The status of international treaties in the South African domestic legal system: Small steps towards harmony in light of *Glenister*?[*]

Glenister v President of the Republic of South Africa 2011 3 SA 347 (CC)

Introduction

The Vienna Convention on the Law of Treaties defines a treaty as 'an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.[1] When a treaty

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[44] *Ibid*.

[45] See n10 above at 24.

[46] Article 19 of the Draft Articles.

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[1] Article 2(1)(a) of the Vienna Convention on the Law of Treaties (1969) 8 *ILM* 679. This definition of 'treaty' has been accepted in South Africa, see *Harksen v President of the Republic of South Africa* 2000 2 SA 825 (CC) 835 n 21.

enters into force, it binds those who are party to it and obliges these parties to perform in terms of the treaty in good faith, without dictating how this should be done.[2] When an international treaty enters into force, it becomes binding on the parties in the international sphere,[3] but the status of international law obligations within a state's domestic legal system can vary. Whether the particular rights and obligations created in the international sphere by treaties give rise to enforceable domestic rights and obligations depends on the approach adopted by a state to the incorporation of international law into domestic law.[4]

Today, South Africa is a signatory to a number of international treaties.[5] The place and status of international law, including treaties, in the domestic legal system of South Africa is regulated by the Constitution of the Republic of South Africa, 1996 (the Constitution). Despite this legislative guidance, the status and effect of international treaty obligations within the domestic legal arena is a complex issue. This was illustrated in the recent case of *Glenister v President of the Republic of South Africa.*[6] The arguments advanced in this case show that this is an intricate topic which is not yet fully resolved.

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[2]Article 26 of the Vienna Convention on the Law of Treaties of 1969. See also Malunga 'International civil matters' (2005) *De Rebus* at 27. Treaties are not the only source of international law, other sources include customary international law, general principles of law recognised as such by civilised nations; and legal jurisprudence; see art 38 of the Statute of the International Court of Justice. This was accepted by the Constitutional Court in *S v Makwanyane* 1995 3 SA 391 (CC) 413. The Constitutional Court found that 'international law would include non binding as well as binding law', referring to sources listed in art 38 of the Statute of the International Court of Justice. Other sources, such as UN resolutions and declarations, are increasingly being recognised as evidence of international law or used in the interpretation of principles of international law; for more on this see Meyersfeld *Domestic violence and international law* (2010) at 3 7. For an example of this in the context of South Africa, see *Carmichele v Minster of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 968.

[3]In the context of South Africa, s 231(2) of the Constitution regulates this. In terms of s 231(2) of the Constitution, South Africa is only bound by a treaty if 'it has been approved by resolution in both the National Assembly and the National Council of Provinces'. This is subject to the proviso set out s 231(3). These provisions are dealt with further below.

[4]Today it is generally accepted that there are two main approaches which can be adopted: first, the monist approach, and secondly, the dualist approach. The monist approach maintains that international law and domestic law are to 'be regarded as manifestations of a single conception of law' as they are far from being different. Dualists, on the other hand, regard international law and domestic law as being completely different systems of law and international law can only be applied by domestic courts if the international treaty has been 'adopted' by the domestic courts or transformed by legislation into domestic law. Dugard *International law: A South African perspective* (2011) (4ed) 42, quoting from 'International law and municipal law' in Lauterpacht (ed) *International law: Being the collected papers of Hersch Lauterpacht* vol 1 *The general works* (1970) 216 at 217. See also Katz 'An act of transformation: The incorporation of the Rome Statute of the ICC into national law in South Africa' (2003) *African Security Review* 25 at 26; and Michie 'The provisional application of treaties in South African law and practice' (2005) *SAYIL* 1 at 13 14.

[5]Malunga n 2 above at 27.

[6]*Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC).

The purpose of this discussion is to establish whether the approach adopted by the *Glenister* decision is novel and progressive in its dealings with international treaty obligations and, if so, whether this decision may have a lasting impact on how South African courts deal with international treaty obligations in future. In order to achieve this, I shall, first, briefly consider the status of international treaties within the South African domestic arena, before 1994 and thereafter, and how the courts dealt with the provisions of international treaties in domestic cases. Secondly, the recent *Glenister* decision will be considered in order to establish how the Constitutional Court dealt with the impact of international treaty obligations in the domestic arena. Thirdly, the *Glenister* decision will be analysed to determine the actual stance adopted in the case and whether the decision can have a lasting impact, possibly changing the status of international treaty obligations in the South African domestic arena.

South Africa: The status of international treaties

Position before 1994

Before 1994, the head of the Republic, being the State President, was entrusted with the power to enter into and ratify treaties on behalf of the country.[7] As a result, treaties only became part of the domestic legal system after some act of legislative transformation.[8] South Africa was regarded as following a dualist approach to the incorporation of international treaties prior to 1994, which was clearly set out in *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd*:[9]

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[7]Section 6 of the previous constitution Act 110 of 1983; Dugard n 4 above at 48; Michie n 4 above at 17; Rautenbach 'Formalities of "foreign" internet wills in South Africa and the Netherlands: A storm in a teacup?' (2009) *THRHR* 241 at 246; *Quagliani v President of the Republic of South Africa; Van Rooyen and Brown v The President of the Republic of South Africa* (unreported, TPD Cases Nos 959/04 and 28214/06) at 11 12; and *President of the Republic of the South Africa v Quagliani, and two similar cases* 2009 2 SA 466 (C) at 477.

[8]Dugard n 4 above at 48; *Quagliani v President of the Republic of South Africa; Van Rooyen and Brown v The President of the Republic of South Africa* n 7 above at 11 12; and Michie n 4 above at 17 and 24. Justice Edwin Cameron has stated that during the apartheid era (the reigning regime prior to 1994) 'international law was reviled' and was regarded as 'an alien and hostile doctrine'; for more listen to his paper on 'Constitutionalism, rights and international law: The *Glenister* decision' presented at the Annual Herbert L Bernstein Memorial Lecture 2011: Hon Edwin Cameron' 8 September 2011 available at http://www.youtube.com/watch?v 5FwDsv7rSnO (accessed 3 February 2012). Dugard expresses the same sentiment when he states that 'the hostility of successive apartheid governments to the United Nations and international human rights conventions undoubtedly influenced the attitudes of legislators, judges and lawyers. International law received no constitutional recognition and was largely ignored by the courts and lawyers. While international law was applied by the courts in politically neutral matters, such as sovereign immunity and diplomatic privileges, it was generally viewed as an alien and hostile legal order.' Dugard 'Kaleidoscope: International law and the South African Constitution' (1997) 1 *EJIL* at 77.

[9]*Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 3 SA 150 (A) at 161C D. See also *Maluleke v Minister of Internal Affairs* 1981 1 SA 707 (B) at

> It is common cause, and trite law I think, that in this country the conclusion of a treaty, convention or agreement by the South African Government with any other Government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our municipal law except by legislative process … In the absence of any enactment giving their relevant provisions the force of law, they cannot affect the rights of the subject.

Thus, before 1994, 'the power to enter into treaties was entrusted to the executive, whilst the power to transform the treaties into domestic law was assigned to the legislature'.[10] A legal subject could not derive any rights from a treaty not embodied in municipal law through legislative process, and the treaty could do no more than serve as an interpretation aid for legislation on doubtful points.[11]

Position after 1994

On 27 April 1994 the Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution) came into effect. The interim Constitution regulated the position for a period of some two years before the Constitution came into effect. In terms of the interim Constitution the President retained the authority to negotiate and sign treaties; while parliament was required to agree to the ratification of and accession to treaties.[12] Such agreement by parliament was sufficient for such a treaty to become law in South Africa, 'provided Parliament expressly so' provided and it was not contrary to the interim Constitution.[13]

The Constitutional Court of South Africa found that unincorporated international treaties, whether South Africa was a party to such treaty or not, were relevant only for purposes of interpreting the interim Constitution 'on the

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712 13; *Binga v Cabinet for South West Africa* 1988 3 SA 155 (A) at 184 85; Dugard n 4 above at 48; Katz n 4 above at 26; Michie n 4 above at 17; Devine 'The relationship between international law and municipal law in the light of the Interim South African Constitution 1993' 1995 *ICLQ* 1 at 5; and *Swissbourgh Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 2 SA 279 (T).

[10] Rautenbach n 7 above at 246.

[11] *Maluleke* n 9 above at 712 713.

[12] Sections 82(1)(i) and 231(2) of the interim Constitution. See also Dugard n 4 above at 53 54; *Quagliani v President of the Republic of South Africa; Van Rooyen and Brown v The President of the Republic of South Africa* n 7 above at 12; and *President of the Republic of the South Africa v Quagliani, and two similar cases* n 7 above at 477.

[13] Section 231(3) of the interim Constitution. See also Dugard n 4 above at 53. What precisely was meant by the term 'expressly so provides' has been the subject of debate amongst various academics. This falls beyond the scope of this piece and will not be dealt with here. For more, see Devine 'Some problems relating to treaties in the interim South African Constitution' (1995) *SAYIL* at 1; and Botha 'Incorporation of treaties under the Interim Constitution: A pattern emerges' (1995) *SAYIL* at 196.

ground that the lawmakers of the [interim] Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law'.[14] The Constitutional Court upheld the pre-1994 view that incorporation by legislative enactment was required before international treaties became part of the domestic legal system, enforceable in the South African courts at the instance of private individuals.[15] This was said to be supported by the direct provisions of the interim Constitution.[16]

The position adopted under the interim Constitution was a marked changed from that under the pre-1994 apartheid regime. Previously regarded as a threat to the state, international law was now 'viewed as one of the pillars of the new democracy'.[17] The provisions of the interim Constitution were, however, not without problems. Section 231(2) of the interim Constitution 'failed to take account of the bureaucratic mind', resulting in few treaties being presented promptly to parliament.[18] Furthermore, parliament relied heavily on committees, with the result that a treaty may have been subject to approval by a number of parliamentary committees before finally being presented for ratification, causing further delays.[19] The result of this cumbersome process was that only a small number of treaties ratified by parliament were integrated into domestic law.[20]

Today section 231 of the Constitution, which was signed into law on 10 December 1996, deals with the status of international treaties in the South African domestic arena. In terms of section 231, the responsibility of negotiating and signing international agreements remains with the national executive.[21] Before an international agreement becomes binding on the

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[14] *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 8 BCLR 1015 (CC), 1996 4 SA 671 (CC) at par 26.

[15] *Id* at par 26. The Constitutional Court found support for this stance in the pre 1994 cases of *Pan American World Airways Incorporated* n 9 above; *Maluleke* n 9 above; and *Binga* n 9 above.

[16] *AZAPO* n 14 above par 27. It is important to understand the provisions of the interim Constitution, and the way in which they functioned, as s 231(5) of the Constitution provides that '[t]he Republic is bound by international agreements which are binding on the Republic when the Constitution took effect'. Thus treaties which bound the Republic under the interim Constitution remain binding under the Constitution.

[17] Dugard n 8 above at 77.

[18] Dugard n 4 above at 53; and Dugard n 8 above at 81. The reason for this, according to Dugard, is that the government departments whose responsibility it was to scrutinize a treaty before submission to parliament refused to submit such a treaty to parliament until they were entirely satisfied that the provisions of the treaty did not conflict with domestic law.

[19] Dugard n 4 above at 53; and Dugard n 8 above at 81.

[20] For more on this, see Botha n 13 above; and Michie n 4 above at 18. Dugard n 4 above at 53; and Dugard n 8 above at 81.

[21] Section 231(1) of the Constitution. The Constitution uses the term 'international agreement' instead of 'treaty'. For more see Dugard n 4 above at 60. When the President acts as head of the national executive for purposes of treaty making, he 'is obliged to act in a collaborative manner';

Republic in the international sphere, it must be approved by the National Assembly and the National Council of Provinces by resolution.[22] However, if the agreement is 'of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession', it will bind South Africa in the international arena without approval by the National Assembly and the National Council of Provinces, provided it is tabled in parliament 'within a reasonable time'.[23] Such agreements are therefore exempt from parliamentary approval.[24]

All international agreements only become law in South Africa when enacted into domestic 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'.[25] All international agreements which were binding on South Africa when the Constitution took effect continue to bind the Republic.[26] In terms of section 231 of the Constitution, it is therefore necessary for an international treaty to

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President of the Republic of the South Africa v Quagliani, and two similar cases n 7 above at 477. See also Botha 'Rewriting the Constitution: The "strange alchemy" of Justice Sachs, indeed!' (2009) 34 *SAYIL* 253, 257.

[22] Section 231(2) of the Constitution. Parliament consists of two houses, the National Assembly and the National Council of Provinces; s 42(1) of the Constitution. Without this approval by parliament the treaty does not bind South Africa internationally, unless s 231(3) of the Constitution is applicable.

[23] Section 231(3) of the Constitution.

[24] Whether a treaty is one of 'a technical, administrative or executive nature' has not yet been established by case law or statute in South Africa and 'remains a question of interpretation'; Keightley 'Public international law and the Final Constitution' (1996) *SAJHR* 405 414. Whether an agreement is one which requires ratification is, in theory, a determination to be made by the executive; Michie n 4 above at 19. However, the Department of International Relations and Cooperation *Practical guide and procedures for the conclusion of agreements* sets out guidelines to be applied when determining whether parliamentary approval is necessary or not. According to the guide, agreements requiring parliamentary approval in terms of s 231(2) of the Constitution include those that '[r]equire ratification or accession (usually multilateral agreements); [h]ave financial implications that require an additional budgetary allocation from Parliament; [h]ave legislative or domestic implications (e.g. require new legislation or legislative amendments); [a]pproval for ratification is required in cases where South Africa has signed the agreement and it provides for such an instrument; [and] [a]pproval for accession is required when South Africa has not signed an agreement but can become a party thereto through accession'; Department of International Relations and Cooperation *Practical guide and procedures for the conclusion of agreements* (3ed) at 9. Agreements which fall within the exclusion provided by s 231(3) of the Constitution are those which 'do not require parliamentary approval for ratification or accession'; that 'have no extra budgetary financial implications'; and which 'do not have legislative implications'; Department of International Relations and Cooperation *Practical guide and procedures for the conclusion of agreements* (3ed) at 8.

[25] Section 231(4) of the Constitution.

[26] Section 231(5) of the Constitution. This was said to reassure other states 'that they may rely on previous treaties despite the fundamental nature of the change in government structures taking place under the Constitution'; Devine n 9 above at 7.

be enacted into law by national legislation for it to be binding on the domestic legal order and for it to give rise to enforceable domestic rights. This is due to the executive retaining the authority to enter into international treaties.[27] There are three ways which are employed by the legislature to incorporate international treaties into domestic law; first, embodiment of the provisions of a treaty in the text of national legislation; secondly, a schedule to a statute may incorporate a treaty; and thirdly, the executive may be given the power, by an enabling statute, to incorporate the treaty into domestic law by means of proclamation or notice in the *Government Gazette*.[28] Treaty provisions which are self executing become part of the domestic legal order automatically, unless they are in conflict with the Constitution or other national legislation.[29]

Treaties which are signed and ratified by the President and which are approved by resolution in parliament, are of a technical, administrative or executive nature, or do not require ratification or accession, are binding on the state on the international plane, despite not having been enacted into domestic law.[30] A failure by South Africa to abide by the provisions of a treaty may result in the country 'incurring liability towards other signatory states'.[31] Despite not providing enforceable domestic rights, unincorporated international treaties do still play some role in the South African legal system.

Section 233 of the Constitution provides that:

> 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.

In addition, our courts are also instructed to consider international law when interpreting the Bill of Rights.[32] For this purpose, international law is said to 'include non-binding as well as binding law. They may both be used under the

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[27] Section 231(4) of the Constitution; Dugard n 4 above at 56; Michie n 4 above at 19; Rautenbach n 7 above at 247; Devenish 'International law and the Constitution' in Joubert (founding ed) *The law of South Africa* vol 5/3 (2004) (2ed) par 375; *AZAPO* n 14 above; and *Progress Office Machines CC v South African Revenue Service* (2007) 4 All SA 1358 (SCA).

[28] Dugard n 4 above at 55. This was confirmed by the minority in *Glenister* n 6 above at par 99.

[29] Section 231(4) of the Constitution; *Quagliani v President of the Republic of South Africa; Van Rooyen and Brown v The President of the Republic of South Africa* n 7 above at 12 13; Dugard n 4 above at 56; Rautenbach n 7 above at 247; Devenish n 27 above par 375; and *Swissbourgh Diamond Mines (Pty) Ltd* n 9 above. See also *President of the Republic of South Africa* n 7 above at 480 481.

[30] Section 231(2) and (3) of the Constitution. Dugard n 4 above at 54.

[31] *Ibid*.

[32] Section 39(1)(b) of the Constitution. This obligation is an obligation only to consider international law, courts are not bound to apply international law once they have considered it; *S v Williams* 1995 3 SA 632 (CC); and Hopkins 'Can customary international law play a meaningful role in our domestic legal order: A short case study to consider' (2005) *SAYIL* 276 at 279.

section as tools of interpretation'.[33] Furthermore, when developing the common law or customary law, the domestic courts are required to 'promote the spirit, purport and objects of the Bill of Rights'.[34]

In *Swissbourgh Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* the court again applied the position adopted in *Pan American Airways Inc*, namely that embodiment into the domestic legal system by legislative process is required before a treaty may give rise to rights for subjects.[35] The court (following Professor Dugard's formulation) recognised the existence of four exceptions to the general rule; firstly, domestic courts may consider unincorporated international treaties when interpreting ambiguous statutes;[36] secondly, 'an unincorporated treaty may be taken into account in the challenge of the validity of delegated legislation on grounds of unreasonableness'; thirdly, if a rule of customary law is evidenced by an unincorporated treaty, it may be applied as a customary rule; and fourth, treaties which fall exclusively within the purview of the executive are also regarded as an exception to the general rule.[37] Self-executing provisions contained in an international treaty are also regarded as forming part of domestic law.[38] This, the court found, was in accordance with section 231 of the Constitution.[39]

Today the Constitution expressly sets out the status and effect of international treaties in the domestic arena. Section 231 of the Constitution is said to combine a monist and dualist approach (although being predominantly dualist) to the incorporation of international treaties.[40] However, the recent case of

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[33] *Makwanyane* n 2 above at 413 14; Dugard n 4 above at 62 63; and Hopkins n 32 above at 279. See also Viljoen 'Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa' (1999) *Journal of African Law* 12 13 and 15 16, who deals with the African Charter on Human and Peoples' Rights being used as an interpretative tool.

[34] Section 39(2) of the Constitution.

[35] *Swissbourgh Diamond Mines (Pty) Ltd* n 9 above at 327.

[36] It is important to point out that this exception is not entirely correct. In terms of s 233 of the Constitution, all courts are required to consider international law '[w]hen interpreting any legislation', not merely ambiguous statutes. Section 233 requires the courts to prefer an interpretation of legislation which is consistent with international law over any interpretation which is in conflict with international law. Thus, international law should be considered when interpreting any legislation, not merely ambiguous statutes.

[37] *Swissbourgh Diamond Mines (Pty) Ltd* n 9 above at 327

[38] *Ibid*.

[39] *Ibid*.

[40] There is some debate as to which approach s 231 of the Constitution adopts. Some authors argue that the position enumerated combines a monist and dualist approach to the incorporation of international treaties into the South African domestic law; see Couzens 'The incorporation of international environmental law (and multilateral environmental agreements) into South African domestic law' (2005) *SAYIL* 128; and Devenish n 27 above at par 375. See, however, the view of Cameron n 8 above. Cameron states that '[b]efore Glenister the legal position within South Africa regarding international treaties clearly reflected the dualist conception. A treaty which has been signed and ratified but not enacted into local law was regarded as binding on South Africa only on the international plane. .... This position dramatically limited the domestic impact of the states

Glenister approached the incorporation of treaties into the domestic arena in a unique and novel manner, possibly heralding change in this regard.

Glenister v President of the Republic of South Africa

Facts

In 2001 the Directorate of Special Operations (DSO), also known as the Scorpions, was established under the National Prosecuting Authority Act 32 of 1998. The DSO, a specialised crime fighting unit located within the National Prosecuting Authority (NPA), was created with the intention that it should complement the existing law enforcement agencies' efforts in addressing organised crime. The DSO was granted powers to investigate and institute criminal proceedings in respect of organised crimes and other specified offences.[41]

On 27 January 2009, the President of the Republic of South Africa signed into law the National Prosecuting Authority Amendment Act 56 of 2008 and the South African Police Service Amendment Act 57 of 2008. The effect of the statutes was to disband the DSO and establish the Directorate of Priority Crime Investigation (DPCI), also known as the Hawks, located within the South Africa Police Service (SAPS). The purpose of these two statutes, it was said, was to strengthen the capacity to fight organised crime and to give effect to the decision to relocate the DSO to the SAPS from the NPA. These two statutes were at the centre of this constitutional challenge.[42]

The constitutional challenge launched by the applicant against the legislation was based on the contention that the scheme of the impugned laws, which brought about the dissolution of the DSO, was unconstitutional. It was submitted that the legislation was 'irrational, unreasonable, unfair and undermines the structural independence of the NPA', and that the legislature had violated a number of its constitutional obligations, including the duty to respect international treaty obligations, in enacting the legislation.[43] The *amicus*, the Helen Suzman Foundation, presented an argument based on 'an international

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undertaking international law obligations. Under this conception, if a state in the application of its domestic law acts contrary to international law it commits a breach of its international law obligations but only those obligations not its domestic constitutional obligations. A state that has contracted valid international law obligations is bound to make its legislation with such modifications as may be necessary to ensure the fulfilment of the obligations undertaken but it's accountable for a failure to do that only before international tribunals on the dualist conception'.

[41] *Glenister* n 6 above at pars 1 2 and 6 7.

[42] *Id* at pars 1 2 and 10 12. There were also political influences in the background giving rise to the abolition of the Scorpions. The initial decision to disband the Scorpions, and create a single police service, was taken by resolution at the national conference of the African National Congress, the ruling party, in December 2007.

[43] *Glenister* n 6 above at par 17.

obligation to establish an independent anti-corruption agency', which the legislation violated.[44] This constitutional obligation was said to flow from the international treaties ratified by South Africa, which required the country to establish an independent anti-corruption unit to fight corruption. It was submitted that the DPCI, located within the SAPS, was not structurally and operationally independent and as a result could not be an effective corruption-fighting mechanism.[45] For this reason, these laws were alleged to be inconsistent with South Africa's international obligations, and thus, the Constitution.[46]

Issues to be decided by the Constitutional Court

Put succinctly, the key question in this case was whether the two relevant statutes signed into law by the President on 27 January 2009, which disbanded the DSO and created the DPCI, were constitutionally valid.[47] In reaching a conclusion, both the minority and the majority judgments considered the incorporation of international law obligations into domestic law, including whether such obligations give rise to enforceable domestic law rights and duties. It is only this limited aspect of the judgment which is relevant for purposes of the present discussion.

Decision and reasons regarding the effect of international treaty obligations in the domestic sphere

Minority judgment

Ngcobo CJ, writing for the minority of four judges, sets out and considers the argument of the *amicus* in which it is contended that the obligation to create an independent anti-corruption unit is implicit in the Constitution when one considers the country's international treaty obligations. This constitutional obligation is said to rest on two interrelated submissions: first, the constitutional obligation arises from South Africa's ratification of the United Nations Convention against Corruption[48] and the enactment in domestic law of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA); and secondly, that the constitutional obligation contended 'arises from the positive obligation of the state to protect the rights in the Bill of Rights which is imposed by section 7(2) of the Constitution as informed by South Africa's obligations

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[44]The Helen Suzman Foundation, the *amicus*, is a non governmental organisation which has its objectives 'to defend the values that underpin ... liberal constitutional democracy and to promote respect for human rights'; *Glenister* n 6 above at par 4.
[45]*Id* at pars 18 and 178.
[46]*Id* at par 178.
[47]*Id* at par 160. See also the 'Media Summary', available at http://www.constitutionalcourt.org .za/site/ Glenister.htm (accessed 14 April 2011).
[48]This Convention was ratified by South Africa on 22 November 2004, and entered into force on 14 December 2005.

under the Convention'.[49] The minority found that these arguments had to 'be evaluated in light of the place of international law in [the] domestic legal framework', and especially within the scheme of section 231 of the Constitution which regulates international treaties.[50]

Section 231 of the Constitution was said to be deeply rooted in the separation of powers, and the distinction between the executive branch and the legislature. The national executive is assigned, by section 231(1), the power to negotiate and sign all international agreements.[51] However, such agreements negotiated and signed by the national executive do not automatically become binding on the Republic, unless such an agreement is of a technical, administrative or executive nature, or does not require either ratification or accession, provided that it is tabled in the National Assembly and National Council of Provinces within a reasonable time.[52] All other international agreements require additional elements in order to become binding on the Republic; first, there must be approval by resolution by parliament, and secondly, it must either be enacted into law by national legislation, or if it is a self-executing agreement which is approved by parliament, it becomes law upon approval by parliament unless it is inconsistent with the Constitution or any other legislation.[53]

An international agreement which has been approved by parliament under section 231(2) of the Constitution, constitutes an undertaking at the international level only; that is between South Africa and other state parties, and is binding on South Africa on the international plane.[54] Such an agreement does not become part of the domestic legal order 'until and unless it is incorporated into our law by national legislation', and an international agreement cannot be the source of rights and obligations in the domestic sphere if it has not been incorporated as such.[55] Once incorporated into the domestic sphere, under section 231(4) of the Constitution, the international agreement assumes the same status as ordinary legislation in domestic law.[56] Support for this proposition is also found in other common law jurisdictions, including Australia, Canada and New Zealand.[57]

Ultimately it was found that international agreements, and their ratification by

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[49] *Glenister* n 6 above at pars 84 85.
[50] *Id* at par 87.
[51] *Id* at pars 88 89.
[52] Section 231(2) read together with s 231(3) of the Constitution. *Glenister* n 6 above at pars 88 89.
[53] Section 231(2) read together with s 231(4) of the Constitution. *Glenister* n 6 above at pars 88 90.
[54] *Glenister* n 6 above at pars 91 92. A failure to observe any obligations in such international agreement was said to result in responsibility towards other signatory states only.
[55] *Glenister* n 6 above at par 92; also quoting from *AZAPO* n 14 above at par 26, which provides support for this reading of s 231 of the Constitution.
[56] *Glenister* n 6 above at pars 100 101.
[57] *Id* at pars 93 94.

parliament, indicate that parliament will act in accordance with the provisions of that agreement, subject to the provisions of the Constitution, but that the international agreement does not create rights and obligations in the domestic sphere.[58] When international agreements are incorporated into the domestic sphere the agreement assumes the status of ordinary legislation and does not create constitutional rights and duties; the international rights and duties are not transformed by incorporation into constitutional rights and duties.[59]

Despite not automatically creating enforceable domestic rights and obligations, it was said that international agreements do play an important role in domestic law as 'interpretative aids' in understanding the nature and scope of constitutional obligations, which does not have the same effect as creating binding constitutional rights and obligations in domestic law.[60]

Therefore, it is clear that the minority took the conservative approach in reaching a decision in line with previous cases, adopting what has been described as a combined monist (for self-executing provisions only) and dualist approach to the incorporation of international treaties. Legislative enactment is necessary for international treaty obligations to give rise to domestically enforceable rights and obligations, except when dealing with self-executing provisions which have been approved by parliament. This approach allows for differences to arise in what the Republic agrees to at the international level, and what they actually do in the domestic arena, and any such differences can only be remedied through international dispute resolution provisions.

The majority judgment handed down in the *Glenister* case, however, followed and developed a novel approach regarding the status of international treaty obligations in the domestic arena.

Majority judgment

The majority judgment, written by Moseneke DCJ and Cameron J with the support of three other justices, deals with the incorporation and effect of international agreements slightly differently from the minority. The majority state that 'our Constitution takes into its very heart obligations to which the Republic,

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[58] *Id* at pars 95 96.
[59] *Id* at par 102.
[60] *Id* at pars 98 and 115. The minority decision concludes that ss 7(2) and 39(1)(b) of the Constitution do not impose a constitutional obligation on the state to establish an independent anti corruption unit (pars 112 113). It goes further and holds that if such constitutional obligation is found, there 'is an adequate level of structural and operational autonomy that is secured through institutional and legal mechanisms that are designed to prevent undue interference in the effective functioning of the DPCI' (par 155). The appeal against the constitutional challenge, according to the minority, must be dismissed (par 159). See also the 'Media Summary' n 47 above.

through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measure of the state's conduct in fulfilling its obligations in relation to the Bill of Rights'.[61] In considering the impact of international law on the domestic legal system of South Africa, the majority consider section 39(1)(b) of the Constitution, which provides for a consideration of international law when interpreting the Bill of Rights; section 231, which sets out the status of international treaties; section 232, in which customary international law is said to be law in South Africa, unless it is inconsistent with the Constitution or other legislation; and section 233, which concerns the application of international law.[62]

In considering section 231(1), (2) and (3) of the Constitution, the majority reached the same conclusions as the minority on a few points, namely that 'the negotiating and signing of all international agreements "is the responsibility of the national executive"'; that such agreements do not bind South Africa without more; for an agreement to bind South Africa it must be approved by parliament by resolution; and that an agreement 'of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession' does not require parliamentary approval.[63] Section 231(2) is said to be mainly directed at South Africa's legal obligations in international law, and does not deal with the transformation of international law rights and duties into domestic constitutional rights and duties.[64] Section 231(4) 'creates a path for domestication of international agreements', which shows that international agreements cannot, without more, create binding domestic constitutional rights and duties.[65] This does not mean, though, that such international agreements, which are approved by parliament, do not have any constitutional effect within the domestic legal order.[66]

International agreements, which have been approved by parliament, 'bind the

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[61] *Glenister* n 6 above at par 178.
[62] *Id* at par 179.
[63] *Id* at par 180.
[64] *Id* at par 181.
[65] *Ibid*.
[66] *Id* at par 182. A number of international agreements on the combating of corrupt activities currently bind South Africa, including the United Nations Convention against Corruption (2004) 43 *ILM* 37 (the UN Convention); the Southern African Development Community Protocol on Combating Illicit Drugs adopted on 24 August 2006, and the African Union on Preventing and Combating Corruption (2004) 43 *ILM* 5. The majority found that the obligations created by these agreements were 'clear and they are unequivocal', imposing a duty on South Africa to establish an independent anti corruption unit. This duty was said not only to exist in the international sphere. The UN Convention was ratified by parliament. PRECCA was enacted and provides for practical measures to investigate corruption. PRECCA acknowledges, in the Preamble, that corruption undermines human rights (and the state has a duty to protect human rights), that it damages democratic institutions, that corruption requires international cooperation, and that the countering of corruption is in the interest of securing the right of individuals and groups within the country.

Republic', and this has an important impact in demarcating the obligations on the state 'in protecting and fulfilling the rights in the Bill of Rights'.[67] When international agreements impose clear and unequivocal obligations on the Republic, this duty does not only exist in the international sphere, and it is also not only enforceable in that sphere. The Constitution 'appropriates the obligation for itself and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere'.[68] The explanation for this starts with section 7(2) of the Constitution,[69] which imposes a positive obligation on the state and all its organs to provide to everyone appropriate protection through laws and structures designed to afford this protection. Embedded in this section is the requirement that the state must take reasonable and effective steps to respect, protect, promote and fulfil the rights in the Constitution.[70] The Constitution binds the legislature, the executive and the judiciary, which means that the executive is bound by section 7(2) when exercising powers under the Constitution, including the power to prepare and initiate legislation.[71]

There are various ways in which the state can comply with its duty to take positive steps under section 7(2), provided that 'they fall with the range of possible conduct that a reasonable decision-maker in the circumstances may adopt'.[72] The state can decide which of these measures – of which there are a range – will be taken, so long as they are reasonable.[73] In determining what reasonable measures the state is required to take in terms of the Constitution in complying with its section 7(2) duty, international law becomes a consideration in terms of section 39(1)(b), which requires international law to be considered when interpreting the Bill of Rights.[74] Thus, in using international law obligations as an interpretative tool, international law obligations are used to determine what reasonable measures the Constitution requires the state to take to meet its section 7(2) obligations where rights in the Bill of Rights are undermined. International law obligations are important in 'determining whether a state fulfilled its duty to respect, protect, promote and fulfil the rights in the Bill of Rights', and section 7(2) requires that the steps which are taken by the state in meeting this obligation must be reasonable.[75]

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[67] *Glenister* n 6 above at par 182.
[68] *Id* at par 189.
[69] Section 7(2) of the Constitution obliges states to respect, protect, promote and fulfil the rights in the Bill of Rights.
[70] *Glenister* n 6 above at par 189.
[71] *Id* at par 190.
[72] *Id* at par 191.
[73] *Id* at par 192.
[74] *Ibid*. It is provided that the international law obligation which is binding on South Africa is not in conflict with any provision of the Constitution. This was not an issue in this case; *Glenister* n 6 above at par 205.
[75] *Glenister* n 6 at par 194.

As rights in the Bill of Rights are corroded by corruption, the section 7(2) duties on the state are triggered, and the state is required to fulfil its section 7(2) duty by combating corruption in the manner it determines most suitable.[76]

It is said by the majority that this interpretation of constitutional duties and the effect of international law is not to incorporate international agreements into the Constitution, but is rather 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 interpretative injunctions'.[77] According to this, in ensuring that the constitutional rights are protected and fulfilled, the state is required to meet its international law obligations in taking reasonable measures to comply with its section 7(2) duty, which obligations are constitutionally enforceable.[78] Such obligations are not 'extraneous' and imported from international law into our Constitution, but rather sourced from domestic legislation and from domesticated international obligations, making them an intrinsic part of the Constitution and the constitutional rights and duties which are created.[79]

Therefore, according to the majority, courts are constitutionally obliged to consider international law when determining the content of the obligation imposed on the state by section 7(2) of the Constitution when constitutional rights are involved in a matter. This is not using the interpretative nature of section 39(1)(b) 'to manufacture or create constitutional obligations'.[80] It is said to rather respect 'the careful way in which the Constitution itself creates concordance and unity between the Republic's external obligations under international law, and their domestic impact'.[81]

Section 233 of the Constitution, which demands that any reasonable interpretation of legislation which is consistent with international law must be preferred over any other, reinforces the conclusion reached by the majority. Courts are not able to escape from the Constitutional demand to integrate international law obligations into the domestic sphere in a way that is permitted by the Constitution.[82]

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[76] *Id* at par 200.
[77] *Id* at par 195.
[78] *Id* at par 197.
[79] *Ibid*. It is important to note that the majority expressly state 'that the failure on the part of the state to create a sufficiently independent anti corruption entity infringes a number of rights. These include the rights to equality, human dignity, freedom, security of the person, administrative justice and socio economic rights, including the rights to education, housing, and health care'; *Glenister* n 6 above par 198. The undermining of human rights by corruption is also recognised in PRECCA.
[80] *Glenister* n 6 above at par 201.
[81] *Ibid*.
[82] *Id* at par 202. All rights in the Bill of Rights can be limited in terms of section 36 of the Constitution. The majority reached the conclusion that the Constitution imposes an obligation

The way in which the majority in *Glenister* apply the Constitutional provisions regarding international treaty law is not entirely clear upon a first reading. This has sparked some debate amongst authors regarding the actual effect of this decision on the status of international law in the domestic arena.

The effect of *Glenister*

Conflicting views

Despite the minority judgment being fairly clear and straightforward regarding its interpretation of the Constitution and the place of international law in the domestic sphere, the majority decision is unfortunately not as obvious in its determination. This has led to confusion and conflicting opinions being put forward as to what the majority decision is actually saying.

The first opinion expressed on the majority decision in *Glenister* was by Professor Motala, of Howard Law School in the United States.[83] According to Motala, the majority judgment 'lacks cogency, depth of reasoning, or logic and fundamentally ignores the ... separation of powers'.[84] He argues that the majority decision ignores all precedent in finding that international agreements create an obligation in domestic law, even though such international agreements are not self-executing.[85] Thus, he believes that the court simply incorporated international law obligations into the domestic sphere, creating domestically enforceable obligations, without any legislative enactment even though the international agreement was not self-executing.

Motala's publication set off a debate as to the consequences of the *Glenister* decision. Motala has been criticised, on more than one occasion, for his inaccurate attack on the decision.[86] Seleoane, who argues that the thrust of Motala's argument is that the court is inconsistent in dealing with international

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on the state to establish and maintain an independent anti corruption unit (par 244); and that the DPCI does not meet the constitutional requirement of adequate independence (par 248). As such, the appeal was upheld, and a declaration of invalidity was granted, which was suspended for 18 months to allow parliament an opportunity to remedy the defect (par 251). See also 'Media Summary' n 47 above.

[83] Motala 'Divination through a strange lens' 26 March 2011, published in the *Sunday Times* newspaper, available at http://www.timeslive.co.za/opinion/columnists/article988909.ece/Divination through a strange lens (accessed 1 June 2011).

[84] *Id* at 1.

[85] *Id* at 2.

[86] In this regard see Asmal 'SA is all the better for court's ruling on the destruction of the Scorpions' 3 April 2011, available at http://www.timeslive.co.za/opinion/article1000587.ece/SA is all the better for courts ruling on the destruction of the Scorpions (accessed 1 June 2011); Seleoane 'Glenister debate: Both sides blinkered' 10 April 2011, available at http://www.timeslive.co.za/opinion/article1010651.ece/Glenister debate both sides blinkered (accessed 25 May 2011); and de Vos 'How not to criticise a court judgment' 28 March 2011, available at http://constitutionallyspeaking.co.za/how not to criticise a court judgment/ (accessed 1 June 2011).

law, reads the majority decision differently.[87] According to him, the majority does not incorporate international agreements into the Constitution, such instruments only become part of the domestic law when incorporated by legislation.[88] Despite holding this opinion, Seleaone does not provide any explanation or assistance as to what the effect of the majority decision is and how international treaties are to be used in the interpretation of legislation.

Pierre de Vos has also stated that Motala misconstrued 'aspects of the judgment'.[89] According to de Vos, the majority argued that a positive duty is imposed on the state by section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights, which is something the court has repeated in a number of cases. The majority then reaches the conclusion that corruption (which was in issue in the case) infringes on a number of rights in the Constitution, including equality, human dignity, and freedom and security of the person. For the state to comply with its positive obligation to respect, protect, promote and fulfil these rights, the state had a duty to establish an independent corruption-fighting unit, as only such an independent body would be effective in the fight against corruption. Thus, international agreements were used only to assist in the interpretation of the text of the Constitution and to 'establish the scope and content of the obligation to protect, promote and fulfil this obligation to fight corruption to protect the various rights' affected.[90]

The actual effect of Glenister*: Inroads towards harmony?*

Given the different opinions expressed by authors as set out above, questions arise as to the actual meaning of the *Glenister* judgment with regard to the status of international treaty obligations: are they automatically incorporated according to the majority; or are they still only regarded as interpretative aids.

On a proper reading of the majority judgment handed down, it becomes apparent that international law is used only as an interpretative aid in determining constitutional duties under section 7(2), but that this is done in a way which allows for the domestic enforcement of international rights against the state in certain instances. When rights set out in the Bill of Rights are infringed, or have the potential to be infringed, the state has a constitutional duty to take positive steps, which are reasonable and effective, to respect, protect, promote and fulfil the rights in the Constitution. International law and

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[87] Seleoane n 86 above at 1.
[88] *Id* at 2.
[89] De Vos n 86 above at 1.
[90] *Id* at 2. See also de Vos 'Glenister: A monumental judgment in defence of the poor' 18 March 2011, available at http://constitutionallyspeaking.co.za/glenister a monumental judgment in defence of the poor/ (accessed 25 May 2011).

obligations are used by the courts to determine what reasonable steps the Constitution requires the state to take in order to meet its section 7(2) duties, these obligations are regarded as the standard against which the state's conduct in meeting its section 7(2) duty is to be measured. Therefore, the duty created by the Constitution itself can only be given meaning when it is interpreted with reference to international treaties, and the various obligations they impose on a state. Through the process of interpretation, international obligations are transformed into constitutional obligations which are domestically enforceable against the state, through section 7(2), provided that rights in the Bill of Rights are threatened or infringed.

Although the court expressly states that it is only using international law obligations as 'interpretative tools' in determining the scope and content of the section 7(2) obligation, this majority decision could potentially be used as authority in future for reliance on international law obligations in domestic matters in which any constitutional rights in the Bill of Rights are threatened or infringed. Thus, it may be said that indirectly, through the process of interpretation of the section 7(2) duty on the state, international law obligations are given enforceable domestic law status and can be relied upon in the domestic courts. In other words, despite denying the incorporation of international law obligations into the domestic sphere, the weight attached to these international obligations in the interpretation of the section 7(2) duty of the state, ultimately results in these international obligations being enforceable in domestic law, as constitutional rights, with the result that such obligations may be relied upon in domestic cases where constitutional rights face infringement or potential infringement. The majority judgment, although not as clear as that of the minority, appears to be more progressive and liberal in its determination of the effect and status of international law in our domestic legal order.

While the majority decision does not incorporate international law directly in the domestic arena, but rather gives effect to international treaty obligations through interpretation of section 7(2) of the Constitution, the court is moving closer towards achieving harmony between the international legal system and the domestic system. By simply providing that international law which has not been incorporated does not give rise to enforceable domestic obligations, our courts have always, in the past, seen the two systems as being completely separate with the obligations not overlapping from one system to another, unless expressly incorporated. However, by at least considering these obligations within the interpretative process, and according them significant weight in this process (as *Glenister* does), our courts are allowing international law obligations to become more interwoven in our domestic system and affords them the opportunity to play a more significant role in the domestic courts. Courts no longer simply have to 'consider' international law in the

interpretation process and prefer an interpretation that is in line with international law over any other, they are required to actively engage with the international law obligations of the state and give real meaning and content to these in interpreting the state's constitutional duty when rights in the Bill of Rights are involved, with the end result that international treaties may be relied upon by individuals in the South African domestic courts when enforcing the state's section 7(2) duty.

Conclusion

The Constitution, and specifically section 231, has remained true to the separation of powers doctrine and incorporates a predominantly dualist approach in South Africa in most instances. Section 231 of the Constitution expressly deals with the status and effect of international agreements and the Constitution makes it clear that international agreements are to be used as 'interpretative aids' in the interpretation of the Bill of Rights. However, notwithstanding the express statements in the Constitution, the Constitutional Court, in *Glenister*, makes it clear that the issue of the status and effect of international agreements in the South African domestic arena is not a straightforward matter.

The minority in *Glenister* abide by the dualist approach finding that more is needed for international agreements to create domestic rights and duties. However, the majority in *Glenister* embark on a unique and progressive consideration of the role of international agreements in the interpretation of the state's constitutional duties, opening the door to domestic enforcement of international rights in specific instances. By affording international agreements significant weight in the interpretation of the state's section 7(2) constitutional duty, international obligations are transposed into the domestic arena as constitutional obligations on the state which can be enforced domestically, provided that rights in the Bill of Rights are threatened or infringed.

This bold move by the Constitutional Court can be seen as a step forward on the road towards a monist approach, a step closer to achieving harmony between international law and the domestic system. Our courts can no longer merely consider international agreements when interpreting the Bill of Rights, our courts will in future be required actively to engage with international obligations on the state and give effect to these when determining a state's constitutional duty to respect, promote, protect and fulfil the rights in the Bill of Rights. Individuals will have a wider range of obligations to rely upon in enforcing their rights against the state. Harmonisation between international treaty law and domestic law may be on the horizon for South Africa.

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