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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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Summary

South Africa's (post-apartheid) Constitution, in multifaceted and some unique (and underutilised) ways, embraces international law. Yet, as demonstrated by the study, despite the Constitution's transformative embrace of international law, the approach of South African courts to international law has not always been consistent or rigorous, nor has it always given full effect to the Constitution's embrace of international law. The study assesses the extent of the issue by describing, theorising, and systematising the approach to international law within South Africa's domestic constitutional framework. In doing so, it analyses and critiques the approach taken by the courts, and offers proposals for charting the way ahead in a manner consistent with and faithful to international law and the Constitution (including its founding value of the rule of law). This is done to ensure that South Africa's courts can better realise the international-law-friendly promise of its Constitution. Thus, the main research question addressed in this study is as follows:

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

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

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

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

The sub-questions focus specifically on the engagement with customary international law and treaty law as the two primary sources of international law. In addressing these questions, the chapters also consider whether and how subsidiary sources (such as judicial decisions and scholarly works) are used to determine customary international law and treaty law.

In Chapter 2, I provide a detailed description and analysis of South African courts' engagement with customary international law (which, in

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

In Chapter 3, I give an account of the evolving nature of South African courts' application of unincorporated treaties within the framework of the Constitution. I provide a critical and descriptive account of how South African courts have approached the application of unincorporated treaties. I begin by outlining the various ways treaties find application in South African law before providing a critical evaluation of the courts' approach to the application of unincorporated treaties. The analysis reveals how the Constitutional Court's application of the Constitution's international law provisions in particular cases has led to an evolution in how the courts apply unincorporated treaties over time. The analysis demonstrates how the Constitutional Court's jurisprudence has, in successive cases, evolved, if not always consistently, to recognise that unincorporated treaties do, in many circumstances, create domestically enforceable obligations for the government, given the integrative international law injunctions of the Constitution. Having considered the courts' evolving approach to the application of unincorporated treaties, and critiquing certain retrogressive decisions, I argue that the courts need to adopt an approach to the application of unincorporated treaties that is guided by principles anchored in the Constitution. I argue that the approach should be holistic (having due regard to the whole Constitution), harmonising (ensuring that, where possible, domestic law and international law do not conflict), certain, and rigorous. Flowing from these principles, I make proposals for charting the course ahead to ensure that, in practice, the open and integrative approach to international law in South Africa's Constitution is properly embraced and given full effect.

As made clear in Chapter 3, the application of treaties has become an ever more embedded feature of the South African courts' jurisprudence; yet it was recognised that the application of treaties in certain of the cases considered was coupled with a particular superficial approach to their interpretation. In light of that, in Chapter 4, I undertake a systematic descriptive

assessment of the South African courts' approach to the interpretation of treaties applied in cases over the period 2018-2023. I begin by considering how treaties ought to be interpreted, with particular regard to customary international law's rules for treaty interpretation. Through that lens, I then delineate the pertinent features of the courts' approach to treaty interpretation by analysing all the cases decided between 2018 and 2023 in which treaties are considered and applied in some manner. This reveals that the courts' approach to treaty interpretation has not generally been methodologically rigorous from an international law perspective. Courts, with some notable exceptions, particularly in the most recent cases, tend to adopt a superficial approach that ignores customary international law's interpretative rules (particularly as codified in the Vienna Convention on the Law of Treaties) and the materials they make applicable, notwithstanding the constitutional obligation to use these rules. Given these trends, I make recommendations to ensure that as South Africa starts its fourth decade of constitutionally enshrined integration of international law, treaty law's interpretive neglect does not continue.

Chapter 5 provides the conclusion to this study. I offer a synthesis of the earlier chapters' cross-cutting issues and proposals. I draw attention to a series of cases considered in the study, that make clear that notwithstanding the identified shortcomings in the South African courts' approach to international law, at their best, the courts have begun to facilitate an embrace of international law that has ensured that the government is held to South Africa's international law obligations, giving effect to the transformative promise and international-law-integrative and rule-of-law commitments of the Constitution. I emphasise that while South African courts have done much to realise the Constitution's embrace of international law, the study observes that, while there is frequent reference to international law (in particular treaties and at times customary international law), this is generally coupled with an unsophisticated approach to the determination of that law (be it the interpretation of treaties or the identification of customary international law). I argue, in line with earlier chapters, that the Constitution requires better of South African courts. They can and should be sophisticated jurists when handling international law, who carefully, consistently, and having proper regard to applicable materials, determine and apply international law relevant to the matters before them. I draw attention to how each substantive chapter provides suggestions for ensuring that this occurs in a manner that enables courts to be more thoughtful and rigorous in determining and applying international law. This is not to suggest some impossible standard of perfection or analytical purity. Rather, it is to recommend an approach to international law that is constitutionally required and legally and practically possible. That can only benefit South Africa's jurisprudence, the parties that appear before its courts, and South Africa's good faith compliance with its international law obligations.

The study emphasises that the neglect in respect of the determination of customary international law and treaty law, revealed in the study, is particu-

larly noteworthy at this juncture. We are three decades into South Africa's post-apartheid epoch. A new generation of South African lawyers and judges has spent much of their professional lives practising under its new (international-law-integrative and rule-of-law-embracing) Constitution. The courts have had time to explicate, settle on, and at least in practice use, some methodology for the determination of international law. Yet when this study considered how South African courts determine international law, what was still generally observed was a widespread and material ambivalence to any clear, certain or proper methodology in the determination of international law. This is evident both in respect of customary international law (where the primary determination issue is how customary international law is to be identified, as discussed in Chapter 2) and treaty law (where the primary determination issue is how the written treaty text is to be interpreted, as discussed in Chapter 4).

As South Africa begins its journey into its fourth decade of constitutional democracy, this study has sought to provide a clear picture of how far courts have come in ensuring the Constitution's embrace of international law is realised (i.e. taking seriously the international-law-integrative obligation of the Constitution), to give effect to its full transformative and rule-of-law potential. Much of this, with some notable exceptions, the courts have begun to do. Notwithstanding the identified shortcomings in the South African courts' approach to international law, at their best, the courts have begun to facilitate an embrace of international law that has ensured that the government is better held to South Africa's international law obligations, giving effect to the transformative promise and integrative and rule-of-law commitments of the Constitution (allowing international law to play the critical role envisaged by the Constitution). This has started to mark South Africa out as particularly friendly to international law, in practice, not just in terms of its Constitution. And this friendliness in practice, as the cases discussed demonstrate, has significant consequences for holding the executive to account, and for the protection of democratic governance, human rights, and the rule of law. But lest South Africa become no more than a fair-weather friend of international law, and its perceived openness becomes only a mirage, or a friendship of convenience (where international law is only used when expedient, or to support an already determined position), as it enters its fourth decade this study sounds a call for methodological rigour and consistency in the application and determination of international law by South African courts, with the jurisprudential sophistication, focus and respect it deserves and the Constitution requires. This can only be to the great benefit of South Africa (ensuring respect for the rule of law, accountability, fulfilment of international law obligations, and allowing international law to play the transformative role envisaged by the Constitution), as well as benefiting the international community and international law more generally.