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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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*'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

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 Coutsooudis & 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

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- 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 Coutsooudis, '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 Coutsooudis '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 law¹⁷ (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-

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- 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 democracies²⁰ 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 North²⁵ (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

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- 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

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 series³⁶ and the main online repository of reported and unreported cases³⁷ 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 Saffii.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 searches³⁸ 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 court³⁹) 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 Court⁴¹ 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 approach⁴³ 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 time-frame 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 series⁵⁰ and the main online repository of reported and unreported South African cases⁵¹ 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 interpretation⁵⁶ and South Africa's constitutional scheme and legal framework.

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 & Coutsoodis (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

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- 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

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

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- 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 engagement⁷⁶ 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.

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 article⁸⁴ 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.'). *Soo-ramoney 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 Africa⁹¹ 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 Arguelles, '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 Arguelles (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

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- 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.

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

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://www.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 Haffeejee* [2023] ZAKZ-PHC 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-

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- 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 co-ordinating 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 Rights¹²⁵ '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.

