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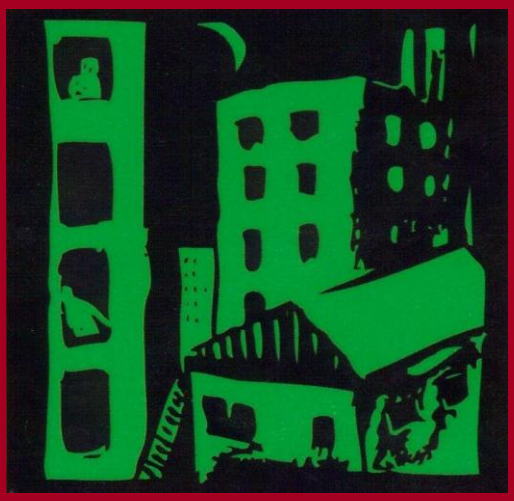

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USING INTERNATIONAL HUMAN RIGHTS LAW TO PROMOTE CONSTITUTIONAL RIGHTS: THE (POTENTIAL) ROLE OF THE SOUTH AFRICAN PARLIAMENT

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1 INTRODUCTION

Parliaments are seen as the guardians of human rights due to their role of representing the people and facilitating their participation in the management of public affairs.[1] In addition, the activities of parliaments – legislating, overseeing and scrutinising government actions, and adopting budgets – cover the entire spectrum of human rights and have an immediate impact on the enjoyment, protection and promotion of

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[1] Inter-Parliamentary Union and Office of the UN High Commissioner for Human Rights *Human Rights: A Handbook for Parliamentarians* No 8 (2005) 63. The Inter-Parliamentary Union is the world (international) organisation of parliaments and was established in 1889.

rights. These activities can "improve the quality of policy-making and implementation, enhance the transparency of governmental decision-making, and, where human-rights standards are used, help create the conditions for protecting [human] rights".[2] For example, the parliament of Sierra Leone played a decisive role, following the end of the war in 2002, in promoting human rights through its law-making and oversight functions and through ensuring implementation of international standards.[3]

National parliaments also play an important role in the integration of international human rights instruments and standards within the domestic human rights system. In many countries, parliament is responsible for the ratification of international treaties.[4] In addition, parliaments have helped translate the ideals in treaties into concrete actions and benefits. A case in point is the Turkish parliament, which has strived to promote human rights through amending laws and the Constitution to ensure that it is in line with international human rights law (IHRL) and has forced the Turkish government to comply with human rights through its Committee for Human Rights.[5] Also, several national parliaments in Europe have adopted specific action plans in the field of human rights and established a political human rights committee.[6] Furthermore, the crucial role of parliaments in the fulfilment of the rights in the Convention on the Rights of the Child can be seen from the following quotation:

> "As political leaders, many parliamentarians have become spokespersons for the rights of the child, helping to contribute to greater awareness throughout their societies; their influence has been decisive in law-making, promoting conformity between domestic legislation and the principles and provisions of the Convention; their action has been felt in the approval of national budgets, through support to the development of national plans on the rights of the child and, at times, through their participation in national bodies responsible for policy development and coordination of action on children's rights."[7]

In South Africa, the Constitution of 1996 requires parliament to, among other things, scrutinise and oversee government actions,[8] thus providing it with the opportunity to protect and promote human rights. In addition, a number of principles guide the South

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[2] Feldman D "The roles of parliaments in protecting human rights: A view from the UK" Miegunyah Public Lecture delivered at the Law School, University of Melbourne (2006) available at http://cccs.law.unimelb.edu.au/download.cfm?DownloadFile=DBCDB63D-1422-207C-BAD1A4E8B8A83EE7 (accessed 21 June 2011).

[3] Sorie I "The role of parliamentarians in enhancing arms control and human security – Promoting regional and international instruments" available at http://www.parliamentaryforum.org/joomla/images/stories/7._parliamentary_response_sierra_leone_hon_sorie.pdf (accessed 21 June 2011).

[4] Art 2(1)(a) of the Vienna Convention on the Law of Treaties of 1969 defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". It is worth noting that South Africa is not a party to the Vienna Convention, but because the principal rules of the Convention reflect customary international law, South Africa is bound by it.

[5] Bozkurt R "The role of Turkish parliament in promoting human rights" (2003) 1 available at http://www.asgp.info/Resources/Data/Documents/MEMBKIRBQXTBKXINGNIWXAWIMDEBVM.pdf (accessed 21 June 2011).

[6] Hammarberg T "National parliaments can do more to promote human rights" *Viewpoint* (2009) available at http://www.coe.int/t/commissioner/Viewpoints/090216_en.asp (accessed 21 June 2011).

[7] Pais MS "The role of parliament in fulfilling the Convention on the Rights of the Child" Statement by the UN Special Representative of the Secretary General on Violence against Women (2010) 2.

[8] Sections 42(3) and s 55(2) of the Constitution.

African parliament in carrying out its mandate. These include advancement of human rights, human dignity, equality, social justice, accountability, responsiveness and openness.[9]

Parliaments have thus become a major arena for the promotion of human rights. Their fundamental role in ensuring respect for and protection and promotion of human rights at the national level has been recognised and emphasised by various bodies, institutions and international conferences.[10]

This article considers the (potential) role of the South African national parliament in promoting constitutional rights through ensuring compliance with IHRL. The need for parliament to play a role in ensuring compliance with IHRL, as a means of advancing rights at the national level, is motivated by the fact that the obligations that a state assumes are binding on "all" branches of government, thus validating a role for parliament. In fact, a key obligation contained in various IHRL treaties is the obligation to adopt laws and other measures to give effect to the rights in the treaties. As the legislative arm of government, parliament has a significant role to play in ensuring compliance with this obligation.

The South African parliament consists of the National Assembly (NA) and the National Council of Provinces (NCOP).[11] This article focuses on the NA, and references to the national parliament or parliament in the context of South Africa in this article should be understood as referring to the NA. The article examines parliament's role in the negotiation and ratification of treaties; and then its role in the domestication and implementation of IHRL. The article identifies opportunities within the mandate of parliament that would allow it to use IHRL to promote rights at the national level. One of the obligations arising from international human rights treaties that the article also examines is the reporting obligation, which has a huge potential for improving rights realisation at the national level. After establishing a more proactive and extended role for parliament in the negotiation and ratification of treaties and in the implementation of IHRL obligations, the influence of the notion of separation of powers on this role is considered, albeit briefly. The article concludes with some recommendations aimed at enhancing parliament's role in using international human rights law to promote rights realisation and enjoyment at the national level. Where relevant, the article also refers to examples from other national parliaments that illustrate the role of parliament in promoting and protecting human rights and in ensuring implementation of obligations under IHRL.

The focus on IHRL is motivated by the fact that it sets more precise norms than the Bill of Rights in the Constitution and provides clarity with regard to the adoption, content and interpretation of national laws. It is thus important in the promotion and enforcement of rights in the South African Constitution and in the interpretation of national legislation. This is evidenced by the considerable weight that the Constitution

[9] See the preamble and s 1 of the Constitution, which state the human rights and democratic principles that must shape the South African society and government.

[10] See, for example, the Interlaken Declaration of 19 February 2010, PP 6, adopted by the High Level Conference on the Future of the European Court of Human Rights: see http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf (accessed 21 June 2011). This declaration stressed this important role of parliaments.

[11] Section 42(1) of the Constitution.

attaches to it.[12] The Constitutional Court has also seen international law, especially that relating to human rights, as vital in providing a framework within which the rights in the Constitution can be evaluated and understood.[13] In addition, the government has acknowledged the importance of international human rights treaties in strengthening domestic mechanisms for promoting rights.[14]

It is furthermore appropriate to use international human rights standards because some of them have either been recognised by states as customary international law (such as the standards in the Universal Declaration of Human Rights of 1948 [UDHR]) and are thus binding on all states, or South Africa has accepted the standards as binding by signing and ratifying relevant human rights treaties. Through ratification of a treaty, South Africa agrees to be bound by the treaty and commits itself to perform the obligations contained therein in good faith.[15] By signing a treaty, the government commits to refraining from acts that would defeat the object and purpose of the treaty between signature and ratification.[16] In line with this, the government has acknowledged that the act of signature indicates South Africa's agreement with the main idea in a treaty, that it would not take any actions that violate it and will be party to all the ideals of the treaty.[17]

2 NEGOTIATION AND RATIFICATION OF HUMAN RIGHTS TREATIES

Ratification is a formal expression at the international plane of a state's commitment to be bound by a treaty.[18] Through ratification, a state commits itself to implement the rights and obligations in a treaty and allow international scrutiny of its progress in this regard. In other words, "ratification renders the international human rights norms guaranteed in a treaty legally effective in the ratifying country and obliges it to report to the international community on measures adopted to align its legislation with treaty norms".[19]

In general, national parliaments are not directly involved in the negotiation and drafting of treaties.[20] When it comes to the ratification of treaties, while in some

[12] See, for example, s 39(1) and s 233 of the Constitution.
[13] See *S v Makwanyane and Another* 1995 (3) SA 391 (CC), para 35; *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169, para 26; *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) paras 96-97 and 192.
[14] Parliamentary Monitoring Group "Optional Protocol to the United Nations Convention on the Elimination of All Forms of Discrimination against Women" (2005) available at http://www.pmg.org.za/print/5608 (accessed 21 June 2011).
[15] See Art 2(1)(b) of the Vienna Convention on the Law of Treaties of 1969 (VCLT).
[16] See Art 18 of the VCLT. Between signature and ratification or accession, governments are effectively given time to seek ratification or accession to the treaty and, where necessary, make changes to laws and policies which may be necessary to implement the treaty.
[17] Parliamentary Monitoring Group "Convention on the Rights of Persons with Disabilities: Briefing by the Office on the Status of Disabled Persons & Department of Foreign Affairs" (2007) available at http://www.pmg.org.za/minutes/20070524-convention-rights-persons-disabilities-briefing-office-status-disabled-persons-depa (accessed 21 June 2011).
[18] See Art 2(1)(b) of the VCLT.
[19] Inter-Parliamentary Union and Office of the UN High Commissioner for Human Rights (2005) at 66.
[20] Ibid.

countries the ultimate decision on ratification rests with the national parliament, in others treaty ratification generally rests with the executive.[21]

The latter is the case with South Africa, where the Constitution assigns the power to negotiate and sign international treaties to the national executive.[22] However, the approval of the NA and the NCOP by resolution is required for international treaties to be binding on South Africa.[23] The procedure for approving international treaties is laid down in the rules of procedure of the NA.[24] The executive is required to submit a copy of the agreement together with an explanatory memorandum to the NA,[25] which is then referred to the relevant committees for consideration.[26] Parliament's approval for the ratification of a treaty is normally sought prior to the depositing of the instrument of ratification.[27] However, there is an exception to the approval obligation with regard to treaties signed by the executive that are of a technical, administrative or executive nature or those that do not require ratification or accession. Such treaties do not require the approval of the NA or NCOP but must be tabled before these bodies within a reasonable time.[28]

The agreement and explanatory notes are then referred to one of the NA's committees that is responsible for the issue, or any other committee that the NA might decide upon. The committee then examines and reports on its approval or rejection. The recommendation of the committee is then joined to a motion for the adoption of a resolution by the NA. During the examination of the explanatory notes and the agreement, the committee may consult the parliamentary Committee on International Relations and Cooperation and any other NA committee that is directly concerned with the subject of the treaty or agreement.

Approval of an international agreement by parliament does not imply that it has become law at the domestic level. (The process of domestication is addressed in the next section.) Notwithstanding this, approval by parliament of an international agreement, in the words of section 231(2) of the Constitution, "binds the Republic". As held by the majority in the *Glenister* case, approval has domestic constitutional effect because it has a significant impact in delineating the state's obligations in protecting and fulfilling the rights in the Bill of Rights.[29] The minority judgment in the case also considered the legal effect of approval, holding that it "conveys South Africa's intention, in its capacity as a sovereign state, to be bound at the international level by the

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[21] UN Office of the High Commissioner for Human Rights *From Exclusion to Equality: Realizing Rights of Persons with Disabilities - Handbook for Parliamentarians* No. 14 (2007) 43. For further reading on the role of parliament in ratification in other countries, see Ben-Porat D and Kain H, "The role of the parliament in the ratification of international treaties and agreements: Comparative survey" (2003) available at http://www.knesset.gov.il/mmm/data/pdf/me00647.pdf (accessed 17 August 2011).
[22] Section 231(1) of the Constitution.
[23] Section 231(2) and (3) of the Constitution.
[24] NA Rules 306-308 of 2008.
[25] NA Rule 306.
[26] NA Rule 307.
[27] See the example of the African Charter on the Rights and Welfare of the Child of 1990: Parliamentary Monitoring Group "Ratification of the African Charter on the Rights and Welfare of the African Child" (1999), subsequently ratified by South Africa on 7 January 2000; available at http://www.pmg.org.za/print/5402 (accessed 22 June 2011).
[28] Section 231(3) of the Constitution.
[29] Ibid para 182

provisions of the agreement".[30] If South Africa fails to observe the provisions of the agreement, it may incur responsibility towards other signatory states.[31] It was further held that approval is an undertaking "to take steps to comply with the substance of the agreement" either by incorporating the agreement into South African law or bringing the country's laws in line with the agreement through other means.[32]

The *Glenister* case involved a challenge to the constitutionality of the national legislation that created the Directorate for Priority Crime Investigation (the Hawks), and that disbanded the Directorate of Special Operations (the Scorpions). The case raised a number of issues, including whether both the ratification of an international treaty and its domestication give rise to a constitutional obligation.[33] *Glenister* is thus instructive in relation to the process and implications of ratification as well as domestication of treaties.[34]

The *Quagliani*[35] case is likewise instructive in relation to the process involved in the negotiation and signature of international agreements. It involved a challenge to the power given by the Constitution to the national executive to negotiate and sign treaties as well as the constitutional provisions regulating the manner in which treaties are domesticated.[36] The decision in this case, among other things, recognised the area of international affairs as an executive function. However, the case is not useful in relation to the delineation of the specific role of parliament in treaty negotiation and ratification in line with the arguments advanced in this article, since this was not a subject of the challenge.

Evidently, looking at the constitutional provisions relating to treaty-making and implementation, the involvement of parliament in the negotiation of international treaties was not considered in the South African Constitution. Parliament has thus played no role in the negotiation of treaties. Ahmed has provided two approaches to the interpretation of the relevant constitutional provisions.[37] A narrow interpretation would result in the conclusion that "there is no obligation to include parliament in the international agreement development process preceding ratification".[38] The provisions from a narrow perspective therefore limit parliament's role to approval of treaties that have been negotiated and signed by the executive and their domestication, following ratification. However, a broader interpretation of the relevant constitutional provisions

[30] *Glenister* para 91.
[31] Ibid para 92.
[32] Ibid para 91.
[33] Ibid paras 86.
[34] Ibid paras 88-89,180-182 and 189.
[35] *President of the Republic of South Africa and Others v Quagliani; President of the Republic of South Africa and Others v Van Rooyen and Another; Goodwin v Director-General, Department of Justice and Constitutional Development and Others* 2009 (4) BCLR 345 (CC).
[36] The validity and enforceability of an Extradition Agreement entered into by the President of South Africa in 1999 between South Africa and the United States was challenged on the basis that the President had delegated his own responsibilities to members of his Cabinet, the Agreement was not validly adopted by the NA and the NCOP in terms of s 231(2) of the Constitution and was not formally enacted as an Act of parliament.
[37] Ahmed AK "The role of parliament in South Africa's foreign policy development process: Lessons from the United States' Congress" (2009) 16(3) *South African Journal of International Affairs* 291 at 291-293.
[38] Ibid at 292.

suggests that parliament should be included, or at least consulted, during the negotiation phase of a treaty or agreement, since it has the duty to ratify the international agreement.[39] The basis of Ahmed's argument is the spirit of the Constitution as well as the constitutional dispensation that has evolved, which recognises a collaborative approach to foreign policy development. He concludes as follows:

> "The principle of collaboration and the requirement for final ratification by the legislature reflected in the constitution provides parliament with a sound basis for greater involvement in the treaty-making process. It is this principle of collaboration that must therefore be upheld when considering parliament's role in the foreign policy development process."[40]

Therefore, the national parliament can assume some role in the negotiation processes. This would imply going beyond its traditional mandate of simply approving treaties entered into by the executive. The broader approach proposed by Ahmed is also consistent with the growing international trend towards involving parliament in the negotiation and signing of international treaties.

This international trend was acknowledged in the report of the independent assessment of parliament. The report saw parliament's role as a forum for the debate of issues of national concern and in the subsequent ratification of treaties as the basis for parliament to get involved in such processes.[41] Accordingly, the report recommended that parliament should adopt mechanisms and improve its capacity to support its role in the negotiation and ratification of international treaties.[42] The report also referred to the establishment of a standing committee on international agreements with the mandate of scrutinising all treaty actions prior to ratification, including debating their likely impact.[43] Parliament could thus use its oversight mandate – through questions and briefings – to monitor on-going treaty negotiations. The proposed committee, if established, would go a long way in enhancing parliament's capacity to play a role not just in negotiations but also in the implementation of treaties.

Such a role for parliament is not new and is increasingly recognised worldwide. The Inter-Parliamentary Union (IPU), for example, has consistently called on parliaments to be involved in a variety of ways in the early stages of negotiating processes of international human rights treaties and not just at the conclusion of treaties.[44] This call is based on the fact that parliaments eventually enact relevant legislation and ensure the implementation of the treaties. With reference to the South African context, treaty-making and implementation has been seen to impact on areas of vital concern to parliament.[45] This is based on the fact that the obligations imposed by treaties include

[39] Ibid at 292-293.
[40] Ibid at 293.
[41] Parliament of South Africa *Report of the Independent Panel Assessment of Parliament* (2009) 78.
[42] Ibid at 87.
[43] Ibid.
[44] Inter-Parliamentary Union and Office of the UN High Commissioner for Human Rights (2005) at 66; Parliament of South Africa (2009) at 77.
[45] Nakhjavanii S "Rules for our country, rules for our world: Prospects for enhancing parliamentary oversight of treaty-making and implementation in South Africa" (briefing paper prepared for the Portfolio Committee on International Relations and Cooperation and presented on 28 May 2010) 3.

enacting implementing legislation, adopting uniform standards and the fact that some treaties impact on the livelihoods of South Africans.[46]

A comparative study on the participation of parliaments in treaty-making, focusing on some states in the Americas, shows that parliament can play an important role in the treaty negotiation phase. The study found in all the cases that during the treaty-negotiation phase the executive consulted with leaders of parliament through an informal process and, in some instances, members of parliament served on treaty-negotiation delegations.[47] Being part of the delegation would provide an opportunity for parliament to ensure that the interests and human rights of citizens are reflected in the treaty being negotiated.

However, for parliament to play an effective role in treaty negotiation, the government would need to inform parliament of its policies and negotiating positions in advance.[48] Also, members of parliament would have to take it upon themselves to improve their knowledge of the status of treaties and government's plans so as to be able to effectively scrutinise and oversee treaty-related plans. This would address some concerns around parliament's competence. The IPU has further called on parliaments to take action at the national level to ensure that their countries ratify human rights treaties promptly. Where ratification has already taken place, they should ensure that reservations made are not contrary to the object and purpose of the treaty and that provisions of national laws and regulations are in line with the norms and standards contained in international treaties.[49]

Where ratification has not taken place, parliament could ascertain whether the government has any intention of ratifying the treaties. If not, it can then use its oversight mandate to determine the reasons for non-ratification and encourage the government to commence the process.[50] Thus, with regard to treaties that South Africa has not yet ratified, parliament can and has played a role in encouraging the executive to ratify. For example, prior to South Africa's ratification of the Convention on the Rights of Persons with Disabilities of 2006 (CRPD),[51] parliament engaged with the Office on the Status of Disabled Persons and the Department of International Relations and Cooperation (then Foreign Affairs) on the issue, posing questions around, among other things, the meaning of ratification, the implications and implementing tools, and the consultation process with civil society around the Convention (requesting that there be sufficient consultation before finalising the agreement).[52] Parliament also questioned government, prior to their subsequent ratification, on why it had not ratified the African Charter on Youth of 2006[53] and the Optional Protocol to the Convention on the Rights of

[46] Ibid.
[47] Ibid at 8.
[48] Parliament of South Africa (2009) at 77.
[49] Inter-Parliamentary Union "50th anniversary of the Universal Declaration of Human Rights" Resolution adopted by the Inter-Parliamentary Council at its 161st session (1997) para 3(i) and (ii).
[50] Inter-Parliamentary Union and Office of the UN High Commissioner for Human Rights (2005) at 67.
[51] Ratified by South Africa on 30 November 2007.
[52] See, in general, Parliamentary Monitoring Group (2007).
[53] Ratified by South Africa on 28 May 2009.

the Child on the Involvement of Children in Armed Conflict of 2000,[54] among others, and the processes involved in the treaties.[55]

Another example has been the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR), which South Africa signed close to 17 years ago.[56] In 2009 the parliamentary Portfolio Committee on Justice and Constitutional Development engaged in discussion, albeit limited, on why South Africa had not yet ratified this treaty.[57] Though the questions in this regard were directed at the South African Human Rights Commission as opposed to the executive, it illustrates a role for parliament with regard to ensuring ratification. Ascertaining from the executive why there are excessive delays in the ratification of treaties is crucial, considering that government has acknowledged that "as a matter of principle, the time between signing and ratification should not be prolonged".[58] It should be noted that parliament subsequently had the opportunity to direct this question at the executive.[59]

Where a signing or ratification procedure has commenced, parliament's role would be to establish if government intends to make reservations to the treaty and, if this is the case, to determine whether the reservations are necessary and compatible with the purpose and content of the treaty. If not necessary, it should encourage government to reconsider its decision. Even where treaties have been in force, parliament's role would be to constantly check reservations to the treaties to establish their further relevance.[60] The national parliament has in fact voiced its concern at reservations made by South Africa upon ratification that were ill-advised. It emphasised that, when a State ratifies protocols with reservations, it encourages other States to do the same, to the detriment of the cause being promoted. It was further underscored that the ratification of protocols had to go through a parliamentary process and get parliamentary approval.[61]

Notwithstanding the aforesaid, a challenge that has been highlighted with regard to parliament's role in ratification is how to determine which treaties or agreements are of a technical, administrative or executive nature, and therefore do not require approval by parliament. The department responsible for processing a particular agreement bears responsibility for establishing if it falls in this category, taking into consideration issues such as whether the agreement has no extra-budgetary and legislative implications.[62]

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[54] Ratified by South Africa on 24 September 2009.

[55] Parliamentary Monitoring Group "International treaties on children and the disabled: Department of Foreign Affairs briefing" (2008) available at http://www.pmg.org.za/print/12570 (accessed 22 June 2011).

[56] Signed by South Africa on 3 October 1994.

[57] Parliamentary Monitoring Group "South African Human Rights Commission: Briefing" (2009) available at http://www.pmg.org.za/report/20090708-south-african-human-rights-commission-matters-interest-briefing or http://www.pmg.org.za/node/17164 (accessed 22 June 2011).

[58] See, in general, Parliamentary Monitoring Group (2007).

[59] Parliamentary Monitoring Group "Questions and replies: Question No. 1225" submitted on 4 May 2010 available at http://www.pmg.org.za/node/21347 (accessed 22 June 2011).

[60] Inter-Parliamentary Union and Office of the UN High Commissioner for Human Rights (2005) at 67.

[61] Parliamentary Monitoring Group "South Africa's compliance with the Convention on the Elimination of all Forms of Discrimination against Women & 1995 Beijing Platform for Action reporting requirements: Commission on Gender Equality briefing" (2010) available at http://www.pmg.org.za/print/22240 (accessed 22 June 2011).

[62] See State Law Advisor *Practical Guides and Procedures for the Conclusion of Agreements* 3rd Edition (undated) at 8 available at http://www.dfa.gov.za/foreign/bilateral/conclusion_agreement0316.pdf (accessed 17 August 2011).

This, however, does not provide much clarity on the subject. Government is thus given leeway in terms of deciding which treaties or agreements require approval by parliament and which do not.[63] Parliament's increased involvement in the pre-ratification phase of treaties would to some extent assist in addressing this challenge. This is because parliament would have more information from the outset to enable it to ascertain whether the treaty would require its approval, or whether it is a stand-alone agreement not requiring the aid of implementing legislation.

Another challenge to the ability of Parliament to scrutinise treaties is the way they are tabled. The current practice, as mentioned above, is that the executive tables the international agreement together with an explanatory memorandum. The memorandum does not normally contain adequate information to enable parliament to engage in effective scrutiny.

3 DOMESTICATION AND IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS TREATIES AND STANDARDS

Domestication refers to making a treaty part of national law either by way of incorporation or transformation.[64] It thus involves a duty to give effect to treaties in the domestic legal order. International human rights treaties generally adopt a flexible approach to domestication so that the particular circumstances of each state can be taken into account. For example, the ICESCR requires a state to use any appropriate means, including the adoption of legislation, when domesticating the Covenant.[65] This allows for the particularities of the administrative and legal systems as well as other considerations of each state party to be taken into account. The means used must, however, be appropriate and adequate. It must thus produce results and ensure the fulfilment of the rights in the ICESCR.[66] Similarly, the African Charter on Human and Peoples' Rights of 1981 (African Charter) require states parties to adopt legislative and other measures to give effect to the rights contained in it.[67]

An international agreement becomes law in South Africa when enacted by way of national legislation.[68] Put differently, in addition to the resolution by parliament approving an international treaty, national legislation has to be adopted incorporating the treaty into domestic law. This position was underscored by the Constitutional Court in the *AZAPO* case where it stated that "[i]nternational conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment".[69]

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[63] Parliament of South Africa (2009) at 78.
[64] Viljoen F *International Human Rights Law in Africa* (2007) 22.
[65] Art 2(1) of the ICESCR.
[66] Committee on Economic, Social and Cultural Rights, General Comment No. 9: The domestic application of the Covenant, UN Doc. E/C.12/1998/24 (1998) paras 5 and 7.
[67] See Art 1 of the African Charter.
[68] s 231(4) of the Constitution.
[69] *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC) at para 26.

Three main ways that parliament seems to follow in domesticating international treaties were outlined in the *Glenister* case:

> "(a) the provisions of the agreement may be embodied in the text of an Act; (b) the agreement may be included as a schedule to a statute; and (c) the enabling legislation may authorise the executive to bring the agreement into effect as domestic law by way of a proclamation or notice in the *Government Gazette*."[70]

Once incorporated, an international treaty enjoys the same status as any other domestic law, unless parliament explicitly elevates it to a superior status in relation to its general application or in the event of a conflict between the treaty and domestic legislation.[71] The rights and obligations in the treaty, however, do not become constitutional rights and obligations; they become statutory rights and obligations enforceable under the national legislation incorporating the agreement.[72]

A self-executing provision of an agreement that has been approved by parliament immediately becomes law unless it is inconsistent with the Constitution or an Act of parliament.[73] It is unfortunately not clear at times whether or not an agreement is self-executing. One of the challenges in the *Quagliani* case related to the enforceability of the Extradition Agreement in domestic law, since it had not been formally enacted as an Act of parliament. The Constitutional Court found it unnecessary to consider whether the Agreement was self-executing, bearing in mind the Agreement's inextricable link with the extradition legislation which provides the framework for giving domestic effect to the contents of extradition agreements.[74] It is, however, evident from the case that, in determining whether an agreement is self-executing, one would have to look at the nature of the agreement and existing South African law on the subject, amongst others.

Customary IHRL is part of South African law in so far as it is consistent with the Constitution or an Act of Parliament.[75] With regard to "soft" law such as resolutions of the UN Security Council, the Application of Resolutions of the Security Council of the United Nations Act 172 of 1993 empowers the president to incorporate resolutions of the Security Council into municipal law by proclamation in a Government Gazette and to provide for its implementation under South African law. Members of parliament can play a role in this regard by keeping themselves informed of key resolutions that advance human rights and encouraging the president to incorporate these into law.

Implementation, on the other hand, goes beyond domestication. The UN High Commissioner for Human Rights (OHCHR) has defined implementation in the context of IHRL as "moving from a legal commitment, that is, acceptance of an international human rights obligation, to realization by the adoption of appropriate measures and ultimately the enjoyment by all of the rights enshrined under the related obligations".[76] Effective

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[70] *Glenister* para 99 (footnotes omitted).
[71] Ibid at para 100.
[72] Ibid at paras 102-103 and 181.
[73] Section 231(4) of the Constitution.
[74] *Quagliani* paras 38-48.
[75] Section 232 of the Constitution. Notwithstanding this provision, one needs to turn to judicial precedent in order to establish the rules of customary international law that are applicable: see Dugard J *International Law; A South African Perspective* (2005) 56. Sources of customary international law include settled (constant and uniform) state practice.
[76] United Nations Report of the High Commissioner for Human Rights on Implementation of Economic, Social and Cultural Rights, UN Doc. E/2009/90 (2009) para 3.

implementation would thus require the ratification and domestication of international treaties, recognition of the rights as enforceable rights, development and implementation of policies and laws that give effect to these rights, and the provision of remedies for violations.

Apart from playing a role in the incorporation of treaties, parliament can also play a crucial role in the implementation of the rights and obligations in the treaties. In this regard it is important to note a principle that is relevant in relation to the application of IHRL at the national level. As stated in article 27 of the VCLT, "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". This principle is somehow mirrored in section 233 of the Constitution which requires preference to be given to any reasonable interpretation of legislation that is consistent with international law over an alternative interpretation that is inconsistent with it. This further reinforces the importance of IHRL. Ensuring the effective implementation of IHRL, particularly the obligations assumed following ratification of a human rights treaty, would unquestionably contribute towards improved enjoyment of rights at the national level.

3.1 Opportunities within the mandate of parliament

The legislative, budgetary and oversight functions of parliament are seen as being at the heart of the implementation of principles and rights in international human rights treaties.[77] There are thus several opportunities within the mandate of parliament to use IHRL as a tool to promote the realisation of constitutional rights.

Firstly, through its legislative mandate, parliament can assess new and existing legislation for compliance with international human rights standards. The national parliament is mandated to pass legislation[78] and amend the Constitution.[79] In exercising its legislative power parliament may "consider, pass, amend or reject any legislation".[80] This provides it with the opportunity to assess such legislation in terms of its compliance with international human rights standards. In this way, parliament would be promoting constitutional rights through promoting consistency between national legislation and international human rights standards.

In this regard the IPU has called on parliaments to take appropriate action at the national level to ensure that "the provisions of national laws and regulations are harmonised with the norms and standards contained in [international] instruments with a view to their full implementation".[81] This includes reviewing laws and, if need be,

[77] See Committee on the Elimination of Discrimination against Women "National parliaments and the Convention on the Elimination of All Forms of Discrimination against Women" (undated) para 4, available at http://www2.ohchr.org/english/bodies/cedaw/docs/statements/Parliamentarians.pdf (accessed 22 June 2011).

[78] Section 43 of the Constitution vests the legislative authority of the national sphere of government in parliament, while that of the provincial sphere of government is vested in the provincial legislatures.

[79] Section 44 of the Constitution.

[80] Section 55(1) of the Constitution.

[81] Inter-Parliamentary Union (1997) para 3(ii). See also Inter-Parliamentary Union "Strong action by national parliaments in the year of the 50th anniversary of the Universal Declaration of Human Rights to ensure the promotion and protection of all human rights in the 21st century" (Resolution adopted at the

amending them to conform with international human rights standards. Parliament's legislative mandate is thus crucial for building a rights-based system of justice.

The parliament of Finland, for example, has used IHRL standards in drafting and scrutinising legislative proposals. Its Constitutional Law Committee, with the help of external academic expertise, has reviewed the consistency of proposed Bills with the Constitution and human rights standards.[82] The United Kingdom (UK) parliament's Joint Committee on Human Rights (although not required to) has also made it a priority to examine the compatibility of legislation introduced into parliament with rights in international human rights treaties that the UK has signed or is party to. It then provides advice on the human rights compatibility of the proposed legislation in a timely manner to parliament so that this can be taken into account when debating the legislation.[83]

The relevant committees in the South African national parliament could thus, in considering bills, consider also their consistency with binding and non-binding international human rights standards.

Secondly, in addition to its legislative mandate, the national parliament of South Africa is required to scrutinise and oversee government action. One of the aims of this function is to protect rights and liberties of citizens. In using international human rights standards to ensure that government complies with its obligations in treaties, parliament would be promoting rights at the national level. For example, the key role parliament can play through its oversight function in ensuring respect for the human rights of persons with disabilities has been recognised by the United Nations Department of Economic and Social Affairs (UN-DESA), the OHCHR and the IPU.[84]

In carrying out its oversight mandate, the national parliament focuses on observance and implementation of laws, application of budgets and effective management of government departments. The Constitution facilitates the carrying out of this mandate by requiring members of cabinet to submit full and regular reports to parliament on matters under their control.[85] Using the commitments of the government under various international human rights treaties in carrying out this task would have far-reaching implications for the rights of the individual. Human rights have been seen as offering standards that can be used by members of parliament "to ask governments to explain and justify their proposals systematically by reference to objective standards with clear moral weight, and then to debate proposals rationally".[86]

Parliament would thus have to ensure that government policies and actions are in line with IHRL standards and also that government meets the commitments made

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100th Inter-Parliamentary Conference, Moscow, 11 September (1998)) para 1(iii).

[82] Inter-Parliamentary Union and Office of the UN High Commissioner for Human Rights (2005) at 73.

[83] Sakaria A and Aiyagari S "The parliamentary committee as promoter of human rights: The UK's Joint Committee on Human Rights - A case study for Commonwealth parliaments" (2007) 6: see http://www.humanrightsinitiative.org/publications/hradvocacy/parliamentary_committee_as_promoter_of_hr.pdf (accessed 22 June 2011).

[84] UN Department of Economic and Social Affairs, Office of the UN High Commissioner for Human Rights and the Inter-Parliamentary Union *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities – Handbook for Parliamentarians*, No 14 (2007) 105.

[85] See s 92(2) and (3) of the Constitution.

[86] See, in general, Feldman (2006).

under human rights treaties. For instance, when the various government departments report to parliament, as required under section 92 of the Constitution, it can assess if they have adequately implemented human rights obligations. Also when approving national budgets parliament can ensure that sufficient funds are allocated for the implementation of human rights.

The national parliament has, in some instances, established committees to oversee the implementation of international human rights treaties as a means of promoting rights at the domestic level. For example, the Joint Committee on the Improvement of Quality of Life and Status of Women was established in 1996 as an Ad Hoc Committee but later became a Standing Committee, tasked with ensuring improvement in the quality of life of women in South Africa through monitoring and overseeing the implementation of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW), the Beijing Platform for Action and other applicable international instruments.[87] The Committee, among other things, accelerated the introduction of national legislation on domestic violence and sexual offences against women.[88] Parliament has also engaged with the Commission on Gender Equality on the state of compliance with CEDAW and the 1995 Beijing Platform for Action, taking into consideration national law.[89]

It should be noted that international accountability mechanisms can have a significant and progressive impact on the domestic realisation of rights. Recommendations made by human rights treaty bodies (as well as those made by the UN Human Rights Council, African Union and human rights experts such as special rapporteurs) could be effectively used by parliament to oversee and scrutinise government's compliance with its human rights obligations. The recommendations often deal with issues that impact directly on the enjoyment of rights. For instance, following a review of South Africa under the UN Human Rights Council's Universal Periodic Review (UPR) mechanism, a number of recommendations were made relating to the protection and promotion of the rights of vulnerable groups and the ratification of core international human rights treaties.[90] Parliament's role would be to study the recommendations, check if any action has been taken to implement them and, if not, use its oversight mandate to establish the reasons and initiate follow-up action. This also applies to decisions made by treaty bodies.

Through its oversight function, parliament can be involved in the implementation of the decisions of international bodies and institutions. This role is important in strengthening national mechanisms for ensuring compliance with the constitutional provisions on human rights and their interpretation. The parliament of Brazil illustrates parliament's potential role in the implementation of judicial decisions of regional courts.

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[87] Parliamentary Monitoring Group "Committee report on violence against women" (2002) available at http://www.pmg.org.za/print/1726 (accessed 22 June 2011).

[88] See Parliamentary Monitoring Group "Joint Committee on Improvement of Quality of Life and Status of Women: Workshop on international law and gender analysis" (2000) Appendix 3 available at http://www.pmg.org.za/minutes/20000402-international-law-gender-analysis-workshop (accessed on 22 June 2011).

[89] See, in general, Parliamentary Monitoring Group (2010).

[90] See Human Rights Council Report of the Working Group on the Universal Periodic Review: South Africa, UN Doc. A/HRC/8/32 (2008) para 67.

It was instrumental in the implementation of the first decision of the Inter-American Commission on Human Rights in a case against Brazil, organising a national campaign to raise awareness among authorities of the decision and the importance of implementing it.[91] Also, the Parliamentary Assembly of the Council of Europe has invited national parliaments to introduce mechanisms and procedures for effective parliamentary oversight of the implementation of the European Court of Human Rights judgments on the basis of regular reports by the responsible ministries.[92]

Thirdly, the national parliament is required to facilitate public participation in legislative and other processes,[93] thus linking people and government. The right to participate in government is provided for in various international human rights treaties.[94] Through its mandate of facilitating public participation, parliament is not only enforcing the rights in the Constitution and other legislation but also IHRL.

Furthermore, as seen below, one of parliament's activities is engaging with the public on international relations issues, thus providing it with a basis to consider IHRL. Whiting and Salmon have shown that the South African parliament could be highly instrumental in addressing poverty and inequality through facilitating public participation, though this has not been as effective as it should be.[95] Poverty and inequality impact on the enjoyment of rights, and rights realisation can be improved by addressing these issues.

Fourthly, parliament is mandated to engage and participate in and oversee international relations.[96] Under this mandate parliament ensures, through its committees and other mechanisms, that there is ongoing engagement with the public on important international relations issues. It also engages in activities aimed at developing and strengthening partnerships in Africa and internationally and making progress towards achieving the UN Millennium Development Goals (MDGs). Reference to the MDGs is illustrative of parliament's use of international standards to promote the enjoyment of rights at the national level.

The MDGs and human rights are interdependent and mutually reinforcing. They also share a common objective, which is to protect and uphold human dignity, equality and freedom. Parliaments have thus been encouraged to monitor initiatives relating to these goals so as to ensure that the goals are achieved.[97] The MDGs could also be important benchmarks for scrutinising government action, which would no doubt result in rights improvement and empowerment of the poor. The IPU has underscored the crucial role of national parliaments in championing the MDGs and in ensuring that legislative and

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[91] Inter-Parliamentary Union and Office of the UN High Commissioner for Human Rights (2005) at 69.
[92] See Parliamentary Assembly of the Council of Europe, "Implementation of Judgments of the European Court of Human Rights", Resolution 1516 adopted on 2 October (2006) paras 22.1 and 22.7.
[93] Section 42(3) and (4) and s 49 of the Constitution.
[94] See for instance Art 21 of the UDHR and Art 25 of the International Covenant on Civil and Political Rights of 1966 (ICCPR).
[95] See, in general, Whiting SA and Salmon A "Parliament's role in overcoming inequality and structural poverty in South Africa" (Conference paper presented at 'Inequality and Structural Poverty in South Africa: Towards Inclusive Growth and Development', Johannesburg, 20-22 September 2010) 6. They outline a number of challenges that impact negatively on public participation (at 13-14).
[96] See Parliament of South Africa *Strategic plan for Third Parliament 2004-2009* available at http://www.parliament.gov.za/live/content.php?Category_ID=12 (accessed 22 June 2011).
[97] Whiting and Salmon (2010) at 6.

appropriate budgetary allocations are made towards meeting the goals, which would in turn promote human rights.[98]

The South African parliament has engaged in activities at the national level aimed at furthering the realisation of the MDGs. A recent example is the 2011 International Consultative Seminar, recognising the role of the legislative sector in evaluating and reviewing strategies and interventions and in forging consensus to ensure that South Africa meets its commitments in relation to the MDGs. Another example is the 2010 Women's Summit on the MDGs, which considered South Africa's progress on the MDGs and how they impact on the lives of women. However, there is not much evidence of parliament effectively engaging with government through its oversight functions to ensure implementation of the MDGs.

3.2 Promoting compliance with reporting obligations

International human rights treaties require governments to report on their progress in the implementation of the rights and obligations contained in the treaties. This is a procedure common to core human rights treaties. Each treaty specifies the reporting periods, and the bodies responsible for monitoring the implementation of the treaties have gone further to provide states with guidelines on reporting. A state would be in violation of a treaty if it fails to submit a report as required under the treaty.

After examination of reports, the treaty body provides an assessment of compliance or non-compliance with the obligations in the treaty and informs the state of its concerns and recommendations aimed at enhancing the realisation of rights and compliance with treaty obligations. Implementation of the recommendations is an important part of the process.

The process of state reporting provides governments with an opportunity to take stock of its achievements and failures in making the guarantees in the treaties a reality (critical introspection).[99] Compliance with this obligation is useful as it will provide governments with insight into the need to adapt laws, policies and practices at the national level. The process further provides governments with an opportunity for constructive dialogue with human rights experts.

South Africa has an obligation to report regularly under human rights treaties it has ratified. However, South Africa's reports to treaty monitoring bodies have often been delayed, and currently there are some overdue reports.[100] For instance, under the African Charter on Human and Peoples' Rights of 1981 (African Charter)[101] the

[98] Inter-Parliamentary Union "The role of parliaments in establishing innovative international financing and trading mechanisms to address the problem of debt and achieve the Millennium Development Goals", Resolution adopted unanimously by the 112th Assembly (2005).
[99] For further reading, see Viljoen (2007) at 369-370.
[100] See, in general, Chenwi L "South Africa: State of state reporting under international human rights law" (Paper presented at seminar on Promoting Constitutional Rights through International Human Rights Law: The State of South Africa's State Reporting, Cape Town, 22 September 2010). See also Olivier M "Compliance with reporting obligations under international law: Where does South Africa stand?" (2009) 31 *South African Yearbook of International Law* 179-195.
[101] Ratified by South Africa on 9 July 1996.

government is required to report every two years.[102] Government submitted its first report in 1998 and, following an extensive delay, submitted the combined second, third and fourth reports in 2005. The next report was due in 2007. However, government has not yet submitted it. Similarly, under the United Nations Committee on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW)[103] South Africa was required to report initially within one year after the entry into force of the treaty for South Africa and thereafter every four years.[104] Following a three year delay, the first report was submitted in 1998 and, after more than a ten-year delay, the combined second, third and fourth reports were submitted in 2009.

Parliament has a role to play in the reporting process and in ensuring timely compliance with this obligation. In fact, states are legally obliged to involve parliaments in the drafting of reports.[105] Accordingly, the 100th Inter-Parliamentary Conference called on parliaments to take action to ensure that national governments fulfil their reporting responsibilities under human rights treaties in a timely and effective way.[106]

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has also requested that states "establish an appropriate mechanism to facilitate collaboration between Parliament and Government with regard to the input of its Parliament in the elaboration of reports, and its role in following up on the concluding observations of the Committee".[107] The Committee, at its 41st session, adopted a standard paragraph on parliament which it used in its subsequent concluding observations to draw to the attention of states the importance of involving parliament in the reporting process under CEDAW as well as the implementation of all the provisions of CEDAW. The paragraph reads as follows:

> "While reaffirming that the Government has the primary responsibility and is particularly accountable for the full implementation of the State party's obligations under the Convention, the Committee stresses that the Convention is binding on all branches of Government and invites the State party to encourage its national Parliament, in line with its procedures, where appropriate, to take the necessary steps with regard to the implementation of these concluding observations and the Government's next reporting process under the Convention."[108]

In addition, in the South African context, the report of the independent assessment of parliament recommended that a mechanism with adequate capacity in terms of technical skills and administrative support be established through which parliament can monitor South Africa's reporting obligations under international treaties so as to ensure timely and effective reporting.[109] The role of the South African parliament would thus be to ascertain the status of reporting under core human rights treaties that have

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[102] See Art 62 of the African Charter.
[103] Ratified by South Africa on 15 December 1995.
[104] See Art 18(1) of CEDAW.
[105] Committee on the Elimination of Discrimination against Women (undated) para 5.
[106] Inter-Parliamentary Union (1998) para 4(ii).
[107] Committee on the Elimination of Discrimination against Women (undated) para 5; Committee on the Elimination of Discrimination against Women *Concluding observations on the combined fourth, fifth, sixth and seventh periodic reports of Uruguay*, UN Doc. CEDAW/C/URY/CO/7 (2008) para 9.
[108] See, for example, Committee on the Elimination of Discrimination against Women *Concluding observations on the combined second, third and fourth periodic reports of South Africa*, UN Doc. CEDAW/C/ZAF/CO/4 (2011) para 11.
[109] Parliament of South Africa (2009) 79.

been ratified by South Africa and using its oversight mandate to encourage government to meet its reporting obligation under the Charter. Where the preparation of a report has commenced, its role would be to ascertain whether an opportunity has been created for civil society to make an input and, if not, encourage government to create such an opportunity.

Generally, treaty bodies recommend that states prepare their reports in consultation with civil society. The South African national parliament has, for example, questioned the government on whether civil society's opinion specifically would be included in the country report under the CRPD and emphasised the importance of consultation.[110]

Parliament also needs to ensure through its respective committees that it is involved in the preparation of the country's reports, which can be done through providing input on the report and checking that the report complies with reporting guidelines and takes into consideration recommendations on previous reports. This is, in fact, a role that parliament itself has acknowledged. With regard to South Africa's combined second, third and fourth report submitted under CEDAW, a question as to whether the report had gone through parliament was raised by the portfolio committee on Women, Youth, Children and Disability. Parliament indicated that it would have liked to engage with the report and emphasised the importance of involving other relevant national institutions, such as the Commission on Gender Equality, in the process.[111]

The report was presented by the Office on the Status of Women to parliament's Joint Monitoring Committee on Improvement of Quality of Life and Status of Women on 16 May 2008. The Joint Committee made comments on some of the issues. For example, the chairperson of the Joint Committee stated that "there should be a shift of focus from administrative issues to more practical issues that dealt with women's interests".[112] However, the Joint Committee did not adequately engage with the report. In order to ensure effective participation of parliament in the reporting process, the state report needs to be submitted to all relevant committees that focus on the subject.

Where possible, parliament should participate in the examination of the country's report through ensuring that one of its relevant members is part of the country's delegation before the treaty bodies. The CEDAW Committee has commended states for including representatives from parliament in the delegation at the consideration of state reports.[113] It is important also to note the role of civil society in bringing to parliament's attention instances where government is not meeting its reporting obligations or where the reporting process is flawed. In addition, civil society's role would include contributing to the state report by making submissions if the opportunity is made available. In the absence of such an opportunity or where their views are not incorporated in the report, their role would involve preparing a shadow (alternative) report to the treaty body addressing gaps in the state report.

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[110] See, in general, Parliamentary Monitoring Group (2007).
[111] See, in general, Parliamentary Monitoring Group (2010).
[112] Parliamentary Monitoring Group "Convention on the Elimination of Discrimination against Women: Implementation report by Office on Status of Women" (2009) available at http://www.pmg.org.za/print/11925 (accessed 22 June 2011).
[113] Committee on the Elimination of Discrimination against Women (2010) para 4.

Furthermore, follow-up on the implementation of recommendations made by treaty bodies with regard to South Africa is vital, as their effective implementation would translate into concrete benefits, including improvement in rights enjoyment at the national level. States are required not only to submit concluding observations and recommendations of treaty bodies to parliament and relevant ministries so as to ensure their full implementation, but also to encourage their national parliaments to take the necessary steps with regard to the implementation of the concluding observations and the state's subsequent reporting process.[114] The CEDAW Committee has seen the monitoring role of parliament in ensuring compliance of the state with its international obligations to be vital in enhancing the implementation of its recommendations.[115]

A case in point in relation to parliament's role in ensuring implementation of the recommendations of treaty bodies is the UK's Joint Committee on Human Rights. The Committee has reviewed the concluding observations of UN treaty bodies on the UK's compliance with the United Nations' Convention on the Rights of the Child of 1989 (CRC), the ICESCR and the Convention on the Elimination of All Forms of Racial Discrimination of 1965 (CERD). With regard to the ICESCR, for example, the concluding observations were issued in June 2002 and in March 2003 the Committee issued a call for written evidence responding to the concluding observations. It then issued a report in November 2004 emphasising that the socio-economic rights in the ICESCR should not be divided from civil and political rights and should not be given lesser status than the latter. It also disagreed with the government's position that the rights in the ICESCR should be viewed as aspirational goals rather than enforceable rights.[116]

4 THE QUESTION OF SEPARATION OF POWERS

The executive's domination of international policy issues in South Africa and parliament's uncertainty about its role in international policy processes has resulted in parliament deferring to the executive on foreign policy matters.[117] In fact, a problematic situation obtains, with parliament being dominated by the executive (the majority party), which is responsible for international relations and the negotiation and signature of treaties. It is therefore not surprising that parliament's role in the negotiation and ratification of treaties and the implementation of IHRL obligations has, thus far, been quite limited. This article has provided some certainty in relation to parliaments' role in international policy issues. It has illustrated a more proactive and extended role for parliament in the negotiation and ratification of treaties and in the implementation of IHRL obligations as a means of promoting constitutional rights.

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[114] See Committee on the Elimination of Discrimination against Women *Concluding observations on the combined fourth, fifth, sixth and seventh periodic report of Panama*, UN Doc. CEDAW/C/PAN/CO/7 (2010) paras 10 and 11; Committee on the Elimination of Discrimination against Women *Concluding observations on the combined initial, second, third, fourth, fifth and sixth periodic report of Liberia*, UN Doc. CEDAW/C/LBR/CO/6 (2009) paras 10 and 11; Committee on the Rights of the Child, *Concluding observations on the third periodic report of Tunisia*, UN Doc. CRC/C/TUN/CO/3 (2010) para 69; Committee on the Rights of the Child *Concluding observations on the second periodic report of Niger*, UN Doc. CRC/C/NER/CO/2 (2009) para 83.

[115] Committee on the Elimination of Discrimination against Women (undated) para 5.

[116] Sakaria and Aiyagari (2007) 12-13.

[117] Ahmed (2009) 291-292.

At this point it is important to briefly consider the influence that the principle of separation of powers might have on parliament assuming this extended role. As observed by the Constitutional Court in *Glenister*, section 231 of the Constitution, dealing with the negotiation, signing and domestication of treaties, is deeply rooted in the principle of the separation of powers, particularly the checks and balances between the executive and the legislature.[118] Of particular importance is its influence in relation to the first two stages of treaty-making; that is, negotiation and ratification. Parliament's role in the subsequent stages – domestication and implementation – is relatively apparent, taking into consideration its oversight and legislative mandate although, as illustrated in this article, it could be enhanced. A key question, therefore, is whether parliament's involvement in the negotiation and ratification of treaties as illustrated in this article raises any insurmountable concerns relating to the separation of powers.

The separation of powers principle, implicit in the Constitution, is not absolute. In the First Certification judgment, the Constitutional Court stated that the doctrine of separation of powers is not a fixed or rigid constitutional doctrine. It "anticipates the necessary or unavoidable intrusion of one branch on the terrain of another";[119] therefore the approach to this doctrine is one that is flexible and not based on a rigid delineation of the role and functions of the three branches of government.[120] This flexibility implies that the principle is not intended to completely prohibit one branch of government from taking an action that is properly within its functions but not explicitly mandated. In the *Doctors for Life* case the Court's dictum was that intrusions into internal procedures of other branches of government would be necessary in order to uphold the Constitution.[121] It could thus be argued that it is justifiable for parliament to play the suggested extended role in order to, for example, ensure that the positions adopted or reservations made by the executive during the negotiation and ratification of treaties are in line with the Constitution.

Furthermore, one of the purposes of the principle of separation of powers is to prevent an excessive concentration of power in any one branch of government through the division of powers and the creation of systems of mutual control.[122] This implies, in practical terms, that each branch of government has to keep watch over the powers of the other branches. It is evident from this article that an extended role is necessary for parliament to be able to effectively watch over the executive in relation to treaty negotiation, ratification and implementation. The extended role envisaged is suitably incidental to the performance by parliament of its own appropriate constitutionally mandated function: the primary oversight function of the executive that is vested in parliament.

The doctrine of separation of powers therefore cannot be seen as a barrier to parliament assuming the extended role suggested in this article. With increasing globalisation and the internationalisation of law as well as increasing treaty-making,

[118] *Glenister* para 89.
[119] *Ex parte chairperson of the constitutional assembly: In re certification of the Constitution of the Republic of South Africa 1996* ("First certification judgment") 1996 (4) SA 744 (CC) pars 108-109 and 111.
[120] Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) at 21.
[121] *Doctors for Life v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) pars 68 and 69.
[122] Liebenberg (2010) at 67.

inquiries around the role of parliament in treaty-making should not be premised on a rigid separation of powers. The practice in South Africa in relation to treaty ratification is illustrative of the notion of not applying a rigid approach in this context. As stated above, while the decision to ratify a treaty rests with the executive, practice illustrates that parliament's approval is usually required before the decision is executed. Hence, in practice, treaty ratification is not exclusively in the domain of the executive, and there is room to involve parliament in treaty negotiation, since parliament plays a crucial role in the domestication and implementation of the treaty.

The relevant constitutional provisions relating to international policy issues, particularly the approach to their interpretation, is the basis for the further understanding of this argument. Though the principle of separation of powers is at the core of the provisions, a broader approach that takes into consideration the spirit of the Constitution, and the way the constitutional dispensation has evolved in relation to the role of parliament and the executive in the ratification of treaties, suggests an extended role for parliament. Furthermore, the extended role that is envisaged is clearly not one that requires parliament to usurp the functions of the executive, nor does it unduly impede the executive's ability to meet its international obligations. It is one of a collaborative or mutual nature that would strengthen responsiveness, openness and accountability of the executive in the negotiation, ratification and implementation of IHRL treaties and obligations. It is thus a role that is not contrary to the principle of separation of powers, especially considering that the need to enhance democracy, accountability and efficiency, and to promote and protect human rights, is at the heart this principle.

5 CONCLUSION

This article has explained the role parliament could play in promoting rights through ensuring effective implementation of international human rights obligations, with specific reference to the South African national parliament. This is a role that parliament has performed in some instances, but its use of IHRL needs to be improved. Parliament needs to increase its efforts and strengthen mechanisms to monitor and oversee the positions adopted by government and national compliance with international human rights norms and obligations, and to monitor and make an input in relation to international negotiations.

For parliament to be effective in fulfilling this role a number of safeguards are necessary. These include protecting the rights and freedom of expression of members of parliament and ensuring that they have a full understanding of the legal framework in which they operate, the IHRL framework and the status of international human rights treaties, and the international and national human rights commitments of government. Civil society organisations and national human rights institutions have an important role in providing parliament with information on international human rights standards, obligations, developments and violations to enable parliament to effectively assess the compatibility of state measures with human rights.

Parliament's role can also be enhanced through improving its relationship with national human rights institutions and enhancing the operation of such institutions. The

92nd Inter-Parliamentary Conference recognised the unique and important role parliaments play in enhancing the operation of such institutions.[123] The international workshop on national human rights institutions and legislatures, aimed at defining the relationship between these institutions and parliament among other things, also recognised the potential of the relationship between national human rights institutions and parliaments in protecting and promoting human rights at the national level.[124] The South African Constitution establishes a number of institutions to strengthen constitutional democracy and human rights, whose work could complement parliament's oversight function, especially in ensuring compliance with international human rights obligations. There are also several civil society organisations working on human rights that could assist in alerting parliament to gaps in the implementation of international human rights obligations that impact on the enjoyment of rights.

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[123] Inter-Parliamentary Union "Strengthening national structures, institutions and organizations of society which play a role in promoting and safeguarding human rights". Resolution adopted by the 92nd Inter-parliamentary Conference (1994) available at http://www.ipu.org/conf-e/92-1.htm (accessed 22 June 2011).

[124] See "Report of the international workshop on national human rights institutions and legislatures: Building an effective relationship" (2004) available at http://www.britishcouncil.org/report_abujaworkshop.doc (accessed 22 June 2011).

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