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

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ABSTRACT: Treaties, which over the last few decades have increased in number and scope, play a significant role in determining the content and reach of international law. It often falls to domestic courts to mediate the interface between international treaty law and domestic law and reconcile those laws by determining if and how treaties find application in the domestic sphere. In that context, this article provides an account of the evolving nature of South African courts' application of unincorporated treaties (those that have not been incorporated into domestic law by legislation) within the framework of the Constitution. The article begins by outlining the various ways in which treaties find application in South African law before providing a critical evaluation of the courts' approach to the application of unincorporated treaties. 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, the article argues that the courts need to adopt an approach to the application of unincorporated treaties that is guided by four principles anchored in the Constitution. The approach should be: holistic (having due regard to the whole Constitution); harmonising (ensuring that, where possible, domestic law and international law do not conflict); certain; and rigorous. Flowing from these four principles, the article makes certain proposals for charting the course ahead, so that South Africa, a country whose Constitution is often heralded as particularly friendly to international law, is not found, in practice, to be no more than a fair-weather friend of international law.

KEYWORDS: international agreements, international law, monist and dualist, relationship between international and domestic law, Section 231

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I INTRODUCTION

Treaties play a significant role in determining the content and reach of international law. Over the last few decades, there has been a considerable increase in treaty-making and the range of matters now governed by treaty, including those that directly impact or confer rights on individuals.[1] Moreover, it often falls to domestic courts to mediate the interface between international treaty law and domestic law and to determine if and how treaties find application in the domestic sphere.[2] The effects of this trend are also evident in South Africa.[3] This article thus considers the evolving manner in which its courts apply treaties[4] (what the South African Constitution refers to as 'international agreements'[5]) within the framework of the Constitution of the Republic of South Africa, 1996 ('Constitution'). The article focuses on the courts' approach to the application of 'unincorporated treaties' ie treaties that have not been incorporated into South African law in terms of domestic legislation. The article aims to answer two primary questions. How do unincorporated treaties find application in South African law? And has the approach to application changed over time?

An analysis of the application of treaties reveals how the Constitutional Court's application of the Constitution's international law provisions in particular cases has led to an evolution in how the Court applies unincorporated treaties over time. Early in the Constitutional Court's jurisprudence one observes an approach to treaty application that can be broadly described as

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

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

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

[4] The term 'treaty', which is widely used in international law, will be adopted in this article, and will be taken to mean, as provided in art 1(a) of the Vienna Convention on the Law of Treaties (1969) 8 ILM 679 (Vienna Convention), 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

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

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

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

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

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

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

[8] Discussed and explained in part III-C.

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

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

[11] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State & Others* [2021] ZACC 28, 2021 (11) BCLR 1263 (CC) ('*Zuma III*').

II HOW ARE TREATIES MADE APPLICABLE IN SOUTH AFRICA?

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

A The direct incorporation of treaties under Section 231 of the Constitution

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

[12] J Crawford *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (2013) at para 272 ('domestic or national law dictates the terms on which international law "comes in" to domestic law and this preliminary competence is actually allowed or contemplated by international law itself. For international law allows States to have diverse constitutional arrangements, including as to the relations with international law').

[13] Constitution S 1(c).

[14] Section 232 of the Constitution provides that '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' For a general consideration of the identification and application of customary international law by South African courts, see A Coutsoudis 'Customary International Law is Law in South Africa – Now What? Analysing the Courts' Identification and Application of Customary International Law over the Last Decade' (2023) 1 *South African Law Journal* 53 (Coutsoudis CIL).

[15] This is discussed in A Coutsoudis & M du Plessis 'We are all International Lawyers: Now What? Taking Seriously the Constitutional Injunction to Integrate International Law Obligations into South African Law' (2020) 10 *Constitutional Court Review* (Coutsoudis & Du Plessis CCR) 174–175. See also F Sucker 'Approval of an International Treaty in Parliament: How Does Section 231(2) "Bind the Republic"?' (2013) 5 *Constitutional Court Review* 417.

government departments" which would not generally engage or warrant the focussed attention or interest of Parliament.'[16]

Subsections (1) to (3) of Section 231 are concerned with the domestic requirements for treaties to be made binding on South Africa on the international plane. The domestication of treaties (the incorporation into South African law) is dealt with separately in Section 231(4).[17] This section provides that treaties become 'law' in South Africa by way of national legislation (legislative incorporation). The only exception in Section 231(4) is in respect of what the Constitution refers to as 'self-executing provisions' of treaties which Parliament has approved in terms of Section 231(2). These self-executing provisions do not require legislative incorporation (domestication). Like customary international law,[18] these self-executing provisions automatically become part of South African law if not inconsistent with the Constitution and national legislation, as provided in Section 231(4). The Constitution does not define what is meant by 'self-executing provisions', and the Constitution's provision for the automatic incorporation of self-executing portions of treaties into South African law has received little attention from the courts.[19] Indeed, in the sole reported case where a High Court was willing to hold that a treaty was self-executing, on appeal to the Constitutional Court, the Constitutional Court found a different basis to determine the case, and left open the question of whether the treaty might be self-executing.[20]

Thus, in general (and subject to the material qualifications considered in part II-B), as the Constitutional Court has affirmed, 'international treaty law only becomes law in the Republic once enacted into domestic legislation.'[21] However, Section 231 only deals with how, formally, the Constitution provides for treaties binding on South Africa to be directly incorporated into South African law. As summarised in the next part, the Constitution also provides an express interpretative role for international law, including unincorporated treaties, which the courts have used, together with the Constitution's other international-law-integrative provisions, to give unincorporated treaties some domestic effect, particularly in relation to the obligations they place on organs of state.

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

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

[18] Constitution S 232.

[19] Dugard & Coutsoudis (note 5 above) at 81–86. See also S Samtani 'International Law, Access to Courts and Non-retrogression: Law Society v President of the Republic of South Africa' (2020) 10 *Constitutional Court Review* 197, 214–217.

[20] *President of the Republic of South Africa & Others v Quagliani* [2009] ZACC 1, 2009 (2) SA 466 (CC) ('*Quagliani*'). For a critique of this case, see N Botha 'Rewriting the Constitution: The "Strange Alchemy" of Justice Sachs, Indeed!' (2009) 34 *South African Yearbook of International Law* 253; W Scholtz & G Ferreira 'The Interpretation of Section 231 of the South African Constitution: A Lost Ball in the High Weeds!' (2008) 41(2) *Comparative and International Law Journal of Southern Africa* 324; and Dugard & Coutsoudis (note 5 above) at 84–85.

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

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

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

At the least contentious end of the scale, unincorporated treaties have often been relied on as interpretative instruments (or aids), when domestic legislation or the Bill of Rights (Chapter 2 of the Constitution) is interpreted.[23] The Constitution expressly provides for this. Section 233 requires legislation to be interpreted as far as reasonably possible in accordance with 'international law'.[24] The reference to 'international law' has been accepted to include treaties binding on South Africa.[25] Similarly, Section 39(1)(b) requires courts, when interpreting the Bill of Rights, to consider international law (which has been interpreted to include binding and non-binding treaties, with more weight given to treaties that bind South Africa).[26] Section 39(2) also requires that when 'developing the common law … every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. In practice, the Constitutional Court has adopted an interpretative approach that melds these two interpretative injunctions in Sections 39(1)(b) and 39(2). The Court, in effect, takes the view that it ought to consider international law when developing the common law (albeit indirectly

[22] *National Commissioner* (note 21 above) at para 24.

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

[24] Constitution S 233 ('When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'). For a discussion of this provision see Coutsoudis & Du Plessis CCR (note 15 above) at 157–158 and *S v Okah* (note 23 above) at para 38.

[25] In *Okah* (note 23 above) this acceptance is implicit from the interpretative reliance that the Constitutional Court places on various binding unincorporated treaties. See A Coutsoudis & M du Plessis 'We are all International Lawyers Now: The Constitution's International-Law Trifecta Comes of Age' (2019) 136 *South African Law Journal* 433 (Coutsoudis & Du Plessis SALJ), 441–442. (As discussed in that article: 'It is an open question whether the Constitutional Court's willingness to adopt a broad interpretation of the reference to international law (to include non-binding sources) in s 39(1)(b) when interpreting the Bill of Rights, will also extend to s 233's interpretative injunction when interpreting legislation.') See also D Tladi 'The Interpretation and Identification of International Law in South African Courts' (2018) 135 *South African Law Journal* 708, 724–725 (Tladi suggests that the more far-reaching implications of s 233 might necessitate a more limited interpretation of 'international law' than s 39(1)(b)'s reference to 'international law').

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

via its interpretation of the Bill of Rights). This approach is most clear in the *Fick* decision.[27] In *Fick*, the Constitutional Court effectively found an obligation to develop the common law so as to give effect to treaty obligations in an unincorporated treaty (the SADC Treaty).[28]

In addition to using unincorporated treaties as interpretative instruments pursuant to Sections 233 and 39(1)(b), they have also been used more directly when it comes to challenges to the constitutionality and lawfulness of government action. Perhaps the starkest example of this is found in *Law Society* (the SADC Tribunal decision).[29] In that relatively recent case, the Constitutional Court held that the conduct of the President as a member of the highest decision-making body of an international organisation (the Summit of SADC[30]) – in participating in its decision to suspend the SADC Tribunal and signing a new Tribunal Protocol which would limit the Tribunal's jurisdiction to inter-state complaints – had breached South Africa's treaty obligations and violated the treaty rights of SADC citizens (in particular their ability to institute claims against member states). Consequently, the Court held that the President's conduct was unconstitutional and unlawful and ordered the President to withdraw his signature from the new Tribunal Protocol. The critical feature of the case, for this article, is that the treaty at issue (the SADC Treaty,[31] which, by subsequent amendment, incorporated the 2000 Tribunal Protocol[32]) had not been incorporated into South African law by national legislation, nor was there any suggestion that the treaty was self-executing.[33] The implication of this case will be discussed in detail in part III-C. In summary, the principle that appears to be established by the case is that, as a matter of South African law, all governmental exercises of public power must comply with all of South Africa's treaty obligations (regardless of whether the treaty has been domesticated), failing which that conduct can and will be reviewed and set aside by South African courts. In practice, this could do away with most of the substantive distinction between incorporated and unincorporated treaties when assessing whether government actions are domestically lawful. It may, in effect, indirectly allow some domestic enforcement of international treaty rights afforded to individuals, because the government, by being ordered to act in accordance with South Africa's treaty obligations by a domestic court, could be required to protect and fulfil those rights. This development will be critically evaluated in part III-C-2. But, as we shall see, the position adopted by the Constitutional Court

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

[28] *Fick* (note 23 above) at para 62 (emphasis added) ('The Amended [SADC] Treaty, incorporating the Tribunal Protocol, places an international law obligation on South Africa to ensure that its citizens have access to the Tribunal and that its decisions are enforced. Section 34 of the Constitution must therefore be interpreted, and the common law developed, so as to grant the right of access to our courts to facilitate the enforcement of the decisions of the Tribunal in this country. This, as said, will be achieved by regarding the Tribunal as a foreign court, in terms of our common law').

[29] *Law Society v President* (note 7 above).

[30] Southern African Development Community (SADC).

[31] Treaty of the Southern African Development Community, 1992 (SADC Treaty).

[32] Protocol on Tribunal in the Southern African Development Community, 2000 (2000 Tribunal Protocol).

[33] I return to this issue in part III-C-2-dd.

in *Law Society* may prove to be something of an outlier. Time will tell whether South African courts build on and cement this jurisprudential development, or seek to distance themselves from it, whether expressly or by necessary implication. Part IV considers whether there are any initial indications as to which approach the Constitutional Court may adopt.

C Summarising how treaties find application in South African law

Given what is set out in parts II-A and II-B, in summary, one sees that treaties have effect in South African law in the following ways:
(a) treaties form part of South African law, as provided for by Section 231(4) of the Constitution, when incorporated into South African law by national legislation;[34]
(b) treaties form part of South African law, as provided by Section 231(4) (but almost never applied in practice) if, even in the absence of incorporation by national legislation: (i) the treaty has been approved by Parliament, (ii) its provisions are self-executing, and (iii) those provisions are not in conflict with the Constitution or national legislation;
(c) treaties may have domestic effect, even when not formally incorporated and not self-executing, as the standard by which the exercise of public power by organs of state should be measured for lawfulness – this is considered in detail in parts III and IV;
(d) treaties indirectly have effect, given Sections 233 and 39(1)(b) of the Constitution, by shaping the interpretation of legislation and the Bill of Rights, and, through the interpretation of the Bill of Rights, the development of the common law.[35]

III FROM *AZAPO* TO *LAW SOCIETY*: THE ARC OF THE COURT'S APPROACH TO THE APPLICATION OF UNINCORPORATED TREATIES

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

A *Azapo* – the Constitutional Court's early affirmation of a strict 'dualist' approach

Azapo (the Truth and Reconciliation Commission [TRC] amnesty case)[36] was decided a little over a year after the Constitutional Court heard its first matter in 1995. It involved a challenge to the constitutionality of legislation (the TRC Act)[37] that provided for the granting of amnesty by the Amnesty Committee of the TRC.[38] The case was of significant political moment, given that the granting of amnesty was the linchpin of the Truth and Reconciliation process adopted

[34] There are numerous examples of this. To list only a small selection: the International Convention on Salvage (1989) 1953 UNTS 165 is incorporated by the Wreck and Salvage Act 94 of 1996; the Rome Statute of the ICC (1998) 37 ILM 999 is incorporated by the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002; the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1968) 7 ILM 1042 is incorporated by the International Arbitration Act 15 of 2017; and the Hague Convention on the Civil Aspects of International Child Abduction (1980) 19 ILM 1501 is incorporated in terms of the Children's Act 38 of 2005.

[35] Constitution S 39(2) read with S 39(1)(b).

[36] *Azapo* (note 9 above).

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

[38] *Azapo* (note 9 above) at para 5.

by South Africa to transition from the abhorrent apartheid regime to its new constitutional democracy. International treaty law was at issue because, as part of the applicants' case, they argued that in terms of the Geneva Conventions,[39] to which South Africa was a party, South Africa was obliged to prosecute those responsible for gross human rights violations. Therefore, the applicants argued that the provisions of section 20(7) which authorised amnesty for such offenders constituted a breach of international law.[40]

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

> [i]nternational law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, *relevant only in the interpretation of the Constitution itself*, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law. *International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment.*[41]

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

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

[40] Ibid at para 8.

[41] Ibid at para 26 (emphasis added).

[42] While the decision was taken under Interim Constitution (1993):

(a) there are significant similarities in the treatment of treaties in the final (1996) Constitution (one of the material differences is that the Interim Constitution did not include the equivalent interpretative injunction to S 233 of the final Constitution, in relation to interpreting legislation in accordance with international law); and

(b) this statement by the Court in *Azapo* was quoted with approval by Ngcobo CJ (writing for the minority) in *Glenister II* (note 10 above) at para 92 decided under the final Constitution, which the majority appears to accept: see *Glenister II* (note 10 above) at para 181.

The one significant change in the final Constitution was the introduction of the concept of 'self-executing provisions' of treaties, which do not require domestic incorporation to have domestic effect. But this provision has been mostly ignored by the Court, and has thus, in practice, played almost no part in the application of treaties in South Africa.

[43] *Azapo* (note 9 above) at para 26.

[44] Ibid at para 28.

on a limited and superficial consideration) that 'the content of these Conventions in any event do not assist the case of the applicants'.[45]

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

B *Glenister II* – an evolving approach to unincorporated treaties

As one sees from *Azapo*, the Constitutional Court had no difficulty considering unincorporated treaties as an interpretative aid when interpreting the Bill of Rights. However, it emphasised that the obligation in section 35(1) of the interim Constitution (which is substantively the same as Section 39(1)(b) in the final Constitution) was 'only to "have regard" to public international law if it is applicable to the protection of the rights entrenched in the chapter'.[49] In other words, the Court was pointing out that the obligation was not necessary to ensure conformity with international law (including unincorporated treaties) but merely to have regard thereto (or, in the words of Section 39(1)(b) of the final Constitution, to 'consider'[50] international law when interpreting the Bill of Rights) – as one interpretative consideration among many. Nevertheless,

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

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

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

[48] *Glenister II* (note 10 above).

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

[50] As discussed above in note 49.

given that the Bill of Rights set out a series of broadly defined rights of people and obligations for the state, the use of international law, even as an interpretative aid, leaves significant scope for unincorporated treaties to have a material effect on how the Court interprets the rights and obligations created by such treaties. In *Glenister II*, the Constitutional Court made use of this interpretative scope to full and dramatic effect – more, as we shall see, as a launching pad, than an endpoint.

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

Importantly for the current analysis, the Court made clear that the unincorporated treaties that South Africa is a party to are the benchmark for assessing whether the government had acted reasonably to fulfil its constitutional obligation under Section 7(2).[52] This did not expressly incorporate those treaties into South African law, and one could argue that the Court's approach merely used the treaties as an interpretative instrument to determine the nature of the obligation created by Section 7(2), as envisaged by Section 39(1)(b) of the Constitution.[53] But, in practice, the Court appears to give the treaties much more direct (and substantive) effect than merely as an adjunct to interpreting the Constitution[54] – certainly more than the thin obligation 'only to "have regard" to public international law' (or to 'consider international law' to use the language of the final Constitution) envisaged by the Court in *Azapo*. For in the Court's interpretation of the Constitution, it held that 'our *Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law,* and *makes them the measure of the State's conduct in fulfilling its obligations in relation to the Bill of Rights*.'[55] Thus, the Court is suggesting that treaties that are binding on South Africa on the international plane have direct domestic (at least obligatory) effect on the government, as 'the measure of'[56] whether the government has done enough to comply with its obligations to safeguard and fulfil rights in the Bill of Rights.

[51] *Glenister II* (note 10 above) at para 168.

[52] Ibid at para 194.

[53] For instance, see *Glenister II* ibid at para 194 and the discussion by C Gowar 'The Status of International Treaties in the South African Domestic Legal System: Small Steps towards Harmony in Light of Glenister' (2011) 36 *South African Yearbook of International Law* 307, 320 and B Meyersfeld 'Domesticating International Standards: The Direction of International Human Rights Law in South Africa' (2013) 5 *Constitutional Court Review* 399, 408–409.

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

[55] *Glenister II* (note 10 above) at para 178 (emphasis added).

[56] Ibid.

Moreover, it is evident that South Africa's treaty obligations in relation to combating corruption[57] had a significant impact in the case. Although channelled (or mediated) through Section 7(2), they nevertheless emphatically cast a domestic obligation on the government.[58] This is made clear in the Court's findings. In particular, the Court held that

> [t]he obligations in these Conventions are clear and they are unequivocal. They impose on the Republic the duty in international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere and *is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere*.[59]

Similarly, the Court held that 'the fact that s 231(2) provides that an international agreement that Parliament ratifies "binds the Republic" is of prime significance. It makes it unreasonable for the state, in fulfilling its obligation under s 7(2), to create an anti-corruption entity that lacks sufficient independence', since 'the Republic is bound under international law to create an anti-corruption unit with appropriate independence'.'[60]

Reading these pronouncements together, within the context of the case, one sees that the Constitutional Court seeks to meld South Africa's treaty obligations on the international plane with the domestic obligations placed on the government by the Constitution. Nevertheless, the Court (perhaps wary of being seen to depart too far from its earlier jurisprudence and given the dissenting minority judgment's warning against using interpretation to domesticate treaty obligations through the back door[61]) states that '[t]his is not to incorporate international agreements into our Constitution.' Rather, said the Court, this is merely 'to be faithful to the Constitution itself, and to give meaning to the ambit of the duties it creates in accordance with its own clear *interpretive injunctions*.'[62] It is not immediately apparent (nor does the Court explain) how these statements, which seem to downplay the significance of the Court's decision, can be readily reconciled with its earlier statements in the same judgment (quoted above).[63]

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

[58] For instance see Gowar (note 53 above) at 325 and G Ferreira & A Ferreira-Snyman 'The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy between Monism and Dualism' (2014) 17 *Potchefstroom Electronic Law Journal* 1471, 1482.

[59] *Glenister II* (note 10 above) at para 189 (emphasis added).

[60] Ibid at para 194.

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

[62] *Glenister II* (note 10 above) at para 195.

[63] Ibid at para 178, quoted above at note 55.

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

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

In the article, while Justice Cameron sought to emphasise that the Court was moving away from a 'dualist conception' of the place of international law, he hastens to add that the Court in *Glenister II* was not 'adopting a monist approach'.[67] At this point, we should pause to observe that the use of the terms 'monist' and 'dualist' as descriptive labels, while often used and broadly understood shorthand,[68] can be imprecise, misleading and sometimes unhelpful.[69] They can be misleading and unhelpful if viewed and applied as binary alternatives.

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

[65] Cameron (note 54 above).

[66] Ibid at 404–405 (emphasis added).

[67] Ibid at 405.

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

[69] PH Verdier & M Versteeg 'International Law in National Legal Systems: An Empirical Investigation' (2015) 109 *American Journal of International Law* 514, 516 (Verdier and Versteeg conclude, after a detailed empirical comparative survey of domestic legal systems, that 'the monist-dualist distinction has fundamental limitations for the purpose of classifying national approaches to international law. First, because they derive from a theoretical debate about the nature of international law rather than an effort to classify actual legal systems, "neither theory offers an adequate account of the practice of international and national courts, whose role

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

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

in articulating the positions of the various legal systems is crucial." Second, national systems do not adopt a monolithic approach to international law; most of them combine aspects of the monist and dualist approaches. For example, in the United Kingdom treaties do not become part of domestic law unless implemented by Parliament, while courts may directly apply international custom. Finally, because the distinction is articulated at a high level of generality, scholars sometimes differ as to whether a particular country should properly be classified as "monist" or "dualist"'). See also Tzanakopoulos ILA Final Report ibid at paras 17–20; and A Paulus 'The Emergence of the International Community and the Divide between International and Domestic Law' in J Nijman & A Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (2007) 234 ('For domestic courts, the pluralism of legal orders implies that the general characterization of the relationship between "international" and "national" law as "monist" or "dualist" will often not be very helpful').

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

[71] Cameron (note 54 above) at 405.

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

[73] Cameron (note 54 above) at 405.

[74] Ibid at 404.

[75] Ibid at 405 (emphasis added).

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

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

C *Law Society* – from evolution to revolution?

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

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

The constitutional 'hooks' relied on in *Law Society* generally appear different from (or additional to) the Section 7(2) approach taken by the Court in *Glenister II*[83] – nevertheless,

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

[78] For instance, see Gowar (note 53 above) at 325 and Ferreira & Ferreira-Snyman (note 58 above) at 1490–1491.

[79] For instance, see *Sucker* (note 15 above) discussed below.

[80] For instance, see *Sonke Gender Justice NPC v President of the Republic of South Africa & Others* [2020] ZACC 26, 2021 (3) BCLR 269 (CC) ('*Sonke*') discussed in part IV-B-1; *Fick* (note 23 above) at paras 28, 66 and 67; *Khosa & Others v Minister of Defence and Military Defence and Military Veterans & Others* [2020] ZAGPPHC 147, 2020 (5) SA 490 (GP) at paras 128–129; *McBride v Minister of Police & Others* [2015] ZAGPPHC 830 (GP), 2016 (4) BCLR 539 (GP) at 17, 18 and 35; and *McBride v Minister of Police & Another (Helen Suzman Foundation as amicus curiae)* [2016] ZACC 30 (CC), 2016 (11) BCLR 1398 (CC) at paras 15–16, 35–36.

[81] For a more detailed consideration of the facts, see Coutsoudis & Du Plessis CCR (note 15 above) at 161–164.

[82] Coutsoudis & Du Plessis CCR ibid at 184–188.

[83] Ibid.

they seem to flow from, or build on, the Court's reasoning in *Glenister II*.[84] In the *Law Society* judgment, the Court does not always delineate which of these 'hooks' is doing the work. It is, therefore, helpful to differentiate each 'hook', even if they may be overlapping and reinforcing.

First, the Court held that the effect of Section 231(2)[85] is that if Parliament has approved a treaty, in order for South Africa to be bound by that treaty on the international plane, then it would be unconstitutional for the government to act in conflict with that treaty.[86] The Court does not explain its reasoning. While not articulated, it appears that the constitutional predicate for the Court's reliance on Section 231(2) may be that conduct by the executive that puts South Africa in violation of its binding treaty obligations on the international plane would undermine the legislature's constitutionally required approval of that treaty, and, hence, violate the separation of powers.[87] Some indirect support for this approach (while not referred to by the Court) may be found in *DA v The Minister of International Relations* (the 'ICC Withdrawal' decision).[88] In that case, a full court of the Gauteng High Court[89] reviewed and set aside the executive's decision to withdraw from the Rome Statute of the ICC and ordered

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

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

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

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

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

[89] Mojapelo DJP, Makgoka and Mothle JJ.

it to rescind its notice of withdrawal. The High Court relied on the separation of powers, evident in the scheme of Section 231, to find that since Section 231(2) expressly requires parliamentary approval in order for South Africa to be bound by a treaty, it is implicit that the executive could not unilaterally (without prior parliamentary approval) seek to withdraw from a treaty.[90] Therefore, the High Court held that 'the national executive's decision to deliver the notice of withdrawal without obtaining prior parliamentary approval violated s 231(2) of the Constitution, and breached the separation of powers doctrine enshrined in that section.'[91] The High Court's explanation of why, given that the Constitution conferred no power on the executive to withdraw from treaties, the executive's action was unconstitutional also lends support to the Constitutional Court's approach in *Law Society*. The High Court explained as follows:

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

Of course, in *Law Society*, the President was not withdrawing from the SADC Treaty (incorporating the 2000 Tribunal Protocol). Nevertheless, his unilateral actions[93] had the effect of rendering a significant aspect of the SADC Treaty (the Tribunal and its jurisdiction to hear individual complaints against member states) inoperative. Thus, to an extent, the *de facto* consequences were not dissimilar to terminating an existing international agreement. For ease of reference, I refer to this basis for the Court's decision as the *separation of powers hook.*

Second, the Court held that violations of binding (but unincorporated) treaties may also violate the rule of law (from which flows the principle of legality[94]) enshrined in Section 1(c) of the Constitution – the President must comply with the law, and that includes, as an agent of the state,[95] the 'international law obligation [on the state] to act in line with its commitments

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

[91] Ibid at para 57.

[92] Ibid at para 56 (emphasis added).

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

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

[95] *Law Society* (note 7 above) at para 48, read with para 43 ('Any reference to the President being bound by an undomesticated treaty must be understood as a reference to the binding effect of that instrument on her merely as a representative of the State. In other words, it is the State alone that is itself bound by that undomesticated legal instrument'). See also *Genocide Convention Case* (1951) ICJ Rep 15 at para 44 ('According to international law, there is no doubt that every head of State is presumed to be able to act for it internationally, with all his legally relevant acts being attributable to the State'); and J Foakes *The Position of Heads of State and Senior Officials in International Law* (2014) at 41 ('a head of State's acts or omissions when acting in an official capacity

made in terms of [the SADC] Treaty'.[96] I refer to this basis for the Court's decision as the *rule of law hook*.

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

as an organ of the State are attributable to the State itself and, if they involve a breach of the State's international obligations, the State bears international responsibility for them').

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

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

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

[99] Coutsoudis & Du Plessis CCR (note 15 above) at 165–171.

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

It will be noted that in describing these three constitutional hooks no direct reference is made to the Bill of Rights. That is not to say that in *Law Society* the President's unconstitutional conduct did not have Bill-of-Rights implications (in particular, in respect of the right of access to court).[101] However, whatever role the right of access to court played in the judgment,[102] the important point for the current analysis is that the constitutional hooks identified above, on their own terms, were self-standing grounds for the unconstitutionality and unlawfulness of the President's conduct. Thus, as argued in a previous article,[103] the Bill-of-Rights implications of the President's conduct should at best be understood as an additional (concurrent) ground of unconstitutionality,[104] not a prerequisite for the unconstitutionality predicated on the three constitutional hooks identified above.

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

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

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

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

[103] Coutsoudis & Du Plessis CCR (note 15 above) at 184–188.

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

[105] *Law Society* (note 7 above) at 5 (quoted in note 100 above).

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

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

Society matter, as sought by the applicants,[108] the Court not only declared the President's signature of the 2014 Protocol unlawful, it also ordered him to withdraw his signature from the 2014 Protocol (which he did).[109]

aa Did the Court go too far?

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

However, this critique has at least two limitations. First, it does not detract from the customary international law obligation to comply with binding treaties and its incorporation into South African law by Section 232 (the customary obligation hook), coupled with the rule of law obligation on organs of state to comply with the law, which would include that customary obligation (the rule of law hook). Second, it does not remove the separation of powers concerns with the executive exercising public power in a manner that has the effect of nullifying international treaty obligations that the legislature has approved. In other words, if the executive does not have the power to withdraw from a treaty that Parliament has approved unilaterally, but requires parliamentary approval for such withdrawal, as an implicit feature of Section 231(2) and an incidence of the separation of powers, it would be equally impermissible for the executive unilaterally to fail to act in accordance with a treaty that Parliament has approved (thus treating it as if South Africa were not a party).

Put differently, concerns that *Law Society* failed to give due weight to Section 231(4)'s provision for legislative incorporation may be met by a broader consideration of the Constitution and its integrative approach to international law, which is both variegated and manifest.[111] The

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

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

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

[111] For instance, Meyersfeld (note 53 above) at 400, writing shortly after *Glenister II* was decided, emphasised that 'FC [Final Constitution] s 231 is, however, not alone. FC ss 232 and 233, when read with FC s 231, raise a host of thorny questions.' The first two questions she suggests are raised ('(a) What is the distinction between being bound by an international agreement, on the one hand, and an international agreement being law in South

courts[112] and scholars[113] alike have recognised the special place that international law finds in our Constitution. Thus, considering the constitutional scheme in totality ('one of the most international-law friendly constitutions around the globe'[114]), it is not surprising that the Court would find that for an organ of state[115] to act in a way that causes South Africa to violate its binding treaty obligations is inconsistent with the Constitution's integrative approach to international law and the rule of law constraints it places on all exercises of public power.[116] As Justice Cameron notes, commenting on the underlying predicate for the Court's decision in *Glenister II*, 'the constitutional scheme, taken as a whole, cannot mean that the national executive could proclaim and act in accordance with one position at the international level, but adopt a different approach within the domestic arena.'[117] Cameron emphasises that '[a] dichotomy of this sort would raise at least rule of law issues—and the rule of law is enshrined as a founding value of the Constitution.'[118]

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

In support of Cameron's view as to the implications of the constitutional scheme, taken as a whole, including its enshrining of the rule of law, it is important to emphasise a critical point about how the Constitution conceptualises the rule of law. It is trite that 'the rule of law' is a founding value of the Constitution,[119] which places a duty on 'the courts to insist that the State,

Africa, on the other?', '(b) How does the answer to this first question square with the requirements of FC s 232, namely that customary international law "is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament"?') appear to be precisely (while not expressly) the questions being grappled with, and to an extent answered, by the Court in *Law Society* in its use of the separation of powers hook and the customary obligation hook.

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

[113] For instance, see N Botha & M Olivier 'Ten Years of International Law in the South African Courts: Reviewing the Past and Assessing the Future' (2004) 29 *South African Yearbook of International Law* 42, 42 ('On paper at least, South African law must now be regarded as among the most progressive and international-law friendly in the world') and H Woolaver 'South Africa' in Palombino (note 76 above) at 320 ('the Final Constitution of South Africa is one of the most international-law friendly constitutions around the globe. This openness to international law is clear from many parts of the constitutional text. International law is, in many instances, directly enforceable in South African domestic law without the need for transformation by the legislature').

[114] Woolaver ibid.

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

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

[117] Cameron (note 54 above) at 406.

[118] Ibid.

[119] This is expressly provided for in S 1(c), and it has been regularly affirmed by the courts. See, e.g., *Pharmaceutical Manufacturers* (note 94 above) at paras 17 and 40; *Justice Alliance of South Africa v President of Republic of South Africa & Others* [2011] ZACC 23, 2011 (5) SA 388 (CC) at para 31 ('The significance of the rule of law and its close relationship with the ideal of a constitutional democracy cannot be overemphasised'); and *Khumalo & Another v Member of the Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49 (CC), 2014 (5)

in all its dealings, operates within the confines of the law'.[120] What should be noted is the kind of 'rule of law' that the Constitution appears to contemplate. There are clear indications that the 'law' that must rule the conduct of organs of state includes international law binding on South Africa. The first indication is, of course, Section 232. As discussed, this makes customary international law 'law' in South Africa (absent conflict with the Constitution or national legislation). The second indication is Section 199(5). This provision deals with the security services. These are defined broadly to include the defence force, the police and intelligence services (these are organs of state that operate both domestically and internationally).[121] Section 199(5) states that members of the defence force, the police and the intelligence services must act in accordance with 'the Constitution and the law, *including customary international law and international agreements binding on the Republic'*.[122] This is a classic rule of law statement. That is to say, it is a case-specific articulation of the Constitution's justiciable 'rule of law' principle (Section 1(c)). What is interesting about this articulation is that the Constitution makes plain that 'the law' that must be complied with *includes* customary international law and international agreements binding on the Republic. In other words, the 'law' that must rule the conduct of the organs of state is not merely domestic law, but also binding international law. To be clear, that is a very 'monist' conception of the rule of law. One sees the same broad conception of the rule of law in Section 198(c). This provides that '[n]ational security must be pursued in compliance with the law, including international law.' Once again, 'the law' that must be complied with *includes international law*. It could be argued that this same formulation is not used elsewhere (ie the express statement that 'law' *includes* international law). Therefore, this might suggest that it is only in respect of the police, the defence force, the intelligence services, and when government officials take decisions concerning national security matters, that rule of law obligations include the obligation not to act in violation of international law. Yet such an argument would ignore the indicative nature of these sections. Section 199(5) is one of the few places where there is express reference to a general obligation to comply with the Constitution and the law (for instance, unlike in respect of the security services, there are no express provisions requiring compliance with the Constitution and the law directed at the President or other members of the national executive). Rather, generally, the well-established proposition that all exercises of public power must comply with the rule of law (and that this is a constitutional obligation) is sourced by the Court in Section 1(c) of the Constitution.[123] As we have seen, Section 1(c) simply states that one of the founding values of the Constitution is

SA 579 (CC) at para 29 ('The rule of law is a founding value of our constitutional democracy. It is the duty of the courts to insist that the State, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power').

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

[121] Constitution S 199(1).

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

[123] As already noted, it has long been accepted that the rule of law, and the principle of legality which flows from that, create a justiciable constitutional obligation that all exercises of public power must accord with the law and that in exercising such power organs of state must not go beyond the powers conferred by the Constitution and law that accords with the Constitution. See *Mansingh v General Council of the Bar & Others* [2013] ZACC 40, 2014 (2) SA 26 (CC) at para 25; *Pharmaceutical Manufacturers* (note 119 above) at para 40; and *Kaunda* (note 21 above) at paras 78–80. A breach of this obligation will mean that the exercise of power is unconstitutional. In terms of S 172(1)(a) of the Constitution, courts are obliged to declare exercises of public power that do not

'the rule of law'. It does not give further guidance as to what type of rule of law is intended. For that, one must look at the rest of the Constitution.[124] When one does that, what is significant about the features of the Constitution, and most notably in Sections 198(c) and 199(5), is that they give an indication of what type of 'rule of law' the Constitution has in mind (and how the Constitution conceptualises 'the law'). It has in mind a rule of law where the 'law' that must be complied with by the organs of state *includes* customary international law and binding international agreements. And such an understanding of the rule of law makes perfect sense in the Constitution's general integrative (open) approach to international law.

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

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

For the reasons discussed in part III-C-2-aa and bb, *Law Society*'s constitutional hooks, especially when understood together, have a strong constitutional pedigree. They are plainly part of the architecture of the Constitution and how it draws international law obligations into the domestic sphere. They should not be ignored. These constitutional features are not mere accidents, nor the product of some over-realised or wish-fulfilment interpretation by the Court. Our Constitution's openness to international law is not some judicial invention. It is deeply

accord with the Constitution invalid. See *Economic Freedom Fighters v Speaker, National Assembly* [2016] ZACC 11, 2016 (3) SA 580 (CC) at para 103.

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

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

[126] Coutsoudis CIL (note 14 above) at 94.

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

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

rooted in the fabric of South Africa's transformative[129] and progressive Constitution.[130] The Constitution expressly gives international law pride of place.[131] It purposively does so, making it a key feature of the Constitution's transformation project, precisely because of South Africa's abhorrent pre-constitutional past.[132] The Constitution marks a 'decisive break' from that past[133] – a past where it was an international law pariah.[134] The purpose of the Constitution was, among other things, as the preamble makes plain, to ensure that South Africa could take its rightful place in the family of nations.[135] As O'Regan J opined in *Kaunda*, 'our Constitution recognises and asserts that, after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law.'[136] And, as the SCA held in *Minister of Justice v SALC* (the *Al Bashir* matter),

> [t]he Constitution incorporated these provisions [giving international law its 'special place in our law'] pursuant to the goal stated in the Preamble that its purpose is to '[b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'.

[129] The Constitutional Court has referred to the Constitution as being transformative on numerous occasions – see, for instance, *Road Accident Fund & Another v Mdeyide* [2010] ZACC 18, 2011 (2) SA 26 (CC) at 125; *Sonke* (note 80 above) at para 23 fn 49; *Biowatch Trust v Registrar, Genetic Resources, & Others* [2009] ZACC 14, 2009 (6) SA 232 (CC) at para 17; and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* [2004] ZACC 15, 2004 (4) SA 490 (CC) at paras 73–74. See also Karl Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 (Klare observes, at 155, that a 'particularly appealing feature of the South African Constitution is its self-consciousness that it is an instrument committed to social transformation and reconstruction'; and argues, at 156, that the 'Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals').

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

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

[132] This history must be taken into account when interpreting the Constitution. See *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others* [2000] ZACC 12, 2001 (1) SA 545 (CC) at para 21; *United Democratic Movement v Speaker of the National Assembly & Others* [2017] ZACC 21, 2017 (5) SA 300 (CC) at para 29-3.

[133] *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC) at para 262 (per Mahomed J) ('In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and *represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive* and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. *The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic*' (emphasis added)).

[134] *Law Society* (note 7 above) at para 4; *Kaunda* (note 21 above) at para 222; the *Al Bashir* case (note 112 above) at para 63; and J Dugard 'Kaleidoscope: International Law and the South African Constitution' (1997) 1 *European Journal of International Law* 77, 77 ('So it was that South Africa became a pariah state within the international community; a delinquent state in the context of the "new" international law of human rights').

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

[136] *Kaunda* (note 21 above) at para 222.

> From being an international pariah South Africa has sought in our democratic state to play a full role as an accepted member of the international community.[137]

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

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

In view of the above discussion, it is necessary to emphasise what *Law Society* is *not* doing. It is not saying that unincorporated treaties as a whole form part of South African 'law' absent incorporation by legislation (and absent being found to be self-executing) and thus create domestic rights that can be directly relied on between private individuals.[138] It is rather doing what the Court in *Glenister II* said was necessary: ensuring proper respect for 'the manifest constitutional injunction to integrate, in a way the Constitution permits, international law *obligations* into our domestic law'.[139] Via the constitutional hooks considered, those obligations are cast on the state, and its organs, which, as such, may cause the state to breach its international law obligations. Therefore, for the reasons given above, while one might take issue with the exact routes used by the Court in *Law Society*, its final destination appears consistent with the Constitution's scheme. And, while certain of the constitutional hooks (or routes) used by the Court are different (or additional to) to that adopted in *Glenister II*, it is perhaps best to understand *Law Society* as simply taking seriously the integrative invocation of the Constitution recognised in *Glenister II*. As we have seen, the Constitution embraces international law in multifaceted ways. Once that is so, it must be the case that there are many different and permissible routes by which, depending on the circumstances, unincorporated treaties may find application. Indeed, as Woolaver has rightly pointed out, 'there are many constitutional routes either requiring or permitting the application of international law in the South African domestic legal system, which have been taken up with vigour by South African courts.'[140]

That different or additional routes were explored in *Law Society* to those previously considered by the Constitutional Court does not, in itself, suggest that the new routes are wrong.[141] In fact, it is worth noting that Sucker, writing soon after *Glenister II*, criticised the Constitutional Court in that case for making use of Section 7(2), read with Section 39(1)(b), to give a form of domestic effect to the obligations flowing from unincorporated treaties. As part of her critique, she proposed a different route to reach the same conclusion: relying *inter alia* on Section 231(2), and its provision that international treaties approved by Parliament

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

[138] For instance, as Dugard explains, once incorporated by legislation, pursuant to S 231(4), an incorporated treaty 'creates rights and duties for the individual in the same way that an ordinary statute creates rights and duties' (J Dugard 'South Africa' in D Sloss *The Role of Domestic Courts in Treaty Enforcement* (note 6 above) at 472).

[139] *Glenister II* (note 10 above) at 202 (emphasis added).

[140] Woolaver (note 112 above) at 393, writing prior to the *Law Society* decision (note 7 above).

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

bind South Africa, as understood together with the state's customary international law obligations, inter alia, to comply with treaty obligations in good faith.[142] With some nuances and additions, and without direct reference, the constitutional hooks adopted by the Court in *Law Society* (as discussed above) appear to be in line with, or at least bear echoes of, the route proposed by Sucker.

Of course, just as in *Glenister II*, other or additional routes may have been available to the Court in *Law Society*. One obvious option might have been, as with *Glenister II*, for the Court to base its determination of unconstitutionality *solely* (and without reliance on any of the other constitutional hooks discussed above) on a finding that in causing South Africa to violate treaty obligations, including the obligation[143] to ensure that individuals continue to enjoy the treaty right to lodge complaints in the Tribunal against SADC states,[144] the President did not reasonably protect and fulfil the rights in the Bill of Rights, in violation of Section 7(2).[145] This is the route that the minority in *Law Society* favoured.[146] And in response to the minority judgment, the majority appeared vaguely to suggest that the *Glenister II* (Section 7(2)) route also formed an additional basis (alongside the constitutional hooks discussed above) for its finding that the President's conduct was unconstitutional.[147] However, even for the minority, the endpoint, or effect, of applying the *Glenister II* approach in *Law Society*, seemed no different

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

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

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

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

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

[147] *Law Society* (note 7 above) at paras 43 and 78.

from that reached by the majority using the additional constitutional hooks, since the minority affirms that 'the Constitution enswathes the President with the obligation to ensure that his conduct does not result in a breach of South Africa's international obligations.'[148]

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

[148] *Law Society* (note 7 above) at para 100.

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

[150] A trend most recently continued in *Zuma III* (note 11 above), as discussed below in part IV-B-2.

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

[152] *Fick* (note 23 above) at para 9.

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

[154] Article 36 of the SADC Treaty.

[155] Ibid, see Coutsoudis & Du Plessis CCR (note 15 above) at 183.

[156] 2000 Tribunal Protocol art 15(1) ('The Tribunal shall have jurisdiction over disputes between states, and between natural or legal person is and states').

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

In conclusion, the position can be summed up as follows. The Court's reasoning in *Law Society* is not always a model of clarity and is open to critique. There were other possible routes available to the Court, in addition to the three constitutional hooks identified. But this does not, in itself, suggest that the three constitutional hooks that the Court relied on, at least when viewed holistically, were not constitutionally permissible. It is perhaps best to conceptualise the Constitution's variegated embrace of international law more like a garden to be explored than a tightrope to be walked. And South Africa's transformative Constitution, which is a blueprint

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

[158] Coutsoudis & Du Plessis CCR (note 15 above) at 183 and 193.

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

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

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

for a future not yet fully realised,[162] must allow for incremental jurisprudential development,[163] as the courts in successive judgments grapple with and explore its commitment to the rule of law and international law. That is what the Court in *Law Society* was doing, and its endeavours have opened up and made accessible new jurisprudential paths in that constitutional garden.

IV POST-*LAW SOCIETY* – A NEW, MORE 'MONIST' WORLD? OR MERELY A FALSE DAWN?

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

A The approach of the High Court

If one begins by considering the decisions of the High Court, one sees that the position has been uneven. It is evident that various divisions of the High Court have not expressly viewed the *Law Society* decision as adopting a new approach that is substantively different from *Glenister II*.[164] However, subsequent to *Law Society*, there is at least one High Court case that appears, in practice, to have embraced the *Law Society* approach to the domestic effect of unincorporated treaties – while not doing so expressly or with any apparent awareness that its approach was novel. In *SAHRC v Msunduzi Local Municipality*,[165] the South African Human Rights Commission[166] brought a case against a municipality regarding its failure to properly operate and maintain a landfill site. Without referring to the *Law Society* judgment, the Court effectively followed the approach taken in *Law Society*, by finding that a municipality was bound by various unincorporated treaties, which South Africa had ratified, in relation to

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

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

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

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

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

specific environmental obligations.[167] The Court found that the municipality had violated its obligations, as an organ of state, under these treaties.[168] It also found that the municipality had violated various environmental statutes and Section 24 of the Constitution (the right to a healthy environment). As the Court held, '*[a]part* from the serious violations committed by the municipality in respect of the various provisions of the legislative framework as found above, I further consider that it has also *acted in breach of the relevant environmental provisions contained in the international instruments referred to above. Since these instruments have been ratified by Parliament, they are binding on the municipality as an organ of state*.'[169] While not referred to by the Court, this language embraces or echoes the separation of powers hook (predicated on Section 231(2) of the Constitution) relied on by the Constitutional Court in *Law Society*.[170]

Moreover, in the orders granted by the Court, in addition to declaring that the municipality had breached various domestic statutes and Section 24 of the Constitution, the Court made a separate and distinct order declaring that the municipality had violated its international law obligations flowing from various unincorporated treaties.[171] The Court also granted a detailed structural interdict.[172] Amongst other things, this required the municipality to file regular reports with the Court to explain how it was complying with its obligations going forward, allowing the other parties to comment on those reports, and providing for the court to retain continued oversight, with the ability to issue further directions or orders. The Court, therefore, appears to accept that unincorporated treaties will create domestically binding obligations for state entities (such as municipalities or other organs of state, or government officials) which can be challenged before domestic courts, with remedial relief granted for violations. Of course, unlike the order declaring that the municipality violated international obligations, the structural interdict cannot be said to flow purely from the violations of treaties, because the Court also found that the municipality had violated various provisions of domestic environmental legislation. Both statutory and treaty violations evidently formed the predicate for the substantive interdictory relief granted. Can it be said that the Court would have still granted the structural interdict absent a statutory breach? In other words, if there were only breaches of international treaty obligations, and no concomitant violation of domestic legislation, would the Court still have ordered various steps to be taken to ensure compliance with international obligations only? That is not clear. But, on the other hand, nothing in the judgment would suggest this would have been incompetent.

[167] As the Court records at para 81, '[t]he Commission submits that the Republic is a signatory to several international agreements which have been ratified or approved by Parliament. Amongst these are the following agreements that are relevant to the present dispute and are binding on the municipality as an organ of state: the African Charter on Human and People's Rights (1981); the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, and the International Covenant on Economic, d Social and Cultural Rights.' The Court then went on briefly to record certain relevant provisions of these treaties: *SAHRC v Msunduzi Local Municipality* (note 165 above) at paras 82–84.

[168] *SAHRC v Msunduzi Local Municipality* (note 165 above) at para 98.

[169] Ibid (emphasis added).

[170] As discussed in the text at note 96 above.

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

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

However, the approach taken by *SAHRC v Msunduzi Local Municipality* has not been generally replicated in other recent High Court decisions. In particular, one sees a very different approach being taken by the Western Cape division of the High Court in *Bosch Home Appliances v ITAC*,[173] which was also decided in 2021. The case involved a judicial challenge to the imposition by the South African authorities (the International Trade Administration Commission (ITAC), the Minister of Trade and Industry, and the Minister of Finance)[174] of a customs duty (a trade tariff) on certain appliances. As part of its argument, the applicant submitted that in assessing whether the decision was lawful or ought to be reviewed, the relevant standard was imposed by South Africa's treaty obligations under article X of the General Agreement on Tariffs and Trade (GATT),[175] in particular, the 'principles of reasonableness, uniformity, and impartiality'. However, the High Court rejected this argument, instead accepting ITAC's argument that South Africa tended towards a 'dualist' approach,[176] such that international treaties have no application domestically unless they have been incorporated by domestic legislation (with unincorporated international treaties merely being used as the basis to interpret domestic legislation – as provided by Section 233 of the Constitution).[177] The Court, therefore, held that the 'reasonableness' standard in GATT could not be directly relied upon to create an obligation on ITAC, nor could the relevant domestic legislation be interpreted to incorporate such an obligation. This conclusion appears to be in direct conflict with the Constitutional Court's determination in *Law Society*,[178] which bound the High Court. No mention is made of *Law Society*. Therefore, it appears that when the High Court reached its conclusion on the applicability of unincorporated treaties, it was either unaware of the approach taken by the Constitutional Court in *Law Society*,[179] or ignored or misunderstood it.

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

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

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

[176] *Bosch v ITAC* (note 173 above) at para 92.

[177] Ibid at paras 92–94.

[178] As discussed in part III-C-1.

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

B The Constitutional Court's approach since the *Law Society* decision

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

1 Sonke – *Two steps forward, one step back?*

A year after the *Law Society* decision, the Constitutional Court delivered judgment in the *Sonke*[180] matter. From the discussion below, it will be clear that *Sonke*[181] sits in the *Glenister II* vein of cases, but does not in truth embrace the new world betokened by *Law Society*. *Sonke* involved a challenge to the constitutionality of sections of legislation in respect of correctional centres (ie prisons).[182] These sections were challenged on the basis that they failed to provide for an adequate level of independence for the Judicial Inspectorate of Correctional Services (a statutory body tasked with inspecting and monitoring correctional centres in South Africa). The Court held that flowing directly from an interpretation of the rights in the Bill of Rights there was a duty on the state, in the legislation, to ensure that the statutory body tasked with inspecting and monitoring correctional centres in South Africa was adequately independent. The Court, therefore, emphasised that it was not necessary to have regard to international law in order to find that the legislation was unconstitutional. However, the Court nevertheless considered South Africa's treaty obligations as part of its interpretative exercise, as required by Section 39(1)(b) of the Constitution.

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

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

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

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

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

Effectively the Court was affirming that treaties that bind South Africa on the international plane are relevant to determining the obligations on the state to fulfil rights in the domestic sphere as required by Section 7(2). The effect of this was to 'appropriate' international treaty obligations on the state and give them domestic constitutional force, at least as the standard against which to assess whether the state has complied with Section 7(2). As in *Glenister II*, through the lens of Section 7(2), the Court in *Sonke* accepts that treaties binding on South Africa on the international plane set the standard against which to judge whether there has been compliance with the obligations to fulfil rights in the Bill of Rights and failure to comply with those treaty obligations will generally lead to a violation of Section 7(2). Thus, the Court held that '[t]he Convention and the Optional Protocol, read with the Paris Principles, demonstrate the *measures that must be in place and the level of protection that must be afforded in order for the State to discharge its obligations under Section 7(2)* of the Constitution in respect of the conglomerate of implicated rights of inmates.' [192] Indeed, as noted above, the Court explains, relying on *Glenister II*, that 'this duty does not only exist in international law ... "the

[187] Ibid at para 67 and the footnote to this paragraph (para 67 fn 168).

[188] It refers to *Glenister II* (note 10 above) at para 182.

[189] *Sonke* (note 80 above) at para 67 (emphasis added).

[190] Ibid at para 67 fn 168.

[191] Ibid at para 69 (emphasis added), quoting from *Glenister II* (note 10 above) at para 189.

[192] Ibid at para 68 (emphasis added): 'The Convention and the Optional Protocol, read with the Paris Principles, demonstrate the measures that must be in place and the level of protection that must be afforded in order for the State to discharge its obligations under Section 7(2) of the Constitution in respect of the conglomerate of implicated rights of inmates.'

Constitution appropriates the obligation for itself".'[193] This strong affirmation appears to confirm that the *Glenister II* line of reasoning, as relied on in *Sonke*, may ultimately conduce to the same substantive position reached by the Court in *Law Society* in matters where rights in the Bill of Rights are implicated, albeit by a slightly less direct route. In other words, in substance, even if not form, non-compliance with international obligations in unincorporated treaties, at least in so far as non-compliance has an effect on the realisation of rights in the Bill of Rights, will be unconstitutional and unlawful.

Given that the Court in *Sonke* accepted and applied the *Glenister II* approach, which it considered as establishing a 'clear precedent',[194] what should be made of the fact that the *Law Society* approach which elucidates further constitutional hooks was also available, and, therefore, if applicable was also an available precedent that should have been relied on?[195] To answer this question, it is necessary to consider whether there is any substantive difference between the approach in *Glenister II* (as applied in *Sonke*) and *Law Society*. It appears that one can discern two distinguishing features of substance. First, at least hypothetically, the Section 7(2) route, in theory, leaves the possibility open that the government could argue that, notwithstanding failing to ensure compliance with treaty obligations, the government has nevertheless taken reasonable steps to protect, prompt and fulfil the rights in the Bill of Rights (although in neither *Glenister II* nor *Sonke* does the Court suggest that such an argument is, in fact, open to the government).[196] Second, the three constitutional hooks discussed above that were used in *Law Society* would, in principle, appear to make non-compliance with unincorporated treaties unconstitutional and unlawful regardless of whether that non-compliance had any implications for the state's fulfilment of rights in the Bill of Rights.[197] The *Glenister II* approach (the Section 7(2) route) would require the failure to have some impact on the realisation or enjoyment of a right in the Bill of Rights.

Whether these two possible distinguishing features would, in practice, make a difference will depend on the nature of the matter. In *Sonke*, it appears that embracing the constitutional hooks utilised in *Law Society* would not have made a difference because rights in the Bill of Rights were clearly implicated, and the Court therefore understood the effect of *Glenister II* to mean that the binding treaties, approved by Parliament, created, via Section 7(2), a binding domestic obligation on the state.[198] This may explain why the Court did not refer to *Law Society* – it was unnecessary. Moreover, it is worth emphasising that the Court in *Law Society*

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

[194] Ibid at para 56.

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

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

[197] As discussed in text at notes 101 to 104 above.

[198] *Sonke* (note 80 above) at paras 68 and 69.

did not view its decision as conflicting with *Glenister II*.[199] In *Law Society*, the Court offered further routes (the three constitutional hooks) to the same endpoint as *Glenister II*, rather than in any way suggesting that the *Glenister II* Section 7(2) route was impermissible or undesirable. It intended to build on *Glenister II*. That being so, the Court in *Sonke* was entitled to adopt the *Glenister II* (Section 7(2)) approach, given that there was no specific need to adopt any of the additional constitutional hooks used in *Law Society*. The Section 7(2) route was sufficient, and the further routes (or hooks) suggested by *Law Society* would not have changed the outcome of the case. Viewed in this light, it may be less unusual that the Court did not appear to have regard to or consider the implication of *Law Society* at all.

Therefore, in the final analysis, the Court's reliance in *Sonke* on Section 7(2), as it did in *Glenister II*, as the basis to find international obligations must be complied with, when respecting and fulfilling rights in the Bill of Rights, is not an incorrect jurisprudential move. And it appears that in *Sonke* little more was needed. But this does not detract from the fact that the Constitution has multiple avenues in which international law can and must be integrated. Much like *Glenister II* before it, the *Law Society* case illustrated further avenues. In some cases, certain avenues may have more salience, but this does not suggest a rejection of other avenues, where they might find ready application in other cases. For this reason, even though it would not have led to a different outcome in *Sonke*, the Court's approach in other cases may make a difference.[200] It is, therefore, necessary for the Court either to embrace the *Law Society*'s jurisprudential approach to international law obligations in unincorporated treaties or, if it believes that this approach is inappropriate or wrong, to explain why. I return to this in part V-A.

2 Zuma – *from revolution to devolution?*

A year after the *Sonke* decision, the Constitutional Court gave judgment in the *Zuma III* matter.[201] *Zuma III* is one of the recent examples of the Constitutional Court's meaningful engagement with the application of unincorporated treaties. *Zuma III* involved an application by former President Zuma (Mr Zuma) to rescind a judgment of the Constitutional Court. In that earlier judgment (*Zuma II*),[202] which Mr Zuma sought to have rescinded, the Court found Mr Zuma in contempt of court, and ordered his imprisonment for a 15-month term, for refusing to comply with an order of the Constitutional Court (in *Zuma I*)[203] requiring

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

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

[201] *Zuma III* (note 11 above).

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

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

him to give evidence before the State Capture Inquiry.[204] In *Zuma III*, by way of majority judgment, the Court dismissed Mr Zuma's rescission application because he failed to meet the stringent test that would allow a court to rescind its own final and binding judgment.[205] The relevant unincorporated treaty at issue was the International Covenant on Civil and Political Rights (ICCPR). The Court had sought further submissions from the parties in relation to aspects of the ICCPR's fair trial right provisions, and the Human Rights Committee's (HRC's) interpretation of those.[206] The question was whether the Court, in ordering Mr Zuma's imprisonment, had violated his fair trial rights in the Bill of Rights and whether the Court had failed to interpret those rights with due regard to the ICCPR, notwithstanding the interpretative obligations to consider international law in Section 39(1)(b) of the Constitution.[207] The important feature of the case for present purposes is the Court's emphatic statements about the place of treaties in South Africa.

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

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

There are several difficulties with this statement. First, generally, international law has nothing to say about how it is received into domestic law.[209] Thus, presumably, the Court meant to

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

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

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

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

[208] *Zuma III* (note 11 above) at para 108 (emphasis added).

[209] Generally it is for each state's own domestic constitutional law to determine how international law takes effect domestically, although specific treaties may require state parties to domesticate the treaty or certain obligations under it. In principle, international law is concerned with compliance with international obligations, not

say that the principle that 'international treaties must be incorporated into a State's body of domestic law by way of an implementing provision enacted by that State's Legislature' is a 'cardinal tenet' not of 'international law', but domestic constitutional law's treatment of international law in 'dualist' states.

Second, and more importantly, it is striking that the Court would make an emphatic statement that seemed to expressly categorise South Africa as a dualist state when it comes to treaties. The Court in appearing to apply this label to South Africa had no regard to the fact that 'dualism' and 'monism', while potentially useful shorthand labels,[210] are, as we have observed, not strict or binary alternatives. Most countries find themselves somewhere on a spectrum given their own unique domestic constitutional arrangements.[211] For it is those constitutional arrangements in each state that determine how international obligations find domestic application,[212] not any *a priori* label. It is as if the Constitutional Court went back to the world of *Azapo* (and South Africa's pre-constitutional era, which followed a similar 'dualist' approach to that adopted by the UK and other commonwealth countries[213]) and simply skipped over 25 years of its own incremental interpretation of the Constitution and its international-law harmonising jurisprudence.[214] Indeed, this 'dualist' moniker – used for the first time by the Constitutional Court in *Zuma III*[215] – would appear to be an emphatic

the domestic means or modalities. As Tzanakopoulos ILA Final Report (note 68 above) at para 20 notes, international law is 'quite indifferent to any variations in its reception by domestic law'. Rather, as Crawford notes, 'domestic or national law dictates the terms on which international law "comes in" to domestic law' (Crawford *Chance, Order, Change* (note 12 above) at para 272). See also J Crawford 'International Law in the House of Lords and the High Court of Australia 1996–2008: A Comparison' in E Shirlow, I Saunders & DR Rothwell (eds) *The Australian Year Book of International Law* (2009) 28 ('international law does not in general address the secondary rules of national law; it imposes obligations of result, not of means').

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

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

[212] Crawford *Chance, Order, Change* (note 12 above) at para 272.

[213] Sloss (note 211 above) at 358–360 ('Almost all the British Commonwealth States follow the dualist approach for treaties' at 358); and Aust (note 70 above) at 194–195. See too *Moohan & Another v Lord Advocate* [2015] 2 All ER 361 paras 29, 30 and 38 (where the appellants' argument that 'the Scottish Parliament lacks the competence to legislate in breach of art 25 of the ICCPR' was rejected by UK Supreme Court, given the 'dualist approach' of UK law, which meant that unincorporated treaties do not create domestic rights, nor do international obligations flowing from unincorporated treaties form part of domestic law). The UK Supreme Court has similarly affirmed that the 'dualist system is a necessary corollary of Parliamentary sovereignty' in *R (on the application of Miller & Another) v Secretary of State for Exiting the European Union* [2017] 1 All ER 593 para 57.

[214] As seen, *inter alia*, in *Glenister II* (note 10 above), *Law Society* (note 7 above), and *Sonke* (note 180 above).

[215] There is no reported Constitutional Court decision, other than *Zuma III* (note 11 above), where the Court has ever referred to South Africa's legal system as being dualist. And even in lower court decisions, there is almost no reference to South African law being 'dualist' or taking a 'dualist' approach. Indeed, other than in *Zuma III*, the Western Cape High Court decision of *Commissioner, South African Revenue Service v Van Kets* [2011] ZAWCHC 435, 2012 (3) SA 399 (WCC) appears to be the only reported case where a South African court itself uses the term to refer to South African law's approach to international law (see para 14). And in one other case the High Court simply refers to submissions made to it by one of the parties (where that party submitted

rejection of the view taken by Justice Cameron as to the effect of the *Glenister II* decision (not to mention its acceptance in numerous subsequent cases, including *Law Society* and *Sonke*).

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

that South Africa's system is dualist), rather than embracing that description of South African law itself. See *Women's Legal Centre Trust v President of the Republic of South Africa & Others* [2018] ZAWCHC 109, 2018 (6) SA 598 (WCC) ('*Women's Legal Centre HC*') at para 92. See also *Bosch v ITAC* (note 173 above) at para 92, where, as indicated above, the High Court accepted ITAC's argument that South Africa tended towards a 'dualist' approach.

[216] Considered in parts III-B, III-C and IV-B-1.

[217] *Zuma III* (note 11 above) at para 109.

[218] The Court's statement that the truth (or position) 'ossifies' is a strange turn of phrase. It is probably employed figuratively to mean the position had become clear or solidified. But ossify has a different shade of meaning, which is far more pejorative when it is used figuratively. While not intended, it appears the position adopted by the Court was indeed indicative of ossification (as defined by the Oxford Dictionary). The Shorter Oxford Dictionary (2007) defines ossify as:

1. Turn into bone or bony tissue. e18.
2. fig. (Cause to) become emotionally hardened or callous; (cause to) become rigid or fixed in attitude etc. Now chiefly as ossified.

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

[220] As discussed in part III-C-2.

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

Moreover, it certainly must be the case that litigants are indeed entitled, under our Constitution, to invoke binding treaties before the Constitutional Court, irrespective of whether they are domestically incorporated or unincorporated. This much is made plain by Section 39(1)(b) (international law *must* be considered when interpreting rights in the Bill of Rights) and Section 233 (legislation must be interpreted to accord with international law where reasonably possible).[222] Now, in *Zuma III*, as the majority found, the obligation in Section 39(1)(b) 'to consider' international law when interpreting rights in the Bill of Rights, does not expressly require that an interpretation in conformity with international law must be adopted. Nevertheless, where the 'international law' in question is a binding unincorporated treaty, approved by Parliament (as the ICCPR is), the question is why the Court would wish to adopt an interpretation of any right in the Bill of Rights in conflict with South Africa's international treaty obligations, where a reasonable interpretation in conformity with those obligations is possible. Indeed, the Court has repeatedly indicated that where the international law in question is a binding treaty obligation, more weight ought to be given to it in the interpretative exercise.[223] And it is evident that, where possible, the Constitution intends harmony between South Africa's domestic law (including the Constitution) and South Africa's international law obligations.[224] As the Constitutional Court affirmed in *National Commissioner v SALC* (the 'Torture docket decision'), quoting, with approval, Ngcobo CJ's minority judgment in *Glenister II*, '[t]he Constitution reveals a clear determination to ensure that *the Constitution* and South African law are *interpreted to comply with international law*'.[225] In principle, it would be permissible for the Court to find that it is not reasonably possible to interpret a right in the Bill of Rights in a manner that accords with a binding treaty (although the executive and the legislature should not seek to make South Africa party to treaties that are in conflict with the Constitution).[226] But where it is possible to achieve harmony between the Constitution and international treaty obligations, that would undoubtedly be the more appropriate jurisprudential approach.[227]

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

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

[224] Coutsoudis & Du Plessis CCR (note 15 above) at 171–172.

[225] *National Commissioner* (note 21 above) at para 22 (emphasis added), quoting *Glenister II* (note 10 above) at para 97 (the majority did not disagree with this view, rather the S 7(2) approach taken by the majority is clearly predicated on the acceptance that the Bill of Rights should be interpreted to accord with international treaties). See also *De Vos NO & Others v Minister of Justice and Constitutional Development & Others* [2015] ZACC 21, 2015 (9) BCLR 1026 (CC) at para 29 ('Section 39(1)(b) requires courts to interpret the Bill of Rights and our law in a way that complies with international law').

[226] *Prince* (note 63 above) at para 82 ('The Constitution is the supreme law of the Republic and, in entering into international agreements, South Africa must ensure that its obligations in terms of those agreements are not in breach of its constitutional obligations'), and discussion in Coutsoudis & Du Plessis (note 15 above) at 167–170.

[227] This is evidently the approach adopted by the Constitutional Court in *Fick* (note 23 above) at para 62 (it held that it must interpret S 34 of the Constitution, and therefore develop the common law, to give effect to the

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

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

However, when the Court then discussed the approach to the ICCPR, it appeared to make no attempt to apply its own jurisprudence. In particular, it pays no heed to the determination in *Sonke*, relying on *Glenister II*, that 'this Court has made it clear that, once an international instrument has been ratified and approved in accordance with Section 231(2) of the Constitution, it is deemed to be of "the foremost interpretative significance" and "has significant impact in delineating the State's obligations in protecting and fulfilling the rights in the Bill of Rights".'[231] In summary, it is evident that the Court simply had insufficient regard to its previous jurisprudence, which while it referred to it with apparent approval, it, in practice, absent any explanation, seemed to disregard. This is inappropriate: the Court has affirmed that 'it "must not easily and without coherent and compelling reason deviate from its own previous decisions, or be seen to have done so".'[232] It is inconsistent with the requirement of legal precedent, founded on the rule of law. As the Court itself has cautioned,

> without precedent, certainty, predictability and coherence would dissipate. The courts would operate without map or navigation, vulnerable to whim and fancy. Law would not rule.[233]

Finally, while the Court did not completely ignore the fact that Section 231(4) made provision for self-executing provisions of treaties to become part of South African law absent legislation,

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SADC Treaty provisions requiring domestic enforcements of SADC Tribunal decisions).

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

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

[230] *Sonke* (note 80 above) at para 56 (emphasis added).

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

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

[233] *Ruta* (note 195 above) at para 21.

the Court simply stated that the ICCPR provisions are not self-executing.[234] It did not consider why this was so, and it relied on no authority for this proposition. Moreover, had it had regard to scholarly writing on the topic, it would have noted that some South African academics have argued that the provisions of the ICCPR and other human rights treaties that have been approved by Parliament ought to be viewed as self-executing.[235] Of course, different foreign courts, shaped by their own constitutional regimes, past judicial practice, and the approach to the application of international treaties in their domestic spheres, have reached divergent conclusions as to whether and the extent to which the ICCPR's provisions are 'self-executing'.[236] Thus, *Zuma III* represents yet another missed opportunity for the Court to properly grapple with and develop an autochthonous South African jurisprudence as to when treaty provisions will be considered self-executing. This was a methodological failure by the Court.[237] By simply stating that the ICCPR was not self-executing, it did not consider whether the specific provisions relevant to the issues before it (articles 9 and 14(5)) met the requirements for being self-executing provisions for the purposes of Section 231(4). More concerningly, it made its finding without even attempting to formulate any requirements or test to determine whether or not a provision is self-executing. In other words, the Court stated a conclusion (the ICCPR's provisions are not self-executing), without even indicating what standard it was assessing the ICCPR and its provisions against, in order to determine whether they were self-executing.

In summary, in multiple respects, in *Zuma III*, the Court fails to heed 'the manifest constitutional injunction to integrate, in a way the Constitution permits, international law

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

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

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

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

obligations into our domestic law'.[238] In part IV-B-3-aa, I reflect on the unique context in which *Zuma III* was decided and how this context may explain this failure and why *Zuma III* is unlikely to be followed in subsequent cases.

3 *Where next for the Constitutional Court?*

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

aa How has *Zuma III* fared?

It is perhaps best to begin by assessing the possible jurisprudential legacy of the *Zuma III* decision. In doing so, it is necessary to start with a contextual observation. It will be recalled that in *Zuma II*, the Court, by majority decision, ordered the imprisonment of former President Zuma for 15 months for contempt of court. It found that it was compelled to do so given the flagrant contempt of court by the former President of South Africa who had made clear that he refused to accept the Court's authority and orders (refusing, despite the Court's order, to give evidence before the State Capture Inquiry)[239] and because this posed a genuine threat to the rule of law and the administration of justice.[240] Therefore, *Zuma III* – where Mr Zuma sought to have the Court urgently rescind its own final imprisonment judgment and order[241] – was a most unusual case that placed the Court in the eye of a political, legal and violent societal storm.[242] Given that context, one might tentatively observe that it appears evident that the Court's majority was intent on downplaying the significance of the ICCPR obligations and the HRC's interpretation of those (which the Court in any event briefly sought to distinguish),[243] to see off an accusation by the Court's minority which argued that (a) the Court's ordering of the imprisonment of Mr Zuma for contempt of court was itself unconstitutional and in violation of Mr Zuma's rights, and (b) the majority had impermissibly

[238] *Glenister II* (note 10 above) at 202.

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

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

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

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

[243] *Zuma III* (note 11 above) at para 121 fn 105. The Court also pointed out that the decisions of the HRC relied on by the minority are not binding (para 12 fn 106).

failed to have regard to international law when interpreting the Bill of Rights (even though in *Zuma II* none of the parties had raised the ICCPR,[244] nor had the dissenting judges).[245] Thus, it may have been opportune for the Court to adopt this approach of minimising the domestic significance of South Africa's ICCPR obligations to protect the actual or perceived legitimacy and validity of its decision and, ultimately, its own institutional legitimacy, given the case's unique circumstances.

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

In 2022, the Constitutional Court handed down decisions in *AmaBhungane Centre*,[248] *Centre for Child Law*,[249] *Women's Legal Centre Trust*,[250] *Blind SA*[251] and *Rafoneke*[252] where at

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

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

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

[247] There relevant principles flowing from that constitutional scheme are discussed in part V.

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

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

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

[251] In *Blind SA v Minister of Trade, Industry and Competition & Others* [2022] ZACC 33, 2023 (2) BCLR 117 (CC) ('*Blind SA*') the focus was predominately on a consideration of a treaty that South Africa had signed but not ratified (the Marrakesh Treaty), which the Court had regard to when crafting an interim remedy, while Parliament was given time to amend legislation that had been found to be unconstitutional given the violation of various rights in the Bill of Rights. For a detailed consideration of the judgment, see CB Ncube & S Samtani 'Copyright, Disability Rights, and the Constitution: *Blind SA v Minister for Trade, Industry and Competition*' (2023) 13 *Constitutional Court Review* 471, available at https://doi.org/10.2989/CCR.2023.0016.

[252] In *Rafoneke & Others v Minister of Justice and Correctional Services & Others (Makombe Intervening*) [2022] ZACC 29, 2022 (6) SA 27 (CC) ('*Rafoneke*'), there was no direct engagement with treaties, and it was not the predicate for the decision, rather the Court merely mentioned as background, and as a counterpoint, the

least certain parties sought to persuade the Court to have regard to unincorporated binding treaties in determining and interpreting the domestic obligations on the government or in crafting remedies. The first important point that can be drawn from these decisions is that in none of them did the Court refer to *Zuma III* or the type of approach adopted in *Zuma III*. Importantly, in *Centre for Child Law*, the Constitutional Court (without referencing *Zuma III*) appears directly to reject *Zuma III*'s approach to the interpretative application of unincorporated treaties. *Centre for Child Law* dealt with the use of international law when interpreting the Bill of Rights (as required by Section 39(1)(b)). In doing so, the Court took a markedly different approach to that articulated in *Zuma III*.[253] In *Centre for Child Law*, the Court was required to determine whether a provision in national legislation[254] was unconstitutional because it criminalised the use or possession of cannabis by a child. Central to this determination was the Constitution's protection of the rights of children and the requirement that their best interests be treated 'as of paramount importance in all matters affecting' them.[255] Within this context, the Court had regard to how unincorporated treaties to which South Africa was party dealt with the best interests of the child principle.[256] For our purposes, what is significant is that when dealing with the requirement to consider international law when interpreting the Bill of Rights (Section 39(1)(b)), the Court did *not* refer to *Zuma III* and the assertion in that case that international law (including binding treaties) ought only to be considered not preferred in the interpretative exercise (given the difference in language between Section 233 and Section 39(1)(b)).[257] Rather, in *Centre for Child Law*, the Court referred with approval to its determination in *New Nation* (decided a year before *Zuma III*) that 'when interpreting the Bill of Rights, "[a]n interpretation that is consonant with international law should be *preferred* over the one that is not".'[258] This squarely contradicts what was said in *Zuma III* (the ICCPR 'must be considered, *not* necessarily preferred').[259] The Court's approach in *New Nation* was also consistent with the view expressed by the Court in *National Coalition* that '[t]he Constitution reveals a clear

obligations of South Africa in terms of the General Agreement on Trade in Services (para 85). In addition, one of the *amici curiae* made submissions that the International Covenant on Economic, Social and Cultural Rights (ICESCR), ICCPR, and the African Charter on Human and Peoples' Rights all impose a duty on states parties to ensure that all people, irrespective of citizenship or whether their status is documented under domestic law or not, enjoy the right to work (paras 66 and 67). But the Court, in its judgment, does not engage with these submissions or seek to interpret either the relevant provisions of the Constitution, or the legislation at issue, in light of these obligations.

[253] *Centre for Child Law* (note 249 above).

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

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

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

[257] *Zuma III* (note 11 above) at para 118.

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

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

determination to ensure that *the Constitution* and South African law are *interpreted to comply with international law.*'[260] The majority in *Zuma III* ignored (but did not seek to overturn or distinguish) those earlier decisions. Now, in *Centre for Child Law*, the Court ignored *Zuma III* and confirmed its earlier (international law embracing and harmonising) jurisprudence.

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

bb How have *Glenister II* and *Law Society* fared?

If *AmaBhungane Centre*, *Centre for Child* Law, *Women's Legal Centre Trust*, *Blind SA* and *Rafoneke* provide an initial indication that *Zuma III* is likely to be viewed as an aberration, what do those decisions tell us, if anything, about the *Glenister II* and *Law Society* lines of authority? First, in none of the decisions did the Court seek to rely on any of the further incorporative constitutional hooks developed in *Law Society* (although none of those hooks was considered and rejected). Indeed, in none of the decisions is the *Law Society* decision even referred to. Second, in *AmaBhungane Centre* and *Women's Legal Centre Trust*, one sees the Court (or the parties before it) adopting or at least referring to an approach similar to that taken in *Glenister II* (without any reference to *Law Society*).[262] This is not dissimilar to what one saw in *Sonke*. As

[260] *National Commissioner* (note 21 above) at para 22, quoting *Glenister II* (note 10 above) at para 97.

[261] See notes 195 and 228 above.

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

considered in part IV-B-1, it is evident that one ought to be cautious about drawing too much from the *Sonke* decision beyond the fact that the Court accepted and affirmed the incorporative approach in *Glenister II*, via Section 7(2) of the Constitution. The Court does not refer to the *Law Society* decision, nor does anything in its judgment suggest that the further constitutional hooks elucidated in *Law Society* were impermissible. For the reasons already considered, it may be that it was simply unnecessary for the Court to consider other alternative routes, given the nature of the case before it, which, as discussed, bore a striking resemblance to that in *Glenister II*. One can make the same points broadly concerning *AmaBhungane Centre* and *Women's Legal Centre Trust*, which like *Glenister II* involved challenges to legislation (or subordinate legislation).

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

and the unincorporated treaties, since it found that the state had enacted legislation dealing with marriage, and, rather than requiring separate legislation to cater for Muslim marriages, the fault lay with the under-inclusiveness of the existing legislation and its violation of rights in the Bill of Rights (para 82). The Court, when interpreting the relevant rights in the Bill of Rights (equality, dignity, access to courts, and the principle of the best interests of the child), which were breached by the legislation, did *not* expressly refer to any of the treaties (paras 42–63).

[263] *Sonke* (note 80 above) at para 56 ('in *Glenister II*, this Court established clear precedent on the role of international treaties that have been approved by Parliament in determining what "reasonable and effective" steps the State is obliged to take under Section 7(2) in order to respect, protect, promote and fulfil those rights').

V REFLECTIONS FOR NAVIGATING THE ROAD AHEAD

In parts II to IV, I considered the evolving approach of the courts to the application of treaties in South Africa, within the framework of the Constitution, as they have grappled with the Constitution's approach to binding treaties. One sees a general trend towards an approach that gives unincorporated treaties significant domestic effect in respect of the obligations they place on organs of state. However, the approach has at times been inconsistent and has not always been faithfully followed in all subsequent decisions. Moreover, while we have seen a greater exploration of the Constitution's international-law-integrative routes (or hooks), we have seen the strange and persistent neglect of Section 231(4)'s self-executing route. It, therefore, appears that what is required is for the courts in general, and the Constitutional Court in particular, to adopt an approach to the application of unincorporated treaties that gives proper and full effect to the Constitution's integrative scheme. I suggest that, in order to ensure this occurs, four principles should guide the courts' approach to the application of treaties going forward. As I explain below, these principles emerge from and are grounded in the Constitution, its foundational values and international law scheme, and the Constitutional Court's jurisprudence.

First, courts' approach to the application of unincorporated treaties in South African law should be *holistic*, by which I mean that courts should approach the application of treaties with due regard to the whole Constitution. The Constitution does not make international law applicable in a simple or one-dimensional way. Its embrace of international law is nuanced and variegated.[264] How international law finds application in each country's domestic sphere is determined by its own constitutional scheme.[265] South Africa's Constitution, as we have seen, shows, as a product of its history, a particular openness to international law, which is both manifest and diverse. This requires courts to do the hard work of fashioning a South African jurisprudence in relation to the application of treaty obligations that gives appropriate weight to all of the Constitution's incorporative injunctions, not just some. In this way courts show due fealty to 'the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law'.[266] Viewed properly, that is what one sees the Constitutional Court trying, albeit in different ways and not without difficulties, to do in cases such as *Glenister II*, *Law Society* and *Sonke*, and failing adequately to do in *Zuma III*.

Second, the courts should approach the application of unincorporated treaties in a manner that is *harmonising*. It is plain that the constitutional scheme seeks to ensure harmony between South Africa's domestic law and its international law obligations, not conflict.[267] This commitment to harmony should, as far as possible, pervade the courts' approach to the application of treaty obligations. Where possible, the courts should seek to apply unincorporated

[264] As discussed in part III-C-2.

[265] Crawford *Chance, Order, Change* (note 12 above) at para 272; Tzanakopoulos ILA Final Report (note 68 above) at para 19.

[266] *Glenister II* (note 10 above) at 202.

[267] This is evident, inter alia, from the preamble, S 232, S 233, S 39(1)(b) and S 199(5) of the Constitution: see discussion in Coutsoudis & Du Plessis CCR (note 15 above) at 171–172. See also *Glenister II* (note 10 above) at para 201 (the Court referred to the need to 'respect the careful way in which the Constitution itself creates concordance and unity between the Republic's external obligations under international law, and their domestic legal impact'), quoted with approval in *National Commissioner* (note 21 above) at para 23 fn 15.

treaties in ways that facilitate harmony between South African law and international law and the obligations they both place upon the state.

Third, the courts must approach the application of unincorporated treaties in a manner that ensures *certainty*. The need for certainty flows from the rule of law (a foundational principle of the Constitution).[268] Legal certainty, which is promoted, inter alia, by respect for legal precedent, is necessary. Without it, not only courts, but also organs of state and litigants, 'would operate without map or navigation, vulnerable to whim and fancy'.[269] To avoid this, what is therefore required is a clearly articulated and consistently applied approach to the application of treaties in different circumstances.

Fourth, the courts' approach to the application of unincorporated treaties, within the framework of the Constitution, must be *rigorous*. In other words, the courts must be methodologically rigorous in ensuring that when unincorporated treaties are applicable within the framework of the Constitution, they are applied and applied properly. This is a constitutional obligation because Section 165(2) of the Constitution expressly provides that courts are 'subject only to the Constitution and the law, *which they must apply* impartially and without fear, favour or prejudice'.[270] Whatever its normative desirability, the Constitution, in various ways, embraces and makes applicable treaties binding on South Africa. At times this will demand of courts that they do not ignore relevant treaties when interpreting the Constitution or legislation. At other times, it will require courts to consider whether the state is improperly exercising public power in a manner that causes South Africa to violate its treaty obligations.[271] Thus, South African courts cannot avoid applying unincorporated treaties – in many circumstances, they are part of the law, which the courts 'must apply'. So what is required is a thorough, detailed and systematic methodology for the application of unincorporated treaties binding on South Africa within the range of what is necessary and legally appropriate, given South Africa's constitutional framework. Only in this way can courts properly fulfil their duty to apply treaty law when the Constitution requires it.

Against the background of where we have come in over two and half decades of constitutionally ordained application of unincorporated treaties in South African law, the four principles that I have articulated, which should guide the approach to treaty application, lead to a series of proposals for navigating the road ahead.

A Grappling with the further constitutional hooks suggested in *Law Society*

An approach to the application of unincorporated treaties that is holistic, harmonising, certain and rigorous requires the Constitutional Court to re-engage with the further constitutional hooks identified in *Law Society*. In other words, at least, in an appropriate case, the Court needs to reflect on *Law Society* and clarify the reach, extent and applicability of its constitutional hooks. Not only would this show proper fealty to all of the Constitution's integrative provisions (be holistic), and avoid conflicts between the obligations on the state in domestic law and international law (be harmonising), it is important from a rule of law perspective: ensuring

[268] *Ruta* (note 195 above) at para 21; *Camps Bay Ratepayers* (note 195 above) at para 28; *Bwanya* (note 195 above) at para 46, quoted in note 195 above.

[269] *Ruta* (note 195 above) at para 21 (albeit in reference to the important reason for honouring precedent, from the perspective of the courts).

[270] Emphasis added.

[271] Constitution S 1(c), S 7(2), S 39(1)(b), S 198(c), S 199(5) and S 232.

certainty, predictability and coherence.[272] This would provide greater certainty[273] to lower courts, government officials exercising public power and litigants. If any of the further constitutional hooks enunciated in the *Law Society* matter are to be abandoned, then legal certainty, the rule of law, and the need to adopt a methodically rigorous approach require the Constitutional Court to expressly and with 'coherent and compelling' reasons explain why it was 'clearly wrong' to employ these in *Law Society*.[274] It may be that one or other of the constitutional hooks may be subject to criticism.[275] However, as discussed in part III-C-2, it appears evident that when viewed together, there is a compelling argument,[276] based on the Constitution's provisions and customary international law, which is law in South Africa, that it would be domestically unlawful for the state to conduct itself in a way that causes South Africa to violate its international law obligations (save where such non-compliance was required by the Constitution). This is not in conflict with, but complementary to, the approach in *Glenister II* (where the Court accepted that the state would not fulfil its obligations to respect, promote and fulfil the rights in the Bill of Rights if it failed to ensure that South Africa's treaty obligations were complied with).[277]

B Embracing Section 231(4)'s domestication of self-executing treaty provisions

It is striking that the Constitutional Court has been willing to use various constitutional hooks to give unincorporated treaties some domestic effect in relation to the obligations they placed on the government, while at the same time failing to consider the applicability of one of the Constitution's most explicit integrative provisions: Section 231(4), which makes 'self-execution provisions' of treaties, approved by Parliament, automatically part of domestic law absent conflict with the Constitution or national legislation.[278] Therefore, in keeping with an approach that is guided by the need to be holistic, harmonising, certain and rigorous, it is past time for the Constitutional Court, as the guardian of the Constitution and at its apex interpreter,[279] to develop a meaningful jurisprudence around how Section 231(4) of the Constitution gives domestic effect to 'self-executing' provisions of unincorporated treaties. This express incorporative feature of South Africa's binding constitutional framework ought no longer to be overlooked. Every country's courts, in principle, need to develop their own jurisprudence as to when treaty provisions will be considered self-executing within their own domestic legal framework.[280] Thus, while there is enduring ambiguity concerning when treaty

[272] *Barnard* (note 228 above) at para 34; *Bwanya* (note 195 above) at para 46.

[273] As the Constitutional Court has observed, 'uncertainty and unpredictability' are 'at variance with the rule of law, a linchpin of the Constitution': *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg & Others v Minister of Police & Others* [2021] ZACC 37, 2022 (1) BCLR 46 (CC) at para 118. See also *Ruta* (note 195 above) at para 21.

[274] *Ruta* (note 195 above) at para 21; *Camps Bay Ratepayers* (note 195 above) at para 28; *Bwanya* (note 195 above) at para 46.

[275] As discussed in part III-C-2.

[276] As discussed in part III-C-2.

[277] As discussed in note 84 above and part III-C-2-dd.

[278] Samtani (note 19 above) at 213–216, and discussion above in part III-C-2.

[279] *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* [1999] ZACC 9, 1999 (4) SA 147 (CC) at para 72; *Doctors for Life International v Speaker of the National Assembly & Others* [2006] ZACC 11, 2006 (6) SA 416 (CC) para 38; *Pharmaceutical Manufacturers* (note 94 above) at para 55.

[280] A Evans 'Self-executing Treaties in the United States of America' (1953) 30 *British Yearbook of International Law* 178, 193 ('The definition of self-executing treaties, which is essentially a problem of the enforcement of treaties,

provisions will be 'self-executing' for the purposes of Section 231(4), it is precisely because of this ambiguity that it is incumbent on courts to develop some type of framework for making use of this provision. Usually, an open-textured constitutional provision has invited judicial clarification and content-giving, not forestalled it. What the courts should not do is adopt the approach taken in *Zuma III*: simply declare treaty provisions to be non-self-executing without explanation.[281] To do so is neither appropriately rigorous nor does it lead to certainty. More concerningly, it undermines the harmonising and the holistic (whole-Constitution) approach that the Constitution requires (disregarding a signal international-law-integrating provision).

C Avoiding conflicts between domestic and international obligations

As an incidence of the harmonising approach, and an outworking of the need for a holistic, certain and rigorous embrace of international law, courts should seek to avoid conflicts between domestic and international obligations. This means that, as in *Centre for Child Law*, the courts should favour reasonable interpretations of the Constitution that are consistent with South Africa's treaty obligations, over interpretations that cause South Africa to be in violation of its obligations. Of course, interpretation has limits, and if a constitutional provision or legislation cannot be reasonably construed in accordance with South Africa's treaty obligations, then the Constitution makes clear that, in the case of conflict, the Constitution takes precedence.[282] But such conflicts ought to be rare, and should be minimised if the courts show proper fidelity to the Constitution. For instance, it would be inconsistent with the Constitution for the government and Parliament to seek to bind South Africa to a treaty that violates or is inconsistent with the Constitution.[283] Avoiding conflict also appears to require the courts to ensure, through the constitutional hooks or routes in *Glenister II*, *Sonke* and *Law Society*, that the exercise of public power by organs of state should not cause South Africa to violate its treaty obligations.[284]

However, as I discuss in the next section, avoiding conflict between the Constitution and treaty obligations requires more than merely properly interpreting the Constitution. It also requires properly interpreting the relevant unincorporated treaties. At times the Constitutional Court has too quickly asserted the primacy of the Constitution, over any *prima facie* inconsistent treaty obligations, without first carefully considering what the precise scope of those treaty obligations are, and whether, in truth, they mandate anything inconsistent with the Constitution.[285]

is a matter to be determined by the municipal law of a given state, interpreted with due consideration of the constitutional history of the State, the organisation of its government, and, indeed, of the political currents of a given period').

[281] As discussed in part IV-B-2.

[282] Constitution Ss 232, 231(4) and 233. See also discussion in Coutsoudis & Du Plessis CCR (note 15 above) at 170–171.

[283] *Prince* (note 63 above) at para 82.

[284] As Cameron (note 54 above) at 409 powerfully opines, 'there should be no cover from properly undertaken international law obligations in the thicket of domestic law. There should be consonance, not dissonance, between what governments say and do internationally and what they say and do domestically. Our role as lawyers, and our duty, is to reduce the gap where it exists.'

[285] See Coutsoudis & Du Plessis CCR (note 15 above) at 167–168, discussing the shortcomings of the Constitutional Court's approach in *Minister of Justice and Constitutional Development & Others v Prince (Clarke & Others intervening)* [2018] ZACC 30, 2018 (6) SA 393 (CC).

D Properly interpreting the unincorporated treaties being applied

In this article, the focus has been on how South African courts apply unincorporated treaties within the framework of the Constitution. However, a holistic, harmonising, certain and rigorous approach to the application of treaties must, as a starting point, ensure that unincorporated treaties are properly interpreted when they are being applied. The reason for this is plain. To apply unincorporated treaties in South Africa's domestic law – whether to use them as interpretative aids (pursuant to Sections 39(1)(b) and 233) or to more directly apply them (whether because their provisions are self-executing, or as the standard against which to judge the state's compliance with Section 7(2), or through one of the constitutional hooks in *Law Society*) – the starting point must be to determine what the unincorporated treaties themselves provide. That requires appropriately interpreting them. Why? Because words are not self-interpreting. In all areas of interpretation, whether of contracts, domestic statutes or international treaties, some hermeneutical process is required to attribute meaning to the words used. Otherwise, a reflexive 'interpretation' may simply mirror the interpreter's (potentially erroneous or biased) intuitions or preferences. Indeed, when interpreting legislation or contracts, the South African courts have developed a rigorous hermeneutical process for attributing meaning to their provisions, for precisely this reason.[286]

Customary international law has developed its own rules for treaty interpretation. These are codified in articles 31 and 32 of the Vienna Convention – 'the Vienna rules'.[287] The Vienna rules (as customary international law) form part of South African law by virtue of Section 232 of the Constitution.[288] The Vienna rules create a broad and flexible framework. This requires a treaty to be 'interpreted in *good faith* in accordance with the *ordinary meaning* to be given to its terms in their *context* and in the light of its *object and purpose*'.[289] Furthermore, any subsequent agreement or practice by the states parties in relation to the interpretation of the treaties and any relevant rules of international law applicable in the relations between the parties must also be taken into account,[290] with recourse also being permissible to supplementary means of interpretation, including (but not limited to) the preparatory work of the treaty (*travaux préparatoires*) and the circumstances of its conclusion.[291] Rather than the application of these rules being a mechanical or tick-box exercise, as the International Law Commission (ILC), in its Draft Conclusions on Subsequent Practice, has emphasised, '[t]he interpretation of a treaty consists of a single combined

[286] For instance, see *University of Johannesburg v Auckland Park Theological Seminary & Another* [2021] ZACC 13 (CC), 2021 (6) SA 1 (CC) at paras 65 and 66; *Chisuse & Others v Director-General, Department of Home Affairs & Another* [2020] ZACC 20, 2020 (6) SA 14 (CC), 2020 (10) BCLR 1173 (CC) at paras 51 and 52; *Natal Joint Municipal Pension Fund v Endumeni* Municipality [2012] ZASCA 13, 2012 (4) SA 593 (SCA) at para 18.

[287] ILC Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries 2018 (A/73/10) in Conclusion 2 provides a useful summary of the Vienna Rules and their application.

[288] *Law Society* (note 7 above) at paras 36–39; *Commissioner SARS v Levi Strauss SA (Pty) Ltd* [2021] ZASCA 32, 2021 (4) SA 76 (SCA) at para 36 fn 16; *Glenister II* (note 21 above) at para 187 fn 43; *Krok & Another v Commissioner, South African Revenue Service* 2015 (6) SA 317 (SCA) at para 27.

[289] Article 31(1) of the Vienna Convention, emphasis added. See, for instance, the application of this in *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, ICJ Reports 2014 at 226, 250–252.

[290] Article 31(3) of the Vienna Convention.

[291] Article 32 of the Vienna Convention.

operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.'[292]

South African courts must apply these rules. As customary international law, they are part of South African law (Section 232), and Section 165(2) of the Constitution expressly provides that courts are 'subject only to the Constitution and the law, which they must apply'. Thus, it is unnecessary to enter into any jurisprudential debate as to whether the use of the Vienna rules necessarily leads to the 'right' interpretation.[293] At the very least, these international law rules of interpretation set the bounds (or framework[294]) of permissible interpretative approaches (they are a relevant and 'distinct international hermeneutical framework').[295] Moreover, the courts and litigants should want to apply them as a 'powerful tool' developed by the international law system to give proper meaning to the provisions of treaties.[296]

Since this article focuses on how unincorporated treaties find application in South African law, no systematic descriptive account is sought to be made of how South African courts approach their interpretation. Nevertheless, it suffices to note that in a number of cases considered in this article, what is striking about the courts' willingness to apply unincorporated treaty obligations in various ways is that it appears to be often coupled with a failure to adopt a rigorous and methodologically sound interpretative approach to those unincorporated treaties.[297] The courts merely ascertain what treaty provisions mean by the most minimal of textual reference (or even by pure assertion, even when at odds with the ordinary meaning of the treaty's provisions).[298] They fail, either expressly or implicitly, to

[292] ILC Draft Conclusions on subsequent agreements and subsequent practice (note 287 above) Conclusion 2.

[293] The issue of the interpretation of treaties has been much debated. In the South African context, see D Tladi 'Interpretation of Treaties in an International Law-Friendly Framework: The Case of South Africa' in HP Aust & G Nolte *The Interpretation of International Law by Domestic Courts* (2016). Recent general discussions include: M Fitzmaurice, O Elias & P Merkouris (eds) *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (2010); Andrea Bianchi, D Peat & M Windsor (eds) *Interpretation in International Law* (2015); and HP Aust, A Rodiles & P Staubach 'Unity or Uniformity?: Domestic Courts and Treaty Interpretation' (2014) 27 *Leiden Journal of International Law* 75. For one example of earlier scholarship, see H Lauterpacht 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 *British Yearbook of International Law* 48.

[294] As Gardiner opines, '[t]hat the structure provided by the Vienna rules "has become the virtually indispensable scaffolding for the reasoning on questions of treaty interpretation", particularly nicely sums up the role of the rules, even if "indispensable" *may be concealing an unhealthily large number of cases where passing reference to the rules has substituted for thorough application*.' R Gardiner *Treaty Interpretation* (2nd Ed, 2015) 495 (emphasis added).

[295] HP Aust, A Rodiles & P Staubach (note 294 above) at 77 (they raise, for the purposes of their analysis, the following question (which is then applied to three particular cases): 'whether domestic courts are aware of the existence of a distinct hermeneutical framework when they decide cases pertaining to questions of international law. In other words: do they acknowledge that international law provides for specific rules of interpretation?').

[296] Crawford *Chance, Order, Change* (note 12 above) at para 190.

[297] For instance, see Coutsoudis & Du Plessis CCR (note 15 above) at 188–194, discussing the shortcomings of the interpretative approach in *Law Society*. See also Tladi (note 161 above). Cf Nyathi & Phooko (note 102 above).

[298] For instance, in part II-D-1, I considered *SAHRC v Msunduzi Local Municipality* (note 75 above). In that case, despite readily accepting that the municipality had violated various unincorporated treaty provisions and declaring such breach in its order (as discussed), its interpretation of those treaties was exceptionally superficial, consisting of little more than the recitation of certain provisions and assertions of violation (see *SAHRC v Msunduzi Local Municipality* (note 75 above) at paras 82–84, read with para 98).

adopt any of the international law tools for the interpretation of treaties.[299] The courts have been criticised for this.[300] Whatever the root cause of this apparent interpretative neglect, this needs to change.

VI CONCLUSION

South Africa's Constitution, as we have seen, shows a particular openness to international law. The Constitution gives international law pride of place. However, the nature of our Constitution's multifaced embrace of international law prevents neat distinctions when it comes to the application of binding treaties. It requires the courts to do the difficult work of developing a methodologically sound and practical jurisprudence for dealing with the application of unincorporated treaties that is consistent with, and has full regard to, the whole Constitution and its integrative scheme.[301] This eschews simplistic classifications of the Constitution's approach to treaties as either 'dualist' or 'monist'. Indeed, in the final analysis, it may be unhelpful to apply these stereotypical labels if it stifles the careful and rigorous analysis of the unique ways in which the Constitution seeks to incorporate international obligations into domestic law. Whatever its normative desirability, the Constitution embraces international law. Thus, courts cannot avoid it. So what is required is a more holistic, harmonising, certain and rigorous approach to the application of treaties binding on South Africa, within the range of what is necessary and legally appropriate, given South Africa's constitutional framework. The Constitution demands nothing less of South Africa's courts.[302] Nor should the international community expect any less from the courts of a country whose Constitution is often heralded as particularly friendly to international law,[303] lest South Africa be found, in practice, to be no more than a fair-weather friend of international law. Within that context, I have made certain proposals for navigating the way ahead that it is hoped may aid in ensuring that the integrative international law injunctions of South Africa's Constitution are fully realised so that it continues to achieve its transformative purpose of a democratic South Africa able to take its rightful place in the family of nations.[304] So that never again may South Africa – founded on the rule of law (in

[299] For instance, see *Law Society* and *Fick*, where, when interpreting the SADC Treaty and 2000 Tribunal Protocol, despite their centrality to those cases, there is no consideration of the proper approach to interpreting treaties, let alone reference to the Vienna rules. See discussions in H Woolaver 'Judicial Enforcement of International Decisions against Foreign States in South Africa: The Case of *Government of the Republic of Zimbabwe v Louis Karel Fick and others*' (2015) 6 *Constitutional Court Review* 217; Tladi (note 161 above); and Coutsoudis & Du Plessis CCR (note 15 above) at 188–194.

[300] Ibid.

[301] *Glenister II* (note 10 above) at para 202.

[302] Constitution S 165 (courts are subject to and must apply the law), read with, inter alia, S 232 (customary international law is law in South Africa), S 233 (legislation must be interpreted to accord with international law), S 39(1)(b) (the courts when interpreting the Bill of Rights, including the obligation in S 7(2) to respect and fulfil those rights, must consider international law), and S 199(5) (the security services must comply with the law, including customary international law and binding international agreements).

[303] See Botha & Olivier (note 113 above) at 42; *Law Society* (note 7 above) at para 4 (international law 'enjoy[s] well-deserved prominence in the architecture of our constitutional order') and *Glenister II* (note 21 above) at paras 201–202.

[304] Constitution preamble.

all its richness) and the advancement of human rights and dedicated to an integrative and open approach to international law – 'suffer the indignity of being the skunk of the world'.[305]

[305] From President Mandela's inaugural address as President of South Africa, available at https://www.sanews.gov.za/south-africa/read-nelson-mandelas-inauguration-speech-president-sa.