.

⁸ P Allott, 'The Concept of International Law' (1999) 10 *EJIL* 31, 43.

⁹ For instance see I Van Damme, *Treaty Interpretation by the WTO Appellate Body* (2009) 33 ('[e]very legal system has developed principles to guide and justify the reasoning process of the adjudicator in interpreting and applying the law.'). As discussed below, the South African courts have variously considered and laid down rules for the interpretation of domestic statutes and contracts (see reference and text at note 46 below).

¹⁰ The Vienna Convention on the Law of Treaties, 1969 ('the Vienna Convention').

the customary international law position.¹¹ South Africa is not a party to the Vienna Convention. South Africa's government has, nevertheless, taken the view that the Vienna Convention is declaratory of customary international law and, therefore, binding on South Africa.¹² Moreover, South African courts have, at least in the limited instances when they have considered the issue, in more recent cases accepted that the Vienna Convention's main provisions, which include those in relation to the interpretation of treaties, are reflective of customary international law and, therefore, part of South African law and applicable to the interpretation of treaties.¹³

The Vienna rules' central features can be summarised as follows:

- (1) The Vienna rules *require* that a treaty be interpreted in 'good faith', with its terms given their 'ordinary meaning', having regard to 'their context', and in the light of the treaty's 'object and purpose'.¹⁴ The text of a treaty that must be taken into account includes its preamble (a common feature of treaties) and any annexes.¹⁵ The 'context', in addition to the full text of the treaty, also comprises agreements by all the parties in connection with the conclusion of the treaty, or instruments by one or other of the parties where all the parties accept that these relate to the treaty.¹⁶

11 ILC 'Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries' (2018) UN Doc A/73/10 ('ILC Draft Conclusions: Subsequent Practice'), Conclusion 2(1), commentary para 4, at 18–19; *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment [2009] ICJ Reports 213 para 47; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment [2007] ICJ Reports 43 para 160; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Preliminary Objections, Judgment [2022] ICJ Reports 477 para 87. Article 33 of the Vienna Convention (which deals with the interpretation of treaties authenticated in two or more languages) may also be part of customary international law, but this is less well-established.

12 See the Department of International Relations and Cooperation's website <https://dirco.gov.za/general-information/>.

13 *Law Society of South Africa & Others v President of the Republic of South Africa & Others* 2019 (3) SA 30 (CC) ('*Law Society*') paras 36–39 (accepting that the Vienna Convention, and in particular its main provisions, formed part of customary international law – although it does not refer to or apply its provisions in respect of treaty interpretation); *Commissioner SARS v Levi Strauss SA (Pty) Ltd* 2021 (4) SA 76 (SCA) ('*Levi Strauss*') para 36 fn 16 (expressly finding that certain of the Vienna rules must be used, relying on Constitutional Court's acceptance in *Law Society* of the customary status of Vienna Convention generally); *Krok and Another v Commissioner, South African Revenue Service* 2015 (6) SA 317 (SCA) ('*Krok*') para 27. For an earlier example where the Constitutional Court relied on one aspect of the Vienna rules to explain the use of material in interpretation but did not explicitly explain why the Vienna rules were applicable, see *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC) ('*Glenister II*') para 187 fn 43.

14 Article 31(1) of the Vienna Convention. See, for instance, the application of this recently by the International Court of Justice ('ICJ') in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)*, Judgment [2024] ICJ Reports 78 paras 46–50.

15 Article 31(1).

16 Article 31(2).

- (2) They also *require* any (i) subsequent agreement by the state parties in relation to the interpretation of the treaty, (ii) subsequent practice that establishes the agreement of the parties in respect of the interpretation of the treaty,¹⁷ and (iii) relevant rules of international law applicable in the relations between the parties, to be taken into account in that interpretative process ‘together with the context’.¹⁸ In other words, such subsequent agreements and subsequent practice (i.e. after the treaty’s conclusion) and applicable rules of international law must be considered as part of the primary exercise of considering the text, context, and purpose when attributing meaning to the treaty.¹⁹
- (3) They *allow* recourse to ‘supplementary means’ of interpretation, including (but not limited to) the preparatory work of the treaty (also referred to as ‘travaux préparatoires’ or ‘travaux’)²⁰ and the circumstances of its conclusion.²¹ As a consequence, having regard to the travaux, even if merely to confirm an interpretation or to assist in clarifying ambiguity, is an important feature of the interpretation of treaties.²²

17 ILC Draft Conclusions: Subsequent Practice (note 11), Conclusion 10(2) provides: ‘The number of parties that must actively engage in subsequent practice in order to establish an agreement under art 31, paragraph 3 (b), may vary. Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction.’

18 Article 31(3) of the Vienna Convention.

19 D Regan, ‘Understanding What the Vienna Convention Says About Identifying and using “Sources for Treaty Interpretation”’ in S Besson & J D’Aspremont (eds), *The Oxford Handbook on The Sources of International Law* (2017) 1052–3 (‘If context must be considered before we can assign any meaning to the words, then whatever else is to be taken into account “together with the context”—that is, the materials of 31(3)—must also be considered before we can assign any meaning to the words.’)

20 As to what constitutes the preparatory work of a treaty, in general ‘there is no doubt that elements that are intrinsic to the negotiating process leading to a treaty will generally be accepted as preparatory work. These elements include the following: official records of the negotiations between the parties; draft texts proposed during the negotiation; statements made by state representatives during the debates; diplomatic exchanges; and interpretations formulated by the president of a drafting committee and not contested.’ Y le Bouthillier, ‘Article 32’ in O Corten & P Klein (eds), *The Vienna Conventions on the Law of Treaties* (2011) 852.

21 Article 32 of the Vienna Convention. Article 32 provides for recourse to supplementary means to ‘confirm the meaning resulting from the application of article 31’ (in other words, in any circumstance) or ‘to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.’ (which is once again broadly framed).

22 For a general discussion on the place of the travaux in the Vienna rules see J Mortenson, ‘The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?’ (2013) 107 *AJIL* 780 (Mortenson argues, at 781, that ‘The Vienna Conference sought to secure [the travaux préparatoires] place as a regular, central, and indeed crucial component of treaty interpretation.’). Obviously having regard to the travaux ought not to be uncritical. See, for instance, comments by the Special Rapporteur on the Law of Treaties (H Waldock) ‘Third Report on the Law of Treaties’ (1964) II *YILC* 5, 58 para 21.

It should also be noted that while subsequent practice²³ that establishes the general agreement of the state parties as to the interpretation of their treaty *must* be taken into account (it is an authentic (primary) means of interpretation) (see (2) above),²⁴ even practice by a few states which falls short of this (i.e. it does not establish such general agreement of the parties) can be used as a supplementary means to interpret the treaty.²⁵ But, of course, as the International Law Commission ('ILC') has emphasised in its Draft Conclusions and commentary on subsequent practice and agreements ('Draft Conclusions: Subsequent Practice'), the weight accorded to such subsequent practice will be less.²⁶ Nevertheless, it may 'contribute to the clarification of the meaning of a treaty.'²⁷ Moreover, the supplementary means that may be considered are not a closed list. They may, in principle, include — in addition to the travaux (expressly referred to in article 32(1)) and state practice falling short of general agreement (as discussed) — court 'jurisprudence and academic literature'.²⁸ Court jurisprudence and academic literature are also expressly listed in article 38(1)(d) of the ICJ Statute²⁹ (which sets out the standard recordal of the sources of international law) as 'subsidiary means' for determining all international law rules (including treaty rules). The nature of the distinction between 'supplementary means' for interpreting treaties (article 32 of the Vienna Convention) and 'subsidiary means' for determining treaty rules (article 38(1)(d) of the ICJ Statute), and whether certain subsidiary means under article 38(1)(d) (for instance international court decisions) may also be supplementary means under article 32 is not always clear-

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- 23 Subsequent practice by states includes various conduct by organs of state, such as official acts in respect of the application of the treaty, official statements as to the interpretation of the treaty, and domestic judicial decisions. ILC Draft Conclusions: Subsequent practice (note 11), Conclusion 4, commentary para 18, at 32.
- 24 ILC Draft Conclusions: Subsequent Practice (note 11), Conclusion 3. As the ILC explains: 'By describing subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), as "authentic" means of interpretation, the Commission recognizes that the common will of the parties, which underlies the treaty, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusion of the treaty. *The 1969 Vienna Convention thereby accords the parties to a treaty a role that may be uncommon for the interpretation of legal instruments in some domestic legal systems.*' Commentary para 3 to Conclusions 3, at 24 (emphasis added).
- 25 ILC Draft Conclusions: Subsequent Practice (note 11) above, Commentary on Conclusion 2, para 9; see Draft Conclusion 4(3) and paragraphs 23–35 of the commentary to Draft Conclusion 4.
- 26 ILC Draft Conclusions: Subsequent Practice (note 11), Conclusion 3, commentary para 12 (Such subsequent practice under art 32 that does not establish the agreement of all the parties cannot constitute an 'authentic' interpretation of a treaty by all its parties and thus will not possess the same weight for the purpose of interpretation').
- 27 ILC Draft Conclusions: Subsequent Practice (note 11), Conclusion 7(3).
- 28 R Van Alebeek and A Nollkaemper, 'The legal status of decisions by human rights treaty bodies in national law' in H Keller & G Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (2012) 411.
- 29 Statute of the International Court of Justice, 1945 ('ICJ Statute').

cut.³⁰ Some view these two concepts as potentially overlapping or interchangeable in relation to determining treaty rules.³¹ It is an issue to which the ILC will shortly be turning its attention in its programme of work on subsidiary means for determining international law rules.³²

- (4) The ILC has emphasised that treaty interpretation should consist of ‘a single combined operation’ whereby ‘appropriate emphasis’ is placed on ‘the various means of interpretation indicated, respectively, in arts 31 and 32’.³³ In other words, the interpreter should make use, with appropriate weight and as relevant, of the various means discussed in (1) to (3) above, as part of a unitary process to determine meaning.³⁴

Given the Vienna rules’ customary status and that they represent international law’s tools for attributing meaning to treaties (they are a ‘distinct international hermeneutical framework’³⁵), which are flexible, useful, and generally accepted,³⁶ they ought to frame the interpretative exercise of those who are required to determine the meaning of any given treaty.³⁷ Neverthe-

30 For instance, see Van Alebeek and Nollkaemper (note 28) 411–12, who attempt to draw no clear distinction.

31 See, for instance, D Azaria, ‘Codification by Interpretation: The International Law Commission as an Interpreter of International Law’ (2020) 31 *EJIL* 171, 197; Van Alebeek and Nollkaemper (note 28) at 411–412; *Canadian Cattlemen for Fair Trade v USA* Award on jurisdiction, IIC 316 (2008), 28th January 2008, Ad Hoc Tribunal (UNCITRAL) para 50.

32 See the ILC’s Report on the work of the ILC’s 74th session (2023) (A/78/10), Ch VII para 93.

33 ILC Draft Conclusions: Subsequent Practice (note 11), Conclusion 2(5), emphasis added.

34 ILC Draft Conclusions: Subsequent Practice (note 11), Conclusion 2 and commentary paras 11–14 at 21–22 (Para 13 states: ‘This is not to suggest that a court or any other interpreter is more or less free to choose how to use and apply the different means of interpretation. The interpreter needs to identify the relevance of different means of interpretation in a specific case and determine their interaction with the other means of interpretation by placing a proper emphasis on them in good faith, as required by the treaty rule to be applied.’)

35 HP Aust, A Rodiles, & P Staubach ‘Unity or Uniformity?: Domestic courts and Treaty Interpretation’ (2014) 27 *LJIL* 75, 77.

36 For instance, see the UN General Assembly’s endorsement of the ILC Draft Conclusions: Subsequent Practice (note 11), including, inter alia, Conclusion 2, which expressly situates the work within the framework of applying arts 31 and 32 as required by customary international law. (Resolution adopted by the General Assembly on 20 December 2018, A/RES/73/202); J Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Pocket Books of the Hague Academy, 2014) para 190 (‘Article 31 of the Vienna Convention on the Law of Treaties is a powerful interpretive device capable of rendering sensible meaning to a text’); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)*, Preliminary Objections, Judgment, [2021] ICJ Reports 71 paras 78–88 (a recent example of the ICJ’s use of the Vienna rules); J Sorel & V Bore Eveno ‘Article 31’ in Corten & Klein (note 20) 804; K Berner, ‘Judicial Dialogue and Treaty Interpretation: Revisiting the “Cocktail Party” of International Law’ (2016) 54 *Archiv des Völkerrechts* 67, 70 (‘although they do not necessarily practice what they preach, domestic courts now widely profess adherence to Articles 31–33 VCLT.’).

37 R Gardiner, *Treaty Interpretation* 2 ed (2015) 495 (‘the structure provided by the Vienna rules “has become the virtually indispensable scaffolding for the reasoning on questions of treaty interpretation”’).

less, there has been and continues to be significant scholarly debate about the interpretation of treaties.³⁸ For instance, Tladi argues that recourse to the Vienna rules ‘*facilitates consistent interpretation of treaty rules and the search for the objective meaning of the treaty*, which is arguably an expectation of states when they conclude a treaty. ... The *idea that there is an objectively correct interpretation, even if arriving at it may not be easy, explains in part, the necessity for having common rules of interpretation.*’³⁹ But even those who may critique this type of approach (and disagree that there is one objectively correct interpretation, or that the Vienna rules are the means for arriving at it) would generally accept that:

...although the provisions of the VCLT do not guide the interpreter to the ‘correct’ interpretation in any given case, *they do set the outer limits of the interpretative enquiry by prescribing the materials that should be taken into account by the interpreter, where those materials are present.* The text of the treaty, for example, cannot be ignored in a free-ranging search for the intentions of the parties, *nor can one disregard any relevant subsequent practice of the parties in the application of the treaty.* Within these broad limits, one might say that the VCLT articles provide the standard for criticism of a particular interpretation.⁴⁰

This chapter, of course, cannot settle the variegated interpretation debates, nor does it attempt to defend some particular ground in the field of jurisprudential contestation. It is sufficient for our analysis of South African jurisprudence that it will generally be accepted that it is a methodological

38 For more recent examples see: M Fitzmaurice, O Elias, and P Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (2010); A Bianchi, D Peat, and M Windsor (eds), *Interpretation in International Law* (2015); Gardiner (note 37); J Pauwelyn & M Elsig, ‘The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals’ in J L Dunoff and M A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2012); D Peat, ‘Disciplining Rules? Compliance, the Rules of Interpretation, and the Evaluative Dimension of Articles 31 and 32 of the VCLT’ (2022) 69 *Netherlands International LR* 221; G Hernández, ‘Law’s Determinability: Indeterminacy, Interpretative Authority, and the International Legal System’ (2022) 69 *Netherlands International LR* 191; with specific reference to domestic courts see, e.g. Aust, Rodiles & Staubach (note 35). For one example of earlier scholarship, see H Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’ (1949) 26 *BYIL* 48.

39 Tladi 2018 *SALJ* (note 4) at 41, referring, inter alia, to *R v Secretary of State for the Home Department, ex parte Adan* [2001] AC 477, 515-17 (per Lord Steyn). Of course, Tladi accepts that ‘even the application of the Vienna rules cannot guarantee consistent outcomes as interpretation is not an exact science.’

40 D Peat, *Comparative Reasoning in International Courts and Tribunals* (2019) 21, emphasis added. In a later article, Peat sets out the basis for contending that arts 31 and 32 of the Vienna Convention operate as ‘rules’ only in a ‘non-legal sense’ (see Peat ‘Disciplining Rules?’ (note 38)). Cf Berner (note 36) at 70 (‘Articles 31-33 VCLT do not offer interpretative guidelines but stipulate legally binding rules.’); Tladi *ibid* at 140.

error, and may, in practice, lead to errors in the outcome of judgments⁴¹ and unnecessary fragmentation in international law:⁴²

- (i) to completely ignore the international law rules of interpretation and the material made relevant by those rules,⁴³
- (ii) to refer in passing to those rules, but then not even attempt to use them to frame some of the interpretative inquiry, or
- (iii) to simply not conduct any interpretative exercise at all — as if clauses of complicated negotiated documents such as treaties are self-interpreting.

Evidently, some hermeneutical process is required. Without one, any ‘interpretation’ risks being purely subjective⁴⁴ and wholly at the mercy of the interpreter’s (potentially biased) assumptions or inclinations.⁴⁵ Even in the

41 For an example where this was held to have occurred and was one of the bases for the overturning of a decision, see the ICSID annulment tribunal decision of *Malaysian Historical Salvors, SDN, BHD v The Government of Malaysia*, ICSID Case No ARB/05/10 para 80 (per Schwebel J (then a former ICJ judge) and Tomka J (at the time an ICJ judge)) (available at <https://www.italaw.com/sites/default/files/case-documents/ita0497.pdf>) (The Tribunal annulled the award, and found that the initial Tribunal had manifestly exceeded its powers, because inter alia, ‘it failed to take account of the preparatory work of the ICSID Convention and, in particular, reached conclusions not consonant with the *travaux* in key respects’).

42 As Gardiner (note 37) at 486 points out in relation to the fragmentation in the interpretation of international investment treaties by arbitral tribunals, ‘a more coherent body of case law could have been achieved had judgments or awards been faithfully based on the common scheme of interpretation in the Vienna rules, even if this would not necessarily ensure complete uniformity of outcomes for controversial issues.’ See also HP Aust ‘Between Universal Aspiration and Local Application: Concluding Observations’ in Aust & Nolte (note 4) at 345–346.

43 On the important functioning of rules of interpretation generally, see O Fiss, ‘Objectivity and Interpretation’ (1982) 34 *Stanford LR* 739, 744–745 (‘The interpreter is not free to assign any meaning he wishes to the text. He is disciplined by a set of rules that specify the relevance and weight to be assigned to the material (e.g., words, history, intention, consequence), as well as by those that define basic concepts and that established the procedural circumstances under which the interpretation must occur. The disciplining rules may vary from text to text. The rules for the interpretation of a poem differ from those governing the interpretation of legal material; and even within the law, there may be different rules depending on the text—those for contractual interpretation vary from statutory interpretation, and both vary from those used in constitutional interpretation. Though the particular content of disciplining rules varies, their function is the same. They constrain the interpreter, thus transforming the interpretive process from a subjective to an objective one, and they furnish the standards by which the correctness of the interpretation can be judged.’)

44 Ibid.

45 That cognitive bias can affect decision-making, including legal decision-making, is well recognised. See for instance, V Fikfak, D Peat, and E van der Zee, ‘Bias in International Law’ (2022) 23 *German LJ* 281, 285 (‘We also tend to interpret, favor or recall information in a manner that confirms our beliefs or values and thus expresses preference when none should be had—confirmation bias’); RS Nickerson, ‘Confirmation Bias: A Ubiquitous Phenomenon in Many Guises’ (1998) 2 *Review of General Psychology* 175, 193 (‘A hypothesis in hand also can bias the interpretation of subsequently acquired data, either because one selectively looks for data that are supportive of the hypothesis and neglects to look for disconfirmatory data (Barrows et al., 1977) or because one interprets data to be confirmatory that really are not (Elstein et al., 1978)’); A Olaborede & L Meintjes-Van Der Walt, ‘Cognitive bias affecting decision-making in the legal process’ (2020) 41 *Obiter* 806 (who discuss cognitive bias in the context of criminal proceedings).

domestic context, when interpreting statutes and contracts, the Constitutional Court and Supreme Court of Appeal ('SCA') have accepted that the interpretation of legislation or contracts requires a unitary consideration of text, context and purpose to attribute meaning to the words used and they regularly articulate and apply that interpretative methodology in judgments.⁴⁶ Of course, the international law rules of interpretation of treaties would in addition, amongst other things, *require* consideration of the subsequent practice of the state parties in relation to the application of a treaty which establishes their agreement in relation to its interpretation (and any relevant rules of international law), and would allow recourse to preparatory work and other supplementary means (including the practice of only one or two states). In South African domestic law, subsequent practice in the application of legislation can generally not be used for the purposes of statutory interpretation;⁴⁷ however, its use has been accepted (with caution and certain caveats), but *not* required, in respect of the interpretation of contracts.⁴⁸

In the final analysis, whatever the position might be in other legal systems, because the customary international law rules of treaty interpretation as codified in the Vienna Convention (i) prescribe how treaties *shall* be interpreted (at least article 31 is mandatory in its language, whereas article 32 provides that supplementary means of interpretation *may* be taken into account) and (ii) are law in South Africa and binding on courts by virtue of section 232 of the Constitution, South African courts *must* apply them and a failure to do so is unlawful and unconstitutional. Indeed, section 165 of the Constitution expressly provides that courts are '*subject only to the Constitution and the law, which they must apply*'. The Vienna rules are part of the 'law'. Thus, the courts are constitutionally obligated to apply them.

46 See for example *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) paras 65–6; *Chisuse and others v Director-General, Department of Home Affairs and another* 2020 (6) SA 14 (CC) paras 51–2; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18. The courts have also emphasised that reasonable interpretations of statutory provisions that accord with the Constitution (and therefore preserve their constitutional validity) ought to be preferred (see, for instance, *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28 and see s 39(2) of the Constitution which requires courts when interpreting legislation to 'promote the spirit, purport and objects of the Bill of Rights.'). Recent examples of the articulation and application of an interpretative methodology in respect of domestic instruments include *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko* (2024) (2) SACR 113 (SCA) paras 48–54 (statutory interpretation) and *ABSA Bank Limited v Rosenburg and Another* [2024] ZASCA 58 paras 27–33 (interpretation of contracts).

47 *Marshall and Others v Commissioner for the South African Revenue Service* 2019 (6) SA 246 (CC) paras 10–11.

48 It is permissible (but not required) to have regard to the manner in which parties have implemented their contract when objectively determining a reasonable interpretation of the words used in the contract, but this 'not an invitation to harvest evidence, on an indiscriminate basis, of what the parties did after they concluded their agreement'; 'such evidence must be relevant to an objective determination of the meaning of the words used in the contract'. *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) para 48.

3 HOW HAVE SOUTH AFRICAN COURTS INTERPRETED TREATIES OVER THE LAST HALF-DECADE?

Treaties find application in South African law in a number of ways (as interpretative aids, as the standard by which to determine the lawfulness of government's conduct, and through legislative incorporation).⁴⁹ In order to facilitate a careful analysis of the manner in which courts interpret the treaties they apply, I have undertaken detailed research of the cases that the South African courts have decided between 2018 and 2023. The main law report series were considered, as was *saflii.org*, an online repository of both reported and unreported South African cases. A consideration of the South African law reports (by search and substantive review⁵⁰) indicated over a hundred cases⁵¹ (almost forty in the Constitutional Court alone) during this period where treaties were referred to by the courts. The cases considered varied as to the weight accorded to the treaties, the detail in which they were considered, and the significance of the treaties for the case. For instance, in some cases, treaties were given significant weight, and the courts' consideration of South Africa's obligations thereunder can be seen to have materially influenced the outcome.⁵² In many other cases, treaties are referred to as additional support for a position already established by recourse to domestic law.⁵³ In some cases, only very passing reference is made to international treaties by way of background or in a summary of submissions made by the parties.⁵⁴ In certain instances, the court down-

49 Chapter 3, Part 2.

50 The main law reports series (SALR (including Juta's unreported online reports), All SA and BCLR) and *saflii.org* were searched using keywords, such as 'international law', 'treaty/ies', 'convention', 'protocol', and 'international agreement', to identify cases where treaties were referred to. These cases were then analysed, including to determine whether the case in fact made references to, or relied on, any treaties, or merely responded to the keyword search for other reasons (for instance quoting from a section of the Constitution that references international law or international agreements without in fact referring to any treaties).

51 Of these, 39 were decisions of the Constitutional Court and 12 were decisions of the Supreme Court of Appeal. The remainder were decisions of various lower courts (including the Labour Appeal Court, the Labour Courts, the various divisions of the High Court, and one decision by the Tax Court).

52 Examples include *Law Society* (note 13) and *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance and Others* [2023] ZACC 31, 2024 (1) SA 567 (CC) ('Nu Africa').

53 Examples include *Centre for Child Law v Director of Public Prosecutions, Johannesburg & Others* [2022] ZACC 35, 2022 (12) BCLR 1440 (CC) ('Centre for Child Law') paras 44–47; *Sonke Gender Justice NPC v President of the Republic of South Africa & Others* [2020] ZACC 26, 2021 (3) BCLR 269 (CC) ('Sonke') paras 56–70; and *Tshabalala v S; Ntuli v S* 2020 (5) SA 1 (CC) ('Tshabalala').

54 For instance, *Rafoneke and Others v Minister of Justice and Correctional Services & Others (Makombe Intervening)* 2022 (6) SA 27 (CC) ('Rafoneke') paras 67–68 (the Court notes that an *amicus curiae* made submissions in respect of certain treaties, but the Court, in its judgment, did not engage with these submissions or the treaties nor did it seek to either interpret relevant provisions of the Constitution, or the legislation at issue, in light thereof).

played the relevance of treaties when parties employed the treaties to support arguments that ran counter to the approach favoured by the court.⁵⁵

The focus of this chapter will be the cases that, after consideration, demonstrated that the courts, rather than simply mentioning an international treaty in passing (or that a party before the court referred to certain treaties), at least found it necessary to refer to the treaty's provisions or broad effect for the purpose of deciding the case before it. In some of these cases, courts found it necessary to apply treaties because they have been directly incorporated into South African law by legislation,⁵⁶ and in a few instances, the government's conduct was reviewed for violation of unincorporated treaties.⁵⁷ However, in the majority of the cases, the courts consider treaties because they are required to be considered when interpreting the Bill of Rights and statutes (i.e. South Africa's treaty obligations were used as interpretative aids).⁵⁸ Although there are cases where the courts are more or less superficial, there is no trend that suggests interpretative superficiality (or, conversely, rigour) is limited only or predominantly to certain types of treaties (i.e. human rights treaties vs other treaties).⁵⁹ Moreover, in general, the approach to the interpretation of treaties does not differ materially when the court is applying a treaty that has been incorporated by domestic

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- 55 For instance, see *Minister of Justice and Constitutional Development & Others v Prince (Clarke & Others intervening)* 2018 (6) SA 393 (CC) para 82 (see discussion in Coutsoudis & Du Plessis CCR (note 4) at 167–168) and *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') para 109 (see the discussion in Chapter 3, Part 4.2.2).
- 56 See for instance *Ad Hoc Central Authority for the Republic of SA and Another v Koch NO & Another* 2024 (3) SA 249 (CC) ('Koch NO') and *Nu Africa* (note 52).
- 57 See *Law Society* (note 13) and *South African Human Rights Commission v Msunduzi Local Municipality & Others* 2021 (6) SA 500 (KZP) ('SAHRC v Msunduzi Local Municipality').
- 58 See s 39(1)(b) and s 233 of the Constitution and the discussion in Chapter 3, Part 2.2. Examples of reliance on treaties in the interpretation of statutes include *Van Zyl NO v RAF* 2022 (3) SA 45 (CC) ('Van Zyl NO') paras 78–86, and *S v Okah* 2018 (4) BCLR 456 (CC) ('Okah') para 38. Examples in relation to the interpretation of the Bill of Rights include *Mahlangu & Another v Minister of Labour & Others* 2021 (1) BCLR 1 (CC) ('Mahlangu') paras 41–6, 58, and *Makana Peoples Centre v Minister of Health and Others* 2023 (8) BCLR 963 (CC) ('Makana') paras 82, 152–4, 168.
- 59 For instance one sees superficiality in relation to treaties such as the Treaty of the Southern African Development Community ('SADC Treaty') (see *Law Society* (note 13), discussed below at the text to notes 82 to 86); International Labour Organization ('ILO') treaties (*National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) & Others* 2020 (6) BCLR 725 (CC) ('NUMSA v Lufil') paras 42–4); the Convention Relating to the Status of Refugees, 1951 ('the Refugee Convention') (*Ashebo v Minister of Home Affairs and Others* 2023 (5) SA 382 (CC) ('Ashebo') para 44); and various human rights treaties (see, e.g. *EB (born S) v ER (born B) and Others*; *KG v Minister of Home Affairs & Others* 2024 (2) SA 1 (CC) ('EB v ER') para 136).

legislation as opposed to those that are unincorporated: in neither instance do the courts generally refer to the Vienna rules, or seek to apply them.⁶⁰

Regardless of how treaties were applied in the case, certain general trends became readily apparent. I identify and discuss those trends below.⁶¹

3.1 No reference or application of the Vienna rules

The first trend that is readily noticeable is that South African courts almost never refer to the Vienna rules when interpreting treaties during this period. In over a hundred cases considered in the last half-decade, in only two cases were the Vienna rules referred to expressly. Strikingly, during this period, the Constitutional Court did not make any reference to the Vienna rules when interpreting treaties.⁶² The sole references to the Vienna rules during this period are found in one SCA case and one Tax Court decision, which I will discuss in turn.

In *SARS v Levi Strauss*,⁶³ the SCA was faced with an appeal in relation to the import duties and value-added tax payable on goods. To determine one of the issues in the appeal, the SCA was required to interpret the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 ('the Implementation Agreement'). In particular, it had to consider whether an amount paid by Levi Strauss South Africa to another group company (Levi APD) fell within the definition of 'buyer's commission'.⁶⁴ In doing so, the SCA expressly noted that

[w]hen dealing with an international agreement, one must always be cautious not to import domestic legal concepts into its construction that may not be internationally recognised. It is desirable that there should, so far as possible, be uniformity

60 This is evident from the cases discussed in Parts 3.1–3.6. Although in two instances, where incorporated treaties were considered (*Nu Africa* (note 52) and *Koch NO* (note 56)), the analysis shows a higher degree of interpretative rigour than generally seen, albeit that, as discussed below, even in these cases the Vienna rules were not referred to nor their principles fully applied. By contrast, in the only instance where the Vienna rules were referred to and at least some attempt was made to apply them, this occurred in respect of a treaty that had not been incorporated by legislation (*Levi Strauss* (note 13), discussed below in Part 3.1).

61 In discussing examples of these trends, generally preference is accorded to the decisions by the Constitutional Court, given its status as South Africa's apex court.

62 For instance, see the various cases listed in notes 52–9. In none of these cases are the Vienna rules referred to.

63 *Levi Strauss* (note 13).

64 The definition was found in paragraph 1(a)(i) of the Interpretative Note to art 8, Annex 1 to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (in terms of article 14, '[t]he notes at Annex I to this Agreement form an integral part of this Agreement'). This definition was the same as used in the Customs and Excise Act 91 of 1964, s 65(9) (*Levi Strauss* *ibid* para 32), and s 65, was required to be interpreted in terms of the Implementation Agreement (see Custom and Excise Act, s 74A(1); *Levi Strauss* *ibid* para 37).

among nations. This is consistent with the requirements of articles 31(1) and (4) of the Vienna Convention, *which apply to the interpretation of the Implementation Agreement*.⁶⁵

For this reason, the SCA held (when dealing with how the term ‘importer’s agent’, in the Implementation Agreement’s definition of buyer’s commission, ought to be interpreted) that ‘[a]ccordingly, I do not think that we should determine whether *Levi APD* would be regarded as an “agent” in the technical sense of our [South African] law of agency.’⁶⁶ Although the SCA did not clearly explain how the relevant Vienna rules identified were to be applied and seemed, in the final analysis, to merely assert a meaning to the relevant terms of the treaty, the SCA appeared to have at least some regard to the context and purpose of the relevant terms later in its judgment.⁶⁷ However, the Court, while apparently alive to the need to not automatically adopt an interpretation of ‘agent’ that merely followed South Africa’s law of agency, did not explain how its own interpretation was supported by the text, context, and object and purpose of the treaty (as article 31(1), to which the SCA referred, requires), or why any special meaning was to be given to the term ‘agent’, if, in line with article 31(4) (which the SCA also references) this was intended by the parties. Thus, while one sees a reference to some of the Vienna rules, this does not betoken a careful, thorough-going application of those rules.⁶⁸

In *ABC v SARS*,⁶⁹ in a tax matter before the Tax Court,⁷⁰ the court was required to have regard to the interpretation of various double taxation agreements (‘DTAs’) between South Africa and other countries.⁷¹ The Tax

65 *Levi Strauss* (note 13) para 36, emphasis added. The SCA refers to article 31(1) (‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’) and article 31(4) (‘A special meaning shall be given to a term if it is established that the parties so intended.’)

66 *Ibid*, emphasis added.

67 *Ibid* paras 33–7.

68 As will be discussed in Part 3.3, there is limited reference to practice by only two countries, the UK and USA (*Levi Strauss* *ibid* paras 38–40). There is also brief reference, in para 37, to a commentary issued by the Technical Committee of Customs Valuation established under the Implementation Agreement, established in terms of art 18 of the Implementation Agreement (whose role is aimed at ‘ensuring, at the technical level, uniformity in interpretation and application of this Agreement.’ Annex II(1)). Section 74A(1) of the Customs and Excise Act expressly indicates that commentaries to the Implementation Agreement must be considered when interpreting s 65.

69 *ABC (Pty) Limited v Commissioner for the South African Revenue Services* [2019] ZATC 14, [2019] JOL 46057 (TC) (‘*ABC v SARS*’).

70 Tax Courts are established under s 116 of the Tax Administration Act 28 of 2011 and, in terms of ss 117 and 118, presided over by a judge (or acting judge) of the High Court, together with an accountant and member of the commercial community where necessary (or in certain circumstances, three judges of the High Court).

71 The DTAs were made applicable in terms of s 108 of the Income Tax Act 58 of 1962 (see *ABC v SARS* (note 69) para 19).

Court stated, without explanation, that when interpreting DTAs, the starting point was South African domestic law, and then only ‘if appropriate’, the Vienna Convention.⁷² But the court then went on solely to apply the South African domestic law approach to the interpretation of domestic contracts, without any reference to the Vienna rules. Moreover, it was clear that the application of South Africa’s domestic interpretative approach and rules, which the court understood to *exclude* certain types of evidence as to the state parties’ intention in passing a DTA,⁷³ may have affected the range of evidence the Tax Court was willing to consider. Had a more flexible approach been taken in keeping with the Vienna rules (including recourse to subsequent practice or agreements by state parties and, where necessary, to the travaux), it may, at least, possibly have led to a different interpretation.

Other than these two solitary cases, it appears that no South African court has referred to the Vienna rules in any judgments during the last half-decade. And, as we shall see, not only is there no express reference to the Vienna rules, but there is little indication that the principles in those rules are generally (let alone consistently) applied in the absence of their express reference.⁷⁴

3.2 No rigorous or consistently applied approach to the interpretation of treaties

Apart from there being almost no reference or application of the Vienna rules, the courts over the last half-decade have generally not articulated or applied any consistent methodology for the interpretation of treaties. Such interpretive neglect is evident not only where the treaties are referred to

72 *ABC v SARS* *ibid* para 19.

73 *Ibid* para 30. The Tax Court took the view that the evidence was excluded by the ‘parol evidence rule’, applicable in domestic South African law in relation to contracts between parties. The parol evidence rule broadly provides that, ‘[i]f a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning.’ *ABC v SARS* (note 69) para 28, quoting from the *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2019] 1 All SA 291 (SCA) para 65. How the parol evidence rule operates and applies, given South African courts’ current, and generally more flexible, approach to the interpretation of domestic contracts, has been much debated and it may be that the Tax Court misunderstood its application, or that the appellant mischaracterised how it wished to make use of the evidence. See *University of Johannesburg* (note 46) para 92 and *Capitec* (note 48) paras 38–54.

74 See Parts 3.2, 3.3, and 3.6. There are some limited exceptions. Perhaps most notable, while no mention is made of the Vienna rules, in the recent decision of *Koch NO* (note 56), in the judgments of both the majority and minority they variously refer to the text, context, and/or purpose and object of the Hague Convention, when interpreting it (see minority in paras 36, 40, 41, 42, 45, 50, 53, 55, 54, 56, 60, 62, 81, 82, 83, 84, and 133, and majority in paras 149, 164 fn 111, 165, 184, 200, 214, 215, 216, and 217).

more by way of background or as a peripheral consideration,⁷⁵ but also where the treaties and their provisions form an important part of the Court's judgment.⁷⁶ In many cases during this period, the courts often adopted an overly superficial approach, conducting almost no interpretative exercise at all, with the briefest of textual reference or mere (unsubstantiated) assertion of the meaning, with no or minimal textual analysis, and with no consideration of context and object and purpose, let alone any subsequent practice or preparatory work.⁷⁷

Take, for example, the recent case of *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa*,⁷⁸ where the Constitutional Court had regard to South Africa's obligations under the Corruption Convention⁷⁹ when interpreting rights in the Bill of Rights. The Court asserted without proper interpretation that '[i]nternationally, there is the obligation imposed by article 7(3) of the United Nations Convention

75 For instance, see *One Movement South Africa NPC v President of the Republic of South Africa & Others* 2023 (2) SA 148 (CC) para 280 fn 172; *Rafoneke* (note 54) paras 67 and 68; *Women's Legal Centre Trust v President of the Republic of South Africa & Others* 2022 (5) SA 323 (CC) para 20 (the Constitutional Court took note that the High Court had regard to various treaties that South Africa was party to in reaching its decision, but then did not itself consider those treaties, and ultimately determined the case based on constitutional provisions, with no regard to international law); and *Smit v Minister of Justice and Correctional Services & Others* 2021 (3) BCLR 219 (CC) para 84.

76 Examples include the following: *Law Society* (note 13), discussed below in text at notes 82-6; *SAHRC v Msunduzi Local Municipality* (note 57) paras 82-4, read with para 98 (despite readily accepting that the municipality had violated various treaty provisions and declaring this in its order, the Court's interpretation of those treaties was exceptionally superficial consisting of little more recitation of certain provisions and assertions of violation (for a discussion of this case see Chapter 3, Part 4.1)); *Qwelane v South African Human Rights Commission & Another* 2021 (6) SA 579 (CC) ('*Qwelane*') paras 88-9; and *Blind SA v Minister of Trade, Industry and Competition & Others* 2023 (2) BCLR 117 (CC) para 89; and *Wilkinson & Another v Crawford NO & Others* 2021 (4) SA 323 (CC) paras 83-4 (the Constitutional Court has brief regard to the United Nations Convention on the Rights of the Child for the purposes of interpreting the Bill of Rights, yet the Court simply asserts the meaning of certain provisions of the Convention, even though the asserted meaning does not, as the Court seems to acknowledge, appear to be directly reflected in the text of the article quoted by the Court).

77 For instance, in addition to cases in note 76 above, see *Okah* (note 58) para 38 fn 64 (the Constitutional Court makes a general assertion as to the obligation arising from various treaties in relation to terrorism, and then simply quotes from a portion of one article from each treaty, without any further analysis; and does so in a case where the international treaty obligations thus articulated were used to favour one interpretation of domestic legislation over another (and rejects the interpretation determined by the SCA)); *Van Zyl NO* (note 58) paras 81-6 and 106; *New Nation Movement NPC & Others v President of the Republic of South Africa & Others* 2020 (6) SA 257 (CC) ('*New Nation Movement*') paras 145 and 154; *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) & Others* 2020 (6) BCLR 725 (CC) para 42; *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg & Others v Minister of Police & Others* 2023 (3) SA 329 (CC) para 201; *President of the RSA & Another v Women's Legal Centre Trust & Others* 2021 (2) SA 381 (SCA) paras 23-4.

78 2023 (2) SA 1 (CC) ('*AmaBhungane v President*').

79 United Nations Convention Against Corruption, 2003 ('Corruption Convention').

Against Corruption to enact legislative measures for enhanced transparency in respect of the individual candidatures for public office and the funding of political parties.⁸⁰ But the Court, in making this assertion, had no regard to the actual text, context, or object and purpose of this article. Had it considered the article, it would have noted that article 7(3), unlike certain other articles in the Convention, uses weak non-mandatory language ('shall also consider taking appropriate legislative and administrative measures'), not peremptory language ('shall adopt', see, for instance, article 16). It is clear that the language in article 7(3) is and was intended to be non-mandatory.⁸¹ But the Court failed to have any regard to this.

One of the most prominent examples of a superficial approach to the interpretation of treaties during this period, notwithstanding the central role of the treaties in the case, is the Constitutional Court's decision of *Law Society*.⁸² The Court held that the President had unconstitutionally participated in the SADC Summit's suspension of the SADC Tribunal and signed the new 2014 Tribunal Protocol, which would limit the Tribunal's jurisdiction. Critically, in this case, what the treaties at issue (the SADC Treaty and the 2000 Tribunal Protocol, incorporated into the SADC Treaty) meant mattered. The Court was not merely referring to them in passing, as mere window-dressing, or as an additional buttress for an interpretation of domestic law already reached. Rather, the Court found that the President acted unconstitutionally and unlawfully precisely because his conduct caused South Africa to violate its treaty obligations.⁸³ This makes the superficiality of the interpretative approach all the more striking and concerning. What is most remarkable, aside from the fact that the Court did not refer to or apply the Vienna rules (despite expressly finding that the Vienna Convention was binding on South Africa as customary international law⁸⁴), is that the Court simply adopted its interpretation of the relevant treaty provisions with little more than assertion.⁸⁵ This superficiality is discussed in more detail in a previous article.⁸⁶

80 *AmaBhungane v President* *ibid* para 40.

81 For instance, see C Rose, 'The Limitations of the United Nations Convention against Corruption', in *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (2015) (for instance, at 97, 'Most of the Convention's provisions do not impose firm obligations on the States Parties...many merely present them with the option of adopting certain measures, without even necessarily encouraging States Parties to do so.')

82 *Law Society* (note 13). I have previously critiqued the Court's interpretation (see Coutsooudis & du Plessis CCR (note 4)), as have others (see for example Tladi 2020 CCR (note 4)).

83 Chapter 3, Part 3.3.1. See also the brief summary of the Court's findings in *Law Society* *ibid* in *President of the Republic of South Africa & Another v Tembani & Others* [2024] ZACC 5, 2024 (9) BCLR 1152 (CC) para 26.

84 *Law Society* *ibid* paras 34–8. The Court did this in order to find that arts 18 and 26 of the Vienna Convention were reflective of customary international law and thus formed part of South African law in terms of s 232 of the Constitution.

85 *Ibid* paras 52–3, 67–71 (no careful textual or contextual interpretation is undertaken); Coutsooudis & du Plessis CCR (note 4) 188–194.

86 Coutsooudis & du Plessis CCR *ibid* 188–194. See also Tladi 2020 CCR (note 4).

In general, the South African courts have shown no awareness that they are failing to be appropriately rigorous or that they might need to properly interpret treaties before applying them (whether directly or as interpretative aids). One exception during this period, which ironically demonstrates the Constitutional Court's own superficiality, is *Qwelane*.⁸⁷ The case involved a challenge to the constitutionality of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the determination of a hate speech complaint. In its judgment, the Constitutional Court criticised the SCA (which had handed down the judgment being appealed to the court) for making only 'cryptic reference to international law' while failing to address the main provisions of the treaty (CERD⁸⁸) that the court found were central to the analysis of the relevant international obligations on South Africa.⁸⁹ However, despite levelling this criticism at the SCA, the Constitutional Court itself, while it set out the provisions of CERD that were relevant, merely quoted from these provisions.⁹⁰ It undertook no express interpretative exercise, and it did not refer at all to the context and purpose, the subsequent practice of parties,⁹¹ or any supplementary means. Similarly, the Court also quoted from and paraphrased the ICCPR⁹² without undertaking any interpretative process.⁹³ Indeed, when relying on CERD and the ICCPR to support a particular interpretation of the legislation being considered, the Court appears to merely assert the meaning of CERD and the ICCPR.⁹⁴

Given the courts' general failure (particularly the Constitutional Court) to adopt or explicate any clear interpretive approach to treaties, it

87 *Qwelane* (note 76).

88 International Convention on the Elimination of All Forms of Racial Discrimination ('CERD').

89 *Qwelane* (note 76) para 88. CERD was relevant and applicable when interpreting the Promotion of Equality and Prevention of Unfair Discrimination Act ('Equality Act') (a section of which was declared constitutionally invalid), as required by s 233 of the Constitution (see para 87 read with para 104).

90 *Qwelane* *ibid* paras 88, 99, 107, and 113.

91 It did undertake a comparative foreign law exercise by requesting research from the World Conference on Constitutional Justice ('Venice Commission') (para 93) and considering certain foreign legislation (*Qwelane* *ibid* para 93 fn 125; and see also paras 90–1). However, this was only briefly mentioned and not as the basis for interpreting CERD or any other treaty, but rather as part of considering comparative foreign law when interpreting the Bill of Rights (as accepted by s 39(1)(c) of the Constitution, and s 3(2)(c) of the Equality Act).

92 International Covenant on Civil and Political Rights ('ICCPR').

93 *Qwelane* (note 76) para 87. The Court referred in passing, in a footnote, to a statement made in relation to the interpretation of art 20 of the ICCPR in a report by the UN High Commissioner for Human Rights (para 99 fn 134). However, no explanation is given as to what weight was accorded to the views in the UN High Commissioner's Report or whether they were referred to as a type of supplementary means for interpreting the relevant treaty rules.

94 *Ibid* para 104 fn 143, referencing (without quoting) art 20(b) of the ICCPR and art 4 of CERD.

is unsurprising that the approach to treaties is far from consistent and can vary between cases (possibly affected by the makeup of the bench or the submissions of the parties).⁹⁵

3.3 Generally, no regard to subsequent state practice, but some recent exceptions

As discussed in Part 2, the Vienna rules require subsequent practice that establishes the agreement of the parties in respect of the interpretation of the treaty to be taken into account when interpreting treaties, and even more limited subsequent practice that does not establish such agreement (for instance, by only certain states) may be helpful to clarify the meaning of a treaty. Moreover, given the nature of treaties (they ‘embody the common understanding of the parties to them’), it has been argued that the ‘concordant practice of the parties is the best evidence of their correct interpretation.’⁹⁶ As a consequence, the significance accorded to subsequent practice ‘is a distinctive feature of treaty interpretation.’⁹⁷ Therefore, a striking aspect of South African courts’ disregard of the Vienna rules during the last half-decade is their general failure to have regard to relevant subsequent practice.⁹⁸

An illuminating example of this is the *Law Society* case, which has already been considered. The proper interpretation of the SADC Treaty (incorporating the 2000 Tribunal Protocol) was central to the case. A crucial issue was how to properly interpret the procedures provided in the SADC Treaty for the replacement or amendment of the 2000 Tribunal Protocol. Yet, the Constitutional Court did not consider the subsequent practice of SADC member states in this regard, despite the fact that such practice was available and relevant.⁹⁹

Another example is *Marsland v the Additional District Court Magistrate*,¹⁰⁰ which involved the challenge to the provisional arrest of the appellant in South Africa pursuant to an extradition request from Botswana. The case turned on a careful interpretation of the Extradition Act 67 of 1962, and the SADC Protocol on Extradition (‘the Extradition Protocol’), a multilateral

95 For instance, compare *Marsland v The Additional District Court Magistrate, Kempton Park & Another* 2021 (1) SACR 454 (SCA) (discussed in Part 3.3), where no regard is had to the Vienna rules, and the decision, by the same court, but a different bench, only a few months later, in *Levi Strauss* (note 13) (which, as discussed in Part 3.1, accepted the need to interpret treaties with regard to the Vienna rules).

96 Gardiner (note 37) 254.

97 Ibid 123.

98 For instance, *Okah* (note 58); *Van Zyl NO* (note 58) paras 81–6 and 106; *SAHRC v Msunduzi Local Municipality* (note 57) paras 82–4; and *EB v ER* (note 59) para 136, read with paras 88–90.

99 Coutsooudis & du Plessis CCR (note 4) 190–4, provides a fuller consideration of the court’s failure to have regard to subsequent practice.

100 2021 (1) SACR 454 (SCA) (‘*Marsland*’).

regional extradition treaty to which both South Africa and Botswana were parties, but which had not been incorporated into South African law by legislation. In interpreting the relevant articles of the Extradition Protocol,¹⁰¹ the SCA simply recited and appeared to have recourse to domestic law principles of interpreting legislation.¹⁰² Indeed, the Court referred to the same principles before interpreting both the treaty and the domestic legislation before it, as if there was no difference in kind between these two instruments.¹⁰³ There are, of course, overlaps between the interpretative approach used by South African courts in relation to domestic statutes and contracts and the approach to interpreting treaties required by the Vienna rules, as well as differences.¹⁰⁴ But it is concerning that in this case South Africa's second-highest court (which is often, in practice, the final court of appeal in matters, given the limited caseload of the Constitutional Court) appears (without reflection) to believe it should use a purely domestic law methodology (which, as a reading of the case reveals, it hardly bothered to apply)¹⁰⁵ not specifically created to deal with treaties, without even stopping to consider if there were any differences and what they were.¹⁰⁶ In particular, the Vienna rules, which were not considered or applied, require recourse to the subsequent practice of the parties (or at least allow recourse to the practice of some of the parties even if this does not establish the agreement of all the parties). In this case, subsequent practice may well have been telling in determining one of the central issues in dispute: whether the Extradition Protocol required the extradition request to be received by the Minister of International Relations directly or if it was sufficient if the Department of International Relations received the request.

The courts' approach in these cases is in line with their general failure to look for or consider subsequent state practice in relation to the implementation of treaties as a means of interpretation. In the relevant period,

101 Section 4(1), which deals with how a request for surrender must be made, expressly provides that it is '[s]ubject to terms of any extradition agreement', and the Extradition Protocol, in art 6, set out the method by which an extradition request must be made.

102 *Marsland* (note 100) paras 10–11.

103 *Ibid* para 10, read with paras 12–18.

104 See the discussion in Part 2 in the text to notes 46–48. For instance, as Gardiner (note 37) at 254 observes, the particular importance accorded to subsequent practice in the interpretation of treaties, as opposed to the interpretation of domestic legislation and contracts 'is, at least in part, because treaties differ in character from national legal instruments, bearing an exact analogy neither to contract nor to legislation.'

105 *Marsland* (note 100) paras 12–18. The focus seems almost exclusively textual.

106 As Sbolci argues, '[t]he interpretation of international treaties raises specific questions that cannot be resolved on the basis of general theories of interpretation, which frequently reflect the principles of national legislation. An interpreter who is not aware of these specific questions might be tempted to interpret a treaty in line with the rules of interpretation pertaining to his or her own legal system.The interpretation of treaties calls for the adoption of standard criteria, applicable by all the contracting states.' L Sbolci 'Supplementary Means of Interpretation' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (2011) 145.

in no case has the Court sought to carefully consider whether subsequent practice within the framework of article 31(3)(b) of the Vienna Convention was available (i.e. practice that establishes the agreement of the parties as to the treaty's interpretation). But there are some limited examples of at least some cursory regard being had to subsequent practice.¹⁰⁷

In *Levi Strauss*, which is discussed in Part 3.1, the SCA had brief regard to the practice of the USA and UK when interpreting the Implementation Agreement.¹⁰⁸ Interestingly, it does not reference the predicate for having regard to the USA's and UK's practice as being required or permissible under the Vienna rules (articles 31(3)(b) and 32), even though, as discussed in Part 3.1, the Court refers to articles 31(1) and (4) of the Vienna rules. Moreover, without explanation, the SCA only references the practice of two states.¹⁰⁹ It is not clear why it only considered two states (it may have been a function of the limited evidence and submissions placed before the SCA by the parties before it; or the SCA could simply have taken the view that looking at the USA's and UK's practice was sufficient). Nevertheless, it is telling that even in this case, where some attempt was made to consider subsequent practice in the interpretative exercise, the consideration was superficial. Of course, as mentioned above, even limited subsequent practice by only two states may be regarded as a form of supplementary means for interpreting treaties (under article 32).¹¹⁰ But evidently, the weight attached to such practice would be less.¹¹¹ And, importantly, a court is *required* to

107 In addition to the cases considered below, another example is *Gavric v Refugee Status Determination Officer, Cape Town & Others* 2019 (1) SA 21 (CC) ('*Gavric*') paras 90-1 (the court briefly refers to how article 1F of the Refugee Convention had been interpreted by the UK Home Office in a guidance note and also the European Asylum Support Office's Practical Guide on Exclusions; although it did not characterise either of these as being the subsequent practice of state parties, nor does it make any reference to the Vienna rules, or the weight to be accorded to these pronouncements). See *Association of Mineworkers and Construction Union & Others v Anglo Gold Ashanti Limited t/a Anglo Gold Ashanti & Others* 2022 (8) BCLR 907 (CC) ('*AMCU v Anglo*') paras 46-8 and 51 (brief references to academic writers, who in considering the obligations that flow from ILO conventions, make broad statements in relation to the practice of states).

108 The SCA considered a US case and a compliance document published by the US Customs and Border Protection agency (*Levi Strauss* (note 13) para 38 fn 18) and two UK cases (para 39 fn 19-20).

109 See discussion in Part 2 as to the use of subsequent practice both under art 31(3)(b) and as supplementary means under art 32. As the ILC notes in Draft Conclusions: Subsequent Practice (note 11), Conclusion 10(2), '[t]he number of parties that must actively engage in subsequent practice in order to establish an agreement under art 31, paragraph 3 (b), may vary. Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction.' See also J Crawford 'A consensualist interpretation of article 31 (3) of the Vienna Convention on the Law of Treaties' in Georg Nolte (ed) *Treaties and Subsequent Practice* (2013) 29; Gardiner (note 37) 269-70.

110 ILC Draft Conclusions: Subsequent Practice (note 11), Conclusion 4(3) ('A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.')

111 ILC Draft Conclusions: Subsequent Practice (note 11) Conclusion 4, Commentary para 33.

have regard to the subsequent practice that establishes the agreement of the parties as to the interpretation of the treaty where it is available. Having regard to the practice of only two states is likely to be insufficient to assess properly whether there is any discordant practice by other state parties. As the ILC has cautioned, when ‘using subsequent practice by one or more, but not all, parties to a treaty as a supplementary means of interpretation under article 32, one must, however, always remain conscious of the fact that “the view of one State does not make international law”’.¹¹² However, the SCA shows no appreciation for this distinction. Nor does it explain why it (perhaps reflexively) turned to the practice of only the USA and the UK.

In *Nu Africa*,¹¹³ a recent case before the Constitutional Court, the Court was faced with a challenge to the constitutionality of legislation in relation to customs duties and the ability of foreign diplomats to purchase goods duty-free. It was necessary for the Court to consider and interpret the 1961 Vienna Convention¹¹⁴ and the 1963 Vienna Convention,¹¹⁵ to determine whether the domestic legislative scheme (which, due to alleged abuse by diplomats, was amended to include a quota system for the quantities that diplomats could purchase duty-free) was in violation of these Conventions. Rogers J (writing a separate judgment, concurring in part with the majority’s judgment), in dealing with the 1961 and 1963 Vienna Conventions, observed that ‘[t]he Vienna Conventions, as *international treaties*, should be interpreted by our courts as far as possible in a way that is consistent with international consensus on the meaning of the Conventions.’¹¹⁶ This statement appears to accept the importance of considering subsequent practice in respect of the interpretation of international treaties. Rogers J does not say why he supported this approach (indeed, he does not refer to or rely on the Vienna rules), but the approach is clearly consistent with article 31(3) (b). Rogers J went on to apply this approach by finding that the terms ‘laws and regulations’ referred to in articles 36(1) and 50(1) of the 1961 and 1963 Conventions, respectively, could include reference to international practice relating to ‘quantitative limits aimed at curbing abuse.’¹¹⁷ In support of this, Rogers J had regard to an affidavit filed by the Commissioner of SARS¹¹⁸ indicating various countries that imposed quantitative limits.¹¹⁹ This appears to be a rare example of a party placing some relevant state practice before the Court. In addition, Rogers J noted that his own research had indicated many more countries that could be added to the countries to which

112 Ibid (quoting from *Sempre Energy International v Argentine Republic*, Award, 28 September 2007, ICSID Case No ARB/02/16 para 385).

113 *Nu Africa* (note 52).

114 Vienna Convention on Diplomatic Relations 1961

115 Vienna Convention on Consular Relations 1963.

116 *Nu Africa* (note 52) para 216, emphasis added.

117 Ibid.

118 The Commissioner for the South African Revenue Service (‘SARS’), the second respondent in the case.

119 *Nu Africa* (note 52) para 216.

the Commissioner had referred.¹²⁰ Importantly, the majority did not appear to disagree with Rogers J's interpretative approach or his interpretation in this respect, although it did not choose to refer to or endorse it expressly.¹²¹

In *Makana*, the Constitutional Court, in its determination of a challenge to the constitutionality of the Mental Health Care Act 17 of 2002, briefly refers to article 14 of the Convention on the Rights of Persons with Disabilities ('CRPD'), as part of the Court's consideration of international law relevant to the interpretation of rights in the Bill of Rights. The Court ultimately found that it was unnecessary for the purpose of the judgment to consider in detail the proper interpretation of article 14. However, the Court (in a unanimous judgment by Rogers J), in considering the possible requirements of article 14, noted that it had not come across any 'modern legal system' that did not have 'a regime for involuntary inpatient treatment of mentally ill persons'.¹²² The Court based this statement on its consideration (directly, or through academic literature) of a range of countries both in the Global North and South,¹²³ and a survey of European states, referenced in a European Court of Human Rights ('ECtHR') judgment.¹²⁴ The Court did not consider whether this subsequent practice, while far from including all states parties, was sufficient to be evidence of the agreement of all parties to CRPD (indeed, it appears unaware that subsequent state practice may rise to the level of an authentic means of interpretation). It seems that the Court was in effect having regard to subsequent practice to determine the appropriate interpretation of article 14 of CRPD, and whether the Committee on the Rights of Persons with Disabilities ('CRPD Committee') Guidelines ought to be accepted as accurately reflecting South Africa's treaty obligations (an issue I deal with in Part 3.4), although it did not explain this in terms of the Vienna rules, nor were these even clearly referred to as part of the interpretative process. That the Constitutional Court was willing to undertake this exercise, albeit that it was only briefly mentioned in the case and was not developed further, is a welcome change.

What is lacking even in these more recent Constitutional Court judgments where some subsequent practice is considered is (as emphasised) any appreciation of the ways the Vienna rules make subsequent practice relevant to the interpretation of treaties and how such practice ought to be considered and weighed in the interpretative process. Nevertheless, these recent decisions (albeit one of the judgments was only a separate judgment, rather than a majority decision) potentially betoken an important shift in the

120 Ibid para 216 fn 141.

121 Ibid the majority judgment (per Mathopo J) paras 1–149 (the difference between the majority judgment and Rogers J's judgment was unrelated to the appropriate interpretation of the 1961 and 1963 Vienna Conventions, see paras 116–123, and cf paras 140–4. The use of preparatory work in *Nu Africa* will be considered in Part 3.6).

122 *Makana* (note 58) para 111.

123 The United Kingdom, Canada, the United States, Australia, New Zealand, Germany, France, Spain, Ghana, Kenya and Zambia (ibid para 111).

124 Ibid para 111 fn 149.

Constitutional Court's openness to having regard to subsequent practice, which shows a marked difference from the Court's approach only a few years earlier in *Law Society*.

3.4 Relying on treaty bodies' pronouncements

An interesting feature that bears consideration is that, during the last half-decade, South African courts have, with varying degrees of detail, in a number of matters¹²⁵ considered the pronouncements of treaty bodies¹²⁶ when applying treaties.¹²⁷ However, the courts, apart from the exception discussed below, generally do not explain on what basis they had regard to the pronouncements of the treaty bodies (i.e. whether they are viewed as

125 Of the 39 Constitutional Court judgments identified during the last half-decade where treaties were referred to, in 17 there was some reference made to the pronouncements of treaty bodies.

126 International organisations created by treaty, usually tasked with some role in overseeing the implementation of the treaties by states. For instance, the Human Rights Committee created under the ICCPR and empowered to consider and pronounce on reports by states, make general comments, and in certain circumstances consider inter-state complaints, and also empowered under the Optional Protocol to the ICCPR to receive, consider, and determine communications from individual complainants.

127 Examples in the Constitutional Court include (in addition to those referred to in the main text): *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC) para 26 fn 77 (referred briefly to Human Rights Committee General Comment No 31 when considering the interpretation of art 7 of the ICCPR) and para 27 fn 78; *Prisons Civil Rights Union v South African Correctional Services Workers' Union & Others* 2019 (1) SA 73 (CC) paras 89 and 91; *Tshabalala* (note 53) para 94 fn 67 (in Victor AJ's concurring judgment, she has brief regard to CEDAW Committee General Recommendation No 35); *AK v Minister of Police* 2022 (11) BCLR 1307 (CC) para 88 fn 37 (refers briefly to CEDAW Committee recommendations and observations made by the Committee in relation to South Africa's report to the Committee); *Thubakgale & Others v Ekurhuleni Metropolitan Municipality & Others* 2022 (8) BCLR 985 (CC) paras 111–12 (a brief reference in a minority judgment to the General Comment by the Committee on Economic, Social and Cultural Rights ('CESCR') in relation to rights to adequate housing). In the SCA: *Advertising Regulatory Board NPC & Others v Bliss Brands (Pty) Ltd* 2022 (4) SA 57 (SCA) paras 35, 37 and 38 (very brief passing reference made to General Comment No 34 of the Human Rights Committee in the context of considering the right to freedom of expression). In the Labour Appeal Court: *Municipal and Allied Trade Union of South Africa (MATUSA) v Central Karoo District Municipality & Others* [2020] ZALAC 20, [2020] 9 BLLR 896 (LAC) paras 16, 31–3. In the High Court: *Balení & Others v Minister of Mineral Resources & Others* 2019 (2) SA 453 (GP) paras 78–82 (the Court considers CERD Committee's General Recommendation 23, the Human Rights Committee's General Comment 21 and a decision of the Human Rights Committee in respect of an individual communication); *Right to Know Campaign & Others v City Manager of Johannesburg Metropolitan Municipality & Another* 2022 (5) SA 570 (GJ) paras 67–9 and fn 50 (the Court referred to decisions of the Human Rights Committee and its interpretation of art 21 of ICCPR in General Comment 27).

some type of supplementary means for interpretation, under article 32, or as indicative of subsequent state practice¹²⁸), or the weight accorded them.¹²⁹

In *Mlungwana & others v S & another*,¹³⁰ the Constitutional Court was faced with a challenge to the constitutionality of section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 and an appeal against a conviction under the Act. The Court briefly considered international law when interpreting the constitutional right to assemble.¹³¹ In doing so, it had passing regard to decisions by the Human Rights Committee in relation to article 21 of the ICCPR. Importantly, when referencing the decisions of the Human Rights Committee, the Court indicated in a footnote, with reference to Human Rights Committee's General Comment No 33,¹³² that such decisions of the Human Rights Committee were 'deemed' to fall within article 38(1)(d) of the ICJ Statute (being 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.').¹³³ This appears to be the first time that any South African court has expressly indicated that it was referring to the pronouncements by a treaty body as a subsidiary means for determining treaty rules or expressing any view as to the status of a treaty body's

128 It should be noted that it is generally accepted that the pronouncements of treaty bodies are not themselves *per se* subsequent practice. However, the ILC accepts that they might give rise to subsequent practice (if it can be shown that state parties acted on and accepted the treaty bodies' interpretation) or refer to (i.e. include reference to) state parties' subsequent practice, and recognises that they are often relied on by international and domestic courts in interpreting treaties, possibly as a species of supplementary means under art 32 of the Vienna Convention or subsidiary means under art 38(1)(d) of the ICJ Statute. See ILC Draft Conclusions: Subsequent Practice (note 11), Conclusion 13 and commentary, at 106–16. See also generally Van Alebeek & Nollkaemper (note 28); D Azaria, 'The Legal Significance of Expert Treaty Bodies Pronouncements for the Purpose of the Interpretation of Treaties' (2020) 22 *International Community LR* 33.

129 See for example *Mahlangu* (note 58) para 43 fn 41 (the Constitutional Court made passing reference to the CERD Committee's General Recommendation 25) and para 44 fns 43–44 (the Court had regard to the Committee on Economic, Social and Cultural Rights' General Comment 16 and General Comment 23, as well as the Committee's concluding observations in relation to South Africa's initial report pursuant to the ICESCR).

130 2019 (1) BCLR 88 (CC) ('*Mlungwana*').

131 Constitution, s 17.

132 Committee's General Comment No 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 25 June 2009, UN Doc CCPR/C/GC/33. This sets out the Committee's view of the status and role of Human Rights Committee's decisions ('views') in respect of individual communications. It should be noted that the Committee does not, in Comment No 33, state that its pronouncements in respect of individual communication under the Optional Protocol fall within article 38(1)(d) of the ICJ Statute.

133 *Mlungwana* (note 130) para 48 fn 71. For a discussion of the relationship between art 32 of the Vienna Convention and art 38(1)(d) of the ICJ Statute, see the discussion in Part 2.

pronouncements.¹³⁴ However, the Court did not reflect on the weight to be accorded to such pronouncements or whether or how they ought to be considered within the framework of the Vienna rules (for instance, whether they could constitute some form of supplementary means for interpretation under article 32;¹³⁵ might they also include evidence of or lead to subsequent practice?¹³⁶)

In *Makana*, as mentioned briefly in Part 3.3, the Constitutional Court had regard to the CRPD Committee Guidelines on article 14 of CRPD (in which the Committee set out its view of the obligations placed on states by article 14¹³⁷). However, while the Court held it was not necessary to reach a final determination of how article 14 ought to be interpreted,¹³⁸ it did not accept the CRPD Committee Guidelines as necessarily an accurate determination of states' treaty obligations. Rather, it took account of the fact that the Committee Guidelines have been labelled controversial by a New Zealand court, which had emphasised the views expressed were at odds with pronouncements by the Human Rights Committee.¹³⁹ Furthermore, the Court referred to the fact that while the Guidelines repeated a number of propositions found in an earlier CRPD Committee's General Comment on article 12,¹⁴⁰ the views expressed by the CRPD Committee in that General Comment had engendered significant debate (including some criticism) in the academic literature.¹⁴¹ The Court did not find it necessary to reach a firm view on the appropriate interpretation of article 14 (nor did it attempt any such detailed interpretation)¹⁴² or whether this was in conflict with the Guidelines. However, it is, nevertheless, important to note that the Court was willing to be critical of a treaty body's pronouncements and not merely

134 However, it should be noted that in *Zuma III* (note 55), decided approximately three years after *Mlungwana* (note 130), the Constitutional Court emphasised that pronouncements by the Human Rights Committee are not binding. Although the Court did not directly suggest they could not be used as subsidiary means for determining treaty rules (and accepted that its pronouncements could be 'instructive') and it had no regard to what was said in *Mlungwana* (see *Zuma III* para 120 fn 106).

135 See discussion in note 128 above.

136 See ILC Draft Conclusions: Subsequent Practice (note 11), Conclusion 13 and commentary at 106-16, and note 128 above.

137 Guidelines adopted at CRPD Committee's 14th session, held in September 2015 (para 2: 'The Committee, being the international monitoring body of the Convention, has adopted these guidelines to provide further clarification ... about the obligation of States parties pursuant to the Convention on the Rights of Persons with Disabilities to respect, protect and guarantee the right of persons with disabilities to liberty and security.').

138 *Makana* (note 58) paras 110-11.

139 Ibid para 110, referring to *M (CA677/2017) v Attorney-General (in respect of the Ministry of Health)* [2020] NZCA 311 para 114, which referred to the Human Rights Committee's General Comment No 35 in respect of art 9 of the ICCPR (liberty and security of person) UN Doc CCPR/C/GC/35, 16 December 2014.

140 CRPD Committee's General Comment No 1: Article 12 – Equal recognition before the law, April 2014.

141 *Makana* (note 58) para 110 fn 146.

142 Ibid paras 110-11.

follow them blindly, particularly where they had been criticised and did not appear to accord with state practice.¹⁴³

I will return to the use of treaty bodies' pronouncements in Part 4. It is sufficient to point out that South African courts are not alone in not fully explaining the basis for their reference to the pronouncements of treaty bodies.¹⁴⁴

3.5 Having regard to international and foreign judicial decisions

In some of the cases during this period, the courts had regard to judicial decisions by foreign or international courts in the process of interpreting and applying treaties.¹⁴⁵ This is not unusual.¹⁴⁶ However, the courts generally provide no guidance as to when foreign or international decisions will be considered, or why. For instance, foreign domestic decisions (unlike international court decisions) may be evidence of the practice of their state;¹⁴⁷ and both international and foreign domestic decisions may be a supplementary means of interpretation (under article 32 of the Vienna Convention) and subsidiary means for determining treaty rules (under article

143 Ibid para 111.

144 ILC Draft Conclusions: Subsequent Practice (note 11) 115–116. The ILC notes that 'Court decisions have not always fully explained the relevance of pronouncements by expert treaty bodies for the purpose of the interpretation of a treaty.' The ILC gives as an example the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Reports 136, in which the ICJ seems to suggest that such pronouncements might be supplementary means under art 32 or a subsidiary means under art 38(1)(d). See also Azaria (note 128).

145 In addition to cases discussed below, see also, for instance, *Levi Strauss* (note 13); *Baleni* (note 127) para 82 (the Court briefly refers to the African Court's interpretation of the African Charter in one of its decisions); and *Makana* (note 58) (discussed in Part 3.4). In certain cases, unsurprisingly, the courts also refer to earlier decisions by South African courts. For instance, in *Koch NO* (note 56), the Constitutional Court has regard to earlier South African jurisprudence in relation to the interpretation and application of the Hague Convention, including *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) ('*Sonderup*'). See the minority judgment at para 54 (summarising the Court's interpretation of art 13(b) in *Sonderup*) and the issues left open in that case (see also paras 56 and 60).

146 For instance see *Berner* (note 40) 90. For a consideration of the general use of foreign court decisions by European courts, see Martin Gelter & Mathias Siems 'Citations to Foreign Courts – Illegitimate and Superfluous, or Unavoidable? Evidence from Europe' (2014) 62 *American Journal of Comparative Law* 35; Mathias Siems 'A Network Analysis of Judicial Cross-Citations in Europe' (2023) 48 *Law & Social Inquiry* 881.

147 See ILC Draft Conclusions: Subsequent Practice (note 11), Conclusion 5(1): 'Subsequent practice under articles 31 and 32 may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial, or other functions.' In Part 3.3, in certain of the cases discussed, it appears clear that foreign case law was considered as evidence of the practice of their respective states (see, for instance, *Levi Strauss* (note 13)).

38(1)(d) of the ICJ Statute).¹⁴⁸ Obviously, the weight accorded to international or foreign decisions ought to be considered, and may vary depending on issues such as the identity of the Court making the decision, its reasoning and why the decision is being relied on, and why other decisions are not considered or ignored.¹⁴⁹

A recent example of a court considering foreign decisions when interpreting treaties is *Koch NO*.¹⁵⁰ In this case, the Constitutional Court was faced with an appeal in relation to an abduction of a child regulated by the Hague Convention on the Civil Aspects of International Child Abduction ('Hague Convention').¹⁵¹ A central issue was the interpretation of article 13(b) of the Hague Convention. Article 13(b) allows a court to refuse to order the return of an abducted child if 'there is a grave risk that their return would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation.' Both the majority¹⁵² and the minority¹⁵³ referred to the interpretation of the Hague Convention by courts in various foreign jurisdictions (in addition to previous decisions of the South African courts). The Court had particular regard to UK decisions.¹⁵⁴ However, the Court also considered the approach in a few other jurisdictions.¹⁵⁵ The Court did not explain on what basis it had regard to these foreign decisions. Therefore, it is not clear whether it viewed these decisions as simply subsidiary means for determining the relevant treaty rules (focusing on the decisions, qua reasoned legal determination, as one would an international court decision or academic writing)¹⁵⁶ or whether it viewed

148 See Draft conclusions on subsidiary means for the determination of rules of international law, with commentaries provisionally adopted by ILC in its Report on the work of the seventy-fourth session (2023) A/78/10, Chapter VIII ('ILC Draft Conclusions: Subsidiary Means') Conclusion 2(a) and commentary paras 7–8 at 80 and 82.

149 ILC Draft Conclusions: Subsidiary Means *ibid* Draft Conclusion 3: 'When assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to, *inter alia*: (a) their degree of representativeness; (b) the quality of the reasoning; (c) the expertise of those involved; (d) the level of agreement among those involved; (e) the reception by States and other entities; (f) where applicable, the mandate conferred on the body.'

150 *Koch NO* (note 56).

151 The Children's Act 38 of 2005, s 275, incorporates the Hague Convention into South African law.

152 Majiedt J, with Zondo CJ, Kollapen J, Makgoka AJ and Potterill AJ concurring.

153 Van Zyl AJ, with Madlanga J, Rogers J and Theron J concurring.

154 *Koch NO* (note 56) paras 55 fn 34, 61 (quoting from the UK Supreme Court in *Re E (Children) (Wrongful Removal: Exceptions to Return)* [2011] UKSC 27, which quoted in turn from *Re D (A Child)* [2006] UKHL 51), 64, 66, 68 fn 50, 69, 79, 84, 110 fn 75, 119–120, 128 fn 80, 131, 158, 161, 164, 166, 200 fn 127, 203–210, and 217 fn 144.

155 *Koch NO* *ibid* para 58, read with para 163, referring to Australian, Canadian, and UK decisions, as well as legislation in the US. See also para 211. In para 160, the Constitutional Court referred to a portion of *Sonderup* (note 145) where the Court had relied on a Canadian decision.

156 Article 38(1)(d) of the ICJ Statute. As discussed in Part 2, this might overlap with art 32.

the foreign decision as a species of subsequent state practice (or both).¹⁵⁷ As discussed in Part 2, as subsequent practice, these decisions could either constitute an authentic means for interpreting the treaty if the practice demonstrates the agreement of the parties or as supplementary means for interpreting the treaty (to which less weight ought to be accorded) in terms of article 32 where they do not establish such agreement. However, the Court did not refer to decisions by a large (or representative) number of states. Therefore, there can be no suggestion that the Court was considering state practice that would fall within the definition of subsequent practice that establishes the agreement on the interpretation by all state parties. Rather, it had regard to a limited number of cases, with particular focus being paid to UK decisions. It is not clear that the Court itself was aware of the different ways in which foreign domestic decisions may have a bearing on the interpretative exercise.¹⁵⁸ The Court does not consider what weight to accord to the decisions, and it is unclear why certain foreign decisions, but not others, are considered. While this is of concern, it is encouraging to see that the court nevertheless had regard to foreign decisions as part of its own interpretative exercise (this is particularly evident in the minority decision). That interpretative exercise included having regard, at various points, to the text, context, and purpose and object of the Hague Convention in a more fulsome manner than generally seen in other South African court decisions during this period (although the Court did not do this in a particularly systematic manner and made no reference to the Vienna rules).¹⁵⁹

In *Scalabrini Centre of Cape Town & another v Minister of Home Affairs & others*,¹⁶⁰ a matter involving a challenge to the constitutionality of certain provisions of the Refugees Act 130 of 1998, the Constitutional Court referred briefly to the UK Supreme Court's high-level interpretation of the Refugee Convention. But the court made no attempt to undertake its own interpretation of the Refugee Convention (or the other treaties that were relevant¹⁶¹). The Constitutional Court merely asserted the meaning of the treaties and

157 As indicated in Part 2 whether there is a distinction between subsidiary means and supplementary means is open to debate.

158 In particular, neither the majority nor minority indicates whether these foreign decisions were being considered qua subsequent practice under art 31(1) or art 32 (given that the practice was only of certain states), or qua judicial decisions as a subsidiary means of determining treaty obligations, under art 38(1)(d) of the ICJ Statute.

159 See note 74 and references to relevant portions of the majority and minority judgment.

160 2024 (3) SA 330 (CC) (*'Scalabrini'*) para 33, quoting from general statements by Lord Stephen in *G v G* [2021] UKSC 9 para 81 (the UK Supreme Court, in this case, does not undertake any detailed interpretative exercise. Rather, it referred to a passage of an earlier decision, *ST (Eritrea) v Secretary of State for the Home Department* [2012] UKSC 12, in which the Supreme Court had more careful regard to the elements of the Vienna rules when interpreting the treaty). The Refugee Convention was relevant because, in terms of s 1A of the Refugees Act, it must be interpreted, *inter alia* in light of the Refugee Convention.

161 1967 Protocol Relating to the Status of Refugees and Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa ('OAU Refugee Convention').

certain provisions.¹⁶² It might be argued that it was not necessary for the Court to conduct a more careful interpretative exercise, since the treaty was apparently only considered as an interpretative aid to assist in the interpretation of the Refugees Act (which was the subject of the challenge), rather than to enforce the treaty obligations directly. Yet, the Court plainly stated that the meaning of the Refugee Convention was one of the fundamental reasons why the impugned sections of the Refugees Act were unconstitutional.¹⁶³ Therefore it was plainly important for the Refugee Convention to be interpreted properly, even if only as an interpretative aid.

In *New Nation Movement*,¹⁶⁴ the Constitutional Court¹⁶⁵ had regard to a decision of the African Court in interpreting the African Charter,¹⁶⁶ as well as having regard to decisions of the ECtHR. In particular, Madlanga J considered a number of ECtHR cases where it interpreted article 11 of the European Convention on Human Rights ('ECHR'), to which Madlanga J chose to have regard, in interpreting section 18 of the Constitution.¹⁶⁷ The references were limited, and there was little indication of what status or weight was accorded to these decisions. They were all considered in a rather roundabout way, with no guidance as to when they would be used.

New Nation Movement is one of a number of cases where the Constitutional Court had regard to the ECtHR's decisions when considering international human rights obligations,¹⁶⁸ even though the ECtHR generally interprets and applies the ECHR, to which South Africa is not a party. This is probably due to the overlap between the rights enshrined in the ECHR and rights protected by other international human rights treaties to which

162 *Scalabrini* (note 160) para 30 (later in para 31, the Court also relies on the statement by the Court itself in the *Ruta* (note 127) as to the principle of non-refoulement in 'customary international law and international human rights law', but in *Ruta* *ibid* paras 27–28 the Court was merely making broad statements as to the principle, without any attempt at a careful interpretation of treaty law). By way of comparison, see the detailed interpretative process employed by the Canadian Supreme Court in relation to the interpretation of the Refugee Convention in *Febles v Minister of Citizenship and Immigration* (2022) 197 ILR 549, where the Court based its interpretation on the application of the Vienna rules, and while it briefly had regard to foreign jurisprudence this was in addition to a careful interpretation by the Court itself.

163 *Scalabrini* *ibid* para 34, read with para 33, and see generally paras 28–35.

164 *New Nation Movement* (note 77).

165 The main majority judgment was written by Madlanga J (paras 1–128), concurred in by all the judges, save Froneman J (paras 196–233), who wrote a dissent. Jafta J also wrote a separate majority judgment (paras 139–95), also concurred in by all the judges (including Madlanga J), save for Froneman J.

166 *New Nation Movement* (note 77) paras 38–41

167 *Ibid* paras 30–37, and see para 42 fn 65.

168 See for example *Kruger v National Director of Public Prosecutions* 2019 (6) BCLR 703 (CC) ('*Kruger v NDPP*') para 116 fn 63; *AK v Minister of Police* 2023 (2) SA 321 (CC) paras 90–4; *Makana* (note 58) para 108. See also the SCA case of *Advertising Regulatory Board v Bliss Brands* (note 127) para 37.

South Africa is a party and the Constitution¹⁶⁹ (and the Court may view the ECtHR's decisions as akin to comparative foreign law, to which the Court also regularly has regard¹⁷⁰). For instance, in *Mlungwana*,¹⁷¹ which I considered in Part 3.4, the Constitutional Court had regard to decisions by the ECtHR in relation to the interpretation of article 11 (the freedom of assembly and association) of the ECHR.¹⁷² It plainly did so because the ICCPR (to which South Africa is party) and South Africa's Constitution, like the ECHR, include a right to assemble.¹⁷³ The Court, therefore, had regard to how that (substantially similar) right in the ECHR had been interpreted by the ECtHR for the purposes of interpreting the right to assemble in the Constitution.

3.6 Mostly, no regard had to preparatory work

As discussed in Part 2, the Vienna rules allow recourse to the travaux préparatoires (as a supplementary means of interpretation) when interpreting a treaty and having regard to the travaux (preparatory work) can play a helpful and important role in treaty interpretation.¹⁷⁴ However, in general, South African courts do not have regard to such preparatory work when interpreting treaties. For instance, in *Law Society*, no attempt was made to have regard to any available travaux préparatoires when interpreting the SADC Treaty and the 2000 Tribunal Protocol. By way of comparison, consider, for instance, the approach of the Singapore courts to the interpretation of the SADC Treaty at approximately the same time. In *Kingdom of Lesotho v Swissbourgh Diamond Mines*,¹⁷⁵ a review of an international arbitral award in relation to Lesotho's participation in the suspension of the SADC Tribunal, the Singapore High Court was required to interpret the SADC Treaty and

169 Tzanakopoulos refers to this phenomenon in relation to human rights norms that exist both in international law and domestic law as 'consubstantial norms' (See A Tzanakopoulos, 'ILA Study Group on Principles on the Engagement of Domestic Courts with International Law Final Report: Mapping the Engagement of Domestic Courts with International Law' (2016) ('ILA Final Report') paras 30 and 54). An example of another domestic court, of a country not party to the ECHR having regard to ECtHR decisions is *Marab & Others v Israel Defence Force Commander in the West Bank & Another*, 5 February 2003 (2008) 133 ILR 332. In *Marab*, the Israeli Supreme Court had regard to international law and the ECtHR interpretation of rights in the ECHR in the Court's determination of the legality of prolonged detention without judicial oversight (see paras 27 and 28).

170 The Constitution in s 39(1)(c) provides that the Court may have regard to foreign law when interpreting the Bill of Rights.

171 *Mlungwana* (note 130).

172 Ibid para 54.

173 Compare the ICCPR art 21; the Constitution s 17; and the ECHR art 11.

174 For a general discussion of the use of travaux in treaty interpretation see Gardiner (note 37) 349–98. See also the text and references quoted at note 22 above.

175 *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* [2017] SGHC 195 ('*Lesotho v Swissbourgh*'), upheld on appeal by the Singapore Court of Appeal in *Swissbourgh Diamond Mines (Pty) Ltd & others v Kingdom of Lesotho* [2018] SGCA 81.

the SADC Investment Protocol.¹⁷⁶ The Singapore High Court, as part of a rigorous interpretative process in which it had full regard to and applied the Vienna rules,¹⁷⁷ specifically requested the parties to furnish it with the travaux in respect of the SADC Treaty and SADC Investment Protocol (although the parties were able to make available only the travaux for the Investment Protocol).¹⁷⁸

During the period under consideration, it appears that in no reported cases did any court itself have *direct* regard to the travaux of any treaty as part of its interpretative exercise.¹⁷⁹ However, there are two partial exceptions. In two cases, the Constitutional Court had regard to academic commentaries on treaties that referenced the travaux when interpreting the treaties.¹⁸⁰ I discuss these cases below.

In *Gavric* (which involved a review to set aside the refusal to grant the applicant refugee status and a challenge to the constitutionality of section 4(1)(b) of the Refugee Act), the Constitutional Court referred, in a footnote, to academic writing that considered the Refugee Convention, quoting from a portion that referred briefly to the preparatory work of the Refugee Convention when seeking to offer an interpretation of article 1F of the Convention.¹⁸¹ However, the Court did not appear to make much of this aspect of the academic writing (indeed, it is tucked away in a footnote).

176 SADC Protocol on Finance and Investment, 2006.

177 *Lesotho v Swissbourgh* (note 175) paras 88–104.

178 *Ibid* para 99.

179 In one case which is not reported in any of the law report series, but available on saflii.org, *Kingdom of Lesotho v Frazer Solar GMBH and Others* [2023] ZAGPJHC 1486, the High Court had brief regard to the travaux when interpreting the Model Law on International Commercial Arbitration (para 103). However, the Model Law is not a treaty (see for example I Bantekas 'International Origin and General Principles' in I Bantekas (et al eds) *Model Law on International Commercial Arbitration: A Commentary* (2020) 40). It is a proposed model of domestic legislation prepared by the United Nations Commission on International Trade Law ('UNCITRAL') for countries to consider and, as they see fit, incorporate into their domestic law. The Model Law is incorporated into South African law by the International Arbitration Act 15 of 2017. Section 8 of the Act, moreover, expressly provides that when interpreting the Model Law, the courts may have regard to 'relevant reports of UNCITRAL and its secretariat' (as the Court took note of, see para 86).

180 In addition, in *Koch NO* (note 56) para 134, the Court had regard to the Explanatory Report by Professor Elisa Perez-Vera, the Rapporteur to the 1980 sessions of the Hague Conference that produced the Convention, which while not formally part of the travaux would certainly form supplementary means that can and have been considered by courts. See, for instance, Gardiner (note 37) 403. By way of contrast, in *Abbott v Abbott* (2010) 130 S Ct 1983, when interpreting the Hague Convention, the US Supreme Court had regard to the drafting history (and debates), in addition to the Perez-Vera Explanatory Report, although it found the drafting history inconclusive in relation to the interpretative issue confronting it (at 1994). The Supreme Court noted that it 'need not decide whether this Report should be given greater weight than a scholarly commentary', although it considered it and indicated that it supported the Court's interpretation (at 1995).

181 *Gavric* (note 107) para 24 fn 15, quoting from Geoff Gilbert 'Current Issues in the Application of the Exclusion Clauses' in E Feller, V Türk & F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003).

In *Nu Africa*, the Constitutional Court quoted from, and drew particular attention to, Denza's well-respected academic commentary on the 1961 Vienna Convention on Diplomatic Immunity.¹⁸² It will be recalled from the discussion in Part 3.3 that a central issue in the case was whether the new legislative provisions that imposed a quota system, which limited the number of duty-free items diplomats could acquire, violated the 1961 Vienna Convention. In that context, the Court quotes from Denza's summation of the 'common understanding' evident in the preparatory work¹⁸³ on article 36 of the 1961 Vienna Convention 'that permissible regulations would include those which laid down procedural formalities and those which were designed to prevent abuse – for example, quantitative restrictions'.¹⁸⁴ Thus, while the Court did not have regard to the travaux directly, it appears clear that it relied on Denza's summary of the relevant travaux in order to interpret the Convention, and to determine whether the quota system introduced in the domestic law would violate the Convention. This suggests an implicit understanding of the interpretative value of the travaux (perhaps guided by Denza's use of them), but absent any reference to, or full understanding of, how the Vienna rules make such supplementary means relevant.

It is, of course, somewhat surprising that, during the last half-decade, the courts have not generally had regard to preparatory work when interpreting treaties (save for the minor exceptions mentioned above), nor suggested that the preparatory work if available ought to be considered, yet during this same period, the Constitutional Court, in a majority judgment in *AMCU v Anglo*, (i) reaffirmed that preparatory work in respect of the Constitution could be consulted when interpreting the Constitution;¹⁸⁵ and (ii) specifically had regard to the preparatory work in respect of domestic legislation to assist it in interpreting that legislation, which was part of the basis for abandoning the literal interpretation proposed by the Court's minority in the judgment.¹⁸⁶ It is, therefore, unfortunate that the value of considering the travaux in relation to treaty interpretation has not generally been affirmed by the South African courts.

182 E Denza, *Diplomatic Law: Commentary on the Vienna Convention* (4th ed 2016); quoted in *Nu Africa* (note 52) para 142 (per Mathopo J, for the majority), and see para 215, where Rogers J, in his separation judgment (with Kollapen J concurring), also references this quote from Denza and relies on it when interpreting the Convention. It is worth noting that in none of the written submissions by the parties before the Constitutional Court is any reference made to Denza (or indeed to the travaux, or more generally to the Vienna rules). It thus appears that the Court independently sought out academic views on the interpretation of the 1961 Vienna Convention. Written submissions available at <https://www.saflii.org/za/cases/ZACC/2023/31hoa.pdf>.

183 *Nu Africa* *ibid* para 143, summarising what was quoted at para 142 (Denza *ibid* refers to the 'Conference records').

184 *Nu Africa* *ibid* para 142, quoting Denza *ibid* 312; see also *Nu Africa* *ibid* para 215.

185 *AMCU v Anglo* (note 107) paras 58–59.

186 *Ibid* paras 60–62.

4 RECOMMENDATIONS FOR THE WAY AHEAD: HOW TO INTERPRET THE TREATIES SKILFULLY

As one can see from the cases referred to in Part 3 — even thirty years into South Africa's international-law-integrative constitutional democracy — while South African courts regularly find it necessary to apply treaties, they often fail to have regard to or properly use international law's own rules for interpreting those treaties.¹⁸⁷ As we begin the fourth decade of constitutional democracy, this should change. At a practical level, to ensure that the next decade witnesses a more rigorous and adroit approach to the interpretation of treaties, a few recommendations can be offered.

4.1 Courts should expressly structure their interpretation of the treaties through the lens of the Vienna rules

When faced with any treaty that needs to be applied (whether directly, as an aid for interpretation, or as the standard by which to judge the lawfulness of governmental action), the courts ought to do so with reference to and through the interpretive lens of the Vienna rules — international law's tools for interpreting a treaty. The need for this and the value of doing so has been articulated in Part 2. Not only does the Constitution compel their use by South African courts, but plainly some hermeneutical interpretative process needs to be adopted. The Vienna rules offer a specific, well-accepted, international-law hermeneutic for attributing meaning to treaties, which, given their customary international law status, form part of South African law. The need for the Vienna rules to be used is particularly pressing precisely because, as demonstrated in Part 3, often the courts have followed no clear, nor consistent, interpretative approach (or any interpretative approach at all). This is plainly inappropriate. It also violates the requirement of certainty, a central aspect of the rule of law, which is a founding constitutional value.¹⁸⁸ Even if interpretation may be more art than science, no one paints a masterpiece without even picking up a paintbrush or apply-

187 This is, in some ways, analogous to the lack of a rigorous and sound international law methodology evident in South African courts' determination of the other main source of international law which South African courts can and do apply: customary international law. See Chapter 2, Parts 4 and 5. Obviously, there is a difference between the interpretation of treaties and identification of customary rules, but what one sees is that on the one hand (compelled by the Constitution), South African courts are usually very willing to have regard to and apply both forms of international law (customary international law and treaty law), but on the other they generally ignore or fail to properly apply international law's own secondary rules for determining the content of these sources of international law.

188 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* (note 77) para 118. See Chapter 3, text at footnotes 268–269.

ing paint to the canvas.¹⁸⁹ Treaties do not interpret themselves or explicate their meaning without interpretation, any more than a picture paints itself.

Given that South Africa has an adversarial system,¹⁹⁰ courts should be clear as to the fact that they will approach the interpretation of the treaties using the Vienna rules and that they accordingly expect the parties before them to frame their submissions on interpretation through the Vienna rules.¹⁹¹ This will also better ensure a certain and predictable approach to the interpretation of treaties. Absent clear guidance to parties, it is likely that courts will not receive suitably rigorous submissions on matters of interpretation, or have relevant interpretive materials placed before them. If the parties themselves ignore active engagement with treaty interpretation and either make no submissions or superficial submissions, the courts' judgments are also likely not to be thorough when it comes to interpreting treaties. This will, to an extent, be less likely to occur if the courts (and in particular the Constitutional Court) clarify that they will approach the interpretation of any treaties relied on through the lens of the Vienna rules. Such pronouncements on issues of interpretation are far from rare in the domestic context. Both the Constitutional Court and the SCA have written numerous judgments seeking to explicate the appropriate approach to interpreting statutes and contracts,¹⁹² and, as a consequence, the parties, when making submissions, now regularly situate their submissions on the interpretation of these domestic instruments through these lenses.¹⁹³ There is no reason why the courts should not similarly adopt this approach in respect of the application of the Vienna rules. What is surprising is their failure to have done so to date.

4.2 Ensuring that materials made relevant by the Vienna rules are considered

Part of the importance of the courts making use of the Vienna rules and expecting parties to do likewise is that this should ensure that materials made relevant by the rules, where available, are placed before the courts and considered. This would include relevant subsequent practice and the

189 Gardiner (note 37) at 5 ('Those who would practise the art [of interpretation] need to understand the rules.').

190 *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) paras 21–22; Chapter 2, text at footnotes 55–56. An adversarial court generally relies on parties to frame issues in dispute and make competing submissions on those issues.

191 By way of example, as indicated above in note 182, in *Nu Africa* (note 52), none of the parties made reference to the Vienna rules in their written submissions, despite the interpretation of the 1961 Vienna Convention being central to the determination of the case.

192 See references in note 46, and such cases as *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper & Others* 2018 (4) SA 71 (SCA) para 26.

193 For instance, see the written submission by the respondent, relying on the Constitutional Court and the SCA's jurisprudence on the proper approach to the interpretation of statutes in *Competition Commission of South Africa v Group Five Construction Ltd* 2023 (1) BCLR 1 (CC), available at <https://www.saflii.org/za/cases/ZACC/2022/36hoa.pdf>.

travaux préparatoires. It is not as if South African courts have never had regard to such materials, but not generally nor consistently, and not with any clear sense of when, why, and how they are applicable.¹⁹⁴ This can lead to cherry-picking, misapplication (for instance, the definitive and uncritical reliance on limited practice of one or two states, or the reference to travaux only when supportive of a favoured view), and erroneous interpretation (for instance, where relevant and elucidating subsequent practice is available but is not considered¹⁹⁵).

By way of example, the courts show little regard to the distinction between state practice that is limited and not conclusive of any agreement of the parties as to the interpretation of the treaties (and thus can be considered but ought to be given less weight), and state practice which does establish the agreement of the parties, and therefore must be taken in account as an authentic means of interpretation.¹⁹⁶ Thus the courts have not articulated any sense of the different weights to be accorded to the subsequent practice, even though the *nature* of the practice (how clear and specific it is; whether it is repeated; whether it is practice that suggests the agreement of all states, or merely the practice of some; and whether it is consistent) should impact the weight accorded to it.¹⁹⁷ The South African courts are not alone in this regard.¹⁹⁸ Therefore, the South African courts would do well to have regard to the ILC's relatively recently completed work on the use of subsequent agreement and practice in treaty interpretation. The ILC has produced detailed Draft Conclusions (in essence, principles), elucidated with com-

194 See Parts 3.6 and 3.3.

195 *Law Society* (note 13) provides a potential example of this, as discussed above, and in Coutsooudis & Du Plessis CCR (note 4) at 189–91 (referring, inter alia, to the analogous example of the importance of state practice in the ICJ's interpretation of the voting procedure in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion* [1971] ICJ Reports 16). See also ILC Draft Conclusions: Subsequent Practice (note 11) at 54. The importance of reliance on subsequent practice is accepted too by state law advisors who regularly interpret treaties and ensure that states comply with treaties. See SD Murphy 'The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties' in Nolte (ed) (note 109) at 84; J Hill *Aust's Modern Treaty law and Practice* 4 ed (2022) 250.

196 As discussed in Part 3.3.

197 ILC Draft Conclusions: Subsequent Practice (note 11), Conclusion 9: '1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, inter alia, on its clarity and specificity. 2. In addition, the weight of subsequent practice under article 31, paragraph 3 (b), depends, inter alia, on whether and how it is repeated. 3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.'

198 ILC Draft Conclusions: Subsequent Practice (note 11) at 36 (While the ILC emphasises the need to draw a clear distinction between the nature and weight of the subsequent practice being considered, it noted that '[d]omestic courts have sometimes not clearly distinguished between subsequent agreements and subsequent practice under article 31, paragraph 3, and other subsequent practice under article 32'; referring to decisions by UK, New Zealand and German courts, as indicative of this failure).

mentaries on these,¹⁹⁹ which are, and were intended to be, of significant practical assistance to courts and the litigants that appear before them in relation to the use of subsequent practice and agreements.²⁰⁰

In relation to the consideration of the preparatory work, given the realities of South Africa's procedural law,²⁰¹ drawing any relevant preparatory work to the Court's attention would often fall to the litigants, or *amici curiae* (friends of the court).²⁰² And where they do so, it is more likely that the courts will make use of them as part of the interpretative exercise.²⁰³ But, evidently, this generally does not occur in South Africa.²⁰⁴ It appears that, even when this has occurred, the South African courts have not always welcomed this approach.²⁰⁵ It is, in the circumstances, encouraging, as discussed in Part 3.6, that the Constitutional Court, in the recent *Nu Africa* decision, had regard to and quoted from an academic author summarising the relevant preparatory work in relation to the treaty being interpreted.²⁰⁶ In that case, as noted, the preparatory work was an important confirmation of the proper interpretation of the relevant provisions of the treaty. This at

199 ILC Draft Conclusions: Subsequent Practice (note 11).

200 As indicated in note 36, the UN General Assembly has approved these Draft Conclusions inclusive of the commentaries, taking note of them and resolving that they, inter alia, be brought to the attention of 'all who may be called upon to interpret treaties, and encouraged their widest possible dissemination.'

201 Chapter 2, text at footnotes 55–56 ('South Africa has an adversarial system The Court is assigned "the role of neutral arbiter of the case presented". ... Their analysis is largely limited by the evidence and legal argument placed before them by opposing parties.')

202 The accessibility of such material has become easier over time. For instance, as Gardiner notes 'where the explanations of a preparatory body are likely to be useful to an interpreter, these are now commonly readily available, if not always in their raw form, then in published commentaries, explanatory reports, and such like.' (Gardiner (note 37) at 350). For a recent example of amici joining to specifically make submissions on relevant international law in the High Court, see *Smith & Others v Minister of Justice & Correctional Services* [2023] ZAGPJHC 1127 para 9 (the court took note of the fact that Redress, an international human rights NGO, which was admitted as an amicus, had made written and oral submissions on relevant international law).

203 See for example E Shirlow & M Waibel, 'A Sliding Scale Approach to Travaux in Treaty Interpretation: The Case of Investment Treaties' (2021) *British Yearbook of International Law* 10, 29, who point out, in the context of interpretation of treaties by investment tribunals, that '[t]ribunals tend to rely on travaux where they are made available to them.' They also note the significant use by investment tribunals of the travaux as an interpretative aid, and the regular reference by parties in their submissions to the travaux.

204 In fact, as indicated above in note 182, in *Nu Africa* (note 52), where the Constitutional Court references Denza's reliance on the travaux of the 1961 Vienna Convention, this authority and the reference to the travaux was not drawn to the court's attention in any of the parties' written submissions.

205 *Minister of Justice v SALC* (note 29) paras 37–9 (in a case concerning the government's failure to arrest and surrender then President Al Bashir of Sudan to the ICC, the SCA refused to admit amici that sought to make submissions and place documents before the Court in relation to 'the interpretation of Articles 27 and 98 of the Rome Statute, especially in the light of the *travaux préparatoires* and "the original intent of the drafters"').

206 However, as indicated above, the parties did not draw the Court's attention to this preparatory work.

least provides some initial indications that South African courts may begin to become alive to the value of the preparatory work in the interpretative process. But this should not only happen as the exception, but as the norm, where the preparatory work is available and relevant.

4.3 A critical approach to the use of supplementary means

As discussed in Part 2, using judicial decisions, treaty bodies' pronouncements, or academic writing to assist in the interpretative exercise is not objectionable. However, where judicial decisions, academic writings or pronouncements by treaty bodies are considered when interpreting treaties, the courts should give critical consideration to the weight that ought to be accorded to them. This would require the courts to at least be alive to such considerations as the nature of the materials (i.e. whether they should be viewed as a species of supplementary or subsidiary means, whether under article 32 of the Vienna Convention or article 38(1)(d) of the ICJ Statute, or whether they provide any evidence, for instance, of subsequent state practice for the purpose of article 31(3)(b)).

Moreover, the court should also be alive to such considerations as 'their degree of representativeness' (for instance, whether the academic writings are from only one country, or one region, or whether they straddle diverse regions), 'the quality of the reasoning' (what interpretative process is followed; and whether the Vienna rules are applied); 'the expertise of those involved', 'the reception by states and other entities' (particularly in respect of, for instance, pronouncements by treaty bodies: whether state parties have accepted this, or whether there has been a rejection of certain interpretations by the treaty body); and 'where applicable, the mandate conferred on the body' (once again relevant particularly for treaty bodies).²⁰⁷ The considerations that ought to be taken into account when having regard to international or foreign judicial decisions as part of the interpretative process would include: why the particular decisions are being considered (if they are foreign domestic decisions, whether this is to see the practice of foreign states or whether the decision is being considered more as a subsidiary means to determine treaty rules — effectively considering or relying on another court's legal reasoning and interpretative exercise); the nature of the court (for instance, whether it is an international court); the representativity of the decisions considered (whether the decisions are from a diverse range of countries considered, and if not, why not); and the court's reasoning in the decision being considered (whether the court has followed some appropriate process to determine the treaty obligations; or whether it merely asserts a meaning).

²⁰⁷ These are relevant considerations when sources such as academic writers or judicial decisions (or pronouncements of treaty bodies) are used as subsidiary means to determine international law rules; see ILC Draft Conclusions: Subsidiary Means (note 148), Conclusion 3.

4.4 The courts should call for further submissions or do their own research where necessary

Where parties have not sought to place proper submissions before the Court in relation to the interpretation of treaties they rely on, and have failed to make available relevant material to assist in the interpretation, the Court should make use of its power to call for further submissions on the interpretation of the treaty, including the placing of relevant material before the Court (for instance in relation to subsequent practice). This is an approach that the Constitutional Court itself has adopted in certain cases involving international law.²⁰⁸ However, thus far, its request for submissions has not been expressly with respect to particular issues of treaty interpretation. The closest it has come is that in *Zuma III*, the court specifically called for submissions on the applicability and implications for the case of two articles of the ICCPR and the decisions by the Human Rights Committee in respect thereof (which implicitly required the parties to engage with the interpretation of those articles and the Human Rights Committee's interpretation and application of them).²⁰⁹ There is no reason why this practice ought not to continue and find application not merely in the Constitutional Court but in the lower courts too. Even if this were not required in every case, it makes sense for the Court to enlist the assistance of the parties to ensure that it is able to interpret treaties that are particularly pertinent to the case in view of all the relevant interpretive materials and that are based on proper submissions on interpretation.

Suggesting that courts should call for further submissions from parties does not mean that the courts themselves should feel constrained from undertaking further research, if they deem it necessary, to supplement the submissions on the interpretation that the parties place before them. The Constitutional Court has demonstrated a willingness to conduct its own research in a number of instances, including in respect of foreign comparative law²¹⁰ (which may also be indicative of subsequent state practice) and even, more recently, in relation to international law (including having regard to some state practice when considering the interpretation of a

208 In *Van Zyl NO* (note 58), the Constitutional Court (through the Chief Justice) issued directions to the parties calling for submissions on the application of CRPD to the case (para 79). Similarly, in *Zuma III* (note 55), the Constitutional Court sought further submissions from the parties on the application of ICCPR (para 105 fn 81), and it sought further submission from international law experts in *Okah* (note 58). See discussion in Chapter 3, text at footnotes 155–162. As noted earlier, one has also seen that the Singapore courts when faced with interpreting the SADC Treaty and the SADC Investment Protocol, requested the parties to place evidence of the treaties' travaux before it (see text at notes 175–8 above).

209 *Zuma III* *ibid* para 105 fn 81.

210 See Chapter 3, Part 5.3 and the discussion of examples of the Constitutional Court undertaking comparative law research, including with the assistance of the Venice Commission (see e.g. *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) para 133).

treaty).²¹¹ When required, this should be encouraged. It can only add to the certainty, rigour, and objectivity of the interpretative process.

4.5 Properly interpreting treaties regardless of application

It is important that treaties ought to be properly interpreted regardless of how they are being used or applied by South African courts. Even where international treaties are being used as interpretative aids for the purpose of interpreting legislation or the Bill of Rights, there is no reason not to interpret the treaties properly so that what is being applied as an aid is, in fact, international law, as opposed to some vague approximation of international law. For instance, in the case of statutes, the Constitution requires that these be interpreted, as far as reasonably possible, to accord with international law (including binding treaties).²¹² It is no use preferring one interpretation of a statute over another, on an unsubstantiated assertion that that interpretation better accords with South Africa's treaty obligations, when no proper attempt has been made to interpret the treaty to establish its meaning. For in that case, an interpretation of a domestic statute may be favoured which is alleged to better accord with a treaty obligation, but which in fact does not, because the perfunctory assertion as to what the relevant treaty requires does not accord with its proper meaning.²¹³ Such superficiality might have a material effect on a case and South Africa's compliance with its treaty obligations. It would also make the 'application' of treaty law no more than rote recitation or performative signalling (a reference meant simply to reify a conclusion that the court has already reached). However, the Constitution requires the courts to do the difficult work of properly applying treaty law.²¹⁴ This requires, as a starting point, the proper interpretation of that law. This process should not be short-circuited.

5 CONCLUSION

There is no escaping from the fact that the Constitution requires South African courts to consider and apply international treaty law in a variety of ways and circumstances.²¹⁵ But treaties cannot be applied without being interpreted. Nevertheless, what one observes in the last half-decade is that while there is frequent reference to treaties and 'application' of treaties,

211 See the discussion in Part 3.3 and the example of *Nu Africa* (note 52).

212 Section 233 of the Constitution.

213 For instance see the example discussed above in Part 3.2 in relation to *AmaBhungane v President* (note 78), where this appears to have occurred.

214 *Glenister II* (note 13) para 202 ('s 233 [of the Constitution]...demands any reasonable interpretation that is consistent with international law when legislation is interpreted. There is, thus, no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law.')

215 Chapter 3; *Glenister II* *ibid*.

this is generally coupled with a rather unsophisticated approach to the interpretation of those treaties. The Constitution requires better of South Africa's courts. Judges should be sophisticated jurists, including in relation to international law, who carefully, and with proper regard to relevant materials, interpret the treaties that are relevant to the matters before them. International law has developed its own powerful tools (or hermeneutical framework) for giving meaning to treaties. They are codified in the Vienna rules. And the South African courts have no principled reason not to apply them. Nor, for the reasons discussed above, could they. As customary international law, the Vienna rules are part of South African law, and therefore, it is the courts' 'constitutional duty' when applying treaties to make use of those interpretive rules.²¹⁶ At times, the courts have shown themselves capable of applying some of the Vienna rules and the materials they make relevant (even if they do not always directly refer to those rules). But these are the exceptions. The last half-decade is generally characterised by interpretive neglect. Whatever the reasons for this neglect, this must change. In Part 4, I offered some suggestions for ensuring this occurs in a way that allows courts to be more thoughtful and rigorous in the interpretation of treaties. This is not to suggest some impossible standard of perfection or analytical purity. But rather I encourage an approach to the interpretation of treaties that is cognisant of what is constitutionally required and legally and practically possible. This may not always result in the 'correct' interpretation of treaty obligations, but courts will be more likely to apply treaty law as it is, rather than some vague approximation of that law, or worse, something that bears no resemblance to the actual law. That can only benefit South Africa's jurisprudence, the parties that appear before its courts, and its good faith compliance with its treaty obligations.

216 *Glenister II* *ibid*, read with s 232 and s 165(2) of the Constitution.