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**The interpretation, application and incorporation of international law into South Africa's domestic law by South African courts, within the framework of the South African Constitution**

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# 1 THE CONSTITUTION'S INTEGRATIVE VISION AND ENSURING THAT INTERNATIONAL LAW'S WELL-DESERVED PROMINENCE IS EMBRACED

In 2024, South Africa completed its third decade since the end of apartheid. This study has focused on a specific aspect of the transition to a new constitutional democracy: how South African courts have grappled with, and should continue to grapple with, the fact that, over and against its history (as an international pariah), its Constitution embeds international law in post-apartheid South African domestic law as part of its integrative vision and transformative project. The present study does this by setting out a descriptive account of how, looking back from the vantage point of this seminal juncture, South African courts, in practice, determine and apply international law, within the framework of the Constitution. This is done to assess how far South Africa has come in realising and giving effect to the Constitution's integration of international law. Put differently, recalling the language of the Constitutional Court in *Law Society*, the study sheds light on whether international law's 'well-deserved prominence' is properly given effect to and allowed to play its 'critical role' 'in the development and enrichment of our constitutional jurisprudence' to ensure the 'pursuit of good governance'.<sup>1</sup> This study also makes proposals for how this can better be achieved.

The study's descriptive account reveals how South African courts have, in practice, integrated international law into the domestic sphere, guided by the Constitution's embrace of international law. The courts have done this by applying international law in ways that are, in certain instances, distinctive and unexpectedly innovative, while in others, more conventional. The study illustrates that the full promise of this integration of international law into the domestic sphere has not been automatic or immediate; it has been a slow and progressive evolution through a series of cases, with some unexpected turns along the way. In successive cases, the courts explored the Constitution's jurisprudential garden. They found new paths for integrating international law into the domestic sphere (although the study finds that some of these have yet to be entrenched in the most recent cases, and there have been isolated instances of some retrogressive moves along the

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1 *Law Society of South Africa & Others v President of the Republic of South Africa & Others* [2018] ZACC 51, 2019 (3) SA 30 (CC) ('*Law Society*') para 4.

way).<sup>2</sup> The approaches adopted to the integration of international law by the courts, for instance in *Law Society*, while at times innovative, were nevertheless faithful to the Constitution's text, its fundamental values, and its transformative purpose (when holistically understood, properly explained, theorised, and defended — as done in this study).<sup>3</sup>

The chapters illustrate how South African courts, guided by a predominantly international-law-friendly Constitution, have shown a general willingness to embrace international law.<sup>4</sup> In several cases, the courts have used the Constitution's provisions in ways that give full effect to the integration of international law. They have been willing to engage with and apply international law, including holding the government accountable for failing to comply with South Africa's international obligations. They have done this even in matters involving sensitive and high-level international relations (this is particularly clear in cases such as *National Commissioner*,<sup>5</sup> *Minister of Justice v SALC*,<sup>6</sup> and *Law Society*). Although not generally used, in certain limited instances, the Constitutional Court has also been willing to deal with a paucity of submissions on relevant issues of international law from the parties by inviting experts with international law experience to file submissions as *amici curiae*, by asking the parties to file further submissions, or conducting its own research.<sup>7</sup>

However, a striking feature revealed by the study is that this general openness to the application of international law is often still coupled with a markedly superficial approach to the determination of the international law being applied.<sup>8</sup> This is all the more concerning because the study reveals that important international law issues come before the South African courts for determination, including in cases in which the courts are required to hold the government to account for failing to comply with South Africa's

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2 See the discussion in Chapter 3, Parts 4.2.2–4.2.3, of *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State & Others* [2021] ZACC 28, 2021 (11) BCLR 1263 (CC) ('*Zuma III*'), and the ways that subsequent cases have ignored *Zuma III*'s more retrogressive statements in relation to international law. As discussed, *Zuma III*'s retrogressive approach to international law has continued to be ignored and the open and integrative approach consonant with the Constitution, and enunciated by the Constitutional Court in *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC) ('*Glenister II*') and *Law Society* *ibid*, has found favour in more recent decisions of the Constitutional Court. See also the discussion of more recent cases in Part 8.1.

3 See Chapter 3, Part 3.3.1–3.3.2.

4 As demonstrated in Chapter 2 (in relation to customary international law) and Chapter 3 (in relation to treaties).

5 *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & another* 2015 (1) SA 315 (CC) ('*National Commissioner*').

6 *Minister of Justice and Constitutional Development & others v Southern African Litigation Centre & others* 2016 (3) SA 317 (SCA) ('*Minister of Justice v SALC*').

7 See Chapter 2, Part 5.3, and Chapter 4, Part 4.4.

8 This is true even, for instance, in *Law Society* (note 1). See Chapter 4, Part 3.2, and references at footnote 82.

international law obligations.<sup>9</sup> For this reason, throughout the study, proposals have been made to address the shortcomings identified, to ensure that the Constitution's international-law-integrative promise and purpose are progressively and fully realised.

## 2 REALISING THE CONSTITUTION'S TRANSFORMATIVE EMBRACE OF INTERNATIONAL LAW

Notwithstanding the identified shortcomings in the South African courts' approach to international law, at their best, the courts have begun to facilitate an embrace of international law that has ensured that the government is better held to South Africa's international law obligations. This gives effect to the transformative promise and integrative and rule-of-law commitments of the Constitution (allowing international law to play the critical role in good governance suggested by the Constitutional Court<sup>10</sup>).

If one considers a number of cases and situations in South Africa's third decade of democracy, what one sees is an interesting dialogue between the South African government, its civil society, and its courts, within the framework of the Constitution, concerning South Africa's international law obligations (the Constitution's integrative rule-of-law vision and the culture of justification in action).<sup>11</sup> In these cases, one observes the following general pattern. Civil society and other parties (who enjoy broad standing grounds under the Constitution<sup>12</sup>) approached the courts to argue that the government has failed to comply with South Africa's international law obligations. They are able to do so precisely because of the founding value of the rule of law<sup>13</sup> and the special place international law has in the

9 See e.g. *Minister of Justice v SALC* (note 6); *Law Society* (note 1), *Glenister II* (note 2), and *National Commissioner* (note 5).

10 *Law Society* (note 1) para 4.

11 An initial version of this list of cases appears in A Coutsooudis, 'Tracing the Constitutional Court's Exploration of the Constitution's embrace of international law from *Azapo* to *Glenister II*, to *Law Society* and beyond' (2024) 37(1) *Advocate* 42, 46 <https://gcbsa.co.za/law-journals/2024/April/42-48.pdf>, which is a reproduction of a paper I presented based on Chapter 3.

12 Constitution, s 38 (broad standing including in the 'public interest' is provided for cases involving violations or threats to rights in the Bill of Rights); *Kruger v President of the Republic of South Africa* 2009 (1) SA 417 (CC) paras 21-23 (broad standing is not only limited to cases involving rights in the Bill of Rights). See also *Ferreira v Levin* NO 1996 (1) SA 984 (CC) paras 165 and 229; and *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 33.

13 It is a justiciable requirement of the rule of law (section 1(c) of the Constitution) that all exercises of public power must be lawful. See e.g. *Law Society* (note 1) paras 46 to 48; *Fed-sure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* [1998] ZACC 17, 1999 (1) SA 374 (CC) paras 56-59; *Electoral Commission v Mhlope & Others* [2016] ZACC 15, 2016 (5) SA 1 (CC) para 130; *Khumalo & Another v Member of the Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49 (CC), 2014 (5) SA 579 (CC) para 29; and discussion in Chapter 3, Part 3.3.1.

Constitution. In instances where the courts find that the government has failed to comply with South Africa's international law obligations (and any concomitant domestic obligations), the courts have ordered the government to remedy these violations. And the government has, as it must, accepted and followed the courts' orders requiring compliance with these obligations. A few prominent examples drawn from cases discussed in this study that illustrate this trend are as follows.

In 2014, in *National Commissioner*, in litigation instituted by human-rights NGOs, the Constitutional Court ordered the police to investigate allegations of torture by Zimbabwean officials in Zimbabwe (for possible domestic prosecution in South Africa), given domestic and international law obligations, notwithstanding the diplomatic sensitivities involved in the matter.<sup>14</sup> In doing so, the Constitutional Court accepted that since torture is an international crime under customary international law, section 232 of the Constitution automatically incorporated it into South African law. There was no need for any transformation, domestication, or other action by the courts, the executive, or the legislature. And the fact that torture as an international crime was incorporated into South African law, pursuant to section 232, was separate from and, in addition to, its criminalisation under legislation providing for the prosecution of torture in South Africa.<sup>15</sup> In Chapter 2, I argue that this automatic incorporation, as a consequence of section 232, would, by necessary implication, apply to all international crimes.<sup>16</sup> It is clear from the Court's reasoning that this would apply even where, unlike with torture, there was no legislation covering the prosecution of the international crime.<sup>17</sup> This has now been affirmed in the recent

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14 *National Commissioner* (note 5).

15 *National Commissioner* (note 5) paras 37, 39, 40, and 77.

16 Chapter 2, Part 4. I noted, at footnote 105, that this can be contrasted with the approach taken by the UK House of Lords in *R v Jones (Margaret)* [2007] 1 AC 136 in respect of the crime of aggression. I discuss this contrast in approaches in A 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) 70–72.

17 *National Commissioner* (note 5) paras 37, 39, 40, and 77. See Andreas Coutsooudis & Max du Plessis, 'We are all International Lawyers Now: the Constitution's International-Law Trifecta Comes of Age' (2019) 136 *SALJ* 433, 446–9; Andreas Coutsooudis & Max du Plessis, 'We Are All International Lawyers; Now What? Taking Seriously the Constitutional Injunction to Integrate International Law Obligations into South African Law' (2020) 10 *Constitutional Court Review* 155, 158–159.

High Court decision in *S v Ephraim* (decided in 2025).<sup>18</sup> In that matter, the accused objected to charges brought against them of committing the crimes against humanity of apartheid and murder in 1982. The Implementation Act<sup>19</sup> provides for the prosecution of crimes against humanity (including apartheid as a crime against humanity). But it only applies to international crimes committed after the entry into force of the Rome Statute of the ICC in 2002.<sup>20</sup> The High Court (applying the reasoning in *National Commissioner*) held that international crimes can be prosecuted based on section 232's incorporation of customary international law, in the absence of domestic legislation. The Court explained that '[t]he automatic incorporation of customary international law through s 232 of the Constitution provides a basis for prosecuting any crime recognised under customary international law at the time of its commission, regardless of whether special legislation exists for that crime. The result is that it covers crimes committed before and after the adoption of the ICC [Implementation] Act.'<sup>21</sup>

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- 18 *S v Ephraim and Others* [2025] ZAGPJHC 410, 2025 JDR 1804 (GJ) (the judgment is not yet reported in a law report series, and the SAFLII neutral citation and Juta's online series of unreported judgments, confusingly, use the middle name of Accused 1 (Thlamedi Ephraim Mfalapitsa) rather than his surname; Accused 2 is Christiaan Siebert Rorich). For initial discussions of this case see Gerhard Kemp, 'Criminal Court in South Africa Confirms Charges in Historic First Prosecution of the Crime Against Humanity of Apartheid' *Opinio Juris* (29 April 2025) <https://opiniojuris.org/2025/04/29/criminal-court-in-south-africa-confirms-charges-in-historic-first-prosecution-of-the-crime-against-humanity-of-apartheid/> and Miles Jackson and Hannah Woolaver, 'Apartheid on trial: the COSAS 4 prosecution and the direct application of customary international law in South Africa' *EJIL:Talk!* (1 May 2025) <https://www.ejiltalk.org/apartheid-on-trial-the-cosas-4-prosecution-and-the-direct-application-of-customary-international-law-in-south-africa/>. See also G Kemp & W Nortje, 'Prosecuting the crime against humanity of apartheid: the historic first indictment in South Africa and the application of customary international law' (2023) 21 *Journal of International Criminal Justice* 405, who, in an article written before the judgment, discuss the indictment and prosecution of Mfalapitsa and Rorich, inter alia, on charges of committing the crime against humanity of murder and the crime against humanity of apartheid in relation to the murder of three teenaged boys and the serious injuring of another, who were members of the Congress of South African Students ('COSAS') in 1982. The history and current status of the matter is summarised by the Foundation for Human Rights, 'The COSAS 4', <https://unfinishedtrc.co.za/cosas-4/> (the High Court refused leave to appeal, but Accused 2 (Rorich) was granted leave to appeal by the SCA on 25 September 2025; at the time of writing the SCA had yet to set the appeal down for hearing). See also *Mfalapitsa v Minister of Justice and Correctional Services and Others* [2024] ZAGPJHC 1136, 2025 (1) SACR 482 (GJ) paras 1–12 (the matter relates to a review of the refusal of Mfalapitsa's application for amnesty more than two decades earlier and provides a useful discussion of the factual background to the charges).
- 19 The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ('Implementation Act').
- 20 Implementation Act s 5(2) ('No prosecution may be instituted against a person accused of having committed a crime if the crime in question is alleged to have been committed before the commencement of the Statute.').
- 21 *S v Ephraim and Others* (note 18) para 102.

In 2016, in *Minister of Justice v SALC* (the Al Bashir matter),<sup>22</sup> which was instituted by a human-rights NGO, the government was found to have violated its domestic and international obligations when it failed to arrest, pursuant to an ICC arrest warrant, then President Al-Bashir of Sudan when he attended an African Union Summit hosted in South Africa. However, precisely because of the litigation, not only was President Al-Bashir forced to secretly flee from South Africa (no red carpet departure for him), but he has never returned, because the Supreme Court of Appeal ('SCA') made clear, and the government accepted, that if he did, he would have to be arrested.<sup>23</sup>

The South African government's initial response to the decision was far from an acceptance of the course that the SCA appeared to place the country on. The government applied to the Constitutional Court for leave to appeal the SCA's decision. The parties filed written submissions, and the Constitutional Court admitted four parties as *amici curiae* to make written and oral submissions (including Professors Dugard and Mettraux, who were jointly admitted as *amici*).<sup>24</sup> However, before the Constitutional Court hearing, the government withdrew its application for leave to appeal. It appeared that the government's plan in withdrawing its application, at the time, was to avoid the outcome of the SCA judgment, not by appealing the SCA's interpretation of the Implementation Act, but by withdrawing from the Rome Statute of the ICC, to be followed with a planned repealing of the Implementation Act and replacing it with new legislation that expressly maintained heads of state immunity.<sup>25</sup> However, the government's attempt to withdraw from the ICC was thwarted by a successful judicial challenge.

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22 *Minister of Justice v SALC* (note 6).

23 *Minister of Justice v SALC* (note 6).

24 As referred to in Chapter 2 fn 164.

25 See the discussion of factual background in *Democratic Alliance v Minister of International Relations* [2017] ZAGPPHC 53, 2017 (3) SA 212 (GP) ('*DA v Minister (ICC Withdrawal)*') paras 2–6.

In 2017, in *DA v Minister of International Relations (ICC Withdrawal)*,<sup>26</sup> the High Court held that the government's withdrawal from the ICC was unconstitutional (given a failure first to obtain parliamentary approval for the withdrawal)<sup>27</sup> and ordered the government to rescind its notice of withdrawal.<sup>28</sup> The government did not appeal; it complied with the order, withdrawing its notice of withdrawal.<sup>29</sup> But it introduced new legislation, the International Crimes Bill,<sup>30</sup> in Parliament that would repeal the Implementation Act. The International Crimes Bill initially stalled with the change

26 *DA v Minister (ICC Withdrawal)* *ibid.* For a discussion of the case see e.g. Coutsooudis 'The Place of international law in South African municipal law' (note 16) 79–80, 84; Hannah Woolaver, 'Domestic and International Limitations on Treaty Withdrawal: Lessons from South Africa's Attempted Departure from the International Criminal Court' (2017) 111 *AJIL Unbound* 450. Erika de Wet writing a few years before the judgment argued, in line with the submissions that found favour with the Court, that 'the decision to terminate a treaty vests in the executive, it is arguable that the spirit of section 231(2) would require parliamentary involvement in the same manner as foreseen for ratification. This would imply the consent to termination of both Houses of Parliament in relation to all "non-technical" treaties.' E de Wet, 'The reception of international law in the South African legal order: an introduction' in E de Wet, H Hestermeyer and R Wolfrum (eds), *The Implementation of International Law in Germany and South Africa* (2015) 36. See also N Botha, 'Treaty making in South Africa: A reassessment' (2000) 25 *South African Yearbook of International Law* 69, 85 ('given the pre-eminent role of the legislature under section 231(2) of the Constitution before a treaty can be said to bind the Republic on an international level, it is submitted that it would be required to play an equivalent role in the termination of treaty commitments.... [Therefore] treaties requiring parliamentary approval before they come into force.... would, it is submitted, also require parliamentary approval for their termination.'). Cf H Woolaver 'The rise of judicial review of South Africa's Treaty-making powers' (2025) 142 *SALJ* 822, 844–5. Woolaver argues that a 'preferable approach' to that taken by the Court in *DA v Minister (ICC Withdrawal)* 'would be to require parliamentary approval *only* when withdrawal would directly affect domestic law' (emphasis added). However, it does not appear that limiting parliament's withdrawal role in this way is in keeping with the clear separation of powers choice made by the Constitution, in section 231(2), to vest parliament (not the executive) with the power to determine to bind South Africa to treaties on the *international* plane (not merely with the power to domesticate any treaty obligations by legislation, as separately provided for in section 231(4)).

27 *DA v Minister (ICC Withdrawal)* (note 25) paras 77 and 84 (orders 1 and 2). The government argued, *inter alia*, that parliamentary approval was not required for withdrawal, because art 127 of the Rome Statute included no such requirement (at most the Vienna Convention, in art 67(2) (not explicitly referred to in the judgment), requires that '[i]f the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers'). However, the Court ultimately found that the Rome Statute did not purport to determine how each state may make decisions on whether to deposit a notice of withdrawal, and who was empowered under domestic law to make that decision. Thus, the case ultimately turned on a proper interpretation of section 231 of the Constitution and the necessary domestic steps before South Africa could lodge a notice of withdrawal. See *DA v Minister (ICC Withdrawal)* (note 25) paras 40, 47–51.

28 See *DA v Minister (ICC Withdrawal)* (note 25) para 84 (order 3).

29 UN Treaty Section, 'Rome Statute of the International Criminal Court — South Africa: Withdrawal of notification of withdrawal' (7 March 2017) UN Doc C.N.121.2017.TREATIES-XVIII.10, <https://treaties.un.org/doc/publication/CN/2017/CN.121.2017-Eng.pdf>.

30 The International Crimes Bill B37-2017.

in 2019 from President Zuma's to President Ramaphosa's administration. And in March 2023, the International Crimes Bill was ultimately withdrawn by the Ramaphosa administration.<sup>31</sup> Nevertheless, it is worth noting that the Bill, while it still provided for the prosecution of international crimes, expressly stated in section 3(1) that '[t]his Act does not apply to persons who are immune from the criminal jurisdiction of the courts of the Republic in accordance with customary international law or as provided for in the Diplomatic Immunities and Privileges Act, 2001.' Thus, the International Crimes Bill (and the initial concomitant threat to seek the necessary parliamentary approval for withdrawal from the Rome Statute)<sup>32</sup> can be seen as an initial, direct reaction to, and rejection of, the progressive direction that the SCA interpreted South Africa to have taken by passing the Implementation Act.<sup>33</sup> That initial rejection was remedied ultimately by the Ramaphosa administration's eventual withdrawal of the Bill. As a consequence, South Africa's progressive Implementation Act (as interpreted by the SCA<sup>34</sup>) remains in force and unchanged, and South Africa has remained a member of the ICC and accepts its rights and obligations under the Rome Statute. This became relevant in the 2023 Putin-South Africa arrest warrant saga, as discussed below, and also meant that, in November 2023, South Africa, together with four other states, was able to refer the situation in Palestine to the Prosecutor of the ICC for investigation under the Rome Statute.<sup>35</sup>

In 2017, the government granted immunity to the then First Lady of Zimbabwe (Grace Mugabe) to shield her from arrest and prosecution for allegedly assaulting three young women while in South Africa. In *DA v Minister of International Relations (Grace Mugabe)*, a political party and one of the women who had been assaulted (supported by several civil society organisations which joined as amici curiae) challenged the granting of immunity to Grace Mugabe. In 2018, the High Court set aside the decision to grant immunity, because it was predicated on the government's belief that such immunity was accorded to Grace Mugabe under customary inter-

31 Parliament of the Republic of South Africa, 'Announcements, Tablings and Committee Reports, No 32-2023' (10 March 2023), <https://www.parliament.gov.za/storage/app/media/Docs/atc/3ac52e60-8baa-424a-8fe7-742dc03b9f3b.pdf> ('The International Crimes Bill [B37-2017] (National Assembly – sec 75) has been withdrawn in accordance with Assembly Rule 334.')

32 Republic of South Africa, Ministry of Justice and Correctional Services, 'Opening statement by Adv Tshililo Michael Masutha MP' (General Debate, Sixteenth session of the Assembly of States Parties to the International Criminal Court, New York, 4–14 December 2017), [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/ASP16/ASP-16-ZA.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP16/ASP-16-ZA.pdf).

33 See Chapter 2, text at footnotes 124–127.

34 See discussion of the SCA's interpretation of the Implementation Act (which it argued placed South Africa at the 'vanguard' in the fight against impunity) in Chapter 2, text at footnotes 124–127.

35 Bangladesh, Bolivia, Comoros, Djibouti and South Africa, 'State Party referral of the Situation in the State of Palestine in accordance with article 14 of the Rome Statute' (17 November 2023), <https://www.icc-cpi.int/sites/default/files/2023-11/ICC-Referral-Palestine-Final-17-November-2023.pdf>.

national law (when the Court found it was not).<sup>36</sup> Shortly after that, the South African authorities issued an arrest warrant for Grace Mugabe.<sup>37</sup>

In 2018, in the *Law Society* matter, which the Law Society of South Africa instituted,<sup>38</sup> the Court found that the President had acted unconstitutionally in participating in the SADC Summit's suspension of the SADC Tribunal and by signing the 2014 SADC Tribunal Protocol limiting the Tribunal's jurisdiction, and ordered the President to withdraw his signature. The President complied with that order and duly removed South Africa's signature.<sup>39</sup> South Africa has never again sought to become party to that Protocol.

In a similar vein, a more recent and prominent example is litigation in 2023 concerning the arrest of President Putin of Russia. In urgent litigation instituted by the official parliamentary opposition party, a South African court was faced with the question of whether the South African government was compelled, given its obligations under the Rome Statute and national legislation to give effect to the Rome Statute, to arrest President Putin. The government initially submitted in its affidavits that issues, including the risk of Russian military retaliation, personal immunity, and engagements with the ICC, meant that the government could allow President Putin to attend a BRICS Summit in South Africa without arresting him.<sup>40</sup> Ultimately, as a result of the litigation, President Putin never came to South Africa. However, he had been invited to (and was expected to) attend the BRICS Summit. But as recorded in an agreed court order (which the government agreed to at the beginning of the court hearing, with a tender of costs, thus obviating the need for the court to hear the full matter and issue a judgment<sup>41</sup>), the government finally accepted (no doubt as a consequence of the

36 *Democratic Alliance v Minister of International Relations and Co-operation and Others; Engels and Another v Minister of International Relations and Co-operation and Another* [2018] ZAGPPHC 534, [2018] 4 All SA 131 (GP) ('*DA v Minister (Grace Mugabe)*').

37 Jason Burke, 'South African police issue arrest warrant for Grace Mugabe', *The Guardian* (19 December 2018), <https://www.theguardian.com/world/2018/dec/19/south-african-police-issue-arrest-warrant-for-grace-mugabe-zimbabwe-accused-assault-hotel>.

38 The case was also supported by six intervening co-applicants (Zimbabwean landowners), who had claims against Zimbabwe before the SADC Tribunal at the time it was suspended. See *Law Society* (note 1) para 7; *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZAGPPHC 4, [2018] 2 All SA 806 (GP) para 35.

39 Communiqué of the 39th SADC Summit of Heads of State and Government (Dar es Salaam, 17–18 August 2019) para 20, [https://www.sadc.int/sites/default/files/2021-06/Communique\\_of\\_the\\_39th\\_SADC\\_Summit-English.pdf](https://www.sadc.int/sites/default/files/2021-06/Communique_of_the_39th_SADC_Summit-English.pdf) ('Summit noted the withdrawal of South Africa's signature from the Protocol on the Tribunal in the Southern African Development Community of 2014 in compliance with a Constitutional Court ruling.').

40 *Democratic Alliance v President of the Republic of South Africa & Others* Case No 50604/23 (Unreported order) ('*DA v President (Putin case)*') (a copy of the court papers is on file with the author). See discussion in M du Plessis & A Coutoudis, 'The Putin-South Africa arrest warrant saga: A tale of the shrinking world of an accused war criminal' *EJIL:Talk!* (18 August 2023), <https://www.ejiltalk.org/the-putin-south-africa-arrest-warrant-saga-a-tale-of-the-shrinking-world-of-an-accused-war-criminal/>.

41 As a consequence of the agreed order (copy on file with the author), there was no need for the Court to issue a judgment.

litigation) that it was required to arrest President Putin pursuant to an ICC arrest warrant and therefore took the necessary steps to ensure that the warrant was domestically enforceable in South Africa.<sup>42</sup>

Thus, one observes that in a number of cases significant issues of international law have been considered by the South African courts and, where necessary, appropriate relief has been granted. This has included requiring the South African government to take steps on the international plane — withdrawing a signature from a treaty and retracting a notice of treaty withdrawal — and comply with international law, even when it was not politically or diplomatically desirable (including forcing the government to effectively disinvite President Putin from a BRICS Summit). Such steps may appear particularly invasive of the government's competence to conduct international relations and could strike one as surprising.<sup>43</sup> Nevertheless, they remain hopeful beacons, pointing to a legal system where the rule of law and the embrace of international law are not merely paid lip service,<sup>44</sup>

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42 du Plessis & Coutsooudis 'Putin-South Africa arrest warrant saga' (note 40).

43 For instance, in the United States, issues of this type may be precluded from being determined by the courts by the political questions doctrine. See, for example, *Haig v Agee*, (1981) 453 US 280, 292, in which the US Supreme Court held, at 292, that 'the conduct of foreign relations ... [is] exclusively entrusted to the political branches ... [and] immune from judicial inquiry or interference.' For a recent (high-profile) application of this doctrine to preclude a claim to force the Biden administration to desist from offering assistance to Israel, see *Defense for Children International–Palestine v Biden* 107 F 4th 926 (9th Cir 2024) (and the District Court decision, *Defense for Children International–Palestine v Biden* 714 F Supp 3d 1160 (ND Cal 2024)). Similarly, in the UK, certain types of international relations decision may be found to be non-justiciable. See e.g. *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, 398 ('many of the most important prerogative powers concerned with control of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the Law Courts.') See more recently *Shergill v Khaira* [2014] UKSC 33, [2015] AC 359, *Rahmatullah v Ministry of Defence* [2017] UKSC 1, [2017] AC 649, and *R (on the application of Al-Haq) v Secretary of State for Business and Trade* [2025] EWHC 1615 (Admin) paras 45–118 (the Court held, *inter alia*, that the issue of whether the Secretary of State for Business and Trade's decision not to suspend licences for the export of aircraft components to Israel caused a violation of the UK's international obligations under unincorporated treaties was not justiciable). For a summary of the position in the UK see J Crawford, *Brownlie's Principles of Public International Law* (9th ed, 2019) 68–70.

44 For instance, Edwin Cameron (speaking extra curially while still a judge of the Constitutional Court) noted, in discussing *Glenister II* (note 2) that 'the rule of law require[s] that the executive's promises in the international sphere be consistent with its approach in the domestic arena.' E Cameron, 'Safeguarding the Constitution and the Rule of Law' (4th Congress of the Conference of Constitutional Jurisdictions of Africa, 25 April 2017) [https://www.judiciary.org.za/images/speeches\\_from\\_the\\_judiciary/Safeguarding\\_the\\_Constitution\\_and\\_the\\_Rule\\_of\\_Law\\_-\\_By\\_Justice\\_Edwin\\_Cameron.pdf](https://www.judiciary.org.za/images/speeches_from_the_judiciary/Safeguarding_the_Constitution_and_the_Rule_of_Law_-_By_Justice_Edwin_Cameron.pdf). See also E Cameron, 'Constitutionalism, Rights, and International Law: The Glenister Decision' (2013) 23 *Duke Journal of Comparative & International Law* 389, 406 and 409 (emphasising the same point, partially quoted in Chapter 3, footnotes 84 and 284).

but are the subject of active and meaningful dialogue between government, civil society and the courts as the Constitution envisages and requires.<sup>45</sup>

### 3 OPEN BUT SUPERFICIAL APPROACH TO INTERNATIONAL LAW

Despite the openness and general willingness to apply international law and hold the government to South Africa's international obligations, the study reveals that South African courts often still determine or handle international law superficially (particularly from an international law perspective). Importantly, this superficiality occurs even though its courts and lawyers ought to be adroit international lawyers precisely because of the Constitution's openness to international law (which, in effect, requires all South African courts and practitioners to be international lawyers<sup>46</sup>). In other words, the Constitution's embrace of international law should mean that there is no excuse for South African courts and lawyers to be

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45 This can be seen as an outworking of the 'culture of justification' and the rule of law, which the Constitution gives effect to, and the Constitution's purposive embrace of international law, as discussed in Chapter 1, Part 5.2. See also S Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 66–74. Liebenberg suggests that the Constitution, as interpreted by the Constitutional Court, embraces a 'constitutional dialogue' or 'dialogic' model of separation of powers, which 'values a flexible and co-operative model of relations between the three branches of government' (at 68–9), which acknowledges the duty on the courts to ensure that all branches comply with constitutional obligations, but does so in 'ways that respects the particular institutional role and competencies of the other branches' (at 71). She emphasises that conceptually the dialogue should not only be between the courts, parliament, and the executive, but should also include civil society and communities (at 71). She argues generally that 'no one branch should monopolise all the power and dominate the conversation and processes of transformation' (at 69), and more specifically in relation to socio-economic rights that, '[a] fluid, dialogic model of the separation of powers doctrine is best suited to promoting a transformative jurisprudence on socio-economic rights' (at 71).

46 A Coutsoudis & M du Plessis, 'We are all international lawyers now: The Constitution's international-law trifecta comes of age' (2019) 136 *SALJ* 433; Coutsoudis & du Plessis CCR (note 17).

unfamiliar with the contours and requirements of international law.<sup>47</sup> And the requirements of the rule of law (a founding and binding value of the Constitution<sup>48</sup>) should demand a certain, consistent, and rigorous determination of sources of international law. Properly determining the law (including international law) is a constitutional and rule-of-law obligation that all South African courts bear — they are not at liberty to adopt some ad hoc or laissez-faire approach.<sup>49</sup> They cannot eschew or ignore the proper determination of international law any more than they can dispense with a proper determination of domestic law sources.<sup>50</sup>

The neglect in respect of the determination of customary international law and treaty law, revealed in the study, is particularly noteworthy at this juncture. We are three decades into South Africa's post-apartheid epoch. A new generation of South African lawyers and judges has spent much of

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47 Dugard, writing in the year the Constitution came into force, pointed out that: 'Inevitably, it will take time for South African lawyers and judges to become fully conversant with the sources, rules and reasoning of international law. *The Constitution* which serves as the foundation stone for the new South Africa *will ensure that this happens*.' J Dugard, 'Kaleidoscope: International Law and the South African Constitution' (1997) 8 *EJIL* 77, 92 (emphasis added). Even absent the Constitution's international law friendly provisions, it has been recognised in the Bangalore Principles of Judicial Conduct that judges must be familiar with international law. In explaining the principle of competence and diligence (Principle 6), Principle 6.4 provides that: 'A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms'. Bangalore Principles of Judicial Conduct (2002), endorsed by UN Economic and Social Council in Resolution 2006/23 (27 July 2006) UN Doc E/RES/2006/23. The Constitutional Court recently referred to the Bangalore Principles in *O'Brien NO v Minister of Defence and Military Veterans* [2024] ZACC 30, 2025 (2) SA 613 (CC) paras 89, 100–102. Albeit not specifically in relation to the requirement to have regard to international law, the Court emphasised, at para 100, that '[o]ur courts have cited these Principles and they are seen as a benchmark for judicial independence in our law'. Similarly, South Africa's Judicial Code of Conduct requires diligence, which, inter alia, requires judges to 'take reasonable steps to maintain the necessary level of professional competence in the law' (Code, art 10(1)(i)) (the Code is adopted pursuant to s 12 of the Judicial Service Commission Act 9 of 1994, and in terms s 12(5), judges must comply with it). Evidently those requirements should be interpreted in light of the Bangalore Principles, since the Code of Conduct's preamble (para 7) expressly recognises that 'it is necessary for public acceptance of its authority and integrity in order to fulfil its constitutional obligations that the judiciary should conform to ethical standards that are internationally generally accepted, more particularly as set out in the Bangalore Principles of Judicial Conduct' (and it is accepted that the 'Bangalore Principles materially informed the content of the Code of Judicial Conduct', see *Communicare NPC v Acting Magistrate Burgins and Others* [2023] ZAWCHC 117 para 4).

48 Constitution, s 1(c) and Chapter 3, Part 3.3.2.2.

49 See Chapter 3, Part 5.4, and Chapter 4, Parts 2 and 5.

50 See e.g. F Michelman, 'The Rule of Law, Legality and the Supremacy of the Constitution' (OS 02-05) in S Woolman & M Bishop (eds), *Constitutional Law of South Africa* (2nd ed, 2014) Ch 11, 14, who opines that 'what every judge is expected to do in every single case that ever may come before her' is 'do the best she can to discern the relevant law correctly, and apply that law correctly, to the acts of the parties and others connected to the case.' The same evidently holds true when the 'law' in question is treaty law or customary international law.

their professional lives practising under its new (international-law-integrative and rule-of-law-embracing) Constitution.<sup>51</sup> The courts have had time to explicate, settle on, and at least in practice use some methodology for the determination of international law. Yet when this study considered how South African courts determine international law, what was still generally observed was a widespread and material ambivalence to any clear, certain or proper methodology in the determination of international law. This is evident both in respect of customary international law (where the primary determination issue is how customary international law is to be identified, as discussed in Chapter 2) and treaty law (where the primary determination issue is how the written treaty text is to be interpreted, as discussed in Chapter 4).

Obviously, there is a difference between the interpretation of treaties and the identification of customary rules. However, the study identifies similar methodological concerns in the determination of both sources. The systematic descriptive accounts in Chapters 2, 3, and 4 reveal that, compelled by the Constitution, South African courts are usually willing to have regard to and apply customary international law and treaty law. However, they rarely follow a structured or careful approach to the determination of these sources. The courts fail to articulate or apply a clear methodology and generally ignore international law's own secondary rules for determining the content of these sources of international law (be it the Vienna rules for the interpretation of treaties or the two-element approach to customary identification). This has significant consequences and creates material risks. Instead of applying what is, in fact, international law, an approach lacking in suitable rigour to the determination of international law (in conceptualisation and application) may allow the 'international law' to be misdetermined, so that it comes to mean whatever courts or practitioners want it to mean.<sup>52</sup> This may lead to incorrect, or at least poor-quality, decisions. It may limit the value and importance of the determination, because what may

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51 While many of South Africa's most senior judges attended law school prior to 1994, even they would have spent much of their professional and judicial lives in post-apartheid South Africa. See the biographies of the Constitutional Court judges (Constitutional Court 'Permanent Judges', <https://www.concourt.org.za/index.php/judges/current-judges>) and the SCA judges (Supreme Court of Appeal 'Current judges of Supreme Court of Appeal', <https://www.supremecourtofappeal.org.za/index.php/judges/judges-of-the-supreme-court-of-appeal>).

52 ILC 'Draft conclusions on identification of customary international law, with commentaries' (2018) UN Doc A/73/10 ('the ILC Draft Conclusions: CIL') 122: 'a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is identified correctly, thus promoting the credibility of the particular determination as well as that of customary international law more broadly.' See also Francisco Orrego Vicuña, 'Customary international law in a global community: Tailor made?' (2005) 38(148) *Revista de Estudios Internacionales* 22 at 38 ('if rules of law are based on pure political acceptability and not on legal certainty, nothing will prevent "their use as apologies for tyranny"'), and the discussions in Chapter 2, Part 5.4 and Chapter 4, Parts 2 and 5.

be occurring is simply a reference or use of 'international law' to support a predetermined outcome, or even a rejection of a perceived international law obligation, absent any thorough engagement with what that relevant international law is and requires.<sup>53</sup> This does a disservice to South African law,<sup>54</sup> international law,<sup>55</sup> and the rule of law more generally.<sup>56</sup>

Seeking to properly determine the law is a constitutional, and rule-of-law, obligation that all South African courts bear.<sup>57</sup> This applies both to customary international law and treaty law.<sup>58</sup> For instance, the Constitution requires the courts to apply international law's methodology for attributing meaning to treaties (the Vienna rules) because that methodology is part of customary international law, which is law in South Africa unless it is

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53 See Chapter 2, Part 5.4, Chapter 3, Part 5.3, and Chapter 4, Part 4.4. See also the example of *Minister of Justice and Constitutional Development & Others v Prince (Clarke & Others intervening)* [2018] ZACC 30, 2018 (6) SA 393 (CC) para 82 (absent any interpretation or analysis of the relevant treaty obligations, to assess whether they were in fact inconsistent with the Constitution, the Court stated that, 'Counsel for the State referred to various international agreements to which South Africa is a signatory and submitted that South Africa is obliged to give effect to these international agreements. The answer to the submission is that South Africa's international obligations are subject to South Africa's constitutional obligations. The Constitution is the supreme law of the Republic and, in entering into international agreements, South Africa must ensure that its obligations in terms of those agreements are not in breach of its constitutional obligations. This Court cannot be precluded by an international agreement to which South Africa may be a signatory from declaring a statutory provision to be inconsistent with the Constitution.') See the critique of the Court's failure to properly interpret the relevant treaties in Coutsooudis & du Plessis CCR (note 17) 167–168.

54 In Chapter 2, for instance, I, inter alia, argue that the lack of a clear and certain approach to the identification of customary international law may also mean that despite being *de jure* part of South African law, customary international law may be eschewed for being too uncertain, complex, or vague to be relied upon (like uncharted territory, avoided for fear of getting lost). Moreover, it would mean that instead of giving effect to international law, as required by the Constitution, something other may be applied. See also A Nollkaemper, 'The power of secondary rules to connect the international and national legal orders' in T Broude & Y Shany (eds), *Multi-sourced equivalent norms in international law* (2011) 62 ('a failure to give effect to an international obligation with the meaning and contents it has at the international plane may constitute a wrong. For giving effect to an international norm devoid of its international normative context, may well be, to give effect to a different norm.')

55 See e.g. Nollkaemper *ibid* 49 (who argues inter alia: '[t]o the extent that ... national organs are not guided by international secondary norms, the national interpretation and application of international norms indeed may undermine the unity of international law as it is received at domestic level.')

56 A Watts, 'The Importance of International Law', in M Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (2001) 7 ('The rule of law involves accepting that international law is not an a la carte choice. It applies as a whole, and for all States including (and indeed especially) those with the physical and political power to marginalize the law if they so choose.')

57 See Chapter 2, Part 5.3, Chapter 3, Part 5, and Chapter 4, Part 5.

58 See Chapter 2, Part 5.3, and Chapter 4, Part 4.

inconsistent with the Constitution or statute.<sup>59</sup> Similarly, since customary international law is part of South African law, it is evidently necessary that 'customary international law' — which has clear and accepted secondary rules as to what constitutes a customary international law rule and what does not (its constituent elements are general practice coupled with *opinio juris*) — is correctly determined.<sup>60</sup> And, indeed, neither customary international law's identification methodology (the two-element approach, most authoritatively and practically elucidated by the ILC in its Draft Conclusions),<sup>61</sup> nor the Vienna rules for treaty interpretation, are in any way in conflict with the Constitution or any national legislation. Both are consistent with and required by the Constitution, because it requires that the law be properly determined before it is applied.<sup>62</sup> A proper approach to the determination of law (including international law) is evidently required by the Constitution and the rule of law and necessitated by the judge's duty

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59 See Chapter 3, Part 5.4, and Chapter 4, Parts 2 and 5. See also the general point made by Nollkaemper (note 54) at 59 in this regard ('The normative effect of international secondary rules may also flow from the fact that secondary rules themselves may be part of national law. ... This would, for instance, be relevant for a state that is not a party to the VCLT, but that is bound by the customary rules of the law of treaties[.] As many states in the world accept the national effect of customary rules of international law, their courts would be empowered and perhaps obliged to give effect to domesticated international obligations in light of such secondary rules.')

60 KJ Heller, 'Customary international law symposium: The stubborn tenacity of secondary rules' *Opinio Juris* (7 July 2020), <http://opiniojuris.org/2020/07/07/customary-international-law-symposium-the-primary-rules-of-cil-are-not-coming-to-save-us/> (Heller illustrates the necessity of applying an accepted approach to determination, see the quote in Chapter 2 fn 178).

61 See Chapter 2, Part 5.4. I argue that while the ILC Draft Conclusions: CIL (note 52) would certainly not settle all academic debates, they bear the approval and imprimatur of the international community, and provide a useful starting point for a domestic court, even if they do not deal with a number of domestic context-specific issues with which South African courts will need to grapple, particularly in relation to the procedural and evidentiary matters and limitations.

62 Constitution, s 165(2).

of diligence.<sup>63</sup> Otherwise, what is being applied is something other than the 'law', which the courts must apply.<sup>64</sup>

#### 4 A SURPRISING LACK OF RIGOUR GIVEN THE APPROACH TO DETERMINATION OF DOMESTIC SOURCES

The study emphasises that the generally superficial approach to determining international law, as evidenced in this study, is particularly surprising because South African courts accept the need to articulate and use a certain methodology when determining equivalent domestic law sources.

Chapter 2 draws attention to the courts' articulation and application of a methodology for the identification of (domestic) customary law (also known as indigenous law) (which is part of South African law in terms of the Constitution). By way of analogy, it is emphasised that it is worth noticing that the courts were willing to consider and articulate the approach that should be followed to establish domestic customary law,<sup>65</sup> yet had not properly articulated, thought through, or applied a particular (and appropriate) methodology in relation to the identification of customary international law. The difference is significant. It indicates that South African courts are not opposed to articulating and applying methodologies for determining the law, and they saw value in doing so, particularly in areas such as domestic customary law. Instead, it seems that the South African courts generally deemed it unnecessary to articulate and apply any methodology for how

63 See Judicial Code of Conduct, and Bangalore Principles, as discussed at note 47 above. And see for instance also C Ryngaert & D Siccama, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' (2018) 65 *Netherlands International LR* 1 at 25 (who suggest that precisely because 'domestic courts, which function in a state governed by the rule of law, are supposed to identify and apply the law, regardless of the political ramifications of their decisions', 'a rigorous application of the two-elements approach to customary law identification by domestic courts is called for') and M Wood & O Sender, *Identification of Customary International Law* (2024) 299 ('An accepted and reliable methodology for the identification of the rules of customary international law is therefore necessary, affording a predictability that is important to the rule of law internationally as well as at the national level. Those entrusted with the legal task of determining the rules of customary international law bear a heavy responsibility.') For the same reasons a rigorous application of the Vienna rules when interpreting treaties is also required. See Michelman (note 50) 14. See also *Vodacom (Pty) Ltd v Makate and Another* [2025] ZACC 13; 2025 (6) SA 352 (CC) paras 45–53, 64, and 70 fn 54 (although not in the context of the determination of international law, the Constitutional Court affirmed that courts had a 'duty of proper consideration', flowing from the right to a fair hearing and the rule of law, which is breached if there is a failure 'to consider issues that are fundamental to the determination of a matter' (para 70 fn 54)).

64 Constitution, s 165(2).

65 See Chapter 2, Part 5.4. The Constitutional Court's grappling with the determination of domestic (indigenous) customary law has continued, see recently, e.g. *President of the Republic of South Africa v Sigcau and Others* [2024] ZACC 21, 2025 (1) BCLR 26 (CC).

customary international law ought to be determined before them (leaving various procedural questions unconsidered and unanswered).

Similarly, Chapter 4 draws attention, by analogy, to the articulation and application of a rigorous methodology by South African courts when interpreting written domestic sources: statutes and contracts. There has been a clear elucidation and refinement of a methodology for correctly interpreting domestic contracts and legislation; the constant repetition of that methodology by the courts; and concomitant use and reference to that methodology by litigants.<sup>66</sup> Yet, in the same period, no comparable methodological rigour has been applied to the interpretation of treaties. This is surprising, given that there is a well-accepted, broad and flexible, international law methodology for interpreting treaties (the Vienna rules), which is (a) domestically part of South African law given its customary international law status<sup>67</sup> and, therefore, must be applied and (b) not that dissimilar (while there are certain distinctions<sup>68</sup>) from the domestic methodology for interpreting legislation and contracts. Nevertheless, what is observed in the majority of cases is that there has been no clear articulation or application of any methodological or systematic approach to the interpretation of treaties (i.e. it is not even as if some erroneous or questionable domestic methodology has been articulated and applied).

The comparisons in Chapters 2 and 4 with the courts' approach to the determination of analogous domestic law sources illustrate that the suggestion that an equivalent rigour be shown to the determination of international law sources is neither impractical nor a mere academic cavil or counsel of perfection. How, one may ask (rhetorically), in a country where the rule of law (which requires lawfulness and certainty) is a constitutionally binding and justiciable founding value (and when judicial officers are bound by and must apply the law<sup>69</sup> and do so diligently<sup>70</sup>), could there be a reasonable argument that any source of law should be applied absent proper determination. The law being applied must, of course, be properly determined.<sup>71</sup>

The point, also emphasised in Chapters 2 and 4, in respect of the determination of custom and treaties, is that the courts' lack of rigorous engagement and clear methodology when determining international law can lead to a vicious cycle. Courts do not receive proper submissions and

66 Chapter 4, Part 2, draws attention to *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13, 2012 (4) SA 593 (SCA) (where the Supreme Court of Appeal reconsiders and reframes earlier jurisprudence in relation to the interpretation of contracts and legislation) and the lines of cases, including by the Constitutional Court, that have followed and developed this approach.

67 See Chapter 4.

68 See Chapter 4, text at footnotes 46–48 and 73.

69 Constitution s 165(2): 'The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.'

70 See Judicial Code of Conduct art 10.

71 See Michelman (note 50) 14.

materials in relation to the determination of international law precisely because they have articulated no need for a proper methodology, given no guidance in respect thereof, nor demonstrated any application of such methodology themselves. The courts are thus left (because of the lack of proper submissions and placement of relevant materials before them) less able to determine international law rigorously. The virtue of setting out and applying an appropriate methodology for determining analogous domestic law is demonstrated by the virtuous cycle observed in Chapter 4: the courts' articulation and application of a proper methodology for the interpretation of statutes and contracts has, in turn, resulted in parties framing their submissions to the courts with reference to this methodology.<sup>72</sup>

Given the absence of a rigorous approach to international law, despite a more rigorous approach to analogous domestic sources, one might even be inclined to wonder whether the superficiality in South African courts' approach to international law's determination is redolent of a view that international law is not 'real' law that needs to be carefully determined before being applied.<sup>73</sup> Indeed, one might wonder whether it is sometimes implicitly approached as a non-legal set of vague aspirational values that courts can briefly summon when useful to reify decisions, without much thought. In other words, could the stark divergence in methodological rigour between the determination of (roughly analogous) domestic sources of law and international sources of law be understood to flow from some inarticulate premise that views international law as something more akin to a normative moral commitment, than something as precise and binding as law? Of course, such a view or premise would be anathema to the clear and essential place international law, as 'law', is given in South Africa's legal system by the Constitution (as articulated and defended in this study). Nor has any court suggested such a view. And all courts would decry any suggestion that this view is implicit in the persistent failure to grapple with, articulate, and apply proper international law determinative methodologies. Moreover, it is not as if international law has not developed its own powerful tools (or methodological frameworks and secondary rules) for determining that law. It has (be it the interpretative rules relevant for treaties, or the identificatory rules in respect of custom). And it is not as if the South African courts have any principled reason not to apply them. Nor, for the reasons discussed in the study, could they, given the Constitution's integrative approach to international law. But then, since this must be so, it is past time for the South African courts to end their methodological neglect

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72 See Chapter 4, Part 4.1.

73 Such a view, now generally rejected, finds its most prominent early expression in the work of John Austin, see J Austin, *The Province of Jurisprudence Determined* (Wilfred E Rumble ed, 1995) 171. Examples of more recent discussions include OA Hathaway and SJ Shapiro, 'Outcasting: Enforcement in Domestic and International Law' (2011) 121 *Yale LJ* 252 and D Lefkowitz, *Philosophy and International Law: A Critical Introduction* (2020).

of international law. That is the main thrust and purpose of the prescriptive sections in Chapters 2 and 4.

## 5 THE SURPRISING PERSISTENCE OF A SUPERFICIAL APPROACH TO INTERNATIONAL LAW

Lest one were to take the view that the superficiality in the determination of international law that is observed is something isolated or historic, the study makes clear that this is not so. Chapter 4 makes plain — from a careful analysis of over a hundred cases over a six-year period in the most recent South African jurisprudence — that this superficiality in treaty interpretation is not a limited occurrence, but a general and persistent trend.

A similar persistent trend was observed in relation to customary international law. Chapter 2 identified and analysed the key cases over a 10-year period, in which customary international law played a significant role in the determination of the case (albeit far fewer than in respect to treaty law). The study analysed the cases where customary international law formed a material issue for determination. These were cases where customary international law was not merely an issue of no moment to the decision or elicited only passing reference. However, in the identified cases, it was revealed that there were significant concerns with the courts' approach to identifying customary international law, since they failed to properly consider important methodological issues that should influence their approach. This meant the courts' approaches were generally (with certain exceptions) perfunctory and ignored or failed to weigh key material properly.

Thus, the study highlights that this superficiality is not something that merely happened in the first few years of South Africa's post-apartheid embrace of openness to international law (when it would have been more explicable). This continues to occur three decades later.<sup>74</sup> This is at a stage where one would expect the South African courts to have gained a greater sophistication in relation to international law, given the frequency of its invocation, and the important position given to international law in the Constitution. Moreover, the courts have had time to articulate and apply at least some clear and certain approach to the determination of treaty law and customary international law. However, the study reveals that they have not done so.

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74 More recent case law, beyond the periods reviewed in Chapters 2 and 4, shows a similar lack of rigour in relation to the determination of international law, even in matters where international law plays a significant part. See discussion of recent cases in Part 8.1 below.

## 6 PROPERLY EXPLORING AND UTILISING THE CONSTITUTION'S VARIEGATED AND MANIFEST EMBRACE OF INTERNATIONAL LAW

Another key aspect of the study is offering and defending a systematic account of the proper approach to the application of international law in South Africa, given the Constitution's nuanced and varied embrace of international law — it is more a garden to be explored, than a tightrope to be walked.

Chapter 3 offers a descriptive account that identifies and defends the constitutional bases (or constitutional hooks) for integrating international law into South African law used by the courts to apply unincorporated treaties in holding the government's exercises of public power to account. The chapter demonstrated that, while not fully explained or theorised by the Constitutional Court in *Law Society*, its decision and approach to unincorporated treaties was predicated on three constitutional hooks (the rule of law hook, the separation of powers hook and the customary obligation hook). I argue that when properly described, critically assessed, and doctrinally defended, these constitutional hooks give effect to and are consistent with the variegated ways that the Constitution embraces international law.<sup>75</sup> However, the study shows that, although these hooks have not been rejected by the courts in the cases since *Law Society*, they do not yet appear to be generally or fully embraced.<sup>76</sup> Therefore, I contend that it is necessary, at least in appropriate cases, for the Constitutional Court to reflect and clarify the reach, extent and applicability of the constitutional hooks relied on in *Law Society*, as part of considering, applying, and giving effect to the express, yet underutilised, integrative provisions in the Constitution. By doing this, the Court would honour several central principles and constitutional values.<sup>77</sup> It would show fealty to a fuller spectrum of the Constitution's integrative provisions (thus being holistic), avoid conflicts between the obligations on

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75 The study does this by pointing out the importance of other features of the Constitution, including (a) that the rule of law is a founding value, (b) that the conception of the rule of law, as illustrated by specific provisions, plainly includes requiring organs of state to comply with international law, (c) the Constitution's separation of powers framework in relation to treaties, and (d) the automatic incorporation of customary international law (including the rule requiring good faith compliance with treaty obligations). Thus, Chapter 3 emphasises how unincorporated treaties do have a rule of law function to play, in requiring that the government acts in accordance with binding treaties, precisely because of the way the South African Constitution embraces international law.

76 For a consideration of how the courts have approached *Law Society* (note 1) in the most recent cases, see Part 8.1 below.

77 In Chapter 3, Part 5, I identify and articulate four key principles that ought to guide courts' approach to the application and determination of treaty law which emerge from and are grounded in the Constitution, its foundational values and international law scheme, and the Constitutional Court's jurisprudence. I argue that the approach should be holistic (having due regard to the whole Constitution); harmonising (ensuring that, where possible, domestic law and international law do not conflict); certain; and rigorous.

the state in domestic law and international law (thus being harmonising<sup>78</sup>), and is important from a rule of law perspective: ensuring certainty, predictability, and coherence.<sup>79</sup>

Additionally, Chapter 3 draws attention to the fact that a striking feature of even the most recent South African jurisprudence is that, while the Constitutional Court has been willing to use various constitutional hooks to give unincorporated treaties some domestic effect by holding the government to South Africa's treaty obligations,<sup>80</sup> it has continued to neglect an express integrative provision in section 231(4). Section 231(4) provides that 'a self-executing provision' of an unincorporated treaty that has been approved by Parliament 'is law' in South Africa (absent conflict with the Constitution or national legislation). Therefore, the study emphasises that in keeping with an approach that is holistic, harmonising, certain and rigorous, it was (some thirty years into democracy) past time for the Constitutional Court, as the guardian and apex interpreter of the Constitution, to develop jurisprudence on the interpretation of this integrative provision in section 231(4).<sup>81</sup> What the courts should not do is continue to ignore this provision or baldly assert that a treaty (or its provisions) is not self-executing without explaining why and having failed to develop any criteria for making such determination (an approach adopted in *Zuma III*, and critiqued in Chapter 3).<sup>82</sup> As discussed in Part 8.2 below, this is an area where this study only suggests the need for further consideration, without seeking to advance final proposals for how the courts should interpret section 231(4).

## 7 TOWARDS CERTAINTY AND RIGOUR: ENSURING THE COURTS FULFIL THE CONSTITUTION'S INTERNATIONAL LAW VISION

In Chapters 2, 3, and 4, the issues identified in the South African courts' approach to international law are the predicate for proposals to improve that approach. The proposals were guided by the requirements of international law, core commitments in the Constitution,<sup>83</sup> in particular, the rule of law, and what is practical within the South African (adversarial) procedural

78 See Chapter 3, Part 5, and *Charnell Commando and Others v City of Cape Town and Another* [2024] ZACC 27, 2025 (3) SA 1 (CC) para 142 (per Bilchitz AJ): 'The decision to ratify clearly indicates parliamentary approval of the treaty and an intention to render it binding on the Republic. Unless clearly in breach of our Constitution, this Court must thus give effect to that parliamentary intention and seek to harmonise our own domestic law with the relevant international law.' Bilchitz AJ, in para 142 fn 116, relies on S Liebenberg, 'South Africa and the International Covenant on Economic, Social and Cultural Rights: Deepening the Synergies' (2020) 3 *South African Judicial Education Journal* 12 at 39 and Coutsooudis & du Plessis CCR (note 17) 172.

79 Chapter 3, Part 5.

80 See e.g. *Glenister II* (note 2) and *Law Society* (note 1).

81 Chapter 3, Part 5.2.

82 Chapter 3, Part 4.2.2.

83 See note 77 above.

framework.<sup>84</sup> The proposals share a number of similar features, which are important for the courts to adopt, but are not foreign to how they approach matters generally, and pay proper attention to South Africa's procedural law context. Principally, there is a call for a more considered, certain, and rigorous approach to the application and determination of international law, with due regard to international law's own secondary rules for the determination of that law, and fealty to the way the Constitution weaves international law into South Africa's domestic legal order.

The proposals in each chapter aim to encourage the courts to consider the importance of articulating and consistently applying a known methodology for applying and determining international law, which accords with international law, while also being compatible with South Africa's domestic procedural system and the Constitution. These proposals do not aim to demand some type of methodological purity or perfection. Nor do I suggest that articulating and applying a certain methodology would necessarily lead to the right determination. Yet it would better ensure rigour, certainty and transparency in the South African courts' approach to international law.<sup>85</sup>

While scholarly debates surrounding the interpretation of treaties and the identification of customary international law are acknowledged, the point is that:

- (a) There is an accepted core of what is generally understood as a proper approach to determining international law. That core includes (i) the Vienna rules, which as customary international law form a binding part of South African law, and (ii) the ILC's elucidatory work in Draft Conclusions both on customary international law<sup>86</sup> and subsequent practice,<sup>87</sup> which are intended precisely to assist those tasked with determining international law (in particular those such as domestic courts that may not be experts in the field).
- (b) The determination of international law at least requires the application of some methodology.
- (c) Having and applying no methodology to the determination of international law sources is not only ill-advised — it is inconsistent with courts' duties and obligations.

In light of this, the proposals for charting the path ahead largely reference known and accepted principles of international law's own secondary rules

<sup>84</sup> See Chapters 2, 3, and 4.

<sup>85</sup> All these are important, and necessary, requirements of the rule of law. See e.g. also Chapter 3, Part 5, and, for instance, *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg & Others v Minister of Police & Others* [2021] ZACC 37, 2022 (1) BCLR 46 (CC) para 118; the Venice Commission's 'Rule of Law Checklist' (Venice, 11-12 March 2016) [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e); T Bingham, *The Rule of Law* (2010); and S Besson 'Theorizing the Sources of International Law' in S Besson & J Tasioulas (eds) *The Philosophy of International Law* (2010) at 172.

<sup>86</sup> ILC Draft Conclusions: CIL (note 52)

<sup>87</sup> ILC 'Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries' (2018) UN Doc A/73/10.

for determining its content. In other words, international law's own views as to how best to determine its sources. These should at least be the starting point. There may well be, and the study accepts that there are, disputes within international law scholarship as to how customary international law should be identified and treaties interpreted. But the point being made in this study is that at its core, there are known and agreed principles and extant rules that should frame the determination of international law, even if, on consideration (whether rightly or wrongly), a court chooses to deviate from these at some points. Put simply, any deviation should be intentional and well-reasoned, not unthinking or accidental, due to the failure to be aware of or use any methodology. If South African courts are to deviate from specific, generally accepted approaches to determining international law, the deviation should be from the point of knowledge, not out of ignorance.

Therefore, even if the courts are to deviate from the Vienna rules or ignore the materials made relevant by those rules, they should do so intentionally, not by accident. Similarly, even if they were to find that the standard principles of identification of customary international law, the two-element approach, and the ILC Draft Conclusions, which gives practical guidance concerning the approach to such identification, are somehow not helpful or impractical, they should deviate from these intentionally as opposed to by accident or through ignorance. However, the analysis shows that the courts are generally not making intentional decisions to deviate from or not apply a proper methodology to determine international law. In most cases, the courts do not apply any clear approach to the determination of international law. Nor do they grapple with how international law ought to be determined, how parties ought to approach that determination in their papers and submissions, and the type of materials and submissions they should place before the courts. Of course, the study reveals that there are exceptions. It emphasises that the exceptions should become the norm.

Having no methodological approach to the determination of international law (i.e. a completely *ad hoc* approach or the lack of any determination process) is almost certain to lead to erroneous determinations of international law in at least some cases (even a broken watch may be right twice a day — but one would have to consult a working watch to know when such accidental accuracy is achieved).

Moreover, as emphasised in Chapter 4, following an appropriate methodology is essential for rule of law reasons.<sup>88</sup> The rule of law is a foundational principle of the South African Constitution, and, indeed, at

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88 See also Besson (note 85) 172 ('The law-making processes by which we identify valid legal norms should themselves be such as to satisfy the requirements associated with the Rule of Law. The same should be said about the legality of international law. International law-making processes should therefore be such as to satisfy some of the requirements associated with the Rule of International Law and in particular the requirements of clarity, publicity, certainty, equality, transparency, and fairness.'). See also Venice Commission's Rule of Law Checklist (note 85) item 3 ('Does the domestic legal system ensure that the State abide by its binding obligations under international law?').

the normative level, it is often argued that the rule of law is an organising principle of any legal system properly so-called.<sup>89</sup> The rule of law's status in South African law is put beyond doubt by the Constitution's imprimatur: it is a justiciable and binding founding constitutional value.<sup>90</sup> And as such, the Constitution's embrace of international law must be consistent with the rule of law. That must require at the very least consistency, predictability, and certainty, and there must be a proper (and lawful) approach to the application and determination of the law.<sup>91</sup> That can only be achieved by domestic courts paying heed to international law's own secondary rules and principles on the proper determination of the content of primary international law rules. The legitimacy of South Africa's embrace of international law, and international law itself, depends on this;<sup>92</sup> and improper determinations of international law by South African courts may unwittingly place South Africa in violation of its international law obligations.<sup>93</sup>

89 Besson *ibid* 172 ('To identify a society as having a system of law, as opposed to some other sort of order, is to identify it as satisfying some or all of the requirements associated with the Rule of Law.'). N Barber, 'The Rechtsstaat and the Rule of Law' (2003) 53 *The University of Toronto LJ* 443, 452; Attorney General Lord Hermer KC, 'The Rule of Law in an Age of Populism' (Bingham Lecture, 14 October 2024) <https://www.gov.uk/government/speeches/attorney-generals-2024-bingham-lecture-on-the-rule-of-law> ('Lord Bingham's conception of the rule of law also recognises that international law is the 'Rule of Law' writ large, and that States must comply with their international obligations, just as they must comply with domestic law. This, too, is crucial. International law is not simply some kind of optional add-on, with which States can pick or choose whether to comply. It is central to ensuring our prosperity and security, and that of all global citizens.'). Cf J Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Pocket Books of the Hague Academy, 2014) paras 445 and 460. The UN General Assembly has affirmed, in various resolutions, the importance and centrality of the rule of law both domestically and internationally (for instance, see UNGA Resolution of 24 September 2012, UN Doc A/RES/67/1 and UNGA Resolution of (4 December 2024) UN Doc A/RES/79/126).

90 Constitution, s 1(c), and see Chapter 1, Part 5.2 and Chapter 3, Part 3.3.2.2.

91 For instance see the UN Secretary-General's Report 'The rule of law and transitional justice in conflict and post-conflict societies' (2004) UN Doc S/2004/616 para 6, where the Secretary-General indicates that the rule of law requires 'measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency' (emphasis added). The Venice Commission's 'Report on the Rule of Law' (4 April 2011) CDL-AD (2011)003rev, <https://rm.coe.int/1680700a61>, points out, at para 54, that, 'It is vital that the judiciary has power to determine which laws are applicable and valid in the case, to resolve issues of fact, and to apply the law to the facts, in accordance with an appropriate, that is to say, sufficiently transparent and predictable, interpretative methodology.' See also Michelman (note 50) 14.

92 Nollkaemper (note 54) 49.

93 PM Dupuy, 'International Law and Domestic (Municipal) Law' (last updated April 2011) in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* para 124 ('Any decision taken by a judicial organ of the State at the municipal level may, if contrary to an international obligation of that State, entail its international responsibility').

In summary, if the courts have no regard for a process for determining international law (and adopt no process, or are ad hoc), international law's application and content in South Africa, and the decisions by courts that purport to be based on international 'law' would risk being rendered 'arbitrary' — which is anathema to the rule of law, as recognised by the ICJ<sup>94</sup> and the Constitutional Court,<sup>95</sup> and more generally.<sup>96</sup>

As argued in Chapter 2, how South African courts approach the application and identification of customary international law can have ramifications not just for South African law and the parties before its courts, but for international law's development and legitimacy more generally.<sup>97</sup> Therefore, courts should be aware of their position (as agents of international law<sup>98</sup>) and adopt a sound approach. Moreover, from the perspective of South African law, since courts are required to apply international law, and in various ways it forms part of the law that is domestically binding and must be applied, because the Constitution gives it that role,<sup>99</sup> then interna-

94 *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, Judgment [1989] ICJ Reports 15 para 128 ('[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law').

95 See e.g. *King NO and Others v De Jager and Others* [2021] ZACC 4, 2021 (4) SA 1 (CC) para 102; *Mphahlele v First National Bank of SA Ltd* [1999] ZACC 1, 1999 (2) SA 667 (CC) para 12 ('The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons.').

96 See e.g. Venice Commission's Report on the Rule of Law (note 91) para 54 (quoted above in footnote 91 above).

97 For instance, see E Denza, 'The Relationship between International Law and Domestic Law' in Malcolm Evans *International Law* (6th ed, 2024) 401, noting that 'national courts are often asked to resolve [international law's] most fundamental uncertainties.' Yuji Iwasawa has argued that, 'The domestic implementation and application of international law is the most fundamental and important means of enforcing international law.' Y Iwasawa, 'Various means of enforcing International law' (2023) 65 *Harvard International LJ* 1, 4. See also the Venice Commission's Report on the Rule of Law (note 91) para 51, which notes that, 'Legal certainty — and supremacy of the law — imply that the law is implemented in practice.' And see A Tzanakopoulos, ILA Study Group on Principles on the Engagement of Domestic Courts with International Law, *Final Report: Mapping the Engagement of Domestic Courts with International Law* (2016), available at [https://www.ila-hq.org/en\\_GB/documents/conference-study-group-report-johannesburg-2016](https://www.ila-hq.org/en_GB/documents/conference-study-group-report-johannesburg-2016), para 70 ('Given the paucity of international judicial settlement of disputes, judicial law-making by domestic courts that impacts on international law, while subject to informal and diffuse international monitoring, requires much more vigilance in order to be kept within acceptable limits, and in order to have a developing rather than a merely corrosive effect on international regulation (which could be cast as a form of fragmentation).').

98 Iwasawa *ibid* at 4–5 ('In contrast to executive and legislative organs, which tend to prioritize national interests, judicial organs or domestic courts are more likely to serve as true organs of the international community. The important role played by domestic courts in international law is attributable to the decentralized nature of the international legal order.') See also Chapter 2.

99 As discussed in Chapters 2 and 3, customary international law is law in South Africa and treaties are increasingly used even when not domesticated by legislation to test whether government conduct is lawful, as well as to guide the interpretation of domestic legislation and the Constitution.

tional law must be properly determined. Otherwise what is being applied and incorporated into South African law — under the banner of constitutionally mandated international law integration — may be something other than international law. This is a genuine concern since a lack of a rigorous and applied methodology may lead to at least two scenarios: one where judges in good faith misunderstand the law because they did not follow a correct approach to determination of international law (be it interpretation of treaties, or identification of customary international law); or one where judges, through an intentional lack of diligence, rely upon their own broad ideas of what international law on an issue may or ought to be (by simple affirmation) to support their own views or to diminish competing views. By way of example, this could allow a judge to assert that an interpretation of legislation or the Constitution that the judge objects to is inconsistent with South Africa's treaty obligations, when no attempt is made to properly and thoroughly interpret the actual treaty provisions that must form the basis for those obligations.<sup>100</sup>

Therefore, the consequences of inadequately determining international law are deeply concerning. These consequences are, undoubtedly, not what the South African courts intend when they are superficial in their approach to the determination of international law. As a consequence, a central theme of this study has been to call upon the South African courts to take the determination of international law seriously, precisely because of the Constitution's openness to international law,<sup>101</sup> and its commitment to the rule of law (and its embrace of international law as part of the law that must rule).<sup>102</sup>

Pragmatic proposals, with due regard to South Africa's procedural law, were made to encourage the courts, where insufficient submissions had been received from the parties on the determination of customary international law or treaty law, to either call for further submissions from the parties, to encourage *amici curiae* with international law expertise to assist the court, or to undertake their own research.<sup>103</sup> As emphasised, these prag-

100 See a discussion of a possible example of this in Chapter 4, Parts 3.2 and 4.5 (with reference to *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31, 2023 (2) SA 1 (CC)).

101 The integrative approach to international law that the Constitution requires means that courts and South African practitioners should be adroit international lawyers, being rigorous and consistent in applying and determining international law within the Constitution's framework.

102 See Constitution, sections 198(c) and 199(5), and section 1(c) read with section 232 (which makes the customary obligation to comply with treaty obligations in good faith part of South African law), and the discussion of implication of these sections in Chapter 3, text at footnotes 119–128. See also Bingham (note 85) Ch 10 (in this chapter of his work on the rule of law, Bingham argues that, 'The rule of law requires compliance by the state with its obligations in international law as in national law'); a similar argument by Justice Cameron, at the time a judge of the South African Constitutional Court, as discussed in note 44; and Venice Commission 'Rule of Law Check List' (note 85) item 3.

103 See Chapter 2, Part 5.3 and Chapter 4, Part 4.4.

matic approaches, while not generally utilised in relation to the determination of international law, are at least evidenced in some of the Constitutional Court's practice with regard to international law and comparative foreign law issues,<sup>104</sup> and procedurally available to the courts. The courts would do well to make use of them regularly when required, in order to assist in the realisation of a proper and full embrace of international law as mandated by the Constitution.

## 8 RECENT DEVELOPMENTS AND ISSUES LEFT UNADDRESSED

In concluding this study, it is helpful to briefly reflect on more recent case developments and the issues left unaddressed by this study, which will require consideration by courts and scholars. I discuss these below.

### 8.1 Recent case developments

Since the cases surveyed in Chapters 2, 3, and 4, the trends identified in those chapters have generally continued in the most recent South African decisions. In broad terms, one continues to observe an openness to international law coupled with a general lack of rigour in its determination. This is evident from the courts' approach to unincorporated treaties, the application and identification of customary international law, and the interpretation of treaties, which I discuss in turn.

In relation to the approach to unincorporated treaties, one sees a continued application of unincorporated treaties, particularly when interpreting legislation and the Constitution.<sup>105</sup> There is evidence that unincorporated treaties are being used to determine the constitutionality of legislation (as was done in *Glenister II*), by assessing whether the state (including the legislature) is respecting and fulfilling the rights in the Bill of Rights,

104 Chapter 2, Part 5.3, and Chapter 4, Part 4.4.

105 For examples in the Constitutional Court see *Jordaan and Others v Minister of Home Affairs and Another* [2025] ZACC 19, 2025 (6) SA 323 (CC) paras 64–75; *Mutsila v Municipal Gratuuity Fund and Others* [2025] ZACC 17, 2026 (1) SA 1 (CC) para 42 footnote 31; *Corruption Watch (RF) NPC v Speaker of the National Assembly and Others* [2025] ZACC 15, 2026 (1) SA 327 (CC) para 28; O'Brien (note 47) paras 85–95; *Charnell Commando* (note 78) paras 139–150. In the SCA see *African Centre for Biodiversity NPC v Minister of Agriculture, Forestry and Fisheries and Others* [2024] ZASCA 143, 2025 (2) SA 31 (SCA) paras 11–13; *International Trade Administration Commission and Others v Association of Meat Importers and Exporters and Others* [2025] ZASCA 173, [2026] 1 All SA 28 (SCA) paras 5, 21–22; *Rossouw v Blignaut and Wessels and Another* [2025] ZASCA 146, 2026 (2) SA 477 (SCA) para 85. In the High Court see *Green Connection* (note 138), discussed at text at note 138ff below; *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* [2025] ZAWCHC 202, [2025] 3 All SA 827 (WCC) paras 53–55 (the Constitutional Court heard the application for confirmation of the High Court's declaration of statutory invalidity on 12 February 2026 (see <https://collections.concourt.org.za/handle/20.500.12144/38715>), but the Court had not delivered judgment at the time of writing).

with reference to international law obligations.<sup>106</sup> We have seen continued reference to and reliance on the *Law Society* decision, but no discussion or express application of the further constitutional hooks used in that decision that go beyond the approach in *Glenister II*. There is, however, at least one decision where the Constitutional Court appears implicitly to have accepted the approach in *Law Society*. Moreover, the courts have not sought to rely on or emulate the approach to unincorporated treaties suggested by *Zuma III*. Four cases are illustrative of this.

In *Ntuli*,<sup>107</sup> the Constitutional Court was faced with a challenge to the lawfulness of a policy of the Department of Correctional Services in relation to the use of computers by prison inmates ('the Policy').<sup>108</sup> The Policy regulated the use of computers by inmates enrolled in further studies who required a computer for this purpose. The Policy prohibited inmates from using computers in their cells. The Court held that this prohibition violated the inmates' constitutional right to education.<sup>109</sup> Of particular interest for our purposes is that the Court, after finding a violation of the constitutional right to education, then separately found that the Policy violated South Africa's international obligations.<sup>110</sup> These international obligations were found to flow from the ICESCR (an unincorporated treaty to which South Africa was party),<sup>111</sup> understood in light of various non-binding principles.<sup>112</sup> The Court does not explain whether the violation of South Africa's international law obligations was a separate ground for invalidating the Policy. However, the structure of the judgment suggests that this was so. South Africa's international obligations were not used to interpret the right to education in the Constitution. Rather, after finding that the constitutional

106 See O'Brien (note 47) para 87; *Embrace Project NPC and Others v Minister of Justice and Correctional Services and Others* [2024] ZAGPPHC 961, 2025 (1) SACR 36 (GP) paras 60–68 (the Constitutional Court heard the application for confirmation of the High Court's declaration of statutory invalidity on 25 September 2025 (see <https://collections.concourt.org.za/handle/20.500.12144/38628>), but the Court had not delivered judgment at the time of writing).

107 *Minister of Justice and Correctional Services and Others v Ntuli* [2025] ZACC 7, 2025 (8) BCLR 869 (CC) ('Ntuli').

108 *Ntuli* (note 107) para 1.

109 In particular the right to further education in section 29(1)(b) of the Constitution ('Everyone has the right...to further education, which the state, through reasonable measures, must make progressively available and accessible.')

110 *Ntuli* (note 107) paras 75–79, read with para 39.

111 The International Covenant on Economic, Social and Cultural Rights ('ICESCR'), ratified by South Africa on 12 January 2015. The Court relied particularly on the UN Committee on Economic, Social and Cultural Rights' ('CESCR's') General Comment 13, dealing with the right to education under Article 13 of the ICESCR (adopted by CESCR at its 21st session, 15 November – 3 December 1999), see *Ntuli* (note 107) para 75, read with para 39.

112 In particular, the Court quotes from the Abidjan Principles on the Human Rights Obligations of States to Provide Public Education (which the Court indicates accords with the CESCR's General Comment 13), the UN Standard Minimum Rules for the Treatment of Prisoners, and the UN Basic Principles for the Treatment of Prisoners (see *Ntuli* (note 107) para 76–78). It simply quotes from these. The Court does not say that it was using them to interpret article 13 of the ICESCR. And the Court pays little attention to the fact that these principles, unlike the Covenant, are not binding on South Africa.

right was violated (without reference to international law), the Court, in a self-standing section, found that the Policy violated South Africa's international obligations.<sup>113</sup> Thus, while the Court did not expressly refer to *Law Society* or any of the constitutional hooks relied on in that case, it appears to implicitly accept that for the government to act (in this instance by enacting the Policy) in violation of South Africa's international law obligations meant that its actions were domestically unlawful.

In *O'Brien*, the Constitutional Court was faced with a constitutional challenge to legislation dealing with military courts.<sup>114</sup> The primary ground of challenge was that the legislation failed to ensure adequate independence for military judges. Relying on *Law Society* and *Glenister II*,<sup>115</sup> the Court held that it was necessary to have regard to unincorporated treaties when determining what constituted adequate independence.<sup>116</sup> In principle, the Court appears to approach this as merely using international law to interpret the Constitution and the obligations it imposes on the state.<sup>117</sup> However, as with *Glenister II*, the Court made clear that whether there was adequate independence,<sup>118</sup> and therefore the constitutionality of the provisions, would be determined by South Africa's international law obligations.<sup>119</sup> The Court held expressly that '[o]ur international law obligations inform the internationally accepted standard of judicial independence. That is the standard by which we ought to assess the guarantee of judicial independence provided for in the Constitution, which includes that such a guarantee must be afforded to military courts.'<sup>120</sup> The Court concludes its consideration of South Africa's international law obligation by making clear that given 'the requirement imposed on our country to take steps to secure

113 *Ntuli* (note 107) para 79 ('On a conspectus of all these international law instruments, South Africa is thus obliged to adopt and implement education policies that adequately meet the needs of incarcerated persons in a fair, just and equitable manner. In prohibiting tools reasonably necessary to access further education, namely the use of a personal computer in an inmate's cell, the Policy runs afoul of international law principles').

114 *O'Brien* (note 47) para 2 (the challenge was to sections of the Military Discipline Supplementary Measures Act 16 of 1999 and the Defence Act 42 of 2002).

115 *O'Brien* (note 47) paras 85–87 (the Court also relied on *Justice Alliance of South Africa v President of the Republic of South Africa* [2011] ZACC 23, 2011 (5) SA 388 (CC), which itself made reference to *Glenister II* (note 2)).

116 The Court relies on the ICCPR and the African Charter (see *O'Brien* (note 47) paras 89–95). The Court refers to and relies on the Human Rights Committee's and the African Commission's interpretation of these treaties. It also has regard to certain non-binding principles (see paras 99–102).

117 *O'Brien* (note 47) paras 86–87 (the Court refers to the interpretative obligations in sections 39(1)(b) and 233 of the Constitution).

118 *O'Brien* (note 47) para 87. The Court held that the constitutional requirement for judicial independence could be found to flow from section 165 (which provides expressly for this), interpreted in light of the Bill of Rights (including, in particular, the right to a fair trial), section 7(2) (the obligation on the state to promote, protect, fulfil and respect the rights in the Bill of Rights), and rule of law in section 1(c).

119 *O'Brien* (note 47) paras 86–106.

120 *O'Brien* (note 47) para 86, emphasis added.

the independence of the Judiciary in its constitution or laws, in fulfilment of its international legal obligations' the question before it, in determining the constitutional validity of the legislation, was 'whether the relevant provisions of the [domestic legislation being challenged] have succeeded' in fulfilling these international legal obligations.<sup>121</sup> In its analysis, the Court does not specifically reference the constitutional hooks used in *Law Society*. And this may not have been necessary, since one can understand *O'Brien* as an example of the Court using international law to interpret the Constitution's guarantee of judicial independence, in order to then determine the constitutionality of legislation against that constitutional guarantee.<sup>122</sup> However, the Court appears to situate its approach to international law (and the use of international law as the standard for assessing the constitutionality of the legislation) through the lens of *Law Society*.<sup>123</sup> It begins by stressing that, '[t]his Court stated in *Law Society* that international law "enjoy[s] well deserved prominence in the architecture of [South Africa's] constitutional order"'.<sup>124</sup> And, importantly, in contrast to *Zuma III* (which the Court does not refer to), the Court makes clear that the Constitution must be interpreted in accordance with international obligations binding on South Africa, rather than those obligations merely being considered but not necessarily given preference.<sup>125</sup>

The third case worth considering is *Charnell Commando*.<sup>126</sup> The case involved a challenge to the constitutionality of the City of Cape Town's ('the City's') housing policy and its implementation. At the heart of the case was the constitutionality of the City's provision of emergency housing to vulnerable individuals far from the housing from which they had been evicted. The central issue was whether there was a violation of section 26 of the Constitution (the right to adequate housing<sup>127</sup>). In the majority judgment,<sup>128</sup> the Court did not consider international law in interpreting or applying section 26.<sup>129</sup> However, in the separate judgment of Bilchitz AJ (with

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121 *O'Brien* (note 47) para 106.

122 Arguably this is similar to what occurred in *Sonke Gender Justice NPC v President of the Republic of South Africa and Others* [2020] ZACC 26, 2021 (3) BCLR 269 (CC) ('*Sonke*') as discussed in Chapter 3, Part 4.2.1.

123 *O'Brien* (note 47) para 85.

124 *O'Brien* (note 47) para 85 (insertions in original).

125 *O'Brien* (note 47) paras 85–106. This is a continuation of the trend identified and discussed in Chapter 3, Part 4.2.3.1.

126 *Charnell Commando* (note 78).

127 Constitution, sections 26 ('(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right').

128 Per Mathopo J.

129 The Court notes that certain international law submissions (including in relation to ICE-SCR and African Charter) were made by an amicus curiae (*Charnell Commando* (note 78) paras 48–50). But it then does not go on to deal with these submissions in its judgment. It is possible (although this is not stated) that the Court adopted this approach because it accepted that international law would be dealt with in Bilchitz AJ's separate judgment.

Dodson AJ concurring),<sup>130</sup> he considers international law for the purposes of interpreting section 26. His consideration of international law provided additional support for the majority judgment.<sup>131</sup> Although the majority did not address international law, nothing in its judgment suggested that it disagreed with Bilchitz AJ's approach (and his judgment has been relied on by the SCA).<sup>132</sup> Importantly, he emphasised that the Court ought to seek to adopt a harmonising approach to international law by ensuring that the Bill of Rights was interpreted in line with South Africa's treaty obligations (particularly under the ICESCR).<sup>133</sup> In doing so, he highlighted that '[t]he act of ratification renders the treaty legally binding on the Republic and indicates clear parliamentary approval of the treaty by the branch of state elected by the people. It thus places a democratic check on the Executive's power prior to rendering a treaty binding on the Republic.'<sup>134</sup> Similar considerations informed the separation of powers hook (which Bilchitz AJ does not expressly invoke) used by the Court in *Law Society* as one of the bases for invalidating the executive's actions that were inconsistent with South Africa's treaty obligations. Moreover, while he also does not specifically mention the customary obligation hook used in *Law Society*, Bilchitz AJ stresses South Africa's customary international law obligation to give effect to its treaty obligations in good faith.<sup>135</sup> And as one observes in *Ntuli, O'Brien*, and other subsequent Constitutional Court decisions discussed in Chapter 3,<sup>136</sup> Bilchitz AJ does not refer to *Zuma III*. However, his emphasis on the need to harmonise South Africa's domestic law and international

130 As Bilchitz AJ noted at *Charnell Commando* (note 78) para 120: 'I concur in the reasoning in [the majority] judgment but believe it is important to add complementary legal reasoning relating primarily to the role, applicability and usefulness of international legal approaches in interpreting the socio-economic rights in our Constitution in light of South Africa's ratification of the ICESCR.' He also partially dissented in relation to the relief, as he would have granted further orders requiring engagements between the City and the applicants.

131 Ibid.

132 *Johannesburg (City) and Others v Occupiers, Farm Randjesfontein No 405 and Another* [2025] ZASCA 47, 2025 (5) SA 86 (SCA) paras 30–31 (the SCA relied on Bilchitz AJ's judgment in *Charnell Commando*, and his reference to the ICESCR in interpreting the right of access to housing, in a decision in which the SCA was also faced with a case involving a municipality's provision of temporary emergency accommodation to persons who had been evicted).

133 *Charnell Commando* (note 78) paras 141–145. As indicated in note 78 above, Bilchitz AJ provides two academic authorities for this harmonising approach: (a) my article with Max du Plessis (Coutoudis & du Plessis CCR (note 17) 172, in which we explain why such an approach is consistent with the Constitution's embrace of international law, and should limit conflict between South Africa's international obligation and the Constitution); and (b) an article by Liebenberg (note 78), which deals with avenues for aligning South Africa's domestic law with obligations under the ICESCR. He also notes that the approach is clearly affirmed by the Court's reading of the Constitution in *Glenister II* and *Sonke* (see *Charnell Commando* (note 78) para 142, footnotes 116 and 117 and para 143).

134 *Charnell Commando* (note 78) para 140.

135 *Charnell Commando* (note 78) para 145. In a footnote, Bilchitz AJ referred to article 26 of the Vienna Convention. Although South Africa is not a party to the Convention, in *Law Society* (note 1) paras 54–55, the Court accepted that article 26 formed part of customary international law.

136 See discussion in Chapter 3, Part 4.2.3.1.

treaty obligations indicates a rejection of the more equivocal approach suggested in *Zuma III*. As he explains,

[i]t is highly undesirable for there to be one approach adopted towards South Africa's obligations at the international level and another approach adopted towards the interpretation of the socioeconomic rights in our Constitution. It is for that reason that our Constitution includes the injunction in section 39(1)(b) to consider international law in the interpretation of the Bill of Rights and section 233 requires preference, in the interpretation of legislation, for any reasonable interpretation that is consistent with international law.<sup>137</sup>

One sees a similar approach in the High Court decision in *Green Connection*.<sup>138</sup> The matter concerned the judicial review of an environmental authorisation granted to a multi-national petroleum company to conduct exploratory drilling off South Africa's coast.<sup>139</sup> One of the issues in the review was whether the final environmental and social impact assessment report ('the Final EIR') submitted as part of the application for authorisation (as required by domestic legislation) ought to have properly addressed the transboundary impacts on Namibia that could be caused by an oil spill from the exploratory activities.<sup>140</sup> The applicants relied on customary international law and treaty obligations in support of their contention that the Final EIR required an assessment of transboundary impacts. The Minister attempted to rely on *Zuma III* to argue against the invocation of international law by the applicants.<sup>141</sup> However, the High Court held, relying on *Law Society* and section 233 of the Constitution, that it was required to interpret the domestic legislation (the National Environmental Management Act ('NEMA') and its regulations), as far as reasonably possible, in a manner that gives effect to international law.<sup>142</sup> On this basis, the Court held that 'the approach adopted by the [government] respondents, to the effect that NEMA and the EIA Regulations do not require environmental impact assessments to assess and predict transboundary harm is inconsistent with the customary international law and international law obligations discussed above'.<sup>143</sup> The

137 *Charnell Commando* (note 78) para 145 (this also has echoes of the view expressed by Cameron quoted at note 44).

138 *Green Connection NPC and Another v Minister of Forestry, Fisheries and the Environment and Others* [2025] ZAWCHC 349 ('*Green Connection*').

139 *Green Connection* (note 138) paras 2–8.

140 *Green Connection* (note 138) paras 158–189.

141 *Green Connection* (note 138) para 167.

142 *Green Connection* (note 138) para 178. It is worth noting that, unlike in *Zuma III* (note 2), the issue in *Green Connection* was the interpretation of domestic legislation, not the Bill of Rights. When it comes to the interpretation of legislation, section 233 of the Constitution is clear in its terms. It requires courts to adopt an interpretation of legislation that is consistent with international law (over any alternative interpretation inconsistent with it), provided only that the interpretation is reasonable. See discussion in relation to *Zuma III* in Chapter 3, text at footnotes 222–227; *Law Society* (note 1) para 5; *S v Okah* 2018 (4) BCLR 456 (CC) para 38; *Makana Peoples Centre v Minister of Health and Others* 2023 (8) BCLR 963 (CC) para 82; and *Coutsoudis* (note 16) 98–99.

143 *Green Connection* (note 138) para 187.

Court, therefore, held that the failure to assess transboundary impacts in the Final EIR meant that the authorisation ought to be reviewed and set aside.<sup>144</sup>

In respect of customary international law, the courts, consistent with section 232 of the Constitution, continue to emphasise that it automatically forms part of South African law (unless inconsistent with the Constitution or national legislation).<sup>145</sup> In the last few years, the Constitutional Court has made only passing reference to customary international law in isolated cases, but in none of these cases was customary international law material to the Court's determination of the case.<sup>146</sup> Unsurprisingly, in those cases, the Court does not engage with the identification of customary international law, nor does it articulate how the identification of customary international law ought to be approached.<sup>147</sup> The position is similar in the SCA and High Court, even in cases where customary international law was material to the determination of the case.<sup>148</sup> This is illustrated by two cases.

<sup>144</sup> *Green Connection* (note 138) para 189.

<sup>145</sup> See discussion above in Part 2 of *S v Ephraim* (note 18), see also e.g. *Green Connection* (note 138) para 173; *Scalabrini (WCC)* (note 105) para 54; and *Schultz v Minister of Justice and Correctional Services and Others* [2024] ZASCA 77, 2024 (2) SACR 294 (SCA) para 31.

<sup>146</sup> See e.g. *Director of Public Prosecutions, Johannesburg and Another v Schultz and Others; Director of Public Prosecutions, Bloemfontein v Cholota* [2026] ZACC 3, 2026 (3) BCLR 175 (CC) para 27 (In this extradition matter, the Court took note that in the decision on appeal to it the High Court had stated that the 'fundamental doctrine of legality, the rule of law, the principles of customary international law and our Constitution lie at the heart of the question before the Court'. But there was no further reference to any customary international law rules in the Constitutional Court's decision); *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* 2024 (3) SA 330 (CC) para 31 (In this immigration case the Court made passing reference to the fact that the 'principle of non-refoul[e]ment accordingly forms part of customary international law and international human rights law'. It made this statement after referencing a number of treaties (including those binding on South Africa) that recognise the principle); and *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance and Others* [2023] ZACC 31, 2024 (1) SA 567 (CC) para 142 (In passing the Court took account of the fact that an academic writer (Denza) had noted that 'prior to the conclusion of the Vienna Convention the granting of customs privileges to diplomats was not a legal requirement of customary international law, but a matter of courtesy, comity or reciprocity only.' Nothing turned on the customary international law position in the case, since South Africa is party to the Vienna Convention on Diplomatic Relations).

<sup>147</sup> *Ibid.*

<sup>148</sup> In addition to cases discussed below, see e.g. *Scalabrini (WCC)* (note 105) para 54. In *S v Ephraim* (note 18), a central issue was whether apartheid was recognised as an international crime under customary international law at the time the alleged crimes occurred in 1982. The Court appeared to find that it was an international crime based only on a very cursory consideration of a UN General Assembly resolution and given the adoption of the UN Convention on the Suppression and Punishment of the Crime of Apartheid in 1973 (see paras 37–43, read with para 87). The Court also seemed, later in the judgment, to confuse the question of whether apartheid was an international crime (as a form of crime against humanity) in 1982, with the question of when crimes against humanity generally became crimes in customary international law, which was not the issue (see paras 62–64; and see also Jackson & Woolaver (note 18)). The Court engaged with none of the issues raised in Chapter 2 in relation to the process for identification of customary international law. It did not explain why it relied on the subsidiary means it referred to or what weight ought to be accorded to them.

In *EAC v MTN*,<sup>149</sup> the SCA was required to determine aspects of state immunity. The case involved a damages claim instituted against a South African telecommunications company (MTN), other companies in the MTN group, and two former directors ('the MTN defendants'). The MTN defendants had raised several special pleas. By agreement, the special pleas were determined on the pleadings prior to the hearing of evidence. One of the special pleas raised was that EAC's damages claim was precluded by state immunity. The special plea was based on the fact that one of the central predicates for the damages claim was the allegation that the Iranian government (which had not been cited) had been bribed by the MTN defendants to act corruptly in the awarding of a telecommunication licence in Iran. The SCA was, therefore, required to determine whether Iran's state immunity, as given effect to by the Foreign States Immunities Act 87 of 1981 ('the Act'), precluded the claim. The SCA's determination of customary international law was brief and focused primarily on considering the customary status of article 6(2)(b) of the UN Convention on Jurisdictional Immunities of States and Their Property, which has not entered into force, and to which South Africa is not a party.<sup>150</sup> It was necessary to make this determination because the SCA was required to interpret section 2(2) of the Act consistently with customary international law (as required by section 233 of the Constitution). In making this determination, the SCA primarily had regard to a UK decision, *Belhaj v Straw*, which had made certain pronouncements on aspects of the customary status of article 6(2)(b).<sup>151</sup> The SCA commendably made clear that a key issue was whether there was sufficient state practice to demonstrate that article 6(2)(b) was reflective of customary international law (although it made no mention of the need for *opinio juris*).<sup>152</sup> Unfortunately, while the SCA summarily indicated that, on what was placed before it, there was insufficient evidence of state practice,<sup>153</sup> it failed (as courts before it have done) to engage with and give guidance on the type of practical and methodological questions in relation to the identification of customary international law discussed in Chapter 2.<sup>154</sup>

In *Green Connection*, which was dealt with previously, the High Court, in identifying the customary international law obligations (in respect of environmental harm and the principle of prevention) relevant to its interpretation of the domestic legislation, relied exclusively on a decision of the

149 *East Asian Consortium B.V. v MTN Group Limited and Others* 2025 (5) SA 33 (SCA) ('*EAC v MTN*'). I provide a more detailed general discussion of this case in Coutsooudis (note 16) at 133–143.

150 *EAC v MTN* (note 149) paras 40–44.

151 *Belhaj v Straw* [2017] UKSC 3; see *EAC v MTN* (note 149) para 43.

152 *EAC v MTN* (note 149) para 44.

153 *EAC v MTN* (note 149) para 44.

154 See Chapter 2, text at fn 170. For a general discussion of this case see Coutsooudis (note 16) 133–143.

ICJ and an interstate arbitral tribunal award.<sup>155</sup> The Court did not engage with the appropriateness of using subsidiary means to identify customary international law rules, or which subsidiary means should be used or the weight to be accorded to them, or how courts ought to approach the determination of customary international law.<sup>156</sup> But as with previous decisions, it appears that the Court was willing to accept that certain rules formed part of customary international law on the strength of pronouncements by the ICJ (although it expressed no view on the status of ICJ judgments).<sup>157</sup> It appears that the Court understood the government not to meaningfully dispute that the relevant customary international law rules articulated by the ICJ were part of customary international law.<sup>158</sup> This may be why the Court did not believe it was necessary to engage in a detailed consideration of the identification of the customary international law rules at issue.

In respect of the interpretation of treaties, we see a continuation of the general lack of methodological rigour in the approach of the South African courts. Particularly, the Constitutional Court generally continues to reference South Africa's international obligations under treaties by mere assertion or declaration, with little apparent methodological consideration for how it ought to interpret those treaties and certainly no articulation thereof.<sup>159</sup> Since the survey of cases undertaken in Chapter 4, there have been no new cases (whether from the Constitutional Court, the SCA, or the High Court) in which any reference has been made to the customary international law approach to treaty interpretation as codified in the Vienna

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155 *Green Connection* (note 138) para 176 (quoting and relying on the decision of *Pulp Mills on the River Uruguay (Argentina v Uruguay)* Judgment [2010] ICJ Rep 14). The Court also had regard to an early international arbitral decision in a case involving the USA and Canada (*Trail Smelter Case (United States, Canada)* (1938 and 1941) 3 Reports of International Arbitral Awards 1905) which made similar statements in relation to customary international law to those made in the later *Pulp Mills* decision of the ICJ (see paras 164, 170, and 174).

156 In *Green Connection* (note 138) footnote 82 (para 174), the Court quoted with approval the statement in *S v Ephraim* (note 18) para 30 that: 'A custom becomes a rule of customary international law where it is a sufficiently widespread practice adopted by states out of a sense of legal obligation.' However, the Court in *Green Connection* made no attempt to apply this two-element approach to the identification of customary international law, or even to state that these elements were satisfied. It simply accepted that certain rules were part of customary international law based on statements by the ICJ.

157 The Court also refers to the *Trail Smelter Case*, but it appears that it primarily relied on the ICJ decision in *Pulp Mills* (see *Green Connection* (note 138) paras 174–176).

158 *Green Connection* (note 138) para 174. At paras 170 and 171, the Court suggests that the Minister had initially sought to distinguish the *Trail Smelter Case* and to argue that the ICJ's decision in *Pulp Mills* (note 155) should not be relied on since the ICJ was ultimately deciding the case on the basis of a treaty between the states and not customary international law. But the Court held, at para 174, that: 'Although the Minister seeks to distinguish those cases on the basis of facts, it is not disputed that the principles the cases relied upon and applied were well-established rules of customary international law.'

159 See e.g. *Ntuli* (note 107) paras 75–79. One sees a similar approach in the SCA, e.g. in *Rossouw* (note 105) para 85.

Convention on the Law of Treaties.<sup>160</sup> This is notwithstanding the fact that, during this most recent period, South African courts (a) found it necessary to have regard to and apply treaties when determining cases,<sup>161</sup> and (b) in at least two cases the courts referenced other provisions in the Vienna Convention.<sup>162</sup> This, therefore, continues to demonstrate the same trend noted in the *Law Society* decision: reference to certain provisions in the Vienna Convention and acceptance that they form part of South African law, given that they are reflective of customary international law, while at the same time ignoring the rules it codifies for how treaties ought to be interpreted.<sup>163</sup>

160 This has been confirmed by key word searches and review of cases in the main South African case law report series (South African Law Reports ('SALR'), All South African Law Reports ('All SA'), and Butterworths Constitutional Law Reports ('BCLR')) and the main online repository of reported and unreported cases (saflii.org). There are many examples where the courts rely on treaties but fail to reference or apply the Vienna rules (see e.g. *Ntuli* (note 107) paras 75–79 and *International Trade Administration Commission v Association of Meat Importers and Exporters* (note 105) para 21).

161 See e.g. *Charnell Commando* (note 78) paras 139–149; *O'Brien* (note 47) paras 90–98; *Scalabrini* (WCC) (note 105) para 53; *Green Connection* (note 138) para 185; *Schultz* (note 145) paras 7, 9, 14, and 41.

162 *Charnell Commando* (note 78) paras 139 and 145 fn 122; *Schultz* (note 145) para 29.

163 Chapter 4, text at footnotes 84–85. I refer to the critique of the interpretive approach in *Law Society* in Coutoudis & du Plessis (note 17) 189–194. In that article, at 189 (read with footnote 143) I (together with M du Plessis) emphasise that in adopting a proper approach to interpreting the SADC Treaty, the Court ought to have had regard to other rules of international law in relation to when treaties can be replaced (for instance, as codified in article 59(1) of the Vienna Convention) in order to determine whether under the SADC Treaty the state parties were entitled to adopt a new Protocol to replace the 2000 Protocol. This is required by article 31(3)(c) of the Vienna Convention (which provides that 'any relevant rules of international law applicable in the relations between the parties' must be taken into account when interpreting a treaty), as emphasised by Tladi, in his critique of the Court for failing to have regard to other relevant international human rights rules in relation to access to court when interpreting the SADC Treaty. See D Tladi, 'The Constitutional Court's Judgment in the SADC Tribunal Case: International Law Continues to Befuddle' (2020) 10 *Constitutional Court Review* 129, 142. Taking relevant international law rules into account when interpreting treaties is important, as it is a guard against fragmentation in international law. See ILC, 'The Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' in *Report of International Law Commission on the Work of its 58th Session* (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10. As noted at 413 (para 251(17)), which sets out the ILC Study Group's conclusions, article 31(3)(c) 'gives expression to the objective of "systemic integration" according to which, whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact'. The Study Group explains at 413 (para 251(18)) that '[i]n many cases, the issue of interpretation will be capable of resolution with the framework of the treaty itself. Article 31 (3) (c) deals with the case where material sources external to the treaty are relevant in its interpretation. These may include other treaties, customary rules or general principles of law'. See also E de Wet, 'The Constitutionalization of Public International Law' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 1223–4; and C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *ICLQ* 279. For a detailed discussion of the requirement, in terms of article 31(3)(c), to take other relevant rule of international law into account when interpreting a treaty, see R Gardiner, *Treaty Interpretation* (2nd ed, 2015) 289–334.

In line with the trends observed in Chapter 4, in instances where the courts go beyond merely asserting that obligations arise from a treaty (or simply quoting from the treaty without more), rather than undertaking any interpretative exercise directly themselves, the courts have sometimes relied on supplementary means for interpreting treaties. For instance, in the recent cases, there is reliance on the treaty bodies' pronouncements.<sup>164</sup> There is also some reliance on foreign decisions.<sup>165</sup>

## 8.2 The questions left unanswered and areas for further engagement

Given the continuation of the trends identified in Chapters 2, 3, and 4, the proposals in those chapters remain appropriate for the courts to consider in order to better realise the Constitution's embrace of international law. However, this study does not address all the issues that may arise regarding how South African courts apply and determine international law. Nor does it aim to. There are many issues that are left unresolved or unconsidered. This is inevitable in a study constrained by length and given the need to limit the already broad scope of analysis. The study does this by focusing on systematically describing the courts' engagement with customary international law and treaty law. The trends identified and the proposals made in response to those trends are generally directed at ensuring a suitably rigorous and methodologically sound approach to the application and determination of treaties and customary international law, within the framework of the Constitution and given international law's own requirements. Thus, in general, this study does not seek to advance final conclusions as to where a more rigorous, methodological, and certain approach that is consistent with international law and the Constitution may lead. Nor does it seek to address all the various issues that may arise in pursuing such an approach. Therefore, there are many further questions and issues that will no doubt engage the South African courts' attention in the future and, in respect of which, further scholarship will be required.

A few examples will suffice. As indicated in Part 6 above, in Chapter 3, I emphasise the need for the courts to engage with the express provision in section 231(4) of the Constitution that provides that the 'self-executing' provisions of unincorporated treaties are part of South African law, absent

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164 See e.g. *Charnell Commando* (note 78) paras 122, 148–149, para 165 (fn 157), 172, 181 (Bilchitz AJ relied on the General Comments of the CESCR, which he refers to as 'the most authoritative interpretation' of the ICESCR); *O'Brien* (note 47) paras 90–96 (The Court turned to decisions by the African Commission in interpreting the African Charter, and had regard to the Human Rights Committee's General Comment 32 to interpret the ICCPR); *Ntuli* (note 107) (the Court relies on General Comment 13 of the CESCR to interpret the ICESCR, as discussed above).

165 See e.g. *Irakunda and Another v Director of Asylum Seeker Management: Department of Home Affairs and Others* [2024] ZASCA 87, 2024 (6) SA 376 (SCA) paras 31–36.

legislation.<sup>166</sup> However, I did not seek to offer a view on how the courts ought to develop a South African jurisprudence on when treaty provisions will be ‘self-executing’. That issue has been the subject of considerable scholarship already in South Africa,<sup>167</sup> as it has been in other countries.<sup>168</sup> Unfortunately, as noted when discussing *Zuma III*, the Constitutional Court ignored this scholarship,<sup>169</sup> despite summarily asserting (absent explanation) that relevant provisions of the ICCPR were not self-executing. Since then, the Constitutional Court has not pronounced (even in terse terms) on whether a treaty provision would be self-executing for the purposes of sec-

166 See discussions in respect of *Zuma III*, in Chapter 3, Part 4.2.2, and in respect of *Law Society*, in Chapter 3 footnotes 149–159. See also S Samtani ‘International law, access to courts and non-retrogression: *Law Society v President of the Republic of South Africa*’ (2020) 10 *Constitutional Court Review* 197, 212–217.

167 For a summary of this and some of the scholarly discussions and disagreements as to when treaty provisions ought to be considered self-executing see Coutsooudis (note 16) 85–90. See also Samtani (note 166) 214–217; E de Wet, ‘South Africa’ in D Shelton *International Law and Domestic Legal Systems* (2011) 578; Liebenberg (note 78) 28–29; E Ngolele, ‘The Content of the Doctrine of Self-Execution and Its Limited Effect in South African Law’, (2006) 31 *SAYIL* 153; M Olivier, ‘Exploring the Doctrine of Self-Execution as Enforcement Mechanism of International Obligations’, (2002) 27 *SAYIL* 99; and M Killander, ‘Judicial immunity, Compensation for unlawful detention and the elusive self-executing treaty provision: *Claassen v Minister of Justice and Constitutional Development* 2010(6) SA 399 (WCC)’ (2010) 26 *SAJHR* 386.

168 See for instance the divergent approaches in relation to the ICCPR, referenced in the Chapter 3, footnote 236, in the Cypriot and US courts. See also generally Coutsooudis (note 16) 85–90. See also CM Vazquez, ‘The Four Doctrines of Self-Executing Treaties’ (1996) 89 *American Journal of International Law* 695, 695 (‘A distinction has become entrenched in United States law between treaties that are “self-executing” and those that are not. The precise nature of this distinction—indeed, its very existence—is a matter of some controversy and much confusion. More than one lower federal court has pronounced the distinction to be the “most confounding” in the United States law of treaties. A tremendous amount of scholarship has sought to clarify this distinction, but the honest observer cannot but agree with John Jackson’s observation that “[t]he substantial volume of scholarly writing on this issue has not yet resolved the confusion” surrounding it.’) And more recently, see also D Sloss, ‘Taming Madison’s Monster: How to Fix Self-Execution Doctrine’ (2015) *Brigham Young University Law Review* 1691, 1693 (‘judicial application of NSE doctrine is almost entirely arbitrary.’); Hollis & Vázquez, ‘Treaty Self-Execution as “Foreign” Foreign Relations Law’ in CA Bradley (ed) *The Oxford Handbook of Comparative Foreign Relations Law* (2019) 468 (‘it is fair to say that few doctrines of U.S. foreign relations law have confounded U.S. courts and commentators as thoroughly. It is therefore surprising that this distinction has been embraced in other states.’); and T Lynch, ‘The ICCPR, Non-Self-Execution, and DACA Recipients’ Right to Remain in the United States’, (2020) 34 *Georgetown Immigration Law Review* 323, 375 (‘The doctrine of treaty self-execution is complex and not wholly coherent.’). For a general discussion on the use in domestic courts of the doctrine of self-executing treaties see M Van Alstine, ‘Summary and Conclusions’ in DL Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 599–603. For a consideration of the development of the doctrine in the US and subsequent adoption and metamorphosis in Europe and other countries see, Y Iwasawa, *Domestic Application of International Law: Focusing on Direct Applicability* (2022).

169 Chapter 3, Part 4.2.2 (and see A Evans, ‘Self-Executing Treaties in the United States of America’ (1953) 30 *British Yearbook of International Law* 178, 193, quoted at footnote 280).

tion 231(4).<sup>170</sup> Therefore, as emphasised in Chapter 3, while there is enduring ambiguity concerning when treaty provisions will be ‘self-executing’ for the purposes of section 231(4), it is precisely because of this ambiguity that it is incumbent on the South African courts to develop a jurisprudence for how this provision is to be interpreted and applied, given South Africa’s own unique framework.<sup>171</sup> There is no doubt that it will be important for the courts to turn to the wealth of scholarship both in South Africa and in other countries when doing so.<sup>172</sup> By way of example, an aspect highlighted by the scholarship, which the courts have not grappled with, but is evident from the language of section 231(4) (*‘a self-executing provision of an agreement that has been approved by Parliament is law in the Republic’*), is that however ‘self-executing’ is interpreted within the South African context, a court need not find that the entire treaty is self-executing in order for section 231(4) to be applicable. Rather, section 231(4)’s language plainly allows for a nuanced approach, in terms of which, a court need only find that certain relevant provisions of a treaty are self-executing and, on that basis, part of South African law.<sup>173</sup>

170 This has been confirmed by key word searches and review of cases on [saflii.org](http://saflii.org) and the main law report series. The same holds true for the SCA. There is only one recent High Court decision which tersely noted that it was ‘common cause’ that the treaty at issue in the case was not self-executing, but the Court simply noted, without explanation, that this was so ‘because it is not an international agreement of a technical, administrative or executive nature’ (see *Diedericks v MEC for Agriculture, Environmental Affairs, Rural Development and Land Reform (Northern Cape) and Another* 2026 (1) SA 574 (NCK) para 37). This statement does not make sense. The Court plainly conflates two separate inquiries: (a) whether the treaty required parliamentary approval (under section 231(2)) or could be made binding on the international plane without parliamentary approval (as provided under section 231(3) for “international agreement of a technical, administrative or executive nature”); and (b) the separate question, under section 231(4), of whether the provisions of a treaty approved by parliament are self-executing. As discussed in Chapter 3, section 231(4) is clear: only self-executing provisions of treaties *approved* by parliament form part of South African law absent legislative incorporation (which would normally then exclude all treaties of a technical, administrative or executive nature, since they do not require parliamentary approval). In other words, it would only be treaties that are *not* of a technical, administrative or executive nature (and therefore require and receive parliamentary approval) whose ‘self-executing’ provisions would become part of South African law in terms of section 231(4).

171 Chapter 3, Part 5.2. See also H Woolaver, ‘Engagement of South African Domestic Courts with International Law’ in A Nollkaemper, Y Shany, A Tzanakopoulos and E Methymaki (eds), *The Engagement of Domestic Courts with International Law: Comparative Perspectives* (2024) 54–55 (‘the absence of clear guidance from the Constitutional Court on the meaning of self-executing treaties in the South African Constitution creates the potential for the emergence of a new method of avoidance. ... [C]ourts may in the future rely on the absence of guidance from the Constitutional Court as to what constitutes a self-executing treaty to justify their refusal to apply international law stemming from untransformed treaties, when these treaties should be enforceable by virtue of the constitutional mandate in Section 231 of the Constitution.’).

172 See references in footnotes 167 and 168.

173 For support for this view see Killander (note 167) 391 and de Wet (note 167) 578. See also Coutsooudis (note 16) 90.

Given the focus on application and determination of treaties and customary international law, another issue not addressed is how the South African courts ought to enforce or treat an international court decision binding on South Africa. This is not an issue which the South African courts have yet had to address directly under the Constitution (the closest they have come is to consider the enforcement of a SADC Tribunal decision in respect of Zimbabwe in *Fick*).<sup>174</sup> It, therefore, is not an issue that has arisen in the cases considered during the periods under review in chapters 2, 3, and 4, or subsequently. What has been considered is the use of international court decisions as subsidiary means for determining customary international law,<sup>175</sup> or as supplementary means for purposes of interpreting treaties.<sup>176</sup> I have, for instance, emphasised that the SCA has, in one case, taken the view that the ICJ decisions are authoritative pronouncements of customary international law.<sup>177</sup> However, the question of how South African courts should treat a decision of an international court in respect of and binding on South Africa has received some academic consideration.<sup>178</sup>

For example, Erika de Wet has emphasised that, at least until any legislative developments, the use of the common law to enforce international court decisions, as was done in *Fick*, would in principle be welcome.<sup>179</sup> Although she has cautioned that if international law decisions are treated like foreign (domestic) decisions (as was done in *Fick*), the conflict of laws principles applicable to the enforcement of foreign decisions (including the discretion not to enforce a decision against public policy) may create scope

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174 In Chapter 3, Part 2 I draw attention to the fact that in several cases the courts have relied on international law to develop the common law. This approach by the courts is based on section 39(2) of the Constitution (the duty on courts when developing the common law to 'promote the spirit, purport and objects of the Bill of Rights') read with section 39(1) (b) (the duty to consider international law when interpreting the Bill of Rights). I mention that the clearest example of this is *Government of the Republic of Zimbabwe v Fick and Others* [2013] ZACC 22, 2013 (5) SA 325 (CC) ('*Fick*'). In that case the Court developed the common law on the execution of foreign judgments, to include the decisions of the SADC Tribunal given the obligations in the SADC Treaty (incorporating the Tribunal Protocol). For a detailed consideration of the case see E de Wet, 'The case of *Government of the Republic of Zimbabwe v Louis Karel Fick*: A first step towards developing a doctrine on the status of international judgments within the domestic legal order' (2014) 17(1) *Potchefstroom Electronic Law Journal* 553; and H Woolaver, 'Judicial Enforcement of International Decisions against Foreign States in South Africa: The Case of *Government of the Republic of Zimbabwe v Louis Karel Fick and others*' (2015) 6 *Constitutional Court Review* 217. For a brief discussion of the case, see Coutsooudis (note 16) 106–107.

175 Chapter 2, Part 4 and cases at footnote 82.

176 Chapter 4, Part 3.5.

177 Chapter 2, Part 5.2, with reference to *Minister of Justice v SALC* (note 6) para 67.

178 De Wet, 'The case of *Government of the Republic of Zimbabwe v Louis Karel Fick*:' (note 174); Woolaver (note 174) (Woolaver offers a critique of *Fick*, and a general discussion on enforcement of decisions of international courts and tribunals).

179 De Wet (note 174) 562 (De Wet argues that the use of the common law in this way ought to be welcomed 'as it underscores the Constitution's openness towards public international law'), read with 565

for non-enforcement of certain decisions.<sup>180</sup> De Wet suggests that it remains to be seen whether South African courts will continue to treat international decisions, as they did SADC Tribunal decisions, as foreign judgments, or whether 'they will find other creative ways for interpreting the common law in order to give domestic effect to decisions of international courts'.<sup>181</sup> Similarly, Hannah Woolaver has argued that rather than enforce international court decisions (such as the SADC Tribunal decisions) as 'foreign judgments', 'South African courts should and could develop a common-law doctrine enabling direct enforcement of decisions of international courts to which South Africa is bound, or which South Africa is bound to enforce, in international law'.<sup>182</sup>

The courts have not yet had occasion to consider or take up these proposals in relation to decisions in respect of and binding on South Africa. Another way that the courts may approach how an international court decision binding on South Africa ought to be given effect to is to consider the issues through the lens of the constitutional hooks one observes in the *Law Society* decision. Depending on the treaty and the relevant provisions governing the binding nature of the international decision in question, the courts may approach the matter from the perspective that South Africa had a treaty obligation to comply with the decision. Therefore, depending on the circumstances, by virtue of the constitutional hooks in *Law Society*, for the executive to fail to give effect to and act in accordance with an international court decision binding on South Africa would be domestically unconstitutional. By way of example, take a hypothetical decision by the ICJ against South Africa. South Africa is a party to the UN Charter. It has a treaty obligation under the UN Charter, and the ICJ Statute that forms part of the Charter, to comply with ICJ decisions in matters in which it is a

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180 As de Wet (note 174) notes, in *Fick* the Constitutional Court found that public policy did not preclude enforcement of the SADC Tribunal decision in the *Campbell* case (*Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe* Case (2/2007) [2008] SADCT 2) (see *Fick* (note 174) para 35). However, as de Wet draws attention to, in Zimbabwe, in a matter where the applicants also sought enforcement of the SADC Tribunal decision in *Campbell*, the Zimbabwean High Court refused to enforce the Tribunal's decision based on public policy (see *Gramara (Pvt) Ltd v Government of the Republic of Zimbabwe* HH169-09 (26 January 2010)). See also E de Wet, 'The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa' (2013) 28 *ICSID Review* 45, for a discussion of the litigation prior to the Constitutional Court judgment in *Fick*. It should be noted, for completeness, that in Zimbabwe, the applicants had only sought enforcement of the main merits decision of the Tribunal in *Campbell* (of 28 November 2008). Whereas in South Africa, the applicants sought recognition and enforcement of the merits decision and the subsequent costs decision (of 5 June 2009, *Campbell and Another v Republic of Zimbabwe* (SADC (T) 03/2009) [2009] SADCT 1) (see *Government of the Republic of Zimbabwe v Fick and Others* [2012] ZASCA 122 paras 12, 14 and 26). The Constitutional Court, in refusing the appeal, focused primarily on enforcement of the costs decision (see e.g. paras 16-17, 35, and 62-64).

181 De Wet (note 174) 565.

182 Woolaver (note 174) 243-44 (At 235, Woolaver argues that this 'would be justified on the basis of the constitutional provisions noted by the Court [in *Fick*]').

party.<sup>183</sup> There is a customary international law obligation to comply with treaty obligations in good faith. That customary international law obligation forms part of South African law by virtue of section 232 of the Constitution. On this reasoning, in line with *Law Society's* customary obligation and rule of law hooks, were the executive to act inconsistently with this obligation and fail to comply with a binding ICJ decision against South Africa in a matter in which it is a party, the executive's actions would be domestically unconstitutional and subject to review by South African courts (which could order the executive to take steps to comply with South Africa's obligations).

This highlights the importance of the point made in Chapter 3 (and emphasised in Part 6 above): the courts need to grapple with whether and how the constitutional hooks in *Law Society* should be applied and developed. Where the courts ought to land in that grappling may well raise doctrinal and theoretical issues of international law and constitutional law. This would include considering the following questions: which approach would be faithful to the overall scheme of the Constitution and its embrace of international law; what are the democratic and separation of powers issues at stake with the different approaches;<sup>184</sup> and how ought those issues to be considered in light of the founding values and transformative com-

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183 Article 59 of ICJ Statute, read with Article 94 of the UN Charter. See general C Tams, 'Article 94 UN Charter' and C Brown, 'Article 59' in A Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (3rd ed, 2019). As Brown explains at 1562, 'The text of Article 59 of the ICJ Statute contains a negative statement: "Decisions have no binding force"; but it adds two exceptions which are essential for decisions of a court or tribunal, namely that they are binding (i) for the parties and (ii) in respect of the particular case. These "exceptions" set out the intrinsic limits of decisions of the ICJ. Article 59 must also be seen and interpreted in connection with the first sentence of Article 60 of the Statute, which provides that "[t]he judgment is final and without appeal", and Article 94 of the UN Charter, which states in part that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party".'

184 For a general discussion of the features of South Africa's democracy under the Constitution; its representative and participatory nature; its conception of the separation of powers; and the duty of the courts to ensure that other branches of government comply with their constitutional obligations, see *Doctors for Life International v Speaker of the National Assembly & Others* [2006] ZACC 11, 2006 (6) SA 416 (CC) paras 111–117. See also generally T Roux, 'Democracy' in S Woolman & M Bishop (eds), *Constitutional Law of South Africa* (2nd ed, OS, 2006) Chapter 10. For instance, while accepting that all exercises of public power are subject to judicial review to ensure consistency with the Constitution, Tladi has argued that in certain cases the courts have failed to show the executive sufficient deference in relation to its policy decisions in respect of the conducting of South Africa's international relations (see D Tladi, 'A Constitution Made for Mandela, A Constitutional Jurisprudence Developed for Zuma: The Erosion of Discretion of the Executive in Foreign Relations' in HP Aust and T Kleinlein (eds), *Encounters between Foreign Relations Law and International Law: Bridges and Boundaries* (2021)). Of course, the nature and extent of the executive's policy discretion when conducting international relations is a function of the constitutional constraints on the executive, including by virtue of the constitutional and international law obligations on the state. This makes the proper determination of that law all the more important, as emphasised throughout this study.

mitments of the Constitution?<sup>185</sup> In some ways, one already sees Bilchitz AJ potentially pointing to a democratic legitimacy defence of the reliance on unincorporated treaties in *Charnell Commando*. In emphasising the importance of ensuring that constitutional provisions are interpreted consistently with the ICESCR binding on South Africa, he underscores that '[t]he act of ratification renders the treaty legally binding on the Republic and indicates clear parliamentary approval of the treaty by the branch of state *elected by the people*. It thus places a democratic check on the Executive's power prior to rendering a treaty binding on the Republic.'<sup>186</sup> In Chapter 3, I also draw attention to the separation of powers considerations underpinning the separation of powers hook relied on in *Law Society*.<sup>187</sup> For the executive to fail to act in accordance with treaties that Parliament has approved (in respect of which it bears an obligation to conduct public participation processes<sup>188</sup>) would allow the executive to undermine 'the branch of state elected by the people'<sup>189</sup> and the separation of powers inherent in section 231.<sup>190</sup>

In relation to the approach to the determination of customary international law, as indicated previously, in Chapter 2, I raise, but do not seek to answer finally, a range of questions as to how customary international law ought to be determined.<sup>191</sup> A selection of these questions includes: should parties place evidence before the court, where they are able, in relation to the constituent elements of customary international law (state practice and *opinio juris*)? Alternatively, will the courts mostly be satisfied with subsidiary means for determining customary international law, given, among other things, the practical difficulties of a detailed traversing of primary evidence? If the former, in what instances would primary evidence be required or desirable? Will the courts allow a party to adduce expert evidence in respect of customary international law, even if such expert evidence is not viewed as dispositive of the content of customary international law? While I have not sought to answer these and other questions definitively, I have, however, provided a framework within which they are relevant, understandable, and might be answered.<sup>192</sup>

There are likewise significant theoretical issues and debates about how one ought to determine international law,<sup>193</sup> how international law and

185 This would include, for instance, consideration of the culture of justification and its expression in various provisions in the Constitution as discussed in Chapter 1.

186 *Charnell Commando* (note 78) para 140.

187 Chapter 3, see text at footnotes 85–93.

188 See Coutsooudis & du Plessis (note 16) 175, where I, together with Max du Plessis, explain that prior to approving a treaty, Parliament would generally be under a constitutional obligation to ensure public participation (with reference to *Earthlife Africa Johannesburg and Another v Minister of Energy and Others* 2017 (5) SA 227 (WCC) para 144).

189 *Charnell Commando* (note 78) para 140.

190 Chapter 3, see text at footnotes 85 to 93.

191 See Chapter 2, Part 5.4.

192 As noted in Part 8.1, none of these questions have yet been addressed by the courts.

193 These theoretical and doctrinal debates in relation to the identification of customary international law and interpretation of treaties have been referred to in Chapters 2 and 4.

domestic law ought to interact,<sup>194</sup> and how best to read the Constitution and its transformative agenda,<sup>195</sup> or even whether the constitutional project as a whole is a worthy project or one that is particularly useful in society.<sup>196</sup> The answer to these questions is beyond the scope of this study. They are questions which no doubt the courts and scholars should and will continue to grapple with.

However, I would note that those debates and the answers (if any can ever be given in a way that would satisfy everyone) must be mindful of certain features and principles of international law and domestic constitutional law that should frame future consideration. Many of those have been extrapolated and discussed in this study. The need for certainty and rigour can hardly be doubted. Neither can the importance of adopting an approach that accords with the place the Constitution expressly and purposively gives to international law. There is, therefore, plainly value in taking proper account of international law's own secondary rules for determining its content. Likewise regard should be had for the founding value of the rule of law, and the culture of justification that courts have understood as an animating principle running through the Constitution and its transformative provisions.<sup>197</sup>

At least from the perspective of South African courts (the focus of this study), these principles and features are not really open to good-faith debate. The Constitution expressly provides that judges are bound by the Constitution and the law, which they 'must' apply.<sup>198</sup> They must do so 'impartially'. They must swear an oath or give a solemn affirmation<sup>199</sup> that they will 'uphold and protect the Constitution and the human rights entrenched in it', and that they 'will administer justice' 'in accordance with the Constitution and the law.'<sup>200</sup> Therefore, they must be guided by the Constitution, its founding values, and framework, including its embrace of international law. They are not free agents. The Constitution, and the law — be it domestic law or international law — does not mean whatever a judge wishes it to mean.<sup>201</sup> They must determine and apply the law in

194 See the reference to historic and ongoing debates in Chapter 1, Part 5.1.

195 See Chapter 1.

196 Chapter 1, Part 5.2.

197 Chapter 1, Part 5.2.

198 Constitution, section 165

199 Constitution, section 174(8) ('Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.').

200 Constitution, Schedule 2, part 6.

201 *Zuma and Others v S* [1995] ZACC 1, 1995 (2) SA 642 (Kentridge AJ) para 17; K Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 149; O Fiss, 'Objectivity and Interpretation' (1982) 34 *Stanford LR* 739, 744–745; J Goldsworthy, 'Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (2006) 141; D Moseneke, 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 *South African Journal on Human Rights* 309, 317.

good faith.<sup>202</sup> While there may be ongoing debates as to the nature, range, and significance of judicial discretion, good faith attempts to determine and apply the law require that the courts act within the framework of law, and its secondary rules, not outside them.<sup>203</sup>

## 9 EMBRACING THE PROMISE: REALISING THE CONSTITUTION'S INTEGRATIVE VISION FOR INTERNATIONAL LAW

As South Africa begins its journey into its fourth decade of constitutional democracy, and comes of age, this study has sought to provide a clear pic-

202 For instance article 31(1) of the Vienna Convention, which articulates customary international law, requires that interpretation of treaties be in 'good faith'. See also K Roach, 'Dialogic Judicial Review and its Critics' (2004) 23 *Supreme Court Law Review* 49, 69 ('courts have a special commitment to make sense of legal texts that were democratically enacted as foundational documents. It is important that judges have to make some effort to engage in a good faith interpretation of the constitutional text, even though the fact of reasonable disagreement is evident to all.')

203 *President of the Republic of South Africa v South African Rugby Football Union* (1999) 4 SA 147 (CC) para 70 ('It has never been seriously suggested that judges do not have political preferences or views on law and society. Indeed, a judge who is so remote from the world that she or he has no such views would hardly be qualified to sit as a judge. What is required of judges is that they should decide cases that come before them without fear or favour according to the facts and the law, and not according to their subjective personal views. This is what the Constitution requires.');

Bingham (note 85) 51 ('The job of judges is to apply the law, not to indulge their personal preferences. There are areas in which they are required to exercise a discretion, but such discretions are much more closely constrained than is always acknowledged') and 54 ('The rule of law does not require that official or judicial decisionmakers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered');

N Varsava, 'Professional Irresponsibility and Judicial Opinions' (2021) 59 *Houston LR* 103, 116 ('in their judicial role, judges have a duty to develop legal doctrine in a way that coheres with the existing body of law and the principles behind it');

Bangalore Principles (note 47), Principle 1.1 (judges are required to determine cases 'on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason');

Code of Judicial Conduct (note 47) article 9 (judges are obligated to 'resolve disputes by making findings of fact and applying the appropriate law in a fair hearing');

and Crawford *Chance, Order, Change* (note 89) para 210. Even those who argue that legal constraints on judges are 'more plastic than commonly acknowledged', still accept the fact of legal constraints on judges, see Klare (note 201) 149–150, 159–160. Cf T Roux, 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?' (2009) 20 *Stellenbosch Law Review* 258 (Roux offers a critique of Klare's article and the theoretical approach to adjudication that underpins it, which is drawn from descriptive accounts of US's constitutional system, that, in significant ways, is materially different from South Africa's). See also E Cameron, 'South Africa under the Rule of Law: Peril and Promise' (2019) 68 *Journal of Legal Education* 507, 518–519 ('If the law is to function there must be judges who pronounce it, and who pronounce it boldly and honestly.')

and generally Steven Burton, *Judging in Good Faith* (1992) (Burton develops and argues for a theory of adjudication flowing from the duty on judges to uphold the law in good faith).

ture of how far courts have come in ensuring the Constitution's embrace of international law is realised (i.e. taking seriously the international-law-integrative obligation of the Constitution<sup>204</sup>), in order to give effect to its full transformative and rule-of-law potential. Much of this, with some notable exceptions, the courts have begun to do. This has started to mark South Africa out as particularly international law friendly, in practice, not just in terms of its Constitution. And this friendliness in practice, as the cases discussed demonstrate, has significant consequences for holding the executive to account,<sup>205</sup> for the protection of democratic governance, human rights, the rule of law and international law.<sup>206</sup> But lest South Africa become no more than a fair-weather friend of international law, and its perceived openness becomes only a mirage, or a friendship of convenience (where international law is only used when expedient, or to support an already determined position), as it enters its fourth decade this study sounds a call for methodological rigour and consistency in the application and determination of international law by South African courts, with the jurisprudential sophistication, focus and respect it deserves and the Constitution requires.

204 *Glenister II* (note 2) para 202 ('There is... no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law').

205 As noted above, the application of international law has important rule of law functions, and ensures compliance with international law. Iwasawa (note 97) at 5, argues that, 'The primary function of a domestic court is to apply international law to the acts of its government and, where such acts are inconsistent with international law, to find them unlawful.'

206 See for instance *Law Society* (note 1), *National Commissioner* (note 5), *Glenister II* (note 2), and *Minister of Justice v SALC* (note 6); and more recently *DA v President (Putin case)* (note 40). *National Commissioner* (note 5) offers an example of how a South African court's determination of customary international law may have implications more generally for the determination and development of that law. When determining the ambit of the obligation to investigate, the Court explicitly found, at para 61, that 'investigating international crimes committed abroad is permissible only if the country with jurisdiction is unwilling or unable to prosecute and only if the investigation is confined to the territory of the investigating state.' Cedric Ryngaert interprets the Court's placing of this limitation on the duty to investigate (which Ryngaert refers to as 'horizontal complementarity') as being derived by the Court from customary international law (see CMJ Ryngaert, 'Horizontal Complementarity' (last updated February 2018) in H Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* at para 30). The basis for the Court's insistence on a complementarity limitation on the duty to investigate (which the Court does not properly explain and only vaguely suggests is drawn from South Africa's 'applicable legislative scheme, understood in the light of international customary law and other international obligations' (para 61)) is unclear. However, leaving this aside, it is interesting to consider that Ryngaert goes on to suggest that the South African court's approach could serve as the basis for the development of a customary international law rule (if it were to be embraced by other domestic legislatures and courts), even if currently it would 'be a stretch to posit the existence of a requirement of horizontal complementarity under customary international law. At most, horizontal complementarity can be considered as an emerging norm of customary international law' (para 30). This demonstrates how a South African court's approach to an underdeveloped or nascent area of customary international law may plant the seed for the emergence of a new norm of customary international law; and why the manner in which its courts approach international law matters.

This can only be to the great benefit of South Africa (ensuring respect for the rule of law, accountability, fulfilment of international law obligations, and allowing international law to play the transformative role envisaged by the Constitution), as well as benefiting the international community and international law more generally. This would ensure that, as the Constitution enjoins, South Africa can take its rightful place among the family of nations; no longer the international pariah, but one of the international system's proudest and truest subjects. So that, in the words of the Constitutional Court, international law can play the 'critical role' 'in the development and enrichment of our constitutional jurisprudence and by extension the unarticulated pursuit of good governance' that South Africa needs it to 'play'.<sup>207</sup> It is thus hoped that this study will make a small contribution to ensuring that international law will be properly applied and determined so that it can guide and shape South Africa's future both domestically and on the international stage, as it did in its transition to democracy.<sup>208</sup> This is particularly important as South Africa faces the unfinished business of building a just, equal and united society that embodies and achieves its human rights and rule of law aspirations at home and champions them internationally.<sup>209</sup>

207 *Law Society* (note 1) para 4.

208 J Dugard, 'The Role of International Law in the Struggle for Liberation in South Africa' (1991) 18 *Social Justice* 83, 91 ('International law will continue to guide and shape South African society. Non-discrimination, respect for human rights, and the right to self-determination have been consistently invoked against apartheid. They are now part of the national consciousness and form the basic principles for the new political dispensation').

209 In *National Commissioner* (note 5) para 1, the Court begins by recalling President Mandela's heralding, in his inauguration in 1994, of a new human-rights-centric approach to international relations, which is echoed in the preamble to the Constitution: 'South Africa's future foreign relations will be based on our belief that human rights should be the core concern of international relations, and we are ready to play a role in fostering peace and prosperity in the world we share with the community of nations.' And in *Law Society* (note 1) para 91, the Court pointed out that, '[t]he correct approach to sound diplomatic relations and international cooperation here is, from a correct South African perspective, fundamentally about the protection and promotion of the essence of our Bill of Rights and of the Treaty, namely, access to justice, human rights, democracy, the rule of law and the independence and effectiveness of institutions that strengthen good governance.' A recent example of South Africa seeking to outwork this is its institution of proceedings in ICJ against Israel in respect of Israel's siege of Gaza (which the President of South Africa argued in his 2025 State of the Nation Address was 'in accordance with [South Africa's] obligations under the Genocide Convention', and he emphasised that South Africa was fully committed to its obligation under the UN Charter 'including the principle that all members shall settle their international disputes by peaceful means'. C Ramaphosa, 'State of the Nation Address' (6 February 2025) <https://www.gov.za/speeches/2025StateOfTheNation>). Writing one day later, a (Non-South African) scholar used South Africa's institution of proceedings in the ICJ as a commendable modelling of compliance with international law, necessary to defend against an assault on the international rule of law, ME O'Connell, 'Speaking Truth to Trump on the International Rule of Law' *EJIL:Talk!* (7 February 2025), <https://www.ejiltalk.org/speaking-truth-to-trump-on-the-international-rule-of-law/> ('a leading state is one that honors international law in its foreign policy. South Africa has led a dramatic turn to the International Court of Justice in its effort to enforce the Genocide Convention.').