“Give and take”: International Law and the Interpretation of the Right to Life in the South African Constitution:

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Outline

- Sections 39(1)(b) and 233 of the Constitution
- *S v Makwanyane* (1995)
- *Mohamed v President, RSA* (2001)
- *Minister of Home Affairs v Tsebe* (2012)
- *Ex parte Minister of Safety and Security in re S v Walters* (2002)
- *Gavrić v Refugee Status Determination Officer, Cape Town* (2019)
- Conclusion

Two constitutional provisions on the role of international law in domestic cases

- Section 39(1)(b) of 1996 Constitution:

  "When interpreting a right in the Bill of Rights, a court must consider international law"

Precursor section 35(1) of interim Constitution

"shall have regard to public international law"

- Section 233 of the 1996 Constitution provides:

  "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

- The differences (and similarities) between the two provisions have not yet been explicitly explored by the CC

- Section 39(1)(b) concerns interpretation of the *Bill of Rights*
- Section 233 concerns interpretation of *legislation*
- Section 39(1)(b) says “must *consider*”
- Section 233 says “must *prefer a reasonable interpretation* that is consistent with international law”
- Both refer to “international law”

1. *S v Makwanyane*

- Decided under interim Constitution, the relevant provision s 35(1) was slightly differently formulated
- Chaskalson P: s 35 (1) meant that the Court may "derive assistance from public international law" but is not bound to follow it
- "public international law": both binding and non-binding law may be used as tools of interpretation

Use of international law

- International law not very helpful
- The rights in question in the interim Constitution were
  - s 9: every person shall have the right to life
  - s 10: every person shall have the right to respect for and protection of his or her dignity
  - s 11(2): … nor shall any person be subject to cruel, inhuman or degrading treatment or punishment

International law (human rights covenants)

- Article 6 of ICCPR: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
- Article 4 of the ACHPR: Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.
- Article 2 of the ECHR: Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

International law (jurisprudence)

- UN HRC *Kindler v Canada; Ng v Canada* (1991)

  in both cases majority of committee held that Article 6 did not require an abolitionist state to seek assurances from a retentionist state before agreed to extradite.

- And *Soering v UK* (ECHR) (1989) held that article 3 of ECHR (inhuman and degrading treatment could not prohibit all capital punishment because of art 2, but on facts risk of art 3 infringement

- *Makwanyane* apart from Chaskalson P's judgment not extensive citation of international law
- Chaskalson P decided case on basis of s 11(2) (cruel, inhuman or degrading treatment) and considered international law was relevant to determining the meaning of that right. Kentridge AJ and Madala J also based their decisions on s 11 (2)
- All other judges based decisions on right to life as well as other rights

2. *Mohamed v President RSA* (2001)

- Suspect in Tanzanian bombing “removed” from South Africa to USA to stand trial
- Argued a breach of right to life (s 11 of 1996 Constitution), s 10 (dignity) and s 12 (not to be subjected to cruel, inhuman or degrading treatment
- Court held removal had not taken place lawfully in terms of either deportation or extradition legislation

Duty to seek assurances

- The Court also held that government had breached Mohamed's rights under the Constitution in assisting in his removal when they must have known that there was "a real risk" that he would be sentenced to death without obtaining assurances that the death penalty would not be carried out.
- Inconsistent with the right to life
- Cited the recent Canadian Supreme Court decision of *Burns v Canada* (2001)

International law in *Mohamed*

- The Court in its reasoning noted the obligation of *non-refoulement* in the Convention against Torture and the Refugees Convention
- At the time the CC decided the case, the UN HRC jurisprudence in *Ng v Canada* and *Kindler v Canada* stood
- But shortly after in *Judge v Canada* (2003) the UNHRC held that an abolitionist state had a duty not to expose a person being extradited to a real risk of the application of the death penalty

ECHR jurisprudence

- Followed by *Öcalan v Turkey* (2005) and then

Al-Saadoon v UK (2010)

- Influenced by widespread ratification of Thirteenth Protocol to ECHR.

3. *Minister of Home Affairs v Tsebe* (2012)

- Extradition request from Botswana to South Africa to extradite two men to face criminal prosecution for the (separate) murder of their intimate partners
- South Africa asked Botswana to give assurances that death penalty would not be imposed but Botswana refused
- South African ministry then decide to accede to Botswana's requests despite refusal, and argued that given that it had made request it had met its constitutional obligations

International law in *Tsebe*

- Court noted terms of SADC Protocol on Extradition which provides that an abolitionist state may refuse extradition to retentionist state unless assurances provided. The Protocol also provides that in that event the requested state may try the person in its own courts
- No law providing jurisdiction for that course in SA

Government arguments in *Tsebe*

- Government argued that decision in *Mohamed* evinced excessive concern for those accused of crime and insufficient concern for victims of crime and those at risk of violent offenders
- But Court rejected argument
- How widespread refusal of assurances is globally is unclear. In southern Africa most countries have either abolished the death penalty (eg. Namibia and South Africa) or do not implement it. Botswana is the exception. 51 people on death row in 2019.

4. *Ex parte Minister of Safety and Security in re S v Walters* (2002)

- The court does not always consider international law (despite the text of s 39(1)(b))
- For example, *Walters,* which concerned a constitutional challenge to s 49the Criminal Procedure Act provision that regulates use of force on arrest
- Court held force may only be used if necessary and only to minimum degree required
- No binding treaty provision that would have been directly relevant, but some useful "soft" law (eg. Basic Principles on Use of Force and Firearms by Law Enforcement Officials, 1990, UN Congress on Prevention of Crime and Treatment of Offenders)
- Walters did not consider s 233 and whether it covers non binding law

5. *Gavrić v Refugee Status Determination Officer, Cape Town* (2019)

- Decision on refugee status and challenge to Refugees Act. Gavrić was a Serbian who had been convicted in absentia in Serbia of the murder of one of Milošević's lieutenants, the leader of an organisation called Arkan's Tigers.
- Applicant argued that he had a well-founded fear of being killed if returned to Serbia. Status refused by RSDO on ground that he had committee serious non-political crime.

International Law

- Court considered 1951 Refugees Convention, Protocol relating to Status of Refugees of 1967 and OAU Convention on Refugees (1969). Noted that the challenged provision of the SA Refugees Act was formulated in similar terms to a provision in Convention
- Court also looked at guidelines issued by UNHCR intended to provide interpretative legal guidance to decision-makers. Guidelines state that a balance needed to be struck between nature of offence and degree of persecution feared, but court held this guideline should *not* be followed as the principle of non-refoulement was wider under the SA Act in that it applied to those not granted refugee status.

Conclusion

- There has been “give and take” between South African domestic law and international law. Generally the Court has been open to international law and committed to the idea that South Africa is a member of the “family of nations”
- In *Makwanyane,* international law in section 39(1)(b) was given a wide remit, it is not yet clear what the remit of international law in s 233 is, although it may well be limited to international law obligations binding on SA
- But in at least the first two cases concerning the right to life, international law norms were not particularly helpful given that key human rights covenants do not prohibit the death penalty and the text of the right to life in the SA Constitution was more assertive

- In the field of the death penalty, and particularly in relation to the duty to seek assurances (*Mohamed)*, it is arguable that the CC decisions have had some influence in relation to international law
- Not only human rights conventions but also more specific regional agreements have been useful. So in *Tsebe*, the SADC Protocol was relied on by the Court
- The Court has not always been consistent in its reference to international law (*Walters)*. This is probably influenced by the arguments that are put before it.

- The Court has taken the view that soft law international guidelines should not be implemented without consideration as to whether they are appropriate (*Gavrić)*. This is consistent with the approach set in *Makwanyane* that the Court "may derive assistance" from international law under s 39(1)(b) but is not bound by it.
- At least in so far as s 39(1)(b) is concerned and the interpretation of rights in the Bill of Rights, lawyers should see international law as a resource for interpretive reasoning, rather than fixed rules.