

*The Influence of International Law on the Constitutional Jurisprudence of South Africa*  
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The new South African Constitution<sup>1</sup> came into force in 1997 after a lengthy constitution-making process involving widespread domestic and international consultation. Appropriately, given the role played by international law and international institutions in inducing strong international opposition to the apartheid regime, the new Constitution gives international law a prominent role in the domestic law of South Africa. Generally, there are two ways in which international law can influence the content of domestic law. The first is for a rule of international law to become directly enforceable in a domestic jurisdiction, essentially becoming a rule of domestic law albeit originating in the international sphere. The second is for a rule of international law to influence the interpretation of particular rules of domestic law. In keeping with the prominence accorded to international law, both of these methods of influence are provided for in the Final Constitution. In terms of direct application, customary international law and some treaties are made directly enforceable in South African law without the need for transformation by the legislature, while other treaties become directly enforceable once legislative action is taken. Secondly, international law can significantly influence the content of domestic South African law indirectly, through various interpretative obligations imposed on the courts to interpret and develop domestic law compatibly with South Africa's international legal obligations.

It is clear that South African courts have taken this mandate seriously. In a series of judgments stretching back to the earliest decisions under the Interim Constitution of 1993, international law has been widely invoked and relied on by the new South African Constitutional Court as well as the High Courts and the Supreme Court of Appeal. This has continued through to the most recent judgments of the Constitutional Court involving international law. Especially in these latest judgments,<sup>2</sup> South Africa's international legal obligations, and particularly international human rights obligations, have been heavily relied on by the Court with significant implications. Substantial consequences have therefore flowed from the prominent place given to international law in the South African Constitution.

Nonetheless, the application of international has not been without controversy. In particular, the enthusiastic application of international law has led some to argue that the Constitutional Court has, in effect, created new Constitutional rights through inappropriate reliance on international law. At other times, in contrast, South African domestic courts have sought to avoid the application of international law even when it seemed that the Constitution mandated such application. Most often, this was done when it was felt that the domestic context was sufficiently dissimilar from the international context to warrant a distinct national approach being taken.

This paper will therefore analyse the impact of international law on the Constitutional jurisprudence of South African domestic courts, focusing on the decisions of the Constitutional Court. The paper will proceed in three parts. First, the general framework

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<sup>1</sup> Constitution of the Republic of South Africa Act 108 of 1996.

<sup>2</sup> Particularly *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; *Government of the Republic of Zimbabwe v Fick and Others* (CCT 101/12) [2013] ZACC 22.

for the application of international law in the domestic legal system of South Africa will be set out. Second, the case law of the Constitutional Court applying international human rights law and public international law more generally will be analysed, to assess whether and to what extent international law has influenced the application and interpretation of South African domestic law. It will be argued that international legal rules have had a substantial influence on the content of South African domestic law, particularly in terms of Bill of Rights and legislative interpretation. Finally, the paper will conclude by identifying the techniques used by the Court to avoid the application of international law, or to bring South African domestic law into alignment with international law in the case law discussed in the preceding sections. It will be argued that South African courts since 1994 have adopted an overall posture of alignment with international law. Indeed, it will be concluded that the wide-ranging application of international law has at times overstepped the Constitutionally-mandated relationship between domestic law and international law, leading to the direct enforcement of international law without the consent of the legislature.

## **I. Relevant Constitutional Provisions**

The new constitutional framework sought to redefine the relationship between international law and South African domestic law. The overall effect of this redefinition was to harmonise these two bodies of law wherever possible, while still retaining scope for the legislature to diverge intentionally from international law when appropriate. In most cases, the provisions of the interim and final Constitutions regulating the relationship between international and domestic law are effectively identical. Any inconsistencies between the treatment of these questions in the Interim and Final Constitutions will be highlighted in the discussion below.

### **1. Directly Enforceable International Law**

#### ***a. Treaties***

Section 231 of the Constitution governs the relationship between domestic law and South Africa's treaty obligations. Treaty-making is the responsibility of the executive,<sup>3</sup> and most treaties require approval by Parliament before they are binding on the State.<sup>4</sup> However, treaties of a 'technical, administrative or executive nature', as well as treaties that do not require ratification or accession, bind the State upon signature, without Parliamentary approval.<sup>5</sup> The executive is only obliged to publish the text of such treaties within a 'reasonable time'.

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<sup>3</sup> Section 231(1): 'The negotiating and signing of all international agreements is the responsibility of the national executive.'

<sup>4</sup> Section 231(2): 'An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).'

<sup>5</sup> Section 231(3): 'An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the

In order for treaties binding on South Africa in the international sphere to be directly enforceable in domestic law, most treaties must be transformed by national legislation<sup>6</sup> – this is known as a ‘dualist’ approach to international obligations. Once transformed, the treaty rule then has the same status as the type of national legislation by which it was transformed; for example, a treaty transformed into domestic law by an Act of Parliament has the status of an Act of Parliament, while a treaty transformed into domestic law by subsidiary legislation has the status of subsidiary legislation.<sup>7</sup>

The requirement of transformation is however subject to the exception of self-executing treaties, which are directly enforceable in domestic law without enactment by national legislation, as long as the provisions are not contrary to an Act of Parliament or the Constitution.<sup>8</sup> The concept of self-executing treaties was introduced into the South African legal system for the first time in the new Constitution, having been borrowed from US constitutional law. As will be discussed in Section II.2.b. below, this concept has caused much confusion and uncertainty in domestic case law, with little clear guidance having been provided as to the criteria for self-execution. As such, there have been disagreements as to whether individual treaties require enactment by national legislation in order to be relied on directly by domestic authorities.<sup>9</sup>

#### ***b. Customary International Law***

In contrast to treaty law, the Constitution establishes a ‘monist’ approach to international obligations stemming from customary international law.<sup>10</sup> As put in Section 232 of the Constitution, ‘customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’. This continued the rule of automatic incorporation from the pre-1994 constitutional regime,<sup>11</sup> but also elevated the status of

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National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.’

<sup>6</sup> Section 231(4): ‘An 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.’

<sup>7</sup> See Section II.2.b. below.

<sup>8</sup> Section 231(4).

<sup>9</sup> See, e.g., discussion of *President of the Republic of South Africa and Others v Quagliani, President of the Republic of South Africa and Others v Van Rooyen and Another, Goodwin v Director-General, Department of Justice and Constitutional Development and Others* (CCT24/08, CCT 52/08) [2009] ZACC1 in Part II below.

<sup>10</sup> Customary international law is described in Article 38 of the Statute of the International Court of Justice as such: ‘international custom, as evidence of a general practice accepted as law’. However, as noted in Brownlie, ‘the wording is prima facie defective: the existence of a custom is not to be confused with the evidence adduced in its favour; it is the conclusion drawn by someone (a legal adviser, a court, a government, a commentator) as to two related questions: (a) is there a general practice; (b) is it accepted as international law?’. Crawford, *Brownlie’s Principles of Public International Law* (8<sup>th</sup> ed., 2012), at 23. There are therefore two elements necessary to prove the existence of international law: State practice and the belief that a practice is accepted as international law, which is referred to as *opinio juris*.

<sup>11</sup> *Nduli v Minister of Justice* 1978 (1) SA 893 (A).

customary international law from its place under the previous constitutional regime. Prior to the Final Constitution, customary international law had the status of rules of common law, and was therefore superseded not only by contrary rules of Acts of Parliament and the Constitution, but also by subsidiary legislation.<sup>12</sup>

As discussed further in Part II below, South African courts have in the past applied a higher threshold for establishing the existence of a rule of customary international law than that accepted in international law itself, particularly in terms of how uniform and widespread State practice must be in order to establish a rule of international custom. In other words, South African courts have at times refused to apply certain rules of customary international law by denying that these rules were supported by the requisite State practice and *opinio juris*. With the new constitutional mandate emphasizing the place of international law in the domestic legal system of South Africa, however, this has fallen out of favour.

## 2. Indirect Effect of International Law

The place of international law in the domestic law of South Africa is perhaps most prominent in relation to the interpretative obligations imposed on domestic courts. Three key constitutional obligations of varying strengths require domestic law to be interpreted compatibly with international law. First, Section 233 imposes the strongest interpretative obligation on domestic courts, mandating that when interpreting any legislation, courts must adopt an interpretation of the legislation that is consistent with international law over any inconsistent interpretation, as long as this results in a 'reasonable' interpretation of the legislative text.<sup>13</sup> It should be noted that this is a stronger interpretative obligation than that in many domestic legal systems, as the Section 233 obligation applies to all legislation. In contrast, courts of, *inter alia*, the UK, New Zealand, Australia, have recourse to the State's relevant international obligations only if the legislation being interpreted is in some way ambiguous.<sup>14</sup> As will be discussed below, Section 233 has been used to give considerable domestic effect to South Africa's international obligations, including international obligations that have not been incorporated into domestic law by the legislature.

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<sup>12</sup> Ibid.

<sup>13</sup> Section 233 Final Constitution: '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.'

<sup>14</sup> '[W]here the law is clear and unambiguous, either stated as common law or enacted by Parliament, recourse to [international law] is unnecessary and inappropriate... But where there is ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English court is not only entitled but, in my judgment, obliged to consider the implications of [international law]. *Derbyshire County Council v Time Newspapers Ltd.*, Court of Appeal (Civil Division), Judgment of 19 February 1992, *The Times*, p. 26 20 February 1992), p.24 at 50. See Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in National and International Law', 235 *Recueil des Cours* 303 (1992) at 361.

Second, courts are subject to a weaker obligation to ‘consider’ international law when interpreting the Bill of Rights.<sup>15</sup> Finally, Section 39(2) of the Constitution requires courts to promote the ‘spirit, purport, and object’ of the Bill of Rights when interpreting any legislation or developing the common law.<sup>16</sup> Though this does not mention international law expressly, it has been held that determining the ‘spirit’ of the Bill of Rights will often require consideration of international law, as many of the rights in the Bill were intentionally drawn from various international human instruments. As will be discussed in Section 2 below, these interpretative obligations have been used extensively by South African courts to give effect in domestic law even to provisions of international law that are not binding on South Africa, and to untransformed treaty obligations.

## II. Engagement with International Law by South African Courts

### 1. Direct Application of International Law

#### a. Customary International Law

While South African courts have, since 1994, become receptive to international law, this was not the case during the apartheid era. Given the international condemnation of the policies of the apartheid State, the eventual determination of apartheid as a crime against humanity,<sup>17</sup> and the suspension of South Africa’s right to sit in the UN General Assembly,<sup>18</sup> it is perhaps unsurprising that domestic courts during this time were not enthusiastic about international law. As a result, courts often sought to avoid the application of rules of international that were pleaded before them. The fact that the apartheid government declined to become a party to almost all international treaties reinforced this attitude.

Interestingly, the refusal by South African courts to apply international law was often the result of the court’s contestation of the customary international law status of the rules relied on by parties to the cases before them, rather than denying the place of international law in the domestic law of South Africa. South African courts prior to the new Constitution appeared to apply a very stringent threshold for the proof of sufficient State practice and *opinio juris* to establish a customary rule; indeed this threshold appeared to be more demanding than that required by international law itself.<sup>19</sup> This

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<sup>15</sup> Section 39(1)(b) Constitution: ‘When interpreting the Bill of Rights, a court, tribunal or forum... must consider international law.’

<sup>16</sup> Section 39(2) Constitution: ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

<sup>17</sup> See UN General Assembly Resolution 3324 (XXIX) 16 December 1974.

<sup>18</sup> See UN General Assembly Resolution 3207 (XXIX) 30 September 1974.

<sup>19</sup> International law requires that State practice amount to a ‘settled practice’, that is, that it is in substantial conformity with the rule claimed to have a customary status. The practice must be widespread among States, and must include the practice of the States whose interests are most closely tied to the particular rule in question, known as ‘specially affected States’. This practice must be accompanied by a belief that the practice is required by law. Limited instances of

therefore led to the non-application by domestic courts of rules of customary international law that were binding on the State.

The key case in which this approach was laid out was *Nduli v Minister of Justice*.<sup>20</sup> This case concerned the trial of South African political activists illegally abducted by South African police officers in Swaziland, contrary to their explicit orders, and then prosecuted in South Africa. The defendants challenged the right of the South African courts to hear the case, on the basis that their arrest contravened international law. The court concluded that as South Africa had not authorized the actions of the police officers, the State was not responsible for any violation of international law, and as a result, the exercise of criminal jurisdiction over the defendants was lawful.

In this case, the Appeals Court confirmed that customary international law was automatically incorporated into South African domestic law, emphasizing the Roman-Dutch origins of this principle.<sup>21</sup> However, the judgment of Rumpff CJ then insisted that ‘universal acceptance’ was required in order to prove the existence of a rule of custom.<sup>22</sup> By requiring such a high level of proof for the recognition of a rule of customary international law, domestic courts were able to avoid the application of rules of international law would likely be considered to be binding rules of custom if the proper standard of ‘widespread acceptance’ was applied.

This approach, however, has since been abandoned by the domestic courts of South Africa. This was clearly stated in the case of *S v Petane*,<sup>23</sup> which concerned terrorist charges laid against a member of the military arm of the ANC. The Defendant argued against the court’s jurisdiction on the basis that the situation in South Africa amounted to a conflict of national liberation, and therefore an international armed conflict under the definition of Additional Protocol I to the Geneva Conventions (‘API’)<sup>24</sup>, and as such was entitled to prisoner of war status. Conradie J explicitly rejected the standard put forward by the *Nduli* decision, holding that South Africa recognised the ‘widespread acceptance’ standard for the establishment of customary international law. The court therefore sought to align the South African standard for proof of custom to that in international law itself.

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contrary practice do not necessarily disprove the existence of a rule of customary international law. Indeed, if such contrary practice is justified by the State as an exception to an established rule, then the practice in fact strengthens rather than undermines the customary status of the rule. See *North Sea Continental Shelf (Federal Republic of Germany/ Netherlands; Federal Republic of Germany/ Denmark)*, ICJ Reports 1969 p.3 at 43; *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)*, ICJ Reports 1986 p 14, at 44; *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)*, Preliminary Objections, Judgment of 24 May 2007, paras 307-1.

<sup>20</sup> 1978 (1) SA 893 (A).

<sup>21</sup> At 906(B).

<sup>22</sup> At 906(D). See Dugard at 28, and Devine, ‘Some Reflections on the Contribution of the Appellate Division to the Development of International Law within the South African Legal System’ in Kahn (ed.), *The Quest for Justice: Essays in Honour of Michael McGregor Corbett Chief Justice of the Supreme Court of South Africa* (1995) at 166.

<sup>23</sup> 1988 (3) SA 51 (C) at 56-7.

<sup>24</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relation to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

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However, even after this statement, indications of an exceptionally rigid interpretation of the requirements for the establishment of custom can be seen in the judgment. The court rejected the argument that the defendant was entitled to POW status, holding that the definition of international armed conflict in API did not reflect customary international law. In coming to this conclusion, the court made several statements indicating a restrictive approach to the establishment of custom. First, the court rejected the possibility of UN General Assembly Resolutions constituting State practice capable of giving rise to a new rule of customary international law, a view which is contrary to the position expressed in the case law of the International Court of Justice ('ICJ').<sup>25</sup> Second, the court argued that if a State verbally supports the existence of a customary rule, but acts in a manner contrary to that rule (giving the example of widespread practice of torture contrary to State's expressed acceptance of the prohibition of torture), this negates the value of the statement in proving the custom. The ICJ had only two years earlier come to the opposite conclusion in one of its seminal decisions.<sup>26</sup> Finally, the court accepted that a treaty such as API could play a role in establishing a new custom, but argued that there would have to be near universal ratification of the treaty for it to do so. Once again, this seems to assert a stricter standard for the establishment of customary international law than that espoused by the ICJ, which has held that the State consent to a treaty must be 'very widespread and representative' in order to form the basis of a new rule of customary international law.<sup>27</sup>

Throughout the judgment, South Africa's pariah status weighed heavily on the judicial reasoning. As put by Conrardie J,

[T]he practice of condemnation of South Africa is evidence only of a general dislike of its internal policies. There is nothing in the condemnation from which the content of a rule of customary international law may be derived. I fail completely to appreciate how the condemnation of South Africa, or even the labeling of apartheid as a crime against humanity, leads to the inference that Protocol I has been accepted as part of customary international law by those States uttering those condemnations. ... United Nations resolutions cannot be said to be evidence of State practice if they relate, not to what the resolving States take it upon themselves to do, but to what they prescribe for others. Customary international law is founded on practice, not on preaching.

It seems fair to say, therefore, that international condemnation of South Africa influenced the adoption of the unduly strict approach to the elements of customary international law.

After the establishment of democratic government in the 1990s and the coming into force of the new Constitution, South Africa is of course no longer a pariah State.

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<sup>25</sup> *Nicaragua*, para.188.

<sup>26</sup> *Nicaragua*, para.186.

<sup>27</sup> '[I]t might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.' *North Sea Continental Shelf (Federal Republic of Germany/ Netherlands; Federal Republic of Germany/ Denmark)* ICJ Reports 1969 p 3, at para. 73.

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South Africa's restoration to good standing in the international community has been accompanied by a new receptiveness to international law, as outlined above. This has extended to a less stringent approach to the assessment of customary international law. Interestingly, however, the Court at times seems reluctant to engage with customary international law. There are a number of cases in which one would have expected to find an extended discussion of the relevant customary international law, when the Court instead confines itself to a discussion of South Africa's treaty obligations or treats the practice of other States purely as comparative examples rather than the raw elements of customary international law.<sup>28</sup>

Nonetheless, in contemporary cases in which customary international law is invoked, very little proof is provided to substantiate the customary status of the claimed rule. Often, when the Constitutional Court or Supreme Court of Appeal has concluded that a particular rule is established in customary international law, its supporting evidence is limited to citing a decision of the International Court of Justice,<sup>29</sup> a decision of the African Commission on Human and Peoples Rights,<sup>30</sup> or an opinion of an academic commentator.<sup>31</sup> At times, it seems that rules are held to exist in customary international law without any substantiation in State practice and *opinio juris*.<sup>32</sup> The most extensive discussion of the requisite standard for the establishment of customary international law by the Constitutional Court can be found in the *Kaunda* decision, where the Court engaged in a relatively lengthy discussion of the customary status of the obligation on the State to exercise diplomatic protection in favour of its citizens. This discussion included analysis of State practice and of a recent report of the International Law Commission. The Court concluded that though State practice did exist supporting the existence of such an obligation, it was held that this was not the 'general practice' of States.<sup>33</sup> As a result, the Court held that such an obligation was not found in customary international law, and was therefore not a part of South African law by virtue of Section 232 of the Constitution. While the case law is not explicit on the issue, it appears that this 'general practice' standard is likely to be similar to the 'settled practice' threshold established by the International Court of Justice. At the least, it is clear that it is substantially lower than the unduly stringent approach displayed in the case law of the apartheid era.

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<sup>28</sup> E.g., *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3, *S v Williams and Others* (CCT20/94) [1995] ZACC, *National Commissioner of the South African Police Service v Southern African Litigation Centre* (485/2012) [2013] ZASCA 168, and *Glenister*, supra, all concerned issues where a discussion of the relevant customary international law would have been highly relevant and useful, but where no engagement was made with this area of law.

<sup>29</sup> See *Koyabe and Others Minister for Home Affairs and Others* (CCT 53/08) [2009] ZACC 23, at para. 41; *Richtersveld Community and Others v Alexkor Ltd and Another* (448/2001) [2003] ZASCA 14, at para. 46; *S v Basson* (CCT30/03A) [2005] ZACC 10, at para.177

<sup>30</sup> *Koyabe*, supra, at para. 45.

<sup>31</sup> *SALC*, supra, para. 39; *Basson*, supra, para.225.

<sup>32</sup> See *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12, at para. 26; *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* (77150/09) [2012] ZAGPPHC 61, at p.80. Neither the Constitutional Court nor the Supreme Court of Appeal has used the term *opinio juris* in a judgement since the coming into force of the Interim or Final Constitution.

<sup>33</sup> *Kaunda and Others v President of the Republic of South Africa* (CCT 23/04) [2004] ZACC 5, para. 29.

**b. Treaties**

As set out in Section 231 of the Constitution, treaties that bind South Africa internationally do not automatically have a place in the domestic law of the State. Unlike customary international law, in order for courts to rely directly on rules of a treaty to which South Africa has become a party, Parliament must enact legislation to transform the treaty obligations into obligations of domestic law.<sup>34</sup> As put by the Constitutional Court in the *Glenister* case,

For an international agreement to be incorporated into our domestic law under section 231(4), our Constitution requires, in addition to the resolution of Parliament approving the agreement, further national legislation incorporating it into our domestic law. There are three main methods that the legislature appears to follow in incorporating international agreements into domestic law: (a) the provisions of the agreement may be embodied in the text of an Act; (b) the agreement may be included as a schedule to a statute; and (c) the enabling legislation may authorize the executive to bring the agreement into effect as domestic law by way of a proclamation or notice in the Government Gazette.<sup>35</sup>

The Constitutional scheme on the status of treaties therefore makes clear that, without enactment in national legislation, individuals cannot directly invoke provisions of treaties for enforcement in South African domestic courts. The Constitutional Court has, particularly in its early cases, emphasized the importance of this requirement of enactment of national legislation as a prerequisite for the enforceability of a treaty in the domestic law of South Africa.<sup>36</sup>

This requirement of transformation operates to protect the Constitutional separation of powers between the legislature and the judiciary. It requires that, in order for treaties to be directly enforceable by the domestic courts, the legislature must have consented to the treaty becoming a part of South African domestic law. As put by the majority decision in the *Glenister* case,

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<sup>34</sup> Section 231(4) Constitution.

<sup>35</sup> *Glenister*, supra, para. 99 (citations omitted).

<sup>36</sup> See *Anazanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16, at para. 26: ‘The issue which falls to be determined in this Court is whether section 20(7) of the Act is inconsistent with the Constitution. If it is, the enquiry as to whether or not international law prescribes a different duty is irrelevant to that determination. International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorize 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’.

[T]he main force of section 231(2) is directed at the Republic's legal obligations under international law, rather than transforming the rights and obligations contained in international agreements into home-grown constitutional rights and obligations. Even though the section provides that the agreement 'binds the Republic' and Parliament exercises the Republic's legislative power, which it must do in accordance and within the limits of the Constitution, the provision must be read in conjunction with other provisions within section 231. Here, section 231(4) is of particular significance. It provides that an international agreement 'becomes law in the Republic when it is enacted into law by national legislation'. The fact that section 231(4) expressly creates a path for the domestication of international agreements may be an indication that section 231(2) cannot, without more, have the effect of giving internal constitutional force to agreements merely because Parliament has approved them. It follows that the incorporation of an international agreement creates ordinary domestic statutory obligations. Incorporation by itself does not transform the rights and obligations in it into constitutional rights and obligations.<sup>37</sup>

Therefore, individuals cannot acquire rights or causes of action directly from international treaties that bind the State, but have not been implemented by domestic legislation. Equally, courts cannot directly enforce provisions of such untransformed treaties.

Ngcobo CJ in his dissent in the *Glenister* decision emphasized the separation of powers rationale for this division of labour set out in Section 231 of the Constitution:

The constitutional scheme of section 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature. ...An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane. And failure to observe the provisions of this agreement may result in South Africa incurring responsibility towards other signatory states. An international agreement that has been ratified by Parliament under section 231(2), however, does not become part of our law until and unless it is incorporated into our law by national legislation. An international agreement that has not been incorporated into our law cannot be a source of rights and obligations.<sup>38</sup>

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<sup>37</sup> *Glenister*, supra, at para. 181.

<sup>38</sup> Dissenting Opinion of Ngcobo in *Glenister*, supra, para. 89, 92.

Thus, for courts to give domestic effect to untransformed treaty obligations would amount to impinging on Parliament's exclusive responsibility for law creation in this respect. Once treaties have been enacted into domestic law by national legislation enforcement thereof is unproblematic, as the treaty has the status of ordinary domestic law. As put by the Constitutional Court 'the incorporation of an international agreement creates ordinary domestic statutory obligations'.<sup>39</sup>

A recent example of the application of treaty obligations by domestic courts is the decision in the *National Commissioner of the South African Police Service v Southern African Litigation Centre*,<sup>40</sup> currently awaiting decision on appeal at the Constitutional Court. In this case, an application was brought by the SALC to require the SAPS to investigate crimes against humanity allegedly committed in the territory of Zimbabwe. The SAPS argued that they were not empowered to do so, since the crimes were not committed in South African territory, and did not involve South African nationals. As held by the High Court and the SCA, however, the police did have such a power, and in fact were under an obligation to do so. This power was rooted in Section 4 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, by which South Africa had enacted its obligations under the Rome Statute of the International Criminal Court into domestic law. In particular, the legislation asserted universal jurisdiction over any of the ICC 'core crimes', namely genocide, war crimes, and crimes against humanity. Therefore, the ICC Act created a lawful basis for the investigation of such crimes wherever in the world they were committed.<sup>41</sup>

This is however not the end of the matter concerning the possibility of direct enforcement of treaties by South African domestic courts. The requirement of transformation is subject to exception. A certain class of treaties is directly enforceable in domestic law without enactment by national legislation. These treaties, known as 'self-executing treaties' take direct effect in South African domestic law as soon as they are binding on the State in the international legal sphere, as long as the provisions are not contrary to an Act of Parliament or the Constitution.<sup>42</sup> As explained below, however, the Constitutional Court has struggled to interpret this exception to the requirement for transformation of treaties, and therefore has struggled to distinguish between treaties should probably be regarded as directly enforceable or unenforceable by domestic courts.

The concept of self-executing treaties was introduced into the South African legal system for the first time in the new Constitution, having been borrowed from US constitutional law. This concept, which has been debated in US courts for decades, is proving to be a difficult and controversial idea for South African courts as well. South African courts have provided little clear guidance as to the criteria for self-execution. South African courts seem to be reluctant to define the concept or to decide on whether particular treaties are indeed self-executing. As such, there have been disagreements as to whether individual treaties require enactment by national legislation in order to be relied

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<sup>39</sup> *Glenister*, supra, at para. 181.

<sup>40</sup> *National Commissioner of the South African Police Service v Southern African Litigation Centre* (485/2012) [2013] ZASCA 168.

<sup>41</sup> *Ibid.*

<sup>42</sup> Section 231(4) Constitution.

on directly by domestic authorities.<sup>43</sup> This creates the risk that treaties that should be directly enforceable in South African domestic law are not applied correctly, resulting in the non-fulfilment of South Africa's international obligations; it also creates the converse risk that a treaty that should properly be subject to legislative implementation is given direct effect as a self-executing treaty, therefore circumventing Parliament's role in law-creation.

This difficulty is best illustrated in the *Quagliani* case, a Constitutional Court decision in a joint appeal of two High Court decisions concerning the status of the US- South African Extradition Agreement. This Agreement had not been transformed into domestic law, and several individuals had relied on this absence of enacting legislation as the basis to challenge the legality under South African domestic law of their extradition to the USA from South Africa. The State, however, argued that the extradition treaty was self-executing, since national legislation, the Extradition Act 67 of 1962 (which preceded the Agreement), established all necessary structures to implement the Agreement with the USA. Three courts heard legal argument to this effect, and each court reached a different conclusion on the self-executing status of the extradition treaty. The High Court in the first case held that the Agreement was not enacted into domestic law, and was therefore not in force domestically. In contrast, in the second case that was joined in the *Quagliani* appeal, the High Court held that the Agreement was self-executing, and was therefore directly enforceable in South African law. The Constitutional Court, in a judgment by Sachs J, declined to decide on the issue of self-execution, arguing that it was not necessary to the decision.

The refusal of the Constitutional Court to address the issue of self-execution was unfortunate, given the confusion surrounding the concept. However, it did not result in the non-application of the international law in question. The Court held that the Extradition Agreement was enforceable in South African law, either because it had been transformed into domestic law by the earlier legislation of the Extradition Act, or because it was self-executing. Sachs J held that since either option would lead to the enforceability of the Act, it was not necessary to declare which option was in fact legally correct.<sup>44</sup> This is a questionable conclusion. The South African Constitution does not provide for transformation of treaties into domestic law by pre-existing legislation. As noted above, the Constitution provides only for two ways for treaties binding on South Africa to become a part of South African domestic law – transformation by specific legislative enactment, or self-execution. Therefore, it is only if the Extradition Agreement can be said to be self-executing that it could be given direct effect in domestic law.

The Constitutional Court decision in the *Quagliani* case avoided the immediate problem of failing to apply the relevant provisions of the treaty. Nonetheless, the absence of clear, and much-needed, guidance from the Constitutional Court on the meaning of self-executing treaties in the South African Constitution is problematic. Courts may in the future rely on the absence of guidance from the Constitutional Court as to what

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<sup>43</sup> See, e.g., discussion of *President of the Republic of South Africa and Others v Quagliani, President of the Republic of South Africa and Others v Van Rooyen and Another, Goodwvin v Director-General, Department of Justice and Constitutional Development and Others* (CCT24/08, CCT 52/08) [2009] ZACC1.

<sup>44</sup> For criticism of this decision, see Dugard, *International Law: A South African Perspective* (4<sup>th</sup> ed. 2011), 57-59.

constitutes a self-executing treaty to justify their refusal to apply international law stemming from untransformed treaties, when these treaties should be enforceable by virtue of the constitutional mandate in Section 231 of the Constitution. This may well result in a failure to satisfy South Africa's international obligations, resulting in South Africa incurring international responsibility to its treaty partners. Equally, the absence of guidance on the criteria for self-execution may result in domestic courts giving direct effect to treaties that, when correctly interpreted, require enactment by domestic legislation. Further guidance on the South African concept of self-execution is therefore needed to avoid potential violations of the separation of powers set out in the Constitution, as well as to ensure South Africa's ability to fulfil its international obligations.

## **2. Indirect Application of International Law**

As outlined above, the South African Constitution contains three provisions mandating, to varying degrees, that courts adopt interpretations of domestic law that are consistent with international law. These interpretative obligations are perhaps the most significant role given to international law in the Constitution, enabling all South African domestic law to be shaped by international law. As put by former Chief Justice Ngcobo,

Our 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 which is carefully defined by the Constitution.<sup>45</sup>

This part will set out how these Constitutional provisions been used to great effect by domestic courts, and particularly the Constitutional Court, in relation to the interpretation of legislation in general, and then in relation to the Bill of Rights in particular.

### ***i. Legislative Interpretation***

Section 233 of the Constitution obliges courts to adopt any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. In relation to this section, courts have interpreted 'international law' to mean all international law that is *binding* on South Africa.<sup>46</sup> Thus, both treaties to which South Africa is a party as well as customary international law have been invoked according to this interpretative obligation. Crucially, this includes both treaties that have been transformed into domestic law by domestic implementing legislation, and those that have not.

The wording of this provision makes clear that this is a strong obligation on the courts. As put by Moseneke DCJ and Cameron J in the *Glenister* case, Section 233

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<sup>45</sup> Dissenting Opinion of Ngcobo in *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6, para. 97.

<sup>46</sup> See *Progress Office Machines*.

‘*demand*s any reasonable interpretation that is consistent with international law when legislation is interpreted’.<sup>47</sup> In addition, as noted above, contrary to other jurisdictions, this provision indicates that no ambiguity in the legislative text is required in order for the obligation of consistent interpretation to be activated.<sup>48</sup> Indeed, by requiring a ‘reasonable’ interpretation consistent with international law to be preferred over *any alternative interpretation*, it is clear that even if the most natural interpretation of the legislation would be contrary to international law, the court must adopt an interpretation that is consistent with international law that is a less natural, but still reasonable, reading of the legislative text.

This has proven to be a powerful tool for South African courts. In particular, it has been used, in effect, to circumvent the requirement of transformation of treaties binding on South Africa to enable them to be given direct effect under domestic law. This has been possible because of the above-noted definition given to ‘international law’ as meaning all international law that is binding on South Africa – thus including both transformed and untransformed treaties, as well as customary international law.

The decision of the Supreme Court of Appeal in the *Progress Office Machines Case*<sup>49</sup> illustrates the domestic effect that can be given to provisions of untransformed treaties through use of this interpretative obligation. In this case, the SCA relied on South Africa’s international obligations under the General Agreement on Tariffs and Trade 1994 (‘GATT 1994’) to interpret subordinate legislation imposing anti-dumping duties to be subject to a time limit that was not provided for in the text of the legislation. The SCA emphasized that South Africa was bound by the GATT 1994 in the international sphere according to Section 231 of the Constitution,<sup>50</sup> and that limitless anti-dumping duties were contrary to these binding international obligations.<sup>51</sup> The SCA acknowledged that South Africa had not enacted the relevant international obligations into domestic law, and that ‘no rights are therefore derived from the international agreements themselves’.<sup>52</sup> Nonetheless, the SCA held that given the interpretative mandate in Section 233, an interpretation of the subordinate legislation allowing an anti-dumping duty without time limit would be unreasonable.<sup>53</sup>

Therefore, the fact that the treaty provisions in question were not directly enforceable in domestic law was no bar to their application through the interpretative

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<sup>47</sup> *Glenister*, supra., at para. 202. The *Glenister* decision is discussed further below at under Part II.1.B.

<sup>48</sup> Supra note 14.

<sup>49</sup> *Progress Office Machines CC v South African Revenue Services and Others* (532/06) [2007] ZASCA 118.

<sup>50</sup> *Ibid*, para.6.

<sup>51</sup> *Ibid*, para.11.

<sup>52</sup> *Ibid*, para.6.

<sup>53</sup> ‘Despite the seemingly limitless operation of the anti-dumping duty imposed in this case by the Minister of Finance the period of its operation should be limited. Not only is a court bound to ‘prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’ but subordinate legislation such as the notice by the Minister of Finance imposing the anti-dumping duty must be reasonable. ...The duration of the anti-dumping duty imposed beyond the period allowed by the Anti-Dumping Agreement would not only be a breach of the Republic’s international obligations and an unreasonable interpretation of the notice but also unreasonable and to that extent invalid.’

mandate of Section 233. Indeed, by way of this interpretive obligation, the treaty obligation on the State was given the same effect as if it had been directly applicable. It is clear, therefore, that the court considers a ‘reasonable interpretation’ under Section 233 to be one that includes reading clauses into legislative provisions. While this is a wide view of what constitutes ‘interpretation’, it is defensible on the grounds of the strength of the obligation in Section 233. It remains to be seen whether this view of interpretation will be extended even further, for instance, to adopt a meaning contrary to the express provisions of the legislation to ensure compliance with binding international law, as has been done by the Constitutional Court in other contexts.<sup>54</sup>

The two most recent cases in which the Constitutional Court has engaged with international law, in the *Glenister* and *Fick* decisions, also examined the role of international law when interpreting legislation using Section 233 of the Constitution. In both of these cases, a similar result to that in *Progress Office Machines* was reached, giving domestic effect to untransformed treaty obligations by way of Section 233. These cases primarily dealt with interpretation of the Bill of Rights, however, and are therefore examined in detail in the following section.

## ***ii. Bill of Rights Interpretation***

As noted above, two further provisions of the Constitution impose obligations that require some measure of attention to be given to international law when interpreting the Bill of Rights. Section 39(1)(b) of the Constitution explicitly obliges ‘consideration’ of international law when interpreting the Bill of Rights. When compared to Section 233, this is clearly a less forceful obligation, as it does not require a court to follow the relevant international law, nor to prefer an interpretation that is consistent with international law. The limits of the obligation were emphasized by the Constitutional Court in the *Makwanyane* case, concerning the constitutionality of the death penalty, which was decided under the Interim Constitution. When interpreting Section 35(1) of the Interim Constitution,<sup>55</sup> the equivalent obligation to Section 39(1)(b), the Court held:

We must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.<sup>56</sup>

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<sup>54</sup> See Bishop and Brickhill, ‘In the Beginning was the Word: The Role of Text in the Interpretation of Statutes’, 129 *South African Law Journal* (2012) 681.

<sup>55</sup> Section 35(1) IC: ‘In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.’

<sup>56</sup> *S v Makwanyane and Another*, supra, para. 39.

Similarly, in *S v Williams*, the Court held that Section 35(1) ‘requires us to “have regard” to [international law]; we are not bound to follow it but neither can we ignore it’.<sup>57</sup> Thus, Section 39(1)(b) of the Constitution requires that courts give attention to relevant international law when interpreting rights in the Bill of Rights, but no more. Courts are not obliged to adopt the international legal approach to or interpretation of any provision of the Bill of Rights.

In addition, Section 39(2), according to the established case law, creates a role for international law when courts are engaged in developing the common law. Section 39(2) requires courts to promote the ‘spirit, purport, and object’ of the Bill of Rights. Though this has not been stated expressly by the Courts, this provision has been interpreted to require consideration of international law that informs the Bill of Rights when developing the common law. This can be discerned particularly from the decision of the Constitutional Court in the *Carmichele* case, where the Court relied on a wide variety of international treaties and resolutions of international human rights bodies when developing the common law of delict.<sup>58</sup> Recently, in the *Fick* decision, the Court again relied on international treaties and decisions of international courts when developing the common law on the enforcement of foreign judgments.<sup>59</sup> It seems clear, therefore, that international law is a factor considered when interpreting the spirit, purport and object of the Bill of Rights to develop the common law.

There are two particular issues that arise in relation to the use of international law in relation to these lesser interpretative obligations. These issues relate to the role given to sources of international law that have not been given the consent of the Executive or Parliament to be enforced domestically. In particular, the impact of non-binding sources of international law and untransformed treaties through these interpretative obligations must be explored. There is always the danger that, through the guise of ‘interpretation’, courts will give domestic effect to international legal rules that, according to Sections 231-232 of the Constitution, required prior approval of the Executive or Legislative arms of government. Giving ‘consideration’ to such sources of international law when interpreting provisions of the Bill of Rights or development of the common can therefore be undertaken in such a way as to circumvent the Constitutional requirements of Executive and Parliamentary consent and/or legislative enactment to allow judicial enforcement. The following sections will therefore analyses the judicial use of non-binding sources of international law and untransformed treaties through Section 39(1)(b) and 39(2) of the Bill of Rights. It will be shown that while the use of non-binding sources has thus far been unproblematic, the impact of untransformed treaty obligations has, perhaps legitimately, been subject to challenge on separation of powers grounds.

### *The impact of non-binding sources of international law*

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<sup>57</sup> *S v Williams*, supra, para. 50.

<sup>58</sup> *Carmichele v Minister of Safety and Security* (CCT 38/00) [2001] ZACC 22, at paras 45-48, 62, and 73.

<sup>59</sup> Though the Court refers explicitly only to Section 39(1)(b) as enabling reference to international law, it does seem that the Court relies heavily on international law when developing the common law under Section 39(2) of the Constitution. See *Government of the Republic of Zimbabwe v Fick and Others*, supra, paras 66-68.

One of the key considerations therefore is what constitutes the ‘international law’ that must be taken into consideration as per Section 39(1)(b) and 39(2) of the Bill of Rights. In contrast to the interpretation given to this term when used in Section 233, in the context of Section 39(1)(b) and 39(2), courts have considered both binding and non-binding international law to be relevant and therefore warranting of consideration.<sup>60</sup> This principle was first set out in the *Makwanyane* case.<sup>61</sup> In this case, the Constitutional Court held that under Section 35(1) IC, the equivalent of Section 39(2) of the Final Constitution, ‘public international law would include non-binding as well as binding law’, and that ‘they may both be used under the section as tools of interpretation.’<sup>62</sup> As a result, the Constitutional Court considered a wide variety of binding and non-binding international legal instruments, including International Covenant on Civil and Political Rights, the European Convention of Human Rights, and the Inter-American Convention on Human Rights.

This interpretation, allowing the consideration of binding and non-binding international law when interpreting the Bill of Rights, has carried over to the Final Constitution, both in relation to Section 39(1)(b)<sup>63</sup> and Section 39(2).<sup>64</sup> Most recently, the decision of the Constitutional Court in the *Glenister* case explicitly cited the principle established in the *Makwanyane* judgment with approval.<sup>65</sup> These provisions of the Constitution, therefore, enable courts to consider any international legal instrument, including treaties to which South Africa is not a party, treaties that South Africa has ratified but not incorporated into domestic law, and non-binding resolutions of treaty bodies, and to give at least some measure of domestic effect to those instruments.

The earliest case law of the Constitutional Court did not distinguish between the weight to be given to binding and non-binding international law when interpreting the Bill of Rights.<sup>66</sup> However, the Court later clarified that more weight should be given to international law that does bind the State in the international sphere.<sup>67</sup> As put by Yacoob J in the *Grootboom* case, ‘[t]he 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

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<sup>60</sup> See Dugard, *International Law: A South African Perspective* (4<sup>th</sup> ed., 2011), chapter 4.

<sup>61</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3.

<sup>62</sup> *Makwanyane*, supra, para.36.

<sup>63</sup> See, e.g., *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19, where the Constitutional Court considered provisions of the International Covenant on Economic, Social and Cultural Rights, then not binding on South Africa, when undertaking Section 39(1)(b) interpretation of the constitutional right to access to housing using.

<sup>64</sup> See e.g., *Carmichele* case, where the Constitutional Court cited a wide variety of binding (including the Convention on the Elimination of Discrimination against Women), and non-binding provisions (including the European Convention on Human Rights) of international law when applying Section 39(2) to develop the common law of delict. *Carmichele v Minister of Safety and Security*, supra, at paras 45-48, 62, and 73

<sup>65</sup> See *Glenister*, supra, at fn 155.

<sup>66</sup> E.g., in *Makwanyane*, supra, and *S v Williams* supra, the court’s reliance on international instruments did not distinguish between binding and non-binding sources.

<sup>67</sup> See Strydom and Hopkins, ‘International Law’ in Woolman et al, *Constitutional Law of South Africa*, 13.

vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.<sup>68</sup>

It seems logical for courts to give greater weight to binding sources of international law when interpreting the Bill of Rights, as these are the rules of international law to which South Africa can be considered to have given its consent. Nonetheless, the wide interpretation of ‘international law’ under Section 39 of the Bill of Rights creates a potential conflict with the separation of powers set up by the Constitution. In particular, this interpretation allows for the common law or the meaning of rights protected by the Bill of Rights to be shaped by international law that does not bind the State, including treaties that the executive has chosen not to join, rules of customary international law to which South Africa has persistently objected, or other non-binding sources of international law such as resolutions of human rights treaty bodies or declarations or resolutions of bodies without authority to bind the State. This may be difficult to reconcile with the exclusive role of Executive and Parliament to decide whether to bind South Africa to provisions of international law.<sup>69</sup>

As of yet, though, the Constitutional Court has not invoked non-binding sources of international law in such a way as to have a significant impact on the content of the Bill of Rights or the common law. While the Court has cited a wide variety of non-binding international instruments in its Section 39(1)(b) and Section 39(2) case law,<sup>70</sup> these sources have been used in a way similar to judicial decisions of foreign States – that is, as comparative examples from which lessons can be learned, rather than one restricting the court’s freedom of decision. Indeed, the Constitutional Court has at times explicitly rejected the approach laid out in non-binding sources of law that it has cited. For example, in the *Grootboom* case, the Court rejected the ‘minimum core’ approach to socio-economic rights supported by the UN Committee on Economic, Social and Cultural Rights when interpreting the International Convention on Economic Social and Cultural Rights. At the time of the decision, the ICESCR was not binding on South Africa. The Court held that this approach to socio-economic rights was not appropriate in the South African domestic context, and was not required by the Constitution.<sup>71</sup>

In fact, when dealing with non-binding sources of international law under Section 39(1)(b), the Court has emphasized that this provision requires only consideration of international law, rather than any obligation to follow international law. Perhaps reflecting the separation of powers concerns noted above, the Court has repeatedly stressed the need to be careful to appreciate the differences in the drafting of provisions of the Constitution from potentially relevant but non-binding international legal provisions.

This concern is demonstrated most obviously in the *Makwanyane* case and in *S v Williams*. In the former, the Court distinguished the position in the South African Constitution concerning the legality of the death penalty from that in relevant international instruments, and particularly the ICCPR, by emphasizing the differences in drafting of the domestic and international provisions. The Court highlighted the fact that

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<sup>68</sup> *Grootboom*, supra, para. 26.

<sup>69</sup> Section 231-233 Constitution.

<sup>70</sup> See, especially the *Makwanyane* case; *S v Williams*; *Carmichele*; *Grootboom*.

<sup>71</sup> See *Grootboom*, supra, para. 26-33.

the Constitution provided an unqualified right to life, while the ICCPR's right to life was qualified, and expressly provided for the legality of the death penalty.<sup>72</sup>

Similarly, in the *Williams* case, the judgment of Langa J qualified corporal punishment against juvenile offenders as cruel, inhuman and degrading treatment, despite the fact that it had not been defined as such by various international tribunals. In doing so, he emphasized the importance of construing the South African constitution with awareness of the domestic context, and particularly, the move away from violence signified by the transition from the apartheid regime to democratic government:

In seeking the purpose of the particular rights, it is important to place them in the context of South African society. It is regrettable, but undeniable, that since the middle 1980s our society has been subjected to an unprecedented wave of violence. ... The process of political negotiations which resulted in the Constitution were a rejection of violence. In this context, it cannot be doubted that the institutionalized use of violence by the State on juvenile offenders... is a cruel, inhuman and degrading punishment.<sup>73</sup>

Thus, both differences in drafting and differences in the domestic context have been relied on in part to justify the adoption of a distinct South African approach to the interpretation of particular rights in the Bill of Rights. This concern to interpret the South African Constitution primarily for the South African context has lessened the impact of non-binding sources of international law under Section 39(1)(b) of the Constitution.

The only instances that can be found in which the Court has used a non-binding source to justify its ultimate decision as to the meaning of a provision of the Bill of Rights or the common law is when there has been a particular reason to draw on that non-binding source. In the *Grootboom* case, while the Court rejected the 'minimum core' concept of the UN Committee on Economic, Social and Cultural Rights, it adopted the Committee's definition of the concept of 'progressive realisation' of the right to housing. The Court justified its reliance on this non-binding source of international law because of the express inclusion of the concept of progressive realisation in the Constitutional right at question in Section 26(2), which the Court held to have been intentionally drawn from the UNESCR. As put by the Court,

The phrase [progressive realisation] is taken from international law and Article 2.1 of the Covenant in particular. ... Although the committee's analysis is intended to explain the scope of states parties' obligations under the Covenant, it is also helpful in plumbing the meaning of 'progressive realisation' in the context of our Constitution. The meaning ascribed to the phrase is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.<sup>74</sup>

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<sup>72</sup> *Makwanyane*, supra, para. 39.

<sup>73</sup> *S v Williams*, supra, para. 51-52.

<sup>74</sup> *Grootboom*, supra, para. 45.

In cases such as these, where the legislature has expressly drawn a provision from a non-binding international legal instrument and enacted that provision in domestic law, giving that non-binding instrument domestic effect by using it to interpret the equivalent domestic provision does not usurp the role of the other arms of government. In those cases, the court is merely acting according to the will of the legislature.

Thus, the wide interpretation of international law does create the opportunity for courts to give effect to sources of international law to which the Executive and Parliament have not bound the State, raising potential separation of powers concerns. Given the way in which these provisions have to this point been used in the Bill of Rights jurisprudence of the Constitutional Court, however, under Section 39 of the Constitution, these concerns remain largely hypothetical.

### *The impact of untransformed treaties*

In addition to non-binding sources of international law, as noted above, the interpretation of what constitutes ‘international law’ for the purposes of Section 39 of the Bill of Rights also includes provisions of treaties that bind South Africa in the international sphere, but have not been enacted into domestic law through legislation. Of course, as with non-binding sources or any other source of international law, domestic courts are required only to give ‘consideration’ to untransformed treaties under Section 39(1)(b). Therefore, despite the fact that untransformed treaties bind South Africa in the international sphere, courts are not obliged to adopt an interpretation of provisions of the Bill of Rights that would be compliant with these treaties under Section 39(1)(b). This reflects the Constitutional separation of powers between the legislature and the judiciary in relation to international treaties. As has been noted previously, unless they are self-executing, treaties do not have direct effect in the domestic legal sphere until they have been implemented by legislative enactment. Before such enactment, untransformed treaties do not constitute ‘law in the Republic’.<sup>75</sup> The requirement of transformation protects the legislature’s exclusive law-making function, and restricts the court’s freedom to enforce provisions of international treaties.

As was noted in the previous section, binding rules of international law have been held to warrant greater weight when interpreting provisions of the Bill of Rights. Untransformed treaties that have been signed and ratified (if necessary<sup>76</sup>) are of course binding on South Africa, despite not having been the subject of legislative enactment. Therefore, such treaties are properly to be given more influence than non-binding sources of international law through Section 39(1)(b) and 39(2). However, it must be assessed precisely how much weight has been given to untransformed treaties under these provisions, given the requirement of legislative enactment to allow direct judicial enforcement of treaties. While this issue was dormant for most of the operation of the Constitutional Court, it has recently come to prominence. In the latest decisions of the Constitutional Court engaging with international law, untransformed treaties have been given a significant effect, and in fact been determinative to the outcome, when

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<sup>75</sup> Section 231(4) Constitution.

<sup>76</sup> See Section 231(3) Constitution.

undertaken Section 39 interpretation. In the *Glenister* and *Fick* cases, the Constitutional Court invoked provisions of untransformed treaties to justify controversial interpretations of provisions of the Bill of Rights and developments in the common law. The cases have therefore demonstrated the dramatic effect that international law can have through the interpretative obligations in Section 39(1)(b) and 39(2), and have opened the Court's use of untransformed treaties to criticism on the basis of separation of powers concerns.

First, in the *Glenister* decision, the Constitutional Court reviewed the constitutionality of a newly-established anti-corruption investigatory unit. This unit, known as the 'Hawks', had been established by legislation to replace the previous anti-corruption unit, the 'Scorpions'. The Scorpions had been disbanded by the South African government despite a strong record of successful investigations into high-profile cases of corruption. The Scorpions had operated independently from the South African Police Service forces, and were also insulated from political control by the executive or other organs of State. In contrast, the Hawks were to be subject to control by members of the executive in a number of ways. A private individual, Mr. Glenister, launched a challenge to the constitutionality of this legislation. Glenister argued that the executive's legislative powers to control the Hawks' operations rendered the scheme contrary to the Bill of Rights. The Constitutional Court agreed. A majority of the Court held that the Hawks were insufficiently independent from the executive to meet the requirements of the Bill of Rights. In particular, the majority held that executive control of the anti-corruption unit violated the State's obligation under Section 7(2) of the Bill of Rights to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.

The use of international law was crucial to the finding of unconstitutionality in the *Glenister* case. The majority decision of Moseneke DCJ and Cameron J held that Section 7(2) of the Bill of Rights implicitly required the State to take 'reasonable and effective' positive steps to protect the rights in the Bill of Rights.<sup>77</sup> One such step that must be taken, according to the majority, is the establishment of an independent anti-corruption unit, which the Court held was necessary because of the threat that corruption poses to the realisation of the rights in the Constitution. In particular, corruption threatened the protection of the rights to equality, human dignity, freedom, security of the person, administrative justice, and various socio-economic rights including the rights to education, housing, and health care.<sup>78</sup> While recognizing that the State had a wide discretion when deciding which measures to take to respect, protect, promote and fulfil the Bill of Rights, any step taken must be reasonable. As put by the Court, '[a] range of possible measures is therefore open to the state, all of which will accord with the duty the Constitution imposes, so long as the measures taken are reasonable'.<sup>79</sup>

The Court found that it was bound by Section 39(1)(b) to consider international law when interpreting the obligation in Section 7(2). Therefore, international law had to

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<sup>77</sup> *Glenister*, supra, at para. 189.

<sup>78</sup> *Ibid.*, para. 198-200. The reasoning of the judgment is somewhat unclear on the origin of the obligation to establish an independent anti-corruption unit. At times the judgment states that the origin of the obligation is Section 7(2), as an implicit aspect of the obligation to respect, etc., the rights in the Bill of Rights. At other times, the obligation is said to originate from South Africa's international treaty obligations, which then becomes rooted in Section 7(2) when that provision is interpreted in light of South Africa's treaty obligations.

<sup>79</sup> *Ibid.*, at para. 191.

be considered when deciding whether measures taken to respect, protect, promote and fulfil the Bill of Rights would be reasonable. In particular, international law would need to be considered when interpreting the obligation to establish an independent anti-corruption unit, implicit in Section 7(2).<sup>80</sup> The Court therefore turned to consider a number of treaties on the combatting of corruption that were binding on South Africa, but had not been transformed into domestic law by national legislation.<sup>81</sup> The Court held:

Section 39(1)(b) states that when interpreting the Bill of Rights a court ‘must consider international law’. The impact of this provision in the present case is clear, and direct. What reasonable measures does our Constitution require the state to take in order to protect and fulfil the rights in the Bill of Rights? That question must be answered in part by considering international law. And international law, through the interlocking grid of conventions, agreement and protocols we set out earlier, unequivocally obliges South Africa to establish an anti-corruption entity with the necessary independence.

Thus, the Constitutional obligation to take reasonable steps to satisfy the Constitutional obligation in Section 7(2) was given meaning by turning to the standards contained in the South Africa’s international obligations. In other words, it would be unreasonable, and therefore unconstitutional as a violation of Section 7(2), to take measures that were not compliant with South Africa’s international obligations.

After assessing the standards in the relevant international treaties, the Court held that the legislation establishing the Hawks did not satisfy the obligations contained in the treaties to establish an independent anti-corruption unit. The Court held therefore that as the legislation establishing the Hawks did not satisfy South Africa’s binding treaty obligations to establish an independent anti-corruption unit, the legislation was not a reasonable step to satisfy the State’s duty under Section 7(2). The majority therefore concluded that the legislation was unconstitutional.<sup>82</sup>

Perhaps unsurprisingly, a dissenting opinion argued strongly that this amounted to enforcing unincorporated treaties ‘by the back door’, contrary to the constitutionally-mandated relationship between domestic and international law. The dissenting opinion of Ngcobo CJ emphasized the Constitutional requirement of transformation of treaties, and argued that the majority had overstepped the boundary between interpretation of the Bill of Rights and giving direct effect to the untransformed treaties.<sup>83</sup> Ngcobo CJ agreed that

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<sup>80</sup> Though see *supra* note 78.

<sup>81</sup> These treaties included the *United Nations Convention Against Corruption* (2004) 43 ILM 37, the *United Nations Convention against Transnational Organized Crime* (2001) 40 ILM 343, the *African Union Convention on Preventing and Combating Corruption* (2004) 43 ILM 5, and the *Southern African Development Community Protocol against Corruption* (2001), available at <http://www.sadc.int>.

<sup>82</sup> See *Glenister, supra*, paras. 179-202.

<sup>83</sup> [Section 39(1)(b) of the Constitution] requires courts, when interpreting the Bill of Rights, to ‘consider international law’. A distinction must be drawn between using international law as an interpretive aid, on the one hand, and relying on international law as a source of rights and

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Section 7(2) required the State to take positive steps to protect the rights in the Bill. However, he argued that the Constitution contained no express requirement to create an independent anti-corruption agency, and that the majority was relying on untransformed treaties to create unfounded constitutional obligations. The majority held, however, that their decision did not create new constitutional obligations out of the State's international obligations, but rather merely gave international law the interpretive role that was mandated by the Constitution itself.<sup>84</sup>

It can be seen, therefore, that by using untransformed treaties as an interpretive tool, the treaties were determinative of the content of the State's constitutional obligations. As put by the majority, the State's international obligations were of 'foremost interpretive significance'<sup>85</sup> when discerning the content of the State's Constitutional obligations under Section 7(2) of the Bill of Rights. It is possible to argue that this use of the treaty provisions exceeded the boundaries of interpretation, and in effect, rendered the treaty provisions directly enforceable by the domestic court. This is particularly the case given that the Constitutional obligation that was being interpreted – the obligation to establish an independent anti-corruption unit – was found to be implicit in Section 7(2) in great measure by relying on the same treaties.<sup>86</sup> Therefore, both the origin and the interpretation of the obligation can be said to be drawn directly from South

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obligations, on the other. The purpose of section 39(1)(b), as its heading, 'Interpretation of Bill of Rights', makes clear, is to provide courts with an interpretive tool when interpreting the Bill of Rights. It does not purport to incorporate international agreements into our Constitution. Nor can it be used to create constitutional obligations that do not exist in our Constitution. ...

The argument based on section 7(2) raises the question whether it is permissible, through a process of interpretation, to read into our Constitution a constitutional obligation that the Constitution does not expressly create. ...

To read the obligation to consider international law as creating, in conjunction with the obligation to protect the rights in the Bill of Rights, a constitutional obligation to establish an independent anti-corruption unit...inevitably would result in incorporating the provisions of the Convention into our Constitution by the back door. This would, in effect, amount to giving the Convention a status equal to the provisions of the Constitution, contrary to the express provisions of section 231 of the Constitution, which determine the legal status of an international agreement. ...Sections 39(1)(b) and 7(2) cannot be used to achieve the result contended for.' *Glenister, supra*, Dissenting Opinion of Ngcobo CJ, para 108-112.

<sup>84</sup> 'This is not to incorporate international agreements into our constitution. It is 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. To conclude that the Constitution requires the state to create an anti-corruption entity with adequate independence is therefore intrinsic to the Constitution itself.' *Glenister* case, majority judgement at para.195.

<sup>85</sup> 'That the Republic is bound under international law to create an anti-corruption unit with appropriate independence is of foremost interpretive significance in determining whether the state has fulfilled its duty to respect, protect, promote and fulfil the rights in the Bill of Rights, as section 7(2) requires. Section 7(2) implicitly demands that the steps the state takes must be reasonable. To create an anti-corruption unit that is not adequately independent would not constitute a reasonable step. In reaching this conclusion, the fact that section 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 obligations under section 7(2) to create an anti-corruption entity that lacks sufficient independence.' *Glenister, supra*, para. 194.

<sup>86</sup> See *supra* note 78.

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Africa's binding, but untransformed, treaty obligations. While this liberal use of international law is laudable from the perspective of ensuring compliance with South Africa's international obligations, it does establish an interpretative approach under Section 39 of the Bill of Rights that undermines the significance of the requirement of legislative transformation of treaties to enable judicial enforcement thereof.

Similarly powerful effect was given to another untransformed treaty in the decisions of the SCA and the Constitutional Court in the *Fick* case, using Section 39(2) of the Bill of Rights.<sup>87</sup> This case concerned the domestic enforceability of decisions of the Tribunal of the Southern African Development Community ('SADC') according to the terms of the Protocol of the SADC Tribunal, which was binding on South Africa by way of the SADC Treaty. In this case, two Zimbabwean farmers whose farms had been expropriated without compensation by the Zimbabwean government brought a complaint against Zimbabwe to the SADC Tribunal.<sup>88</sup> The Tribunal held in the farmers' favour, holding that this expropriation was contrary to the SADC Treaty, and ordered compensation to be given to the farmers. Zimbabwe refused to comply with the decision of the Tribunal, as well as a further decision for costs in favour of the farmers. After persistent non-compliance by the government of Zimbabwe, the farmers launched an action in South African courts for the enforcement of the costs order of the Tribunal via execution against Zimbabwean property located in South Africa. Both the SCA and the Constitutional Court held that the order was enforceable in South Africa, and upheld the execution of the costs order against the Zimbabwean property.

As with the *Glenister* case, provisions of the unincorporated treaty were essential to the outcome of the case. Both the SCA and the Constitutional Court held that Section 39(2) of the Bill of Rights required South African courts to develop the common law on the enforcement of foreign judgments to include the enforcement of decisions of the SADC Tribunal. The fact that the SADC Treaty was binding on South Africa, and included an obligation to 'take forthwith all measures necessary to ensure execution of decisions of the Tribunal',<sup>89</sup> when considered in light of the constitutional right to access to court,<sup>90</sup> was crucial to the Constitutional Court's decision that the spirit, purport, and object of the Bill of Rights required the common law to be developed in this manner. As

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<sup>87</sup> *Government of the Republic of Zimbabwe v Fick and Others* (657/11) [2012] ZASCA 122 (20 September 2012); *The Government of the Republic of Zimbabwe v Fick and Others* (CCT 101/12) [2013] ZACC 22.

<sup>88</sup> The SADC Tribunal became operational in 2005, and was vested with authority to hear complaints by individuals against SADC Member States. One of the first cases brought to the Tribunal was that of *Mike Campbell (Pvt) Ld and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2, which was one of the cases that was the subject of the appeal in the *Fick* case. After the Tribunal gave judgment in favour of Campbell against the government of Zimbabwe, the Tribunal's jurisdiction was amended to by SADC Member States to restrict it to hearing cases brought by States.

<sup>89</sup> Art. 32(2) SADC Tribunal Protocol.

<sup>90</sup> Section 34 Constitution.

such, decisions of the regional Tribunal that were not binding on South Africa<sup>91</sup> were rendered directly enforceable in South African domestic courts.

The precedent established in the *Glenister* decision was relied on by the Constitutional Court in this case to justify its invocation of South Africa's binding treaty obligations under Section 39(2) of the Constitution. Quoting from the *Glenister* judgment, the Court in *Fick* held that

Analogous to the reasoning in *Glenister*... South Africa's obligation to develop the common law as a measure necessary to execute the Tribunal's decision 'is a duty the country itself undertook when it acceded to these international agreements. And it is an obligation that became binding on the Republic, in the international sphere, when the National Assembly and the NCOP by resolution adopted them'.<sup>92</sup>

The Court continued that therefore 'the relevant provisions of the Treaty [must] be taken into account as we develop the common law. ... This will... be achieved by extending the meaning of "foreign court" to the Tribunal'.<sup>93</sup> The Court further held that as Zimbabwe had consented to the jurisdiction of the Tribunal and enforceability of the judgments of the Tribunal by becoming a party to the SADC Protocol, that constituted a waiver of the immunity that normally protects foreign States from subjection to the judicial processes of South African domestic courts, as well as from execution of orders against foreign State assets in South Africa.<sup>94</sup>

The Court clearly therefore established that, consistent with the earlier *Makwanyane*, *AZAPO* and *Williams* cases discussed above, provisions of untransformed treaties, as with any provision of international law, are relevant to the Section 39(2) activity of interpreting the Bill of Rights to develop the common law. However, diverging from the limited role given to international law under Section 39 of the Bill of Rights in the early case law, the international obligations were the key factor in determining the required development of the common law:

Article 32 of the Tribunal Protocol is an offshoot of the Amended Treaty that binds South Africa. It is foundational to the development of the common law on enforcement in this matter and provides that States 'shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal'. It also provides that the 'law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the State in which the judgment is to be enforced shall government enforcement' of the Tribunal's decisions. Since the Enforcement Act does not apply to this matter, the only other applicable foreign judgment enforcement mechanism

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<sup>91</sup> Art.32(3) South Africa was not a party to the relevant decisions of the Tribunal, and therefore, per Art.32(3), these decisions were not binding on South Africa. Zimbabwe was therefore the only Member State bound by the decisions.

<sup>92</sup> *Fick*, supra, para. 67, quoting from *Glenister*, supra, at para. 193.

<sup>93</sup> *Fick*, supra, para. 68.

<sup>94</sup> See *Fick*, para. 32-35. This immunity is found in Section 3(1) of the Foreign States Immunities Act 87 of 1981.

is the common law. We must, therefore, turn to the South African common law. Based on article 32(1), the common law must be developed in a way that would empower South Africa's domestic courts to register and facilitate the enforcement of the Tribunal's decisions.<sup>95</sup>

Thus, by using the untransformed treaty as a tool of interpretation to develop the common law in light of the Bill of Rights, the treaty provisions were subject to direct judicial enforcement by the Constitutional Court.

Again, this decision has laudable outcomes: first, it creates a further tool to ensure South Africa's reliance with its international obligations. Second, it established a mechanism enabling the victims of serious human rights abuses to pursue a remedy. However, it must be questioned whether it is appropriate for the judicial arm of the government to directly enforce the decision of an international tribunal and override legislative guarantees of immunity of foreign State actors on the basis of a treaty that had not yet been the subject of domestic implementing legislation. As with the *Glenister* decision, the prominent role given to international law can be seen to have, in effect, circumvented the need for Parliamentary approval of domestic enforcement of treaties as mandated by Section 231(4) of the Constitution.

#### **IV. Conclusion**

The preceding discussion has assessed the major cases in which the Constitutional Court and other South African domestic courts have engaged with provisions of international law. This discussion can be concluded by attempting to distill the various techniques that have been used by the courts either to avoid the application of international law, or to align South African domestic law with international law.

There are three techniques of avoidance of international law that can be discerned from the jurisprudence discussed above. First, there is the technique of distinguishing the domestic and international contexts that was often applied in the early decisions of the Constitutional Court, and is particularly clear in the *Grootboom*, *S v Williams* and *Makwanyane* judgments interpreting provisions of the Bill of Rights. In these cases, the Constitutional Court justified the adoption of an interpretation of specific rights distinct from that given in relevant International Human Rights treaties by emphasizing the differences between the international and domestic contexts, either in terms of the drafting of the provisions or the particular South African social realities that required a different meaning to be given. In these cases, the Constitutional Court reiterated that the primary role of the Court was to interpret the Constitution for the domestic context, and that this might therefore lead to divergences from international sources. It should be noted, however, that this technique was not used to avoid the application of binding provisions International Law, as the treaties in question were not ones that South Africa had become a party to. Therefore, this technique was not used in such a way as to jeopardize South Africa's fulfillment of its international obligations.

The second technique of avoidance that can be seen in the case law set out above is the denial of self-executing status of a treaty that is binding on South Africa. The saga

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<sup>95</sup> Fick, *supra*, paras. 57-58.

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of the *Goodwood* and *Quagliani* cases have illustrated how this technique can be relied on by South African courts to avoid application of provisions of a binding treaty by holding that its direct enforcement by the domestic court requires legislative implementation. The opposite outcomes in the High Court decisions in the two cases illustrate the stark results that can result from a decision as to whether a particular unimplemented treaty is self-executing according to Section 231 of the Constitution. It is clear that the use of this technique could lead to the non-application of provisions of treaties that should be considered to be a part of South African domestic law according to the Constitutional scheme, and also to a failure to fulfill South Africa's treaty obligations. Interestingly, however, when this technique was applied by the Constitutional Court in the *Quagliani* appeal, it did not lead to the non-application of the binding treaty. That result, however, depended on the unique circumstances of the case, and the flawed logic of the judgment discussed above.

The final technique of avoidance of international law that has been employed in the cases described in this paper is the denial of the customary international law status of a rule pleaded before the domestic court. This was a technique seen in the case law of the previous Constitutional era, and particularly in the *Nduli* and *Petane* cases. A court's refusal to accept the customary status of a rule of international law could effectively avoid the application of a rule that should be directly enforced by the Court, given customary international law's status as automatically a part of South African domestic law per Section 232 of the Constitution. This in turn can frustrate South Africa's ability to perform its international obligations. As noted above, however, this technique seems to have fallen out of favour with the new Constitutional mandate's general receptiveness to international law. Nonetheless, the lack of clarity of the standard applied by South African courts to ascertain the international customary status of a rule creates the risk of the reemergence of this technique in the future.

It is, however, the techniques of alignment between international law and domestic law that have been used to greater effect in the case law of the Constitutional Court and other South African domestic courts. As set out in Section II, South African courts have become remarkably receptive to international law since the adoption of the new Constitution, and the latest judgments of the Constitutional Court illustrate perhaps the highest water mark in this regard thus far. In particular, two techniques have been used to give international law a significant role in shaping the content of domestic law.

First, the obligation of consistent interpretation has been used to give wide-ranging effect to international law when courts undertake the interpretation and development of domestic law. It is submitted that the courts' interpretations of Sections 233, 39(1)(b) and 39(2) of the Constitution have rendered this effect even more significant than the strongly-worded interpretative mandates might have been anticipated to produce. The wide interpretation of what constitutes 'international law' according to these sections of the Constitution established in the *Makwanyane* judgment and affirmed in later case law and have enabled treaty obligations, both those that have and have not been the subject of legislative transformation, to have substantial influence on the content of domestic law. This is particularly evident in the *Progress Office Machines* decision of the SCA, and the *Glenister* and *Fick* decisions of the Constitutional Court. Such judicial interpretations, therefore, have augmented the already strong constitutional obligation to apply

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international law, and therefore reduced the possibility of the use and development of avoidance techniques.

Secondly, it can be seen that courts have employed the requirement of reasonableness to bring domestic law into alignment with international law. This technique has thus far been used alongside the interpretation of legislation or the Bill of Rights under Section 233 and Sections 39(1)(b), but it seems that it could potentially apply more widely. In both the *Progress Office Machines* case and the *Glenister* case, it was held that it would be unreasonable for the State to act in such a way that was incompatible with its international law obligations. This then opened the door to application of international law standards with significant impact on the ultimate decision of the case. It is possible that this technique could be extended to any use of a reasonableness standard by domestic courts, opening the door to the application of international law in circumstances that would not fall within one of the express Constitutional obligations to do so.

Through these two techniques of alignment, and particularly the interpretative obligations under Section 39 of the Bill of Rights, South African courts, and particularly the Constitutional Court, have given a substantial effect to provisions of international law. These techniques have created mechanisms for the enforcement of international law that seem to have extended beyond the Constitutional obligations discussed above. By doing so, the judiciary have shown themselves to be committed to the fulfilment of South Africa's international obligations. These techniques demonstrate potential for the development of effective remedies for violations of international law in the domestic courts of South Africa, which are so often missing in relation to international legal obligations. Such developments should therefore be welcomed.

Nonetheless, the controversy surrounding the heavy use of international law by the domestic courts, particularly in the most recent judgments of the Constitutional Court, must not be ignored. The strongly-worded dissent in the *Glenister* case and political unhappiness with the Court's insistence on enforcing judgments of international tribunals against foreign States could indicate the beginning of a turning point. Courts must be mindful not to overstep the constitutionally-mandated separation of powers by giving direct effect to provisions of international law which have not been consented to or implemented by the Executive and Legislative arms of government. A careful balance must be struck between fulfilling the clearly-stated Constitutional aim of bringing South African law into compliance with international law wherever possible, and respecting the role of the Executive and Parliament as the sole bodies with the authority to bind South Africa to international obligations and to create domestic law.