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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

Coutsoudis, A.

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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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Andreas Coutsoudis

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Andreas Coutsoudis
29 March 2026

# List of Abbreviations

| | |
|---|---|
| African Charter | African Charter on Human and Peoples' Rights |
| AJIL | American Journal of International Law |
| All SA | All South African Law Reports |
| AMCU | Association of Mineworkers and Construction Union |
| BCLR | Butterworth Constitutional Law Reports |
| BLLR | Butterworths Labour Law Reports |
| BRICS | A group of countries originally comprising Brazil, Russia, India, China, and South Africa, and expanded to include other countries |
| BYIL | British Yearbook of International Law |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CEDAW Committee | Committee on the Elimination of Discrimination against Women |
| CERD | Convention on the Elimination of All Forms of Racial Discrimination |
| CERD Committee | Committee on the Elimination of Racial Discrimination |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CIL | Customary International Law |
| CLR | Commonwealth Law Reports |
| CRPD | Convention on the Rights of Persons with Disabilities |
| CRPD Committee | Committee on the Rights of Persons with Disabilities |
| Constitution | Constitution of the Republic of South Africa, 1996 |
| Corruption Convention | United Nations Convention against Corruption |
| DIRCO | Department of International Relations and Cooperation (South Africa) |
| DTAs | Double Taxation Agreements |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| EJIL | European Journal of International Law |
| GATT | General Agreement on Tariffs and Trade |
| Geneva Conventions | Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; and Geneva Convention relative to the Protection of Civilian Persons in Time of War |

| | |
|---|---|
| Genocide Convention | Convention on the Prevention and Punishment of the Crime of Genocide |
| GGATT Act | Geneva General Agreement on Tariffs and Trade Act |
| Hague Convention | Hague Convention on the Civil Aspects of International Child Abduction |
| HRC | Human Rights Committee |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Court of Justice |
| ICJ Reports | International Court of Justice Reports |
| ICJ Statute | Statute of the International Court of Justice |
| ICRC | International Committee of the Red Cross |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| IIC | Oxford Reports on International Investment Claims |
| ILA | International Law Association |
| ILC | International Law Commission |
| ILDC | Oxford Reports on International Law in Domestic Courts |
| ILM | International Legal Materials |
| ILO | International Labour Organization |
| Implementation Act | Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 |
| Interim Constitution | Constitution of the Republic of South Africa Act 200 of 1993 |
| ITAC | International Trade Administration Commission (South Africa) |
| JDR | Juta's Unreported Judgments / Juta's Daily Reports |
| JIDS | Journal of International Dispute Settlement |
| JOL | Judgments Online (unreported judgment series, Lexis-Nexis) |
| LJIL | Leiden Journal of International Law |
| LR | Law Review |
| LJ | Law Journal |
| Marrakesh Treaty | Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled |
| New York Convention | Convention on the Recognition and Enforcement of Foreign Arbitral Awards |
| NGO | Non-Governmental Organisations |
| PCIJ | Permanent Court of International Justice |
| Refugee Convention | Convention Relating to the Status of Refugees |
| SA / SALR | South African Law Reports |
| SACR | South African Criminal Reports (Law report series) |

| | |
|---|---|
| SADC | Southern African Development Community |
| SADC Tribunal | Tribunal of the Southern African Development Community |
| SADC Treaty | Treaty of the Southern African Development Community |
| SAFLII | Southern African Legal Information Institute (online repository of South African cases, accessed at saflii.org, previously saflii.org.za) |
| SAHRC | South African Human Rights Commission |
| SALC | Southern Africa Litigation Centre (previously Southern African Human Rights Litigation Centre) |
| SALJ | South African Law Journal |
| SARS | South African Revenue Service |
| SCA | Supreme Court of Appeal (South Africa) |
| TRC | Truth and Reconciliation Commission |
| TRC Act | The Promotion of National Unity and Reconciliation Act 34 of 1995 — colloquially referred to as the Truth and Reconciliation Act |
| Treaty of Versailles | Treaty of Peace between the Allied and Associated Powers and Germany |
| 2000 Tribunal Protocol / 2000 Protocol | Protocol on Tribunal in the Southern African Development Community, 2000 |
| 2014 Tribunal Protocol / 2014 Protocol | Protocol on the Tribunal in the Southern African Development Community, 2014 |
| UK | United Kingdom |
| UN | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNGA | United Nations General Assembly |
| UNHCR | United Nations High Commissioner for Refugees |
| UNTS | United Nations Treaty Series |
| USA/US | United States of America |
| VCLT/Vienna Convention | Vienna Convention on the Law of Treaties |
| 1961 Vienna Convention | Vienna Convention on Diplomatic Relations, 1961 |
| 1963 Vienna Convention | Vienna Convention on Consular Relations, 1963 |
| Vienna rules | Articles 31 and 32 of the Vienna Convention on the Law of Treaties |
| WTO | World Trade Organization |

# 1 Introduction

*'There is… no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law.'*[1]

*'For, in truth, it does enjoy well-deserved prominence in the architecture of our constitutional order.… And…[South Africa's apartheid] history informs the critical role that we need international law to play in the development and enrichment of our constitutional jurisprudence and by extension the unarticulated pursuit of good governance'*[2]

## 1 Realising the Constitution's Transformative Embrace of International Law in Post-Apartheid South Africa

In the halcyon, end-of-history 1990s, South Africa adopted a new Constitution that ushered in a dramatic break from its apartheid past.[3] From the ashes of an apartheid legal system, generally hostile, or at best indifferent, to international law, emerged a Constitution heralded as particularly open to international law.[4] That was no accident. The negotiators and drafters of South Africa's Constitution understood the transformative promise of

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1 *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC) ('*Glenister II*') para 202.

2 *Law Society of South Africa & Others v President of the Republic of South Africa & Others* [2018] ZACC 51, 2019 (3) SA 30 (CC) ('*Law Society*') para 4 (reaffirmed most recently in *O'Brien NO v Minister of Defence and Military Veterans and Others* [2024] ZACC 30, 2025 (2) SA 613 (CC) para 85).

3 The focus of this study is the courts' determinations within the framework of the Constitution of the Republic of South Africa, 1996 ('the Constitution' or 'the final Constitution'), which came into force in 1997. It was preceded, for a brief period, by an interim Constitution that took effect from 27 April 1994 ('the Interim Constitution'). The Interim Constitution prescribed constitutional principles that the final Constitution was required to comply with. There were limited changes in relation to international law in the final Constitution. Brief reference to certain of these is made in Chapter 3. But the minor differences are not material for this study, and more importantly, it is the final Constitution that has been applicable since 1997.

4 *Law Society* (note 2) para 4; N Botha, 'Justice Sachs and the use of international law by the Constitutional Court: Equity or expediency' (2010) 25 *South African Public Law* 235, 236 fn 8 ('In a Constitution running to some 243 sections, international law features heavily in the preamble and in no fewer than eleven separate sections – far and away the most "featured" single aspect in the Constitution.'). See the brief overview of central provisions of the Constitution considered in this study, at note 13.

international law.[5] International law — with its protection of human rights, championing of self-determination, and criminalising of apartheid — was anathema to apartheid South Africa.[6] It was precisely for this reason that the Constitution embraced international law, and gave it a privileged position in South Africa's legal system.[7] So that, as its Constitution provides, South Africa could — in contrast to and repudiation of that past, as an international law pariah — take its rightful place in the family of nations.[8]

As a consequence, while slowly at first, over the years since the dawn of its constitutional democracy, with increasing frequency and importance, international law has steadily become a noticeable part of litigation and judicial decision-making across a range of areas in South Africa.[9] Indeed, as the cases discussed in this study demonstrate, in many ways South African courts have begun progressively, particularly in the last decade, to embrace the central place given to international law by the Constitution. This has enabled the country to move from its past characterised by ambivalence and hostility to international law to a far more integrative future, allowing international law to start to play the transformative role envisaged by the Constitution's drafters, including by holding the government to account for

5 See discussion in more detail in Chapter 3, Part 3.3.2.3. See also J Dugard, 'The Role of International Law in the Struggle for Liberation in South Africa' (1991) 18 *Social Justice* 83, 91 ('International law has evolved to play its part in the downfall of apartheid, but in the course of this process, international law itself has become a system of law more attuned to the interests of human rights and to the needs of an interdependent world, and less rooted in notions of state sovereignty. South Africa has benefitted from international law, and international law has benefitted from South Africa. International law will continue to guide and shape South African society. Non-discrimination, respect for human rights, and the right to self-determination have been consistently invoked against apartheid. They are now part of the national consciousness and form the basic principles for the new political dispensation').

6 See e.g. E Cameron, 'Constitutionalism, Rights, and International Law: The Glenister Decision' (2013) 23 *Duke Journal of Comparative & International Law* 389, 390 ('Under apartheid, international law was reviled as a source of alien and hostile doctrines.'); J Sarkin, 'The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions' (1998) 1 *University of Pennsylvania Journal of Constitutional Law* 176, 179 ('During the apartheid years, South Africa had little regard for international or comparative law. The country was seen by many, including the United Nations and other international bodies, as a pariah. Similarly, the South African government considered the United Nations an enemy and accorded scant regard to the various decisions and documents emanating from that organization.')

7 See Part 5.2 below.

8 Constitution, preamble.

9 Given the Constitution's embrace of international law, it is unsurprising that important international law questions find themselves before South African courts for consideration. This is evident from the cases discussed throughout this study. For a selection of particularly important cases holding government to account, see Chapter 5, Part 2.

failing to comply with the country's international law obligations.[10] They have begun to heed 'the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into [South Africa's] domestic law.'[11]

However, South African courts' post-apartheid embrace of international law has, in practice, often been slow and far from attaining the Constitution's full promise. For instance, it is telling that, more than two decades after the Constitution was adopted, the senior judge presiding in a landmark South African case, where international law was central, could still comment, half in jest, that the last time the judge had to consider international law was when John Dugard taught it to the judge in law school (some decades previously).[12] This anecdote underscores a paradox, which is at the heart of why I have conducted this study, and why it is important. The Constitution, in multifaceted and some unique (and underutilised)

10 The evolving approach to unincorporated treaties, including in order to hold government to account for violating South Africa's international obligations, is discussed in Chapter 3. And Chapter 2 makes clear how South African courts have taken seriously the constitutional injunction that customary international law 'is law' in South Africa (see discussion of section 232 in Chapter 2, Part 2.2). Chapter 3 also emphasises that one of the predicates for requiring organs of state to comply with obligations in unincorporated treaties is the customary international law obligation (made part of South African law by section 232) to comply with treaty obligations in good faith. See also the discussion in Part 5.2 below.

11 *Glenister II* (note 1) para 202.

12 I reference this anecdote, which occurred in a matter in which I was instructed as counsel, in A Coutsoudis & M du Plessis, 'We are all International Lawyers Now: the Constitution's International-Law Trifecta Comes of Age' (2019) 136 *SALJ* 433, 433. As with the original reference, I have been deliberately vague. See also e.g. E de Wet, 'The reception of international law in the South African legal order: an introduction' in E de Wet, H Hestermeyer and R Wolfrum (eds), *The Implementation of International Law in Germany and South Africa* (2015) 48 ('Most judges, litigators and law-makers are not well versed in public international law, partly due to the fact the subject matter has traditionally been neglected at universities. This in turn is a remnant of the country's years of isolation and hostile attitude towards international law before 1994.').

ways, embraces international law.[13] Yet South African courts have not always given effect to the Constitution's full integrative vision in respect of international law.

Whether South African courts are ensuring the full realisation of the embrace of international law enshrined in the Constitution is of particular relevance because the way domestic systems and their courts treat international law matters.[14] The application, determination, and enforcement of international law may often occur in and through domestic legal systems.[15] As international law's reach and scope have increased over the decades, including in respect of individual rights, so too has the interaction between

13 See, in particular, Constitution s 39(1)(b) (which requires courts to consider international law when interpreting the Bill of Rights, including section 7(2), which obligates the state to respect, protect, promote and fulfil the rights in the Bill of Rights); s 232 (which makes customary international law, 'law' in South Africa, save if inconsistent with the Constitution or national legislation); s 233 (which requires legislation to be interpreted as far as reasonably possible to accord with international law); s 231(2) (which confirms that treaties approved by Parliament bind South Africa); s 231(4) (which provides that not only treaties incorporated by legislation are law in South Africa, but also self-executing provisions of treaties approved by Parliament save if inconsistent with the Constitution or national legislation); and ss 198(c) and 199(5) (which make clear that 'the law' that the defence force, police services, and the intelligence services, and all determinations concerning national security, must comply with *includes* international law binding on South Africa). These sections are discussed in Chapters 2–4, and are set out in an appendix (Appendix: Key sections of the South African Constitution). For a general overview of the Constitution's treatment of international law see, e.g. E de Wet, 'South Africa' in D Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (2011); H Strydom & K Hopkins, 'International Law' (Ch 30, OS 12-05) in S Woolman and M Bishop (eds), *Constitutional Law of South Africa* (2nd ed, 2014); J Dugard & A Coutsoudis, 'The Place of international law in South African municipal law' in J Dugard, M du Plessis, T Maluwa & D Tladi (eds), *Dugard's International Law: A South African Perspective* (5th ed, 2018); De Wet (note 12); and H Woolaver, 'South Africa' in Fulvio Palombino (ed) *Duelling for Supremacy: International Law vs National Fundamental Principles* (2019). For more recent treatments, see e.g. A Coutsoudis 'The Place of international law in South African municipal law' in J Dugard, M du Plessis, T Maluwa & D Tladi (eds), *Dugard's International Law: A South African Perspective* (6th ed, 2026) and H Woolaver, 'Engagement of South African Domestic Courts with International Law' in A Nollkaemper, Y Shany, A Tzanakopoulos and E Methymaki (eds), *The Engagement of Domestic Courts with International Law: Comparative Perspectives* (2024).

14 See e.g. Y Iwasawa, *Domestic Application of International Law* (2022) 276–7 ('The important role played by domestic institutions, in particular courts, in the application and enforcement of international law is due in part to the decentralised character of the international legal order.' at 276).

15 Iwasawa ibid; see also E Denza, 'The Relationship between International Law and Domestic Law' in M Evans, *International Law* (6th ed, 2024) 401; and Y Iwasawa, 'Various means of enforcing International law' (2023) 65 *Harvard International LJ* 1, 4.

domestic and international legal spheres.[16] Domestic courts play a central role in mediating this interaction by determining how international law applies in the domestic sphere, and by holding their own governments to account for failure to comply with international law[17] (which may not, absent this domestic determination, otherwise occur).[18] The interaction between domestic and international law, and how domestic courts engage with international law, is of particular importance not only for the interna-

16 J Crawford, 'International Law and the Rule of Law' (2003) 24 *Adelaide LR* 3, 7–8 ('International law is concerned increasingly with matters internal to the state – human rights, the environment, investment protection, criminal law, intellectual property, the conditions of free trade in terms of the WTO, the control of civil conflict and so on. Indeed it is not too much to say that in many of these areas the role of international law is to reinforce, and on occasions to institute, the rule of law internally.'); Denza (note 15) 401 ('The law of nations was until the twentieth century concerned mainly—though never exclusively—with the conduct of sovereign States and relations between those States. Now, however, it permeates and radically limits and conditions national legal orders, its rules are applied and enforced by national authorities, and national courts are often asked to resolve its most fundamental uncertainties.'); M Shaw, *International Law* (9th ed, 2021) 119 ('There is indeed a clear trend towards the increasing penetration of international legal rules within domestic systems coupled with the exercise of an ever-wider jurisdiction with regard to matters having an international dimension by domestic courts. This has led to a blurring of the distinction between the two previously maintained autonomous zones of international and domestic law, a re-evaluation of the role of international legal rules and a greater preparedness by domestic tribunals to analyse the actions of their governments in the light of international law.'); and OA Hathaway, 'International delegation and state sovereignty' (2008) 71 *Law and Contemporary Problems* 115, 115.

17 See references in footnotes 9 and 10 above. See also J Crawford, *Brownlie's Principles of Public International Law* (9th ed, 2019) 53 ('International law is increasingly finding its way into national courts, and judges are increasingly finding themselves called upon to interpret and apply it — or at least to be aware of its implications.'). And see A Nollkaemper, *National Courts and the International Rule of Law* (2011) 1, where Nollkaemper opines that 'national courts of a substantial number of states (but representing probably not more than half of the states in the world) have become a major institutional force in the protection of the international rule of law'. Even writing in 2011, before the more recent South African decisions holding the government to South Africa's international obligations (which I considered in the current study; see in particular the summary of cases in Chapter 5, Part 2), Nollkaemper would appear to include South African courts in this list (Nollkaemper ibid 13, 138, 235 and 264).

18 In Coutsoudis & du Plessis SALJ (note 12), the point is made, at 459, that: 'the fact that domestic courts can now effectively adjudicate any violation of international law by South African officials is ground-breaking in that it provides a forum for South African actions on the international plane that violate international law to be made subject to binding adjudication. South Africa has often shied away from giving international tribunals or courts compulsory jurisdiction to determine whether it has violated international law, especially when individuals bring the case.'

tional law system but for each domestic system, and for the adherence to and realisation of the rule of law.[19]

Post-apartheid South Africa presents an important microcosm for studying the application and determination of international law in a domestic system. It is a young constitutional democracy, which, given its more recent origin and its history, draws support and inspiration from many more established constitutional democracies[20] and from international law (in particular international human rights law).[21] It is a mixed legal system, drawing from British common law and Roman-Dutch law,[22] now remodelled and reimagined by its human rights and rule-of-law centric post-

19 The rule of law is a (justiciable) founding value of the Constitution (section 1(c)) (see Part 5.2 below and discussion in Chapter 3). Its importance is well accepted. See generally Venice Commission's *Report on the Rule of Law* (4 April 2011), CDL-AD (2011)003rev, https://rm.coe.int/1680700a61 (para 41: 'a consensus can now be found for the necessary elements of the rule of law', these are '(1) Legality, including a transparent, accountable and democratic process for enacting law[;] (2) Legal certainty[;] (3) Prohibition of arbitrariness[;] (4) Access to justice before independent and impartial courts, including judicial review of administrative acts[;] (5) Respect for human rights[; and] (6) Non-discrimination and equality before the law.'). The United Nations General Assembly has in various resolutions affirmed the importance and centrality of the rule of law both domestically and internationally, see e.g. Resolution adopted by the General Assembly on 24 September 2012 on the Rule of Law, A/RES/67/1 (providing, inter alia, at para 7, that 'the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law'). The importance of the rule of law under the Constitution and its application to engagement with international law is discussed in Chapters 2, 3, 4, and 5. See also the discussion of the rule of law and the 'culture of justification' below at Part 5.2. See also generally e.g. *Minister of Safety and Security v South African Hunters and Game Conservation Association* [2018] ZACC 14, 2018 (10) BCLR 1268 (CC) paras 13, 14, and 18 (the rule of law requires certainty, clarity, and legality); *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others* [2000] ZACC 1, 2000 (2) SA 674 (CC) para 85 (the rule of law prohibits arbitrariness); and *S v Mamabolo* [2001] ZACC 17, 2001 (3) SA 409 (CC) para 17 ('No-one familiar with our history can be unaware of the very special need to preserve the integrity of the rule of law against governmental erosion.'). For general discussion of the rule of law and its application on the international plane, see R McCorquodale, 'Defining The International Rule Of Law: Defying Gravity?' (2016) 65 *International and Comparative Law Quarterly* 277.

20 For instance, Canada, Germany, and to a certain extent the United States. See e.g. Sarkin (note 6); DM Davis, 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience' (2003) 1 *International Journal of Constitutional Law* 181, 191 ('the South African constitutional text was modeled largely on the Canadian Charter of Rights and Freedom, with liberal borrowings from Germany and the United States of America.')

21 Sarkin (note 6) 183.

22 See e.g. V Van der Merwe, 'The origin and characteristics of the mixed legal systems of South Africa and Scotland and their importance in globalisation' (2012) 18 *Fundamina* 91, 101–102 ('Consequently South Africa is left with a mixed legal system consisting of predominantly English procedural and commercial law, predominantly Roman-Dutch private law in the fields of persons, property, succession, contract, delict and unjustified enrichment, and the pervasive influence of the new Constitution guaranteeing personal freedoms and the rule of law.'); and generally R Zimmermann & D Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (1996).

apartheid Constitution,[23] which also incorporates (domestic) customary law into South African law.[24] As an African country, South Africa is deeply embedded in the Global South. Nevertheless, it seeks to maintain good relations with the Global North[25] (with its courts often relying on and drawing inspiration from the jurisprudence of Western democracies).[26] These diverse features help explain why the epithet, 'the Rainbow Nation',[27] can be seen as referring to more than just South Africa's multiculturalism.[28] And, within that context, South Africa's Constitution, unlike constitutions that merely entrench and protect a pre-existing order, is best understood as a transformative bridge.[29] A bridge to a future not yet fully known, not yet fully

23 See Constitution s 1. See also s 39(2), which requires every court, when developing the common law, to 'promote the spirit, purport and objects of the Bill of Rights.' See also *Kaunda and Others v President of the RSA and Others (2)* [2004] ZACC 5, 2005 (4) SA 235 (CC) para 220 (per O'Regan J) ('The leitmotif of our Constitution is thus the promotion and protection of fundamental human rights.')

24 See section 211(3) of the Constitution, and e.g. *Beadica 231 CC and others v Trustees for the Time Being of the Oregon Trust and others* [2020] ZACC 13, 2020 (5) SA 247 (CC) para 110 (per Froneman J) ('There are discernible differences in perspective and emphasis in what was, before the Constitution, the two sources of our mixed legal system, the civilian tradition and the English common law tradition. To that mixed legal heritage the Constitution now adds its own overarching objective value system. This must inform not only our views on our mixed common law and civilian heritage, but must embrace also the neglected "third grace" of our legal heritage, namely African customary law and tradition.').

25 See e.g. Department of International Relations and Cooperation, 'Framework Document on South Africa's National Interest and its advancement in a Global Environment' (2022) 25, https://dirco.gov.za/national-interest-framework-doc/ ('South Africa re-cultivated relations with the Global South through the G77, NAM, IORA, IBSA and BRICS, while at the same time maintaining good relations with the existing global powers by spearheading outreach initiatives with the Group of Eight (G8), the European Union and the USA').

26 See, for instance, examples in Chapter 2 at footnotes 81 and 138.

27 See e.g. A Habib, 'South Africa – The Rainbow Nation and Prospects for Consolidating Democracy' (1997) 2 *African Journal of Political Science* 15. The term was originally coined by Archbishop Desmond Tutu (Habib at 15).

28 One earlier post-apartheid academic piece memorably coined the term 'rainbow jurisprudence', to describe 'the value-based nature of constitutional adjudication' of the Constitutional Court in its first year of operation. See Alfred Cockrell, 'Rainbow Jurisprudence' (1996) 12 *South African Journal on Human Rights* 1.

29 *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC) ('*Makwanyane*') para 156 fn 1 (per Ackerman J) ('If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified' – quoting, with approval, from E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31 at 32) and para 262 (per Mahomed J) ('[i]n some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and *represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive* and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. *The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic*' (emphasis added)). See also the preamble to the Constitution, and the postamble to the Interim Constitution, and discussion below in Part 5.2 and in Chapter 3, text at footnotes 129–137 and 162–163.

realised, yet nascent in the Constitution's transformative vision. A vision of a united South Africa in all its diversity, a democracy committed to the rule of law (domestically and internationally) and to dignity, equality, human rights, and social justice for all. And a central feature of the Constitution's transformative blueprint is its integrative (or open and friendly) embrace of international law.[30]

It makes sense, and is appropriate, to undertake this analysis at this juncture. Three decades into South Africa's post-apartheid regime, under its international-law-integrative Constitution, one would expect its courts to have settled on some general approach to the application and determination of international law, which ought to be reflected in the more recent case law.

## 2 Research Aim and Research Question

As indicated, and as demonstrated by the study, despite the Constitution's transformative embrace of international law, the courts' approach to international law has not always been consistent or rigorous, nor has it always given full effect to the Constitution's embrace of international law. Therefore, the study aims to assess the extent of the issue by describing, doctrinally explaining, and systematising the approach to international law within South Africa's domestic constitutional framework. In doing so, it analyses and critiques the approach taken by the courts, and offers proposals for charting the way ahead in a manner consistent with and faithful to international law and the Constitution (including its founding value of the rule of law). This is done to ensure that South Africa's courts can do better to realise the international-law-friendly promise of its Constitution and so that South Africa, in practice, is more than a fair-weather friend of international law. Thus, the main research question that will be addressed in this study is as follows:

> *Have South African courts realised the Constitution's embrace of international law?*

The study addresses this question in three substantive chapters (that have been published as articles) by addressing the following sub-questions:

*a) How have South African courts identified and applied customary international law?*
*b) How have South African courts approached the application of unincorporated treaties?*
*c) How have South African courts interpreted treaties that are being applied?*

30 *Minister of Justice and Constitutional Development & others v Southern African Litigation Centre & others* 2016 (3) SA 317 (SCA) ('*Minister of Justice v SALC*') para 63; Sarkin (note 6). See discussion in Part 5.2.

These sub-questions consider the determination and application of customary international law and treaty law because taking the Constitution's integrative embrace seriously has two central features: (a) applying international law when it finds application and (b) properly determining that law when applying it.

The sub-questions focus specifically on the engagement with customary international law and treaty law as the two primary sources of international law.[31] In addressing these questions, the chapters also consider whether and how subsidiary sources (such as judicial decisions and scholarly works) are used to determine customary international law and treaty law. While little relied on expressly, even by international courts and tribunals, the other (primary) source of international law is usually considered to be 'general principles of law recognized by civilized nations'.[32] This source is not the focus of this study for the following reasons. General principles of law can broadly be understood to be 'supplementary in nature in the sense that their role is to fill gaps in international law and to prevent situations of non liquet.'[33] Thus this source is more relevant to international courts and tribunals, since international law, not always being as fully developed as municipal legal systems, needs to allow judges in international courts and tribunals the flexibility to fill lacunae in treaty and custom with legal principles recognised generally by domestic systems. But since the focus of this study is the application of international law in the domestic legal system of South Africa, its courts do not need to apply 'general principles' as a source of international law when deciding cases. Rather, if necessary, to determine a case before them, they can find relevant (or equivalent) principles already in South Africa's domestic law. The Constitution also makes no express reference to this source of international law (in contrast to treaties and customary international law), nor are there any South African cases where its courts have sought to refer to or apply this source of international law.

Particular attention is paid to the application of unincorporated treaties (those that have not been incorporated into South Africa's domestic law by legislation). This is because, unlike treaties incorporated into domestic law through legislation, the domestic application of unincorporated treaties is not straightforward and has undergone significant evolution through successive court decisions. While the Constitution generally requires legislative enactment for treaties to become law in South Africa,[34] the Constitution provides various international-law-integrative provisions (which I refer to

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31 See e.g. J Dugard and D Tladi, 'Sources of International Law' in *Dugard's International Law* (5th ed) (note 13) 43–45; Crawford *Brownlie's* (note 17) 32–34.

32 Article 38(1)(c) of the ICJ Statute. See also generally, the ILC's work on General Principles of law, available at https://legal.un.org/ilc/guide/1_15.shtml.

33 ILC 'Third report on general principles of law' by Special Rapporteur Marcelo Vázquez-Bermúdez (18 April 2022) UN Doc A/CN.4/753 para 2(g) ('The view was expressed by Commission members that general principles of law are supplementary in nature in the sense that their role is to fill gaps in international law and to prevent situations of *non liquet*.')

34 Section 231(4).

as 'constitutional hooks'[35]) through which unincorporated treaties can be applied, including to create domestically enforceable obligations for the government, which the courts have begun to explore and give fuller effect to in more recent decisions.

## 3 Structure

The thesis comprises three substantive chapters, in addition to this introduction and the conclusion. The substantive chapters (Chapters 2, 3, and 4) have been published as articles in law journals.

Chapter 2 provides a detailed description and analysis of South African courts' engagement with customary international law, particularly over the period of 2011-2021. This analysis reveals that important issues of customary international law do, and no doubt will continue to, find themselves before South African courts for determination and application. The chapter, by way of systematic analysis of the cases referring to customary international law during this period, identifies the principal cases in this period where customary international law was applied and had a significant impact on the decision. The chapter then identifies and discusses the key features that emerge from analysing those main cases. Those features demonstrate that the South African courts' engagement with customary international law would benefit from a more reflective, rigorous, and considered approach. Building on the analysis and description of South African courts' identification and application of customary international law, the chapter offers suggestions for how the road ahead ought to be navigated in order to ensure an approach that is faithful to international law's own secondary rules for identification of customary international law, while accommodating South Africa's procedural law and practical realities.

Chapter 3 gives an account of the evolving nature of South African courts' application of unincorporated treaties within the framework of the Constitution. The chapter provides a critical and descriptive account of how South African courts have approached the application of unincorporated treaties. The chapter begins by outlining the various ways treaties find application in South African law before providing a critical evaluation of the courts' approach to the application of unincorporated treaties. The analysis reveals how the Constitutional Court's application of the Constitution's international law provisions in particular cases has led to an evolution in how the courts apply unincorporated treaties over time. Having considered the courts' evolving approach to the application of unincorporated treaties, and critiquing certain retrogressive decisions, the chapter argues that the courts need to adopt an approach to the application of unincorporated treaties that is guided by principles anchored in the Constitution. Flowing

35 See Chapter 3, Part 3.3.

from these principles, the chapter makes certain proposals for charting the course ahead to ensure that, in practice, the open and integrative approach to international law in South Africa's Constitution is properly embraced and given full effect.

As made clear in Chapter 3, the application of treaties has become an ever more embedded feature of the South African courts' jurisprudence; yet it was recognised that the application of treaties in certain of the cases considered was coupled with a particular superficial approach to their interpretation. In light of this, Chapter 4 offers a systematic descriptive assessment of the South African courts' approach to the interpretation of treaties applied in cases over the period 2018-2023. The chapter begins by considering how treaties ought to be interpreted, with particular regard to customary international law's rules for interpretation. Through that lens, it then delineates the pertinent features of the courts' approach to treaty interpretation by analysing all the cases decided between 2018 and 2023 in which treaties are considered and applied in some manner. This reveals that the courts' approach to treaty interpretation has not generally been methodologically rigorous from an international law perspective. Courts, with some notable exceptions, particularly in the most recent cases, tend to adopt a superficial approach that ignores international law's interpretative rules and the materials they make applicable, notwithstanding the constitutional obligation to use these rules. Given these trends, the chapter makes recommendations to ensure that as South Africa starts its fourth decade of constitutionally enshrined integration of international law, treaty law's interpretive neglect does not continue.

Chapter 5 provides the conclusion to this study. It offers a synthesis of the earlier chapters' cross-cutting issues and proposals. It draws attention to a series of cases considered in the study that show that, notwithstanding the identified shortcomings in the South African courts' approach to international law, at their best, the courts have begun to facilitate an embrace of international law. In doing so, they have helped ensure that the government is held to South Africa's international law obligations, thereby giving effect to the transformative promise and international-law-integrative and rule-of-law commitments of the Constitution. The chapter emphasises that while South African courts have done much to realise the Constitution's embrace of international law, the study observes that, while there is frequent reference to international law (in particular treaties and at times customary international law), this is generally coupled with an unsophisticated approach to the determination of that law (be it the interpretation of treaties or the identification of customary international law). In Chapter 5, I argue, in line with earlier chapters, that the Constitution requires better of South African courts. They can and should approach international law as sophisticated jurists who carefully, consistently, and with proper regard to applicable materials determine and apply the international law relevant to the matters before them. The chapter draws attention to how each substantive chapter provides suggestions for ensuring that this occurs in a manner

that enables courts to be more thoughtful and rigorous in determining and applying international law. This is not to suggest some impossible standard of perfection or analytical purity. Rather, it is to recommend an approach to international law that is constitutionally required and legally and practically possible. That can only benefit South Africa's jurisprudence, the parties that appear before its courts, and South Africa's good faith compliance with its international law obligations.

## 4 Methodology

Each of the substantive chapters offers a descriptive account of how South African courts approach relevant aspects of the application and determination of customary international law and treaties. This is done through a detailed analysis of the relevant primary sources — South African court decisions. The descriptive account aims to be systematic and explanatory. The purpose is to properly describe the approach taken by South African courts over a suitable period of time, and across a range of cases identified by systematic research, in order to draw out relevant trends and features, in a doctrinally explanatory, critical and analytic manner. This descriptive account is, therefore, vital, as it allows for a careful understanding and analysis of how South African courts, in practice, approach the application and determination of international law within the South African legal system. The descriptive account (and the themes identified through it) serve as a basis for offering a careful analysis and doctrinal critique of the approach taken by South African courts. All the chapters then offer prescriptive proposals for addressing the issues identified in the descriptive account, having regard to international law's own secondary rules for the determination of its sources and South Africa's constitutional and procedural law scheme.

The methodology can be further elucidated with reference to the approach taken in each of the substantive chapters (the methodology is also explained in those chapters). The assessment in Chapter 2 of how South African courts approached the identification and application of customary international law uses the following methodology. *First*, the date range of 2011 to 2021 was selected to ensure (a) a suitable length of time to allow for proper assessment of general trends in the courts' approach to customary international law and (b) a focus on the courts' more recent jurisprudence (with the chapter, in article form, being submitted for peer review and publication in 2022). *Second*, within that date range, the main South African case law report series[36] and the main online repository of reported and unreported cases[37] were searched to identify cases where customary interna-

36 South African Law Reports ('SALR'), All South African Law Reports ('All SA'), and Butterworths Constitutional Law Reports ('BCLR').

37 Saflii.org (previously saflii.org.za) (the online repository of South African cases, compiled and hosted by the Southern African Legal Information Institute ('SAFLII')).

tional law was considered in the Court's decision. This was done by way of keyword searches[38] and substantive review, with cases initially responsive to relevant search terms considered to determine whether there was in fact a consideration of customary international law. *Third*, cases that only made passing reference to customary international law, or where it had no material impact on the decision, were excluded from detailed analysis. The aim was to identify cases where the Court considered customary international law and did so because customary international law was material to the decision. *Fourth*, for cases that progressed through South Africa's judicial hierarchy, the detailed analysis concentrated on the final and binding decisions from the Constitutional Court (South Africa's apex court[39]) or South Africa's penultimate appellate court, the Supreme Court of Appeal ('SCA'), where there was no subsequent appeal to the Constitutional Court.[40] High Court[41] decisions were included if they involved a material consideration of customary international law and were not appealed. Based on these criteria, five central cases were identified for detailed analysis. The analysis aimed to identify trends in the courts' identification and application of customary international law, and, if evident, the courts' understanding of their role, if any, in its development. The approach of the courts was critically assessed with particular reference to the International Law Commission's Draft Conclusions on the Identification of Customary International Law ('ILC Draft Conclusions: CIL'), given that these are as close as one is likely to come, currently, to reflecting a generally accepted approach or methodology.[42] Critical proposals for improving the approach to customary international law were made with references to the broad trends identified in the cases analysed, the ILC's Draft Conclusions: CIL, and South Africa's constitutional and procedural law system.

Chapter 3 provides an evaluation of the South African Constitutional Court's approach to the application of unincorporated treaties within the

38 Searches were conducted using key words such as 'customary international law', 'customary', 'custom', 'international customary law', and 'international law'.

39 The Constitutional Court has appellate jurisdiction to hear 'constitutional matters' and arguable points of law of general public importance. Any declarations of constitutional invalidity in respect of legislation and conduct of the President made by the SCA or High Court must be referred to the Constitutional Court for confirmation. It also has original jurisdiction to act as court of first and last instance in constitutional matters. This is referred to as 'direct access' (see Constitutional Court Rule 18 (GN R1675 in GG 25726 of 31 October 2003)), which is sparingly used. Certain matters also fall exclusively within the jurisdiction of the Court (e.g. deciding on the constitutionality of any parliamentary or provincial Bill), and therefore can only be determined by it (Constitution, sections 167(3) to (6)). On the South African court hierarchy generally see Constitution section 166, and Superior Courts Act 10 of 2013 ('Superior Courts Act'), sections 4–7.

40 The Supreme Court of Appeal has jurisdiction to hear appeals from cases decided by the various divisions of the High Court. See Constitution section 168(3).

41 The High Court of South Africa is made up of a number of provincial divisions. See Superior Courts Act section 6.

42 This is defended in Chapter 2, Part 2.1.

framework of the Constitution. The methodology involves a descriptive evaluation of the evolution of the Constitutional Court's approach to unincorporated treaties by focusing on a seminal early Constitutional Court case, which demonstrated an initial and markedly dualist approach[43] to unincorporated treaties (*Azapo* decided in 1996),[44] followed by two later cases (*Glenister II*,[45] decided in 2011, and *Law Society*,[46] decided in 2018) that mark watershed progressive developments from the Court's earliest jurisprudence towards an approach that sought to more fully realise the Constitution's embrace of international law. These cases were identified through a substantive analysis of the Constitutional Court's treatment of unincorporated treaties in its decisions over its first three decades.[47] The chapter analyses how the courts in these successive cases have interpreted and applied the Constitution's international law provisions, leading to an evolution in how unincorporated treaties are applied. This examination is analytical and critical, providing a defence of the more recent jurisprudence with reference to the Constitution's integrative provisions. The analysis then considers whether the more progressive decisions (*Glenister II* and *Law Society*) have been followed in the more recent jurisprudence of the Constitutional Court from 2019 to 2022 (with 2019 being the year following *Law Society*, and 2022 being the last full year before the chapter, in article form, was submitted for peer review and publication). This was done by searching the main law report series and online repository for subsequent decisions that relied on this earlier jurisprudence. The analysis identifies one outlier, which represented a retrogressive approach to unincorporated treaties (*Zuma III*[48] decided in 2021). The Constitutional Court cases in the subsequent year (2022) were then analysed to see whether they referred to or adopted the approach in *Zuma III* or the more integrative approach in *Glenister II* and *Law Society*. The approach taken in these cases is critically analysed with reference to the constitutional scheme, as a whole, and its embrace of international law. Proposals to ensure a proper embrace of unincorporated treaty obligations are made using the Constitution's scheme as the relevant framework for assessment.

Chapter 4 offers a systematic descriptive assessment of how South African courts have interpreted treaties they applied. The methodology for analysing cases involved the following. *First*, the analysis focused on

43 The meaning and use of the label 'dualist', as opposed to 'monist', is discussed in Part 5.1 below, and in Chapter 3.

44 *Azanian People's Organization (AZAPO) & Others v President of the Republic of South Africa & Others* [1996] ZACC 16, 1996 (4) SA 672 (CC) ('*Azapo*').

45 *Glenister II* (note 1).

46 *Law Society* (note 2).

47 The Court heard its first cases in 1995, and the cases were analysed until 2022, the year before the chapter, in article form, was submitted for peer-review and publication.

48 *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] ZACC 28, 2021 (11) BCLR 1263 (CC) ('*Zuma III*').

cases decided over a six-year period, from 2018 to 2023. This specific timeframe was chosen to allow for the identification and assessment of general trends across a manageable, recent period, rather than focusing on isolated cases.[49] The period was chosen in order to be long enough to allow for general trends to be identified, but not so long as to make the number of cases identified unmanageable. This period was shorter than that selected for analysis of customary international law in Chapter 2 given the much higher frequency of courts engaging with treaties than with customary international law. *Second*, detailed research was conducted using keyword searches and substantive review across the main South African law report series[50] and the main online repository of reported and unreported South African cases[51] to identify cases where treaties were dealt with.[52] *Third*, from the cases thus identified for detailed analysis, the focus was narrowed to those cases where courts at least found it necessary to refer to the treaty's provisions or broad effect for the purpose of deciding the case before it. Cases that merely made passing references or used treaties as secondary support were noted but not the primary focus of the interpretive analysis. *Fourth*, broad trends evident in the cases selected were then identified. *Fifth*, in discussing examples of these trends, generally preference is accorded to the decisions by the Constitutional Court, given that its decisions are final and binding on all other South African courts. This assessment of the approach to interpretation was scrutinised having regard to the customary international law rules of interpretation as codified in the Vienna Convention on the Law of Treaties. This was viewed as the appropriate framework, given that these rules of interpretation form part of customary international law, are broad and flexible, and generally considered the most appropriate methodological approach to treaty interpretation.[53] And given their customary status, they form part of South African law,[54] and thus courts are obligated to apply them.[55] The analysis aimed to identify general trends in treaty interpretation, and then to use those trends to inform proposals for future practice, having regard to the customary international law rules of treaty interpretation[56] and South Africa's constitutional scheme and legal framework.

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49 The cases were analysed until 2023, the year before the chapter, in article form, was submitted for peer-review and publication.

50 SALR, All SA, and BCLR.

51 Saflii.org.

52 Keywords such as 'international law', 'treaty/ies', 'convention', 'protocol', and 'international agreement' were used to identify potentially relevant cases.

53 As explained and defended in Chapter 4, Part 2.

54 Constitution s 232 ('Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament').

55 As explained and defended in Chapter 4, Part 2.

56 In considering these rules, regard is also had to ILC's 'Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries' (2018) UN Doc A/73/10.

## 5 Theoretical Context

As explained in Part 4, this study adopts a descriptive approach to systematically examine how South African courts apply and determine customary international law and treaties within the South African constitutional scheme and legal framework. It is nevertheless helpful to situate this descriptive account and the chapters that follow in their broader theoretical context in two respects. First, the theoretical understandings and debates regarding the relationship and interaction between international law and domestic law. Second, the theoretical perspectives on the nature of South Africa's constitutional project and design.

### 5.1 The interaction between domestic law and international law – some theoretical reflections

Theoretical discussions on how international law and domestic law interact can be traced back to early conceptions of the nature of law in general and international law in particular.[57] However, from the beginning of the twentieth century, significant theoretical debate led to the development of two broad schools of thought regarding the relationship between international law and domestic law. On the one hand were monists. As the name implies, they viewed international law and domestic law as part of a single unitary system of law.[58] Famously, Hans Kelsen, seen as the foremost monist theorist of the twentieth century, viewed monism to flow from an account of how law, properly so-called, must (logically or scientifically) work.[59] All

57 See e.g. JG Starke, 'Monism and dualism in the theory of international law' (1936) 17 *BYIL* 66, 66-69; T Maluwa, *International Law in Post-Colonial Africa* (1999) 34–35; and Dugard & Coutsoudis (note 13) 58–59 (who note, for instance, at 58, that 'Grotius saw international law and municipal law as components of a universal legal order premised on natural law').

58 See e.g. H Waldock, 'General Course on Public International Law' (1962) 106 *Recueil des cours de l'Académie de Droit International* 1, 121–122. For earlier discussion see e.g. Starke (note 57). See also DP O'Connell, 'The relationship between international law and municipal law' (1960) 4 *Georgetown Law Journal* 432; H Lauterpacht, 'International law and municipal law' in E Lauterpacht (ed), *International Law: Being the Collected Papers of Hersch Lauterpacht* vol I: The General Works (1970) 216.

59 For instance, Kelsen argues that, 'International law and national law cannot be different and mutually independent systems of norms if the norms of both systems are considered to be valid for the same space, and at the same time. It is logically not possible to assume that simultaneously valid norms belong to different, mutually independent systems.' H Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Lawbook Exchange 2007) 363. See generally for Kelsen's discussion of the relationship between international and domestic law, H Kelsen, *The Pure Theory of Law* (Max Knight tr, Lawbook Exchange 2011) 328–47; H Kelsen, *Principles of International Law* (1959) 403–447.

law, properly so-called, must be viewed as part of one system, with a basic norm (the *Grundnorm*) as its fundamental validator.[60]

Monist theories were advanced in opposition to dualist theories (most closely associated with the writings of Heinrich Triepel and Dionisio Anzilotti).[61] Dualists viewed international law and domestic law as occupying distinct normative spheres, with different subjects, and as belonging to separate, self-contained legal systems.[62]

The theoretical debates between monism and dualism, and various attempts to plot alternative or intermediate theoretical approaches, or to

60 Kelsen *General Theory* (note 59) 366–67; J von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2010) 81 ('For Kelsen, international law and national law were therefore the law of a monistic system that could be traced back to a single basic norm'); and Crawford *Brownlie's* (note 17) 46–47.

61 See e.g. Starke (note 57) 70; A Cassese, 'Modern Constitutions and International Law' (1985) *Recueil des Cours de l'Académie de Droit International* 331, 356; Waldock (note 58) 121; Bruno Simma, 'The Contribution of Alfred Verdross to the Theory of International Law' (1995) 6 *EJIL* 33, 44.

62 Kelsen offered the following summary of the dualist theory: 'According to the dualistic theory, international law and state law (the individual state legal systems) are different systems of norms, systems that, in their validity, are independent of one another but at the same time equal.' Hans Kelsen, 'Sovereignty' in Stanley L Paulson and Bonnie Litschewski Paulson (eds) *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (1998) 527. See also G Gaja, 'Dualism: A Review' in JE Nijman and A Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (2007) 52 ('The main feature of dualism appears to be that international law and municipal laws are viewed as separate legal systems, which may be defined as self-contained, because within each system the only existing rules are those that are part of the system').

classify the debates as unhelpful, have waxed and waned over the years.[63] Even nearly seventy years ago, Sir Gerald Fitzmaurice declared that 'the entire monist-dualist controversy is unreal, artificial and strictly beside the point'.[64] More recently, scholars such as Armin von Bogdandy have argued that '[m]onism and dualism should cease to exist as doctrinal and theoretical notions for discussing the relationship between international law and internal law.'[65] However, these theories have continued to be considered and debated, with no definitive resolution, and certainly no universally accepted theoretical understanding of the interaction between domestic and

63 See e.g. Waldock (note 58) 121, O'Connell (note 58); J Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Pocket Books of the Hague Academy, 2014) para 101 ('On the whole question of the relation between national and international law, theoretical constructions have done much to obscure realities'); H Charlesworth, M Chiam, D Hovell and G Williams, 'International Law and National Legal Systems: Fluid States' in Charlesworth, Chiam, Hovell and Williams (eds), *The Fluid State: International Law and National Legal Systems* (2005) 16 ('the interface between domestic and international law cannot be easily described according, to the familiar, orderly typologies favoured by international and domestic lawyers, such as transformation/incorporation or monism/dualism. Such concepts do not pay enough attention to the wide range of influences that complicate the international/national law relationship, including context, politics and international relations.'); A von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 *International Journal of Constitutional Law* 397, 400; S Besson 'Theorizing the Sources of International Law' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (2010) 184 (who argue for a model of 'external legal pluralism', since 'neither monism nor dualism can fully account for both the increasing intermingling between the national and international legal orders and the fact that neither of them gets primacy in deciding about mutual validity in all cases'). See generally Nijman & Nollkaemper (note 62) (see, for instance, Nijman and Nollkaemper's concluding chapter 'Beyond the Divide', where at 359, they tentatively suggest that perhaps the interaction between domestic and international law might be 'best described as a situation of global legal pluralism', which 'refers to diverse State and non-State and mixed legal regimes created by a diversity of communities.'); Yuval Shany, *Regulating Jurisdictional Relations between National and International Courts* (2007) 4 fn 12 (who explains 'pluralist' approaches (in contradistinction) to monist or dualist approach as follows: 'Although the terms pluralism and dualism were once used interchangeably, it is nowadays common to associate pluralism with the notion that decision makers (including courts) can apply norms derived from a multitude of sources. The invitation extended to courts to consider norms originating outside their own legal system brings modern pluralism closer to traditional monism than to traditional dualism'); A Nollkaemper, Y Shany, & A Tzanakopoulos, 'Engagement of Domestic Courts with International Law: Principled or Unprincipled?' in A Nollkaemper, Y Shany, A Tzanakopoulos, & E Methymaki (eds), *The Engagement of Domestic Courts with International Law: Comparative Perspectives* (2024) 7 (who suggest a 'nuanced paradigm of pragmatic engagement' which would 'replac[e] the older, binary, doctrinal paradigms of acceptance (monism) or rejection (dualism)').

64 G Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 *Recueil des cours de l'Académie de Droit International* 1, 71.

65 von Bogdandy (note 63) 400 (He goes on to state that these theories 'are intellectual zombies of another time and should be laid to rest'). See also references in footnote 63.

international law.[66] This is partly because the theories raise fundamental questions about the nature and conception of law itself.[67] But this may also be because the relationship between domestic law and international law, and the concomitant development of various domestic laws and international law, has not remained static, but has evolved.[68]

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66 See e.g. Nijman & Nollkaemper, 'Beyond the Divide' in Nijman & Nollkaemper (note 62) 342 (They emphasise that 'it is far from clear what model would replace dualism as the previously dominant concept of the (dis-)connection between international and domestic law.' They go on to acknowledge that the different scholarly contributions collected in their book 'provide different, partly overlapping and partly competing, perspectives on possible alternatives'); PM Dupuy, 'International Law and Domestic (Municipal) Law' (last updated April 2011) in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* para 130 ('Whether a conclusive formula can be given for the actual relationship between international and municipal law remains in question. It certainly cannot be found in adherence to either of the traditional theoretical approaches. Dualists have had to introduce so many elements from the opposing concept that their position appears weakened. Likewise, monists have had to make considerable concessions in the light of State practice, which has deeply affected their initial idealistic concept'). However, for more recent support for monism, see e.g. P Gragl, *Legal Monism: Law, Philosophy, and Politics* (2018). See also A Cassese, *International Law* (2nd ed, 2005) 216–217 ('In short, international law no longer constitutes a sphere of law tightly separate and distinct (subject to one or two exceptions) from that of national legal systems. In many areas international law has made significant inroads into national legal systems, piercing their "armour". It no longer constitutes a different legal realm from the various municipal systems, but has a huge daily direct impact on these systems.')

67 Waldock (note 58) 121–122 ('These differences between the supporters of the monist and dualist theories reflect differences in their respective views concerning the very basis of law itself; and to a large extent their theories are the outcome of philosophical speculation rather than of a close analysis of the legal principles actually regulating the relation between international and national law to-day'); B Çali, *The Authority of International Law: Obedience, Respect, and Rebuttal* (2015) 137 ('Monism and dualism are best understood as worldviews that are dependent on more substantive …doctrines about international law. To put it differently, monism and dualism are conclusive statements of larger and more substantive theories one adopts on the nature of law, the nature of international law, the overlap between international law and domestic law, constitutional law, and more importantly, on the authority of international law.'). See also Starke (note 57) 74 (Starke explains that for Kelsen '[a]ny construction other than monism is bound to constitute a denial of the legal character of international law') and Kelsen *The Pure Theory of Law* (note 59) 329. Famously, Hart offered a critique of Kelsen's central theory of law (which underpinned Kelsen's monistic view of international law and domestic law), 'that all valid laws necessarily form a single system', in HLA Hart, 'Kelsen's Doctrine of the Unity of Law', in *Essays in Jurisprudence and Philosophy* (1983) 309ff.

68 See e.g. von Bogdandy (note 63) 399–400 (arguing that 'almost every relevant element has changed' in the legal context in the century since dualism and monist theories were developed and proposed); Lando Kirchmair, *Rethinking the Relationship Between International, EU, and National Law: Consent-Based Monism* (2024) 1–2 ('current developments, fundamental changes and new phenomena such as the massive increase in international institutions, actors, norms and tribunals as well as adjudicators make it imperative to seek new theoretical concepts'); Nijman & Nollkaemper 'Introduction' in Nijman & Nollkaemper (note 62) 11 ('Neither dualism nor monism in their traditional form are able to capture the diversity of the processes of globalization').

The most enduring legacy of these theoretical debates may be that there is still a tendency to label domestic legal systems, or features of such systems, as broadly 'monist' or 'dualist'. This is somewhat removed from grand theoretical debates about the nature of law and the interaction between international law and domestic law.[69] When 'monist' and 'dualist' are used as descriptive labels for domestic legal systems, they are generally understood as follows.

In a monist legal system, international law would form part of the domestic law without any act of domestic incorporation (often termed 'transformation'). International law is automatically incorporated as part of the domestic legal system.[70] In a dualist legal system, international law is treated as separate from domestic law, and can only create domestic rights and obligations if there is some domestic act that leads to the incorporation (or transformation) of that law into domestic law (usually by legislation).[71] But these descriptions are simplistic. And indeed, explained in this way, no domestic system would be purely monist or purely dualist. For instance, there is often a significant difference between the approach to customary international law and treaty law even within domestic legal systems. Most notably, many domestic systems give customary international law rules direct application absent domestic incorporation or transformation; even if

69 See e.g. D Sloss & M van Alstine, 'International Law in Domestic Courts' in Wayne Sandholtz and Christopher Whytock (eds), *Research Handbook on the Politics of International Law* (2017) 86 ('It is common in this context to draw a distinction between so-called 'dualist' and 'monist' approaches to international law. Theoretical debates aside, we use those terms to describe two broad types of domestic legal systems. The fundamental issue that divides the two is whether international norms have the status of law in the domestic legal system'); and D Sloss, 'Treaty Enforcement in Domestic Court: A Comparative Analysis' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) 6–7 ('[a]lthough scholars use the terms monist and dualist to describe different types of domestic legal systems, the actual legal systems of many states do not fit neatly into either of these two categories').

70 See e.g. Sloss & van Alstine (note 69) 97 (they note that, notwithstanding the differences between states, 'the key feature' of a 'monist' state 'is that at least some treaties function as directly applicable domestic law without implementing legislation'); J Hill *Aust's Modern Treaty law and Practice* (4th ed, 2022) 191; 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), https://www.ila-hq.org/en_GB/documents/conference-study-group-report-johannesburg-2016 ('ILA Final Report') para 17.

71 See e.g. Sloss & Van Alstine (note 69) 86 (they note, in relation to treaties (which they suggest provide the clearest example of the difference between 'monist' and 'dualist' states), that 'the key distinguishing feature of dualism is that no treaties have the formal status of law in the domestic legal system unless the legislature enacts a statute to incorporate the treaty into domestic law'; quoting D Sloss, 'Domestic Application of Treaties' in D Hollis (ed), *The Oxford Guide to Treaties* (2012) 370); Hill (note 70) 195; and ILA Final Report (note 70) para 17.

they require legislative incorporation in respect of treaties.[72] At best, one could say that domestic legal systems have more or less monist or dualist features.[73] But the practice of courts and domestic procedures may further blunt or moderate in principle (or de lege) monist or dualist features of a domestic legal system.[74] For these reasons, the use of the 'monist' and 'dualist' labels or theories as a framework for understanding how international law is in fact utilised in the domestic system has been subject to strenuous critique.[75] For instance, Nollkaemper, Shany and Tzanakopoulos have more recently argued that ' "hard" legal doctrine such as monism or dualism has

72 See e.g. ILA Report (note 70) para 18 (This provides an indicative summary of how a handful of different domestic legal systems each approach international law); MP Van Alstine, 'Summary and Conclusions' in D Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) ('Almost irrespective of the general approach to the domestic law effect of treaties whether traditional dualist or hybrid monist – a number of the country chapters report that domestic courts afford some form of direct effect for the rules of customary international law without any required sanction by domestic lawmaking institutions.'); Nollkaemper, Shany, & Tzanakopoulos (note 63) 9 (they note 'the distinction between the direct applicability of custom and the need for legislative incorporation of international treaties, which has been developed in the UK, and has been subsequently adopted by other common law jurisdictions.'); Y Iwasawa, *Domestic Application of International Law* (2022) 4; P H Verdier & M Versteeg 'International Law in National Legal Systems: An Empirical Investigation' (2015) 109 *American Journal of International Law* 514, 515 ('With respect to CIL, we find remarkable consistency across countries: the vast majority of national legal systems now recognize custom as directly applicable, at least in principle').

73 E de Wet, 'The Constitutionalization of Public International Law' in Rosenfeld, Michel, and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 1212 ('In practice, therefore, most systems functioned as a hybrid, incorporating both monist and dualist elements. However, these mechanisms are progressively eroding in an era where both the quantity of international decisions that directly affect individuals and the intensity with which such decisions affect the relationship between individuals vis-à-vis the state (and other individuals) are increasing'); Crawford (note 63) para 269 ('Classifying a State's constitutional design as either monist or dualist is not so much an exercise in absolutes as a matter of degree.'); Hill (note 70) 190 ('If one examines even a small selection of constitutions, it soon becomes apparent that many contain both dualist and monist elements'); Verdier & Versteeg (note 72) 516; and ILA Final Report (note 70) para 17.

74 See ILA Final Report (note 70) para 21–28. See also Nollkaemper, Shany, & Tzanakopoulos (note 63) 11 ('blunting moves or moderating techniques' — 'a combination of avoidance strategies, interpretative tools, and reactive application of conflicting or overlapping (or consubstantial) domestic norms' — 'allow domestic courts considerable latitude to either embrace or reject specific international law norms across a spectrum ranging between automatic incorporation (monism) and legal transformation (dualism)'). See also Sloss & Van Alstine (note 69) 114–115; and Woolaver, 'Engagement of South African Domestic Courts with International Law' (note 13).

75 See e.g. E Denza, 'The relationship between international and national law' in M Evans *International Law* 6 ed (2024) 338 ('To classify a State as "monist" or "dualist" does not assist in describing its constitutional approach to international obligations, in determining how its government and parliament will adopt or implement a new treaty, or in predicting how its courts will approach the complex questions which arise in litigation involving international law'); Crawford (note 63) para 272; and von Bogdandy (note 63) 399–400.

little if any value in explaining or predicting practices of engagement'[76] by domestic courts with international law.

Ultimately, each country's domestic constitutional framework determines how international law finds application within its domestic legal system.[77] Therefore, as I suggest in Chapter 3, trying to classify domestic legal systems as either 'monist' or 'dualist' often obscures more than it clarifies.[78] Such classification can oversimplify or overlook the complex and subtle realities of how each domestic legal system interacts with international law.[79] If one is to employ the terms 'monist' and 'dualist' as classifications, then at least one should view them as loose labels with countries finding themselves at various points on a monist-dualist spectrum, given their unique domestic constitutional arrangements and their courts' interpretation and application of these arrangements.[80] They should not be viewed as *a priori* obligatory orientations or approaches that courts are required to adopt, disconnected from the actual constitutional framework within which the courts operate.[81]

Therefore, to understand how international law is treated by a domestic legal system, one must look to its Constitution and to how the courts, in practice, approach the Constitution's treatment of international law. This study gives its primary attention to that task in relation to South Africa.

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76 Nollkaemper, Shany, and Tzanakopoulos (note 63) 6. They go on to say, at 11, in even more strident terms, that: 'The large number of variables affecting the end result—the specific terms of engagement—renders crude doctrinal distinctions, such as the traditional dichotomy between monist and dualist legal systems, even more useless.'

77 Crawford (note 63) para 272; ILA Final Report (note 70) para 19; Coutsoudis (note 13) 60–61.

78 See generally Chapter 3 and text and reference at footnotes 66–70 (read with footnote 6). See also E Denza 'The relationship between international and national law' in M Evans *International Law* 6 ed (2024) 338; Crawford (note 63) 269 ('The misleading terms "monism" and "dualism" are more appropriately framed as the ends of a continuum of domestic legal structuring, with much variation in between'); Sloss & Van Alstine (note 69) 87 ('Despite the formal distinctions, our analysis reveals few functional differences between dualist and hybrid monist states in the application of international norms.')

79 See e.g. Denza (note 15) 338; ILA Final Report (note 70) para 19.

80 See e.g. J Hill, *Aust's Modern Law of Treaties* 4 ed (2023) 190; Crawford (note 63) para 269; D Sloss, 'Treaty enforcement in domestic court: A comparative analysis' in Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement* (2009) 6–7; and PH Verdier and M Versteeg 'International law in national legal systems: An empirical investigation' (2015) 109 *AJIL* 514, 516.

81 See the critique of the *Zuma III* (note 48) in Chapter 3, Part 4.2.2. On the importance of considering each domestic system's approach to international law see e.g. Crawford (note 63) para 272; and R Jennings and A Watts, *Oppenheim's International Law*, Vol 1 (9th ed, 2008) 54 ('the main practical questions which arise — how do states, within the framework of their internal legal order, apply the rules of international law, and how is a conflict between a rule of international law and a national rule of law to be resolved? — are answered not by reference to doctrine but by looking at what the rules of various national laws and of international law prescribe'). See also Thomas Franck and Arun Thiruvengadam 'International Law and Constitution-Making' (2003) 2 *Chinese Journal of International Law* 467, 470.

## 5.2 Understanding the Constitution's openness to international law within its transformative agenda

In Part 1, when setting the scene for this study, I referred to the Constitution as 'transformative'. That descriptive label is generally accepted and used by South African courts, scholars, and is borne out by a reading of the Constitution's provisions.[82] As recognised by the Constitutional Court, the Constitution, expressly, aims at 'transforming [South African] society from an oppressive past to a non-racial, just and united nation'.[83] This has spurred considerable theoretical discussion and debate. Various scholars have sought to reflect on how the Constitution's transformative nature and agenda ought to shape the approach of courts and other organs of state. The label usually given to this jurisprudential or theoretical project is 'transformative constitutionalism'. It is a phrase coined by Karl Klare in a seminal article[84] that led to a flurry of subsequent scholarly contributions.[85] Yet, some three decades on, it would be challenging to suggest any generally agreed-upon theoretical understanding of this concept. Various scholars have articulated different views of what 'transformative constitutionalism' is and what it may require.[86] Klare famously suggested that 'transformative constitutionalism' was 'a long-term project of constitutional enactment,

82 See e.g. Oliver Fuo, 'The Transformative Potential of the Constitutional Environmental Right Overlooked in Grootboom' (2013) 34 *Obiter* 77, 78; D Davis & K Klare, 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights* 403, 404; D Davis, 'Transformation and the Democratic Case for Judicial Review: The South African Experience' (2007) 5 *Loyola University Chicago International Law Review* 45, 45; D Moseneke, 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 *South African Journal on Human Rights* 309; *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11, 2011 (4) SA 191 (CC) ('*McBride*') para 74 ('The Preamble to the Constitution, its founding values and this Court's jurisprudence have all emphasised that our venture in constitutionalism and democracy commits us to transforming our society from an oppressive past to a non-racial, just and united nation.'); *Soobramoney v Minister of Health, KwaZulu-Natal* (1998) 1 SA 765 (CC) para 8; and *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* [2000] ZACC 12, 2001 (1) SA 545 (CC) para 21.

83 *McBride* (note 82) para 74.

84 K Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 150.

85 See e.g. Catherine Albertyn & Beth Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *South African Journal on Human Rights* 248; M Pieterse, 'What Do We Mean When We Talk About Transformative Constitutionalism?' (2005) 20 *South African Public Law* 155; P Langa, 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351; T Roux, 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?' (2009) 20 *Stellenbosch Law Review* 258; Moseneke (note 82) 309; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010); J Brickhill & Y van Leeve, 'Transformative constitutionalism – Guiding light or empty slogan?' (2015) *Acta Juridica* 141; Davis & Klare (note 82); and Fuo (note 82).

86 Ibid.

interpretation, and enforcement committed … to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.'[87] However, as Pius Langa (then Chief Justice of South Africa), ruefully or ironically stated, '[i]t is perhaps in keeping with the spirit of transformation that there is no single stable understanding of transformative constitutionalism.'[88] He went on to argue that one could find a basis for agreeing on an understanding of the concept by reference to the 'postamble' (or epilogue) to the Interim Constitution,[89] which finds echoes in the preamble to the (final) Constitution.[90] The Constitution's preamble provides that it has been adopted 'as the supreme law of the Republic so as to':

> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> Improve the quality of life of all citizens and free the potential of each person; and
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

Notwithstanding ongoing debates, the concept (qua broad label or project) of 'transformative constitutionalism', if not its precise content, has found

87 Klare (note 84) 150.

88 Langa (note 85) 351. See also Albertyn & Goldblatt (note 85) 248–249.

89 Langa (note 85) 352. The Interim Constitution's postamble (titled 'National Unity and Reconciliation') provides that it is: 'a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.'

90 See e.g. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC) (per Ngcobo J) para 73 (Ngcobo J finds confirmation of the Interim Constitution's transformative vision in the postamble, which is 'affirmed and reinforced' by the final Constitution, and the transformative commitments articulated in its preamble); *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) para 69 (quoting Ngcobo J with approval).

significant adherents in South Africa[91] and abroad.[92] Some have suggested that at its core, given the plain text of the Constitution, there should be nothing particularly controversial about the transformative aspirations of the Constitution, whatever one's jurisprudential lens or political persuasions.[93] Nevertheless, 'transformative constitutionalism' has been open to contest when used to insist on more expansive claims, including about how constitutional adjudication ought to be approached under its aegis, or what transformative constitutionalism ought to be about.[94] And some scholars

91 See references above in note 85. See also more recently, J Fowkes, 'The License and the Burden: Transformative Constitutionalism under the ANC Constitutional Regime' (2025) 15 *Constitutional Court Review* 1; D Davis & K Klare, 'Two Cheers for Transformative Constitutionalism' (2024) 35 *Law & Critique* 487. For a useful summary of different approaches to and understanding of transformative constitutionalism, see H Klug, 'Transformative Constitutionalism as a Model for Africa?' in P Dann, M Riegner and M Bönnemann (eds), *The Global South and Comparative Constitutional Law* (2020) 141–149.

92 See e.g. M Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (2017) 65 *American Journal of Comparative Law* 527; O Vilhena, U Baxi and F Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013); A von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi and Flávia Piovesan (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (2017); P Dann, M Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (2020); Diego Werneck Arguelhes, 'Transformative Constitutionalism: A View from Brazil' in *The Global South and Comparative Constitutional Law* (note 91) 165 ('Since it appeared in the 1990s, the multifaceted notion of "transformative constitutionalism" (hereafter, "TC") has attracted attention as a distinctive ambition, challenge, or feature of "global south" constitutionalism. Recent scholarship has broadened the debate by looking for traces of TC in any legal system or tradition in which the constitutional text both requires social change and creates the legal and institutional tools to do so').

93 See e.g. Roux (note 85) 277 (Roux argues that key features of the transformative reading of the Constitution suggested by Klare are 'essential features of the constitutional text whether you like it or not'; 'any South African lawyer of whatever political persuasion and jurisprudential perspective' would accept them); Brickhill & van Leeve (note 85) 155 (Brickhill & van Leeve note that they 'largely agree' with Roux that 'the content of transformative constitutionalism (as understood by Klare) is so uncontroversial that it would be reached by any good faith reader adopting any of the main interpretative approaches of the Anglo-American legal tradition, from Hartian positivism to a Dworkinian approach'). See also Arguelhes (note 92) 165 ('If what we mean by "transformative" is, then, the combination of a text that contains a blueprint for a better society and the creation of certain institutions to promote it in practice, it is hard to find a constitution drafted in the last decades that is *not* transformative to some extent').

94 See, for instance, Roux's critique of what he views as Klare's central argument, that a critical legal studies interpretative approach 'is required in order to realise the full transformative potential of the Constitution'. Roux (note 85) 259.

have questioned whether the Constitution is simply inadequate or even an obstacle to achieving meaningful social transformation.[95]

Leaving aside the more difficult controversies as to the meaning, object, and value of transformative constitutionalism, it appears that two general propositions can be made that would be difficult to dispute. First, the Constitution has a purpose that can broadly be called transformative (meaning, in its simplest grammatical sense, aimed at bringing about change). Second, that purpose should be taken into account when interpreting the Constitution. The preamble to the Constitution, quoted earlier, makes this broad transformative agenda explicit, as do the provisions of the Constitution.[96] And it is generally accepted that, when interpreting any written document (including the Constitution), it is appropriate to take account of its purpose.[97]

However, it is worth underscoring that this study only examines how courts have given effect to one particular aspect of the Constitution's frame-

95 There have been some strident critiques of 'transformative constitutionalism' and indeed South Africa's entire constitutional project, particularly from a 'decolonial' perspective. See e.g. JM Modiri, 'Conquest and constitutionalism: first thoughts on an alternative jurisprudence' (2018) 34 *South African Journal on Human Rights* 300; T Madlingozi, 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 28 *Stellenbosch Law Review* 12; S Sibanda, 'Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) 22 *Stellenbosch Law Review* 482. For a discussion of these decolonial critiques and critical responses thereto, see T Roux, 'Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa' (2024) 57 *Verfassung und Recht in Übersee* 5; C O'Regan, 'Some Reflections on Theunis Roux's Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa' (2024) 57 *Verfassung und Recht in Übersee* 72; F Cachalia, 'Democratic constitutionalism in the time of the postcolony: Beyond Triumph and Betrayal' (2018) 34 *South African Journal on Human Rights* 375; D Davis, 'Is the South African Constitution an Obstacle to a Democratic Post-Colonial State?' (2018) 34 *South African Journal on Human Rights* 359; J Dugard & AM Sánchez, 'Bringing Gender and Class into the Frame: An Intersectional Analysis of the Decoloniality-As-Race Critique of the Use of Law for Social Change' (2021) 32 *Stellenbosch Law Review* 24. See also Davis & Klare (note 91) who argue that failures to achieve socio-economic transformation can be largely attributed to the absence of political will rather than the Constitution (arguing, at 529, that the Constitution is 'a storehouse of untapped legal values and technologies meant to nourish radical social change if deployed imaginatively'); and also Fowkes (note 91) 23–25 (suggesting not a rejection of transformative constitutionalism, but a less 'court-centric' focus).

96 As indicated above, the postamble to the Interim Constitution similarly envisages transformative objectives.

97 The importance of taking account of the purpose of written instruments when interpreting them has been accepted by South African courts (see e.g. *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18); including when interpreting the Constitution, see e.g. *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (6) SA 477 (CC) paras 36–37; and *Mansingh v General Council of the Bar and Others* [2013] ZACC 40, 2014 (2) SA 26 (CC) para 16. The need to take account of the object and purpose of a treaty when interpreting it is provided for in the Vienna Convention on the Law of Treaties, article 31(1). See generally Chapter 4.

work and agenda — its embrace of international law. It is beyond the scope of this study to consider whether the Constitution *ought* to have taken the approach it has to international law, or whether the transformative aims of the Constitution, as stated in its preamble, are capable of achievement by giving effect to the Constitution. Therefore, for the purpose of this thesis, it is sufficient to note that which is not controversial: the Constitution has, in various ways, adopted an open or integrative approach to international law. And South African courts are under a legal duty to give effect to the Constitution in the cases that come before them.[98]

Nevertheless, it is helpful to reflect on two aspects that can broadly be understood to fall within the Constitution's transformative agenda.

*First*, as some scholars have suggested, 'transformative constitutionalism' includes within its understanding the concept that part of the transformative agenda of the Constitution is to move from a 'culture of authority', under the apartheid regime, towards a 'culture of justification': 'a culture in which every exercise of power is expected to be justified.'[99] This view was most famously articulated by Etienne Mureinik.[100] In over thirty years of constitutional jurisprudence, this understanding that South Africa's constitutional project betokens a move toward a 'culture of justification' has been returned to by the Constitutional Court on many occasions.[101] It is one

98 See e.g. Constitution, section 165 ('The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'); and section 174(8) ('Before judicial officers begin to perform their functions, they must take an oath or affirm, … that they will uphold and protect the Constitution'). See also Chapter 5, Part 8.2.

99 Mureinik (note 29) 32; Pieterse (note 85) 156; Klug (note 91) 145–6; C Hoexter, 'Transformative adjudication in administrative law: The revolutionary jurisprudence of Edwin Cameron' in N Ally & L Boonzaier, *Edwin Cameron: Influences and impact* (2025) 201–202 ('While transformative constitutionalism has no fixed or agreed meaning, in South African public law it is associated primarily and ineluctably with the move from a culture of authority, the culture of the pre-1994 era, to a culture of justification. Achieving a culture of justification is a "central promise or vision of the 1996 Constitution", and arguably its most important contribution to the nascent democratic society'). For consideration of how the 'culture of justification' as a concept may find resonance in constitutional adjudication in other countries see M Cohen-Eliya & I Porat 'Proportionality and the culture of justification' (2011) 59 *American Journal of Comparative Law* 463.

100 Mureinik (note 29). Klare in his article on transformative constitutionalism in fact begins his discussions with an ode to Mureinik's academic contribution and inspiration and to his seminal conception of the Constitution as heralding a move to a culture of justification. Klare (note 84) 146–147.

101 See for instance *Makwanyane* (note 29) para 156 fn 1 (per Ackerman J); *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others* 2000 (2) SA 674 (CC) para 85 fn 107; *South African Police Service v Solidarity obo Barnard (Police and Prisons Civil Rights Union as amicus curiae)* [2014] ZACC 23 (CC), 2014 (6) SA 123 (CC) para 193 fn 220 (per Moseneke ACJ); *Chisuse and others v Director-General, Department of Home Affairs and another* [2020] ZACC 20 (CC), 2020 (6) SA 14 (CC) para 18; *Greater Tzaneen Municipality v Bravospan 252 CC* [2024] ZACC 20 (CC), 2025 (1) SA 557 (CC) para 45 (per Bilchitz AJ). For an example in the SCA, see *Democratic Alliance v President of the RSA and others* 2012 (1) SA 417 (SCA) para 67.

of the central conceptions of the 'transformative' character of the Constitution that the Constitutional Court itself has embraced.[102] This resonates with the Constitution's text. An outworking of this culture, where 'every exercise of power is expected to be justified', is given expression in various provisions of the Constitution: section 1(c) enshrines the supremacy of the Constitution and the rule of law as founding values;[103] section 2 provides that law or conduct inconsistent with the Constitution *is* invalid;[104] section 7(2) obligates the state to respect, protect, promote and fulfil the rights in the Bill of Rights;[105] section 41(1)(c) requires government to be 'accountable' and 'transparent';[106] and section 172(1)(a)[107] mandates the courts to declare conduct or legislation inconsistent with the Constitution invalid. The courts have accepted that these provisions mean that (a) all exercises of public power must comply with the Constitution and the rule of law (which the courts have interpreted to require, amongst other things, lawful

102 For an example of the Constitutional Court expressing this with particular rhetorical vigour see *Economic Freedom Fighters v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (3) SA 580 (CC) (*'EFF v Speaker of the National Assembly'*) para 1 ('One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.')

103 Section 1(c), provides that South Africa is 'founded on the values', amongst others, of: 'Supremacy of the Constitution and the rule of law.'

104 Section 2: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

105 Section 7(2): 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

106 Section 41(1)(c): 'All spheres of government and all organs of state within each sphere must …. provide effective, transparent, accountable and coherent government for the Republic as a whole'.

107 Section 172(1)(a): 'When deciding a constitutional matter within its power; a court – (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'.

and rational exercises of power),[108] and (b) that the courts bear a duty to ensure compliance with the Constitution.[109] The Supreme Court of Appeal, immediately before quoting Mureinik's conceptualisation of the move to a culture of justification, gives this understanding of constitutionalism and the founding value of the rule of law in South Africa:

> The rule of law is a central and founding value. No-one is above the law and everyone is subject to the Constitution and the law. The legislative and executive arms of government are bound by legal prescripts. Accountability, responsiveness and openness are constitutional watchwords. It can rightly be said that the individuals that occupy positions in organs of state or who are part of constitutional institutions are transient but that constitutional mechanisms, institutions and values endure. To ensure a functional, accountable constitutional democracy the drafters of our Constitution placed limits on the exercise of power. Institutions and office bearers must work within the law and must be accountable. Put simply, ours is a government of laws and not of men or women.[110]

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108 See e.g. *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* [2006] ZACC 9, 2007 (1) SA 343 (CC) para 29 ('[t]he exercise of public power is always subject to constitutional control and to the rule of law'); *Notyawa v Makana Municipality and Others* [2019] ZACC 43, 2020 (2) BCLR 136 (CC) para 38 ('The Constitution demands that all government decisions must comply with it, including the principle of legality which forms part of the rule of law, and which is one of our constitutional founding values'); *Mncwabe v President of the Republic of South Africa and Others* [2023] ZACC 29, 2024 (1) SACR 447 (CC) para 125 ('Legality applies to all exercises of public power. It requires that the exercise of public power be lawful and rational.') For a recent example, see *Director of Public Prosecutions, Johannesburg and Another v Schultz and Others; Director of Public Prosecutions, Bloemfontein v Cholota* [2026] ZACC 3 para 72 ('the exercise of the Executive's public power in relation to extradition requests remains subject to judicial review. Public power under the constitutional dispensation must be exercised rationally and lawfully.'). See also discussion of the rule of law in note 19.

109 *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC) para 33 ('[i]n our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so'); *Mphephu-Ramabulana and Another v Mphephu and Others* [2021] ZACC 43; 2022 (1) BCLR 20 (CC) para 65 ('a court which has found conduct to be unconstitutional enjoys no discretion, and must declare it invalid. This stringent injunction "gives expression to the supremacy of the Constitution and the rule of law", which are entrenched in the Constitution').

110 *Democratic Alliance v President of the RSA and others* 2012 (1) SA 417 (SCA) para 67. For an affirmation of this by the Constitutional Court, while differently expressed, see *EFF v Speaker of the National Assembly* (note 102) para 1. See also *Mohamed and Another v President of the RSA and Others* 2001 (7) BCLR 685 (CC) para 68 (the Court quotes with approval Justice Brandeis's statement in *Olmstead et al v United States* (1928) 277 US 438, 485 that '[i]n a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously.' The Court emphasised that Brandeis's 'warning was given in a distant era but remains as cogent as ever. Indeed, for us in this country, it has a particular relevance: we saw in the past what happens when the State bends the law to its own ends and now, in the new era of constitutionality, we may be tempted to use questionable measures in the war against crime').

*Second*, it seems beyond dispute that part of the transformative vision of the Constitution involves an embracing of international law, precisely because of the conscious rejection of South Africa's apartheid past.[111] Dikgang Moseneke (former Deputy Chief Justice of South Africa), who served on the technical drafting committee of the Interim Constitution that laid the foundation for the (final) Constitution,[112] pointed out that:

> As early as in its preamble, the Constitution announces an intention to build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. At a historical and practical level, the first object was to transform the international status of our country from a pariah or rogue state to a worthy participant in the international scene. At a jurisprudential level, our constitutional democracy embraces globalised standards and norms set by international law subject to very modest pre-conditions.[113]

Moseneke's views are shared by the courts,[114] and are plainly borne out by the Constitution's drafting history and materials.[115] Pursuant to section 68 of the Interim Constitution, the first democratically elected parliament of South Africa (consisting of a National Assembly and Senate) fulfilled the role of 'Constitutional Assembly' tasked with drafting and adopting the final Constitution. The Constitutional Assembly's drafting history and materials reveal an intentional embrace of international law as part of the rejection of, and safeguard against, South Africa's apartheid history. This can be illustrated by a few telling examples.

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111 See Chapter 3, text at footnotes 134–137, referencing, inter alia, *Law Society* (note 2) para 4; *Kaunda* (note 23) para 222; and *Minister of Justice v SALC* (note 30) para 63. See also R Oppong, 'Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa' (2007) 30 *Fordham International Law Journal* 296, 323.

112 See e.g. D Moseneke, 'Negotiations and an interim constitution' in D Moseneke, *My Own Liberator: A Memoir* (2016).

113 D Moseneke, 'The Role of Comparative and Public International Law in Domestic Legal Systems: A South African Perspective' (2010) 23(3) *Advocate* 63, https://www.gcbsa.co.za/law-journals/2010/december/2010-december-vol023-no3-pp63-66.pdf, 64, see also at 65 ('our constitutional and consequently judicial predilection for international law norms is rooted in our stubborn determination to turn our backs on an unjust and insular past and to embrace globalised standards which are likely to represent what is just and equitable. We recognise that international norms, whilst adaptable, are more likely to serve as a valuable and more timeless dam wall against the narrow, inward looking patriotism which sometimes renders the rule of law vulnerable to domestic populism').

114 *Law Society* (note 2) para 4; *Kaunda* (note 23) para 222; *Minister of Justice v SALC* (note 30) para 63.

115 As noted in Chapter 4, text at footnote 185, the Constitutional Court has accepted that the drafting material in respect of the Constitution (the 'preparatory work') may be considered for the purpose of interpreting the Constitution (*Association of Mineworkers and Construction Union & Others v Anglo Gold Ashanti Limited t/a Anglo Gold Ashanti & Others* 2022 (8) BCLR 907 (CC) paras 58–59). The use of preparatory work (travaux préparatoires) when interpreting treaties is discussed in more detail in Chapter 4.

In the drafting memorandum prepared by the Constitutional Assembly's Theme Committee tasked with addressing 'Foreign Relations and International Law',[116] it was noted that, '[t]here appears to be widespread support for the notion that South Africa must take its rightful place in the international community and become a party to international human rights conventions', and '[p]arties generally emphasise the importance of adherence to public international law in all spheres of state activity'.[117]

In a report prepared by the Constitutional Assembly's Theme Committee dealing with 'Supremacy of the Constitution and Accountability and Control of the Security Forces', it is recorded that there was agreement that '[t]he Constitution should state that the security apparatus should act within the law, Bill of Rights, Constitution *and relevant international law and conventions on armed conflict*'.[118] It was agreed that the Constitution needed to 'cover' and 'flesh out' these 'long standing principles' applicable to the security apparatus's conduct 'because South Africa is a new democracy with a *particularly troubled security apparatus history*'.[119] That 'troubled' history, chronicled for instance by South Africa's Truth and Reconciliation Commission, and subsequent inquests, included widespread human rights abuse and the use of extrajudicial killings and torture.[120]

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116 The committees of the Constitutional Assembly were made up of members of parliament, from various political parties, who were represented in each committee in proportion to each party's representation in parliament (see the Rules of the Constitutional Assembly of South Africa, https://peacemaker.un.org/en/documents/rules-constitutional-assembly-south-africa). See also *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC) (the Constitutional Court was required to certify that the Constitution complied with the principles set by the Interim Constitution; as required by section 71(2) of the Interim Constitution). For a comprehensive account of the constitution-making process see Hassan Ebrahim, *The Soul of a Nation: Constitution-Making In South Africa* (1998). For a general discussion on the negotiation and drafting process leading to adoption of the Final Constitution and public participation in these processes see J Sarkin, 'The Drafting of South Africa's Final Constitution From a Human-Rights Perspective' (1999) 47 *The American Journal of Comparative Law* 67; and Christina Murray, 'A Constitutional Beginning: Making South Africa's Final Constitution' (2001) 23 *University of Arkansas Little Rock LR* 809.

117 Constitutional Assembly, *Report from Theme Committee One: Block 8 – Foreign Relations and International Law* (31 July 1995), https://www.justice.gov.za/constitution/history/REPORTS/TC13107A.PDF, Part 2, Section A: General Discussion of the Material.

118 Constitutional Assembly, Theme Committee 6.4 (Specialised Structures of Government: Security Apparatus), *Final Report to the Constitutional Committee (Blocks 1 & 2): 'Supremacy of the Constitution and Accountability and Control of the Security Forces'* (27 February 1995), https://justice.gov.za/constitution/history/REPORTS/T64-2702A.PDF, 68 and A7, emphasis added.

119 Ibid at 53 and A1.

120 See, for instance, *Re-opened inquest into the death of Dr Hoosen Mia Haffejee* [2023] ZAKZPHC 93 (the Court pointed out, at para 121, that: 'The TRC found that during this period the State committed a host of gross violations of human rights in South Africa. These included, amongst other violations, extrajudicial killings and torture'); and *Re-opened inquest into the death of Ahmed Essop Timol* [2017] ZAGPPHC 652. See also generally Truth and Reconciliation Commission of South Africa, *Final Report* Vol 2 (1998), https://www.justice.gov.za/trc/report/finalreport/volume%202.pdf.

It is also evident from the drafting history of the Constitution's Bill of Rights that significant attention was paid to ensuring alignment with international human rights law.[121] Moreover, there was agreement as to the importance of requiring that the Bill of Rights be interpreted with due regard to international law.[122] The memorandum from the Technical Committee assisting Theme Committee 4 (dealing with Fundamental Rights), which was submitted to the Constitutional Committee of the Constitutional Assembly,[123] makes clear that the reason for including an express interpretation clause in the Bill of Rights (which requires, inter alia, international law to be considered) was to ensure transformation in the way the judiciary approached the interpretation of the Constitution. The Technical Committee emphasised that courts needed to be expressly enjoined to move away from a judicial approach to interpretation prevalent under apartheid, 'which took no notice of the values of the Roman-Dutch Law or internationally recognized human rights.'[124] As the Technical Committee noted, the interpreta-

121 Constitutional Assembly, Technical Committee of Theme Committee 4, *Overview of Method of Work* (10 October 1995) https://www.justice.gov.za/constitution/history/REPORTS/TC4-09105.PDF (this detailed memorandum prepared by the Technical Committee of Theme Committee 4, shows the attention paid to ensuring alignment with international human rights treaties and in the formulation of rights in the Bill of Rights); Moseneke 'The Role of Comparative and Public International Law in Domestic Legal Systems' (note 113) 64; Lourens du Plessis, 'International Law and the Evolution of (domestic) Human-Rights Law in Post-1994 South Africa' in Nijman & Nollkaemper (eds) (note 62) 312–313. It is also relevant that in certifying whether the Final Constitution complied with the binding 'Constitutional Principles' set by the Interim Constitution, the Constitutional Court considered international law, and in particular international human rights law (*Certification of the Constitution of the Republic of South Africa* (note 116)). The Constitutional Principles included the requirement that the Constitution protect 'universally accepted fundamental rights'. The Court interpreted this phrase to mean 'rights that have gained a wide measure of international acceptance as fundamental human rights' (para 51). For a discussion of the Constitutional Court's two certification decisions (the first refusing to certify that there was full compliance with the Constitutional Principles; and the second certifying the Constitution, after further amendments to the text) see Sarkin, 'The Drafting of South Africa's Final Constitution' (note 116) 72–76.

122 Constitutional Assembly, Theme Committee 4 (Fundamental Rights), 'Report and Explanatory Memorandum on the Interpretation of the Bill of Rights' (1995, undated) https://www.justice.gov.za/constitution/history/REPORTS/tc4-INTERPRE.PDF, at 3 and 6.

123 As explained in the Constitutional Assembly's first annual report: 'The Constitutional Committee (CC) was one of the first structures set up by the CA to act as the central coordinating body in the constitution-making process, and to receive reports from Theme Committees. It is also the body which in turn prepares reports for the CA in plenary. It consists of 44 members, drawn from all political parties in the CA, who are represented in this, as with all CA structures, on a proportional basis.' Constitutional Assembly, *Annual Report May 1994 – May 1995*, https://www.justice.gov.za/legislation/constitution/history/MEDIA/CA94_95.PDF.

124 Constitutional Assembly, Theme Committee 4 Technical Committee, 'Overview of Method of Work' (TC4-09105) (09 October 1995) https://www.justice.gov.za/constitution/history/REPORTS/TC4-09105.PDF, 279.

tion clause in the Bill of Rights[125] 'is unique in human rights law. It seeks to redress the agony of our past and to commit our law and its institutions to a future in which discrimination and repression have no place. It is a provision which enjoyed full support in the Kempton Park negotiations [to end apartheid and draft the Interim Constitution].'[126]

It is perhaps fitting to conclude by reflecting on how the Constitution's transformative commitments (particularly, the culture of justification, which can be seen as one animating part of its transformative blueprint) and its drafting history (especially the purposeful integration of international law) offer valuable context for understanding the two opening quotes in this introduction. They help to explain the Court's recognition of the key place given to international law in the 'architecture of the Constitution', and contextualise why South Africa's apartheid history 'informs the critical role that we need international law to play in the development and enrichment of our constitutional jurisprudence' and in the 'pursuit of good governance'.[127] And they provide a basis for understanding the Constitutional Court's emphatic pronouncements that there is 'no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law'.[128]

It is with this in mind that the study considers how South African courts have responded to the Constitution's embrace of international law.

125 Section 35 in the Interim Constitution, which remained substantively the same in section 39 in the final Constitution.

126 Constitutional Assembly, Theme Committee 4 Technical Committee, 'Overview of Method of Work' (TC4-09105) (09 October 1995) https://www.justice.gov.za/constitution/history/REPORTS/TC4-09105.PDF, 280.

127 *Law Society* (note 2) para 4.

128 *Glenister II* (note 1) para 202.

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

## 1 Introduction

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

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

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

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

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

## 2 Customary International Law and South African Law

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

### 2.1 Customary international law and its identification

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

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

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

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

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

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

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

8 See A Roberts, 'Traditional and Modern Approaches to Customary International Law: a Reconciliation' (2001) 95 *AJIL* 757; R Kolb, 'Selected Problems in the Theory of Customary International Law' (2003) 50 *Netherlands International Law Review* 119; AT Guzman, 'Saving Customary International Law' (2005) 27 *Michigan Journal of International Law* 115; Mario Prost, *The Concept of Unity in Public International Law* (2012) 97–102; and Michael Wood, 'Concluding Observations' (2017) 19 *International Community LR* 156. For a useful and extensive bibliography of the academic writing in this area see, *Fifth Report on Identification of Customary International Law*, Addendum, UN Doc A/CN.4/717/Add.1 (2018).

9 See the consideration of this issue by Michael Wood in his various reports as Special Rapporteur on the identification of customary international law: First report, UN Doc A/CN.4/663 (May 2013); Second report, UN Doc A/CN.4/672 (May 2014); Third report, UN Doc A/CN.4/682 (March 2015); Fourth report, UN Doc A/CN.4/695 (March 2016); and Fifth report, UN Doc A/CN.4/717 (March 2018): all available at https://legal.un.org/ilc/guide/1_13.shtml.

10 ILC Draft Conclusions (note 5) 126 (conclusion 2, commentary para 4). See also Wood (note 8) 157, 'Pleas for a "modern" custom in which either a general practice or its acceptance as law would not be necessary … were for the most part never more than an academic conceit among a few scholars. Such pleas gained no traction with States and no significant following among practitioners.'

11 See *Jurisdictional Immunities of the State Case* (*Germany v Italy*) (Judgment) [2012] ICJ Reports 99 para 122; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Reports 95 para 148; *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)* (Judgment) [1969] ICJ Reports 3 para 77.

12 See e.g. S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 *EJIL* 417; P Tomka, 'Custom and the International Court of Justice' (2013) 12 *Law & Practice of International Courts & Tribunals* 195; J Dugard and D Tladi, 'Sources of International Law' in J Dugard et al (eds), *Dugard's International Law* (5th ed, 2018) 33; S Yee, 'Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases' (2016) 7 *JIDS* 472, 479–87.

13 Article 38(1)(b) refers to 'international custom, as evidence of a general practice accepted as law'. See Malcolm Shaw, *International Law* (9th ed, 2021) 62, and James Crawford, *Brownlie's Principles of Public International Law* (9th ed, 2019) 18–21.

14 See ILC Draft Conclusions (note 5), commentary paras 1 and 4 to conclusion 2 at 125–126. See also Wood Second Report (note 9) paras 21 to 27, where Wood summarises the widespread support for the two-element approach in state practice, international court decisions, and the academic literature.

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

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

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

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

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

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

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

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

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

(i) Evidence of state practice can take the form of physical and verbal acts by states, as well as inaction, and would include, amongst other things, 'diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and *decisions of national courts*.'[23] The probative value of, and the weight to be attached to, different types of state practice is context-specific, and would have to be assessed given the particular circumstances at hand.[24]

(ii) The type of evidence which may demonstrate that there is acceptance as law (opinio juris) includes, but is not limited to, 'public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; *decisions of national courts*; treaty provisions; and conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference.'[25]

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

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

20 Conclusion 2, ILC Draft Conclusions (note 5) 124.
21 Conclusion 2 commentary para 1 of the ILC Draft Conclusions ibid 125.
22 Ibid.
23 Conclusion 6 of the ILC Draft Conclusions ibid 133, emphasis added.
24 Commentary on conclusion 6, para 8 of the ILC Draft Conclusions ibid 134.
25 Conclusion 10(2) of the ILC Draft Conclusions ibid 140, emphasis added.
26 ILC Draft Conclusions ibid 142.
27 Ibid.

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

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

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

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

28 Ibid, emphasis added.
29 Conclusion 13(1) of the ILC Draft Conclusions ibid 149, emphasis added.
30 Conclusion 13(2) of the ILC Draft Conclusions ibid 149, emphasis added.
31 Conclusion 13, commentary para 7, ILC Draft Conclusions ibid 150.
32 Ibid.
33 Conclusion 13(1) ibid provides: 'Decisions of international courts and tribunals, *in particular of the International Court of Justice*, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules' (emphasis added).
34 Commentary on conclusion 13, para 4 ibid 150.

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

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

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

35 Commentary on conclusion 13, para 3 ibid 149.
36 Commentary on conclusion 14, para 3 ibid 151.
37 Ibid.
38 Commentary on conclusion 14 para 4 ibid 151.
39 Ibid.

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

## 2.2 Customary international law in the South African legal system

### *2.2.1 How South African law treats customary international law*

As with any domestic legal system, South African law dictates the terms on which international law in general, and customary international law in particular, 'comes into', or forms part of, its law.[41] Section 232 of the Constitution provides that 'customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'[42] Thus, customary international law is expressly (and automatically) incorporated into South Africa's domestic law.[43] The only exception is that customary international law conflicting with the Constitution or an Act of Parliament does not form part of South African law.[44] Therefore, in principle, in the absence of a conflict[45] with the Constitution or national legislation, customary international law is *de jure* part of South African law. No act of domestic transformation or incorporation by courts or the legislature is required. For this reason, South African courts are, perforce, required to identify customary international law and how they identify customary international law matters.

### *2.2.2 The procedural issues in relation to customary international law*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 3 South African Courts' Engagement with Customary International Law

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

To determine which cases warranted detailed analysis, the following methodology was adopted. First, the various main law reporting series[57] were analysed to identify cases in which the court considered customary international law, and did so because customary international law was material to the decision. Cases that merely make passing reference to customary international law (for instance, where the existence of a particular customary international law rule is merely taken for granted, is not an issue in dispute in the matter, or is mentioned en passant) and where customary international law has no material impact on the decision were not analysed in detail.[58] Similarly, cases that dealt only with other aspects of international law (in particular international agreements) and which did not require the court to consider customary international law were not considered in

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

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

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

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

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

(i) In *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & another* ('*National Commissioner v SALC*')[60] — the Zimbabwean torture docket decision — the Constitutional Court reviewed and set aside the South African Police Service's decision not to investigate alleged torture committed by Zimbabwean police in the run-up to the 2008 elections in Zimbabwe, after the South African Police Service had been presented with a 'docket' of evidence of the alleged torture collated by a regional human-rights organisation.[61] In deciding the case, the Constitutional Court had to determine the relevant customary international law rules in relation to torture and universal jurisdiction.

(ii) In *Minister of Justice and Constitutional Development & others v Southern African Litigation Centre & others* ('*Minister of Justice v SALC*')[62] — the Al Bashir arrest case — the SCA held that the South African government acted unlawfully when it failed to arrest then Sudanese President Al Bashir while he was in South Africa and surrender him to the ICC.[63] In making this decision, the SCA needed to determine whether President Al Bashir enjoyed immunity under customary international law that prevented his arrest and surrender to the ICC.

(iii) In *Cherry Blossom*[64] — the Western Sahara mining case — a full court (three judges) of the High Court granted an interdict preventing a foreign ship carrying phosphate mined in Western Sahara, a non-self-

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

60 2015 (1) SA 315 (CC).

61 Ibid para 84, order 3.

62 2016 (3) SA 317 (SCA).

63 Ibid para 113, order 4.

64 *Cherry Blossom* (note 43).

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

(iv) In *DA v Minister of International Relations*[68] — the Grace Mugabe assault case — the High Court reviewed and set aside the Minister of International Relations' decision to recognise formally[69] the immunity of then Zimbabwean First Lady Grace Mugabe to prevent her from being prosecuted for an alleged assault committed while she was in South Africa.[70] The central issue in the case was whether, as a matter of customary international law, Grace Mugabe, as the spouse of a foreign head of state, also enjoyed personal immunity from foreign domestic prosecution.

(v) In *Law Society v President*[71] — SADC Tribunal suspension case — the Constitutional Court held that the President's participation in the decision by the SADC Summit[72] to suspend the SADC Tribunal (a regional human rights tribunal) and his signature of the 2014 Tribunal Protocol, which limited the Tribunal's jurisdiction to exclude individual complaints, were unlawful and unconstitutional.[73] In determining the case, it was necessary for the Court to identify whether articles 18 and 26 of the Vienna Conven-

65 Ibid para 107, order 1.

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

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

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

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

70 Ibid para 46, order 2.

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

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

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

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

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

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

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

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

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

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

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

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

## 4 The Patterns in the Last Decade of Material Engagement with Customary International Law

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

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

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

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

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

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

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

opinio juris.[84] At best, they consider a few foreign court judgments. These, in principle, may constitute state practice (and possibly opinio juris), but only of the states of those foreign courts. In *DA v Minister of International Relations*, a limited selection of foreign decisions appear, to an extent, to have been used as evidence of state practice.[85] However, most often, foreign judgments appear primarily to be relied on as a subsidiary means for determining customary international law (much like scholarly writings and international court decisions) — given the context and limited manner in which they are used.[86] The courts also, at times, rely on surveys of state practice and opinio juris by others, in particular, the ILC, writers, and other courts.[87] The tendency to 'outsource the determination of custom' by reliance on the identification of customary international law in various subsidiary means, rather than by undertaking any direct analysis of the primary evidence of state practice and opinio juris, is also common with other (non-South African) domestic courts.[88] The one notable exception in the cases analysed is that in *National Commissioner v SALC*, the SCA[89] considered some foreign

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

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

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

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

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

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

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

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

(i) The courts do not generally express any view as to what weight to give the various subsidiary means they consider. For instance, writers are often relied on as authority for the content of customary international law, but there is no discussion as to why certain writers are favoured over others, nor any consideration of whether these writers have themselves undertaken any detailed analysis of primary evidence.[91]

(ii) The same holds true for the use of foreign courts' pronouncements on customary international law. The courts consider only a limited number of foreign decisions in general terms, rather than seeking to consider a comprehensive range, or even a representative sample.[92] Moreover, there is no apparent engagement with why particular foreign courts' decisions are relied on, or whether, in those foreign courts' decisions, the foreign court had conducted any rigorous assessment, particularly of primary evidence, in respect of the relevant customary international law.[93]

(iii) Similarly, the courts have not in any (express) way indicated that they either cannot or should not consider primary evidence of state practice and opinio juris. In general, the courts simply do not consider primary evidence without indicating whether they believe this is unnecessary or simply not feasible. In fact, they rarely enunciate or consider the two-

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

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

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

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

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

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

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

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

95 See references at notes 80–3 above.

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

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

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

Despite the courts generally being reliant on the parties' submissions, in one of the recent cases analysed, the Constitutional Court appeared willing (to a limited extent) to go beyond what the parties placed before it. In *Law Society v President* the Constitutional Court, in considering whether the Vienna Convention represented customary international law, considered the websites of South Africa's Parliament[99] and its Chief State Law Advisor,[100] which indicated an acceptance by these organs of the South African state that the provisions of the Vienna Convention formed part of customary international law.[101] These websites were not drawn to the Court's attention by any of the parties (not in their affidavits, written legal submissions, or oral argument).[102] This is an instance where it appears that the Constitutional Court (sans fanfare) conducted its own, rudimentary, research into publicly available primary evidence at least of South Africa's state practice or opinio juris to supplement the arguments and evidence placed before it by the parties.

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

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

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

100 Although the Court did not refer to, or quote from, the relevant website, it is evident that it had in mind the following statement on the website of the Office of the Chief State Law Advisor: International Law: '[The Vienna Convention] is regarded as declaratory of customary international law and binds all states regardless of whether they are a party to it or not.' Available at http://www.dirco.gov.za/chiefstatelawadvicer/general.html.
Cf e.g. *Gabčíkovo-Nagymaros Dam Case (Hungary v Slovakia)* [1997] ICJ Reports 7 para 46. There is no general consensus that the entire Vienna Convention codifies customary international law. Rather, what is generally accepted is that the main provisions of the Convention (or at least certain of them) form part of customary international law.

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

102 The relevant papers are on file with the author.

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

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

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

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

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

106 See Coutsoudis & Du Plessis (note 45) 442.

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

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

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

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

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

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

110 Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 5 Reflections on Where We Are and Recommendations for Navigating the Road Ahead

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

### 5.1 Erring in good company

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

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

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

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129 See Talmon (note 12) 437 who notes, inter alia, that '[r]eference to the International Law Commission (ILC) is a favourite shortcut in establishing rules of customary international law. … In light of the ILC's extensive review of state practice and opinio juris in its reports and commentaries, this simply may be an example of the Court outsourcing the inductive process to the Commission.'

130 For a limited selection see: CL Lim, 'The Constitution And The Reception Of Customary International Law: Nguyen Tuong Van v Public Prosecutor' 2005 *Singapore Journal of Legal Studies* 218; S Stirling-Zanda, 'The determination of customary international law in European courts (France, Germany, Italy, The Netherlands, Spain, Switzerland)' (2004) 4 *Non State Actors and International Law* 3; BMJ Szewczyk, 'Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions' (2014) 82 *George Washington LR* 1118; B Maripe, 'Giving Effect to International Human Rights Law in the Domestic Context of Botswana: Dissonance and Incongruity in Judicial Interpretation' (2014) 14 *Oxford University Commonwealth LJ* 251; VH Hegde, 'Indian Courts and International Law' (2010) 23 *LJIL* 53; SY Marochkin and VA Popov, 'International Humanitarian and Human Rights Law in Russian Courts' (2011) 2 *Journal of International Humanitarian Legal Studies* 216; J Fleuren, 'The Application of Public International Law by Dutch Courts' (2010) 57 *Netherlands International LR* 245; Lord Collins & Tom Cross, 'The law of international custom in the case law of the House of Lords and the United Kingdom Supreme Court' in *The Judge and International Custom* (2016) 160; JL Guzmán Dalbora, 'The Treatment of International Crimes in Chilean Jurisprudence: A Janus Face' (2010) 10 *International Criminal LR* 535; D Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (2011); P Staubach, 'The Interpretation of Unwritten International Law by Domestic Judges' in HP Aust and G Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (2016).

131 In addition to the various studies in note 130, see also Ryngaert & Siccama (note 88) 24 quoted at note 88; Van Alebeek, who suggests generally (albeit writing particularly in the context of immunity): 'There is no doubt that domestic immunity decisions often display a highly unsatisfactory knowledge of international law.' (R van Alebeek, 'Domestic Courts as Agents of Development of International Immunity Rules' (2013) 26 *LJIL* 559, 565); M Iovane, 'Domestic Courts Should Embrace Sound Interpretative Strategies in the Development of Human Rights-Oriented International Law' in A Cassese (ed), *Realizing Utopia: The Future of International Law* (2012) 612: 'Domestic courts have often sought confirmation of their conclusions about the existence and scope of customary law in earlier decisions by national and international courts on the same subject. In other words, they recognize the effectiveness of a given rule insofar as it is applied by other judges, and not in the repeated behaviour of a state.'

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

### 5.2 Concerns about the courts' reliance on subsidiary means

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

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

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

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

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

(i) While the courts have on a number of occasions relied on decisions of the ICJ (amongst other sources), and in one decision there was a passing recognition of the 'authoritative' nature of ICJ decisions,[137] they have not made clear whether, in principle, ICJ decisions are to be favoured over, for instance, any pronouncements by UK domestic courts (upon which South African courts regularly rely).[138]

(ii) One sees no indication that South African courts see the value or need to treat foreign court decisions with caution, nor the need, where available, to consider a wider range of decisions from different countries' courts. Foreign domestic courts may serve as subsidiary means to identify customary international law, but, as we have seen, they should be used with caution since they may be affected by their unique domestic legal framework and national perspective, they may lack international law expertise,[139] and their determination of a customary international law rule may be superficial.[140]

(iii) In respect of academic writers, while it is quite common for domestic courts to 'make sometimes copious reference to jurists' writings',[141] when South African courts rely on academic writers, there is no consideration given as to which writers on the subject area are to be favoured or relied on, or why.[142] Thus, there is undoubtedly scope, in line with ILC's recommendations in the Draft Conclusions, for the courts to be more careful to ensure that where they rely on writers, those writers have themselves done sufficient work to establish the customary international law on the basis of primary evidence, and to ensure that a range of scholarship is considered (especially from different regions, if possible).

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135 See Part 4, third point.

136 See Part 4, fourth point.

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

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

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

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

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

142 See references in note 80 above.

(iv) The reliance by South African courts in some cases on the ILC's work[143] is to be welcomed. Domestic courts do well to rely on the expertise and breadth of research of the ILC, where this is available, which should at least avoid the danger of establishing customary international law with reference only to limited subsidiary means for determination, and in the absence of the consideration of the relevant primary evidence.[144] However, while at times the courts have relied on the work of the ILC, South African courts have not suggested that they will generally seek to consider the ILC work when this is available (and if not, why not). Such a suggestion in a judgment would no doubt galvanise litigants and their legal representatives, in future cases, to seek out, where available, relevant ILC reports and place those before the courts.

### 5.3 Ways of moderating the adversarial limitations on courts

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

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

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

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

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

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

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

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

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

147 Ibid paras 33–47.

148 Ibid para 133.

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

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

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

appears no reason why, for instance, the Venice Commission[152] could not be relied on, where the need arises, not merely to provide comparative law research, but research in respect of a customary international law issue. In fact, in 2011, the Constitutional Court of Peru requested the Venice Commission to submit an amicus brief in a case before the Court to deal with a series of questions in respect of crimes against humanity. This required the Venice Commission to provide research *inter alia* into state practice or opinio juris evidenced by various court decisions.[153] Naturally, the possible use of the Venice Commission is merely one avenue of potential direct research that the Court has employed on occasions to ensure that it had detailed evidence as to the comparative legal position across a number of jurisdictions. This demonstrates an ability and willingness to conduct primary research, or to draw on the assistance provided by authoritative bodies, that goes beyond the parties' legal submissions or papers, when the courts think it necessary to do so. And, while the Constitutional Court is better placed than any lower courts to conduct its own research, international efforts are being made to make evidence of state practice more easily accessible to those who are required to identify customary international law.[154] This could be drawn on not only by parties, but by courts too.

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

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

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

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

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

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

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

156 The papers are on file with the author.

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

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

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

160 See s 173 of the Constitution.

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

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

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

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

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

164 Written submissions on file with the author.

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

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

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

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

167 Ammann (note 2) 270.

168 ILC Draft Conclusions (note 5) 122.

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

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

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

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

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

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

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

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

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

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

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

174 Section 211(3).

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

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

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

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

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

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

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

179 See note 19.

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

181 UNGA Resolution 73/203 (note 17).

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

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

## 6 Conclusion

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

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

# 3 Making Sense of the South African Courts' Evolving Approach to the Application of Unincorporated Treaties*

## 1 Introduction

Treaties play a significant role in determining the content and reach of international law. Over the last few decades, there has been a considerable increase in treaty-making and the range of matters now governed by treaty, including those that directly impact or confer rights on individuals.[1] Moreover, it often falls to domestic courts to mediate the interface between international treaty law and domestic law and determine if and how treaties find application in the domestic sphere.[2] The effects of this trend are also evident in South Africa.[3] This chapter thus considers the evolving manner in which

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1 D Hollis, 'A comparative approach to treaty law and practice' in D Hollis, M Blakeslee, B Ederington (eds), *National Treaty Law and Practice* (2005) 2 ('As international law has expanded its coverage from traditional areas of interstate relations such as commerce and navigation to cover virtually every area of human endeavor, treaties have paved the way.'); OA Hathaway, 'International delegation and state sovereignty' (2008) 71 *Law and Contemporary Problems* 115, 115 ('In the early years of the 21st century, over 50,000 international treaties cover topics ranging from taxation to trade to torture — and just about everything in between').

2 M Shaw, *International Law* (9th ed, 2021) 119 ('There is indeed a clear trend towards the increasing penetration of international legal rules within domestic systems coupled with the exercise of an ever-wider jurisdiction with regard to matters having an international dimension by domestic courts. This has led to a blurring of the distinction between the two previously maintained autonomous zones of international and domestic law, a re-evaluation of the role of international legal rules and a greater preparedness by domestic tribunals to analyse the actions of their governments in the light of international law').

3 As at 2020, South Africa had entered into 2 419 bilateral treaties and 744 multilateral treaties (see the Department of International Relations and Cooperation's presentation to the Select Committee on Security and Justice (National Council of Provinces), 14 Oct 2020, available at https://pmg.org.za/committee-meeting/31204/). See also the South African Treaty Register, an online repository of the treaties that South Africa is party to, available at https://treaties.dirco.gov.za/dbtw-wpd/textbase/treatywebsearch.htm. Of course, even before the advent of the Constitution, while not frequent, treaties did, on occasion, come before the courts. For an early example, see *Randfontein Estates Gold Mining Co Ltd Appellant v Custodian of Enemy Property Respondent* 1923 AD 576, where the Appellate Division had to consider whether certain shares and bearer debentures were, as a consequence of the Treaty of Versailles (made applicable by a proclamation under domestic legislation), property that could be confiscated.

its courts apply treaties[4] (what the South African Constitution refers to as 'international agreements'[5]) within the framework of the Constitution of the Republic of South Africa, 1996 ('Constitution'). The chapter focuses on the courts' approach to the application of 'unincorporated treaties'; ie treaties that have not been incorporated into South African law in terms of domestic legislation. The chapter aims to answer two primary questions. How do unincorporated treaties find application in South African law? And has the approach to application changed over time?

An analysis of the application of treaties reveals how the Constitutional Court's application of the Constitution's international law provisions in particular cases has led to an evolution in how the Court applies unincorporated treaties over time. Early in the Constitutional Court's jurisprudence one observes an approach to treaty application that can be broadly described as predominantly 'dualist'[6] (which suggests that while treaties may be used as interpretative aids, they must generally be incorporated into domestic law by legislation for them to create domestic rights and obligations). However, the Court's jurisprudence has in successive cases evolved so that now one sees, in practice, a far more nuanced, if not always consistent, paradigm in which unincorporated treaties do create domestically enforceable obligations on the government. The apotheosis of this new paradigm is the *Law Society* decision.[7] In that case, the Constitutional Court effectively accepted — given several different constitutional hooks, including the rule of law (and the principle of legality that flows from it) and the Constitution's automatic incorporation of the customary international law obligation to comply with binding treaty obligations — that it would be domestically unconstitutional and unlawful (and reviewable by domestic courts) for the government to violate any of South Africa's obligations under unincorporated treaties.[8]

The chapter begins in Part 2 by outlining the various ways that treaties find application in South African law. Part 3 offers a descriptive evaluation of the Constitutional Court's evolving approach to the application

4 The term 'treaty', which is widely used in international law, will be adopted in this chapter, and will be taken to mean, as provided in art 1(a) of the Vienna Convention on the Law of Treaties (1969) 8 ILM 679 ('Vienna Convention'), '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'.

5 It is generally accepted that the terms are intended to be synonymous, see J Dugard & A Coutsoudis, 'The Place of international law in South African municipal law' in J Dugard, M du Plessis, T Maluwa & D Tladi (eds) *Dugard's International Law* (5th ed, 2018) 86.

6 This label is used in this chapter, as, in contradistinction, is the 'monist' label (which will similarly be used as shorthand for a position where treaties can create rights and obligations on the domestic plane without first having to be incorporated into domestic law by legislation). The use and issues with these labels are discussed, with reference to authorities, in more detail at notes 68–70.

7 *Law Society of South Africa and Others v President of RSA and Others* [2018] ZACC 51, 2019 (3) SA 30 (CC) ('*Law Society*').

8 Discussed and explained in Part 3.3.

of unincorporated treaties within the framework of the Constitution by considering three seminal cases: *Azapo*,[9] *Glenister II*,[10] and *Law Society*. In Part 4, the chapter considers whether, in the few years since the *Law Society* decision, the Court's approach in that case has in fact been followed in subsequent cases. In that analysis, we are confronted by the Constitutional Court's recent *Zuma III* decision.[11] In this case, one sees a reversion to a traditional 'dualist' view of the applicability of treaties, without any apparent reflection on the inconsistency with the Court's earlier jurisprudence and the Constitution's international-law-friendly (or -integrative) scheme. Yet, from a consideration of the Court's decisions in the brief period since *Zuma III* was decided, it appears that its approach in *Zuma III* may prove to be an aberration — even if, on the other hand, an analysis of recent cases also creates little certainty that the Constitutional Court will fully embrace and apply the approach to unincorporated treaties enunciated in *Law Society*.

Having considered the courts' evolving approach to the application of unincorporated treaties, in Part 5, the chapter argues that there is a need for the courts to adopt an approach to the application of unincorporated treaties that is guided by four principles anchored in the Constitution. The approach should be: holistic (having due regard to the whole Constitution); harmonising (ensuring that, where possible, domestic law and international law do not conflict); certain; and rigorous. Flowing from these four principles, the chapter makes certain proposals for charting the course ahead.

## 2 How Are Treaties Made Applicable in South Africa?

Each country's domestic constitutional schemes determine how international law will find application within its domestic law.[12] The Constitution, as the supreme law of South Africa,[13] governs the reception of international law into South African law. It is, therefore, necessary to consider how the Constitution makes international law, in general, and treaty law, in particular, applicable and the manner in which the courts have interpreted the Constitution's international law (or international-law-integrative) provisions.

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9 *Azanian People's Organization (AZAPO) & Others v President of the Republic of South Africa & Others* [1996] ZACC 16, 1996 (4) SA 672 (CC) ('*Azapo*').

10 *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC) ('Glenister *II*').

11 *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] ZACC 28, 2021 (11) BCLR 1263 (CC) ('*Zuma III*').

12 J Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Pocket Books of Hague Academy, 2014) para 272 ('domestic or national law dictates the terms on which international law "comes in" to domestic law and this preliminary competence is actually allowed or contemplated by international law itself. For international law allows States to have diverse constitutional arrangements, including as to the relations with international law').

13 Constitution s 1(c).

## 2.1 The direct incorporation of treaties under section 231 of the Constitution

Unlike with customary international law,[14] the Constitution has no express provision which provides for the automatic incorporation of all treaties that are binding on South Africa on the international plane into South African law. In principle, the direct reception of treaties into South African law is governed by section 231 of the Constitution. Section 231 prescribes how South Africa enters into and becomes bound by treaties on the international plane and how those treaties are domesticated (incorporated into South African law or given domestic effect). The section delineates the functions of, and the separation of powers between, the national executive and the legislature in relation to binding South Africa to treaties. The executive is empowered to negotiate and sign treaties (section 231(1)). However, as a matter of domestic law, it is permissible for South Africa to become bound by a treaty only after it has been tabled before both houses of Parliament and approved by them (section 231(2)). What this means in practice is that it is only once Parliament has approved a treaty that the executive may take steps on the international plane to bind South Africa to the treaty (usually by depositing an instrument of ratification or accession with the treaty depositary).[15] The requirement for prior parliamentary approval applies to all treaties, save for a small subset of treaties governed by section 231(3). Section 231(3) provides that a treaty which is of a 'technical, administrative or executive nature or does not require either ratification or accession', binds South Africa without parliamentary approval, but it must still be tabled before Parliament. It has been accepted that these section 231(3) treaties are 'merely "of a routine nature, flowing from daily activities of government departments" which would not generally engage or warrant the focussed attention or interest of Parliament.'[16]

Subsections (1) to (3) of section 231 are concerned with the domestic requirements for treaties to be made binding on South Africa on the international plane. The domestication of treaties (the incorporation into

14 Section 232 of the Constitution provides that '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' For a general consideration of the identification and application of customary international law by South African courts, see Chapter 2.

15 This is discussed in A Coutsoudis & 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 ('Coutsoudis & du Plessis CCR') 174–175. See also F Sucker, 'Approval of an International Treaty in Parliament: how does section 231(2) 'Bind the Republic'?' 5 *Constitutional Court Review* 417.

16 *Earthlife Africa & Another v Minister of Energy &* Others [2017] ZAWCHC 50, 2017 (5) SA 227 (WCC) ('*Earthlife*') para 114. For further discussion see Coutsoudis & du Plessis CCR (note 15) at 178-180.

South African law) is dealt with separately in section 231(4).[17] This section provides that treaties become 'law' in South Africa by way of national legislation (legislative incorporation). The only exception in section 231(4) is in respect of what the Constitution refers to as 'self-executing provisions' of treaties which Parliament has approved in terms of section 231(2). These self-executing provisions do not require legislative incorporation (domestication). Like customary international law,[18] these self-executing provisions automatically become part of South African law if not inconsistent with the Constitution and national legislation, as provided in section 231(4). The Constitution does not define what is meant by 'self-executing provisions', and the Constitution's provision for the automatic incorporation of self-executing portions of treaties into South African law has received little attention from the courts.[19] Indeed, in the sole reported case where a High Court was willing to hold that a treaty was self-executing, on appeal to the Constitutional Court, the Constitutional Court found a different basis to determine the case, and left open the question of whether the treaty might be self-executing.[20]

Thus, in general (and subject to the material qualifications considered in Part 2.2), as the Constitutional Court has affirmed, 'international treaty law only becomes law in the Republic once enacted into domestic legislation.'[21] However, section 231 only deals with how, formally, the Constitution provides for treaties binding on South Africa to be directly incorporated into South African law. As summarised in the next part, the Constitution also

17 Section 231(4) provides that '[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'

18 Constitution s 232.

19 Dugard & Coutsoudis (note 5) 81–86. See also S Samtani, 'International law, access to courts and non-retrogression: Law Society v President of the Republic of South Africa' (2020) 10 *Constitutional Court Review* 197, 214–217.

20 *President of the Republic of South Africa and Others v Quagliani* [2009] ZACC 1, 2009 (2) SA 466 (CC) ('*Quagliani*') (hearing appeals from *Goodwin v The Director-General, Department of Justice and Constitutional Development* 2008 JDR 0671 (T), where the High Court held that the ICCPR was self-executing, and *Quagliani v President* Unreported, TPD Case No 959/04, 18 April 2008 (unreported), which found that the ICCPR was not self-executing). For a critique of this case, see N Botha 'Rewriting the Constitution: The ''strange alchemy'' of Justice Sachs, indeed!' (2009) *34 South African Yearbook of International Law* 253; W Scholtz & G Ferreira 'The Interpretation of Section 231 of the South African Constitution: a Lost Ball in the High Weeds!' (2008) 41(2) *Comparative and International Law Journal of Southern Africa* 324; and Dugard & Coutsoudis (note 5) 84–85.

21 *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & Another* [2014] ZACC 30, 2015 (1) SA 315 (CC) ('*National Commissioner*') para 24; *Glenister II* (note 10) para 181; and *Democratic Alliance v Minister of International Relations* [2017] ZAGPPHC 53, 2017 (3) SA 212 (GP) ('*DA v Minister (ICC Withdrawal)*') para 35 ('once parliament approves the agreement, internationally the country becomes bound by that agreement. Domestically, the process is completed by parliament enacting such international agreement as national law in terms of s 231(4)').

provides an express interpretative role for international law, including unincorporated treaties, which the courts have used, together with the Constitution's other international-law-integrative provisions, to give unincorporated treaties some domestic effect, particularly in relation to the obligations they place on organs of state.

## 2.2 The slightly messier position in practice: interpretative instruments and back-door application

While the South African courts have been quick to affirm that formal incorporation of treaties into domestic law requires domesticating legislation,[22] this is far from the complete picture. The courts have often, directly and indirectly, applied unincorporated treaties in South African law.

At the least contentious end of the scale, unincorporated treaties have often been relied on as interpretive instruments (or aids), when domestic legislation or the Bill of Rights (chapter 2 of the Constitution) is interpreted.[23] The Constitution expressly provides for this. Section 233 requires legislation to be interpreted as far as reasonably possible in accordance with 'international law'.[24] The reference to 'international law' has been accepted to include treaties binding on South Africa.[25] Similarly, section 39(1)(b) requires courts, when interpreting the Bill of Rights, to consider international law (which has been interpreted to include binding and non-binding

22 *National Commissioner* (note 21) para 24.

23 In relation to legislative interpretation, see e.g. *Van Zyl NO v RAF* [2021] ZACC 44, 2022 (3) SA 45 (CC) paras 78–86, cf para 105; *S v Okah* [2018] ZACC 3, 2018 (4) BCLR 456 (CC) ('*Okah*') para 38; and *National Commissioner* (note 21) para 77, read with para 23. In relation to the interpretation of rights in the Bill of Rights, see e.g. *Kaunda & Others v President of the RSA & Others (2)* [2004] ZACC 5, 2005 (4) SA 235 (CC) ('*Kaunda*') paras 30–35; *Bhe & Others v Magistrate, Khayelitsha & Others* [2004] ZACC 17, 2005 (1) SA 580 (CC) paras 49 to 59; *Government of the Republic of Zimbabwe v Fick & Others* [2013] ZACC 22, 2013 (5) SA 325 (CC) ('*Fick*'); *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others* [2004] ZACC 25, 2005 (2) SA 140 (CC); *DE v RH* [2015] ZACC 18, 2015 (5) SA 83 (CC); and *Mahlangu & another v Minister of Labour & others* [2020] ZACC 24, 2021 (1) BCLR 1 (CC) paras 41–46, 58.

24 Constitution s 233 ('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.') For a discussion of this provision see Coutsoudis & du Plessis CCR (note 15) at 157–8 and *S v Okah* (note 23) para 38.

25 In *Okah* (note 23) this acceptance is implicit from the interpretative reliance that the Constitutional Court places on various binding unincorporated treaties. See A Coutsoudis & M du Plessis, 'We are all International Lawyers Now: the Constitution's International-Law Trifecta Comes of Age' (2019) 136 *SALJ* 433 (Coutsoudis & du Plessis SALJ), 441–442 (As discussed in that article: 'It is an open question whether the Constitutional Court's willingness to adopt a broad interpretation of the reference to international law (to include non-binding sources) in s 39(1)(b) when interpreting the Bill of Rights, will also extend to s 233's interpretative injunction when interpreting legislation.') See also D Tladi 'The interpretation and identification of international law in South African courts' (2018) 135 *SALJ* 708, 724–5 (Tladi suggests that the more far-reaching implications of s 233 might necessitate a more limited interpretation of 'international law' than s 39(1)(b)'s reference to 'international law').

treaties, with more weight given to treaties that bind South Africa).[26] Section 39(2) also requires that when 'developing the common law…every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. In practice, the Constitutional Court has adopted an interpretative approach that melds these two interpretative injunctions in sections 39(1)(b) and 39(2). The Court, in effect, takes the view that it ought to consider international law when developing the common law (albeit indirectly via its interpretation of the Bill of Rights). This approach is most clear in the *Fick* decision.[27] In *Fick*, the Constitutional Court effectively found an obligation to develop the common law so as to give effect to treaty obligations in an unincorporated treaty (the SADC Treaty).[28]

In addition to using unincorporated treaties as interpretative instruments pursuant to sections 233 and 39(1)(b), they have also been used more directly when it comes to challenges to the constitutionality and lawfulness of government action. Perhaps the starkest example of this is found in *Law Society* (the SADC Tribunal decision).[29] In that relatively recent case, the Constitutional Court held that the conduct of the President as a member of the highest decision-making body of an international organisation (the Summit of SADC[30]) — in participating in its decision to suspend the SADC Tribunal and signing a new Tribunal Protocol which would limit the Tribunal's jurisdiction to inter-state complaints — had breached South Africa's treaty obligations and violated the treaty rights of SADC citizens (in particular their ability to institute claims against member states). Consequently, the Court held that the President's conduct was unconstitutional and unlawful

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26 Section 39(1)(b) provides that '[w]hen interpreting the Bill of Rights, a court, tribunal or forum… must consider international law'. See *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC) ('*Grootboom*') para 26 and *S v Makwanyane & another* 1995 (3) SA 391 (CC) ('*Makwanyane*') para 35. See Coutsoudis & du Plessis SALJ (note 25) 440–441.

27 *Fick* (note 23). See also, more recently, *Tshabalala v S; Ntuli v S* [2019] ZACC 48, 2020 (3) BCLR 307 (CC), where in Victor AJ's concurring judgment (paras 93–98), she had regard to treaties that South Africa was party to and found that these created 'an obligation on the State, including this Court, to develop the domestic laws to ensure that women are protected from sexual violence', which she held to be an additional basis for confirming that application of the doctrine of common purpose to the common-law crime of rape. To an extent this is also evident (but less directly explained by the Court) in *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SA 938 (CC) — see discussion by N Botha 'The Role of International Law in the Development of South African Common Law' (2001) 26 *South African Yearbook of International Law* 253, 259.

28 *Fick* (note 23) para 69 (emphasis added) ('The Amended [SADC] Treaty, incorporating the Tribunal Protocol, places an international law obligation on South Africa to ensure that its citizens have access to the Tribunal and that its decisions are enforced. Section 34 of the Constitution must therefore be interpreted, and the common law developed, so as to grant the right of access to our courts to facilitate the enforcement of the decisions of the Tribunal in this country. This, as said, will be achieved by regarding the Tribunal as a foreign court, in terms of our common law.')

29 *Law Society v President* (note 7).

30 The Southern African Development Community ('SADC').

and ordered the President to withdraw his signature from the new Tribunal Protocol. The critical feature of the case, for this chapter, is that the treaty at issue (the SADC Treaty,[31] which, by subsequent amendment, incorporated the 2000 Tribunal Protocol[32]) had not been incorporated into South African law by national legislation, nor was there any suggestion that the treaty was self-executing.[33] The implication of this case will be discussed in detail in Part 3.3. In summary, the principle that appears to be established by the case is that, as a matter of South African law, all governmental exercises of public power must comply with all of South Africa's treaty obligations (regardless of whether the treaty has been domesticated), failing which that conduct can and will be reviewed and set aside by South African courts. In practice, this could do away with most of the substantive distinction between incorporated and unincorporated treaties when assessing whether government actions are domestically lawful. It may, in effect, indirectly allow some domestic enforcement of international treaty rights afforded to individuals, because the government, by being ordered to act in accordance with South Africa's treaty obligations by a domestic court, could be required to protect and fulfil those rights. This development will be critically evaluated in Part 3.3.2. But, as we shall see, the position adopted by the Constitutional Court in *Law Society* may prove to be something of an outlier. Time will tell whether South African courts build on and cement this jurisprudential development, or seek to distance themselves from it, whether expressly or by necessary implication. Part 4 considers whether there are any initial indications as to which approach the Constitutional Court may adopt.

## 2.3 Summarising how treaties find application in South African law

Given what is set out in Parts 2.1 and 2.2, in summary, one sees that treaties have effect in South African law in the following ways:

(a) treaties form part of South African law, as provided for by section 231(4) of the Constitution, when incorporated into South African law by national legislation;[34]
(b) treaties form part of South African law, as provided by section 231(4) (but almost never applied in practice) if, even in the absence of incorporation by national legislation: (i) the treaty has been approved by Parlia-

31 The Treaty of the Southern African Development Community, 1992 ('SADC Treaty').
32 Protocol on Tribunal in the Southern African Development Community, 2000 ('2000 Tribunal Protocol').
33 I return to this issue in Part 3.3.2.4.
34 There are numerous examples of this. To list only a small selection: The International Convention on Salvage (1989) 1953 UNTS 165 is incorporated by the Wreck and Salvage Act 94 of 1996; the Rome Statute of the ICC (1998) 2187 UNTS 90, 37 ILM 999 is incorporated by the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002; the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) 330 UNTS 3, 7 ILM 1042 is incorporated by the International Arbitration Act 15 of 2017; and the Hague Convention on the Civil Aspects of International Child Abduction (1980) 19 ILM 1501 is incorporated in terms of the Children's Act 38 of 2005.

ment, (ii) its provisions are self-executing, and (iii) those provisions are not in conflict with the Constitution or national legislation;

(c) treaties may have domestic effect, even when not formally incorporated and not self-executing, as the standard by which the exercise of public power by organs of state should be measured for lawfulness — this is considered in detail in Parts 3 and 4;

(d) treaties indirectly have effect, given sections 233 and 39(1)(b) of the Constitution, by shaping the interpretation of legislation and the Bill of Rights, and, through the interpretation of the Bill of Rights, the development of the common law.[35]

## 3 From Azapo to Law Society: The Arc of the Court's Approach to the Application of Unincorporated Treaties

It is useful to plot the arc of the Constitutional Court's approach to the application of unincorporated treaties by focusing on three seminal cases: *Azapo*, decided in 1996; *Glenister II*, decided in 2011; and *Law Society,* decided at the end of 2018.

### 3.1 Azapo – The Constitutional Court's early affirmation of a strict 'dualist' approach

*Azapo* (the Truth and Reconciliation Commission ('TRC') amnesty case)[36] was decided a little over a year after the Constitutional Court heard its first matter in 1995. It involved a challenge to the constitutionality of legislation (the TRC Act)[37] that provided for the granting of amnesty by the Amnesty Committee of the TRC.[38] The case was of significant political moment, given that the granting of amnesty was the linchpin of the Truth and Reconciliation process adopted by South Africa to transition from the abhorrent apartheid regime to its new constitutional democracy. International treaty law was at issue because, as part of the applicants' case, they argued that in terms of the Geneva Conventions,[39] to which South Africa was a party, South Africa was obliged to prosecute those responsible for gross human rights violations. Therefore, the applicants

35 Constitution s 39(2) read with s 39(1)(b).

36 *Azapo* (note 9).

37 The Promotion of National Unity and Reconciliation Act 34 of 1995 — colloquially referred to as the Truth and Reconciliation Act ('TRC Act') (see *Azapo* (note 9) para 3).

38 *Azapo* (note 9) para 5.

39 Ibid para 25 (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; and Geneva Convention relative to the Protection of Civilian Persons in Time of War). South Africa only became a party to the first Additional Protocol to the Geneva Conventions after the end of apartheid (see ibid para 29 fn 29).

argued that the provisions of section 20(7) which authorised amnesty for such offenders constituted a breach of international law.[40]

What is relevant to this chapter is the view taken by the Court regarding the limited effect of treaties, save if they had been domesticated by national legislation. The Court dismissed any attempt by the applicants to directly rely on the Geneva Conventions, which were binding on South Africa, in the analysis of whether the TRC Act's provisions for the granting of amnesty were unlawful. The Court pointed out that:

> International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, *relevant only in the interpretation of the Constitution itself*, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law. *International 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*.[41]

In other words, the Court emphasised that unincorporated treaties only had an interpretative role under South Africa's Constitution.[42] And, absent incorporation by domestic legislation, those treaties were not enforceable at the instance of private individuals before the courts.[43] Therefore, the Court held that '[t]he exact terms of the relevant rules of public international law contained in the Geneva Conventions relied upon on behalf of the applicants would therefore be *irrelevant* if, on a proper interpretation of the Constitution, section 20(7) of the Act is indeed authorised by the Constitution'.[44] However, the Court, in any event, held (based on a limited and superficial consideration) that 'the content of these Conventions in any event do not assist the case of the applicants'.[45]

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40 Ibid para 8.

41 Ibid para 26, emphasis added.

42 While the decision was taken under Interim Constitution (1993):
(a) there are significant similarities in the treatment of treaties in the final (1996) Constitution (one of the material differences is that the Interim Constitution did not include the equivalent interpretative injunction to s 233 of the final Constitution, in relation to interpreting legislation in accordance with international law); and
(b) this statement by the Court in *Azapo* was quoted with approval by Ngcobo CJ (writing for the minority) in *Glenister II* (note 10) para 92 decided under the final Constitution; which the majority appears to accept, see *Glenister II* (note 10) para 181.
The one significant change in the final Constitution was the introduction of the concept of 'self-executing provisions' of treaties, which do not require domestic incorporation to have domestic effect. But this provision has been mostly ignored by the courts, and has thus, in practice, played almost no part in the application of treaties in South Africa.

43 *Azapo* (note 9) para 26.

44 Ibid para 28, emphasis added.

45 Ibid. For a critical discussion of the Court's superficial engagement with the relevant international law issues, see J Dugard, 'Is the Truth and Reconciliation Process Compatible with International Law – An Unanswered Question – *Azapo v President of the Republic of South Africa 1996*' (1997) 13 *South African Journal on Human Rights* 258.

This relatively simple world heralded by *Azapo* hewed closely to the 'dualist' position in South African law that existed in respect of treaties before the entering into force of the Constitution (which the Court in *Azapo* expressly relied on).[46] This approach appears to be reflected in how section 231 of the Constitution generally deals with the approach to the domestic application of treaties.[47] However, this straightforward world became somewhat more complicated about a decade and a half later in the *Glenister II* matter.[48]

### 3.2 Glenister II – an evolving approach to unincorporated treaties

As one sees from *Azapo*, the Constitutional Court had no difficulty considering unincorporated treaties as an interpretative aid when interpreting the Bill of Rights. However, it emphasised that the obligation in section 35(1) of the Interim Constitution (which is substantively the same as section 39(1)(b) in the final Constitution) was 'only to "have regard" to public international law if it is applicable to the protection of the rights entrenched in the chapter.'[49] In other words, the Court was pointing out that the obligation was not necessary to ensure conformity with international law (including unincorporated treaties) but merely to have regard thereto (or in the words

46 *Azapo* (note 9) para 26 fn 28 (As authority for the Court's proposition that for treaties to be enforceable in domestic law they need to be incorporated in domestic law by legislation, the Court referred to a number of pre-Constitutional cases, *Pan American World Airways Incorporated v S.A. Fire and Accident Insurance Co. Ltd.* 1965 (3) SA 150 (A) 161C, *Maluleke v Minister of Internal Affairs* 1981 (1) SA 707 (B) 712G–H, *Binga v Cabinet for South West Africa and Others* 1988 (3) SA 155 (A) 184H–185D, *S v Petane* 1988 (3) SA 51 (C) 56F–G, and a decision of the UK House of Lords, *R v Secretary of State for the Home Department, Ex parte Brind & Others* [1991] 1 AC 696 (HL) 761G–762D).

47 The Court in *Azapo* ibid para 27, interpreted s 231(3) of the Interim Constitution to accord with the pre-Constitutional position in relation to the need for domestic legislation to incorporate treaties. The Interim Constitution's language is less clear as to the need for domestic legislation (referring to the need for Parliament to expressly agree that the treaty will become part of domestic law, without defining whether that express agreement required incorporative legislation) than the more express provisions of s 231(4) of the final Constitution (which made clear, that domestic legislation was required to give domestic effect to treaties).

48 *Glenister II* (note 10).

49 *Azapo* (note 9) para 27, referring to s 35(1) of the Interim Constitution, which is, in material part, the same as section 39(1) of the final Constitution. Section 35(1) of the Interim Constitution provides that when interpreting the Bill of Rights, the Court 'shall have regard to public international law', and section 39(1)(b) of the Constitution provides that when interpreting the Bill of Rights the Court 'must consider international law'. Textually and contextually there is no difference: in this context 'shall' and 'must' mean the same, as do 'have regard' and 'consider'. These superficial differences have never been interpreted by the courts to suggest that these provisions should bear substantively different meanings. Indeed, the Constitutional Court has used 'have regard to' as interchangeable with 'consider'. See e.g. *Mahlangu & another v Minister of Labour & others (Commission for Gender Equality and another as amici curiae)* [2020] ZACC 24, 2021 (1) BCLR 1 (CC) para 42; *Thubakgale & others v Ekurhuleni Metropolitan Municipality & others* [2021] ZACC 45, 2022 (8) BCLR 985 (CC) para 111.

of section 39(1)(b) of the final Constitution to 'consider'[50] international law when interpreting the Bill of Rights) — as one interpretative consideration among many. Nevertheless, given that the Bill of Rights set out a series of broadly defined rights of people and obligations for the state, the use of international law, even as an interpretative aid, leaves significant scope for unincorporated treaties to have a material effect on how the Court interprets these rights and obligations. In *Glenister II*, the Constitutional Court made use of this interpretative scope to full and dramatic effect — more, as we shall see, as a launching pad, than an endpoint.

*Glenister II* involved a constitutional challenge to domestic legislation for failure to create a sufficiently independent corruption-fighting unit. The Constitutional Court effectively found that unincorporated treaties to which South Africa was party, in relation to the combating of corruption, were relevant to whether the state had fulfilled its obligation under section 7(2) of the Bill of Rights 'to respect, protect, promote and fulfil the rights in the Bill of Rights.' The Court held that section 7(2) was the relevant lens through which to assess any failure to create an adequately independent corruption-fighting unit, because corruption is a grave threat to the protection and fulfilment of all the rights in the Bill of Rights.[51]

Importantly for the current analysis, the Court made clear that the unincorporated treaties that South Africa is a party to are the benchmark for assessing whether the government had acted reasonably to fulfil its constitutional obligation under section 7(2).[52] This did not expressly incorporate those treaties into South African law, and one could argue that the Court's approach merely used the treaties as an interpretative instrument to determine the nature of the obligation created by section 7(2), as envisaged by section 39(1)(b) of the Constitution.[53] But, in practice, the Court appears to give the treaties much more direct (and substantive) effect than merely as an adjunct to interpreting the Constitution[54] — certainly more than the thin obligation 'only to "have regard" to public international law' (or to 'consider international law' to use the language of the final Constitution) envisaged by the Court in *Azapo*. For in the Court's interpretation of the Constitution, it held that 'our *Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law,* and *makes them the*

50 As discussed above in note 49.

51 *Glenister II* (note 10) para 168.

52 Ibid para 194.

53 For instance, see *Glenister II* ibid para 194 and discussion by C Gowar, 'The Status of International Treaties in the South African Domestic Legal System: Small Steps towards Harmony in Light of Glenister' (2011) 36 *South African Yearbook of International Law* 307, 320 and B Meyersfeld, 'Domesticating International Standards: The Direction of International Human Rights Law in South Africa' (2013) *Constitutional Court Review* 399, 408–9.

54 For a consideration of the implications of *Glenister II* see Gowar ibid at 323–325 and E Cameron 'Constitutionalism, Rights, and International Law: The Glenister Decision' (2013) 23 *Duke Journal of Comparative & International Law* 389, 402–406, 408–409.

*measure of the State's conduct in fulfilling its obligations in relation to the Bill of Rights*.'[55] Thus, the Court is suggesting that treaties that are binding on South Africa on the international plane have direct domestic (at least obligatory) effect on the government, as 'the measure of'[56] whether the government has done enough to comply with its obligations to safeguard and fulfil rights in the Bill of Rights.

Moreover, it is evident that South Africa's treaty obligations in relation to combating corruption[57] had a significant impact in the case. Although channelled (or mediated) through section 7(2), they nevertheless emphatically cast a domestic obligation on the government.[58] This is made clear in the Court's findings. In particular, the Court held that '[t]he obligations in these Conventions are clear and they are unequivocal. They impose on the Republic the duty in international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere and *is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere*.'[59] Similarly, the Court held that 'the fact that s 231(2) provides that an international agreement that Parliament ratifies "binds the Republic" is of prime significance. It makes it unreasonable for the State, in fulfilling its obligation under s 7(2), to create an anti-corruption entity that lacks sufficient independence', since 'the Republic is bound under international law to create an anti-corruption unit with appropriate independence'.[60]

Reading these pronouncements together, within the context of the case, one sees that the Constitutional Court seeks to meld South Africa's treaty obligations on the international plane with the domestic obligations placed on the government by the Constitution. Nevertheless, the Court (perhaps wary of being seen to depart too far from its earlier jurisprudence and given the dissenting minority judgment's warning against using interpreta-

55 *Glenister II* (note 10) para 178, emphasis added.

56 Ibid.

57 The Court considered the relevant provisions of the following unincorporated treaties, to which South Africa was a party: the United Nations Convention against Corruption (2003) 2349 UNTS 41, (2004) 43 ILM 37; the African Union Convention on Preventing and Combating Corruption (2004) 43 ILM 5 ('AU Convention'); Southern African Development Community Protocol against Corruption ('SADC Corruption Protocol') adopted on 14 August 2001 and Southern African Development Community Protocol on Combating Illicit Drugs ('SADC Drugs Protocol') adopted on 24 August 1996. *Glenister II* (note 10) paras 183–186.

58 For instance see Gowar (note 53) at 325 and G Ferreira & A Ferreira-Snyman 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' (2014) 17 *Potchefstroom Electronic LJ* 1471, 1482.

59 *Glenister II* (note 10) para 189, emphasis added.

60 Ibid para 194.

tion to domesticate treaty obligations through the back door[61]) states that '[t]his is not to incorporate international agreements into our Constitution.' Rather, said the Court, this is merely 'to be faithful to the Constitution itself, and to give meaning to the ambit of the duties it creates in accordance with its own clear *interpretive injunctions*.'[62] It is not immediately apparent (nor does the Court explain) how these statements, which seem to downplay the significance of the Court's decision, can be readily reconciled with its earlier statements in the same judgment (quoted above).[63]

However one characterises, or critiques, what the Court was doing and why,[64] it is evident that the Court was to an extent domesticating South Africa's international treaty obligations, even if indirectly, via the interpretative (back) door of section 39(1)(b) read with the government's broad positive obligations under section 7(2). This is a practical and substantive (and perhaps even a principled) change from what one saw in *Azapo*. In his extra-curial writings, Justice Edwin Cameron (who co-authored the Court's majority decision in *Glenister II* with Moseneke J) acknowledged that this was a sea-change.[65] Cameron points out that:

> The position thus taken in *Glenister* cuts through the theoretical debate about the relationship between international law and national law – the monism/dualism debate. *Before Glenister*, the legal position within South Africa regarding international treaties *clearly reflected the dualist conception*—a treaty that has been signed and ratified, but not enacted into local law, was regarded as "binding on South Africa [only] on the international plane." … This position dramatically limited the domestic impact of the state's undertaking of international human rights obligations……*But Glenister goes far further than this. It cuts through the debate and draws international law directly into the domestic sphere, using the provisions of the Constitution itself*.[66]

In the article, while Justice Cameron sought to emphasise that the Court was moving away from a 'dualist conception' of the place of international

61 Ibid para 98 ('But treating international conventions as interpretive aids does not entail giving them the status of domestic law in the Republic. To treat them as creating domestic rights and obligations is tantamount to "incorporat[ing] the provisions of the unincorporated convention into our municipal law by the back door"'). The minority (per Ngcobo CJ, with Brand AJ, Mogoeng J and Yacoob J concurring), quotes from the Australian decision of *Minister for Immigration and Ethnic Affairs v Teoh* [1995] 183 CLR 273, 291. In the context, the Australian High Court made clear that because ratification of an unincorporated treaty may provide a factual ground (absent other indication to the contrary) for a legitimate expectation that government officials would act in accordance therewith, this did not mean that the government was obligated thereby to comply.

62 *Glenister II* (note 10) para 195.

63 Ibid para 178, quoted above at note 55.

64 There have been many critical academic reflections on *Glenister II*. See, for instance, Sucker (note 15); J Tuovinen 'What to Do with International Law? 3 Flaws in *Glenister*' (2015) 7 *Constitutional Court Review* 435; and Meyersfeld (note 53).

65 Cameron (note 54).

66 Ibid at 404–405, emphasis added.

law, he hastens to add that the Court in *Glenister II* was not 'adopting a monist approach.'[67] At this point, we should pause to observe that the use of the terms 'monist' and 'dualist' as descriptive labels, while often used and broadly understood shorthand,[68] can be imprecise, misleading and sometimes unhelpful.[69] They can be misleading and unhelpful if viewed and applied as binary alternatives. They are, at best, loose general descriptions, rather than representing a strict dichotomy. Most countries find themselves somewhere on a spectrum, given their unique domestic constitutional arrangements and their courts' interpretation and application

67 Ibid at 405.

68 A Aust, *The Modern Law of Treaties* (3rd ed, 2013) 161–162 ('Although no two constitutions are identical, there are two general approaches to how states deal with treaties: "dualism" and "monism". … The two terms are general descriptions of the way in which treaties are dealt with in a state's domestic law. It must be stressed, however, that both approaches are doctrines that have been developed in an attempt to explain the general approaches by states. Although monism is often presented as the opposite of dualism, this is misleading. *If one examines even a small selection of constitutions, it soon becomes apparent that many contain both dualist and monist elements. In this matter the constitutional practices of states make up a spectrum*' (emphasis added)). See also, 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), available at https://www.ila-hq.org/en_GB/documents/conference-study-group-report-johannesburg-2016, para 17 ('If the domestic constitution adopts a monist approach, international law is (ideally) 'automatically' considered part of domestic law and thus incorporated in the legal order of the State. If, by contrast, the domestic constitution takes a dualist stance, then international law remains an external body of law that must be transformed into domestic law through the adoption of some domestic (usually legislative) act in order to lay claim to application in the domestic jurisdiction and before domestic courts.') But Tzanakopoulos makes clear, para 19, that 'the distinction between monism and dualism is simplistic and often unhelpful'.

69 PH Verdier & M Versteeg, 'International Law in National Legal Systems: An Empirical Investigation' (2015) 109 *AJIL* 514, 516 (Verdier and Versteeg conclude, after a detailed empirical comparative survey of domestic legal systems, that 'the monist-dualist distinction has fundamental limitations for the purpose of classifying national approaches to international law. First, because they derive from a theoretical debate about the nature of international law rather than an effort to classify actual legal systems, "neither theory offers an adequate account of the practice of international and national courts, whose role in articulating the positions of the various legal systems is crucial." Second, national systems do not adopt a monolithic approach to international law; most of them combine aspects of the monist and dualist approaches. For example, in the United Kingdom treaties do not become part of domestic law unless implemented by Parliament, while courts may directly apply international custom. Finally, because the distinction is articulated at a high level of generality, scholars sometimes differ as to whether a particular country should properly be classified as "monist" or "dualist."'). See also Tzanakopoulos, ILA Final Report ibid paras 17–20; and A Paulus, 'The Emergence of the International Community and the Divide between International and Domestic Law', in J Nijman and A Nollkaemper (ed), *New Perspectives on the Divide between National and International Law* (2007) 234 ('For domestic courts, the pluralism of legal orders implies that the general characterization of the relationship between "international" and "national" law as "monist" or "dualist" will often not be very helpful').

of these arrangements.[70] In that context, we should observe that despite Justice Cameron's suggestion that the Court was not 'adopting a monist approach', it is clear that *Glenister II* moved much closer, on a spectrum, to a 'monist' approach[71] (which is traditionally understood to refer to an approach by which countries' legal systems 'give direct effect to ratified treaties in the domestic legal order without legislative implementation'[72]) in practice and substance (since it 'draws international [treaty] law *directly* into the domestic sphere' without any legislative incorporation[73]). The Court was evidently signalling a move well beyond, or along the spectrum away from, the standard or strict 'dualist' approach (treaties do not create domestic rights and obligations unless incorporated by legislation), while not formally jettisoning the need for treaties to be incorporated by legislation in order for full domestic effect to be given to their provisions (since the Court's judgment was limited to placing domestic obligations on government to comply with South Africa's treaty obligations in order to protect and fulfil rights in the Bill of Rights).

Nevertheless, any debate as to the use of the 'monist' or 'dualist' labels should not obscure the critical point: Justice Cameron, correctly, views *Glenister II* as a watershed in South African law's approach to treaties. He conceives of a before-*Glenister II* and after-*Glenister II* dichotomy: 'Before *Glenister [II]*' the position was one way (it 'clearly reflected the dualist conception'[74]); after *Glenister II* it was another (treaties are 'draw[n]' '*directly* into the domestic sphere, using the provisions of the Constitution itself'[75]). He was not alone in viewing the effect of *Glenister II* in this way.[76] And, we should note that similar 'monist' shifts, by way of judicial practice, have been perceived in the jurisprudence of other countries whose legal systems,

70 D Sloss, 'Treaty Enforcement in Domestic Court: A Comparative Analysis' in Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement* (2009) 6–7 (Sloss correctly points out that '[a]lthough scholars use the terms monist and dualist to describe different types of domestic legal systems, the actual legal systems of many states do not fit neatly into either of these two categories.'); Aust (note 68); and Tzanakopoulos ILA Final Report ibid.

71 Cameron (note 54) at 405.

72 P Verdier & M Versteeg, 'Separation of Powers, Treaty-Making, and Treaty Withdrawal: A Global Survey' in CA Bradley (ed) *The Oxford Handbook of Comparative Foreign Relations Law* (2019) 137. See, for instance, Article 55 of the Constitution of the French Republic ('Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.')

73 Cameron (note 54) 405 (emphasis added).

74 Ibid 404.

75 Ibid 405 (emphasis added).

76 For instance, see Gowar (note 53) at 325 who writing shortly after *Glenister II* (note 10) was handed down, opined that: 'This bold move by the Constitutional Court [in *Glenister II*] can be seen as *a step forward on the road towards a monist approach*, a step closer to achieving harmony between international law and the domestic system' (emphasis added).

at least formally, have a broadly 'dualist' approach to treaties.[77] However, it is clear that the approach taken by the Court in *Glenister II*, while certainly novel at the time, sought to ground itself squarely in the express provisions of the Constitution (sections 39(1)(b) and 7(2)). And although the approach has been welcomed,[78] as well as critiqued,[79] it has been applied in subsequent decisions as part of the Constitution's international-law-friendly (or international-law-integrating) provisions.[80]

### 3.3 Law Society – from evolution to revolution?

If *Glenister II* was the first herald of a sea-change from the simple dualist world of *Azapo*, then the *Law Society* decision (delivered about eight years after *Glenister II*) appeared to confirm and build on that sea-change and arrive at a jurisprudential destination that might be its apotheosis. To see why, one needs to analyse what occurred in the case. An overview of the central facts is set out in Part 2.2.[81] Crucially, the Court in *Law Society* went well beyond using section 7(2) of the Constitution as the lens through which, in effect, to incorporate international obligations via the back door of interpretation.[82] Indeed, the decision makes clear that if the government acts in such a way as to cause South Africa to violate an unincorporated treaty, this would constitute domestically reviewable, unlawful, and unconstitutional conduct. A careful analysis of the decision demonstrates a number of bases, grounded in the Constitution, for this approach (which I refer to as 'constitutional hooks', but which could also be called 'constitutional routes').

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77 For instance, see M Waters, '*The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties*' (2007) 107 *Columbia Law Review* 628 (see e.g. at 633: 'creeping monism describes a phenomenon in which common law courts are abandoning their traditional dualist orientation and are beginning to utilize unincorporated human rights treaties in their work despite the absence of legislation giving domestic legal effect to the treaties'); VK Singh, 'India' in F Palombino, (ed) *Duelling for Supremacy: International Law vs. National Fundamental Principles* (2019) (see e.g. at 146: 'Indian courts sharply reflect monist tendencies, often producing direct effects for international law in the Indian legal system.'); and P Ranjan 'The Supreme Court of India and International Law: A Topsy-turvy Journey from Dualism to Monism' (2022) 43 *Liverpool Law Review* 571.

78 For instance, see Gowar (note 53) 325 and Ferreira & Ferreira-Snyman (note 58) 1490–1.

79 For instance, see Sucker (note 15) discussed below.

80 For instance, see *Sonke Gender Justice NPC v President of the Republic of South Africa & Others* [2020] ZACC 26, 2021 (3) BCLR 269 (CC) ('*Sonke*') discussed in Part 4.2.1; *Fick* (note 23) paras 28, 66, and 67; *Khosa & Others v Minister of Defence and Military Veterans & Others* [2020] ZAGPPHC 147, 2020 (5) SA 490 (GP) paras 128-129; *McBride v Minister of Police & others* [2015] ZAGPPHC 830 (GP), 2016 (4) BCLR 539 (GP) at 17, 18, and 35; and *McBride v Minister of Police & another (Helen Suzman Foundation as amicus curiae)* [2016] ZACC 30 (CC), 2016 (11) BCLR 1398 (CC) paras 15–16, 35–36.

81 For a more detailed consideration of the facts, see Coutsoudis & du Plessis CCR (note 15) 161–164.

82 Coutsoudis & du Plessis CCR ibid 184–188.

### *3.3.1 Law Society's further constitutional hooks for the application of unincorporated treaty obligations*

The constitutional 'hooks' relied on in *Law Society* generally appear different from (or additional to) the section 7(2) approach taken by the Court in *Glenister II* [83] — nevertheless, they seem to flow from, or build on, the Court's reasoning in *Glenister II*.[84] In the *Law Society* judgment, the Court does not always delineate which of these 'hooks' is doing the work. It is, therefore, helpful to differentiate each 'hook', even if they may be overlapping and reinforcing.

First, the Court held that the effect of section 231(2)[85] is that if Parliament has approved a treaty, in order for South Africa to be bound by that treaty on the international plane, then it would be unconstitutional for the government to act in conflict with that treaty.[86] The Court does not explain its reasoning. While not articulated, it appears that the constitutional predicate for the Court's reliance on section 231(2) may be that conduct by the executive that puts South Africa in violation of its binding treaty obligations on the international plane would undermine the legislature's constitutionally required approval of that treaty, and, hence, violate the separation of

83 Ibid.

84 Justice Cameron (Cameron (note 54) 405–406), in explaining the import and implications of the *Glenister II* judgment, appears at least to foreshadow two of the constitutional hooks enunciated in *Law Society* (the separation of powers hook and the rule of law hook), which I discuss below: 'The Constitution sets the limits within which lawmakers exercise their legislative powers. It follows that the Constitution places an obligation on lawmakers to pay heed to the Republic's international obligations when drafting legislation. While section 231 does not have the effect of elevating all international obligations to the status of constitutional obligations, *it does mean (when read with other provisions of the Constitution) that the state's international obligations are enforceable to some degree on the domestic plane, by domestic actors*. The majority in effect found that the constitutional scheme, taken as a whole, cannot mean that the national executive could proclaim and act in accordance with one position at the international level, but adopt a different approach within the domestic arena. A dichotomy of this sort would raise at least rule of law issues—and the rule of law is enshrined as a founding value of the Constitution.' See also the Court's reference in *Law Society* (note 7) para 73 to *Glenister II* ('in *Glenister II*, we spoke poignantly about the legal and constitutional implications of Parliament's resolution to approve an international agreement'), referring to and quoting from para 178 of *Glenister II* ('our Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measure of the State's conduct in fulfilling its obligations in relation to the Bill of Rights.')

85 To recall s 231(2) provides that, 'An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).'

86 *Law Society* (note 7) para 48 (the Court held that because both houses of our Parliament approved the SADC Treaty for ratification, in terms of s 231(2), 'no constitutional office-bearer, including our President may act, on behalf of the State, contrary to its provisions.')

powers.[87] Some indirect support for this approach (while not referred to by the Court) may be found in *DA v the Minister of International Relations* (the 'ICC Withdrawal' decision).[88] In that case, a full court of the Gauteng High Court[89] reviewed and set aside the executive's decision to withdraw from the Rome Statute of the ICC and ordered it to rescind its notice of withdrawal. The High Court relied on the separation of powers, evident in the scheme of section 231, to find that since section 231(2) expressly requires parliamentary approval in order for South Africa to be bound by a treaty, it is implicit that the executive could not unilaterally (without prior parliamentary approval) seek to withdraw from a treaty.[90] Therefore, the High Court held that 'the national executive's decision to deliver the notice of withdrawal without obtaining prior parliamentary approval violated s 231(2) of the Constitution, and breached the separation of powers doctrine enshrined in that section.'[91] The High Court's explanation of why, given that the Constitution conferred no power on the executive to withdraw from treaties, the executive's action was unconstitutional also lends support to the Constitutional Court's approach in *Law Society*. The High Court explained as follows:

> It would have been unwise if the Constitution had given power to the executive to terminate international agreements, and thus terminate existing rights and obligations, without first obtaining the authority of parliament. That would have conferred legislative powers on the executive: a clear breach of the separation of powers and the rule of law. On this basis, too, the *national executive* thus does not have and *was never intended to have the power to terminate existing international agreements without prior approval of parliament*.[92]

Of course, in *Law Society*, the President was not withdrawing from the SADC Treaty (incorporating the 2000 Tribunal Protocol). Nevertheless,

87 The Constitutional Court has held that 'the separation of powers not only implicitly forms part of our Constitution, but is part of its foundational values' (*Speaker of the National Assembly v Public Protector &Others; Democratic Alliance v Public Protector & Others* [2022] ZACC 1, 2022 (3) SA 1 (CC) para 30, fn 42, relying on *Glenister v President of the Republic of South Africa* [2008] ZACC 19, 2009 (1) SA 287 (CC) para 29 ('It is by now axiomatic that the doctrine of separation of powers is part of our constitutional design.')). We might also note that the requirement that Parliament approve a treaty prior to ratification is the norm in 'monist' countries – precisely because of separation of powers concerns (see Verdier & Versteeg 'Separation of Powers, Treaty-Making, and Treaty Withdrawal' (note 72) 137). This may explain why the Constitutional Court is more willing to give limited effect to unincorporated treaties, given separation of powers considerations, when these have been approved by Parliament.

88 *DA v Minister (ICC Withdrawal*) (note 21). The decision was not appealed by the government, and, as ordered by the Court, the government revoked its notice of withdrawal.

89 Mojapelo DJP, Makgoka and Mothle JJ.

90 *DA v Minister (ICC Withdrawal)* (note 21) para 51, read with paras 55–57.

91 Ibid para 57.

92 Ibid para 56, emphasis added.

his unilateral actions[93] had the effect of rendering a significant aspect of the SADC Treaty (the Tribunal and its jurisdiction to hear individual complaints against member states) inoperative. Thus, to an extent, the de facto consequences were not dissimilar to terminating an existing international agreement. For ease of reference, I refer to this basis for the Court's decision as the *separation of powers hook.*

Second, the Court held that violations of binding (but unincorporated) treaties may also violate the rule of law (from which flows the principle of legality[94]) enshrined in section 1(c) of the Constitution — the President must comply with the law, and that includes, as an agent of the state,[95] the 'international law obligation [on the state] to act in line with its commitments made in terms of [the SADC] Treaty'.[96] I refer to this basis for the Court's decision as the *rule of law hook.*

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93 The President's participation in the SADC Summit's suspension of the SADC Tribunal.

94 The Court has accepted in a series of decisions that the principle of legality (that all exercise of public power must be lawful and rational) is a justiciable principle in South African law, flowing from the rule of law, as enshrined in s 1(c) of the Constitution. See e.g. *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* [1998] ZACC 17, 1999 (1) SA 374 (CC) paras 56–59; *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* [1999] ZACC 11, 2000 (1) SA 1 (CC) para 148; *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex Parte President of the Republic of South Africa & Others* [2000] ZACC 1, 2000 (2) SA 674 (CC) ('*Pharmaceutical Manufacturers*') paras 17 and 40; *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3, 2006 (3) SA 247 (CC) para 49.

95 *Law Society* (note 7) para 48, read with para 43 ('Any reference to the President being bound by an undomesticated treaty must be understood as a reference to the binding effect of that instrument on her merely as a representative of the State. In other words, it is the State alone that is itself bound by that undomesticated legal instrument.') See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Yugoslavia*), Preliminary Objections, Judgment [1996] ICJ Reports 595 para 44 ('According to international law, there is no doubt that every Head of State is presumed to be able to act for it internationally'); and J Foakes *The Position of Heads of State and Senior Officials in International Law* (2014) 41 ('a head of State's acts or omissions when acting in an official capacity as an organ of the State are attributable to the State itself and, if they involve a breach of the State's international obligations, the State bears international responsibility for them').

96 *Law Society* (note 7) para 48, read together with para 3 (where the Court recognises the obligation for all exercises of public power to comply with, inter alia, international law) and para 6 (where the Court characterises the case, as inter alia, as a case about 'the rule of law, of which legality is an integral part'). Similarly, in para 49, the Court held that '[w]hatever the President does must accord with the Constitution and the law.' This paragraph follows immediately on from a statement that the President, as an agent of the state, must comply with South Africa's international law (treaty) obligations (para 48). The Court then, after stating that the President must comply with 'the law' (in para 49), goes on, in the next sentence, to refer to the obligations created by the SADC Treaty and Protocol. This makes it clear that 'the law' which the President's actions must accord with includes international law (and thus binding treaty obligations). See also paras 77 and 79, and the Court's reference to 'the rule of law' as one of the predicates for why the President's conduct that violated the SADC Treaty was unconstitutional in paras 29, 84, and 85.

Third, the Court reasoned that since there was a customary international law obligation to comply with treaty obligations and to do so in good faith (as codified in article 26 of the Vienna Convention),[97] and this was part of South African law pursuant to section 232 of the Constitution (which automatically incorporates customary international law), it would be an unlawful violation of this domesticated international law obligation for the President, as the representative of South Africa, to then act in a way that failed to ensure that South Africa was complying in good faith with all its binding treaty obligations.[98] This use of the Constitution's automatic incorporation of customary international law, effectively to create a justiciable domestic obligation to comply with South Africa's treaty obligations, may, if fully and consistently applied, be considered to be a rather expansive constitutional hook. However, it will be recalled that section 232 automatically incorporates customary international law into South African law only if it does not conflict with the Constitution and legislation (albeit that such conflicts should be rare[99]). Thus, presumably, the customary international law obligation on the state to comply with an unincorporated treaty would only form part of South African law to the extent that complying with that treaty's obligations would not entail the state violating the Constitution or (constitutionally-compliant) national legislation.[100] I refer to this third basis for the Court's decision as the *customary obligation hook.*

It will be noted that in describing these three constitutional hooks no direct reference is made to the Bill of Rights. That is not to say that in *Law Society* the President's unconstitutional conduct did not have Bill-of-Rights implications (in particular, in respect of the right of access to court).[101] How-

97 Vienna Convention on the Law of Treaties ('Vienna Convention'). Article 26, headed 'pacta sunt servanda', provides that, '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.'

98 *Law Society* (note 7) paras 54–56, read with para 79 (as the Court finds para 55: 'This article [article 26 of the Vienna Convention] codifies a pre-existing customary international law position which in effect is that in approaching the decisions like rendering the Tribunal dysfunctional, the negotiations to amend the Treaty, and signing the Protocol, the President was required to act in good faith and in a manner consistent with the country's obligation to uphold the spirit, object, and purpose of the Treaty. And this, he failed to do thus rendering this conduct unlawful on this ground as well.')

99 Coutsoudis & du Plessis CCR (note 15) 165–171.

100 *Law Society* (note 7) para 5 (the Court emphasises in the beginning of its judgment that 'unless otherwise inconsistent with our Constitution, customary international law is law in this country. Implicit in this position is that *consistency with our Constitution is a critical requirement for the acceptability and applicability of international law to our country*' (emphasis added)); *Mansingh v General Council of the Bar & others* [2013] ZACC 40, 2014 (2) SA 26 (CC) para 25 ('the President may exercise only those powers conferred on him or her by the Constitution, or by law that is consistent with the Constitution').

101 For instance, Samtani has offered a detailed analysis of the *Law Society* decision that seeks properly to understand and delineate the Court's pronouncements in relation to access to justice (both the right of access to court enshrined in section 34 of the Constitution and the right of individuals to bring complaints to the Tribunal provided by the SADC Treaty (incorporating the 2000 Protocol)). Samtani (note 19) 209–214.

ever, whatever role the right of access to court played in the judgment,[102] the important point for the current analysis is that the constitutional hooks identified above, on their own terms, were self-standing grounds for the unconstitutionality and unlawfulness of the President's conduct. Thus, as argued in a previous article,[103] the Bill-of-Rights implications of the President's conduct should at best be understood as an additional (concurrent) ground of unconstitutionality,[104] not a prerequisite for the unconstitutionality predicated on the three constitutional hooks identified above.

### *3.3.2 Analysing Law Society's constitutional hooks, their effect, and their constitutional pedigree*

Taken together the three constitutional hooks identified would mean, if applied fully and consistently, that, in essence, all unincorporated treaties that South Africa was bound by would generally have a form of direct domestic effect in respect of the obligations they placed on all state organs and officials (as organs of the South African state) when exercising public power to act in accordance with these obligations, unless to do so would violate the Constitution.[105] And since the Court has accepted that all exercises of public power are judicially reviewable on, inter alia, grounds of unlawfulness,[106] and generous standing is provided to institute judicial review of unlawful state conduct,[107] individuals and organisations could, in principle, challenge any failures by organs of state to comply with international treaty obligations in South Africa's domestic courts. In other words, any failure by the state (through its organs) to act in accordance with South Africa's treaty obligations would not only be wrongful under international

102 Compare Samtani (note 19) 209–214 and M Nyathi & MR Phooko, 'The South African Constitutional Court Judgment Concerning the Suspension of SADC Tribunal: Critiquing the Critics of the Constitutional Court' (2021) 54(2) *Comparative and International Law Journal of Southern Africa* 1, 11–12, 14–16 (who argue, at 14–15, that 'the right of access to justice' was not 'the fundamental issue in the Constitutional Court judgment', '[w]hat was fundamentally at issue was the blatant breach of the provisions of the SADC Treaty by the SADC Summit'). See also discussion at notes 145–147 below.

103 Coutsoudis & du Plessis CCR (note 15) 184–188.

104 Ultimately, the Court's judgment does not directly state that section 34 of the Constitution is violated, nor does the Court reference violation of this section in its order. However, as discussed at notes 145–147 below, the Court appears, in response to the criticism of the minority judgment, to accept, an additional ground for unconstitutionality of the President's conduct was a failure to respect and protect the rights in the Bill of Rights as required by section 7(2), which implicitly assumes that section 34 is, at least indirectly, implicated.

105 *Law Society* (note 7) para 5 (quoted in note 100).

106 On the basis of the principle of legality, flowing from the rule of law (Constitution, s 1(c)). See authorities at note 94.

107 Parties have broad standing, inter alia, based on their own interest and the public interest. Constitution s 38; *Kruger v President of the Republic of South Africa & Others* [2008] ZACC 17, 2009 (1) SA 417 (CC) paras 21–23; *Ferreira v Levin NO* [1995] ZACC 13, 1996 (1) SA 984 (CC) paras 165 and 229; and *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4, 2010 (3) SA 293 (CC) para 33.

law, but unlawful domestically, and reviewable before South African courts, which could then order the government to take remedial action. For instance, in the *Law Society* matter, as sought by the applicants,[108] the Court not only declared the President's signature of the 2014 Protocol unlawful, it also ordered him to withdraw his signature from the 2014 Protocol (which he did[109]).

*3.3.2.1 Did the Court go too far?*

Now it may be asked, if the implications of the constitutional hooks employed by the Constitutional Court in *Law Society* are as described above, did the Constitutional Court go too far? Has what has occurred amounted to the domestication of an unincorporated treaty, absent legislation, in a manner in conflict with section 231(4) of the Constitution? These questions point to legitimate concerns.[110] Thus, in respect of the separation of powers hook, it could be argued that one reads too much into section 231(2) if one takes the fact that parliamentary approval of a treaty leads to (or, more correctly, is a domestic requirement for) South Africa being bound on the international plane, as, on its own, implying any domestic obligations on the government in respect of that treaty. Rather, in terms of section 231(4), to create any domestic obligations flowing from the parliamentary approval of a treaty pursuant to section 231(2), what is required is legislation (or the treaty provisions to be held to be self-executing).

However, this critique has at least two limitations. First, it does not detract from the customary international law obligation to comply with binding treaties and its incorporation into South African law by section 232 (the customary obligation hook), coupled with the rule of law obligation on organs of state to comply with the law, which would include that customary obligation (the rule of law hook). Second, it does not remove the separation of powers concerns with the executive exercising public power in a manner that has the effect of nullifying international treaty obligations that the legislature has approved. In other words, if the executive does not have the power to withdraw from a treaty that Parliament has approved unilaterally, but requires parliamentary approval for such withdrawal, as an implicit

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108 The applicants were former Zimbabwean farmers and companies that had claims against Zimbabwe before the SADC Tribunal, which had been suspended and would have its jurisdiction limited if the 2014 Protocol entered into force, and the Law Society of South Africa acting in the public interest.

109 Communique of the 39th SADC Summit para 20 (17–18 Aug 2019), available at https://www.sadc.int/file/3270/download?token=LeW-63rX.

110 For instance, see Samtani (note 19) 213 ('The majority assumed that this right [the SADC Treaty right of SADC citizens to institute complaints before the SADC Tribunal] was directly enforceable under South African domestic law without considering the role of s 231. Assuming direct applicability of a treaty provision to citizens of South Africa, as the majority did, thereby creating enforceable domestic obligations, muddies the interpretive landscape and runs the risk of rendering s 231's system of treaty classification redundant.')

feature of section 231(2) and an incidence of the separation of powers, it would be equally impermissible for the executive unilaterally to fail to act in accordance with a treaty that Parliament has approved (thus treating it as if South Africa were not a party).

Put differently, concerns that the *Law Society* failed to give due weight to section 231(4)'s provision for legislative incorporation may be met by a broader consideration of the Constitution and its integrative approach to international law, which is both variegated and manifest.[111] The courts[112] and scholars[113] alike have recognised the special place that international law finds in the Constitution. Thus, considering the constitutional scheme in totality ('one of the most international-law friendly constitutions around the globe'[114]), it is not surprising that the Court would find that for an organ of state[115] to act in a way that causes South Africa to violate its binding treaty obligations is inconsistent with the Constitution's integrative approach to international law and the rule of law constraints it places on all exercises of public power.[116] As Justice Cameron notes, commenting on the underlying

111 For instance, Meyersfeld (note 53) 400, writing shortly after *Glenister II* was decided, emphasised that 'FC [Final Constitution] s 231 is, however, not alone. FC ss 232 and 233, when read with FC s 231, raise a host of thorny questions'. The first two questions she suggests are raised ('(a) What is the distinction between being bound by an international agreement, on the one hand, and an international agreement being law in South Africa, on the other?' , '(b) How does the answer to this first question square with the requirements of FC s 232, namely that customary international law "is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament"?') appear to be precisely (while not expressly) the questions being grappled with, and to an extent answered, by the Court in *Law Society* in its use of the separation of powers hook and the customary obligation hook.

112 *Kaunda* (note 23) para 222 (per O'Regan J); *Glenister II* (note 10) para 97 (per Ngcobo CJ) paras 179, 189, and 202 (per Moseneke and Cameron JJ); *National Commissioner* (note 21) paras 1–3, 22–24; *Minister of Justice v Southern African Litigation Centre* [2016] ZASCA 17, 2016 (3) SA 317 (SCA) ('*Minister of Justice v SALC*') para 67; and *Law Society* (note 7) para 4.

113 For instance, see N Botha & M Olivier, 'Ten years of international law in the South African courts: reviewing the past and assessing the future' (2004) 29 *South African Yearbook of International Law* 42, 42 ('On paper at least, South African law must now be regarded as among the most progressive and international-law friendly in the world.') and H Woolaver, 'South Africa' in Palombino (note 77) 320 ('the Final Constitution of South Africa is one of the most international-law friendly constitutions around the globe. This openness to international law is clear from many parts of the constitutional text. International law is, in many instances, directly enforceable in South African domestic law without the need for transformation by the legislature').

114 Woolaver ibid.

115 This includes the President and other officials exercising public power, see Constitution s 239.

116 *Electoral Commission v Mhlope & Others* [2016] ZACC 15, 2016 (5) SA 1 (CC) para 130 ('The rule of law is one of the cornerstones of our constitutional democracy. And it is crucial for the survival and vibrancy of our democracy that the observance of the rule of law be given the prominence it deserves in our constitutional design. To this end, no court should be loath to declare conduct that either has no legal basis or constitutes a disregard for the law, as inconsistent with legality and the foundational value of the rule of law. Courts are obliged to do so').

predicate for the Court's decision in *Glenister II*, 'the constitutional scheme, taken as a whole, cannot mean that the national executive could proclaim and act in accordance with one position at the international level, but adopt a different approach within the domestic arena.'[117] Cameron emphasises that '[a] dichotomy of this sort would raise at least rule of law issues—and the rule of law is enshrined as a founding value of the Constitution.'[118]

*3.3.2.2 Paying due regard to the Constitution's conception of the rule of law*

In support of Cameron's view as to the implications of the constitutional scheme, taken as a whole, including its enshrining of the rule of law, it is important to emphasise a critical point about how the Constitution conceptualises the rule of law. It is trite that 'the rule of law' is a founding value of the Constitution,[119] which places a duty on 'the courts to insist that the State, in all its dealings, operates within the confines of the law'.[120] What should be noted is the kind of 'rule of law' the Constitution appears to contemplate. There are clear indications that the 'law' that must rule the conduct of organs of state includes international law binding on South Africa. The first indication is, of course, section 232. As discussed, this makes customary international law 'law' in South Africa (absent conflict with the Constitution or national legislation). The second indication is section 199(5). This provision deals with the security services. These are defined broadly to include the defence force, the police, and intelligence services (these are organs of state that operate both domestically and internationally).[121] Section 199(5) states that members of the defence force, the police, and the intelligence services must act in accordance with 'the Constitution and the law, *including customary international law and international agreements binding on the Republic*'.[122] This is a classic rule of law statement. That is to say, it is a case-specific articulation of the Constitution's justiciable 'rule of law' principle (section 1(c)). What is interesting about this articulation is that the Constitution makes plain that 'the law' that must be complied with *includes*

117 Cameron (note 54) 406.

118 Ibid.

119 This is expressly provided for in s 1(c), and it has been regularly affirmed by the courts. See e.g. *Pharmaceutical Manufacturers* (note 94) paras 17 and 40; *Justice Alliance of South Africa v President of Republic of South Africa & Others* [2011] ZACC 23, 2011 (5) SA 388 (CC) para 31 ('The significance of the rule of law and its close relationship with the ideal of a constitutional democracy cannot be overemphasised.'); and *Khumalo & another v Member of the Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49 (CC), 2014 (5) SA 579 (CC) para 29 ('The rule of law is a founding value of our constitutional democracy. It is the duty of the courts to insist that the State, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power.')

120 *Khumalo* ibid. See also *Democratic Alliance v President of the Republic of South Africa* [2011] ZASCA 241, 2012 (1) SA 417 (SCA) para 66.

121 Constitution s 199(1).

122 For an application of s 199(5), and the obligation on security services to comply was binding treaties, see *Khosa* (note 80).

customary international law and international agreements binding on the Republic. In other words, the 'law' that must rule the conduct of the organs of state is not merely domestic law, but also binding international law. To be clear, that is a very 'monist' conception of the rule of law. One sees the same broad conception of the rule of law in section 198(c). This provides that '[n]ational security must be pursued in compliance with the law, including international law.' Once again, 'the law' that must be complied with *includes international law*. It could be argued that this same formulation is not used elsewhere (i.e., the express statement that 'law' *includes* international law). Therefore, this might suggest that it is only in respect of the police, the defence force, the intelligence services, and when government officials take decisions concerning national security matters, that rule of law obligations include the obligation not to act in violation of international law. Yet such an argument would ignore the indicative nature of these sections. Section 199(5) is one of the few places where there is express reference to a general obligation to comply with the Constitution and the law (for instance, unlike in respect of the security services, there are no express provisions requiring compliance with the Constitution and the law directed at the President or other members of the national executive). Rather, generally, the well-established proposition that all exercises of public power must comply with the rule of law (and that this is a constitutional obligation) is sourced by the Court in section 1(c) of the Constitution.[123] As we have seen, section 1(c) simply states that one of the founding values of the Constitution is 'the rule of law'. It does not give further guidance as to what type of rule of law is intended. For that, one must look at the rest of the Constitution.[124] When one does that, what is significant about the features of the Constitution, and most notably in sections 198(c) and 199(5), is that they give an indication of what type of 'rule of law' the Constitution has in mind (and how the Constitution conceptualises 'the law'). It has in mind a rule of law where the 'law' that must be complied with by the organs of state *includes* custom-

123 As already noted, it has long been accepted that the rule of law, and the principle of legality which flows from that, create a justiciable constitutional obligation that all exercises of public power must accord with the law and that in exercising such power organs of state must not go beyond the powers conferred by the Constitution and law that accords with the Constitution. See *Mansingh v General Council of the Bar & others* [2013] ZACC 40, 2014 (2) SA 26 (CC) para 25; *Pharmaceutical Manufacturers* (note 119) para 40; and *Kaunda* (note 23) paras 78–80. A breach of this obligation will mean that the exercise of power is unconstitutional. In terms of s 172(1)(a) of the Constitution, courts are obliged to declare exercises of public power that do not accord with the Constitution invalid. See *Economic Freedom Fighters v Speaker, National Assembly* [2016] ZACC 11, 2016 (3) SA 580 (CC) para 103.

124 *Matatiele Municipality & Others v President of the RSA & Others (No 2)* [2006] ZACC 12, 2007 (6) SA 477 (CC) para 36 ('Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole.')

ary international law and binding international agreements. And such an understanding of the rule of law makes perfect sense in the Constitution's general integrative (open) approach to international law.

Significantly, as already emphasised, the Constitution expressly provides that customary international law is law in South Africa (save if it is inconsistent with the Constitution and national legislation). This is well accepted,[125] and cannot be ignored.[126] And customary international law requires states to comply with their binding treaty obligations — this is a fundamental rule of customary international law that is universally recognised.[127] Thus, the obligation to comply with treaty obligations as a customary international law rule is, by virtue of section 232, a domestic legal obligation on the state. That being the case, it would be extraordinary, when the Constitution makes this customary rule 'law' in South Africa, if an organ of the state, when exercising public power, which must comply with the law, could lawfully act in a way that caused South Africa to breach its treaty obligations.[128]

*3.3.2.3 The constitutional pedigree of Law Society's constitutional hooks*

For the reasons discussed in Parts 3.3.2.1 and 3.3.2.2, the *Law Society's* constitutional hooks, especially when understood together, have a strong constitutional pedigree. They are plainly part of the architecture of the Constitution and how it draws international law obligations into the domestic sphere. They should not be ignored. These constitutional features are not mere accidents, nor the product of some over-realised or wish-fulfilment interpretation by the Court. The Constitution's openness to international law is not some judicial invention. It is deeply rooted in the fabric of South

125 *National Commissioner* (note 21) para 24; *Tshabalala v S; Ntuli v S* [2019] ZACC 48, 2020 (5) SA 1 (CC) para 96; *Kaunda* (note 23) paras 23 and 222; *Glenister II* (note 10) para 179; and *Law Society* (note 7) para 4.

126 Chapter 2, Part 6.

127 ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) at 368; O Dörr and K Schmalenbach, 'Art 26' in O Dörr & K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2011) 411; and J Salmon, 'Art. 26 1969 Vienna Convention' in O Corten & P Klein (eds), *The Vienna Conventions on the Law of Treaties* (2011) 681.

128 It will also be recalled that customary international law provides that 'the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State' (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro*) [2007] ICJ Reports 43 para 385). See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* Advisory Opinion [1999] ICJ Reports 62 para 62.

Africa's transformative[129] and progressive Constitution.[130] The Constitution expressly gives international law pride of place.[131] It purposively does so, making it a key feature of the Constitution's transformation project, precisely because of South Africa's abhorrent pre-Constitutional past.[132] The Constitution marks a 'decisive break' from that past[133] — a past where it was an international law pariah.[134] The purpose of the Constitution was, among other things, as the preamble makes plain, to ensure that South

129 The Constitutional Court has referred to the Constitution as being transformative on numerous occasions — see, for instance, *Road Accident Fund and Another v Mdeyide* [2010] ZACC 18, 2011 (2) SA 26 (CC) para 125; *Sonke* (note 80) para 23 fn 49; *Biowatch Trust v Registrar, Genetic Resources, & Others* [2009] ZACC 14, 2009 (6) SA 232 (CC) para 17; and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15, 2004 (4) SA 490 (CC) paras 73–4. See also K Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 (Klare observes, at 155, that a 'particularly appealing feature of the South African Constitution is its self-consciousness that it is an instrument committed to social transformation and reconstruction'; and argues, at 156, that the 'Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals').

130 *Law Society* (note 7) para 4 ('Returning to international law, its centrality in shaping our democracy is self-evident. For, in truth, it does enjoy well-deserved prominence in the architecture of our constitutional order. Unsurprisingly, because we relied heavily on a wide range of international legal instruments to expose the barbarity and inhumanity of the apartheid system of governance in our push for its eradication. … And that history informs the critical role that we need international law to play in the development and enrichment of our constitutional jurisprudence and by extension the unarticulated pursuit of good governance follow[s]').

131 *Law Society* (note 7) para 4; see ss 39(1)(b), 231(4), 232, 233, 199(5), 198(c), and the preamble of the Constitution.

132 This history must be taken into account when interpreting the Constitution. See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd & Others* [2000] ZACC 12, 2001 (1) SA 545 (CC) para 21; *United Democratic Movement v Speaker of the National Assembly & Others* [2017] ZACC 21, 2017 (5) SA 300 (CC) para 29–31.

133 *Makwanyane* (note 26) para 262 (per Mahomed J) ('[i]n some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and *represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive* and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. *The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic*' (emphasis added)).

134 *Law Society* (note 7) para 4; *Kaunda* (note 23) para 222; *Minister of Justice v SALC* (note 112) para 63; and J Dugard, 'Kaleidoscope: International Law and the South African Constitution' (1997) 8 *EJIL* 77, 77 ('So it was that South Africa became a pariah state within the international community; a delinquent state in the context of the "new" international law of human rights.')

Africa could take its rightful place in the family of nations.[135] As O'Regan J opined in *Kaunda*, 'our Constitution recognises and asserts that, after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law.'[136] And, as the SCA held in *Minister of Justice v SALC* (the *Al Bashir* matter):

> The Constitution incorporated these provisions [giving international law its 'special place in our law'] pursuant to the goal stated in the Preamble that its purpose is to '[b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'. From being an international pariah South Africa has sought in our democratic state to play a full role as an accepted member of the international community.[137]

That, of course, would suggest that organs of state should not exercise public power in a way that, once again, causes South Africa to violate international law obligations.

*3.3.2.4 The constitutional hooks used in Law Society and possible alternatives*

In view of the above discussion, it is necessary to emphasise what *Law Society* is *not* doing. It is not saying that unincorporated treaties as a whole form part of South African 'law' absent incorporation by legislation (and absent being found to be self-executing) and thus create domestic rights that can be directly relied on between private individuals.[138] It is rather doing what the Court in *Glenister II* said was necessary: ensuring proper respect for 'the manifest constitutional injunction to integrate, in a way the Constitution permits, international law *obligations* into our domestic law.'[139] Via the constitutional hooks considered, those obligations are cast on the state, and its organs, which, as such, may cause the state to breach its international law obligations. Therefore, for the reasons given above, while one might take issue with the exact routes used by the Court in *Law Society*, its

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135 The Constitution preamble ('We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-…. Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations').

136 *Kaunda* (note 23) para 222.

137 *Minister of Justice v SALC* (note 112) para 63 (the SCA referred to the statement in *Glenister II* (note 10) para 97 (per Ngcobo CJ) that '[o]ur Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law … These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution').

138 For instance, as Dugard explains, once incorporated by legislation, pursuant to s 231(4), an incorporated treaty, 'creates rights and duties for the individual in the same way that an ordinary statute creates rights and duties' (J Dugard, 'South Africa' in Sloss, *The Role of Domestic Courts in Treaty Enforcement* (note 70) 472).

139 *Glenister II* (note 10) 202 (emphasis added).

final destination appears consistent with the Constitution's scheme. And, while certain of the constitutional hooks (or routes) used by the Court are different (or additional) to that adopted in *Glenister II*, it is perhaps best to understand *Law Society* as simply taking seriously the integrative invocation of the Constitution recognised in *Glenister II*. As we have seen, the Constitution embraces international law in multifaceted ways. Once that is so, it must be the case that there are many different and permissible routes by which, depending on the circumstances, unincorporated treaties may find application. Indeed, as Woolaver has rightly pointed out, 'there are many constitutional routes either requiring or permitting the application of international law in the South African domestic legal system, which have been taken up with vigour by South African courts.'[140]

That different or additional routes were explored in *Law Society* to those previously considered by the Constitutional Court does not, in itself, suggest that the new routes are wrong.[141] In fact, it is worth noting that Sucker, writing soon after *Glenister II*, criticised the Constitutional Court in that case for making use of section 7(2), read with section 39(1)(b), to give a form of domestic effect to the obligations flowing from unincorporated treaties. As part of her critique, she proposed a different route to reach the same conclusion: relying *inter alia* on section 231(2), and its provision that international treaties approved by Parliament bind South Africa, as understood together with the state's customary international law obligations, inter alia, to comply with treaty obligations in good faith.[142] With some nuances and additions, and without direct reference, the constitutional hooks adopted by the Court in *Law Society* (as discussed above) appear to be in line with, or at least bear echoes of, the route proposed by Sucker.

Of course, just as in *Glenister II*, other or additional routes may have been available to the Court in *Law Society*. One obvious option might have been, as with *Glenister II*, for the Court to base its determination of unconstitutionality *solely* (and without reliance on any of the other constitutional

140 Woolaver (note 113) 393, writing prior to the *Law Society* decision (note 7).

141 For instance, in *Khosa* (note 80) paras 127–129 one sees the High Court making use of both the *Glenister II* section 7(2) route and the rule of law hook (albeit more directly, by applying s 199(5), given that it was dealing with the security services).

142 Sucker (note 15). Sucker argues, at 431, that 'the endorsement "binds the Republic" in FC s 231(2) must be interpreted to confer a meaning beyond the fulfilment of an internal constitutional requirement for the ratification process.' She also argues, at 431, that 'the approval of an international treaty should be seen as a positive parliamentary affirmation to the citizens of South Africa that Parliament, subject to the provisions of the Constitution, will act in accordance with the approved treaty when exercising legislative power. This understanding would contribute to the previously stated aim to bring international law and South African domestic law into harmony with one another. It is compatible with the separation of powers doctrine, facilitates the principles of governmental accountability, transparency, responsiveness and openness, and acknowledges the obligatory nature of international treaties (when ratified) to perform the treaty obligations in good faith (art 26 VCLT [69]).' In summary, at 432, she contends that 'an approval must therefore have some domestic effect, as suggested above, in [the] form of a good faith obligation.'

hooks discussed above) on a finding that in causing South Africa to violate treaty obligations, including the obligation[143] to ensure that individuals continue to enjoy the treaty right to lodge complaints in the Tribunal against SADC states,[144] the President did not reasonably protect and fulfil the rights in the Bill of Rights in violation of section 7(2).[145] This is the route that the minority in *Law Society* favoured. [146] And in response to the minority judgment, the majority appeared vaguely to suggest that the *Glenister II* (section 7(2)) route also formed an additional basis (alongside the constitutional hooks discussed above) for its finding that the President's conduct was unconstitutional.[147] However, even for the minority, the endpoint, or effect, of applying the *Glenister II* approach in *Law Society*, seemed no different from that reached by the majority using the additional constitutional hooks, since the minority affirms that 'the Constitution enswathes the President with the obligation to ensure that his conduct does not result in a breach of South Africa's international obligations.'[148]

Another constitutional route, advanced by Samtani, is that the Court in *Law Society* should have considered whether the relevant treaty provisions were self-executing, and therefore domestically applicable pursuant to section 231(4). Samtani argues that '[t]he jurisdiction provisions of the SADC Treaty and the Protocol appear to be self-executing. This would provide a framework for the Court's ultimate conclusion that a pre-existing right was taken away solely by the President's impugned conduct on the inter-

143 *Fick* (note 23) para 62 (emphasis added) ('The Amended [SADC] Treaty, incorporating the Tribunal Protocol, places an international law obligation on South Africa to ensure that its citizens have access to the Tribunal').

144 Conferred by the 2000 Tribunal Protocol (incorporated into the SADC Treaty).

145 This approach would then, implicitly, need to accept that fulfilling and protecting the right of access to court in s 34 of the Constitution, includes not removing the treaty right of access to the Tribunal (even though it was not a domestic South African forum). On the Court's approach to s 34 and the possible implicit reliance on the principle of non-retrogression, see Samtani (note 19) 209–210 ('[w]hat the Court effectively did was assert that s 34 henceforth applied to international and regional courts') and 220–221 ('A reading of these passages in the judgment, along with the provisions on the right of access to justice in the Constitution indicates that to the extent to which the principle of non-retrogression is applicable, it may be characterised as a qualification of the duties imposed upon the state under s 7(2). This formulation is in effect an application of the principle of non-retrogression, where the breach of the President's duty under s 7(2) is found in his acts that circumscribed the expanded protection of s 34 offered to South Africans through the accession to the SADC Treaty and its attendant 2000 Protocol').

146 *Law Society* (note 7) para 101 ('By agreeing to amend the Treaty and by thus agreeing to strip away pre-existing rights of access to justice that the Treaty had conferred on South Africans, the President failed to fulfil his obligation, under our Constitution: to "respect, protect, promote and fulfil" the rights in the Bill of Rights. That failure was a breach of the Constitution. The unlawfulness of the President's conduct derives from its breach of sections 7(2) and 8 of the Constitution. It does not derive directly from any violation of international treaty provisions').

147 *Law Society* (note 7) paras 43 and 78.

148 *Law Society* (note 7) para 100.

national plane, without any corresponding acts on the domestic plane.'[149] The Court's failure to grapple with whether the relevant treaty provisions were self-executing and domesticated by virtue of section 231(4) is a glaring omission. This is sadly consistent with the Court's history of avoiding properly dealing with the fact that section 231(4) expressly provides for self-executing provisions of the treaty to form part of South African law absent legislation.[150] To ignore this aspect of section 231(4) is to fail to fully consider the Constitution's international-law-integrative scheme. However, while the Court ought to have properly evaluated whether and to what extent the relevant treaty provisions before it were domesticated through section 231(4)'s self-executing route, the use of this route may have caused difficulties in *Law Society*, had the Court sought to rely on it. That is because whether and to what extent section 231(4)'s self-execution route could have applied to the central treaty provisions at issue in *Law Society* is open to debate (as discussed in a previous article).[151] In summary, this is so for the following reasons. While the Court in its judgment pays no regard to this fact, only the SADC Treaty, prior to amendment, had been approved by Parliament.[152] The 2000 Tribunal Protocol (and the amendment of the Treaty to incorporate the Tribunal Protocol into the Treaty) had not been approved by Parliament.[153] They were made binding on South Africa by dint of an amendment to the SADC Treaty adopted by the SADC Summit (which the SADC Treaty expressly allowed for)[154] absent ratification (or prior approval by Parliament).[155] In other words, neither the 2000 Tribunal Protocol, which provided for the Tribunal's jurisdiction to receive complaints from individuals,[156] nor the amendments to the Treaty, which brought the Proto-

149 Samtani (note 19) 216. Cf Nyathi & Phooko (note 102) at 13 who appear to believe that it was not necessary for the Court to have explored the possibility of the treaty provisions being self-executing in *Law Society* ('The issue of domestication of that Treaty, while probably deserving future judicial exploration and analysis, was certainly not worth the attention of and engagement by the Constitutional Court.')

150 A trend most recently continued in *Zuma III* (note 11), as discussed below in Part 4.2.2.

151 As discussed in text at note 33 above, and Coutsoudis & du Plessis CCR (note 15) 183 and 193 (at 193 it is noted that: 'Whatever specific jurisdiction the Tribunal has over South Africa as provided in the 2000 Protocol, the Tribunal has absent parliamentary approval. Rather, the head of state of South Africa, as a member of Summit, brought the Protocol into force by voting in favour of the amendment of Treaty.')

152 *Fick* (note 23) para 9.

153 This was rather unusual, because, in general, it is accepted that substantive treaties binding on South Africa require, and therefore receive, prior parliamentary approval (see discussion, with references, at note 16).

154 Article 36 of the SADC Treaty.

155 Ibid, see Coutsoudis & du Plessis CCR (note 15) 183.

156 2000 Tribunal Protocol art 15(1) ('The Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and States').

col into force and made it an integral part of the Treaty,[157] were approved by Parliament.[158] However, section 231(4) only allows the self-executing provisions of treaties approved by Parliament to become part of South African law. It is, therefore, questionable whether section 231(4) would apply to substantive amendments to treaties if those amendments have not been considered and approved by Parliament.[159] Given this, it would seem that section 231(4)'s allowance for self-executing provisions to become law absent legislation may not have found application as a basis to give domestic effect to certain of the key treaty provisions that were at the heart of the Court's decision in *Law Society*. Of course, these considerations also raise questions for the Court's application (at least if viewed in isolation) of the separation of powers hook in *Law Society* (albeit that the SADC Treaty, which Parliament approved, expressly provided for its subsequent amendment by the Summit[160]). It is, therefore, unfortunate that the Court failed to grapple with the extent of Parliament's approval of the relevant treaty provisions in issue before it and the implications, if any, for its decision. This lack of methodological rigour is consistent with the Court's superficial engagement with the treaty provisions it relied upon.[161]

In conclusion, the position can be summed up as follows. The Court's reasoning in *Law Society* is not always a model of clarity and is open to cri-

157 Originally article 16(2) of the SADC Treaty provided that: 'The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol adopted by the Summit.' After its amendment by the Summit, article 16(2) of the Treaty provides that: 'The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol, *which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit*.' (addition italicised). Article 22 of the SADC Treaty provides for Protocols to only enter into force once ratified by two-thirds of member states.

158 Coutsoudis & du Plessis CCR (note 15) at 183 and 193.

159 Coutsoudis & du Plessis CCR (note 15) at 183. It should be noted that Nyathi & Phooko (note 102) at 9 question Coutsoudis & du Plessis's querying (at 193) of whether it is constitutionally problematic that the amendments to the SADC Treaty have occurred absent parliamentary approval. But they do not engage with the separate question of whether, if a substantive amendment is made to the SADC Treaty by the Summit, that amendment, given the absence of parliamentary approval, could ever meet the requirements of section 231(4) to be self-executing (as considered by Coutsoudis & du Plessis at 183). However, in an earlier article, the same authors seem to accept that in principle parliamentary approval would be constitutionally required for amendments to the SADC Treaty (MR Phooko and M Nyathi, 'The Revival of the SADC Tribunal by South African Courts: A Contextual Analysis of the Decision of the Constitutional Court of South Africa' (2019) 52 *De Jure* 415, 428: 'in some SADC Member States like South Africa, the domestic constitutional imperative is such that the legislature would have to play a role in the ratification of the amendment').

160 As discussed at note 159 above, and see Nyathi & Phooko (note 102) 9.

161 Coutsoudis & du Plessis CCR (note 15) 188–193 and D Tladi, 'The Constitutional Court's Judgment in the SADC Tribunal Case: International Law Continues to Befuddle' (2020) 10 *Constitutional Court Review* 129. Cf Nyathi & Phooko (note 102) who offer a critique of Tladi's criticism of the Court's interpretative methodology (and, to an extent, of certain overlapping issues raised by Coutsoudis & du Plessis).

tique. There were other possible routes available to the Court, in addition to the three constitutional hooks identified. But this does not, in itself, suggest that the three constitutional hooks that the Court relied on, at least when viewed holistically, were not constitutionally permissible. It is perhaps best to conceptualise the Constitution's variegated embrace of international law more like a garden to be explored than a tightrope to be walked. And South Africa's transformative Constitution, which is a blueprint for a future not yet fully realised,[162] must allow for incremental jurisprudential development,[163] as the courts in successive judgments grapple with and explore its commitment to the rule of law and international law. That is what the Court in *Law Society* was doing, and its endeavours have opened up and made accessible new jurisprudential paths in that constitutional garden.

## 4 Post-Law Society – A New, More 'Monist' World? Or Merely a False Dawn?

From the analysis in Part 3.3, one sees that *Law Society* betokens a further evolution in how South African law approaches unincorporated treaties. And yet, in the years since the *Law Society* decision was handed down, there is little indication that the Constitutional Court itself, or lower courts, have embraced what appears to be a far more robust integrative approach to unincorporated treaties. This is evident from a consideration of a number of decisions.

### 4.1 The approach of the High Court

If one begins by considering the decisions of the High Court, one sees that the position has been uneven. It is evident that various divisions of the High Court have not expressly viewed the *Law Society* decision as adopting a new approach that is substantively different from *Glenister II*.[164] However, subsequent to *Law Society*, there is at least one High Court case that appears, in

162 *Makwanyane* (note 26) para 262 (quoted at note 133), and para 156 fn 1 ('If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified' – Ackerman J quoting from E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31, 32).

163 For instance, see *Bliss Brands (Pty) Ltd v Advertising Regulatory Board NPC & Others* [2023] ZACC 19 para 1 ('in constitutional matters… jurisprudence must be allowed to develop incrementally', quoting with approval *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4, 2010 (3) SA 293 (CC) para 82). See also Klare (note 129) 156.

164 By way of example, in *Chang v Minister of Justice and Correctional Services & Others* [2019] ZAGPJHC 396, [2020] 1 All SA 747 (GJ) paras 69–72, the High Court, while making a footnote reference to *Law Society* (which it lists as one example of cases, in line with *Glenister II* (note 10), where courts 'have been committed to exacting compliance with our obligations under International Law'), applied the s 7(2) route proposed in *Glenister II* without reference to any of the further constitutional hooks suggested in *Law Society*.

practice, to have embraced the *Law Society* approach to the domestic effect of unincorporated treaties — while not doing so expressly or with any apparent awareness that its approach was novel. In *SAHRC v Msunduzi Local Municipality,*[165] the South African Human Rights Commission[166] brought a case against a municipality regarding its failure to properly operate and maintain a landfill site. Without referring to the *Law Society* judgment, the Court effectively followed the approach taken in *Law Society*, by finding that a municipality was bound by various unincorporated treaties, which South Africa had ratified, in relation to specific environmental obligations.[167] The Court found that the municipality had violated its obligations, as an organ of state, under these treaties.[168] It also found that the municipality had violated various environmental legislation and section 24 of the Constitution (the right to a healthy environment). As the Court held, '*Apart* from the serious violations committed by the municipality in respect of the various provisions of the legislative framework as found above, I further consider that it has also *acted in breach of the relevant environmental provisions contained in the international instruments referred to above. Since these instruments have been ratified by Parliament, they are binding on the municipality as an organ of state*.'[169] While not referred to by the Court, this language embraces or echoes the separation of powers hook (predicated on section 231(2) of the Constitution) relied on by the Constitutional Court in *Law Society*.[170]

Moreover, in the orders granted by the Court, in addition to declaring that the municipality had breached various domestic legislation and section 24 of the Constitution, the Court made a separate and distinct order declaring that the municipality had violated its international law obligations flowing from various unincorporated treaties.[171] The Court also granted

165 *South African Human Rights Commission v Msunduzi Local Municipality & Others* [2021] ZAKZPHC 35, 2021 (6) SA 500 (KZP) (*'SAHRC v Msunduzi Local Municipality'*).

166 As the Court records, the Commission is 'a national institution established in terms of Chapter 9 of the Constitution' and '[t]he constitutional role of the Commission is to protect and promote the fundamental human rights enshrined in Chapter 2 of the Constitution as well as to, inter alia, take steps to secure appropriate redress where human rights have been violated': *SAHRC v Msunduzi Local Municipality* ibid para 2.

167 As the Court records para 81, 'The Commission submits that the Republic is a signatory to several international agreements which have been ratified or approved by Parliament. Amongst these are the following agreements that are relevant to the present dispute and are binding on the municipality as an organ of state: the African Charter on Human and People's Rights (1981); the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, and the International Covenant on Economic, Social and Cultural Rights.' The Court then went on briefly to record certain relevant provisions of these treaties: *SAHRC v Msunduzi Local Municipality* (note 165) paras 82–84.

168 *SAHRC v Msunduzi Local Municipality* (note 165) para 98.

169 Ibid (emphasis added).

170 As discussed in the text at note 96.

171 *SAHRC v Msunduzi Local Municipality* (note 165) para 109, order 3.6.

a detailed structural interdict.[172] Amongst other things, this required the municipality to file regular reports with the Court to explain how it was complying with its obligations going forward, allowing the other parties to comment on those reports, and providing for the court to retain continued oversight, with the ability to issue further directions or orders. The Court, therefore, appears to accept that unincorporated treaties will create domestically binding obligations for state entities (such as municipalities or other organs of state, or governmental officials) which can be challenged before domestic courts, with remedial relief granted for violations. Of course, unlike the order declaring that the municipality violates international obligations, the structural interdict cannot be said to flow purely from the violations of treaties, because the Court also found that the municipality had violated various provisions of domestic environmental legislation. Both statutory and treaty violations evidently formed the predicate for the substantive interdictory relief granted. Can it be said that the Court would have still granted the structural interdict absent a statutory breach? In other words, if there were only breaches of international treaty obligations, and no concomitant violation of domestic legislation, would the Court still have ordered various steps to be taken to ensure compliance with international obligations only? That is not clear. But, on the other hand, nothing in the judgment would suggest this would have been incompetent.

However, the approach taken by *SAHRC v Msunduzi Local Municipality* has not been generally replicated in other recent High Court decisions. In particular, one sees a very different approach being taken by the Western Cape division of the High Court in *Bosch Home Appliances v ITAC*,[173] which was also decided in 2021. The case involved a judicial challenge to the imposition by the South African authorities (the International Trade Administration Commission (ITAC), the Minister of Trade and Industry, and the Minister of Finance[174]) of a customs duty (a trade tariff) on certain appliances. As part of its argument, the applicant submitted that in assessing whether the decision was lawful or ought to be reviewed, the relevant

172 A structural (or supervisory) interdict is an order requiring parties to take certain steps and report to the Court on those steps, while the Court retains general supervisor jurisdiction. Examples include the order granted by the Constitutional Court in *Black Sash Trust v Minister of Social Development & Others (Freedom Under Law NPC Intervening)* [2017] ZACC 8, 2017 (3) SA 335 (CC).

173 *Bosch Home Appliances (Pty) Ltd v International Trade and Administration Commission of South Africa* [2021] ZAGPPHC 8, 2021 JDR 0041 (GP) (*'Bosch v ITAC'*).

174 ITAC makes a recommendation to the Minister of Trade and Industry ('the Minister of Trade') to approve or reject an application for the imposition of the customs duty. The Minister of Trade may accept, reject, or refer the recommendation back to ITAC for further investigation. If the Minister of Trade accepts a recommendation of ITAC that a customs duty should be amended or new duty imposed, the Minister of Trade is empowered to request the Minister of Finance to amend the relevant Schedule to the Customs and Excise Act 91 of 1964. The change to the custom duty is given effect to by the amend to the relevant Schedule. See s 4 of the Board of Tariffs and Trade Act 107 of 1986, which is still applicable in terms of Schedule 2, item 2, to the International Trade Administration Act 71 of 2002.

standard was imposed by South Africa's treaty obligations under article X of the General Agreement on Tariffs and Trade ('GATT'),[175] in particular, the 'principles of reasonableness, uniformity, and impartiality'. However, the High Court rejected this argument, instead accepting ITAC's argument that South Africa tended towards a 'dualist' approach,[176] such that international treaties have no application domestically unless they have been incorporated by domestic legislation (with unincorporated international treaties merely being used as the basis to interpret domestic legislation — as provided by section 233 of the Constitution).[177] The Court, therefore, held that the 'reasonableness' standard in GATT could not be directly relied upon to create an obligation on ITAC, nor could the relevant domestic legislation be interpreted to incorporate such an obligation. This conclusion appears to be in direct conflict with the Constitutional Court's determination in *Law Society*,[178] which bound the High Court. No mention is made of *Law Society*. Therefore, it appears that when the High Court reached its conclusion on the applicability of unincorporated treaties, it was either unaware of the approach taken by the Constitutional Court in *Law Society*, [179] or ignored or misunderstood it.

## 4.2 The Constitutional Court's approach since the Law Society decision

One now needs to consider how the Constitutional Court itself has approached the application of treaties in the few years since the *Law Society* decision. I begin with *Sonke*, decided in 2020, followed by *Zuma III*, decided in 2021, before briefly reflecting on a number of cases decided by the Court in 2022.

### *4.2.1 Sonke – two steps forward, one step back?*

A year after the *Law Society* decision, the Constitutional Court delivered judgment in the *Sonke*[180] matter. From the discussion below, it will be

175 The applicant had also referred to the Geneva General Agreement on Tariffs and Trade Act 29 of 1948 ('GGATT Act'), which was an early statute which simply provided for the approval of GATT in 1948 by the then South African Parliament. This is akin to the requirement in s 231(2) of the Constitution, which requires Parliament to approve international agreements before they are made binding on the international plane. This legislation did not provide for the incorporation of GATT into domestic law. Although not stated expressly, the Court accepted this, since it did not suggest that the GGATT Act constituted incorporating legislation in terms of section 231(4), and specifically dealt with GATT as an unincorporated treaty, as did the SCA in *Progress Office Machines CC v South African Revenue Service & Others* [2007] ZASCA 118, [2007] 4 All SA 1358 (SCA) ('*Progress Office Machines'),* which the Court relied on.

176 *Bosch v ITAC* (note 173) para 92.

177 Ibid paras 92–94.

178 As discussed in Part 3.3.1.

179 The Court relied predominately on the SCA decision of *Progress Office Machines* (note 175) and some earlier academic writings, all of which, had been superseded by, or at least ought to be interpreted in light of, the Constitutional Court's later decision in *Law Society* (note 7).

180 *Sonke* (note 80).

clear that *Sonke*[181] sits in the *Glenister II* vein of cases, but does not in truth embrace the new world betokened by *Law Society*. *Sonke* involved a challenge to the constitutionality of sections of legislation in respect of correctional centres (i.e. prisons).[182] These sections were challenged on the basis that they failed to provide for an adequate level of independence for the Judicial Inspectorate of Correctional Services (a statutory body tasked with inspecting and monitoring correctional centres in South Africa). The Court held that flowing directly from an interpretation of the rights in the Bill of Rights there was a duty on the state, in the legislation, to ensure that the statutory body tasked with inspecting and monitoring correctional centres in South Africa was adequately independent. The Court, therefore, emphasised that it was not necessary to have regard to international law in order to find that the legislation was unconstitutional. However, the Court nevertheless considered South Africa's treaty obligations as part of its interpretative exercise, as required by section 39(1)(b) of the Constitution.

The Constitutional Court's majority judgment thus focused on a consideration of South Africa's treaty obligations, particularly under the Optional Protocol to the Torture Convention ('the Optional Protocol').[183] South Africa had ratified the Optional Protocol after Parliament had approved it, but it had not yet been incorporated into South African law by national legislation (whereas the Torture Convention itself had been given domestic effect by national legislation).[184] Although the Court mentions a number of international instruments, it was clear that the key treaty for the purposes of its analysis was the Optional Protocol.[185]

It is relevant for present purposes to highlight that the Court affirmed that unincorporated treaties should be used as interpretative aids pursuant to section 39(1)(b) of the Constitution, and, as a consequence, when assessing whether the state had complied with its obligations under section 7(2) of the Constitution (to respect, protect, promote, and fulfil the rights in the Bill of Rights) then the nature of the binding international treaty obligations on South Africa was relevant. This demonstrates an insistence that while a treaty that South Africa is a party to has significance primarily as an interpretative aid in determining the scope of the domestic constitutional rights, this extends to determining the scope of the obligation on the state to ensure reasonable fulfilment of those constitutional rights.[186]

Thus, in *Sonke* the Constitutional Court's approach is broadly in line with the *Glenister II* approach. But it does appear not to fully embrace the more direct reliance on unincorporated treaties suggested by the *Law*

181 Ibid. Reference below is to the majority judgment written by Theron J.
182 Correctional Services Act 111 of 1998.
183 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
184 The Prevention and Combating of Torture of Persons Act 13 of 2013.
185 *Sonke* (note 80) para 66, referring art 18 and, in fn 162, to arts 1, 3, and 17 of the Optional Protocol.
186 Ibid para 57.

*Society* case. This seemed to be confirmed by the Court. It wished to avoid the domestication issue or any suggestion that causing South Africa to breach an unincorporated treaty is automatically domestically unlawful, by rather using the treaty as an interpretative instrument in assessing whether, in terms of section 7(2), domestic constitutional rights had been properly fulfilled.[187] In particular, the Court affirms, relying on *Glenister II*,[188] that '[r]egardless of the extent of the Optional Protocol's domestication, this Court has, as explained, held that an international instrument approved by Parliament binds South Africa in terms of section 231(2) of the Constitution. *It thus has constitutional import and must be referred to in determining the State's obligations [under section 7(2)] to protect and fulfil the rights implicated by that instrument.*'[189] And the Court, in a footnote, points out that '[t]he approval of an international agreement in terms of section 231(2), by Parliament, tells the world that South Africa undertakes to comply with international agreements as between it and other member states at an international level. The use of the word 'binds' in section 231(2) connotes a legal obligation that South Africa has in the *international sphere*.'[190] However, the Court went on to hold more directly that:

> When the State acceded to the Convention and the Optional Protocol, it assumed internationally binding duties, as well as the obligation to act in good faith with regard to its obligations under those instruments. …They impose on the State the duty in international law to create a correctional centre oversight mechanism that has the necessary independence. As mentioned, *this duty does not only exist in international law, but is sourced in the Constitution itself. As pertinently stated in Glenister II, 'the Constitution appropriates the obligation for itself'*.[191]

Effectively the Court was affirming that treaties that bind South Africa on the international plane are relevant to determining the obligations on the state to fulfil rights in the domestic sphere as required by section 7(2). The effect of this was to 'appropriate' international treaty obligations on the state and give them domestic constitutional force, at least as the standard against which to assess whether the state has complied with section 7(2). As in *Glenister II*, through the lens of section 7(2), the Court in *Sonke* accepts that treaties binding on South Africa on the international plane set the standard against which to judge whether there has been compliance with the obligations to fulfil rights in the Bill of Rights and failure to comply with those treaty obligations will generally lead to a violation of section 7(2). Thus, the Court held that '[t]he Convention and the Optional Protocol, read with the Paris Principles, demonstrate the *measures that must be in place and the level of protection that*

187 Ibid para 67 and the footnote to this paragraph (para 67 fn 168).
188 It refers to *Glenister II* (note 10) para 182.
189 *Sonke* (note 80) para 67 (emphasis added).
190 Ibid para 67 fn 168 (emphasis added).
191 Ibid para 69 (emphasis added), quoting from *Glenister II* (note 10) para 189.

*must be afforded in order for the State to discharge its obligations under section 7(2)* of the Constitution in respect of the conglomerate of implicated rights of inmates.' [192] Indeed, as noted above, the Court explains, relying on *Glenister II,* that 'this duty *does not only exist in international law*..."the Constitution appropriates the obligation for itself".'[193] This strong affirmation appears to confirm that the *Glenister II* line of reasoning, as relied on in *Sonke*, may ultimately conduce to the same substantive position reached by the Court in *Law Society* in matters where rights in the Bill of Rights are implicated, albeit by a slightly less direct route. In other words, in substance, even if not form, non-compliance with international obligations in unincorporated treaties, at least in so far as non-compliance has an effect on the realisation of rights in the Bill of Rights, will be unconstitutional and unlawful.

Given that the Court in *Sonke* accepted and applied the *Glenister II* approach, which it considered as establishing a 'clear precedent',[194] what should be made of the fact that the *Law Society* approach which elucidates further constitutional hooks was also available, and, therefore, if applicable was also an available precedent that should have been relied on?[195] To answer this question, it is necessary to consider whether there is any substantive difference between the approach in *Glenister II* (as applied in *Sonke*) and *Law Society*. It appears that one can discern two distinguishing features of substance. First, at least hypothetically, the section 7(2) route, in theory, leaves the possibility open that the government could argue that, notwithstanding failing to ensure compliance with treaty obligations, the government has nevertheless taken reasonable steps to protect, prompt and fulfil the rights in the Bill of Rights (although in neither *Glenister II* nor in *Sonke*, does the Court suggest that such an argument is, in fact, open to the government).[196] Second, the three constitutional hooks discussed above that were used in *Law Society* would, in principle, appear to make non-compliance with unincorporated treaties unconstitutional and unlaw-

192 Ibid para 68 (emphasis added).

193 Ibid para 69 (emphasis added), quoting from *Glenister II* (note 10) para 189.

194 Ibid para 56.

195 *Ruta v Minister of Home Affairs* [2018] ZACC 52, 2019 (2) SA 329 (CC) ('*Ruta*') para 21; *Camps Bay Ratepayers and Residents Association and Another v Harrison & Another* [2010] ZACC 19, 2011 (4) SA 42 (CC) ('*Camps Bay*') para 28; and *Bwanya v Master of the High Court, Cape Town & Others* [2021] ZACC 51, 2022 (3) SA 250 (CC) ('*Bwanya*') para 46 ('The doctrine of precedent stipulates that a court may depart from its previous decision if that decision was clearly wrong. And whether a decision was clearly wrong is not a matter of personal preference, mere disagreement, misgivings, doubt, let alone whim. The test is a stringent one. And "mere lip service to the doctrine of precedent is not enough; . . . deviation from previous decisions should not be undertaken lightly", for the doctrine of precedent is a core component of the rule of law, without which deciding legal issues would be directionless and hazardous').

196 The Court in both cases appeared to assume that the failure to comply with the international treaty obligations, where those implicated rights in the Bill of Rights, could never meet the requirements of s 7(2) (see *Sonke* (note 80) para 69, and *Glenister II* (note 21) para 189).

ful regardless of whether that non-compliance had any implications for the state's fulfilment of rights in the Bill of Rights.[197] The *Glenister II* approach (the section 7(2) route) would require the failure to have some impact on the realisation or enjoyment of a right in the Bill of Rights.

Whether these two possible distinguishing features would, in practice, make a difference will depend on the nature of the matter. In *Sonke*, it appears that embracing the constitutional hooks utilised in *Law Society* would not have made a difference because rights in the Bill of Rights were clearly implicated, and the Court therefore understood the effect of *Glenister II* to mean that the binding treaties, approved by Parliament, created, via section 7(2), a binding domestic obligation on the state.[198] This may explain why the Court did not refer to *Law Society* — it was unnecessary. Moreover, it is worth emphasising that the Court in *Law Society* did not view its decision as conflicting with *Glenister II*.[199] In *Law Society*, the Court offered further routes (the three constitutional hooks) to the same endpoint as *Glenister II*, rather than in any way suggesting that the *Glenister II* section 7(2) route was impermissible or undesirable. It intended to build on *Glenister II*. That being so, the Court in *Sonke* was entitled to adopt the *Glenister II* (section 7(2)) approach, given that there was no specific need to adopt any of the additional constitutional hooks used in *Law Society*. The section 7(2) route was sufficient, and the further routes (or hooks) suggested by *Law Society* would not have changed the outcome of the case. Viewed in this light, it may be less unusual that the Court did not appear to have regard to or consider the implication of *Law Society* at all.

Therefore, in the final analysis, the Court's reliance in *Sonke* on section 7(2), as it did in *Glenister II*, as the basis to find international obligations must be complied with, when respecting and fulfilling rights in the Bill of Rights, is not an incorrect jurisprudential move. And it appears that in *Sonke* little more was needed. But this does not detract from the fact that the Constitution has multiple avenues through which international law can and must be integrated. Much like *Glenister II* before it, the *Law Society* case illustrated further avenues. In some cases, certain avenues may have more salience, but this does not suggest a rejection of other avenues, where they might find ready application in other cases. For this reason, even though it would not have led to a different outcome in *Sonke*, the Court's approach in

197 As discussed in text at notes 101–104.

198 *Sonke* (note 80) paras 68–69.

199 *Law Society* (note 7) paras 74–75 (the Court, para 74, quotes from *Glenister II* (note 10) para 178: '[O]ur Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measure of the State's conduct in fulfilling its obligations in relation to the Bill of Rights.' And, para 75, relies on it for the proposition that 'international law that is reconcilable with our Constitution is an essential tool in ascertaining whether our constitutional obligations have been discharged and fundamental rights upheld').

other cases may make a difference.[200] It is, therefore, necessary for the Court to either embrace *Law Society*'s jurisprudential approach to international law obligations in unincorporated treaties or, if it believes that this approach is inappropriate or wrong, to explain why. I return to this in Part 5.1.

### 4.2.2 *Zuma – from revolution to devolution?*

A year after the *Sonke* decision, the Constitutional Court gave judgment in the *Zuma III* matter.[201] *Zuma III* is one of the recent examples of the Constitutional Court's meaningful engagement with the application of unincorporated treaties. *Zuma III* involved an application by former President Zuma ('Mr Zuma') to rescind a judgment of the Constitutional Court. In that earlier judgment (*Zuma II*),[202] which Mr Zuma sought to have rescinded, the Court found Mr Zuma in contempt of court, and ordered his imprisonment for a 15-month term, for refusing to comply with an order of the Constitutional Court (in *Zuma I*[203]) requiring him to give evidence before the State Capture Inquiry.[204] In *Zuma III*, by way of majority judgment, the Court dismissed Mr Zuma's rescission application because he failed to meet the stringent test that would allow a court to rescind its own final and binding judgment.[205] The relevant unincorporated treaty at issue was the International Covenant on Civil and Political Rights ('ICCPR'). The Court had sought further submissions from the parties in relation to aspects of the ICCPR's fair trial right provisions, and the Human Rights Committee's ('HRC's') interpretation of those.[206] The question was whether the Court, in ordering Mr Zuma's imprisonment, had violated his fair trial rights in the Bill of Rights and whether the Court had failed to interpret those rights with due regard to the ICCPR, notwithstanding the interpretative obligations to consider international law in section 39(1)(b) of the Constitution.[207] The important feature of the case for present purposes is the Court's emphatic statements about the place of treaties in South Africa.

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200 For instance, in *Bosch v ITAC* (note 173) considered in Part 4.1, no right in the Bill of Rights was in issue. Therefore, the *Glenister II* approach (the section 7(2) route) was not applicable. But the *Law Society's* additional constitutional hooks may have found application, had the High Court had regard to the decision.

201 *Zuma III* (note 11).

202 *Secretary of the Judicial Commission of Inquiry v Zuma & Others* [2021] ZACC 18, 2021 (5) SA 327 (CC) ('*Zuma II*').

203 *Secretary of the Judicial Commission of Inquiry v Zuma* [2021] ZACC 2, 2021 (5) SA 1 (CC) ('*Zuma I*').

204 The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State ('the State Capture Inquiry') (a commission of inquiry into high-level corruption during Mr Zuma's presidency).

205 *Zuma III* (note 11) para 128 (read with paras 129–133). Jafta J and Theron J, who wrote dissenting minority judgments, would have granted Mr Zuma's rescission application.

206 *Zuma III* (note 11) para 105. It is clear that the further submissions were sought at the behest of the minority.

207 Mr Zuma argued that the Court's imprisonment order violated his rights in sections 12(1)(b), 34, and 35(3) of the Constitution (*Zuma III* (note 11) para 67). The minority argued that interpreting these rights in accordance with articles 9 and 14(5) of the ICCPR, the Court's imprisonment order did violate Mr Zuma's constitutional rights (para 105, read with paras 191, 228–229).

The Court (in the majority judgment) asserted a firm and traditional 'dualist' approach to unincorporated treaties (very much in keeping with the *Azapo* and pre-constitutional paradigm), downplaying elements in the Constitution which appeared to previously allow the Court to adopt a more 'monist' approach (as in *Glenister II*, *Law Society*, and *Sonke*), and seemingly ignoring its own jurisprudence. Indeed, the Court even expressly embraced the idea that South Africa is a 'dualist state'. This is telling. As we have seen, strict 'dualism' is an approach that Justice Cameron and the *Glenister II* judgment sought to reject as inconsistent with a full understanding of the Constitution's manifest and manifold integration of international law. Yet the Court in *Zuma III* held that:

> It is trite that international treaties, like the ICCPR, *do not create rights and obligations automatically enforceable within the domestic legal system of the member State that ratifies and signs them*. The architecture of international law is constructed around the recognition of State Sovereignty. *That is why it is a cardinal tenet of international law, that to be given force and effect on the domestic plane* of a *dualist State,* international treaties must be incorporated into a State's body of domestic law by way of an implementing provision enacted by that State's Legislature. *This principle is put on a textual footing in our own Constitution by virtue of section 231(4), which maintains that a South African court cannot treat any international law as directly applicable on the domestic front unless it is first incorporated into domestic law by an enactment of national legislation*.[208]

There are several difficulties with this statement. First, generally, international law has nothing to say about how it is received into domestic law.[209] Thus, presumably, the Court meant to say that the principle that 'international treaties must be incorporated into a State's body of domestic law by way of an implementing provision enacted by that State's Legislature' is a 'cardinal tenet' not of 'international law', but domestic constitutional law's treatment of international law in 'dualist' states.

Second, and more importantly, it is striking that the Court would make an emphatic statement that seemed to expressly categorise South Africa as a dualist state when it comes to treaties. The Court in appearing to apply this label to South Africa had no regard to the fact that 'dualism' and 'monism',

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208 *Zuma III* (note 11) para 108 (emphasis added).

209 Generally it is for each state's own domestic constitutional law to determine how international law takes effect domestically, although specific treaties may require state parties to domesticate the treaty or certain obligations under it. In principle, international law is concerned with compliance with international obligations not the domestic means or modalities. As Tzanakopoulos ILA Final Report (note 68) para 20 notes, international law is 'quite indifferent to any variations in its reception by domestic law.' Rather, as Crawford notes, 'domestic or national law dictates the terms on which international law "comes in" to domestic law' (Crawford *Chance, Order, Change* (note 12) para 272). See also J Crawford, 'International Law in the House of Lords and the High Court of Australia 1996-2008: A Comparison' in E Shirlow, I Saunders & DR Rothwell (eds) *The Australian Year Book of International Law* (2009) 28 ('international law does not in general address the secondary rules of national law; it imposes obligations of result, not of means').

while potentially useful shorthand labels,[210] are, as we have observed, not strict or binary alternatives. Most countries find themselves somewhere on a spectrum given their own unique domestic constitutional arrangements.[211] For it is those constitutional arrangements in each state that determine how international obligations find domestic application,[212] not any *a priori* label. It is as if the Constitutional Court went back to the world of *Azapo* (and South Africa's pre-constitutional era, which followed a similar 'dualist' approach to that adopted by the UK and other commonwealth countries[213]) and simply skipped over 25 years of its own incremental interpretation of the Constitution and its international-law harmonising jurisprudence.[214] Indeed, this 'dualist' moniker — used for the first time by the Constitutional Court in *Zuma III*[215] — would appear to be an emphatic rejection of the view taken by Justice Cameron as to the effect of the *Glenister II* decision

210 As discussed, with references, in notes 68–70.

211 As discussed at text at note 70, and see the references in note 70 (for instance, as indicated, Verdier and Versteeg (note 69) make clear that 'the monist-dualist distinction has fundamental limitations for the purpose of classifying national approaches to international law [inter alia because] national systems do not adopt a monolithic approach to international law; most of them combine aspects of the monist and dualist approaches.') It is probably worth noting that Sloss, for instance, classifies South Africa as a monist country (rather than a dualist country), given the Constitution's international-law-integrative features, in particular its provision for self-executing provisions of treaties to become domestic law absent legislation (D Sloss, 'Domestic Application of Treaties', in D Hollis (ed), *The Oxford Guide to Treaties* (2nd ed, 2020) 360-361).

212 Crawford *Chance, Order, Change* (note 12) para 272.

213 Sloss (note 211) 358–360 ('Almost all the British Commonwealth States follow the dualist approach for treaties' at 358); and Aust (note 70) 194–5. See too *Moohan & another v Lord Advocate* [2015] 2 All ER 361 paras 29, 30, and 38 (where the appellants' argument that 'the Scottish Parliament lacks the competence to legislate in breach of art 25 of the ICCPR' was rejected by UK Supreme Court, given the 'dualist approach' of UK law, which meant that unincorporated treaties do not create domestic rights, nor do international obligations flowing from unincorporated treaties form part of domestic law). The UK Supreme Court has similarly affirmed that the 'dualist system is a necessary corollary of Parliamentary sovereignty' in *R (on the application of Miller & another) v Secretary of State for Exiting the European Union* [2017] 1 All ER 593 para 57.

214 As seen, inter alia, in *Glenister II* (note 10), *Law Society* (note 7), and *Sonke* (note 80).

215 There is no reported Constitutional Court decision, other than *Zuma III* (note 11), where the Court has ever referred to South Africa's legal system as being dualist. And even in lower court decisions, there is almost no reference to South African law being 'dualist' or taking a 'dualist' approach. Indeed, other than in *Zuma III*, the Western Cape High Court decision of *Commissioner, South African Revenue Service v Van Kets* [2011] ZAWCHC 435, 2012 (3) SA 399 (WCC) appears to be the only reported case where a South African court itself uses the term to refer to South African law's approach to international law (see para 14). And in one other case the High Court simply refers to submissions made to it by one of the parties (where that party submitted that South Africa's system is dualist), rather than embracing that description of South African law itself. See *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2018] ZAWCHC 109, 2018 (6) SA 598 (WCC) ('*Women's Legal Centre (HC)*') para 92. See also *Bosch v ITAC* (note 173) para 92, where, as indicated above, the High Court accepted ITAC's argument that South Africa tended towards a 'dualist' approach.

(not to mention, its acceptance in numerous subsequent cases, including *Law Society* and *Sonke*).

Third, the Court appears to focus exclusively on one aspect of section 231(4) in making this statement (its provision for legislative incorporation), while ignoring the variegated ways in which the Constitution embraces international law, as explored in *Glenister II*, *Law Society* and *Sonke*.[216] In fact, the Court went so far as to utter this admonition: 'On a conspectus of all of the above, the simple truth that *ossifies* is that *the ICCPR, an international treaty not incorporated into South African law, has no place being invoked in a national court*, like this one, and litigants *cannot purport to rely on section 39(1)(b) of the Constitution as the basis upon which to attempt to invoke its provisions*.'[217] One might remark that the Court's admonition in this regard was indeed indicative of ossification,[218] in contrast to the supple and nuanced attitude previously taken by the Court to international law, in line with the Constitution's own embrace of international law. Indeed, previous invocations of unincorporated treaties by litigants before the Constitutional Court were not denounced, but welcomed[219] — as they should be, given the multiple ways the Constitution embraces unincorporated treaties binding on South Africa.[220] However, in *Zuma III*, the Court even adopted, with approval, the warning by the dissenting minority in *Glenister II* (which, in context, had been directed at the more integrative (and 'monist'?) approach taken by the majority in *Glenister II*) that 'treating international conventions as interpretative aids does not entail giving them the status of domestic law in the Republic. To treat them as *creating domestic rights and obligations is tantamount to "incorporat[ing] the provisions of the unincorporated convention into our municipal law by the back door"*.'[221] And yet, as we have seen, in *Glenister II, Law Society*, and *Sonke*, the Court certainly accepted that unincorporated treaties do create, albeit via the Constitution (given certain constitutional hooks or routes discussed above, which are located in the Constitution's

216 Considered in Parts 3.2, 3.3, and 4.2.1.

217 *Zuma III* (note 11) para 109.

218 The Court's statement that the truth (or position) 'ossifies' is a strange turn of phrase. It is probably employed figuratively to mean the position had become clear or solidified. But ossify has a different shade of meaning, which is far more pejorative when it is used figuratively. While not intended, it appears the position adopted by the Court was indeed indicative of ossification (as defined by the Oxford Dictionary). The Shorter Oxford English Dictionary (2007) defines ossify as:
1. Turn into bone or bony tissue. e18.
2. fig. (Cause to) become emotionally hardened or callous; (cause to) become rigid or fixed in attitude etc. Now chiefly as ossified.

219 For instance, see *Glenister II* (note 10) para 187; Cameron (note 54) at 397 fn 54 (acknowledging that the amicus was responsible for raising many of the arguments, including in relation to the approach to international law, adopted by the majority from paras 175–206, 210–250); and *S v Okah* (note 23) para 15.

220 As discussed in Part 3.3.2.

221 *Glenister II* (note 10) para 98, quoted in *Zuma III* (note 11) para 116.

own framework), *domestic* obligations on the government not to cause South Africa to violate its international treaty obligations.

Moreover, it certainly must be the case that litigants are indeed entitled, under the Constitution, to invoke binding treaties before the Constitutional Court, irrespective of whether they are domestically incorporated or unincorporated. This much is made plain by section 39(1)(b) (international law *must* be considered when interpreting rights in the Bill of Rights) and section 233 (legislation must be interpreted to accord with international law where reasonably possible).[222] Now in *Zuma III*, as the majority found, the obligation in section 39(1)(b) 'to consider' international law when interpreting rights in the Bill of Rights does not expressly require that an interpretation in conformity with international law must be adopted. Nevertheless, where the 'international law' in question is a binding unincorporated treaty, approved by Parliament (as the ICCPR is), the question is why the Court would wish to adopt an interpretation of any right in the Bill of Rights in conflict with South Africa's international treaty obligations, where a reasonable interpretation in conformity with those obligations is possible. Indeed, the Court has repeatedly signified that where the international law in question is a binding treaty obligation, more weight ought to be given to it in the interpretive exercise.[223] And it is evident that, where possible, the Constitution intends harmony between South Africa's domestic law (including the Constitution) and South Africa's international law obligations.[224] As the Constitutional Court affirmed in the *National Commissioner v SALC* (the 'Torture docket decision') case, quoting, with approval, Ngcobo CJ's minority judgment in *Glenister II*, '[t]he Constitution reveals a clear determination to ensure that *the Constitution* and South African law are *interpreted to comply with international law*'.[225] In principle, it would be permissible for the Court to find that it is not reasonably possible to interpret a right in the Bill of Rights in a manner that

222 As explained in note 207 above, the minority argued that interpreting the rights in the Bill of Rights in accordance with arts 9 and 14(5) of the ICCPR, the Court's imprisonment order did violate Mr Zuma's constitutional rights.

223 *Grootboom* (note 26) para 26 ('The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, *where the relevant principle of international law binds South Africa, it may be directly applicable*' (emphasis added)); *Glenister II* (note 10) para 178; *Mlungwana v S* [2018] ZACC 45, 2019 (1) BCLR 88 (CC) para 48 fn 70 ('It is trite that international law must be considered when interpreting the Bill of Rights, including (albeit with less weight) non-binding international law'); *Kruger v National Director of Public Prosecutions* [2019] ZACC 13, 2019 (6) BCLR 703 (CC) (per Theron J, concurring in the majority judgment) para 116 fn 64.

224 Coutsoudis & du Plessis CCR (note 15) 171–172.

225 *National Commissioner* (note 21) para 22 (emphasis added), quoting *Glenister II* (note 10) para 97 (the majority did not disagree with this view, rather the s 7(2) approach taken by the majority is clearly predicated on the acceptance that the Bill of Rights should be interpreted to accord with international treaties). See also *De Vos N.O & Others v Minister of Justice And Constitutional Development & Others* [2015] ZACC 21, 2015 (9) BCLR 1026 (CC) para 29 ('Section 39(1)(b) requires courts to interpret the Bill of Rights and our law in a way that complies with international law').

accords with a binding treaty (although the executive and legislature should not seek to make South Africa party to treaties that are in conflict with the Constitution).[226] But where it is possible to achieve harmony between the Constitution and international treaty obligations, that would undoubtedly be the more appropriate jurisprudential approach.[227]

What is perhaps most striking in *Zuma III* is that the Court did *not* seek to question or find that *Glenister II*, *Law Society* and *Sonke* were clearly wrong (as it would have to if it wished to depart from them[228]). Rather, the Court, in fact, starts by referring to and paying lip service to the relevant jurisprudence in *Glenister II* and *Sonke* (at least in the footnotes). [229] Indeed, the Court referred to the following paragraph of *Sonke* (albeit without quoting):

> Section 39(1)(b) of the Constitution thus enjoins us to consider international law when interpreting provisions in the Bill of Rights. And, in *Glenister II*, this Court established *clear precedent* on the role of international treaties that have been approved by Parliament in determining what "reasonable and effective" steps the State is obliged to take under section 7(2) in order to respect, protect, promote and fulfil those rights.[230]

However, when the Court then discussed the approach to the ICCPR, it appeared to make no attempt to apply its own jurisprudence. In particular, it pays no heed to the determination in *Sonke*, relying on *Glenister II*, that 'this Court has made it clear that, once an international instrument has been

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226 *Minister of Justice and Constitutional Development & Others v Prince (Clarke & Others intervening)* [2018] ZACC 30, 2018 (6) SA 393 (CC) ('*Prince*') para 82 ('The Constitution is the supreme law of the Republic and, in entering into international agreements, South Africa must ensure that its obligations in terms of those agreements are not in breach of its constitutional obligations.'), and discussion in Coutsoudis & du Plessis (note 15) 167–170.

227 This is evidently the approach adopted by the Constitutional Court in *Fick* (note 23) para 62 (it held that it must interpret s 34 of the Constitution, and therefore develop the common law, to give effect to the SADC Treaty provisions requiring domestic enforcements of SADC Tribunal decisions).

228 Recently the Constitutional Court has affirmed that 'this Court will not depart from an earlier binding statement of the Court unless satisfied that the earlier statement was "clearly wrong". In applying this rule of precedent to itself as the country's apex Court, the Court must tread with caution: it "must not easily and without coherent and compelling reason deviate from its own previous decisions, or be seen to have done so"'. *Barnard Labuschagne Incorporated v South African Revenue Service & Another* [2022] ZACC 8, 2022 (5) SA 1 (CC) ('*Barnard*') para 34, referring to and quoting from the previous decisions of *Turnbull-Jackson v Hibiscus Court Municipality* [2014] ZACC 24, 2014 (6) SA 592 (CC) para 57 and *Gcaba v Minister for Safety and Security* [2009] ZACC 26, 2010 (1) SA 238 (CC) ('*Gcaba*') para 62. See also decisions referred to in note 195.

229 *Zuma III* (note 11) para 107 fn 85 (the Court states the following: 'In *Glenister II v President of the Republic of South Africa & others* [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC) para [192], this Court emphasised the obligation on courts to consider international law when interpreting the Bill of Rights; see also *Sonke Gender Justice NPC* id para [56], and *Women's Legal Centre Trust v President of the Republic of South Africa and others* 2018 (6) SA 598 (WCC) paras [173]–[178].')

230 *Sonke* (note 80) para 56, emphasis added.

ratified and approved in accordance with section 231(2) of the Constitution, it is deemed to be of "the foremost interpretative significance" and "has significant impact in delineating the State's obligations in protecting and fulfilling the rights in the Bill of Rights".'[231] In summary, it is evident that the Court simply had insufficient regard to its previous jurisprudence, which while it referred to it with apparent approval, it, in practice, absent any explanation, seemed to disregard. This is inappropriate: the Court has affirmed that 'it "must not easily and without coherent and compelling reason deviate from its own previous decisions, or be seen to have done so".'[232] It is inconsistent with the requirement of legal precedent, founded on the rule of law. As the Court itself has cautioned, 'without precedent, certainty, predictability and coherence would dissipate. The courts would operate without map or navigation, vulnerable to whim and fancy. Law would not rule.'[233]

Finally, while the Court did not completely ignore the fact that section 231(4) made provision for self-executing provisions of treaties to become part of South African law absent legislation, the Court simply stated that the ICCPR provisions are not self-executing.[234] It did not consider why this was so, and it relied on no authority for this proposition. Moreover, had it had regard to scholarly writing on the topic, it would have noted that some South African academics have argued that the provisions of the ICCPR and other human rights treaties that have been approved by Parliament ought to be viewed as self-executing.[235] Of course, different foreign courts, shaped by their own constitutional regimes, past judicial practice, and the approach to the application of international treaties in their domestic spheres, have reached divergent conclusions as to whether and the extent to which the

231 Ibid para 57 referring to, and quoting from, *Glenister II* (note 10) paras 182 and 195.

232 *Barnard* (note 228) para 34 ('In applying this rule of precedent to itself as the country's apex Court, the Court must tread with caution: it "must not easily and without coherent and compelling reason deviate from its own previous decisions, or be seen to have done so".' Quoting from *Gcaba* (note 228) para 62).

233 *Ruta* (note 195) para 21.

234 *Zuma III* (note 11) para 108. In *Claassen v Minister of Justice and Constitutional Development* [2009] ZAWCHC 190, 2010 (6) SA 399 (WCC), the High Court similarly held that the ICCPR was not self-executing, while failing to properly explain why. However, the Constitutional Court, in *Zuma III*, did not even refer to this decision.

235 M Killander, 'Judicial immunity, Compensation for unlawful detention and the elusive self-executing treaty provision: Claassen v Minister of Justice and Constitutional Development 2010(6) SA 399 (WCC)' (2010) 26 *South African Journal on Human Rights* 386 who argues that certain provisions (and particular, as relevant to the case he was analysing, article 9(5)), could be held to be self-executing (see in particular at 391–392). See also E Ngolele, 'The Content of the Doctrine of Self-Execution and Its Limited Effect in South African Law' (2006) 31 *South African Yearbook of International Law* 153 and M Olivier, 'Exploring the Doctrine of Self-Execution as Enforcement Mechanism of International Obligations' (2002) 27 *South African Yearbook of International Law* 99. For a discussion of the divergent academic views in relation to when treaties will be self-executing in South Africa, see Dugard & Coutsoudis (note 5) 82–83.

ICCPR's provisions are 'self-executing'.[236] Thus, *Zuma III* represents yet another missed opportunity for the Court to properly grapple with and develop an autochthonous South African jurisprudence as to when treaty provisions will be considered self-executing. This was a methodological failure by the Court.[237] By simply stating that the ICCPR was not self-executing, it did not consider whether the specific provisions relevant to the issues before it (articles 9 and 14(5)) met the requirements for being self-executing provisions for the purposes of section 231(4). More concerningly, it made its finding without even attempting to formulate any requirements or test to determine whether or not a provision is self-executing. In other words, the Court stated a conclusion (the ICCPR's provisions are not self-executing), without even indicating what standard it was assessing the ICCPR and its provisions against, in order to determine whether they were self-executing.

In summary, in multiple respects, in *Zuma III,* the Court fails to heed 'the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law.'[238] In Part 4.2.3.1, I reflect on the unique context in which *Zuma III* was decided and how this context may explain this failure and why *Zuma III* is unlikely to be followed in subsequent cases.

### *4.2.3 Where next for the Constitutional Court?*

Stepping back and reviewing the uneasy polarity of certain of the Constitutional Court jurisprudence considered, it may initially appear difficult to assess whether *Zuma III* is an aberration or whether *Glenister II, Sonke* and *Law Society* may ultimately prove to be. However, while far from conclusive, certain cases decided in 2022 may provide initial indications of the Court's likely jurisprudential approach going forward. These might help to answer the primary descriptive question of how South Africa's application of treaties is evolving, which will provide a basis in Part 5 for making proposals for navigating the road ahead.

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236 For instance, the Supreme Court of Cyprus has held, in *Pavlou v Chief Returning Officer, Mayor of Nicosia* (1991) 86 ILR 109, that the ICCPR's provisions are self-executing (the Court reasoned at 119-120 that '[i]ts provisions are not pious declarations. They may be applied by the organs of the State and can be enforced by the Courts. They create rights for the individuals and they govern and affect directly relations of the internal life between the individuals, and the individuals and the State, or the public authorities. Its provisions create rights and interests which can be justiciable. Each State party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant.') The US courts, on the other hand, have held that ICCPR's substantive provisions are not self-executing; although this is predominately due to the fact that in ratifying the ICCPR the US government (through the President and Senate) declared that the ICCPR's substantive human rights provisions were not self-executing: see T Lynch, 'The ICCPR, Non-Self-Execution, and DACA Recipients' Right to Remain in the United States' (2020) 34 *Georgetown Immigration Law Review* 323, 376–377.

237 In relation to the failure to consider the issue of self-executing provisions in the *Law Society* decision see Samtani (note 19) 212–217 and the discussion above at notes 149–159.

238 *Glenister II* (note 10) 202.

#### 4.2.3.1 How has Zuma III fared?

It is perhaps best to begin by assessing the possible jurisprudential legacy of the *Zuma III* decision. In doing so, it is necessary to start with a contextual observation. It will be recalled that in *Zuma II*, the Court, by majority decision, ordered the imprisonment of former President Zuma for 15 months for contempt of court. It found that it was compelled to do so given the flagrant contempt of court by the former President of South Africa who had made clear that he refused to accept the Court's authority and orders (refusing, despite the Court's order, to give evidence before the State Capture Inquiry)[239] and because this posed a genuine threat to the rule of law and the administration of justice.[240] Therefore, *Zuma III* — where Mr Zuma sought to have the Court urgently rescind its own final imprisonment judgment and order[241] — was a most unusual case that placed the Court in the eye of a political, legal, and violent societal storm.[242] Given that context, one might tentatively observe that it appears evident that the Court's majority was intent on downplaying the significance of the ICCPR obligations and the HRC's interpretation of those (which the Court in any event briefly sought to distinguish[243]), to see off an accusation by the Court's minority that argued that (a) the Court's ordering of the imprisonment of Mr Zuma for contempt of court was itself unconstitutional and in violation of Mr Zuma's rights and (b) the majority had impermissibly failed to have regard to international law when interpreting the Bill of Rights (even though in *Zuma II* none of the parties had raised the ICCPR,[244] nor had the dissenting

239 In *Zuma I* (note 203), the Court unanimously ordered Mr Zuma to give evidence before the State Capture Inquiry.

240 In *Zuma II* (note 202) paras 92, 102, 138 and 141.

241 Mr Zuma launched his rescission application in the Constitutional Court before he was required to submit himself for imprisonment. But despite a failed attempt to obtain an interdict from the High Court to prevent execution of the Constitutional Court's imprisonment order, on 7 July 2021, he handed himself over to be imprisoned. See *Zuma III* (note 11) paras 7–10; *Zuma v Minister of Police & Others* [2021] ZAKZPHC 40, [2021] 3 All SA 967 (KZP).

242 In early July 2021, KwaZulu-Natal and Gauteng experienced violent civil unrest, with an estimated 354 dead and over R50 billion lost to the economy, apparently sparked by Mr Zuma's imprisonment, ordered by the Court in *Zuma II*. This was already raging while *Zuma III* was being argued before the Court on 12 July 2021. See Report of the Expert Panel into the July 2021 Civil Unrest, available at https://www.thepresidency.gov.za/content/report-expert-panel-july-2021-civil-unrest.

243 *Zuma III* (note 11) para 120 fn 105. The Court also pointed out that the decisions of the HRC relied on by the minority are not binding (para 120 fn 106).

244 Written submissions filed by the applicant (the Secretary of the Commission of the State Capture Inquiry) and the amicus curiae (the Helen Suzman Foundation) are on file with the author, and available at https://collections.concourt.org.za/handle/20.500.12144/36746?show=full. Mr Zuma refused to participate in the matter despite being cited, served with the papers, and being directly invited to make submissions by the Court (see *Zuma II* (note 202) paras 14 and 63; and *Zuma III* (note 11) para 75).

judges[245]). Thus, it may have been opportune for the Court to adopt this approach of minimising the domestic significance of South Africa's ICCPR obligations to protect the actual or perceived legitimacy and validity of its decision and, ultimately, its own institutional legitimacy, given the case's unique circumstances.

Therefore, *Zuma III* at least raises the question of whether, despite the generally friendly (open or incorporative) approach to international law displayed by South Africa's Constitution and its courts,[246] in certain circumstances, South Africa's courts might, in respect of international law, reveal themselves to be no more than fair-weather friends. Were this to be the case, this would be unfortunate: it would suggest that the Court, in certain cases, may use international law in a purely instrumental fashion (or only when supportive of a predetermined outcome), rather than apply it in a methodologically rigorous manner. This is inconsistent with the constitutional scheme and its openness to international law.[247] It is, therefore, reassuring to see, as discussed below, that in cases since *Zuma III*, the Constitutional Court has not sought to rely on or emulate the approach in *Zuma III*.

In 2022, the Constitutional Court handed down decisions in *AmaBhungane Centre*,[248] *Centre for Child* Law,[249] *Women's Legal Centre Trust*,[250] *Blind*

245 In *Zuma III* (note 11), Justices Theron and Jafta wrote dissent minority judgments. Similarly, in *Zuma II* (note 202), Justice Theron, with Justice Jafta concurring, wrote a dissenting minority judgment (as indicated in para 268, Theron and Jafta JJ would not have ordered Mr Zuma's imprisonment, but rather would have granted 'a coercive order of suspended committal, conditional upon Mr Zuma complying with this Court's order. But because the Commission's lifespan is at its end, I would order that the matter be referred to the DPP for a decision on whether to prosecute Mr Zuma for contempt of court.')

246 Botha & Olivier (note 113) 42 (as quoted at note 113). For an early use of the concept of 'friendliness to international law', see A Cassese, 'Modern Constitutions and International Law' (1985) *Recueil des Cours de l'Académie de Droit International* 331, 343 (Cassese adopts the concept of *völkerrechtsfreundlichkeit* from German scholars).

247 There relevant principles flowing from that constitutional scheme are discussed in Part 5.

248 *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31, 2023 (2) SA 1 (CC) ('*AmaBhungane*') discussed in note 262.

249 *Centre for Child Law v Director of Public Prosecutions, Johannesburg & Others* [2022] ZACC 35, 2022 (12) BCLR 1440 (CC) ('*Centre for Child Law*').

250 *Women's Legal Centre Trust v President of the Republic of South Africa & Others* [2022] ZACC 23, 2022 (5) SA 323 (CC) ('*Women's Legal Centre Trust*') discussed in note 262.

*SA*,[251] and *Rafoneke*[252] where at least certain parties sought to persuade the Court to have regard to unincorporated binding treaties in determining and interpreting the domestic obligations on the government or in crafting remedies. The first important point that can be drawn from these decisions is that in none of them did the Court refer to *Zuma III* or the type of approach adopted in *Zuma III*. Importantly, in *Centre for Child Law*, the Constitutional Court (without referencing *Zuma III*) appears directly to reject *Zuma III*'s approach to the interpretative application of unincorporated treaties. *Centre for Child Law* dealt with the use of international law when interpreting the Bill of Rights (as required by section 39(1)(b)). In doing so, the Court took a markedly different approach to that articulated in *Zuma III*.[253] In *Centre for Child Law*, the Court was required to determine whether a provision in national legislation[254] was unconstitutional because it criminalised the use or possession of cannabis by a child. Central to this determination was the Constitution's protection of the rights of children and the requirement that their best interests be treated as being 'of paramount importance in every matter concerning' them.[255] Within this context, the Court had regard to how unincorporated treaties that South Africa was party to dealt with the best interests of the child principle.[256] For our purposes what is significant is that when dealing with the requirement to consider international law when

251 In *Blind SA v Minister of Trade, Industry and Competition & Others* [2022] ZACC 33, 2023 (2) BCLR 117 (CC) ('*Blind SA*') the focus was predominately on a consideration of a treaty that South Africa had signed but not ratified (the Marrakesh Treaty), which the Court had regard to when crafting an interim remedy, while Parliament was given time to amend legislation that had been found to be unconstitutional given the violation of various rights in the Bill of Rights. For a detailed consideration of the judgment, see CB Ncube & S Samtani 'Copyright, Disability Rights and the Constitution: *Blind SA v Minister for Trade, Industry and Competition* (2023) 13 *Constitutional Court Review* 471.

252 In *Rafoneke & Others v Minister of Justice and Correctional Services & Others (Makombe Intervening)* [2022] ZACC 29, 2022 (6) SA 27 (CC) ('*Rafoneke*'), there was no direct engagement with treaties, and it was not the predicate for the decision, rather the Court merely mentioned as background, and as a counterpoint, the obligations of South Africa in terms of the General Agreement on Trade in Services (para 85). In addition, one of the amicus curiae made submissions that the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), ICCPR, and the African Charter on Human and Peoples' Rights all impose a duty on states parties to ensure that all people, irrespective of citizenship or whether their status is documented under domestic law or not, enjoy the right to work (paras 66 and 67). But the Court, in its judgment, does not engage with these submissions or seek to either interpret relevant provisions of the Constitution, or the legislation at issue, in light of these obligations.

253 *Centre for Child Law* (note 249).

254 Section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992.

255 Section 28 of the Constitution. See *Centre for Child Law* (note 249) paras 42 and 43.

256 *Centre for Child Law* (note 249) para 42. The Court referred to the African Charter on the Rights and Welfare of the Child and the United Nations Convention on the Rights of the Child, both of which South Africa is party to. The Court briefly considers how these treaties deal with the best interest of the child, with reference to the work of the United Nations Committee on the Rights of the Child and certain academic authors (see paras 44–47).

interpreting the Bill of Rights (section 39(1)(b)), the Court did *not* refer to *Zuma III* and the assertion in that case that international law (including binding treaties) ought only to be considered not preferred in the interpretative exercise (given the difference in language between section 233 and section 39(1)(b)).[257] Rather, in *Centre for Child Law*, the Court referred with approval to its determination in *New Nation Movement* (decided a year before *Zuma III*) that 'when interpreting the Bill of Rights, "[a]n interpretation that is consonant with international law should be *preferred* over the one that is not".'[258] This squarely contradicts what was said in *Zuma III* (the ICCPR 'must be considered, *not* necessarily preferred').[259] The Court's approach in *New Nation Movement* was also consistent with the view expressed by the Court in *National Commissioner* that '[t]he Constitution reveals a clear determination to ensure that *the Constitution* and South African law are *interpreted to comply with international law*'.[260] The majority in *Zuma III* ignored (but did not seek to overturn or distinguish) those earlier decisions. Now, in *Centre for Child Law*, the Court ignored *Zuma III* and confirmed its earlier (international law embracing and harmonising) jurisprudence.

Thus, the way that *Zuma III* was ignored in *AmaBhungane Centre*, *Women's Legal Centre Trust*, *Blind SA*, and *Rafoneke*, and its interpretative approach rejected in *Centre for Child Law*, gives an early indication that the Court's restrictive approach to the application of unincorporated treaties evident in *Zuma III* is likely to prove an aberration, not a harbinger of some more general trend away from the openness to international law seen in pre-*Zuma III* jurisprudence. Of course, as already indicated,[261] and discussed in Part 5, the doctrine of legal precedent (an incidence of the rule of law, which insists on legal certainty) requires the Court to comply with its earlier decisions, unless they are clearly wrong. Therefore, rather than merely ignoring *Zuma III*'s approach to unincorporated treaties, the Court should have explained why it was clearly wrong and inconsistent with the Constitution's integrative approach to international law and the Court's earlier decisions.

#### *4.2.3.2 How have Glenister II and Law Society fared?*

If *AmaBhungane Centre*, *Centre for Child* Law, *Women's Legal Centre Trust*, *Blind SA,* and *Rafoneke* provide an initial indication that *Zuma III* is likely

257 *Zuma III* (note 11) para 118.

258 *Centre for Child Law* (note 249) para 42 fn 48, quoting from *New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11, 2020 (6) SA 257 (CC) ('*New Nation Movement*') para 189. The Court in *Centre for Child Law* mistakenly attributed the determination to the first majority judgment of Madlanga J in *New Nation Movement*, rather than the second (concurring) majority judgment of Jafta J.

259 *Zuma III* (note 11) para 118 (emphasis added). The Court also held that 'international law is an interpretative tool to assist in the interpretation of our Bill of Rights and it does not oblige this Court to prefer a position taken in international law.'

260 *National Commissioner* (note 21) para 22 (emphasis added), quoting *Glenister II* (note 10) para 97.

261 See notes 195 and 228.

to be viewed as an aberration, what do those decisions tell us, if anything, about the *Glenister II* and *Law Society* lines of authority? First, in none of the decisions did the Court seek to rely on any of the further incorporative constitutional hooks developed in *Law Society* (although none of those hooks was considered and rejected). Indeed, in none of the decisions is the *Law Society* decision even referred to. Second, in *AmaBhungane Centre* and *Women's Legal Centre Trust*, one sees the Court (or the parties before it) adopting or at least referring to a similar approach to that taken in *Glenister II* (without any reference to *Law Society*).[262] This is not dissimilar to what one saw in *Sonke*. As considered in Part 4.2.1, it is evident that one ought to be cautious about drawing too much from the *Sonke* decision beyond the fact that the Court accepted and affirmed the incorporative approach in *Glenister II*, via section 7(2) of the Constitution. The Court does not refer to the *Law Society* decision, nor does anything in its judgment suggest that the further constitutional hooks elucidated in *Law Society* were impermissible. For the reasons already considered, it may be that it was simply unnecessary for the Court to consider other alternative routes, given the nature of the case before it, which, as discussed, bore a striking resemblance to that in *Glenister II*. One can make the same points broadly concerning *AmaBhun-*

262 *AmaBhungane* (note 248) involved a challenge to the constitutionality of the Executive Ethics Code (which bound the President and Ministers), promulgated under the Executive Members' Ethics Act, because it did not require the disclosure of donations made to campaigns for positions within political parties. The Court, as in *Glenister II* (note 10) and with reference to *Glenister II*, had regard to South Africa's international treaty obligations to fight corruption to interpret and give content to the rights in the Bill of Rights (in particular s 19 of the Constitution, which affords citizens the right to make political choices), in relation to the obligation on the state in s 7(2) to respect, protect and promote the rights in the Bill of Rights (paras 39–42). However, ultimately the Court appears to have regard to these obligations more by way of contextual background. It is unclear what role, if any, the fact of these international obligations ultimately had on the determination of the constitutionality of the Executive Ethics Code, as the Court's analysis turned more on its consideration of whether the Code and legislation thwarted the requirements of transparency and accountability found in the Constitution.
In *Women's Legal Centre Trust*, the SAHRC relied on *Glenister II* (note 10) to argue that 'in considering what measures the state should take into account to give effect to fundamental rights, international instruments play a critical role in determining the substance of the state's domestic obligations' (para 35). The SAHRC relied on a variety of international treaties, to which South Africa was party, but which had not been incorporated by legislation to argue that the state bore an obligation under s 7(2) to pass separate legislation to recognise and regulate Muslim marriages. The SAHRC contended that these obligations arose under both international law and domestic law. A similar approach had been taken by the High Court in the matter (*Women's Legal Centre (HC)* (note 215)). However, ultimately the Court did not end up needing to engage with this approach and the unincorporated treaties, since it found that the state had enacted legislation dealing with marriage, and, rather than requiring separate legislation to cater for Muslim marriages, the fault lay with the under inclusiveness of the existing legislation and its violation of rights in the Bill of Rights (para 82). The Court, when interpreting the relevant rights in the Bill of Rights (equality, dignity, access to courts, and the principle of the best interests of the child), which were breached by the legislation, did *not* expressly refer to any of the treaties (paras 42–63).

*gane Centre* and *Women's Legal Centre Trust*, which like *Glenister II* involved challenges to legislation (or subordinate legislation).

Ultimately what these 2022 decisions — understood in light of *Sonke* and given their apparent rejection of the approach in *Zuma III* — appear to suggest about the *Glenister II* and *Law Society* lines of authority is that the Court generally accepts that unincorporated treaties that South Africa is bound by do, via section 7(2), cast a domestic obligation on the state, when protecting and fulfilling the rights in the Bill of Rights, to do so in a manner that accords with South Africa's treaty obligations. What is left uncertain is whether the Court will see relevance and salience in the further constitutional hooks developed in *Law Society*. The uncertainty arises because in none of the cases has the Court expressly or implicitly rejected the approach in *Law Society,* and that approach, as discussed above, is complementary to (and additional to) that in *Glenister II*. *Law Society* and *Glenister II* are not in conflict. And in many cases, particularly where rights in the Bill of Rights are implicated, they would generally have the same consequence (it would be unconstitutional for the state to act in a way that would cause South Africa to violate its treaty obligations). Thus, precisely because the *Glenister II* approach may ultimately lead to the same result as *Law Society*, and is by now a more established precedent,[263] it may be that, as with *Sonke,* neither the Court nor the parties before it have, thus far, found it necessary to rely on *Law Society*. It may well be that one will need to wait for a case more directly equivalent to *Law Society*, where the Constitutional Court is faced similarly with the conduct by the executive (rather than legislation) that causes South Africa to violate international treaty obligations, to consider whether the Court will reaffirm that such conduct is constitutionally unlawful on the basis of any of the additional constitutional hooks in *Law Society*. As yet, no such case has found itself before the Constitutional Court. This has left the Court's position on *Law Society*'s further constitutional hooks uncertain. In Part 5, I consider why, for this and other principled reasons, the Court needs to grapple with the constitutional hooks enunciated in *Law Society*.

## 5 Reflections for Navigating the Road Ahead

In Parts 2 to 4, I considered the evolving approach of the courts to the application of treaties in South Africa, within the framework of the Constitution, as they have grappled with the Constitution's approach to binding treaties. One sees a general trend towards an approach that gives unincorporated treaties significant domestic effect in respect of the obligations they place on organs of state. However, the approach has at times been inconsistent

263 *Sonke* (note 80) para 56 ('in *Glenister II*, this Court established clear precedent on the role of international treaties that have been approved by Parliament in determining what "reasonable and effective" steps the State is obliged to take under s 7(2) in order to respect, protect, promote and fulfil those rights').

and has not always been faithfully followed in all subsequent decisions. Moreover, while we have seen a greater exploration of the Constitution's international-law-integrative routes (or hooks), we have seen the strange and persistent neglect of section 231(4)'s self-executing route. It, therefore, appears that what is required is for the courts in general, and the Constitutional Court in particular, to adopt an approach to the application of unincorporated treaties that gives proper and full effect to the Constitution's integrative scheme. I suggest that, in order to ensure this occurs, four principles should guide the courts' approach to the application of treaties going forward. As I explain below, these principles emerge from and are grounded in the Constitution, its foundational values and international law scheme, and the Constitutional Court's jurisprudence.

First, the courts' approach to the application of unincorporated treaties in South African law should be *holistic*, by which I mean, courts should approach the application of treaties with due regard to the whole Constitution. The Constitution does not make international law applicable in a simple or one-dimensional way. Its embrace of international law is nuanced and variegated.[264] How international law finds application in each country's domestic sphere is determined by its own constitutional scheme.[265] South Africa's Constitution, as we have seen, shows, as a product of its history, a particular openness to international law, which is both manifest and diverse. This requires courts to do the hard work of fashioning a South African jurisprudence in relation to the application of treaty obligations that gives appropriate weight to all of the Constitution's incorporative injunctions, not just some. In this way courts show due fealty to 'the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law.'[266] Viewed properly, that is what one sees the Constitutional Court trying, albeit in different ways and not without difficulties, to do in cases such as *Glenister II*, *Law Society*, and *Sonke*, and failing adequately to do in *Zuma III*.

Second, the courts should approach the application of unincorporated treaties in a manner that is *harmonising*. It is plain that the constitutional scheme seeks to ensure harmony between South Africa's domestic law and its international law obligations, not conflict.[267] This commitment to harmony should, as far as possible, pervade the courts' approach to the application of treaty obligations. Where possible, the courts should seek

264 As discussed in Part 3.3.2.

265 Crawford, *Chance, Order, Change* (note 12) para 272; Tzanakopoulos ILA Final Report (note 68) para 19.

266 *Glenister II* (note 10) para 202.

267 This is evident, inter alia, from the preamble, s 232, s 233, s 39(1)(b), and s 199(5) of the Constitution, see discussion in Coutsoudis & du Plessis CCR (note 15) at 171-172. See also *Glenister II* (note 10) para 201 (the Court referred to the need to 'respect the careful way in which the Constitution itself creates concordance and unity between the Republic's external obligations under international law, and their domestic legal impact.'), quoted with approval in *National Commissioner* (note 21) para 23 fn 15.

to apply unincorporated treaties in ways that facilitate harmony between South African law and international law and the obligations they both place upon the state.

Third, the courts must approach the application of unincorporated treaties in a manner that ensures *certainty*. The need for certainty flows from the rule of law (a foundational principle of the Constitution).[268] Legal certainty, which is promoted, inter alia, by respect for legal precedent, is necessary. Without it, not only courts, but also organs of state and litigants 'would operate without map or navigation, vulnerable to whim and fancy'.[269] To avoid this, what is therefore required is a clearly articulated and consistently applied approach to the application of treaties in different circumstances.

Fourth, the courts' approach to the application of unincorporated treaties, within the framework of the Constitution, must be *rigorous*. In other words, the courts must be methodologically rigorous in ensuring that when unincorporated treaties are applicable within the framework of the Constitution, they are applied and applied properly. This is a constitutional obligation because section 165(2) of the Constitution expressly provides that courts are 'subject only to the Constitution and the law, *which they must apply* impartially and without fear, favour or prejudice.'[270] Whatever its normative desirability, the Constitution, in various ways, embraces and makes applicable treaties binding on South Africa. At times this will demand of courts that they do not ignore relevant treaties when interpreting the Constitution or legislation. At others, it will require courts to consider whether the state is improperly exercising public power in a manner that causes South Africa to violate its treaty obligations.[271] Thus, South African courts cannot avoid applying unincorporated treaties — in many circumstances, they are part of the law, which the courts 'must apply'. So what is required is a thorough, detailed, and systematic methodology for the application of unincorporated treaties binding on South Africa within the range of what is necessary and legally appropriate, given South Africa's constitutional framework. Only in this way can courts properly fulfil their duty to apply treaty law when the Constitution requires it.

Against the background of where we have come in over two and a half decades of constitutionally ordained application of unincorporated treaties in South African law, the four principles that I have articulated, which should guide the approach to treaty application, lead to a series of proposals for navigating the road ahead.

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268 *Ruta* (note 195) para 21; *Camps Bay Ratepayers* (note 195) para 28; *Bwanya* (note 195) para 46, quoted in note 195 above.

269 *Ruta* (note 195) para 21 (albeit in reference to the important reason for honouring precedent, from the perspective of the courts).

270 Emphasis added.

271 Constitution s 1(c), s 7(2), s 39(1)(b), s 198(c), s 199(5), and s 232.

### 5.1 Grappling with the further constitutional hooks suggested in Law Society

An approach to the application of unincorporated treaties that is holistic, harmonising, certain and rigorous requires the Constitutional Court to re-engage with the further constitutional hooks identified in *Law Society*. In other words, at least, in an appropriate case, the Court needs to reflect on *Law Society* and clarify the reach, extent, and applicability of its constitutional hooks. Not only would this show proper fealty to all of the Constitution's integrative provisions (be holistic), and avoid conflicts between the obligations on the state in domestic law and international law (be harmonising), it is important from a rule of law perspective: ensuring certainty, predictability, and coherence.[272] This would provide greater certainty[273] to lower courts, government officials exercising public power, and litigants. If any of the further constitutional hooks enunciated in the *Law Society* matter are to be abandoned, then legal certainty, the rule of law, and the need to adopt a methodologically rigorous approach require the Constitutional Court to expressly and with 'coherent and compelling' reasons explain why it was 'clearly wrong' to employ these in *Law Society*.[274] It may be that one or other of the constitutional hooks may be subject to criticism.[275] However, as discussed in Part 3.3.2, it appears evident that when viewed together, there is a compelling argument,[276] based on the Constitution's provisions and customary international law, which is law in South Africa, that it would be domestically unlawful for the state to conduct itself in a way that causes South Africa to violate its international law obligations (save where such non-compliance was required by the Constitution). This is not in conflict with, but complementary to, the approach in *Glenister II* (where the Court accepted that the state would not fulfil its obligations to respect, promote and fulfil the rights in the Bill of Rights if it failed to ensure that South Africa's treaty obligations were complied with). [277]

### 5.2 Embracing section 231(4)'s domestication of self-executing treaty provisions

It is striking that the Constitutional Court has been willing to use various constitutional hooks to give unincorporated treaties some domestic effect

272 *Barnard* (note 228) para 34; *Bwanya* (note 195) para 46.

273 As the Constitutional Court has observed, 'uncertainty and unpredictability' are 'at variance with the rule of law, a linchpin of the Constitution' *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg & Others v Minister of Police & Others* [2021] ZACC 37, 2022 (1) BCLR 46 (CC) para 118. See also *Ruta* (note 195) para 21.

274 *Ruta* (note 195) para 21; *Camps Bay Ratepayers* (note 195) para 28; *Bwanya* (note 195) para 46.

275 As discussed in Part 3.3.2.

276 As discussed in Part 3.3.2.

277 As discussed in note 84 and Part 3.3.2.4.

in relation to the obligations they placed on the government, while at the same time failing to consider the applicability of one of the Constitution's most explicit integrative provisions: section 231(4), which makes 'self-executing provisions' of treaties, approved by Parliament, automatically part of domestic law absent conflict with the Constitution or national legislation.[278] Therefore, in keeping with an approach that is guided by the need to be holistic, harmonising, certain and rigorous, it is past time for the Constitutional Court, as the guardian of the Constitution and its apex interpreter,[279] to develop a meaningful jurisprudence around how section 231(4) of the Constitution gives domestic effect to 'self-executing' provisions of unincorporated treaties. This express incorporative feature of South Africa's binding constitutional framework ought no longer to be overlooked. Every country's courts, in principle, need to develop their own jurisprudence as to when treaty provisions will be considered self-executing within their own domestic legal framework.[280] Thus, while there is enduring ambiguity concerning when treaty provisions will be 'self-executing' for the purposes of section 231(4), it is precisely because of this ambiguity that it is incumbent on courts to develop some type of framework for making use of this provision. Usually, an open-textured constitutional provision has invited judicial clarification and content-giving, not forestalled it. What the courts should not do is adopt the approach taken in *Zuma III*: simply declare treaty provisions to be non-self-executing without explanation.[281] To do so is neither appropriately rigorous nor does it lead to certainty. More concerningly, it undermines the harmonising and the holistic (whole-Constitution) approach that the Constitution requires (disregarding a signal international-law-integrating provision).

### 5.3 Avoiding conflicts between domestic and international obligations

As an incidence of the harmonising approach, and an outworking of the need for a holistic, certain and rigorous embrace of international law, courts should seek to avoid conflicts between domestic and international obligations. This means that, as in *Centre for Child Law*, the courts should favour reasonable interpretations of the Constitution that are consistent with South

278 Samtani (note 19) 213–216, and discussion above in Part 3.3.2.

279 *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* [1999] ZACC 9, 1999 (4) SA 147 (CC) para 72; *Doctors for Life International v Speaker of the National Assembly & Others* [2006] ZACC 11, 2006 (6) SA 416 (CC) para 38; *Pharmaceutical Manufacturers* (note 94) para 55.

280 A Evans 'Self-Executing Treaties in the United States of America' (1953) 30 *British Yearbook of International Law* 178, 193 ('The definition of self-executing treaties, which is essentially a problem of the enforcement of treaties, is a matter to be determined by the municipal law of a given state, interpreted with due consideration of the constitutional history of the State, the organisation of its government, and, indeed, of the political currents of a given period').

281 As discussed in Part 4.2.2.

Africa's treaty obligations, over interpretations that cause South Africa to be in violation of its obligations. Of course, interpretation has limits, and if a constitutional provision or legislation cannot be reasonably construed in accordance with South Africa's treaty obligations, then the Constitution makes clear that in the case of conflict, the Constitution takes precedence.[282] But such conflicts ought to be rare, and should be minimised if the courts show proper fidelity to the Constitution. For instance, it would be inconsistent with the Constitution for the government and Parliament to seek to bind South Africa to a treaty that violates or is inconsistent with the Constitution.[283] Avoiding conflict also appears to require the courts to ensure, through the constitutional hooks or routes in *Glenister II*, *Sonke*, and *Law Society*, that the exercise of public power by organs of state should not cause South Africa to violate its treaty obligations.[284]

However, as I discuss in the next section, avoiding conflict between the Constitution and treaty obligations requires more than merely properly interpreting the Constitution. It also requires properly interpreting the relevant unincorporated treaties. At times the Constitutional Court has too quickly asserted the primacy of the Constitution, over any prima facie inconsistent treaty obligations, without first carefully considering what the precise scope of those treaty obligations are, and whether, in truth, they mandate anything inconsistent with the Constitution.[285]

### 5.4 Properly interpreting the unincorporated treaties being applied

In this chapter, the focus has been on how South African courts apply unincorporated treaties within the framework of the Constitution. However, a holistic, harmonising, certain and rigorous approach to the application of treaties must, as a starting point, ensure that unincorporated treaties are properly interpreted when they are being applied. The reason for this is plain. To apply unincorporated treaties in South Africa's domestic law — whether to use them as interpretative aids (pursuant to sections 39(1)(b) and 233) or to more directly apply them (whether because their provisions are self-executing, or as the standard against which to judge the state's compliance with section 7(2), or through one of the constitutional hooks in *Law Society*) — the starting point must be to determine what the unincorporated treaties themselves provide. That requires appropriately interpreting them.

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282 Constitution ss 232, 231(4), and 233. See also discussion in Coutsoudis & du Plessis CCR (note 15) at 170–171.

283 *Prince* (note 226) para 82.

284 As Cameron (note 54) at 409 powerfully opines, 'there should be no cover from properly undertaken international law obligations in the thicket of domestic law. There should be consonance, not dissonance, between what governments say and do internationally and what they say and do domestically. Our role as lawyers, and our duty, is to reduce the gap where it exists.'

285 See Coutsoudis & du Plessis CCR (note 15) at 167–8, discussing the shortcomings of the Constitutional Court's approach in *Prince* (note 226).

Why? Because words are not self-interpreting. In all areas of interpretation, whether of contracts, domestic statutes or international treaties, some hermeneutical process is required to attribute meaning to the words used. Otherwise, a reflexive 'interpretation' may simply mirror the interpreter's (potentially erroneous or biased) intuitions or preferences. Indeed, when interpreting legislation or contracts, the South African courts have developed a rigorous hermeneutical process for attributing meaning to their provisions, for precisely this reason.[286]

Customary international law has developed its own rules for treaty interpretation. These are codified in articles 31 and 32 of the Vienna Convention — 'the Vienna rules'.[287] The Vienna rules (as customary international law) form part of South African law by virtue of section 232 of the Constitution.[288] The Vienna rules create a broad and flexible framework. This requires a treaty to be 'interpreted in *good faith* in accordance with the *ordinary meaning* to be given to its terms in their *context* and in the light of its *object and purpose*'.[289] Furthermore, any subsequent agreement or practice by the state parties in relation to the interpretation of the treaties and any relevant rules of international law applicable in the relations between the parties must also be taken into account,[290] with recourse also being permissible to supplementary means of interpretation, including (but not limited to) the preparatory work of the treaty (*travaux préparatoires*) and the circumstances of its conclusion.[291] Rather than the application of these rules being a mechanical or tick-box exercise, as the International Law Commission ('ILC'), in its Draft Conclusions on Subsequent Practice, has emphasised, '[t]he interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.'[292]

South African courts must apply these rules. As customary international law, they are part of South African law (section 232), and section 165(2) of the Constitution expressly provides that courts are 'subject only to the

286 For instance, see *University of Johannesburg v Auckland Park Theological Seminary & another* [2021] ZACC 13 (CC), 2021 (6) SA 1 (CC) paras 65 and 66; *Chisuse and others v Director-General, Department of Home Affairs & another* [2020] ZACC 20, 2020 (6) SA 14 (CC), 2020 (10) BCLR 1173 (CC) paras 51 and 52; *Natal Joint Municipal Pension Fund v Endumeni* Municipality [2012] ZASCA 13, 2012 (4) SA 593 (SCA) para 18.

287 ILC Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries 2018 (UN Doc A/73/10) in Conclusion 2 provides a useful summary of the Vienna rules and their application.

288 *Law Society* (note 7) para 36-39; *Commissioner SARS v Levi Strauss SA (Pty) Ltd* [2021] ZASCA 32, 2021 (4) SA 76 (SCA) para 36 fn 16; *Glenister II* (note 10) para 187, fn 43; *Krok and Another v Commissioner, South African Revenue Service* 2015 (6) SA 317 (SCA) para 27.

289 Article 31(1) of the Vienna Convention, emphasis added. See, for instance, the application of this in *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, Judgment [2014] ICJ Reports 226, 250–252.

290 Article 31(3) of the Vienna Convention.

291 Article 32 of the Vienna Convention.

292 ILC Draft Conclusions on Subsequent Practice (note 287) Conclusion 2.

Constitution and the law, which they must apply'. Thus, it is unnecessary to enter into any jurisprudential debate as to whether the use of the Vienna rules necessarily leads to the 'right' interpretation.[293] At the very least, these international law rules of interpretation set the bounds (or framework[294]) of permissible interpretative approaches (they are a relevant and 'distinct international hermeneutical framework'[295]). Moreover, the courts and litigants should want to apply them as a 'powerful tool' developed by the international law system to give proper meaning to the provisions of treaties.[296]

Since this chapter focuses on how unincorporated treaties find application in South African law, no systematic descriptive account is sought to be made of how South African courts approach their interpretation. Nevertheless, it suffices to note that in a number of cases considered in this chapter, what is striking about the courts' willingness to apply unincorporated treaty obligations in various ways is that it appears to be often coupled with a failure to adopt a rigorous and methodologically sound interpretative approach to those unincorporated treaties.[297] The courts merely ascertain what treaty provisions mean by the most minimal of textual reference (or even by pure assertion, even when at odds with the ordinary meaning of the treaty's provisions).[298] They fail, either expressly or implicitly, to adopt

293 The issue of the interpretation of treaties has been much debated. In the South African context, see D Tladi 'Interpretation of Treaties in an International Law-Friendly Framework: The Case of South Africa' in HP Aust & G Nolte, *The Interpretation of International Law by Domestic Courts* (2016). Recent general discussions include: 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); and HP Aust, A Rodiles, and P Staubach 'Unity or Uniformity?: Domestic courts and Treaty Interpretation' (2014) 27 *LJIL* 75. For one example of earlier scholarship, see H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 *British Yearbook of International Law* 48.

294 As Gardiner opines, 'That the structure provided by the Vienna rules 'has become the virtually indispensable scaffolding for the reasoning on questions of treaty interpretation', particularly nicely sums up the role of the rules, even if 'indispensable' *may be concealing an unhealthily large number of cases where passing reference to the rules has substituted for thorough application*.' R Gardiner, *Treaty Interpretation* (2nd ed, 2015) 495 (emphasis added).

295 Aust, Rodiles, and Staubach (note 293) 77 (they raise, for the purposes of their analysis, the following question (which is then applied to three particular cases): 'whether domestic courts are aware of the existence of a distinct hermeneutical framework when they decide cases pertaining to questions of international law. In other words: do they acknowledge that international law provides for specific rules of interpretation?').

296 Crawford *Chance, Order, Change* (note 12) para 190.

297 For instance, see Coutsoudis & du Plessis CCR (note 15) 188–194 discussing the shortcomings of the interpretative approach in *Law Society*. See also Tladi (note 161). Cf Nyathi & Phooko (note 102).

298 For instance, in Part 4.1, I considered *SAHRC v Msunduzi Local Municipality* (note 165). In that case despite readily accepting that the municipality had violated various unincorporated treaty provisions and declaring such breach in its order (as discussed), its interpretation of those treaties was exceptionally superficial consisting of little more recitation of certain provisions and assertions of violation (see *SAHRC v Msunduzi Local Municipality* (note 165) paras 82–84, read with para 98).

any of the international law tools for the interpretation of treaties.[299] The courts have been criticised for this.[300] Whatever the root cause of this apparent interpretive neglect, this needs to change.

## 6 Conclusion

South Africa's Constitution, as we have seen, shows a particular openness to international law. The Constitution gives international law pride of place. However, the nature of our Constitution's multifaceted embrace of international law prevents neat distinctions when it comes to the application of binding treaties. It requires the courts to do the difficult work of developing a methodologically sound and practical jurisprudence for dealing with the application of unincorporated treaties that is consistent with, and has full regard to, the whole Constitution and its integrative scheme.[301] This eschews simplistic classifications of the Constitution's approach to treaties as either 'dualist' or 'monist'. Indeed, in the final analysis, it may be unhelpful to apply these stereotypical labels if it stifles the careful and rigorous analysis of the unique ways in which the Constitution seeks to incorporate international obligations into domestic law. Whatever its normative desirability, the Constitution embraces international law. Thus, courts cannot avoid it. So what is required is a more holistic, harmonising, certain, and rigorous approach to the application of treaties binding on South Africa, within the range of what is necessary and legally appropriate given South Africa's constitutional framework. The Constitution demands nothing less of South Africa's courts.[302] Nor should the international community expect any less from the courts of a country whose Constitution is often heralded as particularly friendly to international law,[303] lest South Africa be found, in practice, to be no more than a fair-weather friend of international law.

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299 For instance, see *Law Society* and *Fick*, where, when interpreting the SADC Treaty and 2000 Tribunal Protocol, despite their centrality to those cases, there is no consideration of the proper approach to interpreting treaties, let alone reference to the Vienna rules. See discussions in 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; Tladi (note 161); and Coutsoudis & du Plessis CCR (note 15) 188–194.

300 Ibid.

301 *Glenister II* (note 10) para 202.

302 Constitution s 165 (courts are subject to and must apply the law), read with, inter alia, s 232 (customary international law is law in South Africa), s 233 (legislation must be interpreted to accord with international law), s 39(1)(b) (the courts when interpreting the Bill of Rights, including the obligation in s 7(2) to respect and fulfil those rights, must consider international law), and s 199(5) (the security services must comply with the law, including customary international law and binding international agreements).

303 See Botha & Olivier (note 113) 42, *Law Society* (note 7) para 4 (international law 'enjoy[s] well-deserved prominence in the architecture of our constitutional order') and *Glenister II* (note 21) paras 201–202.

Within that context, I have made certain proposals for navigating the way ahead that it is hoped may aid in ensuring that the integrative international law injunctions of South Africa's Constitution are fully realised so that it continues to achieve its transformative purpose of a democratic South Africa able to take its rightful place in the family of nations.[304] So that never again may South Africa — founded on the rule of law (in all its richness) and the advancement of human rights and dedicated to an integrative and open approach to international law — 'suffer the indignity of being the skunk of the world.'[305]

304 Constitution preamble.

305 From President Mandela's inaugural address as President of South Africa, available at https://www.sanews.gov.za/south-africa/read-nelson-mandelas-inauguration-speech-president-sa.

# 4 Treaties Apply in South African Law – Now What? Analysing the Courts' Interpretation of Treaties over the Last Half-Decade*

## 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 Coutsoudis & 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 Coutsoudis & 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]

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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]

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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 *YBILC* 5, 58 para 21.

It should also be noted that while subsequent practice[23] 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 Statute[29] (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-

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 judgments[41] 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 subjective[44] 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.

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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 review[50]) indicated over a hundred cases[51] (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

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 Convention[79] 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 law[84]), 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]

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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 Coutsoudis & 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); Coutsoudis & du Plessis CCR (note 4) 188–194.

86 Coutsoudis & 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 (CERD[88]) 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 ICCPR[92] 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

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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 Coutsoudis & 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

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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 Convention[114] 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 SARS[118] 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 *Sempra 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 matters[125] considered the pronouncements of treaty bodies[126] 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: *Baleni & 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 practice[128]), 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 14[137]). 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 majority[152] and the minority[153] 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 relevant[161]). 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 Court[165] 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 Constitution[169] (and the Court may view the ECtHR's decisions as akin to comparative foreign law, to which the Court also regularly has regard[170]). 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 work[183] 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.

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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 considered[195]).

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 Coutsoudis & 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 law[210] (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.

# 5 Conclusion

## 1 The Constitution's Integrative Vision and Ensuring that International Law's Well-Deserved Prominence is Embraced

In 2024, South Africa completed its third decade since the end of apartheid. This study has focused on a specific aspect of the transition to a new constitutional democracy: how South African courts have grappled with, and should continue to grapple with, the fact that, over and against its history (as an international pariah), its Constitution embeds international law in post-apartheid South African domestic law as part of its integrative vision and transformative project. The present study does this by setting out a descriptive account of how, looking back from the vantage point of this seminal juncture, South African courts, in practice, determine and apply international law, within the framework of the Constitution. This is done to assess how far South Africa has come in realising and giving effect to the Constitution's integration of international law. Put differently, recalling the language of the Constitutional Court in *Law Society*, the study sheds light on whether international law's 'well-deserved prominence' is properly given effect to and allowed to play its 'critical role' 'in the development and enrichment of our constitutional jurisprudence' to ensure the 'pursuit of good governance'.[1] This study also makes proposals for how this can better be achieved.

The study's descriptive account reveals how South African courts have, in practice, integrated international law into the domestic sphere, guided by the Constitution's embrace of international law. The courts have done this by applying international law in ways that are, in certain instances, distinctive and unexpectedly innovative, while in others, more conventional. The study illustrates that the full promise of this integration of international law into the domestic sphere has not been automatic or immediate; it has been a slow and progressive evolution through a series of cases, with some unexpected turns along the way. In successive cases, the courts explored the Constitution's jurisprudential garden. They found new paths for integrating international law into the domestic sphere (although the study finds that some of these have yet to be entrenched in the most recent cases, and there have been isolated instances of some retrogressive moves along the

1 *Law Society of South Africa & Others v President of the Republic of South Africa & Others* [2018] ZACC 51, 2019 (3) SA 30 (CC) ('*Law Society*') para 4.

way).[2] The approaches adopted to the integration of international law by the courts, for instance in *Law Society*, while at times innovative, were nevertheless faithful to the Constitution's text, its fundamental values, and its transformative purpose (when holistically understood, properly explained, theorised, and defended — as done in this study).[3]

The chapters illustrate how South African courts, guided by a predominantly international-law-friendly Constitution, have shown a general willingness to embrace international law.[4] In several cases, the courts have used the Constitution's provisions in ways that give full effect to the integration of international law. They have been willing to engage with and apply international law, including holding the government accountable for failing to comply with South Africa's international obligations. They have done this even in matters involving sensitive and high-level international relations (this is particularly clear in cases such as *National Commissioner*,[5] *Minister of Justice v SALC*,[6] and *Law Society*). Although not generally used, in certain limited instances, the Constitutional Court has also been willing to deal with a paucity of submissions on relevant issues of international law from the parties by inviting experts with international law experience to file submissions as amici curiae, by asking the parties to file further submissions, or conducting its own research.[7]

However, a striking feature revealed by the study is that this general openness to the application of international law is often still coupled with a markedly superficial approach to the determination of the international law being applied.[8] This is all the more concerning because the study reveals that important international law issues come before the South African courts for determination, including in cases in which the courts are required to hold the government to account for failing to comply with South Africa's

2 See the discussion in Chapter 3, Parts 4.2.2–4.2.3, of *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] ZACC 28, 2021 (11) BCLR 1263 (CC) *('Zuma III')*, and the ways that subsequent cases have ignored *Zuma III*'s more retrogressive statements in relation to international law. As discussed, *Zuma III*'s retrogressive approach to international law has continued to be ignored and the open and integrative approach consonant with the Constitution, and enunciated by the Constitutional Court in *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC) ('*Glenister II*') and *Law Society* ibid, has found favour in more recent decisions of the Constitutional Court. See also the discussion of more recent cases in Part 8.1.

3 See Chapter 3, Part 3.3.1–3.3.2.

4 As demonstrated in Chapter 2 (in relation to customary international law) and Chapter 3 (in relation to treaties).

5 *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & another* 2015 (1) SA 315 (CC) *('National Commissioner')*.

6 *Minister of Justice and Constitutional Development & others v Southern African Litigation Centre & others* 2016 (3) SA 317 (SCA) ('*Minister of Justice v SALC*').

7 See Chapter 2, Part 5.3, and Chapter 4, Part 4.4.

8 This is true even, for instance, in *Law Society* (note 1). See Chapter 4, Part 3.2, and references at footnote 82.

international law obligations.[9] For this reason, throughout the study, proposals have been made to address the shortcomings identified, to ensure that the Constitution's international-law-integrative promise and purpose are progressively and fully realised.

## 2 Realising the Constitution's Transformative Embrace of International Law

Notwithstanding the identified shortcomings in the South African courts' approach to international law, at their best, the courts have begun to facilitate an embrace of international law that has ensured that the government is better held to South Africa's international law obligations. This gives effect to the transformative promise and integrative and rule-of-law commitments of the Constitution (allowing international law to play the critical role in good governance suggested by the Constitutional Court[10]).

If one considers a number of cases and situations in South Africa's third decade of democracy, what one sees is an interesting dialogue between the South African government, its civil society, and its courts, within the framework of the Constitution, concerning South Africa's international law obligations (the Constitution's integrative rule-of-law vision and the culture of justification in action).[11] In these cases, one observes the following general pattern. Civil society and other parties (who enjoy broad standing grounds under the Constitution[12]) approached the courts to argue that the government has failed to comply with South Africa's international law obligations. They are able to do so precisely because of the founding value of the rule of law[13] and the special place international law has in the

9 See e.g. *Minister of Justice v SALC* (note 6); *Law Society* (note 1), *Glenister II* (note 2), and *National Commissioner* (note 5).

10 *Law Society* (note 1) para 4.

11 An initial version of this list of cases appears in A Coutsoudis, 'Tracing the Constitutional Court's Exploration of the Constitution's embrace of international law from *Azapo* to *Glenister II*, to *Law Society* and beyond' (2024) 37(1) *Advocate* 42, 46 https://gcbsa.co.za/lawjournals/2024/April/42-48.pdf, which is a reproduction of a paper I presented based on Chapter 3.

12 Constitution, s 38 (broad standing including in the 'public interest' is provided for cases involving violations or threats to rights in the Bill of Rights); *Kruger v President of the Republic of South Africa* 2009 (1) SA 417 (CC) paras 21-23 (broad standing is not only limited to cases involving rights in the Bill of Rights). See also *Ferreira v Levin NO* 1996 (1) SA 984 (CC) paras 165 and 229; and *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 33.

13 It is a justiciable requirement of the rule of law (section 1(c) of the Constitution) that all exercises of public power must be lawful. See e.g. *Law Society* (note 1) paras 46 to 48; *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* [1998] ZACC 17, 1999 (1) SA 374 (CC) paras 56–59; *Electoral Commission v Mhlope & Others* [2016] ZACC 15, 2016 (5) SA 1 (CC) para 130; *Khumalo & Another v Member of the Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49 (CC), 2014 (5) SA 579 (CC) para 29; and discussion in Chapter 3, Part 3.3.1.

Constitution. In instances where the courts find that the government has failed to comply with South Africa's international law obligations (and any concomitant domestic obligations), the courts have ordered the government to remedy these violations. And the government has, as it must, accepted and followed the courts' orders requiring compliance with these obligations. A few prominent examples drawn from cases discussed in this study that illustrate this trend are as follows.

In 2014, in *National Commissioner*, in litigation instituted by human-rights NGOs, the Constitutional Court ordered the police to investigate allegations of torture by Zimbabwean officials in Zimbabwe (for possible domestic prosecution in South Africa), given domestic and international law obligations, notwithstanding the diplomatic sensitivities involved in the matter.[14] In doing so, the Constitutional Court accepted that since torture is an international crime under customary international law, section 232 of the Constitution automatically incorporated it into South African law. There was no need for any transformation, domestication, or other action by the courts, the executive, or the legislature. And the fact that torture as an international crime was incorporated into South African law, pursuant to section 232, was separate from and, in addition to, its criminalisation under legislation providing for the prosecution of torture in South Africa.[15] In Chapter 2, I argue that this automatic incorporation, as a consequence of section 232, would, by necessary implication, apply to all international crimes.[16] It is clear from the Court's reasoning that this would apply even where, unlike with torture, there was no legislation covering the prosecution of the international crime.[17] This has now been affirmed in the recent

14 *National Commissioner* (note 5).

15 *National Commissioner* (note 5) paras 37, 39, 40, and 77.

16 Chapter 2, Part 4. I noted, at footnote 105, that this can be contrasted with the approach taken by the UK House of Lords in *R v Jones* (*Margaret*) [2007] 1 AC 136 in respect of the crime of aggression. I discuss this contrast in approaches in A Coutsoudis, 'The place of international law in South African municipal law' in J Dugard, M du Plessis, T Maluwa & D Tladi (eds) *Dugard's International Law: A South African Perspective* (6th ed, 2026) 70–72.

17 *National Commissioner* (note 5) paras 37, 39, 40, and 77. See Andreas Coutsoudis & Max du Plessis, 'We are all International Lawyers Now: the Constitution's International-Law Trifecta Comes of Age' (2019) 136 *SALJ* 433, 446–9; Andreas Coutsoudis & Max du Plessis, 'We Are All International Lawyers; Now What? Taking Seriously the Constitutional Injunction to Integrate International Law Obligations into South African Law' (2020) 10 *Constitutional Court Review* 155, 158–159.

High Court decision in *S v Ephraim* (decided in 2025).[18] In that matter, the accused objected to charges brought against them of committing the crimes against humanity of apartheid and murder in 1982. The Implementation Act[19] provides for the prosecution of crimes against humanity (including apartheid as a crime against humanity). But it only applies to international crimes committed after the entry into force of the Rome Statute of the ICC in 2002.[20] The High Court (applying the reasoning in *National Commissioner*) held that international crimes can be prosecuted based on section 232's incorporation of customary international law, in the absence of domestic legislation. The Court explained that '[t]he automatic incorporation of customary international law through s 232 of the Constitution provides a basis for prosecuting any crime recognised under customary international law at the time of its commission, regardless of whether special legislation exists for that crime. The result is that it covers crimes committed before and after the adoption of the ICC [Implementation] Act.'[21]

18 *S v Ephraim and Others* [2025] ZAGPJHC 410, 2025 JDR 1804 (GJ) (the judgment is not yet reported in a law report series, and the SAFLII neutral citation and Juta's online series of unreported judgments, confusingly, use the middle name of Accused 1 (Thlomedi *Ephraim* Mfalapitsa) rather than his surname; Accused 2 is Christiaan Siebert Rorich). For initial discussions of this case see Gerhard Kemp, 'Criminal Court in South Africa Confirms Charges in Historic First Prosecution of the Crime Against Humanity of Apartheid' *Opinio Juris* (29 April 2025) https://opiniojuris.org/2025/04/29/criminal-court-in-south-africa-confirms-charges-in-historic-first-prosecution-of-the-crime-against-humanity-of-apartheid/ and Miles Jackson and Hannah Woolaver, 'Apartheid on trial: the COSAS 4 prosecution and the direct application of customary international law in South Africa' *EJIL:Talk!* (1 May 2025) https://www.ejiltalk.org/apartheid-on-trial-the-cosas-4-prosecution-and-the-direct-application-of-customary-international-law-in-south-africa/. See also G Kemp & W Nortje, 'Prosecuting the crime against humanity of apartheid: the historic first indictment in South Africa and the application of customary international law' (2023) 21 *Journal of International Criminal Justice* 405, who, in an article written before the judgment, discuss the indictment and prosecution of Mfalapitsa and Rorich, inter alia, on charges of committing the crime against humanity of murder and the crime against humanity of apartheid in relation to the murder of three teenaged boys and the serious injuring of another, who were members of the Congress of South African Students ('COSAS') in 1982. The history and current status of the matter is summarised by the Foundation for Human Rights, 'The COSAS 4', https://unfinishedtrc.co.za/cosas-4/ (the High Court refused leave to appeal, but Accused 2 (Rorich) was granted leave to appeal by the SCA on 25 September 2025; at the time of writing the SCA had yet to set the appeal down for hearing). See also *Mfalapitsa v Minister of Justice and Correctional Services and Others* [2024] ZAGPJHC 1136, 2025 (1) SACR 482 (GJ) paras 1–12 (the matter relates to a review of the refusal of Mfalapitsa's application for amnesty more than two decades earlier and provides a useful discussion of the factual background to the charges).

19 The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ('Implementation Act').

20 Implementation Act s 5(2) ('No prosecution may be instituted against a person accused of having committed a crime if the crime in question is alleged to have been committed before the commencement of the Statute.').

21 *S v Ephraim and Others* (note 18) para 102.

In 2016, in *Minister of Justice v SALC* (the Al Bashir matter),[22] which was instituted by a human-rights NGO, the government was found to have violated its domestic and international obligations when it failed to arrest, pursuant to an ICC arrest warrant, then President Al-Bashir of Sudan when he attended an African Union Summit hosted in South Africa. However, precisely because of the litigation, not only was President Al-Bashir forced to secretly flee from South Africa (no red carpet departure for him), but he has never returned, because the Supreme Court of Appeal ('SCA') made clear, and the government accepted, that if he did, he would have to be arrested.[23]

The South African government's initial response to the decision was far from an acceptance of the course that the SCA appeared to place the country on. The government applied to the Constitutional Court for leave to appeal the SCA's decision. The parties filed written submissions, and the Constitutional Court admitted four parties as amici curiae to make written and oral submissions (including Professors Dugard and Mettraux, who were jointly admitted as *amici*).[24] However, before the Constitutional Court hearing, the government withdrew its application for leave to appeal. It appeared that the government's plan in withdrawing its application, at the time, was to avoid the outcome of the SCA judgment, not by appealing the SCA's interpretation of the Implementation Act, but by withdrawing from the Rome Statute of the ICC, to be followed with a planned repealing of the Implementation Act and replacing it with new legislation that expressly maintained heads of state immunity.[25] However, the government's attempt to withdraw from the ICC was thwarted by a successful judicial challenge.

22 *Minister of Justice v SALC* (note 6).
23 *Minister of Justice v SALC* (note 6).
24 As referred to in Chapter 2 fn 164.
25 See the discussion of factual background in *Democratic Alliance v Minister of International Relations* [2017] ZAGPPHC 53, 2017 (3) SA 212 (GP) ('*DA v Minister (ICC Withdrawal)*') paras 2–6.

In 2017, in *DA v Minister of International Relations (ICC Withdrawal)*,[26] the High Court held that the government's withdrawal from the ICC was unconstitutional (given a failure first to obtain parliamentary approval for the withdrawal)[27] and ordered the government to rescind its notice of withdrawal.[28] The government did not appeal; it complied with the order, withdrawing its notice of withdrawal.[29] But it introduced new legislation, the International Crimes Bill,[30] in Parliament that would repeal the Implementation Act. The International Crimes Bill initially stalled with the change

26 *DA v Minister (ICC Withdrawal*) ibid. For a discussion of the case see e.g. Coutsoudis 'The Place of international law in South African municipal law' (note 16) 79–80, 84; Hannah Woolaver, 'Domestic and International Limitations on Treaty Withdrawal: Lessons from South Africa's Attempted Departure from the International Criminal Court' (2017) 111 *AJIL Unbound* 450. Erika de Wet writing a few years before the judgment argued, in line with the submissions that found favour with the Court, that 'the decision to terminate a treaty vests in the executive, it is arguable that the spirit of section 231(2) would require parliamentary involvement in the same manner as foreseen for ratification. This would imply the consent to termination of both Houses of Parliament in relation to all "non-technical" treaties.' E de Wet, 'The reception of international law in the South African legal order: an introduction' in E de Wet, H Hestermeyer and R Wolfrum (eds), *The Implementation of International Law in Germany and South Africa* (2015) 36. See also N Botha, 'Treaty making in South Africa: A reassessment' (2000) 25 *South African Yearbook of International Law* 69, 85 ('given the pre-eminent role of the legislature under section 231(2) of the Constitution before a treaty can be said to bind the Republic on an international level, it is submitted that it would be required to play an equivalent role in the termination of treaty commitments…. [Therefore] treaties requiring parliamentary approval before they come into force….would, it is submitted, also require parliamentary approval for their termination.'). Cf H Woolaver 'The rise of judicial review of South Africa's Treaty-making powers' (2025) 142 *SALJ* 822, 844–5. Woolaver argues that a 'preferable approach' to that taken by the Court in *DA v Minister (ICC Withdrawal*) 'would be to require parliamentary approval *only* when withdrawal would directly affect domestic law' (emphasis added). However, it does not appear that limiting parliament's withdrawal role in this way is in keeping with the clear separation of powers choice made by the Constitution, in section 231(2), to vest parliament (not the executive) with the power to determine to bind South Africa to treaties on the *international* plane (not merely with the power to domesticate any treaty obligations by legislation, as separately provided for in section 231(4)).

27 *DA v Minister (ICC Withdrawal*) (note 25) paras 77 and 84 (orders 1 and 2). The government argued, inter alia, that parliamentary approval was not required for withdrawal, because art 127 of the Rome Statute included no such requirement (at most the Vienna Convention, in art 67(2) (not explicitly referred to in the judgment), requires that '[i]f the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers'). However, the Court ultimately found that the Rome Statute did not purport to determine how each state may make decisions on whether to deposit a notice of withdrawal, and who was empowered under domestic law to make that decision. Thus, the case ultimately turned on a proper interpretation of section 231 of the Constitution and the necessary domestic steps before South Africa could lodge a notice of withdrawal. See *DA v Minister (ICC Withdrawal)* (note 25) paras 40, 47–51.

28 See *DA v Minister (ICC Withdrawal)* (note 25) para 84 (order 3).

29 UN Treaty Section, 'Rome Statute of the International Criminal Court — South Africa: Withdrawal of notification of withdrawal' (7 March 2017) UN Doc C.N.121.2017.TREATIES-XVIII.10, https://treaties.un.org/doc/publication/CN/2017/CN.121.2017-Eng.pdf.

30 The International Crimes Bill B37-2017.

in 2019 from President Zuma's to President Ramaphosa's administration. And in March 2023, the International Crimes Bill was ultimately withdrawn by the Ramaphosa administration.[31] Nevertheless, it is worth noting that the Bill, while it still provided for the prosecution of international crimes, expressly stated in section 3(1) that '[t]his Act does not apply to persons who are immune from the criminal jurisdiction of the courts of the Republic in accordance with customary international law or as provided for in the Diplomatic Immunities and Privileges Act, 2001.' Thus, the International Crimes Bill (and the initial concomitant threat to seek the necessary parliamentary approval for withdrawal from the Rome Statute)[32] can be seen as an initial, direct reaction to, and rejection of, the progressive direction that the SCA interpreted South Africa to have taken by passing the Implementation Act.[33] That initial rejection was remedied ultimately by the Ramaphosa administration's eventual withdrawal of the Bill. As a consequence, South Africa's progressive Implementation Act (as interpreted by the SCA[34]) remains in force and unchanged, and South Africa has remained a member of the ICC and accepts its rights and obligations under the Rome Statute. This became relevant in the 2023 Putin-South Africa arrest warrant saga, as discussed below, and also meant that, in November 2023, South Africa, together with four other states, was able to refer the situation in Palestine to the Prosecutor of the ICC for investigation under the Rome Statute.[35]

In 2017, the government granted immunity to the then First Lady of Zimbabwe (Grace Mugabe) to shield her from arrest and prosecution for allegedly assaulting three young women while in South Africa. In *DA v Minister of International Relations (Grace Mugabe)*, a political party and one of the women who had been assaulted (supported by several civil society organisations which joined as amici curiae) challenged the granting of immunity to Grace Mugabe. In 2018, the High Court set aside the decision to grant immunity, because it was predicated on the government's belief that such immunity was accorded to Grace Mugabe under customary inter-

31 Parliament of the Republic of South Africa, 'Announcements, Tablings and Committee Reports, No 32–2023' (10 March 2023), https://www.parliament.gov.za/storage/app/media/Docs/atc/3ac52e60-8baa-424a-8fe7-742dc03b9f3b.pdf ('The International Crimes Bill [B37-2017] (National Assembly – sec 75) has been withdrawn in accordance with Assembly Rule 334.')

32 Republic of South Africa, Ministry of Justice and Correctional Services, 'Opening statement by Adv Tshililo Michael Masutha MP' (General Debate, Sixteenth session of the Assembly of States Parties to the International Criminal Court, New York, 4–14 December 2017), https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP16/ASP-16-ZA.pdf.

33 See Chapter 2, text at footnotes 124–127.

34 See discussion of the SCA's interpretation of the Implementation Act (which it argued placed South Africa at the 'vanguard' in the fight against impunity) in Chapter 2, text at footnotes 124–127.

35 Bangladesh, Bolivia, Comoros, Djibouti and South Africa, 'State Party referral of the Situation in the State of Palestine in accordance with article 14 of the Rome Statute' (17 November 2023), https://www.icc-cpi.int/sites/default/files/2023-11/ICC-Referral-Palestine-Final-17-November-2023.pdf.

national law (when the Court found it was not).[36] Shortly after that, the South African authorities issued an arrest warrant for Grace Mugabe.[37]

In 2018, in the *Law Society* matter, which the Law Society of South Africa instituted,[38] the Court found that the President had acted unconstitutionally in participating in the SADC Summit's suspension of the SADC Tribunal and by signing the 2014 SADC Tribunal Protocol limiting the Tribunal's jurisdiction, and ordered the President to withdraw his signature. The President complied with that order and duly removed South Africa's signature.[39] South Africa has never again sought to become party to that Protocol.

In a similar vein, a more recent and prominent example is litigation in 2023 concerning the arrest of President Putin of Russia. In urgent litigation instituted by the official parliamentary opposition party, a South African court was faced with the question of whether the South African government was compelled, given its obligations under the Rome Statute and national legislation to give effect to the Rome Statute, to arrest President Putin. The government initially submitted in its affidavits that issues, including the risk of Russian military retaliation, personal immunity, and engagements with the ICC, meant that the government could allow President Putin to attend a BRICS Summit in South Africa without arresting him.[40] Ultimately, as a result of the litigation, President Putin never came to South Africa. However, he had been invited to (and was expected to) attend the BRICS Summit. But as recorded in an agreed court order (which the government agreed to at the beginning of the court hearing, with a tender of costs, thus obviating the need for the court to hear the full matter and issue a judgment[41]), the government finally accepted (no doubt as a consequence of the

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36 *Democratic Alliance v Minister of International Relations and Co-operation and Others; Engels and Another v Minister of International Relations and Co-operation and Another* [2018] ZAGPPHC 534, [2018] 4 All SA 131 (GP) ('*DA v Minister (Grace Mugabe)*').

37 Jason Burke, 'South African police issue arrest warrant for Grace Mugabe', *The Guardian* (19 December 2018), https://www.theguardian.com/world/2018/dec/19/south-african-police-issue-arrest-warrant-for-grace-mugabe-zimbabwe-accused-assault-hotel.

38 The case was also supported by six intervening co-applicants (Zimbabwean landowners), who had claims against Zimbabwe before the SADC Tribunal at the time it was suspended. See *Law Society* (note 1) para 7; *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZAGPPHC 4, [2018] 2 All SA 806 (GP) para 35.

39 Communique of the 39th SADC Summit of Heads of State and Government (Dar es Salaam, 17–18 August 2019) para 20, https://www.sadc.int/sites/default/files/2021-06/Communique_of_the_39th_SADC_Summit-English.pdf ('Summit noted the withdrawal of South Africa's signature from the Protocol on the Tribunal in the Southern African Development Community of 2014 in compliance with a Constitutional Court ruling.').

40 *Democratic Alliance v President of the Republic of South Africa & Others* Case No 50604/23 (Unreported order) ('*DA v President (Putin case)*') (a copy of the court papers is on file with the author). See discussion in M du Plessis & A Coutsoudis, 'The Putin-South Africa arrest warrant saga: A tale of the shrinking world of an accused war criminal' *EJIL:Talk!* (18 August 2023), https://www.ejiltalk.org/the-putin-south-africa-arrest-warrant-saga-a-tale-of-the-shrinking-world-of-an-accused-war-criminal/.

41 As a consequence of the agreed order (copy on file with the author), there was no need for the Court to issue a judgment.

litigation) that it was required to arrest President Putin pursuant to an ICC arrest warrant and therefore took the necessary steps to ensure that the warrant was domestically enforceable in South Africa.[42]

Thus, one observes that in a number of cases significant issues of international law have been considered by the South African courts and, where necessary, appropriate relief has been granted. This has included requiring the South African government to take steps on the international plane — withdrawing a signature from a treaty and retracting a notice of treaty withdrawal — and comply with international law, even when it was not politically or diplomatically desirable (including forcing the government to effectively disinvite President Putin from a BRICS Summit). Such steps may appear particularly invasive of the government's competence to conduct international relations and could strike one as surprising.[43] Nevertheless, they remain hopeful beacons, pointing to a legal system where the rule of law and the embrace of international law are not merely paid lip service,[44]

42 du Plessis & Coutsoudis 'Putin-South Africa arrest warrant saga' (note 40).

43 For instance, in the United States, issues of this type may be precluded from being determined by the courts by the political questions doctrine. See, for example, *Haig v Agee*, (1981) 453 US 280, 292, in which the US Supreme Court held, at 292, that 'the conduct of foreign relations … [is] exclusively entrusted to the political branches … [and] immune from judicial inquiry or interference.' For a recent (high-profile) application of this doctrine to preclude a claim to force the Biden administration to desist from offering assistance to Israel, see *Defense for Children International–Palestine v Biden* 107 F 4th 926 (9th Cir 2024) (and the District Court decision, *Defense for Children International–Palestine v Biden* 714 F Supp 3d 1160 (ND Cal 2024)). Similarly, in the UK, certain types of international relations decision may be found to be non-justiciable. See e.g. *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, 398 ('many of the most important prerogative powers concerned with control of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the Law Courts.') See more recently *Shergill v Khaira* [2014] UKSC 33, [2015] AC 359, *Rahmatullah v Ministry of Defence* [2017] UKSC 1, [2017] AC 649, and *R (on the application of Al-Haq) v Secretary of State for Business and Trade* [2025] EWHC 1615 (Admin) paras 45–118 (the Court held, inter alia, that the issue of whether the Secretary of State for Business and Trade's decision not to suspend licences for the export of aircraft components to Israel caused a violation of the UK's international obligations under unincorporated treaties was not justiciable). For a summary of the position in the UK see J Crawford, *Brownlie's Principles of Public International Law* (9th ed, 2019) 68–70.

44 For instance, Edwin Cameron (speaking extra curially while still a judge of the Constitutional Court) noted, in discussing *Glenister II* (note 2) that 'the rule of law require[s] that the executive's promises in the international sphere be consistent with its approach in the domestic arena.' E Cameron, 'Safeguarding the Constitution and the Rule of Law' (4th Congress of the Conference of Constitutional Jurisdictions of Africa, 25 April 2017) https://www.judiciary.org.za/images/speeches_from_the_judiciary/Safeguarding_the_Constitution_and_the_Rule_of_Law_-_By_Justice_Edwin_Cameron.pdf. See also E Cameron, 'Constitutionalism, Rights, and International Law: The Glenister Decision' (2013) 23 *Duke Journal of Comparative & International Law* 389, 406 and 409 (emphasising the same point, partially quoted in Chapter 3, footnotes 84 and 284).

but are the subject of active and meaningful dialogue between government, civil society and the courts as the Constitution envisages and requires.[45]

## 3 Open but Superficial Approach to International Law

Despite the openness and general willingness to apply international law and hold the government to South Africa's international obligations, the study reveals that South African courts often still determine or handle international law superficially (particularly from an international law perspective). Importantly, this superficiality occurs even though its courts and lawyers ought to be adroit international lawyers precisely because of the Constitution's openness to international law (which, in effect, requires all South African courts and practitioners to be international lawyers[46]). In other words, the Constitution's embrace of international law should mean that there is no excuse for South African courts and lawyers to be

45 This can be seen as an outworking of the 'culture of justification' and the rule of law, which the Constitution gives effect to, and the Constitution's purposive embrace of international law, as discussed in Chapter 1, Part 5.2. See also S Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 66–74. Liebenberg suggests that the Constitution, as interpreted by the Constitutional Court, embraces a 'constitutional dialogue' or 'dialogic' model of separation of powers, which 'values a flexible and co-operative model of relations between the three branches of government' (at 68–9), which acknowledges the duty on the courts to ensures that all branches comply with constitutional obligations, but does so in 'ways that respects the particular institutional role and competencies of the other branches' (at 71). She emphasises that conceptually the dialogue should not only be between the courts, parliament, and the executive, but should also include civil society and communities (at 71). She argues generally that 'no one branch should monopolise all the power and dominate the conversation and processes of transformation' (at 69), and more specifically in relation to socio-economic rights that, '[a] fluid, dialogic model of the separation of powers doctrine is best suited to promoting a transformative jurisprudence on socio-economic rights' (at 71).

46 A Coutsoudis & M du Plessis, 'We are all international lawyers now: The Constitution's international-law trifecta comes of age' (2019) 136 *SALJ* 433; Coutsoudis & du Plessis CCR (note 17).

unfamiliar with the contours and requirements of international law.[47] And the requirements of the rule of law (a founding and binding value of the Constitution[48]) should demand a certain, consistent, and rigorous determination of sources of international law. Properly determining the law (including international law) is a constitutional and rule-of-law obligation that all South African courts bear — they are not at liberty to adopt some ad hoc or laissez-faire approach.[49] They cannot eschew or ignore the proper determination of international law any more than they can dispense with a proper determination of domestic law sources.[50]

The neglect in respect of the determination of customary international law and treaty law, revealed in the study, is particularly noteworthy at this juncture. We are three decades into South Africa's post-apartheid epoch. A new generation of South African lawyers and judges has spent much of

47 Dugard, writing in the year the Constitution came into force, pointed out that: 'Inevitably, it will take time for South African lawyers and judges to become fully conversant with the sources, rules and reasoning of international law. *The Constitution* which serves as the foundation stone for the new South Africa *will ensure that this happens*.' J Dugard, 'Kaleidoscope: International Law and the South African Constitution' (1997) 8 *EJIL* 77, 92 (emphasis added). Even absent the Constitution's international law friendly provisions, it has been recognised in the Bangalore Principles of Judicial Conduct that judges must be familiar with international law. In explaining the principle of competence and diligence (Principle 6), Principle 6.4 provides that: 'A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms'. Bangalore Principles of Judicial Conduct (2002), endorsed by UN Economic and Social Council in Resolution 2006/23 (27 July 2006) UN Doc E/RES/2006/23. The Constitutional Court recently referred to the Bangalore Principles in *O'Brien NO v Minister of Defence and Military Veterans* [2024] ZACC 30, 2025 (2) SA 613 (CC) paras 89, 100–102. Albeit not specifically in relation to the requirement to have regard to international law, the Court emphasised, at para 100, that '[o]ur courts have cited these Principles and they are seen as a benchmark for judicial independence in our law'. Similarly, South Africa's Judicial Code of Conduct requires diligence, which, inter alia, requires judges to 'take reasonable steps to maintain the necessary level of professional competence in the law' (Code, art 10(1)(i)) (the Code is adopted pursuant to s 12 of the Judicial Service Commission Act 9 of 1994, and in terms s 12(5), judges must comply with it). Evidently those requirements should be interpreted in light of the Bangalore Principles, since the Code of Conduct's preamble (para 7) expressly recognises that 'it is necessary for public acceptance of its authority and integrity in order to fulfil its constitutional obligations that the judiciary should conform to ethical standards that are internationally generally accepted, more particularly as set out in the Bangalore Principles of Judicial Conduct' (and it is accepted that the 'Bangalore Principles materially informed the content of the Code of Judicial Conduct', see *Communicare NPC v Acting Magistrate Burgins and Others* [2023] ZAWCHC 117 para 4).

48 Constitution, s 1(c) and Chapter 3, Part 3.3.2.2.

49 See Chapter 3, Part 5.4, and Chapter 4, Parts 2 and 5.

50 See e.g. F Michelman, 'The Rule of Law, Legality and the Supremacy of the Constitution' (OS 02-05) in S Woolman & M Bishop (eds), *Constitutional Law of South Africa* (2nd ed, 2014) Ch 11, 14, who opines that 'what every judge is expected to do in every single case that ever may come before her' is 'do the best she can to discern the relevant law correctly, and apply that law correctly, to the acts of the parties and others connected to the case.' The same evidently holds true when the 'law' in question is treaty law or customary international law.

their professional lives practising under its new (international-law-integrative and rule-of-law-embracing) Constitution.[51] The courts have had time to explicate, settle on, and at least in practice use some methodology for the determination of international law. Yet when this study considered how South African courts determine international law, what was still generally observed was a widespread and material ambivalence to any clear, certain or proper methodology in the determination of international law. This is evident both in respect of customary international law (where the primary determination issue is how customary international law is to be identified, as discussed in Chapter 2) and treaty law (where the primary determination issue is how the written treaty text is to be interpreted, as discussed in Chapter 4).

Obviously, there is a difference between the interpretation of treaties and the identification of customary rules. However, the study identifies similar methodological concerns in the determination of both sources. The systematic descriptive accounts in Chapters 2, 3, and 4 reveal that, compelled by the Constitution, South African courts are usually willing to have regard to and apply customary international law and treaty law. However, they rarely follow a structured or careful approach to the determination of these sources. The courts fail to articulate or apply a clear methodology and generally ignore international law's own secondary rules for determining the content of these sources of international law (be it the Vienna rules for the interpretation of treaties or the two-element approach to customary identification). This has significant consequences and creates material risks. Instead of applying what is, in fact, international law, an approach lacking in suitable rigour to the determination of international law (in conceptualisation and application) may allow the 'international law' to be misdetermined, so that it comes to mean whatever courts or practitioners want it to mean.[52] This may lead to incorrect, or at least poor-quality, decisions. It may limit the value and importance of the determination, because what may

51 While many of South Africa's most senior judges attended law school prior to 1994, even they would have spent much of their professional and judicial lives in post-apartheid South Africa. See the biographies of the Constitutional Court judges (Constitutional Court 'Permanent Judges', https://www.concourt.org.za/index.php/judges/current-judges) and the SCA judges (Supreme Court of Appeal 'Current judges of Supreme Court of Appeal', https://www.supremecourtofappeal.org.za/index.php/judges/judges-of-the-supreme-court-of-appeal).

52 ILC 'Draft conclusions on identification of customary international law, with commentaries' (2018) UN Doc A/73/10 ('the ILC Draft Conclusions: CIL') 122: 'a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is identified correctly, thus promoting the credibility of the particular determination as well as that of customary international law more broadly.' See also Francisco Orrego Vicuña, 'Customary international law in a global community: Tailor made?' (2005) 38(148) *Revista de Estudios Internacionales* 22 at 38 ('if rules of law are based on pure political acceptability and not on legal certainty, nothing will prevent "their use as apologies for tyranny"'), and the discussions in Chapter 2, Part 5.4 and Chapter 4, Parts 2 and 5.

be occurring is simply a reference or use of 'international law' to support a predetermined outcome, or even a rejection of a perceived international law obligation, absent any thorough engagement with what that relevant international law is and requires.[53] This does a disservice to South African law,[54] international law,[55] and the rule of law more generally. [56]

Seeking to properly determine the law is a constitutional, and rule-of-law, obligation that all South African courts bear.[57] This applies both to customary international law and treaty law.[58] For instance, the Constitution requires the courts to apply international law's methodology for attributing meaning to treaties (the Vienna rules) because that methodology is part of customary international law, which is law in South Africa unless it is

53 See Chapter 2, Part 5.4, Chapter 3, Part 5.3, and Chapter 4, Part 4.4. See also the example of *Minister of Justice and Constitutional Development & Others v Prince (Clarke & Others intervening)* [2018] ZACC 30, 2018 (6) SA 393 (CC) para 82 (absent any interpretation or analysis of the relevant treaty obligations, to assess whether they were in fact inconsistent with the Constitution, the Court stated that, 'Counsel for the State referred to various international agreements to which South Africa is a signatory and submitted that South Africa is obliged to give effect to these international agreements. The answer to the submission is that South Africa's international obligations are subject to South Africa's constitutional obligations. The Constitution is the supreme law of the Republic and, in entering into international agreements, South Africa must ensure that its obligations in terms of those agreements are not in breach of its constitutional obligations. This Court cannot be precluded by an international agreement to which South Africa may be a signatory from declaring a statutory provision to be inconsistent with the Constitution.') See the critique of the Court's failure to properly interpret the relevant treaties in Coutsoudis & du Plessis CCR (note 17) 167–168.

54 In Chapter 2, for instance, I, inter alia, argue that the lack of a clear and certain approach to the identification of customary international law may also mean that despite being *de jure* part of South African law, customary international law may be eschewed for being too uncertain, complex, or vague to be relied upon (like uncharted territory, avoided for fear of getting lost). Moreover, it would mean that instead of giving effect to international law, as required by the Constitution, something other may be applied. See also A Nollkaemper, 'The power of secondary rules to connect the international and national legal orders' in T Broude & Y Shany (eds), *Multi-sourced equivalent norms in international law* (2011) 62 ('a failure to give effect to an international obligation with the meaning and contents it has at the international plane may constitute a wrong. For giving effect to an international norm devoid of its international normative context, may well be, to give effect to a different norm.')

55 See e.g. Nollkaemper ibid 49 (who argues inter alia: '[t]o the extent that … national organs are not guided by international secondary norms, the national interpretation and application of international norms indeed may undermine the unity of international law as it is received at domestic level.')

56 A Watts, 'The Importance of International Law', in M Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (2001) 7 ('The rule of law involves accepting that international law is not an a la carte choice. It applies as a whole, and for all States including (and indeed especially) those with the physical and political power to marginalize the law if they so choose.')

57 See Chapter 2, Part 5.3, Chapter 3, Part 5, and Chapter 4, Part 5.

58 See Chapter 2, Part 5.3, and Chapter 4, Part 4.

inconsistent with the Constitution or statute.[59] Similarly, since customary international law is part of South African law, it is evidently necessary that 'customary international law' — which has clear and accepted secondary rules as to what constitutes a customary international law rule and what does not (its constituent elements are general practice coupled with opinio juris) — is correctly determined.[60] And, indeed, neither customary international law's identification methodology (the two-element approach, most authoritatively and practically elucidated by the ILC in its Draft Conclusions),[61] nor the Vienna rules for treaty interpretation, are in any way in conflict with the Constitution or any national legislation. Both are consistent with and required by the Constitution, because it requires that the law be properly determined before it is applied.[62] A proper approach to the determination of law (including international law) is evidently required by the Constitution and the rule of law and necessitated by the judge's duty

59 See Chapter 3, Part 5.4, and Chapter 4, Parts 2 and 5. See also the general point made by Nollkaemper (note 54) at 59 in this regard ('The normative effect of international secondary rules may also flow from the fact that secondary rules themselves may be part of national law. … This would, for instance, be relevant for a state that is not a party to the VCLT, but that is bound by the customary rules of the law of treaties[.] As many states in the world accept the national effect of customary rules of international law, their courts would be empowered and perhaps obliged to give effect to domesticated international obligations in light of such secondary rules.')

60 KJ Heller, 'Customary international law symposium: The stubborn tenacity of secondary rules' Opinio Juris (7 July 2020), http://opiniojuris.org/2020/07/07/customary-international-law-symposium-the-primary-rules-of-cil-are-not-coming-to-save-us/ (Heller illustrates the necessity of applying an accepted approach to determination, see the quote in Chapter 2 fn 178).

61 See Chapter 2, Part 5.4. I argue that while the ILC Draft Conclusions: CIL (note 52) would certainly not settle all academic debates, they bear the approval and imprimatur of the international community, and provide a useful starting point for a domestic court, even if they do not deal with a number of domestic context-specific issues with which South African courts will need to grapple, particularly in relation to the procedural and evidentiary matters and limitations.

62 Constitution, s 165(2).

of diligence.[63] Otherwise, what is being applied is something other than the 'law', which the courts must apply.[64]

## 4 A Surprising Lack of Rigour given the Approach to Determination of Domestic Sources

The study emphasises that the generally superficial approach to determining international law, as evidenced in this study, is particularly surprising because South African courts accept the need to articulate and use a certain methodology when determining equivalent domestic law sources.

Chapter 2 draws attention to the courts' articulation and application of a methodology for the identification of (domestic) customary law (also known as indigenous law) (which is part of South African law in terms of the Constitution). By way of analogy, it is emphasised that it is worth noticing that the courts were willing to consider and articulate the approach that should be followed to establish domestic customary law,[65] yet had not properly articulated, thought through, or applied a particular (and appropriate) methodology in relation to the identification of customary international law. The difference is significant. It indicates that South African courts are not opposed to articulating and applying methodologies for determining the law, and they saw value in doing so, particularly in areas such as domestic customary law. Instead, it seems that the South African courts generally deemed it unnecessary to articulate and apply any methodology for how

63 See Judicial Code of Conduct, and Bangalore Principles, as discussed at note 47 above. And see for instance also C Ryngaert & D Siccama, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' (2018) 65 *Netherlands International LR* 1 at 25 (who suggest that precisely because 'domestic courts, which function in a state governed by the rule of law, are supposed to identify and apply the law, regardless of the political ramifications of their decisions', 'a rigorous application of the two-elements approach to customary law identification by domestic courts is called for') and M Wood & O Sender, *Identification of Customary International Law* (2024) 299 ('An accepted and reliable methodology for the identification of the rules of customary international law is therefore necessary, affording a predictability that is important to the rule of law internationally as well as at the national level. Those entrusted with the legal task of determining the rules of customary international law bear a heavy responsibility.') For the same reasons a rigorous application of the Vienna rules when interpreting treaties is also required. See Michelman (note 50) 14. See also *Vodacom (Pty) Ltd v Makate and Another* [2025] ZACC 13; 2025 (6) SA 352 (CC) paras 45–53, 64, and 70 fn 54 (although not in the context of the determination of international law, the Constitutional Court affirmed that courts had a 'duty of proper consideration', flowing from the right to a fair hearing and the rule of law, which is breached if there is a failure 'to consider issues that are fundamental to the determination of a matter' (para 70 fn 54)).

64 Constitution, s 165(2).

65 See Chapter 2, Part 5.4. The Constitutional Court's grappling with the determination of domestic (indigenous) customary law has continued, see recently, e.g. *President of the Republic of South Africa v Sigcau and Others* [2024] ZACC 21, 2025 (1) BCLR 26 (CC).

customary international law ought to be determined before them (leaving various procedural questions unconsidered and unanswered).

Similarly, Chapter 4 draws attention, by analogy, to the articulation and application of a rigorous methodology by South African courts when interpreting written domestic sources: statutes and contracts. There has been a clear elucidation and refinement of a methodology for correctly interpreting domestic contracts and legislation; the constant repetition of that methodology by the courts; and concomitant use and reference to that methodology by litigants.[66] Yet, in the same period, no comparable methodological rigour has been applied to the interpretation of treaties. This is surprising, given that there is a well-accepted, broad and flexible, international law methodology for interpreting treaties (the Vienna rules), which is (a) domestically part of South African law given its customary international law status[67] and, therefore, must be applied and (b) not that dissimilar (while there are certain distinctions[68]) from the domestic methodology for interpreting legislation and contracts. Nevertheless, what is observed in the majority of cases is that there has been no clear articulation or application of any methodological or systematic approach to the interpretation of treaties (i.e. it is not even as if some erroneous or questionable domestic methodology has been articulated and applied).

The comparisons in Chapters 2 and 4 with the courts' approach to the determination of analogous domestic law sources illustrate that the suggestion that an equivalent rigour be shown to the determination of international law sources is neither impractical nor a mere academic cavil or counsel of perfection. How, one may ask (rhetorically), in a country where the rule of law (which requires lawfulness and certainty) is a constitutionally binding and justiciable founding value (and when judicial officers are bound by and must apply the law[69] and do so diligently[70]), could there be a reasonable argument that any source of law should be applied absent proper determination. The law being applied must, of course, be properly determined.[71]

The point, also emphasised in Chapters 2 and 4, in respect of the determination of custom and treaties, is that the courts' lack of rigorous engagement and clear methodology when determining international law can lead to a vicious cycle. Courts do not receive proper submissions and

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66 Chapter 4, Part 2, draws attention to *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13, 2012 (4) SA 593 (SCA) (where the Supreme Court of Appeal reconsiders and reframes earlier jurisprudence in relation to the interpretation of contracts and legislation) and the lines of cases, including by the Constitutional Court, that have followed and developed this approach.

67 See Chapter 4.

68 See Chapter 4, text at footnotes 46–48 and 73.

69 Constitution s 165(2): 'The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.'

70 See Judicial Code of Conduct art 10.

71 See Michelman (note 50) 14.

materials in relation to the determination of international law precisely because they have articulated no need for a proper methodology, given no guidance in respect thereof, nor demonstrated any application of such methodology themselves. The courts are thus left (because of the lack of proper submissions and placement of relevant materials before them) less able to determine international law rigorously. The virtue of setting out and applying an appropriate methodology for determining analogous domestic law is demonstrated by the virtuous cycle observed in Chapter 4: the courts' articulation and application of a proper methodology for the interpretation of statutes and contracts has, in turn, resulted in parties framing their submissions to the courts with reference to this methodology.[72]

Given the absence of a rigorous approach to international law, despite a more rigorous approach to analogous domestic sources, one might even be inclined to wonder whether the superficiality in South African courts' approach to international law's determination is redolent of a view that international law is not 'real' law that needs to be carefully determined before being applied.[73] Indeed, one might wonder whether it is sometimes implicitly approached as a non-legal set of vague aspirational values that courts can briefly summon when useful to reify decisions, without much thought. In other words, could the stark divergence in methodological rigour between the determination of (roughly analogous) domestic sources of law and international sources of law be understood to flow from some inarticulate premise that views international law as something more akin to a normative moral commitment, than something as precise and binding as law? Of course, such a view or premise would be anathema to the clear and essential place international law, as 'law', is given in South Africa's legal system by the Constitution (as articulated and defended in this study). Nor has any court suggested such a view. And all courts would decry any suggestion that this view is implicit in the persistent failure to grapple with, articulate, and apply proper international law determinative methodologies. Moreover, it is not as if international law has not developed its own powerful tools (or methodological frameworks and secondary rules) for determining that law. It has (be it the interpretative rules relevant for treaties, or the identificatory rules in respect of custom). And it is not as if the South African courts have any principled reason not to apply them. Nor, for the reasons discussed in the study, could they, given the Constitution's integrative approach to international law. But then, since this must be so, it is past time for the South African courts to end their methodological neglect

72 See Chapter 4, Part 4.1.

73 Such a view, now generally rejected, finds its most prominent early expression in the work of John Austin, see J Austin, *The Province of Jurisprudence Determined* (Wilfred E Rumble ed, 1995) 171. Examples of more recent discussions include OA Hathaway and SJ Shapiro, 'Outcasting: Enforcement in Domestic and International Law' (2011) 121 *Yale LJ* 252 and D Lefkowitz, *Philosophy and International Law: A Critical Introduction* (2020).

of international law. That is the main thrust and purpose of the prescriptive sections in Chapters 2 and 4.

## 5 The Surprising Persistence of a Superficial Approach to International Law

Lest one were to take the view that the superficiality in the determination of international law that is observed is something isolated or historic, the study makes clear that this is not so. Chapter 4 makes plain — from a careful analysis of over a hundred cases over a six-year period in the most recent South African jurisprudence — that this superficiality in treaty interpretation is not a limited occurrence, but a general and persistent trend.

A similar persistent trend was observed in relation to customary international law. Chapter 2 identified and analysed the key cases over a 10-year period, in which customary international law played a significant role in the determination of the case (albeit far fewer than in respect to treaty law). The study analysed the cases where customary international law formed a material issue for determination. These were cases where customary international law was not merely an issue of no moment to the decision or elicited only passing reference. However, in the identified cases, it was revealed that there were significant concerns with the courts' approach to identifying customary international law, since they failed to properly consider important methodological issues that should influence their approach. This meant the courts' approaches were generally (with certain exceptions) perfunctory and ignored or failed to weigh key material properly.

Thus, the study highlights that this superficiality is not something that merely happened in the first few years of South Africa's post-apartheid embrace of openness to international law (when it would have been more explicable). This continues to occur three decades later.[74] This is at a stage where one would expect the South African courts to have gained a greater sophistication in relation to international law, given the frequency of its invocation, and the important position given to international law in the Constitution. Moreover, the courts have had time to articulate and apply at least some clear and certain approach to the determination of treaty law and customary international law. However, the study reveals that they have not done so.

74 More recent case law, beyond the periods reviewed in Chapters 2 and 4, shows a similar lack of rigour in relation to the determination of international law, even in matters where international law plays a significant part. See discussion of recent cases in Part 8.1 below.

## 6 Properly Exploring and Utilising the Constitution's Variegated and Manifest Embrace of International Law

Another key aspect of the study is offering and defending a systematic account of the proper approach to the application of international law in South Africa, given the Constitution's nuanced and varied embrace of international law — it is more a garden to be explored, than a tightrope to be walked.

Chapter 3 offers a descriptive account that identifies and defends the constitutional bases (or constitutional hooks) for integrating international law into South African law used by the courts to apply unincorporated treaties in holding the government's exercises of public power to account. The chapter demonstrated that, while not fully explained or theorised by the Constitutional Court in *Law Society*, its decision and approach to unincorporated treaties was predicated on three constitutional hooks (the rule of law hook, the separation of powers hook and the customary obligation hook). I argue that when properly described, critically assessed, and doctrinally defended, these constitutional hooks give effect to and are consistent with the variegated ways that the Constitution embraces international law.[75] However, the study shows that, although these hooks have not been rejected by the courts in the cases since *Law Society*, they do not yet appear to be generally or fully embraced.[76] Therefore, I contend that it is necessary, at least in appropriate cases, for the Constitutional Court to reflect and clarify the reach, extent and applicability of the constitutional hooks relied on in *Law Society*, as part of considering, applying, and giving effect to the express, yet underutilised, integrative provisions in the Constitution. By doing this, the Court would honour several central principles and constitutional values.[77] It would show fealty to a fuller spectrum of the Constitution's integrative provisions (thus being holistic), avoid conflicts between the obligations on

75 The study does this by pointing out the importance of other features of the Constitution, including (a) that the rule of law is a founding value, (b) that the conception of the rule of law, as illustrated by specific provisions, plainly includes requiring organs of state to comply with international law, (c) the Constitution's separation of powers framework in relation to treaties, and (d) the automatic incorporation of customary international law (including the rule requiring good faith compliance with treaty obligations). Thus, Chapter 3 emphasises how unincorporated treaties do have a rule of law function to play, in requiring that the government acts in accordance with binding treaties, precisely because of the way the South African Constitution embraces international law.

76 For a consideration of how the courts have approached *Law Society* (note 1) in the most recent cases, see Part 8.1 below.

77 In Chapter 3, Part 5, I identify and articulate four key principles that ought to guide courts' approach to the application and determination of treaty law which emerge from and are grounded in the Constitution, its foundational values and international law scheme, and the Constitutional Court's jurisprudence. I argue that the approach should be holistic (having due regard to the whole Constitution); harmonising (ensuring that, where possible, domestic law and international law do not conflict); certain; and rigorous.

the state in domestic law and international law (thus being harmonising[78]), and is important from a rule of law perspective: ensuring certainty, predictability, and coherence.[79]

Additionally, Chapter 3 draws attention to the fact that a striking feature of even the most recent South African jurisprudence is that, while the Constitutional Court has been willing to use various constitutional hooks to give unincorporated treaties some domestic effect by holding the government to South Africa's treaty obligations,[80] it has continued to neglect an express integrative provision in section 231(4). Section 231(4) provides that 'a self-executing provision' of an unincorporated treaty that has been approved by Parliament 'is law' in South Africa (absent conflict with the Constitution or national legislation). Therefore, the study emphasises that in keeping with an approach that is holistic, harmonising, certain and rigorous, it was (some thirty years into democracy) past time for the Constitutional Court, as the guardian and apex interpreter of the Constitution, to develop jurisprudence on the interpretation of this integrative provision in section 231(4).[81] What the courts should not do is continue to ignore this provision or baldly assert that a treaty (or its provisions) is not self-executing without explaining why and having failed to develop any criteria for making such determination (an approach adopted in *Zuma III*, and critiqued in Chapter 3).[82] As discussed in Part 8.2 below, this is an area where this study only suggests the need for further consideration, without seeking to advance final proposals for how the courts should interpret section 231(4).

## 7 Towards Certainty and Rigour: Ensuring the Courts Fulfil the Constitution's International Law Vision

In Chapters 2, 3, and 4, the issues identified in the South African courts' approach to international law are the predicate for proposals to improve that approach. The proposals were guided by the requirements of international law, core commitments in the Constitution,[83] in particular, the rule of law, and what is practical within the South African (adversarial) procedural

78 See Chapter 3, Part 5, and *Charnell Commando and Others v City of Cape Town and Another* [2024] ZACC 27, 2025 (3) SA 1 (CC) para 142 (per Bilchitz AJ): 'The decision to ratify clearly indicates parliamentary approval of the treaty and an intention to render it binding on the Republic. Unless clearly in breach of our Constitution, this Court must thus give effect to that parliamentary intention and seek to harmonise our own domestic law with the relevant international law.' Bilchitz AJ, in para 142 fn 116, relies on S Liebenberg, 'South Africa and the International Covenant on Economic, Social and Cultural Rights: Deepening the Synergies' (2020) 3 *South African Judicial Education Journal* 12 at 39 and Coutsoudis & du Plessis CCR (note 17) 172.

79 Chapter 3, Part 5.

80 See e.g. *Glenister II* (note 2) and *Law Society* (note 1).

81 Chapter 3, Part 5.2.

82 Chapter 3, Part 4.2.2.

83 See note 77 above.

framework.[84] The proposals share a number of similar features, which are important for the courts to adopt, but are not foreign to how they approach matters generally, and pay proper attention to South Africa's procedural law context. Principally, there is a call for a more considered, certain, and rigorous approach to the application and determination of international law, with due regard to international law's own secondary rules for the determination of that law, and fealty to the way the Constitution weaves international law into South Africa's domestic legal order.

The proposals in each chapter aim to encourage the courts to consider the importance of articulating and consistently applying a known methodology for applying and determining international law, which accords with international law, while also being compatible with South Africa's domestic procedural system and the Constitution. These proposals do not aim to demand some type of methodological purity or perfection. Nor do I suggest that articulating and applying a certain methodology would necessarily lead to the right determination. Yet it would better ensure rigour, certainty and transparency in the South African courts' approach to international law.[85]

While scholarly debates surrounding the interpretation of treaties and the identification of customary international law are acknowledged, the point is that:

(a) There is an accepted core of what is generally understood as a proper approach to determining international law. That core includes (i) the Vienna rules, which as customary international law form a binding part of South African law, and (ii) the ILC's elucidatory work in Draft Conclusions both on customary international law[86] and subsequent practice,[87] which are intended precisely to assist those tasked with determining international law (in particular those such as domestic courts that may not be experts in the field).
(b) The determination of international law at least requires the application of some methodology.
(c) Having and applying no methodology to the determination of international law sources is not only ill-advised — it is inconsistent with courts' duties and obligations.

In light of this, the proposals for charting the path ahead largely reference known and accepted principles of international law's own secondary rules

84 See Chapters 2, 3, and 4.

85 All these are important, and necessary, requirements of the rule of law. See e.g. also Chapter 3, Part 5, and, for instance, *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg & Others v Minister of Police & Others* [2021] ZACC 37, 2022 (1) BCLR 46 (CC) para 118; the Venice Commission's 'Rule of Law Checklist' (Venice, 11-12 March 2016) https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e; T Bingham, *The Rule of Law* (2010); and S Besson 'Theorizing the Sources of International Law' in S Besson & J Tasioulas (eds) *The Philosophy of International Law* (2010) at 172.

86 ILC Draft Conclusions: CIL (note 52)

87 ILC 'Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries' (2018) UN Doc A/73/10.

for determining its content. In other words, international law's own views as to how best to determine its sources. These should at least be the starting point. There may well be, and the study accepts that there are, disputes within international law scholarship as to how customary international law should be identified and treaties interpreted. But the point being made in this study is that at its core, there are known and agreed principles and extant rules that should frame the determination of international law, even if, on consideration (whether rightly or wrongly), a court chooses to deviate from these at some points. Put simply, any deviation should be intentional and well-reasoned, not unthinking or accidental, due to the failure to be aware of or use any methodology. If South African courts are to deviate from specific, generally accepted approaches to determining international law, the deviation should be from the point of knowledge, not out of ignorance.

Therefore, even if the courts are to deviate from the Vienna rules or ignore the materials made relevant by those rules, they should do so intentionally, not by accident. Similarly, even if they were to find that the standard principles of identification of customary international law, the two-element approach, and the ILC Draft Conclusions, which gives practical guidance concerning the approach to such identification, are somehow not helpful or impractical, they should deviate from these intentionally as opposed to by accident or through ignorance. However, the analysis shows that the courts are generally not making intentional decisions to deviate from or not apply a proper methodology to determine international law. In most cases, the courts do not apply any clear approach to the determination of international law. Nor do they grapple with how international law ought to be determined, how parties ought to approach that determination in their papers and submissions, and the type of materials and submissions they should place before the courts. Of course, the study reveals that there are exceptions. It emphasises that the exceptions should become the norm.

Having no methodological approach to the determination of international law (i.e. a completely ad hoc approach or the lack of any determination process) is almost certain to lead to erroneous determinations of international law in at least some cases (even a broken watch may be right twice a day — but one would have to consult a working watch to know when such accidental accuracy is achieved).

Moreover, as emphasised in Chapter 4, following an appropriate methodology is essential for rule of law reasons.[88] The rule of law is a foundational principle of the South African Constitution, and, indeed, at

88 See also Besson (note 85) 172 ('The law-making processes by which we identify valid legal norms should themselves be such as to satisfy the requirements associated with the Rule of Law. The same should be said about the legality of international law. International law-making processes should therefore be such as to satisfy some of the requirements associated with the Rule of International Law and in particular the requirements of clarity, publicity, certainty, equality, transparency, and fairness.'). See also Venice Commission's Rule of Law Checklist (note 85) item 3 ('Does the domestic legal system ensure that the State abide by its binding obligations under international law?').

the normative level, it is often argued that the rule of law is an organising principle of any legal system properly so-called.[89] The rule of law's status in South African law is put beyond doubt by the Constitution's imprimatur: it is a justiciable and binding founding constitutional value.[90] And as such, the Constitution's embrace of international law must be consistent with the rule of law. That must require at the very least consistency, predictability, and certainty, and there must be a proper (and lawful) approach to the application and determination of the law.[91] That can only be achieved by domestic courts paying heed to international law's own secondary rules and principles on the proper determination of the content of primary international law rules. The legitimacy of South Africa's embrace of international law, and international law itself, depends on this;[92] and improper determinations of international law by South African courts may unwittingly place South Africa in violation of its international law obligations.[93]

89 Besson ibid 172 ('To identify a society as having a system of law, as opposed to some other sort of order, is to identify it as satisfying some or all of the requirements associated with the Rule of Law.'); N Barber, 'The Rechtsstaat and the Rule of Law' (2003) 53 *The University of Toronto LJ* 443, 452; Attorney General Lord Hermer KC, 'The Rule of Law in an Age of Populism' (Bingham Lecture, 14 October 2024) https://www.gov.uk/government/speeches/attorney-generals-2024-bingham-lecture-on-the-rule-of-law ('Lord Bingham's conception of the rule of law also recognises that international law is the 'Rule of Law' writ large, and that States must comply with their international obligations, just as they must comply with domestic law. This, too, is crucial. International law is not simply some kind of optional add-on, with which States can pick or choose whether to comply. It is central to ensuring our prosperity and security, and that of all global citizens.'). Cf J Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Pocket Books of the Hague Academy, 2014) paras 445 and 460. The UN General Assembly has affirmed, in various resolutions, the importance and centrality of the rule of law both domestically and internationally (for instance, see UNGA Resolution of 24 September 2012, UN Doc A/RES/67/1 and UNGA Resolution of (4 December 2024) UN Doc A/RES/79/126).

90 Constitution, s 1(c), and see Chapter 1, Part 5.2 and Chapter 3, Part 3.3.2.2.

91 For instance see the UN Secretary-General's Report 'The rule of law and transitional justice in conflict and post-conflict societies' (2004) UN Doc S/2004/616 para 6, where the Secretary-General indicates that the rule of law requires 'measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, *and procedural and legal transparency*' (emphasis added). The Venice Commission's 'Report on the Rule of Law' (4 April 2011) CDL-AD (2011)003rev, https://rm.coe.int/1680700a61, points out, at para 54, that, 'It is vital that the judiciary has power to determine which laws are applicable and valid in the case, to resolve issues of fact, and to apply the law to the facts, in accordance with an appropriate, that is to say, sufficiently transparent and predictable, interpretative methodology.' See also Michelman (note 50) 14.

92 Nollkaemper (note 54) 49.

93 PM Dupuy, 'International Law and Domestic (Municipal) Law' (last updated April 2011) in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* para 124 ('Any decision taken by a judicial organ of the State at the municipal level may, if contrary to an international obligation of that State, entail its international responsibility').

In summary, if the courts have no regard for a process for determining international law (and adopt no process, or are ad hoc), international law's application and content in South Africa, and the decisions by courts that purport to be based on international 'law' would risk being rendered 'arbitrary' — which is anathema to the rule of law, as recognised by the ICJ[94] and the Constitutional Court,[95] and more generally.[96]

As argued in Chapter 2, how South African courts approach the application and identification of customary international law can have ramifications not just for South African law and the parties before its courts, but for international law's development and legitimacy more generally.[97] Therefore, courts should be aware of their position (as agents of international law[98]) and adopt a sound approach. Moreover, from the perspective of South African law, since courts are required to apply international law, and in various ways it forms part of the law that is domestically binding and must be applied, because the Constitution gives it that role,[99] then interna-

94 *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, Judgment [1989] ICJ Reports 15 para 128 ('[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law').

95 See e.g. *King NO and Others v De Jager and Others* [2021] ZACC 4, 2021 (4) SA 1 (CC) para 102; *Mphahlele v First National Bank of SA Ltd* [1999] ZACC 1, 1999 (2) SA 667 (CC) para 12 ('The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons.').

96 See e.g. Venice Commission's Report on the Rule of Law (note 91) para 54 (quoted above in footnote 91 above).

97 For instance, see E Denza, 'The Relationship between International Law and Domestic Law' in Malcolm Evans *International Law* (6th ed, 2024) 401, noting that 'national courts are often asked to resolve [international law's] most fundamental uncertainties.' Yuji Iwasawa has argued that, 'The domestic implementation and application of international law is the most fundamental and important means of enforcing international law.' Y Iwasawa, 'Various means of enforcing International law' (2023) 65 *Harvard International LJ* 1, 4. See also the Venice Commission's Report on the Rule of Law (note 91) para 51, which notes that, 'Legal certainty — and supremacy of the law — imply that the law is implemented in practice.' And 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), available at https://www.ila-hq.org/en_GB/documents/conference-study-group-report-johannesburg-2016, para 70 ('Given the paucity of international judicial settlement of disputes, judicial law-making by domestic courts that impacts on international law, while subject to informal and diffuse international monitoring, requires much more vigilance in order to be kept within acceptable limits, and in order to have a developing rather than a merely corrosive effect on international regulation (which could be cast as a form of fragmentation).').

98 Iwasawa ibid at 4–5 ('In contrast to executive and legislative organs, which tend to prioritize national interests, judicial organs or domestic courts are more likely to serve as true organs of the international community. The important role played by domestic courts in international law is attributable to the decentralized nature of the international legal order.') See also Chapter 2.

99 As discussed in Chapters 2 and 3, customary international law is law in South Africa and treaties are increasingly used even when not domesticated by legislation to test whether government conduct is lawful, as well as to guide the interpretation of domestic legislation and the Constitution.

tional law must be properly determined. Otherwise what is being applied and incorporated into South African law — under the banner of constitutionally mandated international law integration — may be something other than international law. This is a genuine concern since a lack of a rigorous and applied methodology may lead to at least two scenarios: one where judges in good faith misunderstand the law because they did not follow a correct approach to determination of international law (be it interpretation of treaties, or identification of customary international law); or one where judges, through an intentional lack of diligence, rely upon their own broad ideas of what international law on an issue may or ought to be (by simple affirmation) to support their own views or to diminish competing views. By way of example, this could allow a judge to assert that an interpretation of legislation or the Constitution that the judge objects to is inconsistent with South Africa's treaty obligations, when no attempt is made to properly and thoroughly interpret the actual treaty provisions that must form the basis for those obligations.[100]

Therefore, the consequences of inadequately determining international law are deeply concerning. These consequences are, undoubtedly, not what the South African courts intend when they are superficial in their approach to the determination of international law. As a consequence, a central theme of this study has been to call upon the South African courts to take the determination of international law seriously, precisely because of the Constitution's openness to international law,[101] and its commitment to the rule of law (and its embrace of international law as part of the law that must rule).[102]

Pragmatic proposals, with due regard to South Africa's procedural law, were made to encourage the courts, where insufficient submissions had been received from the parties on the determination of customary international law or treaty law, to either call for further submissions from the parties, to encourage amici curiae with international law expertise to assist the court, or to undertake their own research.[103] As emphasised, these prag-

100 See a discussion of a possible example of this in Chapter 4, Parts 3.2 and 4.5 (with reference to *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31, 2023 (2) SA 1 (CC)).

101 The integrative approach to international law that the Constitution requires means that courts and South African practitioners should be adroit international lawyers, being rigorous and consistent in applying and determining international law within the Constitution's framework.

102 See Constitution, sections 198(c) and 199(5), and section 1(c) read with section 232 (which makes the customary obligation to comply with treaty obligations in good faith part of South African law), and the discussion of implication of these sections in Chapter 3, text at footnotes 119–128. See also Bingham (note 85) Ch 10 (in this chapter of his work on the rule of law, Bingham argues that, 'The rule of law requires compliance by the state with its obligations in international law as in national law'); a similar argument by Justice Cameron, at the time a judge of the South African Constitutional Court, as discussed in note 44; and Venice Commission 'Rule of Law Check List' (note 85) item 3.

103 See Chapter 2, Part 5.3 and Chapter 4, Part 4.4.

matic approaches, while not generally utilised in relation to the determination of international law, are at least evidenced in some of the Constitutional Court's practice with regard to international law and comparative foreign law issues,[104] and procedurally available to the courts. The courts would do well to make use of them regularly when required, in order to assist in the realisation of a proper and full embrace of international law as mandated by the Constitution.

## 8 Recent Developments and Issues Left Unaddressed

In concluding this study, it is helpful to briefly reflect on more recent case developments and the issues left unaddressed by this study, which will require consideration by courts and scholars. I discuss these below.

### 8.1 Recent case developments

Since the cases surveyed in Chapters 2, 3, and 4, the trends identified in those chapters have generally continued in the most recent South African decisions. In broad terms, one continues to observe an openness to international law coupled with a general lack of rigour in its determination. This is evident from the courts' approach to unincorporated treaties, the application and identification of customary international law, and the interpretation of treaties, which I discuss in turn.

In relation to the approach to unincorporated treaties, one sees a continued application of unincorporated treaties, particularly when interpreting legislation and the Constitution.[105] There is evidence that unincorporated treaties are being used to determine the constitutionality of legislation (as was done in *Glenister II*), by assessing whether the state (including the legislature) is respecting and fulfilling the rights in the Bill of Rights,

104 Chapter 2, Part 5.3, and Chapter 4, Part 4.4.

105 For examples in the Constitutional Court see *Jordaan and Others v Minister of Home Affairs and Another* [2025] ZACC 19, 2025 (6) SA 323 (CC) paras 64–75; *Mutsila v Municipal Gratuity Fund and Others* [2025] ZACC 17, 2026 (1) SA 1 (CC) para 42 footnote 31; *Corruption Watch (RF) NPC v Speaker of the National Assembly and Others* [2025] ZACC 15, 2026 (1) SA 327 (CC) para 28; *O'Brien* (note 47) paras 85–95; *Charnell Commando* (note 78) paras 139–150. In the SCA see *African Centre for Biodiversity NPC v Minister of Agriculture, Forestry and Fisheries and Others* [2024] ZASCA 143, 2025 (2) SA 31 (SCA) paras 11–13; *International Trade Administration Commission and Others v Association of Meat Importers and Exporters and Others* [2025] ZASCA 173, [2026] 1 All SA 28 (SCA) paras 5, 21–22; *Rossouw v Blignaut and Wessels and Another* [2025] ZASCA 146, 2026 (2) SA 477 (SCA) para 85. In the High Court see *Green Connection* (note 138), discussed at text at note 138ff below; *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and* Others [2025] ZAWCHC 202, [2025] 3 All SA 827 (WCC) paras 53–55 (the Constitutional Court heard the application for confirmation of the High Court's declaration of statutory invalidity on 12 February 2026 (see https://collections.concourt.org.za/handle/20.500.12144/38715), but the Court had not delivered judgment at the time of writing).

with reference to international law obligations.[106] We have seen continued reference to and reliance on the *Law Society* decision, but no discussion or express application of the further constitutional hooks used in that decision that go beyond the approach in *Glenister II*. There is, however, at least one decision where the Constitutional Court appears implicitly to have accepted the approach in *Law Society*. Moreover, the courts have not sought to rely on or emulate the approach to unincorporated treaties suggested by *Zuma III*. Four cases are illustrative of this.

In *Ntuli*,[107] the Constitutional Court was faced with a challenge to the lawfulness of a policy of the Department of Correctional Services in relation to the use of computers by prison inmates ('the Policy').[108] The Policy regulated the use of computers by inmates enrolled in further studies who required a computer for this purpose. The Policy prohibited inmates from using computers in their cells. The Court held that this prohibition violated the inmates' constitutional right to education.[109] Of particular interest for our purposes is that the Court, after finding a violation of the constitutional right to education, then separately found that the Policy violated South Africa's international obligations.[110] These international obligations were found to flow from the ICESCR (an unincorporated treaty to which South Africa was party),[111] understood in light of various non-binding principles.[112] The Court does not explain whether the violation of South Africa's international law obligations was a separate ground for invalidating the Policy. However, the structure of the judgment suggests that this was so. South Africa's international obligations were not used to interpret the right to education in the Constitution. Rather, after finding that the constitutional

106 See *O'Brien* (note 47) para 87; *Embrace Project NPC and Others v Minister of Justice and Correctional Services and Others* [2024] ZAGPPHC 961, 2025 (1) SACR 36 (GP) paras 60–68 (the Constitutional Court heard the application for confirmation of the High Court's declaration of statutory invalidity on 25 September 2025 (see https://collections.concourt.org.za/handle/20.500.12144/38628), but the Court had not delivered judgment at the time of writing).

107 *Minister of Justice and Correctional Services and Others v Ntuli* [2025] ZACC 7, 2025 (8) BCLR 869 (CC) ('*Ntuli*').

108 *Ntuli* (note 107) para 1.

109 In particular the right to further education in section 29(1)(b) of the Constitution ('Everyone has the right…to further education, which the state, through reasonable measures, must make progressively available and accessible.')

110 *Ntuli* (note 107) paras 75–79, read with para 39.

111 The International Covenant on Economic, Social and Cultural Rights ('ICESCR'), ratified by South Africa on 12 January 2015. The Court relied particularly on the UN Committee on Economic, Social and Cultural Rights' ('CESCR's') General Comment 13, dealing with the right to education under Article 13 of the ICESCR (adopted by CESCR at its 21st session, 15 November – 3 December 1999), see *Ntuli* (note 107) para 75, read with para 39.

112 In particular, the Court quotes from the Abidjan Principles on the Human Rights Obligations of States to Provide Public Education (which the Court indicates accords with the CESCR's General Comment 13), the UN Standard Minimum Rules for the Treatment of Prisoners, and the UN Basic Principles for the Treatment of Prisoners (see *Ntuli* (note 107) para 76–78). It simply quotes from these. The Court does not say that it was using them to interpret article 13 of the ICESCR. And the Court pays little attention to the fact that these principles, unlike the Covenant, are not binding on South Africa.

right was violated (without reference to international law), the Court, in a self-standing section, found that the Policy violated South Africa's international obligations.[113] Thus, while the Court did not expressly refer to *Law Society* or any of the constitutional hooks relied on in that case, it appears to implicitly accept that for the government to act (in this instance by enacting the Policy) in violation of South Africa's international law obligations meant that its actions were domestically unlawful.

In *O'Brien*, the Constitutional Court was faced with a constitutional challenge to legislation dealing with military courts.[114] The primary ground of challenge was that the legislation failed to ensure adequate independence for military judges. Relying on *Law Society* and *Glenister II*, [115] the Court held that it was necessary to have regard to unincorporated treaties when determining what constituted adequate independence.[116] In principle, the Court appears to approach this as merely using international law to interpret the Constitution and the obligations it imposes on the state.[117] However, as with *Glenister II*, the Court made clear that whether there was adequate independence,[118] and therefore the constitutionality of the provisions, would be determined by South Africa's international law obligations.[119] The Court held expressly that '[o]ur international law obligations inform the internationally accepted standard of judicial independence. *That is the standard by which we ought to assess the guarantee of judicial independence* provided for in the Constitution, which includes that such a guarantee must be afforded to military courts.'[120] The Court concludes its consideration of South Africa's international law obligation by making clear that given 'the requirement imposed on our country to take steps to secure

113 *Ntuli* (note 107) para 79 ('On a conspectus of all these international law instruments, South Africa is thus obliged to adopt and implement education policies that adequately meet the needs of incarcerated persons in a fair, just and equitable manner. In prohibiting tools reasonably necessary to access further education, namely the use of a personal computer in an inmate's cell, the Policy runs afoul of international law principles').

114 *O'Brien* (note 47) para 2 (the challenge was to sections of the Military Discipline Supplementary Measures Act 16 of 1999 and the Defence Act 42 of 2002).

115 *O'Brien* (note 47) paras 85–87 (the Court also relied on *Justice Alliance of South Africa v President of the Republic of South Africa* [2011] ZACC 23, 2011 (5) SA 388 (CC), which itself made reference to *Glenister II* (note 2)).

116 The Court relies on the ICCPR and the African Charter (see *O'Brien* (note 47) paras 89–95). The Court refers to and relies on the Human Rights Committee's and the African Commission's interpretation of these treaties. It also has regard to certain non-binding principles (see paras 99–102).

117 *O'Brien* (note 47) paras 86–87 (the Court refers to the interpretative obligations in sections 39(1)(b) and 233 of the Constitution).

118 *O'Brien* (note 47) para 87. The Court held that the constitutional requirement for judicial independence could be found to flow from section 165 (which provides expressly for this), interpreted in light of the Bill of Rights (including, in particular, the right to a fair trial), section 7(2) (the obligation on the state to promote, protect, fulfil and respect the rights in the Bill of Rights), and rule of law in section 1(c).

119 *O'Brien* (note 47) paras 86–106.

120 *O'Brien* (note 47) para 86, emphasis added.

the independence of the Judiciary in its constitution or laws, in fulfilment of its international legal obligations' the question before it, in determining the constitutional validity of the legislation, was 'whether the relevant provisions of the [domestic legislation being challenged] have succeeded' in fulfilling these international legal obligations.[121] In its analysis, the Court does not specifically reference the constitutional hooks used in *Law Society*. And this may not have been necessary, since one can understand *O'Brien* as an example of the Court using international law to interpret the Constitution's guarantee of judicial independence, in order to then determine the constitutionality of legislation against that constitutional guarantee.[122] However, the Court appears to situate its approach to international law (and the use of international law as the standard for assessing the constitutionality of the legislation) through the lens of *Law Society*.[123] It begins by stressing that, '[t]his Court stated in *Law Society* that international law "enjoy[s] well deserved prominence in the architecture of [South Africa's] constitutional order".'[124] And, importantly, in contrast to *Zuma III* (which the Court does not refer to), the Court makes clear that the Constitution must be interpreted in accordance with international obligations binding on South Africa, rather than those obligations merely being considered but not necessarily given preference.[125]

The third case worth considering is *Charnell Commando*.[126] The case involved a challenge to the constitutionality of the City of Cape Town's ('the City's') housing policy and its implementation. At the heart of the case was the constitutionality of the City's provision of emergency housing to vulnerable individuals far from the housing from which they had been evicted. The central issue was whether there was a violation of section 26 of the Constitution (the right to adequate housing[127]). In the majority judgment,[128] the Court did not consider international law in interpreting or applying section 26.[129] However, in the separate judgment of Bilchitz AJ (with

121 O'Brien (note 47) para 106.

122 Arguably this is similar to what occurred in *Sonke Gender Justice NPC v President of the Republic of South Africa and* Others [2020] ZACC 26, 2021 (3) BCLR 269 (CC) ('*Sonke*') as discussed in Chapter 3, Part 4.2.1.

123 *O'Brien* (note 47) para 85.

124 *O'Brien* (note 47) para 85 (insertions in original).

125 *O'Brien* (note 47) paras 85–106. This is a continuation of the trend identified and discussed in Chapter 3, Part 4.2.3.1.

126 *Charnell Commando* (note 78).

127 Constitution, sections 26 ('(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right').

128 Per Mathopo J.

129 The Court notes that certain international law submissions (including in relation to ICESCR and African Charter) were made by an amicus curiae (*Charnell Commando* (note 78) paras 48–50). But it then does not go on to deal with these submissions in its judgment. It is possible (although this is not stated) that the Court adopted this approach because it accepted that international law would be dealt with in Bilchitz AJ's separate judgment.

Dodson AJ concurring),[130] he considers international law for the purposes of interpreting section 26. His consideration of international law provided additional support for the majority judgment.[131] Although the majority did not address international law, nothing in its judgment suggested that it disagreed with Bilchitz AJ's approach (and his judgment has been relied on by the SCA).[132] Importantly, he emphasised that the Court ought to seek to adopt a harmonising approach to international law by ensuring that the Bill of Rights was interpreted in line with South Africa's treaty obligations (particularly under the ICESCR).[133] In doing so, he highlighted that '[t]he act of ratification renders the treaty legally binding on the Republic and indicates clear parliamentary approval of the treaty by the branch of state elected by the people. It thus places a democratic check on the Executive's power prior to rendering a treaty binding on the Republic.'[134] Similar considerations informed the separation of powers hook (which Bilchitz AJ does not expressly invoke) used by the Court in *Law Society* as one of the bases for invalidating the executive's actions that were inconsistent with South Africa's treaty obligations. Moreover, while he also does not specifically mention the customary obligation hook used in *Law Society*, Bilchitz AJ stresses South Africa's customary international law obligation to give effect to its treaty obligations in good faith.[135] And as one observes in *Ntuli*, *O'Brien*, and other subsequent Constitutional Court decisions discussed in Chapter 3, [136] Bilchitz AJ does not refer to *Zuma III*. However, his emphasis on the need to harmonise South Africa's domestic law and international

130 As Bilchitz AJ noted at *Charnell Commando* (note 78) para 120: 'I concur in the reasoning in [the majority] judgment but believe it is important to add complementary legal reasoning relating primarily to the role, applicability and usefulness of international legal approaches in interpreting the socio-economic rights in our Constitution in light of South Africa's ratification of the ICESCR.' He also partially dissented in relation to the relief, as he would have granted further orders requiring engagements between the City and the applicants.

131 Ibid.

132 *Johannesburg (City) and Others v Occupiers, Farm Randjesfontein No 405 and Another* [2025] ZASCA 47, 2025 (5) SA 86 (SCA) paras 30–31 (the SCA relied on Bilchitz AJ's judgment in *Charnell Commando*, and his reference to the ICESCR in interpreting the right of access to housing, in a decision in which the SCA was also faced with a case involving a municipality's provision of temporary emergency accommodation to persons who had been evicted).

133 *Charnell Commando* (note 78) paras 141–145. As indicated in note 78 above, Bilchitz AJ provides two academic authorities for this harmonising approach: (a) my article with Max du Plessis (Coutsoudis & du Plessis CCR (note 17) 172, in which we explain why such an approach is consistent with the Constitution's embrace of international law, and should limit conflict between South Africa's international obligation and the Constitution); and (b) an article by Liebenberg (note 78), which deals with avenues for aligning South Africa's domestic law with obligations under the ICESCR. He also notes that the approach is clearly affirmed by the Court's reading of the Constitution in *Glenister II* and *Sonke* (see *Charnell Commando* (note 78) para 142, footnotes 116 and 117 and para 143).

134 *Charnell Commando* (note 78) para 140.

135 *Charnell Commando* (note 78) para 145. In a footnote, Bilchitz AJ referred to article 26 of the Vienna Convention. Although South Africa is not a party to the Convention, in *Law Society* (note 1) paras 54–55, the Court accepted that article 26 formed part of customary international law.

136 See discussion in Chapter 3, Part 4.2.3.1.

treaty obligations indicates a rejection of the more equivocal approach suggested in *Zuma III*. As he explains,

> [i]t is highly undesirable for there to be one approach adopted towards South Africa's obligations at the international level and another approach adopted towards the interpretation of the socioeconomic rights in our Constitution. It is for that reason that our Constitution includes the injunction in section 39(1)(b) to consider international law in the interpretation of the Bill of Rights and section 233 requires preference, in the interpretation of legislation, for any reasonable interpretation that is consistent with international law.[137]

One sees a similar approach in the High Court decision in *Green Connection*.[138] The matter concerned the judicial review of an environmental authorisation granted to a multi-national petroleum company to conduct exploratory drilling off South Africa's coast.[139] One of the issues in the review was whether the final environmental and social impact assessment report ('the Final EIR') submitted as part of the application for authorisation (as required by domestic legislation) ought to have properly addressed the transboundary impacts on Namibia that could be caused by an oil spill from the exploratory activities.[140] The applicants relied on customary international law and treaty obligations in support of their contention that the Final EIR required an assessment of transboundary impacts. The Minister attempted to rely on *Zuma III* to argue against the invocation of international law by the applicants.[141] However, the High Court held, relying on *Law Society* and section 233 of the Constitution, that it was required to interpret the domestic legislation (the National Environmental Management Act ('NEMA') and its regulations), as far as reasonably possible, in a manner that gives effect to international law.[142] On this basis, the Court held that 'the approach adopted by the [government] respondents, to the effect that NEMA and the EIA Regulations do not require environmental impact assessments to assess and predict transboundary harm is inconsistent with the customary international law and international law obligations discussed above'.[143] The

137 *Charnell Commando* (note 78) para 145 (this also has echoes of the view expressed by Cameron quoted at note 44).

138 *Green Connection NPC and Another v Minister of Forestry, Fisheries and the Environment and Others* [2025] ZAWCHC 349 ('*Green Connection*').

139 *Green Connection* (note 138) paras 2–8.

140 *Green Connection* (note 138) paras 158–189.

141 *Green Connection* (note 138) para 167.

142 *Green Connection* (note 138) para 178. It is worth noting that, unlike in *Zuma III* (note 2), the issue in *Green Connection* was the interpretation of domestic legislation, not the Bill of Rights. When it comes to the interpretation of legislation, section 233 of the Constitution is clear in its terms. It requires courts to adopt an interpretation of legislation that is consistent with international law (over any alternative interpretation inconsistent with it), provided only that the interpretation is reasonable. See discussion in relation to *Zuma III* in Chapter 3, text at footnotes 222–227; *Law Society* (note 1) para 5; *S v Okah* 2018 (4) BCLR 456 (CC) para 38; *Makana Peoples Centre v Minister of Health and Others* 2023 (8) BCLR 963 (CC) para 82; and Coutsoudis (note 16) 98–99.

143 *Green Connection* (note 138) para 187.

Court, therefore, held that the failure to assess transboundary impacts in the Final EIR meant that the authorisation ought to be reviewed and set aside.[144]

In respect of customary international law, the courts, consistent with section 232 of the Constitution, continue to emphasise that it automatically forms part of South African law (unless inconsistent with the Constitution or national legislation).[145] In the last few years, the Constitutional Court has made only passing reference to customary international law in isolated cases, but in none of these cases was customary international law material to the Court's determination of the case.[146] Unsurprisingly, in those cases, the Court does not engage with the identification of customary international law, nor does it articulate how the identification of customary international law ought to be approached.[147] The position is similar in the SCA and High Court, even in cases where customary international law was material to the determination of the case.[148] This is illustrated by two cases.

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144 *Green Connection* (note 138) para 189.

145 See discussion above in Part 2 of *S v Ephraim* (note 18), see also e.g. *Green Connection* (note 138) para 173; *Scalabrini (WCC)* (note 105) para 54; and *Schultz v Minister of Justice and Correctional Services and Others* [2024] ZASCA 77, 2024 (2) SACR 294 (SCA) para 31.

146 See e.g. *Director of Public Prosecutions, Johannesburg and Another v Schultz and Others; Director of Public Prosecutions, Bloemfontein v Cholota* [2026] ZACC 3, 2026 (3) BCLR 175 (CC) para 27 (In this extradition matter, the Court took note that in the decision on appeal to it the High Court had stated that the 'fundamental doctrine of legality, the rule of law, *the principles of customary international law* and our Constitution lie at the heart of the question before the Court'. But there was no further reference to any customary international law rules in the Constitutional Court's decision); *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* 2024 (3) SA 330 (CC) para 31 (In this immigration case the Court made passing reference to the fact that the 'principle of non-refoul[e]ment accordingly forms part of customary international law and international human rights law'. It made this statement after referencing a number of treaties (including those binding on South Africa) that recognise the principle); and *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance and Others* [2023] ZACC 31, 2024 (1) SA 567 (CC) para 142 (In passing the Court took account of the fact that an academic writer (Denza) had noted that 'prior to the conclusion of the Vienna Convention the granting of customs privileges to diplomats was not a legal requirement of customary international law, but a matter of courtesy, comity or reciprocity only.' Nothing turned on the customary international law position in the case, since South Africa is party to the Vienna Convention on Diplomatic Relations).

147 Ibid.

148 In addition to cases discussed below, see *e.g. Scalabrini (WCC)* (note 105) para 54. In *S v Ephraim* (note 18), a central issue was whether apartheid was recognised as an international crime under customary international law at the time the alleged crimes occurred in 1982. The Court appeared to find that it was an international crime based only on a very a cursory consideration of a UN General Assembly resolution and given the adoption of the UN Convention on the Suppression and Punishment of the Crime of Apartheid in 1973 (see paras 37–43, read with para 87). The Court also seemed, later in the judgment, to confuse the question of whether apartheid was an international crime (as a form of crime against humanity) in 1982, with the question of when crimes against humanity generally became crimes in customary international law, which was not the issue (see paras 62–64; and see also Jackson & Woolaver (note 18)). The Court engaged with none of the issues raised in Chapter 2 in relation to the process for identification of customary international law. It did not explain why it relied on the subsidiary means it referred to or what weight ought to be accorded to them.

In *EAC v MTN*,[149] the SCA was required to determine aspects of state immunity. The case involved a damages claim instituted against a South African telecommunications company (MTN), other companies in the MTN group, and two former directors ('the MTN defendants'). The MTN defendants had raised several special pleas. By agreement, the special pleas were determined on the pleadings prior to the hearing of evidence. One of the special pleas raised was that EAC's damages claim was precluded by state immunity. The special plea was based on the fact that one of the central predicates for the damages claim was the allegation that the Iranian government (which had not been cited) had been bribed by the MTN defendants to act corruptly in the awarding of a telecommunication licence in Iran. The SCA was, therefore, required to determine whether Iran's state immunity, as given effect to by the Foreign States Immunities Act 87 of 1981 ('the Act'), precluded the claim. The SCA's determination of customary international law was brief and focused primarily on considering the customary status of article 6(2)(b) of the UN Convention on Jurisdictional Immunities of States and Their Property, which has not entered into force, and to which South Africa is not a party.[150] It was necessary to make this determination because the SCA was required to interpret section 2(2) of the Act consistently with customary international law (as required by section 233 of the Constitution). In making this determination, the SCA primarily had regard to a UK decision, *Belhaj v Straw*, which had made certain pronouncements on aspects of the customary status of article 6(2)(b).[151] The SCA commendably made clear that a key issue was whether there was sufficient state practice to demonstrate that article 6(2)(b) was reflective of customary international law (although it made no mention of the need for opinio juris).[152] Unfortunately, while the SCA summarily indicated that, on what was placed before it, there was insufficient evidence of state practice,[153] it failed (as courts before it have done) to engage with and give guidance on the type of practical and methodological questions in relation to the identification of customary international law discussed in Chapter 2.[154]

In *Green Connection*, which was dealt with previously, the High Court, in identifying the customary international law obligations (in respect of environmental harm and the principle of prevention) relevant to its interpretation of the domestic legislation, relied exclusively on a decision of the

149 *East Asian Consortium B.V. v MTN Group Limited and Others* 2025 (5) SA 33 (SCA) ('*EAC v MTN*'). I provide a more detailed general discussion of this case in Coutsoudis (note 16) at 133–143.

150 *EAC v MTN* (note 149) paras 40–44.

151 *Belhaj v Straw* [2017] UKSC 3; see *EAC v MTN* (note 149) para 43.

152 *EAC v MTN* (note 149) para 44.

153 *EAC v MTN* (note 149) para 44.

154 See Chapter 2, text at fn 170. For a general discussion of this case see Coutsoudis (note 16) 133–143.

ICJ and an interstate arbitral tribunal award.[155] The Court did not engage with the appropriateness of using subsidiary means to identify customary international law rules, or which subsidiary means should be used or the weight to be accorded to them, or how courts ought to approach the determination of customary international law.[156] But as with previous decisions, it appears that the Court was willing to accept that certain rules formed part of customary international law on the strength of pronouncements by the ICJ (although it expressed no view on the status of ICJ judgments).[157] It appears that the Court understood the government not to meaningfully dispute that the relevant customary international law rules articulated by the ICJ were part of customary international law.[158] This may be why the Court did not believe it was necessary to engage in a detailed consideration of the identification of the customary international law rules at issue.

In respect of the interpretation of treaties, we see a continuation of the general lack of methodological rigour in the approach of the South African courts. Particularly, the Constitutional Court generally continues to reference South Africa's international obligations under treaties by mere assertion or declaration, with little apparent methodological consideration for how it ought to interpret those treaties and certainly no articulation thereof.[159] Since the survey of cases undertaken in Chapter 4, there have been no new cases (whether from the Constitutional Court, the SCA, or the High Court) in which any reference has been made to the customary international law approach to treaty interpretation as codified in the Vienna

155 *Green Connection* (note 138) para 176 (quoting and relying on the decision of *Pulp Mills on the River Uruguay (Argentina v Uruguay)* Judgment [2010] ICJ Rep 14). The Court also had regard to an early international arbitral decision in a case involving the USA and Canada (*Trail Smelter Case (United States, Canada)* (1938 and 1941) 3 Reports of International Arbitral Awards 1905) which made similar statements in relation to customary international law to those made in the later *Pulp Mills* decision of the ICJ (see paras 164, 170, and 174).

156 In *Green Connection* (note 138) footnote 82 (para 174), the Court quoted with approval the statement in *S v Ephraim* (note 18) para 30 that: 'A custom becomes a rule of customary international law where it is a sufficiently widespread practice adopted by states out of a sense of legal obligation.' However, the Court in *Green Connection* made no attempt to apply this two-element approach to the identification of customary international law, or even to state that these elements were satisfied. It simply accepted that certain rules were part of customary international law based on statements by the ICJ.

157 The Court also refers to the *Trail Smelter Case*, but it appears that it primarily relied on the ICJ decision in *Pulp Mills* (see *Green Connection* (note 138) paras 174–176).

158 *Green Connection* (note 138) para 174. At paras 170 and 171, the Court suggests that the Minister had initially sought to distinguish the *Trail Smelter Case* and to argue that the ICJ's decision in *Pulp Mills* (note 155) should not be relied on since the ICJ was ultimately deciding the case on the basis of a treaty between the states and not customary international law. But the Court held, at para 174, that: 'Although the Minister seeks to distinguish those cases on the basis of facts, it is not disputed that the principles the cases relied upon and applied were well-established rules of customary international law.'

159 See e.g. *Ntuli* (note 107) paras 75–79. One sees a similar approach in the SCA, e.g. in *Rossouw* (note 105) para 85.

Convention on the Law of Treaties.[160] This is notwithstanding the fact that, during this most recent period, South African courts (a) found it necessary to have regard to and apply treaties when determining cases,[161] and (b) in at least two cases the courts referenced other provisions in the Vienna Convention.[162] This, therefore, continues to demonstrate the same trend noted in the *Law Society* decision: reference to certain provisions in the Vienna Convention and acceptance that they form part of South African law, given that they are reflective of customary international law, while at the same time ignoring the rules it codifies for how treaties ought to be interpreted.[163]

160 This has been confirmed by key word searches and review of cases in the main South African case law report series (South African Law Reports ('SALR'), All South African Law Reports ('All SA'), and Butterworths Constitutional Law Reports ('BCLR')) and the main online repository of reported and unreported cases (saflii.org). There are many examples where the courts rely on treaties but fail to reference or apply the Vienna rules (see e.g. *Ntuli* (note 107) paras 75–79 and *International Trade Administration Commission v Association of Meat Importers and Exporters* (note 105) para 21).

161 See e.g. *Charnell Commando* (note 78) paras 139–149; *O'Brien* (note 47) paras 90–98; *Scalabrini* (WCC) (note 105) para 53; *Green Connection* (note 138) para 185; *Schultz* (note 145) paras 7, 9, 14, and 41.

162 *Charnell Commando* (note 78) paras 139 and 145 fn 122; *Schultz* (note 145) para 29.

163 Chapter 4, text at footnotes 84–85. I refer to the critique of the interpretive approach in *Law Society* in Coutsoudis & du Plessis (note 17) 189–194. In that article, at 189 (read with footnote 143) I (together with M du Plessis) emphasise that in adopting a proper approach to interpreting the SADC Treaty, the Court ought to have had regard to other rules of international law in relation to when treaties can be replaced (for instance, as codified in article 59(1) of the Vienna Convention) in order to determine whether under the SADC Treaty the state parties were entitled to adopt a new Protocol to replace the 2000 Protocol. This is required by article 31(3)(c) of the Vienna Convention (which provides that 'any relevant rules of international law applicable in the relations between the parties' must be taken into account when interpreting a treaty), as emphasised by Tladi, in his critique of the Court for failing to have regard to other relevant international human rights rules in relation to access to court when interpreting the SADC Treaty. See D Tladi, 'The Constitutional Court's Judgment in the SADC Tribunal Case: International Law Continues to Befuddle' (2020) 10 *Constitutional Court Review* 129, 142. Taking relevant international law rules into account when interpreting treaties is important, as it is a guard against fragmentation in international law. See ILC, 'The Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' in *Report of International Law Commission on the Work of its 58th Session* (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10. As noted at 413 (para 251(17)), which sets out the ILC Study Group's conclusions, article 31(3)(c) 'gives expression to the objective of "systemic integration" according to which, whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact'. The Study Group explains at 413 (para 251(18)) that '[i]n many cases, the issue of interpretation will be capable of resolution with the framework of the treaty itself. Article 31 (3) (c) deals with the case where material sources external to the treaty are relevant in its interpretation. These may include other treaties, customary rules or general principles of law'. See also E de Wet, 'The Constitutionalization of Public International Law' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 1223–4; and C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *ICLQ* 279. For a detailed discussion of the requirement, in terms of article 31(3)(c), to take other relevant rule of international law into account when interpreting a treaty, see R Gardiner, *Treaty Interpretation* (2nd ed, 2015) 289–334.

In line with the trends observed in Chapter 4, in instances where the courts go beyond merely asserting that obligations arise from a treaty (or simply quoting from the treaty without more), rather than undertaking any interpretative exercise directly themselves, the courts have sometimes relied on supplementary means for interpreting treaties. For instance, in the recent cases, there is reliance on the treaty bodies' pronouncements.[164] There is also some reliance on foreign decisions.[165]

## 8.2 The questions left unanswered and areas for further engagement

Given the continuation of the trends identified in Chapters 2, 3, and 4, the proposals in those chapters remain appropriate for the courts to consider in order to better realise the Constitution's embrace of international law. However, this study does not address all the issues that may arise regarding how South African courts apply and determine international law. Nor does it aim to. There are many issues that are left unresolved or unconsidered. This is inevitable in a study constrained by length and given the need to limit the already broad scope of analysis. The study does this by focusing on systematically describing the courts' engagement with customary international law and treaty law. The trends identified and the proposals made in response to those trends are generally directed at ensuring a suitably rigorous and methodologically sound approach to the application and determination of treaties and customary international law, within the framework of the Constitution and given international law's own requirements. Thus, in general, this study does not seek to advance final conclusions as to where a more rigorous, methodological, and certain approach that is consistent with international law and the Constitution may lead. Nor does it seek to address all the various issues that may arise in pursuing such an approach. Therefore, there are many further questions and issues that will no doubt engage the South African courts' attention in the future and, in respect of which, further scholarship will be required.

A few examples will suffice. As indicated in Part 6 above, in Chapter 3, I emphasise the need for the courts to engage with the express provision in section 231(4) of the Constitution that provides that the 'self-executing' provisions of unincorporated treaties are part of South African law, absent

164 See e.g. *Charnell Commando* (note 78) paras 122, 148–149, para 165 (fn 157), 172, 181 (Bilchitz AJ relied on the General Comments of the CESCR, which he refers to as 'the most authoritative interpretation' of the ICESCR); *O'Brien* (note 47) paras 90–96 (The Court turned to decisions by the African Commission in interpreting the African Charter, and had regard to the Human Rights Committee's General Comment 32 to interpret the ICCPR); *Ntuli* (note 107) (the Court relies on General Comment 13 of the CESCR to interpret the ICESCR, as discussed above).

165 See e.g. *Irankunda and Another v Director of Asylum Seeker Management: Department of Home Affairs and Others* [2024] ZASCA 87, 2024 (6) SA 376 (SCA) paras 31–36.

legislation.[166] However, I did not seek to offer a view on how the courts ought to develop a South African jurisprudence on when treaty provisions will be 'self-executing'. That issue has been the subject of considerable scholarship already in South Africa,[167] as it has been in other countries.[168] Unfortunately, as noted when discussing *Zuma III*, the Constitutional Court ignored this scholarship,[169] despite summarily asserting (absent explanation) that relevant provisions of the ICCPR were not self-executing. Since then, the Constitutional Court has not pronounced (even in terse terms) on whether a treaty provision would be self-executing for the purposes of sec-

166 See discussions in respect of *Zuma III*, in Chapter 3, Part 4.2.2, and in respect of *Law Society*, in Chapter 3 footnotes 149–159. See also S Samtani 'International law, access to courts and non-retrogression: Law Society v President of the Republic of South Africa' (2020) 10 *Constitutional Court Review* 197, 212–217.

167 For a summary of this and some of the scholarly discussions and disagreements as to when treaty provisions ought to be considered self-executing see Coutsoudis (note 16) 85–90. See also Samtani (note 166) 214–217; E de Wet, 'South Africa' in D Shelton *International Law and Domestic Legal Systems* (2011) 578; Liebenberg (note 78) 28–29; E Ngolele, 'The Content of the Doctrine of Self-Execution and Its Limited Effect in South African Law', (2006) 31 *SAYIL* 153; M Olivier, 'Exploring the Doctrine of Self-Execution as Enforcement Mechanism of International Obligations', (2002) 27 *SAYIL* 99; and M Killander, 'Judicial immunity, Compensation for unlawful detention and the elusive self-executing treaty provision: Claassen v Minister of Justice and Constitutional Development 2010(6) SA 399 (WCC)' (2010) 26 SAJHR 386.

168 See for instance the divergent approaches in relation to the ICCPR, referenced in the Chapter 3, footnote 236, in the Cypriot and US courts. See also generally Coutsoudis (note 16) 85–90. See also CM Vazquez, 'The Four Doctrines of Self-Executing Treaties' (1996) 89 *American Journal of International Law* 695, 695 ('A distinction has become entrenched in United States law between treaties that are "self-executing" and those that are not. The precise nature of this distinction-indeed, its very existence-is a matter of some controversy and much confusion. More than one lower federal court has pronounced the distinction to be the "most confounding" in the United States law of treaties. A tremendous amount of scholarship has sought to clarify this distinction, but the honest observer cannot but agree with John Jackson's observation that "[t]he substantial volume of scholarly writing on this issue has not yet resolved the confusion" surrounding it.') And more recently, see also D Sloss, 'Taming Madison's Monster: How to Fix Self-Execution Doctrine' (2015) *Brigham Young University Law Review* 1691, 1693 ('judicial application of NSE doctrine is almost entirely arbitrary.'); Hollis & Vázquez, 'Treaty Self-Execution as "Foreign" Foreign Relations Law' in CA Bradley (ed) *The Oxford Handbook of Comparative Foreign Relations Law* (2019) 468 ('it is fair to say that few doctrines of U.S. foreign relations law have confounded U.S. courts and commentators as thoroughly. *It is therefore surprising that this distinction has been embraced in other states*.'); and T Lynch, 'The ICCPR, Non-Self-Execution, and DACA Recipients' Right to Remain in the United States', (2020) 34 *Georgetown Immigration Law Review* 323, 375 ('The doctrine of treaty self-execution is complex and not wholly coherent.'). For a general discussion on the use in domestic courts of the doctrine of self-executing treaties see M Van Alstine, 'Summary and Conclusions' in DL Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 599–603. For a consideration of the development of the doctrine in the US and subsequent adoption and metamorphosis in Europe and other countries see, Y Iwasawa, *Domestic Application of International Law: Focusing on Direct Applicability* (2022).

169 Chapter 3, Part 4.2.2 (and see A Evans, 'Self-Executing Treaties in the United States of America' (1953) 30 *British Yearbook of International Law* 178, 193, quoted at footnote 280).

tion 231(4).[170] Therefore, as emphasised in Chapter 3, while there is enduring ambiguity concerning when treaty provisions will be 'self-executing' for the purposes of section 231(4), it is precisely because of this ambiguity that it is incumbent on the South African courts to develop a jurisprudence for how this provision is to be interpreted and applied, given South Africa's own unique framework.[171] There is no doubt that it will be important for the courts to turn to the wealth of scholarship both in South Africa and in other countries when doing so.[172] By way of example, an aspect highlighted by the scholarship, which the courts have not grappled with, but is evident from the language of section 231(4) ('*a self-executing provision of an agreement* that has been approved by Parliament is law in the Republic'), is that however 'self-executing' is interpreted within the South African context, a court need not find that the entire treaty is self-executing in order for section 231(4) to be applicable. Rather, section 231(4)'s language plainly allows for a nuanced approach, in terms of which, a court need only find that certain relevant provisions of a treaty are self-executing and, on that basis, part of South African law.[173]

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170 This has been confirmed by key word searches and review of cases on saflii.org and the main law report series. The same holds true for the SCA. There is only one recent High Court decision which tersely noted that it was 'common cause' that the treaty at issue in the case was not self-executing, but the Court simply noted, without explanation, that this was so 'because it is not an international agreement of a technical, administrative or executive nature' (see *Diedericks v MEC for Agriculture, Environmental Affairs, Rural Development and Land Reform (Northern Cape) and Another* 2026 (1) SA 574 (NCK) para 37). This statement does not make sense. The Court plainly conflates two separate inquiries: (a) whether the treaty required parliamentary approval (under section 231(2)) or could be made binding on the international plane without parliamentary approval (as provided under section 231(3) for "international agreement of a technical, administrative or executive nature"); and (b) the separate question, under section 231(4), of whether the provisions of a treaty approved by parliament are self-executing. As discussed in Chapter 3, section 231(4) is clear: only self-executing provisions of treaties *approved* by parliament form part of South African law absent legislative incorporation (which would normally then exclude all treaties of a technical, administrative or executive nature, since they do not require parliamentary approval). In other words, it would only be treaties that are *not* of a technical, administrative or executive nature (and therefore require and receive parliamentary approval) whose 'self-executing' provisions would become part of South African law in terms of section 231(4).

171 Chapter 3, Part 5.2. See also H Woolaver, 'Engagement of South African Domestic Courts with International Law' in A Nollkaemper, Y Shany, A Tzanakopoulos and E Methymaki (eds), *The Engagement of Domestic Courts with International Law: Comparative Perspectives* (2024) 54–55 ('the absence of clear guidance from the Constitutional Court on the meaning of self-executing treaties in the South African Constitution creates the potential for the emergence of a new method of avoidance. … [C]ourts may in the future rely on the absence of guidance from the Constitutional Court as to what constitutes a self-executing treaty to justify their refusal to apply international law stemming from untransformed treaties, when these treaties should be enforceable by virtue of the constitutional mandate in Section 231 of the Constitution.').

172 See references in footnotes 167 and 168.

173 For support for this view see Killander (note 167) 391 and de Wet (note 167) 578. See also Coutsoudis (note 16) 90.

Given the focus on application and determination of treaties and customary international law, another issue not addressed is how the South African courts ought to enforce or treat an international court decision binding on South Africa. This is not an issue which the South African courts have yet had to address directly under the Constitution (the closest they have come is to consider the enforcement of a SADC Tribunal decision in respect of Zimbabwe in *Fick*).[174] It, therefore, is not an issue that has arisen in the cases considered during the periods under review in chapters 2, 3, and 4, or subsequently. What has been considered is the use of international court decisions as subsidiary means for determining customary international law,[175] or as supplementary means for purposes of interpreting treaties.[176] I have, for instance, emphasised that the SCA has, in one case, taken the view that the ICJ decisions are authoritative pronouncements of customary international law.[177] However, the question of how South African courts should treat a decision of an international court in respect of and binding on South Africa has received some academic consideration.[178]

For example, Erika de Wet has emphasised that, at least until any legislative developments, the use of the common law to enforce international court decisions, as was done in *Fick*, would in principle be welcome.[179] Although she has cautioned that if international law decisions are treated like foreign (domestic) decisions (as was done in *Fick*), the conflict of laws principles applicable to the enforcement of foreign decisions (including the discretion not to enforce a decision against public policy) may create scope

174 In Chapter 3, Part 2 I draw attention to the fact that in several cases the courts have relied on international law to develop the common law. This approach by the courts is based on section 39(2) of the Constitution (the duty on courts when developing the common law to 'promote the spirit, purport and objects of the Bill of Rights') read with section 39(1)(b) (the duty to consider international law when interpreting the Bill of Rights). I mention that the clearest example of this is *Government of the Republic of Zimbabwe v Fick and Others* [2013] ZACC 22, 2013 (5) SA 325 (CC) (*'Fick'*). In that case the Court developed the common law on the execution of foreign judgments, to include the decisions of the SADC Tribunal given the obligations in the SADC Treaty (incorporating the Tribunal Protocol). For a detailed consideration of the case see E de Wet, 'The case of Government of the Republic of Zimbabwe v Louis Karel Fick: A first step towards developing a doctrine on the status of international judgments within the domestic legal order' (2014) 17(1) *Potchefstroom Electronic Law Journal* 553; and 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. For a brief discussion of the case, see Coutsoudis (note 16) 106–107.

175 Chapter 2, Part 4 and cases at footnote 82.

176 Chapter 4, Part 3.5.

177 Chapter 2, Part 5.2, with reference to *Minister of Justice v SALC* (note 6) para 67.

178 De Wet, 'The case of Government of the Republic of Zimbabwe v Louis Karel Fick:' (note 174); Woolaver (note 174) (Woolaver offers a critique of *Fick*, and a general discussion on enforcement of decisions of international courts and tribunals).

179 De Wet (note 174) 562 (De Wet argues that the use of the common law in this way ought to be welcomed 'as it underscores the Constitution's openness towards public international law'), read with 565

for non-enforcement of certain decisions.[180] De Wet suggests that it remains to be seen whether South African courts will continue to treat international decisions, as they did SADC Tribunal decisions, as foreign judgments, or whether 'they will find other creative ways for interpreting the common law in order to give domestic effect to decisions of international courts'.[181] Similarly, Hannah Woolaver has argued that rather than enforce international court decisions (such as the SADC Tribunal decisions) as 'foreign judgments', 'South African courts should and could develop a common-law doctrine enabling direct enforcement of decisions of international courts to which South Africa is bound, or which South Africa is bound to enforce, in international law.'[182]

The courts have not yet had occasion to consider or take up these proposals in relation to decisions in respect of and binding on South Africa. Another way that the courts may approach how an international court decision binding on South Africa ought to be given effect to is to consider the issues through the lens of the constitutional hooks one observes in the *Law Society* decision. Depending on the treaty and the relevant provisions governing the binding nature of the international decision in question, the courts may approach the matter from the perspective that South Africa had a treaty obligation to comply with the decision. Therefore, depending on the circumstances, by virtue of the constitutional hooks in *Law Society*, for the executive to fail to give effect to and act in accordance with an international court decision binding on South Africa would be domestically unconstitutional. By way of example, take a hypothetical decision by the ICJ against South Africa. South Africa is a party to the UN Charter. It has a treaty obligation under the UN Charter, and the ICJ Statute that forms part of the Charter, to comply with ICJ decisions in matters in which it is a

180 As de Wet (note 174) notes, in *Fick* the Constitutional Court found that public policy did not preclude enforcement of the SADC Tribunal decision in the *Campbell* case (*Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe* Case (2/2007) [2008] SADCT 2) (see *Fick* (note 174) para 35). However, as de Wet draws attention to, in Zimbabwe, in a matter where the applicants also sought enforcement of the SADC Tribunal decision in *Campbell*, the Zimbabwean High Court refused to enforce the Tribunal's decision based on public policy (see *Gramara (Pvt) Ltd v Government of the Republic of Zimbabwe* HH169-09 (26 January 2010)). See also E de Wet, 'The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa' (2013) 28 *ICSID Review* 45, for a discussion of the litigation prior to the Constitutional Court judgment in *Fick*. It should be noted, for completeness, that in Zimbabwe, the applicants had only sought enforcement of the main merits decision of the Tribunal in *Campbell* (of 28 November 2008). Whereas in South Africa, the applicants sought recognition and enforcement of the merits decision and the subsequent costs decision (of 5 June 2009, *Campbell and Another v Republic of Zimbabwe* (SADC (T) 03/2009) [2009] SADCT 1) (see *Government of the Republic of Zimbabwe v Fick and Others* [2012] ZASCA 122 paras 12, 14 and 26). The Constitutional Court, in refusing the appeal, focused primarily on enforcement of the costs decision (see e.g. paras 16-17, 35, and 62–64).

181 De Wet (note 174) 565.

182 Woolaver (note 174) 243–44 (At 235, Woolaver argues that this 'would be justified on the basis of the constitutional provisions noted by the Court [in *Fick*]').

party.[183] There is a customary international law obligation to comply with treaty obligations in good faith. That customary international law obligation forms part of South African law by virtue of section 232 of the Constitution. On this reasoning, in line with *Law Society's* customary obligation and rule of law hooks, were the executive to act inconsistently with this obligation and fail to comply with a binding ICJ decision against South Africa in a matter in which it is a party, the executive's actions would be domestically unconstitutional and subject to review by South African courts (which could order the executive to take steps to comply with South Africa's obligations).

This highlights the importance of the point made in Chapter 3 (and emphasised in Part 6 above): the courts need to grapple with whether and how the constitutional hooks in *Law Society* should be applied and developed. Where the courts ought to land in that grappling may well raise doctrinal and theoretical issues of international law and constitutional law. This would include considering the following questions: which approach would be faithful to the overall scheme of the Constitution and its embrace of international law; what are the democratic and separation of powers issues at stake with the different approaches;[184] and how ought those issues to be considered in light of the founding values and transformative com-

183 Article 59 of ICJ Statute, read with Article 94 of the UN Charter. See general C Tams, 'Article 94 UN Charter' and C Brown, 'Article 59' in A Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (3rd ed, 2019). As Brown explains at 1562, 'The text of Article 59 of the ICJ Statute contains a negative statement: "Decisions have no binding force"; but it adds two exceptions which are essential for decisions of a court or tribunal, namely that they are binding (i) for the parties and (ii) in respect of the particular case. These "exceptions" set out the intrinsic limits of decisions of the ICJ. Article 59 must also be seen and interpreted in connection with the first sentence of Article 60 of the Statute, which provides that "[t]he judgment is final and without appeal', and Article 94 of the UN Charter, which states in part that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party".'

184 For a general discussion of the features of South Africa's democracy under the Constitution; its representative and participatory nature; its conception of the separation of powers; and the duty of the courts to ensure that other branches of government comply with their constitutional obligations, see *Doctors for Life International v Speaker of the National Assembly & Others* [2006] ZACC 11, 2006 (6) SA 416 (CC) paras 111–117. See also generally T Roux, 'Democracy' in S Woolman & M Bishop (eds), *Constitutional Law of South Africa* (2nd ed, OS, 2006) Chapter 10. For instance, while accepting that all exercises of public power are subject to judicial review to ensure consistency with the Constitution, Tladi has argued that in certain cases the courts have failed to show the executive sufficient deference in relation to its policy decisions in respect of the conducting of South Africa's international relations (see D Tladi, 'A Constitution Made for Mandela, A Constitutional Jurisprudence Developed for Zuma: The Erosion of Discretion of the Executive in Foreign Relations' in HP Aust and T Kleinlein (eds), *Encounters between Foreign Relations Law and International Law: Bridges and Boundaries* (2021)). Of course, the nature and extent of the executive's policy discretion when conducting international relations is a function of the constitutional constraints on the executive, including by virtue of the constitutional and international law obligations on the state. This makes the proper determination of that law all the more important, as emphasised throughout this study.

mitments of the Constitution?[185] In some ways, one already sees Bilchitz AJ potentially pointing to a democratic legitimacy defence of the reliance on unincorporated treaties in *Charnell Commando*. In emphasising the importance of ensuring that constitutional provisions are interpreted consistently with the ICESCR binding on South Africa, he underscores that '[t]he act of ratification renders the treaty legally binding on the Republic and indicates clear parliamentary approval of the treaty by the branch of state *elected by the people*. It thus places a democratic check on the Executive's power prior to rendering a treaty binding on the Republic.'[186] In Chapter 3, I also draw attention to the separation of powers considerations underpinning the separation of powers hook relied on in *Law Society*.[187] For the executive to fail to act in accordance with treaties that Parliament has approved (in respect of which it bears an obligation to conduct public participation processes[188]) would allow the executive to undermine 'the branch of state elected by the people'[189] and the separation of powers inherent in section 231.[190]

In relation to the approach to the determination of customary international law, as indicated previously, in Chapter 2, I raise, but do not seek to answer finally, a range of questions as to how customary international law ought to be determined.[191] A selection of these questions includes: should parties place evidence before the court, where they are able, in relation to the constituent elements of customary international law (state practice and opinio juris)? Alternatively, will the courts mostly be satisfied with subsidiary means for determining customary international law, given, among other things, the practical difficulties of a detailed traversing of primary evidence? If the former, in what instances would primary evidence be required or desirable? Will the courts allow a party to adduce expert evidence in respect of customary international law, even if such expert evidence is not viewed as dispositive of the content of customary international law? While I have not sought to answer these and other questions definitively, I have, however, provided a framework within which they are relevant, understandable, and might be answered.[192]

There are likewise significant theoretical issues and debates about how one ought to determine international law,[193] how international law and

185 This would include, for instance, consideration of the culture of justification and its expression in various provisions in the Constitution as discussed in Chapter 1.

186 *Charnell Commando* (note 78) para 140.

187 Chapter 3, see text at footnotes 85–93.

188 See Coutsoudis & du Plessis (note 16) 175, where I, together with Max du Plessis, explain that prior to approving a treaty, Parliament would generally be under a constitutional obligation to ensure public participation (with reference to *Earthlife Africa Johannesburg and Another v Minister of Energy and Others* 2017 (5) SA 227 (WCC) para 144).

189 *Charnell Commando* (note 78) para 140.

190 Chapter 3, see text at footnotes 85 to 93.

191 See Chapter 2, Part 5.4.

192 As noted in Part 8.1, none of these questions have yet been addressed by the courts.

193 These theoretical and doctrinal debates in relation to the identification of customary international law and interpretation of treaties have been referred to in Chapters 2 and 4.

domestic law ought to interact,[194] and how best to read the Constitution and its transformative agenda,[195] or even whether the constitutional project as a whole is a worthy project or one that is particularly useful in society.[196] The answer to these questions is beyond the scope of this study. They are questions which no doubt the courts and scholars should and will continue to grapple with.

However, I would note that those debates and the answers (if any can ever be given in a way that would satisfy everyone) must be mindful of certain features and principles of international law and domestic constitutional law that should frame future consideration. Many of those have been extrapolated and discussed in this study. The need for certainty and rigour can hardly be doubted. Neither can the importance of adopting an approach that accords with the place the Constitution expressly and purposively gives to international law. There is, therefore, plainly value in taking proper account of international law's own secondary rules for determining its content. Likewise regard should be had for the founding value of the rule of law, and the culture of justification that courts have understood as an animating principle running through the Constitution and its transformative provisions.[197]

At least from the perspective of South African courts (the focus of this study), these principles and features are not really open to good-faith debate. The Constitution expressly provides that judges are bound by the Constitution and the law, which they 'must' apply.[198] They must do so 'impartially'. They must swear an oath or give a solemn affirmation[199] that they will 'uphold and protect the Constitution and the human rights entrenched in it', and that they 'will administer justice' '*in accordance* with the Constitution and the law.'[200] Therefore, they must be guided by the Constitution, its founding values, and framework, including its embrace of international law. They are not free agents. The Constitution, and the law — be it domestic law or international law — does not mean whatever a judge wishes it to mean.[201] They must determine and apply the law in

194 See the reference to historic and ongoing debates in Chapter 1, Part 5.1.

195 See Chapter 1.

196 Chapter 1, Part 5.2.

197 Chapter 1, Part 5.2.

198 Constitution, section 165

199 Constitution, section 174(8) ('Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.').

200 Constitution, Schedule 2, part 6.

201 *Zuma and Others v S* [1995] ZACC 1,1995 (2) SA 642 (Kentridge AJ) para 17; K Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 149; O Fiss, 'Objectivity and Interpretation' (1982) 34 *Stanford LR* 739, 744–745; J Goldsworthy, 'Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (2006) 141; D Moseneke, 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 *South African Journal on Human Rights* 309, 317.

good faith.[202] While there may be ongoing debates as to the nature, range, and significance of judicial discretion, good faith attempts to determine and apply the law require that the courts act within the framework of law, and its secondary rules, not outside them.[203]

## 9 Embracing the Promise: Realising the Constitution's Integrative Vision for International Law

As South Africa begins its journey into its fourth decade of constitutional democracy, and comes of age, this study has sought to provide a clear pic-

202 For instance article 31(1) of the Vienna Convention, which articulates customary international law, requires that interpretation of treaties be in 'good faith'. See also K Roach, 'Dialogic Judicial Review and its Critics' (2004) 23 *Supreme Court Law Review* 49, 69 ('courts have a special commitment to make sense of legal texts that were democratically enacted as foundational documents. It is important that judges have to make some effort to engage in a good faith interpretation of the constitutional text, even though the fact of reasonable disagreement is evident to all.')

203 *President of the Republic of South Africa v South African Rugby Football Union* (1999) 4 SA 147 (CC) para 70 ('It has never been seriously suggested that judges do not have political preferences or views on law and society. Indeed, a judge who is so remote from the world that she or he has no such views would hardly be qualified to sit as a judge. What is required of judges is that they should decide cases that come before them without fear or favour according to the facts and the law, and not according to their subjective personal views. This is what the Constitution requires.'); Bingham (note 85) 51 ('The job of judges is to apply the law, not to indulge their personal preferences. There are areas in which they are required to exercise a discretion, but such discretions are much more closely constrained than is always acknowledged') and 54 ('The rule of law does not require that official or judicial decisionmakers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered'); N Varsava, 'Professional Irresponsibility and Judicial Opinions' (2021) 59 *Houston LR* 103, 116 ('in their judicial role, judges have a duty to develop legal doctrine in a way that coheres with the existing body of law and the principles behind it'); Bangalore Principles (note 47), Principle 1.1 (judges are required to determine cases 'on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason'); Code of Judicial Conduct (note 47) article 9 (judges are obligated to 'resolve disputes by making findings of fact and applying the appropriate law in a fair hearing'); and Crawford *Chance, Order, Change* (note 89) para 210. Even those who argue that legal constraints on judges are 'more plastic than commonly acknowledged', still accept the fact of legal constraints on judges, see Klare (note 201) 149–150, 159–160. Cf T Roux, 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?' (2009) 20 *Stellenbosch Law Review* 258 (Roux offers a critique of Klare's article and the theoretical approach to adjudication that underpins it, which is drawn from descriptive accounts of US's constitutional system, that, in significant ways, is materially different from South Africa's). See also E Cameron, 'South Africa under the Rule of Law: Peril and Promise' (2019) 68 *Journal of Legal Education* 507, 518–519 ('If the law is to function there must be judges who pronounce it, and who pronounce it boldly and honestly.') and generally Steven Burton, *Judging in Good Faith* (1992) (Burton develops and argues for a theory of adjudication flowing from the duty on judges to uphold the law in good faith).

ture of how far courts have come in ensuring the Constitution's embrace of international law is realised (i.e. taking seriously the international-law-integrative obligation of the Constitution[204]), in order to give effect to its full transformative and rule-of-law potential. Much of this, with some notable exceptions, the courts have begun to do. This has started to mark South Africa out as particularly international law friendly, in practice, not just in terms of its Constitution. And this friendliness in practice, as the cases discussed demonstrate, has significant consequences for holding the executive to account,[205] for the protection of democratic governance, human rights, the rule of law and international law.[206] But lest South Africa become no more than a fair-weather friend of international law, and its perceived openness becomes only a mirage, or a friendship of convenience (where international law is only used when expedient, or to support an already determined position), as it enters its fourth decade this study sounds a call for methodological rigour and consistency in the application and determination of international law by South African courts, with the jurisprudential sophistication, focus and respect it deserves and the Constitution requires.

204 *Glenister II* (note 2) para 202 ('There is… no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law').

205 As noted above, the application of international law has important rule of law functions, and ensures compliance with international law. Iwasawa (note 97) at 5, argues that, 'The primary function of a domestic court is to apply international law to the acts of its government and, where such acts are inconsistent with international law, to find them unlawful.'

206 See for instance *Law Society* (note 1), *National Commissioner* (note 5), *Glenister II* (note 2), and *Minister of Justice v SALC* (note 6); and more recently *DA v President (Putin case)* (note 40). *National Commissioner* (note 5) offers an example of how a South African court's determination of customary international law may have implications more generally for the determination and development of that law. When determining the ambit of the obligation to investigate, the Court explicitly found, at para 61, that 'investigating international crimes committed abroad is permissible only if the country with jurisdiction is unwilling or unable to prosecute and only if the investigation is confined to the territory of the investigating state.' Cedric Ryngaert interprets the Court's placing of this limitation on the duty to investigate (which Ryngaert refers to as 'horizontal complementarity') as being derived by the Court from customary international law (see CMJ Ryngaert, 'Horizontal Complementarity' (last updated February 2018) in H Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* at para 30). The basis for the Court's insistence on a complementarity limitation on the duty to investigate (which the Court does not properly explain and only vaguely suggests is drawn from South Africa's 'applicable legislative scheme, understood in the light of international customary law and other international obligations' (para 61)) is unclear. However, leaving this aside, it is interesting to consider that Ryngaert goes on to suggest that the South African court's approach could serve as the basis for the development of a customary international law rule (if it were to be embraced by other domestic legislatures and courts), even if currently it would 'be a stretch to posit the existence of a requirement of horizontal complementarity under customary international law. At most, horizontal complementarity can be considered as an emerging norm of customary international law' (para 30). This demonstrates how a South African court's approach to an underdeveloped or nascent area of customary international law may plant the seed for the emergence of a new norm of customary international law; and why the manner in which its courts approach international law matters.

This can only be to the great benefit of South Africa (ensuring respect for the rule of law, accountability, fulfilment of international law obligations, and allowing international law to play the transformative role envisaged by the Constitution), as well as benefiting the international community and international law more generally. This would ensure that, as the Constitution enjoins, South Africa can take its rightful place among the family of nations; no longer the international pariah, but one of the international system's proudest and truest subjects. So that, in the words of the Constitutional Court, international law can play the 'critical role' 'in the development and enrichment of our constitutional jurisprudence and by extension the unarticulated pursuit of good governance' that South Africa needs it to 'play'.[207] It is thus hoped that this study will make a small contribution to ensuring that international law will be properly applied and determined so that it can guide and shape South Africa's future both domestically and on the international stage, as it did in its transition to democracy.[208] This is particularly important as South Africa faces the unfinished business of building a just, equal and united society that embodies and achieves its human rights and rule of law aspirations at home and champions them internationally.[209]

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207 *Law Society* (note 1) para 4.

208 J Dugard, 'The Role of International Law in the Struggle for Liberation in South Africa' (1991) 18 *Social Justice* 83, 91 ('International law will continue to guide and shape South African society. Non-discrimination, respect for human rights, and the right to self-determination have been consistently invoked against apartheid. They are now part of the national consciousness and form the basic principles for the new political dispensation').

209 In *National Commissioner* (note 5) para 1, the Court begins by recalling President Mandela's heralding, in his inauguration in 1994, of a new human-rights-centric approach to international relations, which is echoed in the preamble to the Constitution: 'South Africa's future foreign relations will be based on our belief that human rights should be the core concern of international relations, and we are ready to play a role in fostering peace and prosperity in the world we share with the community of nations.' And in *Law Society* (note 1) para 91, the Court pointed out that, '[t]he correct approach to sound diplomatic relations and international cooperation here is, from a correct South African perspective, fundamentally about the protection and promotion of the essence of our Bill of Rights and of the Treaty, namely, access to justice, human rights, democracy, the rule of law and the independence and effectiveness of institutions that strengthen good governance.' A recent example of South Africa seeking to outwork this is its institution of proceedings in ICJ against Israel in respect of Israel's siege of Gaza (which the President of South Africa argued in his 2025 State of the Nation Address was 'in accordance with [South Africa's] obligations under the Genocide Convention', and he emphasised that South Africa was fully committed to its obligation under the UN Charter 'including the principle that all members shall settle their international disputes by peaceful means'. C Ramaphosa, 'State of the Nation Address' (6 February 2025) https://www.gov.za/speeches/2025StateOfTheNation). Writing one day later, a (Non-South African) scholar used South Africa's institution of proceedings in the ICJ as a commendable modelling of compliance with international law, necessary to defend against an assault on the international rule of law, ME O'Connell, 'Speaking Truth to Trump on the International Rule of Law' *EJIL:Talk!* (7 February 2025), https://www.ejiltalk.org/speaking-truth-to-trump-on-the-international-rule-of-law/ ('a leading state is one that honors international law in its foreign policy. South Africa has led a dramatic turn to the International Court of Justice in its effort to enforce the Genocide Convention.').

# Appendix

## Key Sections of the South African Constitution

**Section 1(c)**
The Republic of South Africa is one, sovereign, democratic state founded on the following values:

…

(c) Supremacy of the constitution and the rule of law.

**Section 2**
This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

**Section 7(2)**
The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

**Section 39(1)(b)**
When interpreting the Bill of Rights, a court, tribunal or forum-

…..

(b) must consider international law; and

….

**Section 198(c)**
The following principles govern national security in the Republic:

…

(c) National security must be pursued in compliance with the law, including international law.

**Section 199(5)**
The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.

**Section 231**
(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

**Section 232**
Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

**Section 233**
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.

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# Summary

South Africa's (post-apartheid) Constitution, in multifaceted and some unique (and underutilised) ways, embraces international law. Yet, as demonstrated by the study, despite the Constitution's transformative embrace of international law, the approach of South African courts to international law has not always been consistent or rigorous, nor has it always given full effect to the Constitution's embrace of international law. The study assesses the extent of the issue by describing, theorising, and systematising the approach to international law within South Africa's domestic constitutional framework. In doing so, it analyses and critiques the approach taken by the courts, and offers proposals for charting the way ahead in a manner consistent with and faithful to international law and the Constitution (including its founding value of the rule of law). This is done to ensure that South Africa's courts can better realise the international-law-friendly promise of its Constitution. Thus, the main research question addressed in this study is as follows:

*Have South African courts realised the Constitution's embrace of international law?*

The study addresses this question in three substantive chapters (that have been published as articles) by addressing the following sub-questions:

a) *How have South African courts identified and applied customary international law?*
b) *How have South African courts approached the application of unincorporated treaties?*
c) *How have South African courts interpreted treaties that are being applied?*

These sub-questions consider the determination and application of customary international law and treaty law because taking the Constitution's integrative embrace seriously has two central features: (a) applying international law when it finds application and (b) properly determining that law when applying it.

The sub-questions focus specifically on the engagement with customary international law and treaty law as the two primary sources of international law. In addressing these questions, the chapters also consider whether and how subsidiary sources (such as judicial decisions and scholarly works) are used to determine customary international law and treaty law.

In Chapter 2, I provide a detailed description and analysis of South African courts' engagement with customary international law (which, in

terms of the Constitution, 'is law' in South Africa), particularly over the period of 2011-2021. This analysis reveals that important issues of customary international law do, and no doubt will continue to, find themselves before South African courts for determination and application. Through a systematic analysis of cases referring to customary international law during this period, I identify the principal cases in which customary international law was applied and had a significant impact on the decision. I then identify and discuss the key features that emerge from analysing those main cases. Those features demonstrate that the South African courts' engagement with customary international law would benefit from a more reflective, rigorous, and considered approach. Building on the analysis and description of South African courts' identification and application of customary international law, I offer suggestions for how the road ahead ought to be navigated in order to ensure an approach that is faithful to international law's own secondary rules for identification of customary international law, while accommodating South Africa's procedural law and practical realities.

In Chapter 3, I give an account of the evolving nature of South African courts' application of unincorporated treaties within the framework of the Constitution. I provide a critical and descriptive account of how South African courts have approached the application of unincorporated treaties. I begin by outlining the various ways treaties find application in South African law before providing a critical evaluation of the courts' approach to the application of unincorporated treaties. The analysis reveals how the Constitutional Court's application of the Constitution's international law provisions in particular cases has led to an evolution in how the courts apply unincorporated treaties over time. The analysis demonstrates how the Constitutional Court's jurisprudence has, in successive cases, evolved, if not always consistently, to recognise that unincorporated treaties do, in many circumstances, create domestically enforceable obligations for the government, given the integrative international law injunctions of the Constitution. Having considered the courts' evolving approach to the application of unincorporated treaties, and critiquing certain retrogressive decisions, I argue that the courts need to adopt an approach to the application of unincorporated treaties that is guided by principles anchored in the Constitution. I argue that the approach should be holistic (having due regard to the whole Constitution), harmonising (ensuring that, where possible, domestic law and international law do not conflict), certain, and rigorous. Flowing from these principles, I make proposals for charting the course ahead to ensure that, in practice, the open and integrative approach to international law in South Africa's Constitution is properly embraced and given full effect.

As made clear in Chapter 3, the application of treaties has become an ever more embedded feature of the South African courts' jurisprudence; yet it was recognised that the application of treaties in certain of the cases considered was coupled with a particular superficial approach to their interpretation. In light of that, in Chapter 4, I undertake a systematic descriptive

assessment of the South African courts' approach to the interpretation of treaties applied in cases over the period 2018-2023. I begin by considering how treaties ought to be interpreted, with particular regard to customary international law's rules for treaty interpretation. Through that lens, I then delineate the pertinent features of the courts' approach to treaty interpretation by analysing all the cases decided between 2018 and 2023 in which treaties are considered and applied in some manner. This reveals that the courts' approach to treaty interpretation has not generally been methodologically rigorous from an international law perspective. Courts, with some notable exceptions, particularly in the most recent cases, tend to adopt a superficial approach that ignores customary international law's interpretative rules (particularly as codified in the Vienna Convention on the Law of Treaties) and the materials they make applicable, notwithstanding the constitutional obligation to use these rules. Given these trends, I make recommendations to ensure that as South Africa starts its fourth decade of constitutionally enshrined integration of international law, treaty law's interpretive neglect does not continue.

Chapter 5 provides the conclusion to this study. I offer a synthesis of the earlier chapters' cross-cutting issues and proposals. I draw attention to a series of cases considered in the study, that make clear that notwithstanding the identified shortcomings in the South African courts' approach to international law, at their best, the courts have begun to facilitate an embrace of international law that has ensured that the government is held to South Africa's international law obligations, giving effect to the transformative promise and international-law-integrative and rule-of-law commitments of the Constitution. I emphasise that while South African courts have done much to realise the Constitution's embrace of international law, the study observes that, while there is frequent reference to international law (in particular treaties and at times customary international law), this is generally coupled with an unsophisticated approach to the determination of that law (be it the interpretation of treaties or the identification of customary international law). I argue, in line with earlier chapters, that the Constitution requires better of South African courts. They can and should be sophisticated jurists when handling international law, who carefully, consistently, and having proper regard to applicable materials, determine and apply international law relevant to the matters before them. I draw attention to how each substantive chapter provides suggestions for ensuring that this occurs in a manner that enables courts to be more thoughtful and rigorous in determining and applying international law. This is not to suggest some impossible standard of perfection or analytical purity. Rather, it is to recommend an approach to international law that is constitutionally required and legally and practically possible. That can only benefit South Africa's jurisprudence, the parties that appear before its courts, and South Africa's good faith compliance with its international law obligations.

The study emphasises that the neglect in respect of the determination of customary international law and treaty law, revealed in the study, is particu-

larly noteworthy at this juncture. We are three decades into South Africa's post-apartheid epoch. A new generation of South African lawyers and judges has spent much of their professional lives practising under its new (international-law-integrative and rule-of-law-embracing) Constitution. The courts have had time to explicate, settle on, and at least in practice use, some methodology for the determination of international law. Yet when this study considered how South African courts determine international law, what was still generally observed was a widespread and material ambivalence to any clear, certain or proper methodology in the determination of international law. This is evident both in respect of customary international law (where the primary determination issue is how customary international law is to be identified, as discussed in Chapter 2) and treaty law (where the primary determination issue is how the written treaty text is to be interpreted, as discussed in Chapter 4).

As South Africa begins its journey into its fourth decade of constitutional democracy, this study has sought to provide a clear picture of how far courts have come in ensuring the Constitution's embrace of international law is realised (i.e. taking seriously the international-law-integrative obligation of the Constitution), to give effect to its full transformative and rule-of-law potential. Much of this, with some notable exceptions, the courts have begun to do. Notwithstanding the identified shortcomings in the South African courts' approach to international law, at their best, the courts have begun to facilitate an embrace of international law that has ensured that the government is better held to South Africa's international law obligations, giving effect to the transformative promise and integrative and rule-of-law commitments of the Constitution (allowing international law to play the critical role envisaged by the Constitution). This has started to mark South Africa out as particularly friendly to international law, in practice, not just in terms of its Constitution. And this friendliness in practice, as the cases discussed demonstrate, has significant consequences for holding the executive to account, and for the protection of democratic governance, human rights, and the rule of law. But lest South Africa become no more than a fair-weather friend of international law, and its perceived openness becomes only a mirage, or a friendship of convenience (where international law is only used when expedient, or to support an already determined position), as it enters its fourth decade this study sounds a call for methodological rigour and consistency in the application and determination of international law by South African courts, with the jurisprudential sophistication, focus and respect it deserves and the Constitution requires. This can only be to the great benefit of South Africa (ensuring respect for the rule of law, accountability, fulfilment of international law obligations, and allowing international law to play the transformative role envisaged by the Constitution), as well as benefiting the international community and international law more generally.

# Samenvatting

*De interpretatie, toepassing en incorporatie van internationaal recht in het Zuid-Afrikaanse nationale recht door Zuid-Afrikaanse rechtbanken, binnen het kader van de Zuid-Afrikaanse Grondwet*

De Zuid-Afrikaanse (post-apartheid) Grondwet omarmt het internationaal recht op veelzijdige en unieke (en onderbenutte) manieren. Zoals echter uit de studie blijkt, is de benadering van Zuid-Afrikaanse rechtbanken ten aanzien van het internationaal recht, ondanks de transformerende omarming van het internationaal recht door de Grondwet, niet altijd consistent of rigoureus geweest, noch heeft deze altijd volledig uitvoering gegeven aan de omarming van het internationaal recht door de Grondwet. De studie beoordeelt de omvang van het probleem door de benadering van het internationaal recht binnen het nationale constitutionele kader van Zuid-Afrika te beschrijven, te theoretiseren en te systematiseren. Daarbij analyseert en bekritiseert het de benadering van de rechtbanken en doet het voorstellen om de weg vooruit uit te stippelen op een manier die consistent en trouw is aan het internationaal recht en de Grondwet (inclusief de grondwaarde van de rechtsstaat). Dit gebeurt om te waarborgen dat de Zuid-Afrikaanse rechterlijke macht de internationaalrecht-vriendelijke belofte van de Grondwet beter kan verwezenlijken. De belangrijkste onderzoeksvraag in deze studie luidt dan ook als volgt:

*Hebben de Zuid-Afrikaanse rechtbanken de grondwettelijke omarming van het internationaal recht gerealiseerd?*

In de studie wordt deze vraag behandeld in drie inhoudelijke hoofdstukken (die als artikelen zijn gepubliceerd) door de volgende deelvragen te beantwoorden:

a) *Hoe hebben Zuid-Afrikaanse rechtbanken het gewoonterecht vastgesteld en toegepast?*
b) *Hoe zijn Zuid-Afrikaanse rechtbanken omgegaan met de toepassing van niet-geïncorporeerde verdragen?*
c) *Hoe hebben Zuid-Afrikaanse rechtbanken verdragen geïnterpreteerd die worden toegepast?*

Deze deelvragen gaan over de vaststelling en toepassing van het internationaal gewoonterecht en het verdragsrecht. Het serieus nemen van de integrale omarming van de Grondwet kent namelijk twee centrale kenmerken:

(a) het toepassen van het internationaal recht wanneer het van toepassing is en (b) het op de juiste wijze vaststellen van dat recht bij de toepassing ervan.

De deelvragen richten zich specifiek op de interactie met internationaal gewoonterecht en verdragsrecht als de twee primaire bronnen van internationaal recht. Bij de beantwoording van deze vragen wordt in de hoofdstukken ook gekeken of en hoe subsidiaire bronnen (zoals rechterlijke uitspraken en wetenschappelijke publicaties) worden gebruikt om internationaal gewoonterecht en verdragsrecht te bepalen.

In hoofdstuk 2 geef ik een gedetailleerde beschrijving en analyse van de omgang van Zuid-Afrikaanse rechtbanken met het internationaal gewoonterecht (dat, volgens de Grondwet, 'recht is' in Zuid-Afrika), met name in de periode 2011-2021. Deze analyse laat zien dat belangrijke kwesties van internationaal gewoonterecht zich, en ongetwijfeld ook in de toekomst, voor Zuid-Afrikaanse rechtbanken zullen voordoen ter beoordeling en toepassing. Door middel van een systematische analyse van zaken die betrekking hebben op internationaal gewoonterecht in deze periode, identificeer ik de belangrijkste zaken waarin internationaal gewoonterecht werd toegepast en een significante impact had op de beslissing. Vervolgens identificeer en bespreek ik de belangrijkste kenmerken die uit de analyse van die hoofdzaken naar voren komen. Deze kenmerken tonen aan dat de omgang van Zuid-Afrikaanse rechtbanken met internationaal gewoonterecht baat zou hebben bij een meer reflectieve, rigoureuze en weloverwogen aanpak. Voortbouwend op de analyse en beschrijving van de identificatie en toepassing van gewoonterecht door Zuid-Afrikaanse rechtbanken, doe ik suggesties voor de manier waarop de weg vooruit moet worden bewandeld om te zorgen voor een aanpak die trouw is aan de eigen secundaire regels van het internationaal recht voor de identificatie van gewoonterecht en tegelijkertijd rekening houdt met het procesrecht en de praktische realiteit van Zuid-Afrika.

In hoofdstuk 3 beschrijf ik de veranderende aard van de toepassing van niet-geïncorporeerde verdragen door Zuid-Afrikaanse rechtbanken binnen het kader van de Grondwet. Ik geef een kritisch en beschrijvend verslag van hoe Zuid-Afrikaanse rechtbanken de toepassing van niet-geïncorporeerde verdragen hebben benaderd. Ik begin met een schets van de verschillende manieren waarop verdragen van toepassing zijn in het Zuid-Afrikaanse recht, waarna ik een kritische evaluatie geef van de benadering van de rechtbanken ten aanzien van de toepassing van niet-geïncorporeerde verdragen. De analyse laat zien hoe de toepassing door het Constitutionele Hof van de bepalingen van internationaal recht van de Grondwet in specifieke gevallen heeft geleid tot een evolutie in de manier waarop de rechtbanken niet-geïncorporeerde verdragen in de loop der tijd toepassen. De analyse laat zien hoe de jurisprudentie van het Constitutionele Hof zich in opeenvolgende zaken, zij het niet altijd consistent, heeft ontwikkeld tot de erkenning dat niet-geïncorporeerde verdragen in veel gevallen nationaal afdwingbare verplichtingen voor de overheid creëren, gezien de

integratieve internationaalrechtelijke bepalingen van de Grondwet. Na de veranderende benadering van de rechtbanken ten aanzien van de toepassing van niet-geïncorporeerde verdragen te hebben overwogen en kritiek te hebben geleverd op bepaalde regressieve beslissingen, betoog ik dat de rechtbanken een benadering van de toepassing van niet-geïncorporeerde verdragen moeten hanteren die gebaseerd is op beginselen die verankerd zijn in de Grondwet. Ik betoog dat deze benadering holistisch moet zijn (met inachtneming van de gehele Grondwet), harmoniserend (waarbij, waar mogelijk, nationaal recht en internationaal recht niet met elkaar in conflict komen), zeker en rigoureus. Uitgaande van deze beginselen doe ik voorstellen om de toekomstige koers uit te zetten en ervoor te zorgen dat de open en integratieve benadering van het internationaal recht in de Zuid-Afrikaanse Grondwet in de praktijk op de juiste wijze wordt omarmd en ten volle effect sorteert.

Zoals duidelijk gemaakt in hoofdstuk 3, is de toepassing van verdragen een steeds meer ingebed onderdeel geworden van de jurisprudentie van de Zuid-Afrikaanse rechtbanken; toch werd erkend dat de toepassing van verdragen in bepaalde van de behandelde zaken gepaard ging met een bijzonder oppervlakkige benadering van de interpretatie ervan. In het licht daarvan voer ik in hoofdstuk 4 een systematische beschrijvende beoordeling uit van de benadering van de Zuid-Afrikaanse rechtbanken ten aanzien van de interpretatie van verdragen die van toepassing waren in zaken in de periode 2018-2023. Ik begin met te onderzoeken hoe verdragen geïnterpreteerd zouden moeten worden, met bijzondere aandacht voor de regels van het gewoonterecht voor de interpretatie van verdragen. Vanuit die optiek schets ik vervolgens de relevante kenmerken van de benadering van de rechtbanken ten aanzien van de interpretatie van verdragen door alle zaken te analyseren die tussen 2018 en 2023 zijn beslist waarin verdragen op enigerlei wijze zijn overwogen en toegepast. Dit laat zien dat de benadering van de rechtbanken ten aanzien van de interpretatie van verdragen over het algemeen methodologisch niet rigoureus is geweest vanuit een internationaalrechtelijk perspectief. Rechtbanken, met enkele opmerkelijke uitzonderingen, met name in de meest recente zaken, neigen ertoe een oppervlakkige benadering te hanteren die de interpretatieregels van het gewoonterecht (met name zoals vastgelegd in het Verdrag van Wenen inzake het verdragenrecht) en de materialen die zij van toepassing verklaren negeert, ondanks de grondwettelijke verplichting om deze regels te gebruiken. Gezien deze trends doe ik aanbevelingen om ervoor te zorgen dat, nu Zuid-Afrika aan zijn vierde decennium van constitutioneel verankerde integratie van het internationaal recht begint, de verwaarlozing van de interpretatie van het verdragenrecht niet voortduurt.

Hoofdstuk 5 vormt de conclusie van deze studie. Ik bied een synthese van de overkoepelende kwesties en voorstellen uit de eerdere hoofdstukken. Ik vestig de aandacht op een reeks in de studie behandelde casussen, die duidelijk maken dat, ondanks de vastgestelde tekortkomingen in de benadering van het internationaal recht door de Zuid-Afrikaanse

rechtbanken, de rechtbanken, op hun best, een omarming van het internationaal recht zijn gaan faciliteren die ervoor heeft gezorgd dat de regering zich houdt aan de internationaalrechtelijke verplichtingen van Zuid-Afrika, waarmee uitvoering wordt gegeven aan de transformatieve belofte en de internationaalrechtelijke-integratie en rechtsstatelijkheidsverbintenissen van de Grondwet. Ik benadruk dat, hoewel de Zuid-Afrikaanse rechtbanken veel hebben gedaan om de omarming van het internationaal recht door de Grondwet te realiseren, de studie opmerkt dat, hoewel er vaak wordt verwezen naar internationaal recht (met name verdragen en soms internationaal gewoonterecht), dit over het algemeen gepaard gaat met een ongenuanceerde benadering van de vaststelling van dat recht (hetzij de interpretatie van verdragen of de identificatie van internationaal gewoonterecht). Ik betoog, in lijn met eerdere hoofdstukken, dat de Grondwet een betere aanpak van de Zuid-Afrikaanse rechtbanken vereist. Zij kunnen en moeten ervaren juristen zijn in de omgang met internationaal recht, die zorgvuldig, consistent en met de juiste aandacht voor de toepasselijke materialen het internationaal recht bepalen en toepassen dat relevant is voor de zaken die voor hen liggen. Ik vestig de aandacht op de suggesties die in elk hoofdstuk over de inhoud worden gedaan om ervoor te zorgen dat dit gebeurt op een manier die rechtbanken in staat stelt om zorgvuldiger en rigoureuzer te werk te gaan bij het bepalen en toepassen van internationaal recht. Dit is niet bedoeld om een onmogelijke standaard van perfectie of analytische zuiverheid te suggereren. Het is veeleer bedoeld om een benadering van internationaal recht aan te bevelen die constitutioneel vereist is en juridisch en praktisch haalbaar is. Dat kan de Zuid-Afrikaanse jurisprudentie, de partijen die voor de rechtbanken verschijnen en de goede trouw van Zuid-Afrika bij de naleving van zijn verplichtingen uit het internationaal recht alleen maar ten goede komen.

De studie benadrukt dat de verwaarlozing van de bepaling van internationaal gewoonterecht en verdragsrecht, die in de studie aan het licht komt, op dit moment bijzonder opmerkelijk is. We bevinden ons drie decennia in het post-apartheidstijdperk van Zuid-Afrika. Een nieuwe generatie Zuid-Afrikaanse advocaten en rechters heeft een groot deel van hun professionele leven doorgebracht met het praktiseren onder de nieuwe (internationaalrecht-integrerende en rechtsstatelijke) Grondwet. De rechtbanken hebben de tijd gehad om een methodologie voor de bepaling van internationaal recht uit te leggen, vast te stellen en, in ieder geval in de praktijk, te gebruiken. Toch werd, toen deze studie onderzocht hoe Zuid-Afrikaanse rechtbanken internationaal recht bepalen, nog steeds over het algemeen een wijdverbreide en wezenlijke ambivalentie waargenomen ten aanzien van een duidelijke, zekere of juiste methodologie voor de bepaling van internationaal recht. Dit is evident met betrekking tot zowel het internationaal gewoonterecht (waar de primaire vaststellingsvraag is hoe internationaal gewoonterecht moet worden geïdentificeerd, zoals besproken in hoofdstuk 2) als het verdragsrecht (waar de primaire vaststellingsvraag is hoe de geschreven verdragstekst moet worden geïnterpreteerd, zoals besproken in hoofdstuk 4).

Nu Zuid-Afrika zijn vierde decennium van constitutionele democratie ingaat, heeft deze studie getracht een duidelijk beeld te schetsen van hoe ver de rechtbanken zijn gekomen met het waarborgen dat de Grondwet het internationaal recht omarmt (d.w.z. de internationaalrechtelijke-integratieve verplichting van de Grondwet serieus neemt) en het volledige transformatieve en rechtsstatelijke potentieel ervan ten uitvoer brengt. Veel hiervan, op enkele opmerkelijke uitzonderingen na, zijn de rechtbanken al begonnen te doen. Ondanks de vastgestelde tekortkomingen in de benadering van het internationaal recht door de Zuid-Afrikaanse rechtbanken, zijn de rechtbanken, op hun best, begonnen een omarming van het internationaal recht te faciliteren die ervoor heeft gezorgd dat de regering beter wordt gehouden aan de internationaalrechtelijke verplichtingen van Zuid-Afrika, en dat de transformatieve belofte en integratieve en rechtsstatelijke verplichtingen van de Grondwet worden nageleefd (waardoor het internationaal recht de cruciale rol kan spelen die de Grondwet beoogt). Dit heeft ertoe geleid dat Zuid-Afrika zich in de praktijk, en niet alleen wat betreft de Grondwet, bijzonder gunstig ontwikkelt ten opzichte van het internationaal recht. En deze vriendelijkheid in de praktijk, zoals de besproken gevallen aantonen, heeft aanzienlijke gevolgen voor de verantwoordingsplicht van de uitvoerende macht en voor de bescherming van democratisch bestuur, mensenrechten en de rechtsstaat. Maar om te voorkomen dat Zuid-Afrika slechts een vriend van het internationaal recht wordt, en zijn vermeende openheid slechts een fata morgana of een gemaksvriendschap wordt (waarbij het internationaal recht alleen wordt gebruikt wanneer dat opportuun is, of ter ondersteuning van een reeds bepaald standpunt), doet deze studie, nu het zijn vierde decennium ingaat, een oproep tot methodologische nauwkeurigheid en consistentie in de toepassing en vaststelling van het internationaal recht door Zuid-Afrikaanse rechtbanken, met de jurisprudentiële verfijning, focus en het respect die het verdient en de Grondwet vereist. Dit kan alleen maar in het voordeel zijn van Zuid-Afrika (het waarborgen van respect voor de rechtsstaat, verantwoordingsplicht, nakoming van verplichtingen op het gebied van het internationaal recht, en het toestaan dat het internationaal recht de transformerende rol speelt die de Grondwet beoogt), evenals de internationale gemeenschap en het internationaal recht in het algemeen.

# Curriculum Vitae

Andreas Coutsoudis was born on 21 August 1980 in Durban, South Africa. He completed his BCom and LLB at the University of Natal (now the University of KwaZulu-Natal ('UKZN')). After completing his LLB, he served as a law clerk to Justice TL Skweyiya at the Constitutional Court of South Africa. He was awarded the Rhodes Scholarship to study at Oxford University. At Oxford (Trinity College), he obtained a BCL (in which he took courses in international law, comparative human rights, and constitutional theory) and an MPhil in Law (his thesis considered the immunity of foreign state officials from prosecution for international crimes in domestic courts).

Since December 2007, Andreas has practised as an Advocate of the High Court of South Africa and a member of the Durban Bar. He is currently a member of Ubunye Chambers. His practice has a particular focus on international law and constitutional law.

Andreas is an Honorary Research Fellow at the UKZN School of Law. From October 2020, he has been an external PhD candidate at the Grotius Centre for International Legal Studies, Leiden University. He completed the compulsory Scientific Conduct for PhDs (Law) course at Leiden University in November 2022.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2025 and 2026

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