Constitutional Court Review 2020
Volume 10, 155–195
https://doi.org/10.2989/CCR.2020.0007

We Are All International Lawyers; Now What? Taking Seriously the Constitutional Injunction to Integrate International Law Obligations into South African Law

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ABSTRACT: There is 'no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law.' So proclaimed the Constitutional Court almost a decade ago. The article begins by summarising and analysing how the Constitutional Court and other courts have, in successive cases, drawn international law deeply into the fabric of South African law and the justiciable obligations of public officials. In so doing, the courts have breathed life into what we referred to as the Constitution's *international law trifecta*. It is on this basis we claim that *we are all international lawyers now*. But lest those words appear no more than hollow rhetoric, this article considers how one ought to take seriously the Constitution's inescapable integrative injunction. This is done by first reflecting on and delineating the principles flowing from the last ten years of international law jurisprudence. Having laid that foundation, the article then considers in more detail certain issues that the courts' integrative endeavours have highlighted but remain to be resolved and reconciled. Finally, the article articulates and examines, now that we are all international lawyers, certain of the potential dangers to be avoided when interpreting and applying international law.

KEYWORDS: customary international law, international agreements, *SADC Tribunal* decision, section 232

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ACKNOWLEDGEMENTS: We thank the editors and organisers for their kind invitation to participate in the *Constitutional Court Review* X conference, and our co-participants, particularly Dire Tladi and Sanya Samtani. We acted as counsel in certain of the cases discussed in this article.

I INTRODUCTION

Almost a decade ago the Constitutional Court boldly proclaimed that there is 'no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law.'[1] In a recent article we began to consider how, over the intervening years, the Constitutional Court and other courts have given effect to that manifest constitutional injunction.[2] Our analysis demonstrated how, in successive cases, international law has been drawn deeply into the fabric of South African law and the justiciable obligations of public officials, through what we referred to as the Constitution's international law trifecta. It is on this basis that we made the claim that *we are all international lawyers now*. But, lest those words appear no more than hollow rhetoric, the question that we ask and address in this article is, *now what* (or *where to from here*)? How does one take seriously the Constitution's inescapable integrative injunction? What principles flow from the last ten years of progressive and integrative international law jurisprudence? What issues still require resolving in imagining and realising this brave new world of constitutionally integrated international law?

To answer these questions, we start by examining where the cases leave us. We summarise and distil the main principles from the courts' integrative endeavours. We then consider in more detail certain of the issues that have arisen but remain to be resolved and reconciled. Finally, we suggest that since, by constitutional decree, we are all international lawyers now, we need to avoid certain dangers when interpreting and applying international law, and we provide a discussion of what this requires.

II THE COURTS' INTERPRETATION OF THE CONSTITUTION'S INJUNCTION TO INTEGRATE INTERNATIONAL LAW

In the *SADC Tribunal* matter, the Constitutional Court emphasised that international law 'enjoy[s] well-deserved prominence in the architecture of our constitutional order.'[3] But, in what way is international law given this prominence? The cases demonstrate that there are three central features of the Constitution that give international law its eminence — the Constitution's international law trifecta.[4] First, the Constitution requires all legislation to be interpreted as far as possible to comply with and give effect to international law. Second, by virtue of s 232 of the Constitution, customary international law forms part of South African law (unless it is in conflict with the Constitution or legislation). Third, flowing from the Constitution's enshrining of the rule of law, the courts have determined that it is a justiciable violation of the principle of legality for public officials to act (or take decisions) in breach of

[1] *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC) (*Glenister*) at para 202.

[2] A Coutsoudis & M du Plessis 'We are all International Lawyers Now: the Constitution's International-Law Trifecta Comes of Age' (2019) 136 *South African Law Journal* 433. In our discussion below we deal briefly with certain of the points made in that article.

[3] *Law Society of South Africa & Others v President of the Republic of South Africa & Others* [2018] ZACC 51, 2019 (3) SA 30 (CC) (*SADC Tribunal*) at para 4. The case, as we discuss below, involved the suspension of the Tribunal of the Southern African Development Community (SADC).

[4] Constitution of the Republic of South Africa, 1996 (the Constitution). In Coutsoudis & du Plessis (note 2 above) we discuss the three key features of the Constitution's integrative approach to international law.

South Africa's international law obligations, whether inside or outside South Africa. We briefly discuss these aspects below.

A The Constitution's international-law-favouring interpretative injunction

Section 233 of the Constitution contains an obligatory international-law-favouring interpretative injunction. It requires courts to prefer any reasonable interpretation of legislation that is consistent with international law over any interpretation which is inconsistent with international law. Thus, the Constitutional Court held in the *SADC Tribunal* matter that '[o]ur Constitution also insists that [courts] not *only* give a reasonable interpretation to legislation *but also that the interpretation accords with international law*'.[5] It is not sufficient to interpret any domestic legislation in a manner that is reasonable and textually appropriate; courts must also interpret the legislation to accord with international law.

In *S v Okah*, the Constitutional Court had occasion to demonstrate how s 233's interpretative injunction could make the difference in a particular legislative setting.[6] The case involved a criminal prosecution of Mr Okah, a Nigerian national, for terrorist activities. The prosecution occurred under the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (the Terrorist Act). Mr Okah was charged with 13 counts of terrorism under the Act, in respect of two bombings in Nigeria, which had killed at least nine people. The high court convicted him on all counts. On appeal to the Supreme Court of Appeal (SCA), the SCA interpreted the relevant sections of the Terrorist Act to exclude extraterritorial liability for all but a limited subset of offences (in relation to the financing of terrorist activities).[7] Since Mr Okah was in Nigeria at the time of one of the bombings, the SCA therefore upheld Mr Okah's appeal and acquitted him on four of the counts of terrorism in respect of that bombing, and partially reduced his sentence. In the appeal to the Constitutional Court, the Court disagreed with the SCA's interpretation that, correctly interpreted, the Terrorist Act conferred extra-territorial jurisdiction on South African courts to try terrorist offences that occurred outside South Africa. The crucial aspect, for our purposes, is the role that s 233 of the Constitution played in the Court's decision in *Okah*. The Court emphasised that '[e]ven if one were to assume that [the SCA's] interpretation [of the Terrorist Act] were reasonable, which a textual analysis shows it is not, s 233 of the Constitution requires this Court to interpret the Act in line with international law'.[8] The Court therefore had regard to South Africa's international law obligations, in order to interpret the Act properly. The Court found that South Africa's international law obligation required it to prosecute or extradite those accused of committing terrorist acts. The Court, therefore, on this basis (in addition to its textual interpretation), overturned the SCA's restrictive interpretation of the Act. The Court held that 'there is a clear obligation that South Africa prosecute or extradite persons like Mr Okah. The interpretation in this judgment gives effect to that obligation, whereas the Supreme Court of Appeal's interpretation does not.'[9] This ultimately led to the Court upholding the state's appeal against the SCA's decision. The SCA's partial acquittals and reduction of sentence were replaced by an order dismissing Mr Okah's appeal against the high court's decision.

5 *SADC Tribunal* (note 3 above) at para 5 (emphasis added).

6 [2018] ZACC 3, 2018 (4) BCLR 456 (CC) (*Okah*).

7 *Okah v S & Others* [2016] ZASCA 155; [2016] 4 All SA 775 (SCA); 2017 (1) SACR 1 (SCA).

8 *Okah* ibid at para 38.

9 *Okah* ibid at para 38.

Thus, in *Okah* the Court underlined, as it had re-emphasised in *SADC Tribunal*, that, when interpreting legislation, a mere reasonable interpretation is not sufficient. Courts must consider relevant international law binding on South Africa, and they must interpret domestic legislation to accord with that international law, as far as is reasonably possible. This requires an international-law-first approach. Giving proper effect to s 233 of the Constitution requires that in interpreting domestic legislation a court must first determine whether there is international law binding on South Africa that deals with the relevant subject matter governed by the legislation. If there is such relevant and binding international law, a court must then seek to interpret the legislation to comply with that international law, in so far as the language of the legislation is reasonably capable of that international-law-compliant interpretation.

Linked to this principle is the injunction in s 39(1)(b) of the Constitution. This obligates courts, when interpreting the Bill of Rights, to have regard to international law.[10] And as the Constitutional Court held in *Glenister,* 'our Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measure of the State's conduct in fulfilling its obligations in relation to the Bill of Rights.'[11] As we discuss in part IIIA3, s 39(1)(b) and s 233 of the Constitution operate to ensure that the Constitution and international law are not in conflict, but are interpreted and applied harmoniously in South Africa.

B Customary international law is South African law

Section 232 is unequivocal. It provides that 'customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' This means that customary international law is automatically and directly incorporated into South African domestic law — 'it is law in the Republic'.

The totality of the Constitution's integrative approach is well demonstrated by the fact that it even extends to making international crimes (under customary international law) domestic crimes in South Africa, absent legislation. This was the effect of s 232, as found by the Constitutional Court in the *Torture Docket* case.[12] The case involved a challenge to the constitutionality of the SA Police Service's failure to investigate allegations of torture committed in Zimbabwe by Zimbabwean officials. In its decision, the Court held that since torture is a crime in terms of customary international law (and a violation of a peremptory norm of international law), it was also automatically a crime in South Africa, given s 232.[13] In terms of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the ICC Act) and the Prevention and Combating of Torture of Persons Act 13 of 2013 (the Torture Act), the international crime of torture, both as a self-standing international crime, and as a crime against humanity — when the torture is part of a widespread and systematic attack — is a crime in South Africa. However, even without this domestic legislation, torture is a crime in South Africa as a consequent of s 232's domestication of customary international law. The Court made this plain in its judgment. It emphasised that, '[t]orture, whether on

[10] *SADC Tribunal* (note 3 above) at para 5.

[11] *Glenister* (note 1 above) at para 178.

[12] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & Another* [2014] ZACC 30, 2015 (1) SA 315 (CC) (*Torture Docket*).

[13] *Torture Docket* ibid at para 39.

the scale of crimes against humanity or not, is a crime in South Africa in terms of s 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm'.[14] It went on to explain that, '[i]n effect, torture is criminalised in South Africa under s 232 of the Constitution and the Torture Act whilst torture on the scale of crimes against humanity is criminalised under s 232 of the Constitution, the Torture Act and the ICC Act'.[15] Thus, the Court took care to underscore that its decision was based not only on the effect that the relevant national legislation (the ICC Act and the Torture Act) has on domesticating the crime of torture, but also on the constitutional injunction, in s 232, that customary international law is law in South Africa. According to the Court, s 232 provides a self-standing basis for the domestication of the international crime of torture.[16]

Naturally, the automatic incorporation of customary international law into South African domestic law presents challenges. Establishing what the customary international law in a particular respect is may not always be straightforward. Customary international law is not static, and, unlike treaty law, it is not neatly set out in instruments. Its extent and content are often contested. The rules of recognition for customary international law (whether there is widespread state practice coupled with *opinio juris* — the acceptance that a practice is undertaken by states due to a legal obligation)[17] are open textured. This can lead to reasonable disagreements as to whether a particular rule is part of customary international law or not. But courts are obliged to decide cases that come before them in accordance with our domestic law, which, by virtue of s 232, includes customary international law. Thus, however difficult the task of determining the content of customary international law in any particular situation may be, our courts cannot shy away from it. Customary international law is part of South African law. Like any other part of our law, courts can and must determine what that law is, and apply it. Consequently, courts must be as adroit in determining, interpreting, and applying customary international law as any other area of domestic law.

Recent cases demonstrate that our courts can and will be called upon to settle difficult disputes about the content of customary international law. In the *Grace Mugabe* matter,[18] the key issue in dispute was whether the spouse of a foreign head of state also enjoyed personal immunity from domestic prosecution (in the same way as the head of state did). The Minister of International Relations granted immunity to Grace Mugabe, the wife of the then President of Zimbabwe, Robert Mugabe, under South Africa's domestic legislation. The Minister did this to protect Ms Mugabe from prosecution for the alleged assault of a young South African woman. The Minister's basis for granting the immunity was the Minister's alleged belief that, as the wife of the head of state of a foreign state, Ms Mugabe enjoyed immunity under customary international law, which the Minister argued she was merely recognising. The case

[14] *Torture Docket* ibid at para 37.

[15] *Torture Docket* ibid at para 39; see also para 40.

[16] *Torture Docket* ibid at paras 37, 39, 40, 77.

[17] For example, see *Democratic Alliance v Minister of International Relations and Co-operation & Others; Engels & Another v Minister of International Relations and Co-operation & Another* [2018] ZAGPPHC 534, 2018 (6) SA 109 (GP) (*Grace Mugabe*) at para 16. In broad terms the International Court of Justice (ICJ), in *North Sea Continental Shelf* (1969) ICJ Rep 3 at para 77, explained the test for whether customary international law applies is as follows: 'Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. ... The States concerned must feel that they are conforming to what amounts to a legal obligation'.

[18] *Grace Mugabe* ibid.

reached the high court as a review of the rationality and legality of the Minister's granting of immunity. Central to the applicants' review of the Minister's decision was the submission that the Minister had erred in granting Ms Mugabe immunity, since spouses of heads of state do not enjoy immunity under customary international law. The Minister, persisted in her arguments that not only was she entitled to grant Ms Mugabe immunity but she was obligated to recognise that immunity, given that it was recognised by customary international law. To determine the case the court was therefore compelled to ascertain what the position was in international law. This required the court to undertake a detailed analysis of the customary international law position, to assess whether there was the necessary widespread state practice accompanied by the necessary *opinio juris* supporting the customary recognition of a rule granting spouses immunity.[19] It resulted in the court finding that Ms Mugabe did not enjoy immunity under customary international law, and the court therefore set aside the Minister's decision to recognise or confer immunity on Ms Mugabe.[20]

Section 232's incorporative injunction has a limitation. Customary international law will not be incorporated into our law if it conflicts with national legislation or the Constitution. In part IIIA below we consider the fact that s 232 does not allow incorporation when there is conflict with the Constitution.

C It is unlawful to not act in accordance with South Africa's international law obligations

All exercises of public power must be lawful (*the lawfulness requirement*)[21] and procedurally and substantively rational (*the rationality requirement*).[22] These requirements are the two primary incidences of the principle of legality that flow from the rule of law, enshrined in s 1(c) of the Constitution.[23] International law infuses both the lawfulness requirement and the rationality requirement, as has been made clear by the Constitutional Court in the *SADC Tribunal* decision, which we discuss below. However, before turning to the Court's decision in that matter, and in order to contextualise the constitutional requirement to comply with

[19] *Grace Mugabe* ibid at paras 16–35.

[20] *Grace Mugabe* ibid at para 43.

[21] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17, 1999 (1) SA 374 (CC) (*Fedsure*) at paras 56-59; *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* [1999] ZACC 11, 2000 (1) SA 1 (CC) (*SARFU*) at para 148; *Affordable Medicines Trust & Others v Minister of Health & Another* [2005] ZACC 3, 2006 (3) SA 247 (CC) at para 49; *Mansingh v General Council of the Bar & Others* 2013 ZACC 40, 2014 (2) SA 26 (CC) at para 25.

[22] *New National Party v Government of the Republic of South Africa & Others* [1999] ZACC 5, 1999 (3) SA 191 (CC) at para 24*; Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex Parte President of the Republic of South Africa & Others* [2000] ZACC 1, 2000 (2) SA 674 at para 85; *Minister of Defence and Military Veterans v Motau & Others* [2014] ZACC 18; 2014 (5) SA 69 (CC) (*Motau*) at paras 69, 72–83. In relation to procedural rationality see: *Minister of Home Affairs & Others v Scalabrini Centre, Cape Town & Others* [2013] ZASCA 134, 2013 (6) SA 421 (SCA) (*Scalabrini*)at para 68; *Democratic Alliance v President of South Africa & Others* [2012] ZACC 24, 2013 (1) SA 248 (CC) (*Democratic Alliance* (CC)) at para 34; *Democratic Alliance v President of the Republic of South Africa & Others* [2011] ZASCA 241, 2012 (1) SA 417 (SCA) (*Democratic Alliance* (SCA)) para 66; *Albutt v Centre for the Study of Violence and Reconciliation & Others* [2010] ZACC 4, 2010 (3) SA 293 (CC) at paras 50–51; and *Minister of Justice and Constitutional Development v Chonco & Others* [2010] ZACC 9, 2010 (4) SA 82 (CC) at paras 12, 36.

[23] Section 1 provides that: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values…(c) Supremacy of the constitution and the rule of law.'

international law, it is necessary to begin with a section of the Constitution that has generally escaped judicial attention: s 199(5).

Section 199(5) of the Constitution provides that '[t]he security services must act … in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.' Security services are defined as consisting of 'a single defence force, a single police service and any intelligence services established in terms of the Constitution.' While, there is no reported case in which a court has considered and pronounced upon s 199(5), its implication and effect are plain. At least in relation to the police, the defence force, and the intelligence services, the Constitution accepts that international law forms part of the 'law' that must be complied with. Not to so comply would undoubtedly be a violation of s 199(5), and of course also a violation of the principle of legality flowing from the rule of law, and therefore in terms of s 172(1), the courts would need to declare such conduct to be invalid. However, s 199(5) has a broader implication. It strongly suggests that the Constitution accepts that the obligation to comply with the rule of law (and to adhere to 'the law'), would naturally, in relevant circumstances, include an obligation to comply with international law. What would those 'relevant circumstances' be? This then brings us neatly to a consideration of the decision in *SADC Tribunal*, where the Constitutional Court found that the President's actions did indeed cause South Africa to violate its international law obligations. Although the Court makes no reference to s 199(5), in effect, it made clear that the requirement to ensure compliance with international law applies to all exercises of public power.

To properly appreciate the import of the *SADC Tribunal* decision, which will inform our discussion in this section and the later sections, we highlight the central facts facing the Court.[24] The Court was called upon to confirm the high court's declaration of invalidity in relation to two decisions: President Zuma's participation in 2011 in the SADC Summit's[25] suspension of the SADC Tribunal (the Tribunal);[26] and President Zuma's signature of the 2014 SADC Protocol on the SADC Tribunal Protocol (the 2014 Protocol). Those decisions arose in the following context. SADC was established on 17 August 1992 in terms of the SADC Treaty. It is an international organisation, which at the relevant time had 15 member states,[27] including South Africa. SADC comprises a number of institutions, including the Summit.[28] The Summit

[24] Where necessary to elucidate certain of the facts set out below, in addition to what is dealt with in the judgment, we have also had regard to the full Constitutional Court record (which is on file with us) in *SADC Tribunal* (note 3 above); and, to the extent necessary, we draw from the undisputed facts therein in the brief factual summary below.

[25] The Summit of the Heads of State or Government (the Summit) of the Southern African Development Community (SADC) established by art 9 of the Treaty of the Southern African Development Community, 1992 (the SADC Treaty).

[26] The Tribunal is governed by the Protocol of the Tribunal in SADC (2000) (the 2000 Protocol).

[27] In 2018, the Union of the Comoros became SADC's sixteenth member state (see the SADC website, which records that '[t]he Union of the Comoros was admitted to SADC at the 37th SADC Summit of Heads of State and Government in August 2017, then became a full member at the 38th Summit of Heads of State and Government on August 2018 in Windhoek Namibia.' Available at https://www.sadc.int/member-states/comoros/. At the time the relevant facts in the *SADC Tribunal* matter arose, there were only 15 members. As we discuss below, the number of members is relevant for determining the number of votes and ratification required. We will continue to refer to 15 members when discussing the number of votes or ratifications required for decisions because they were relevant at that time.

[28] Articles 9(1)(a) and 10(1) of the SADC Treaty.

is 'the supreme policy-making institution of SADC'[29] and its members are the heads of state or government of the SADC's member states.[30] It is 'responsible for the overall policy direction and control of the functions of SADC'.[31] Unless the SADC Treaty otherwise provides, 'the decisions of the Summit shall be taken by consensus and shall be binding.'[32] The Summit is invested with significant powers by the Treaty, which includes the power to amend the Treaty,[33] the power to dissolve any SADC institution (which includes the Tribunal)[34] and SADC itself.[35] The President, as the head of state of South Africa, is a member of the Summit.

The Tribunal is provided for in the Treaty, but its jurisdiction and other functions are not. Article 16(2) of the Treaty provides in relevant part that 'the composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol' which is to be adopted by the Summit, and which Protocol will then form an integral part of Treaty. The current Protocol governing the Tribunal is the 2000 Protocol. As recognised and explained by the Constitutional Court in an earlier decision in *Fick*,[36] the Tribunal was only brought into existence by the Summit exercising its power to amend the SADC Treaty. The Summit took a decision in 2001 to bring the 2000 Protocol (which provides for the functioning and jurisdiction of the Tribunal) into operation by exercising its power to amend the SADC Treaty to incorporate the unratified 2000 Protocol into the Treaty. This is because there had been insufficient ratification to bring the 2000 Protocol into force, so the ratification requirement in the 2000 Protocol was effectively dispensed with by amending art 16 of the Treaty to make the Tribunal Protocol adopted by the Summit an integral part of the Treaty.[37] The Tribunal only became operational in November 2005 after its first members were appointed. However, in May 2011, the Summit decided at its meeting in Namibia,[38] by consensus, to suspend the Tribunal (after putting in place a temporary moratorium, in

[29] Article 10(1) of the SADC Treaty.

[30] Ibid.

[31] Ibid art 10(2).

[32] Ibid art 10(9).

[33] Ibid art 36(1).

[34] Ibid art 9(g).

[35] Ibid art 35.

[36] *Government of the Republic of Zimbabwe v Fick & Others* [2013] ZACC 22, 2013 (5) SA 325 (CC) (*Fick*) at para 9.

[37] Originally art 16(2) provided as follows: 'The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol adopted by the Summit.' Article 16(2) (as amended) now provides that: 'The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol, which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit.' See the Agreement Amending the Treaty of the SADC of 14 August 2001 and *Fick* (note 36 above) paras 9, 10; and *Government of the Republic of Zimbabwe v Fick & Others* [2012] ZASCA 122 (*Fick* SCA) at paras 35, 36. In 2002, the Summit also formally amended the 2000 Protocol, and inter alia, deleted the article in the 2000 Protocol which had provided expressly that it would only enter into force once instruments of ratification from two-thirds of the Member States were deposited with SADC. See Agreement amending the Protocol on the Tribunal 2002 (a copy of which is on file with the authors). This Protocol Amendment Agreement further noted, in its preamble, that the states parties recognised that 'the Protocol on the Tribunal was adopted by Summit at Windhoek on 7th August 2000 and that the Protocol entered into force upon the adoption of the Agreement Amending the Treaty of the Southern African Development Community at Blantyre on 14th August 2001'.

[38] The Summit meeting took place on 20 May 2011, in Windhoek, Namibia. A copy of the Summit Communique is on file with the authors.

August 2010, on it hearing new cases). In particular, the Summit put in place a moratorium on receiving any new cases or hearings of any cases by the Tribunal, and decided not to reappoint members to the Tribunal whose term of office would be expiring.[39]

President Zuma did not attend the Summit meeting in May 2011, but the South African High Commissioner to Namibia represented him.[40] At the 2012 Summit meeting, the Summit decided that a new Protocol should be negotiated for the Tribunal, which would limit the Tribunal's jurisdiction to hearing inter-state complaints (complaints brought by states), and not complaints from individuals.[41] Thus began a process of negotiation within SADC and its various institutions to prepare and adopt a new Protocol for the Tribunal, which provided for a more limited mandate for the Tribunal. In August 2014, this process culminated, with the August 2014 Summit meeting held in Zimbabwe,[42] where the Summit adopted the 2014 Protocol, which limited the jurisdiction of the Tribunal to deal with inter-state complaints. The 2014 Protocol expressly provided that: (a) it required ratification to become binding, not a mere signature;[43] (b) it would only enter into force, if and when two-thirds of the member states (10 of the 15 member states) had ratified the Protocol, 'in accordance with their constitutional procedures', by depositing instruments of ratification with SADC;[44] and (c) it would only replace the extant 2000 Protocol once it came into force.[45]

At the Summit meeting where the 2014 Protocol had been adopted by the Summit, and opened for signature, President Zuma signed the 2014 Protocol (which limited the jurisdiction of the Tribunal, more especially by removing the right of individuals to lodge complaints with the Tribunal). The high court declared the President's participation in the suspension of the Tribunal and his signature of the 2014 Protocol unconstitutional. The Constitutional Court confirmed the high court's declarations and it ordered the President (by that time President Ramaphosa) to withdraw the President's signature of the 2014 Protocol. The President duly complied with the order and withdrew the signature of the Protocol.[46]

The first important point to draw from the *SADC Tribunal* decision is that even though the President's exercises of public power occurred outside of South Africa (the participation

[39] In the recordal in para 5 of *Law Society of South Africa &Others v President of the Republic of South Africa &Others* [2018] ZAGPPHC 4, 2018 (6) BCLR 695 (GP) (*SADC Tribunal* HC), where the high court quotes with approval from paragraph 25 of the Law Society's heads of argument.

[40] *SADC Tribunal* HC ibid at para 5 (where the court quotes from para 26 of the Law Society's heads of argument). As reflected in the Summit Communique, President Zuma's representative was the High Commissioner.

[41] In footnote 2 of para 9 in *Fick* (note 36 above) the Court took account of this development

[42] President Zuma signed the 2014 Protocol at the conclusion of the 2014 Summit meeting when it was adopted at Victoria Falls, Republic of Zimbabwe, on 18 August 2014.

[43] Article 52 of the 2014 Protocol provides that, '[t]his Protocol shall be ratified by Member States who have signed the Protocol *in accordance with their constitutional procedures*.' (Emphasis added.)

[44] 2014 Protocol arts 53, 55.

[45] 2014 Protocol art 48.

[46] In the President's formal letter of withdrawal of the signature addressed to the Executive Secretary of SADC, which was formally conveyed to the SADC secretariat in terms of a *note verbale* from the South African High Commissioner to Botswana, the President stated, inter alia, that: 'I wish to inform you that the Government of the Republic of South Africa does not have the intention of becoming a Party to the Protocol, and hereby withdraws the aforementioned signature from the Protocol. Accordingly, South Africa has no legal obligations arising from its signature on 18 August 2014. In this regard, you are requested, in your capacity as the Depositary of the Protocol, to reflect in your records that the signature on the Protocol on behalf of the Republic of South Africa has been withdrawn, and that South Africa is no longer a signatory to the Protocol.' (A copy of the letter and *note verbale* are on file with the authors.)

in the Summit suspension decision, in Namibia, and the signature of the 2014 Protocol, in Zimbabwe), the Court saw no difficulty in holding that the exercises of public power were subject to constitutional constraint and control and were reviewable.

Second, the decision made clear that it was unlawful for the President to exercise public power in such a way as to cause South Africa to violate its international law obligations (or put differently, to act, when representing South Africa, inconsistently with South Africa's international law obligations). Thus, the Court accepted that government actions which violate international law or cause South Africa to violate international law (in this case treaty obligations under the SADC Treaty) are unconstitutional and invalid.[47] Of course, the President's actions affected the ability of citizens to bring claims before the SADC Tribunal (because the Tribunal was suspended, and since the President signed a Protocol, which if it were ratified and came into force, would then remove the Tribunal's individual jurisdiction permanently). Therefore, the President's conduct implicated the right of access to courts, which is protected by s 34 in South Africa and at the regional level by the SADC Treaty incorporating the 2000 Protocol.[48] In part IIIC we consider whether, for an exercise of public power that violates or causes South Africa to violate international law to be held to be unconstitutional, it is necessary for there to be some implication for the rights in the Bill of Rights.

The third key aspect of the *SADC Tribunal* decision is that it confirms that even when a South African official represents the country in an international organisation (such as the SADC Summit) her action or inaction, including in relation to voting (in this case the President's representative participated without objection in the Summit's decision to suspend the Tribunal), may amount to an unlawful and unconstitutional exercise of public power if it constitutes a violation (or undermining) of South Africa's international law obligations or the Constitution (in particular the Bill of Rights).[49] This has implications for the way in which South African representatives conduct themselves in international *fora* when South Africa is a party to that forum (which currently includes the UN Security Council).[50]

The fourth important point to draw from the decision relates to the rationality requirement of the principle of legality. This requires actions to be procedurally rational.[51] The Court held that this requirement applied equally when South Africa participated in the decision-making of an international organisation. If South Africa's representatives participate in the decision-making process of an international organisation, and that organisation's process does not comply with any relevant procedural prescripts in that organisation's rules or treaty, then a South African representative's participation will be irrational and may be declared unconstitutional on that basis since it violates the principle of legality.[52]

[47] *SADC Tribunal* (note 3 above) at para 71, and see discussion below in part IIIB.

[48] *SADC Tribunal* (note 3 above) at paras 75, 77, 78.

[49] For example, the Court in *SADC Tribunal* (note 3 above) at para 3 held succinctly that '[a]ll presidential or executive powers must always be exercised in a way that is consistent with the supreme law of the Republic and its scheme, as well as the spirit, purport and objects of the Bill of Rights, our domestic legislative *and international law obligations*.' And see para 77, where the Court held that, '[t]he President may therefore not approve anything that undermines our Bill of Rights and international law obligations.' See also the further discussion in part III(B).

[50] South Africa's two-year term ends in 2020; see the UN Security Council website, available at https://www.un.org/securitycouncil/content/current-members.

[51] For example, see *Scalabrini* (note 22 above) at para 68; *Democratic Alliance* (CC) (note 22 above) at para 34; and *Democratic Alliance* (SCA) (note 22 above) at para 66.

[52] *SADC Tribunal* (note 3 above) at paras 61–71.

The Court held that, since the 2000 Protocol, which governed the Tribunal's jurisdiction, was an integral part of the SADC Treaty (as provided for in art 16 of the Treaty), and given the specific provision in the SADC Treaty for the amendment of the Treaty, the 2000 Protocol could not simply be replaced by the adoption of a new Protocol. Rather, the different requirements for amendment of the Treaty had to be utilised.[53] The failure to use the Treaty-amendment procedure and instead to use the Protocol-procedure — given the linked failure to realise that the more rigorous procedure was necessary, given the enormity of the decision to amend the Tribunal's core jurisdiction — meant that the decision was procedurally irrational and unlawful.[54] We return to the Court's analysis of the irregularity of the procedure adopted by the Summit in more detail in part IVA below. It provides a useful example of the importance of domestic courts' proper appreciation of the relevant context when they venture into the terrain of international law.

In summary, the *SADC Tribunal* decision establishes the principle that government officials are required by the Constitution to act in accordance with international law binding on South Africa, including international law which prescribes the procedures to be followed by an international organisation to which South Africa is a party.[55] If they fail to do so, their actions, including on the international plane, will be declared invalid by our domestic courts.

III NOW WHAT? NAVIGATING THE ROAD AHEAD

The Constitutional Court and other courts have done much over the last few years 'to integrate, in a way the Constitution permits, international law obligations into our domestic law.' The broad outline of that integration is now well-established by the recent jurisprudence which we have summarised in the previous section. Nevertheless, much remains that is not fully resolved. And that which is clear, presents fresh challenges for courts and practitioners, and new opportunities too.

A Conflicts between international law and the Constitution

The Constitution gives international law pride of place in our constitutional democracy. As we have seen the Constitution does this primarily through its international-law trifecta, as interpreted and elucidated by our courts. However, the Constitution still asserts its own primacy in the domestic sphere over international law. It is therefore necessary to understand when and how the Constitution and international law obligations may conflict, and how courts should deal with these conflicts.

[53] *SADC Tribunal* (note 3 above) at para 49. Article 36 of the SADC Treaty provides that: '1. An amendment of this Treaty shall be adopted by a decision of three-quarters of all the Members of the Summit. 2. A proposal for amendment of this Heaty may be made to the Executive Secretary by any Member State for preliminary consideration by the Council, provided, however, that the proposed amendment shall not be submitted to the Council for preliminary consideration until all Member States have been duly notified of it, and a period of three months has elapsed after such notification.'

[54] *SADC Tribunal* (note 3 above) at paras 71.

[55] For example, see *SADC Tribunal* (note 3 above) at para 56.

1 *Conflicts with customary international law*

The Constitution deals expressly with the possibility of conflict between the Constitution and international law in s 232, when it provides for the automatic incorporation of customary international law into our law. The section provides that customary international law is *law* in South Africa. However, the automatic incorporation comes with an important caveat: '*unless* it is inconsistent with the Constitution'.[56] If a customary international law rule that is binding on South Africa on the international plane, and would otherwise automatically form part of our domestic law, were to be in conflict with the Constitution, then that rule would not be incorporated into our domestic law. As the Court held in the *SADC Tribunal* matter, 'implicit [in the position created by s 232 is that consistency with our Constitution is a critical requirement for the acceptability and applicability of international law to our country.'[57]

To date, there has been no reported decision in which a court has found that any part of customary international law could not be incorporated because of such constitutional conflict. However, the application of s 232's constitutional limitation on incorporation did arise in the *SADC Tribunal* matter. One of the issues considered was whether the challenge to the President's signature of the 2014 Protocol had been premature, given that the 2014 Protocol required ratification to become binding, not mere signature, and the 2014 Protocol had not yet been referred to Parliament for its approval or rejection, and therefore had not been made binding on South Africa.[58] In dealing with this issue, the Court had regard to art 18(a) of the Vienna Convention. This article creates an obligation on the state after signature of a treaty, but prior to its ratification, to 'refrain from acts which would defeat the object and purpose of" the treaty until such time as the state makes clear that it does not intend to become party to the treaty.[59] Importantly, even though the Court found that the obligation which art 18(a) created on signature was part of customary international law, the Court did not then simply accept that this obligation was made domestically applicable. Rather it drew attention to the fact that s 232 does not allow for the incorporation of customary international law into South African law where that customary international law is in conflict with the Constitution. Therefore, the Court considered whether the obligation in art 18 might be argued to conflict with the provisions of s 231(2) (which made international agreements binding only after they had been approved by Parliament). The Court, given its interpretation of the limited nature of the obligation in art 18, held that there was no conflict, between art 18 and s 231(2). Thus, the Court accepted that art 18, as a codification of customary international law, formed part of our law.

The constitutional limitation on the automatic domestication of customary international law also rose in the *Grace Mugabe* case. The amici in the case submitted that if customary international law did recognise the immunity from criminal prosecution for the spouses of heads of state (as the Minister argued), s 232 would, nevertheless, prohibit the incorporation of such immunity into our law, since allowing Ms Mugabe to enjoy immunity from prosecution for her alleged assault on a young South African woman in South Africa would violate rights

[56] Section 232 similarly provides that customary international law is not incorporated if it is inconsistent with South Africa's national legislation.

[57] *SADC Tribunal* (note 3 above) at para 5.

[58] *SADC Tribunal* (note 3 above) at para 21.

[59] Article 18(a) of the Vienna Convention on the Law of Treaties (1969).

in the Constitution.[60] However, because the court found that Ms Mugabe did not in fact enjoy immunity under customary international law, it became unnecessary to determine whether, had Ms Mugabe enjoyed such immunity, this would have been in conflict with the Constitution.

The possibility for conflicts between the Constitution and a binding rule of customary international law is also limited by the government's obligation to conduct South Africa's international relations in a manner that is informed by and gives effect to the Constitution and the Bill of Rights.[61] This obligation would require the government to take steps to persistently object to customary international law that is in conflict with the Constitution, and customary international law that is so objected to that it does not bind South Africa.[62] Obviously, *jus cogens* (peremptory) norms of international law may not be persistently objected to.[63] However, we see little prospect that our Constitution will find itself in conflict with any peremptory norms of international law.

2 *Conflicts with international agreements*

The possibility of conflict between the Constitution and international law does not only arise in respect of customary international law. It may, in principle, also arise in respect of conflicting constitutional and international treaty obligations. The issue of conflict between the Constitution and international treaty obligations arose to an extent in the recent *Prince* decision,[64] in the context of the constitutionality of certain domestic legislation. The case involved a challenge to the constitutionality of legislation that criminalised the possession and use of cannabis. The high court declared certain legislation that criminalised possession of cannabis by individuals for private use to be unconstitutional.[65] As required by s 172(2), the high court's declarations of invalidity were referred to the Constitutional Court for confirmation. In opposing the Court's confirmation of the declaration of invalidity, the State

[60] *Grace Mugabe* (note 16 above) at para 36.

[61] *SADC Tribunal* (note 3 above) and the discussion above.

[62] Drafting Conclusion 15 in the Draft Conclusions on Identification of Customary International Law, with commentaries, adopted by the International Law Commission (ILC) at its seventieth session, in 2018; and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/100), *Yearbook of the International Law Commission, 2018*, vol. II, Part Two, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf:
'Persistent objector 1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection. 2. The objection must be clearly expressed, made known to other States, and maintained persistently. 3. The present conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).' See also Draft Conclusion 14(3) of the ILC's Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*) which was considered and adopted, on first reading, by the ILC in 2019 (A/CN.4/L.936), available at http://legal.un.org/docs/?symbol=A/CN.4/L.936). Draft Conclusion 14(3) provides that '[t]he persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*).'

[63] Draft Conclusion 14(3) of the ILC's Draft Conclusions on Peremptory Norms of General International Law ibid.

[64] *Minister of Justice and Constitutional Development & Others v Prince (Clarke & Others intervening)* [2018] ZACC 30, 2018 (6) SA 393 (CC) (*Prince*). The high court decision, by Davis J, was reported as *Prince v Minister of Justice and Constitutional Development &Others* [2017] ZAWCHC 30, 2017 (4) SA 299 (WCC).

[65] In particular, ss 4(b) and 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 (Drugs Act) and ss 22A(9)(a)(i) and 22A(10) of the Medicines and Related Substances Control Act 101 of 1965 (Medicines Act). The high court declared that these were unconstitutional 'only to the extent that they prohibit the use of cannabis by an adult in private dwellings where the possession, purchase or cultivation of cannabis is for personal consumption by an adult' (as noted by the Constitutional Court in *Prince* (note 64 above) at para 18).

raised the possible conflict with various international treaties that South Africa is a party to. What is of interest is the manner in which the Court dismissed the State's attempt to rely on conflict with certain international treaties. The Court held that:

> Counsel for the State referred to various international agreements to which South Africa is a signatory and submitted that South Africa is obliged to give effect to these international agreements. The answer to the submission is that South Africa's international obligations are subject to South Africa's constitutional obligations. The Constitution is the supreme law of the Republic and, in entering into international agreements, South Africa must ensure that its obligations in terms of those agreements are not in breach of its constitutional obligations. This Court cannot be precluded by an international agreement to which South Africa may be a signatory from declaring a statutory provision to be inconsistent with the Constitution. Of course, it is correct that, in interpreting legislation, an interpretation that allows South Africa to comply with its international obligations would be preferred to one that does not, provided this does not strain the language of the statutory provision.[66]

Unfortunately, the Court did not engage in a detailed traversal of the relevant international treaty obligations, and whether they are in truth in conflict with the Constitution. This is important, since international treaties are usually nuanced documents. They ordinarily include many exceptions and qualifications. They are sophisticated agreements that bear witness to years of negotiation, compromise, and pragmatism. They require careful interpretation. It would have been useful had the Court seen fit, rather than assuming (even if merely for the sake of argument), as appears to be the case, that the State was correct that the international obligations required the State to enact the criminal legislation in issue, to have properly investigated whether this was in fact correct. In the *Grace Mugabe* case, the State's strenuous written and oral argument that Ms Mugabe enjoyed immunity under international law was, once carefully analysed by the court, found not to be the situation. The court's finding, therefore, avoided any possible conflict with the Constitution. Nevertheless, the manner that the Court in *Prince* avoided such a detailed traversal of the international agreements is significant for our purposes. It demonstrates, in broad strokes, how the Court understands the way in which the Constitution deals with conflicts between it and our international law obligations. A number of significant principles can be drawn from what the Court held in *Prince*.

First, the Court highlighted that since the entering into of international agreements is a voluntary exercise (outside of *jus cogens* norms which may not be derogated from even by agreement,[67] all international law, is, at its core, consensual),[68] the government may not seek to bind South Africa to international agreements that are in violation of the Constitution. To do so would be an unconstitutional exercise of public power. Indeed, as demonstrated by the *SADC Tribunal* matter, if a court finds that the signature of an international agreement

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

[67] The Vienna Convention arts 53 and 64. Article 53 provides that 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.' And art 64 provides that, 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.'

[68] International agreements must be agreed to (whether by ratification or accession or otherwise) and customary international law forms through the practice of states and their *opinio juris*, and may be persistently objected to by individual states.

is unconstitutional, the court can and will order the executive to withdraw South Africa's signature.[69] Similarly, the Court emphasised that Parliament cannot approve an international agreement that violates the Bill of Rights or South Africa's international obligations.[70] As the Court held, more generally, in the *SADC Tribunal* decision, the executive, when conducting international relations on the international plane, must do so in a manner that respects, protects, promotes and fulfils the rights in the Bill of Rights; and failing to do so will be unconstitutional, and reviewable. The Constitution therefore requires that the executive and Parliament ensure that when they take steps to bind South Africa to international obligations, they must not do so when this would be inconsistent with the Constitution.

So, when acting on the international plane, on behalf of South Africa, members of the executive are not free agents. The Constitution sets the lawful limits and thereafter banks of any South African international policy and practice, which includes diplomatic relations, as well as the entering into of international treaties. This should ensure the possibility of significantly limiting any conflict between international treaties binding on South Africa and the Constitution. The thrust of the Court's findings in *Prince* is that government, mindful of its constitutional obligations, can be expected to avoid entering into international agreements that conflict with the Constitution. If members of the executive err in this regard, the *SADC Tribunal* decision shows that the courts can and will declare government actions unconstitutional, and will require, if appropriate, steps to be taken on the international plane to ensure that South Africa extricates itself from such obligations.[71]

The second principle that one can draw from the Court's statement in *Prince* is that in the unlikely event that there is, in truth, a conflict between properly interpreted constitutional provisions and properly interpreted international law binding on South Africa, then the Court is required to specify that its obligation to test legislation for constitutional compliance, and to declare legislation that is inconsistent to be invalid,[72] cannot be limited by international agreements to which South Africa is a party. In other words, if provisions of national legislation violate the Constitution, they cannot be saved from invalidity on the basis that the provisions are in accordance with or necessary to give effect to South Africa's international law obligations. Of course, if the executive believes that any domestic legislation is necessary (as opposed to merely desirable) to give effect to South Africa's international obligations, it must seek to enact legislation that gives effect to those obligations in a constitutionally compliant manner. And, as the Court explained, the government should not seek to make South Africa a party to international agreements that are in conflict with the Constitution.

Thus, in practice, we see no reason why, by careful and sensible drafting, national legislation cannot be both constitutionally valid, and, where necessary, give effect to international obligations. This is particularly so, as the Court is cautious to stress, since national legislation must in any event be interpreted so as to comply with international law, unless such

[69] *SADC Tribunal* (note 3 above) at para 94.

[70] *SADC Tribunal* (note 3 above) at para 79.

[71] In the *SADC Tribunal* case (note 3 above), the President's signature of the 2014 Protocol was found to be unconstitutional, and he was ordered to withdraw his signature of the 2014 Protocol. In *Democratic Alliance v Minister of International Relations and Cooperation & Others* [2017] ZAGPPHC 53, 2017 (3) SA 212 (GP) (*ICC Withdrawal*), the government's giving of notice withdrawing South Africa from the Rome Statute of the International Criminal Court (the Rome Statute of the ICC) was found to be unconstitutional, and the government was ordered to formally revoke the notice of withdrawal (see para 84, order 3).

[72] An express obligation placed on courts, in terms of s 172(1)(a) of the Constitution.

interpretation would unduly strain the language of the legislation. It therefore appears unlikely that irreconcilable conflict will arise between the Constitution and international law obligations voluntarily assumed by South Africa.

3 *The Constitution itself must be interpreted with regard to international law*

Not only must South Africa act on the international plane in a manner that will ensure that it is not bound by obligations that are in conflict with the Constitution, it must interpret the Constitution itself with due regard to international law. Section 39(1)(b) of the Constitution decrees that every court must consider international law when interpreting the Bill of Rights. Thus, even the Bill of Rights, the normative core of South Africa's constitutional democracy, must be interpreted having due regard to international law (although, s 39(1)(b), unlike s 233, does not require a court to adopt the interpretation that accords with international law). Thus, it would be difficult to imagine a correctly interpreted section of the Constitution creating conflicting obligations to South Africa's international law obligations. Moreover, as indicated above, the executive must not bind South Africa to an international obligation that would violate the Constitution, and should persistently object to the formation of any customary international law in conflict with the Constitution. There is thus, normally, a virtuous cycle, where international law and constitutional law are interpreted so as to ensure unity and harmonisation, not conflict. It is precisely this virtuous cycle that arose in the recent decision in *Centre for Child Law & Others v Minister of Basic Education & Others*.[73] The case, which came before a full bench of the Eastern Cape High Court, dealt with the right of children who lack the necessary identity documents, passports, birth certificates or permits, to receive public schooling. When the court dealt with interpreting the relevant legislation in conformity with international law, it noted:

> Section 233 of the Constitution also enjoins courts when interpreting legislation to prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is not. Reference has already been made herein above to conventions signed and ratified by South Africa to which the courts are bound to give effect to. These conventions have, on previous occasions, been the source from which the Constitutional Court drew whilst interpreting the provisions in the Bill of Rights.

Thus, the court made the point that the applicable international law that it needed to have regard to, and give effect to when interpreting the relevant legislation as required by s 233 of the Constitution, was also considered and used by the Constitutional Court when interpreting the relevant provisions of the Bill of Rights. Thus, in essence, when interpreting legislation so as to ensure compliance with the Bill of Rights (as required by s 39(1)(b)),[74] and when interpreting legislation to ensure compliance with international law (as required by s 233), no conflict need arise between these two interpretative requirements. That is because the relevant international law would already have been used in determining the scope of the rights in the Bill of Rights. Even though the Court has regard for international law when interpreting a right in the Bill

[73] [2019] ZAECGHC 126, [2020] 1 All SA 711 (ECG).

[74] For more discussion generally, *Cool Ideas 1186 CC v Hubbard & Another* [2014] ZACC 16, 2014 (4) SA 474 (CC) (*Cool Ideas*) at para 28; *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* [2000] ZACC 12, 2001 (1) SA 545 (CC) at para 22; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* [2004] ZACC 15, 2004 (4) SA 490 (CC) at para 91;

of Rights, there may be instances in which the Court may find that the right as expressed in our Constitution is materially different, and cannot reasonably be interpreted to fully align with the position in an international law agreement.[75] But, for the reasons indicated above, the executive and legislature are under a constitutional obligation to ensure that South Africa does not become bound to any international agreement that is irreconcilably in conflict with rights in the Bill of Rights. Therefore, even though the international-law-first approach required by s 233 must, by necessity, be limited by the obligation to interpret all legislation to ensure consistency with the Constitution (and thus such reasonable constitutional interpretation would need to be adopted, even if it were inconsistent with international law), the prospect of international-law-first interpretation, and interpreting legislation to ensure constitutional compliance, means that the possibility of conflicting interpretations is limited.

4 *The Constitution and international law obligations in harmony*

In summary, given our discussion above, one can see that there are three broad reasons why the possibility for direct and irreconcilable conflict between international law binding on South Africa and the Constitution is limited. First, in terms of s 39(1)(b), when interpreting the Bill of Rights, the normative heart of the Constitution, courts are required to consider international law. Thus, the rights in the Bill of Rights are generally interpreted in an international-law compliant manner where possible. This ensures that it would be unlikely that a rule of international law would be directly in conflict with a properly interpreted right in the Bill of Rights. This is well demonstrated by the *Centre for Child Law* decision, discussed above, where the court makes clear that the relevant international law treaties drawn to its attention had already been relied on by the Constitutional Court in interpreting the content and scope of the relevant rights in the Bill of Right. In the *SADC Tribunal* matter, the Constitutional Court spoke of the 'centrality' of international law in 'shaping our democracy' and emphasised the 'critical role that we need international law to play in the development and enrichment of our constitutional jurisprudence'.[76] And, as the Constitutional Court has held, the 'Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply

[75] For instance, the Constitutional Court had regard to the International Covenant on Economic, Social and Cultural Rights (ICESCR) when interpreting (a) the right of access to adequate housing (in *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19, 2001 (1) SA 46(CC) at paras 27–28; and in *Jaftha v Schoeman & Others* [2004] ZACC 25, 2005 (2) SA 140 (CC) paras 23–24), (b) the right of access to health care services (in *TAC),* and (c) the right of access to sufficient water (in *Mazibuko v City of Johannesburg* [2009] ZACC 28, 2010 (4) SA 1 (CC) at 52–53, and fn 31). The Court did so even though at the time South Africa was not a party to the ICESCR, as it had only signed but not ratified it (South Africa finally ratified the ICESCR in 2015). Of relevance, the Court pointed out in *Grootboom* ibid at para 28 that, '[t]he differences between the relevant provisions of the Covenant and our Constitution are significant in determining the extent to which the provisions of the Covenant may be a guide to an interpretation of s 26 [of the Constitution].'

[76] *SADC Tribunal* (note 3 above) at para 4.

with international law'.[77] Second, it would be unconstitutional for South Africa to seek to become a party to and bound by an international agreement which created any obligations in conflict with the Constitution.[78] Third, the government would be constitutionally obligated to persistently object to any customary norm, during the process of formation of that norm, if it conflicts with the Constitution. Such customary international law would not be binding on South Africa, and therefore would not be incorporated in terms of s 233.[79]

The picture by now is clear: the Constitution ensures an integrative and constitutionally consistent approach to international law, which should in principle limit the instance of direct conflict between South Africa's international obligations and the Constitution.

B Section 231 and how international treaties are entered into and domesticated

In *SADC Tribunal*, the Court was faced with several issues arising from the interpretation and application of s 231 of the Constitution. Section 231 prescribes how South Africa enters into and becomes bound by international agreements, and how those international agreements are domesticated. While the Court dealt with the section, the Court left much unanswered. Moreover, the Court's approach to certain of the issues raises questions that will need to be resolved in order to give a proper account of how and to what extent international treaty obligations become applicable and binding in South Africa. We consider and deal with these issues below, in the hope of resolving those issues and providing a consistent and complete account of the Constitution's integration of international treaty law into our law in light of our courts' current jurisprudence: to read the Court's approach in its best light.

By way of introduction, as then Chief Justice Ngcobo opined in the minority decision in *Glenister*, s 231 is 'deeply rooted in the separation of powers'.[80] It creates a careful balance of powers and responsibilities between the legislature and the executive. An appreciation of that constitutionally-ordained separation is vital to understanding the central features of s 231 and in dealing with the issues that arise in applying s 231. We discuss those central features below, and the issues that arise from them.

[77] *Glenister (*note 1 above) at para 97 (Ngcobo CJ), quoted with approval in the *Torture Docket* matter (note 12 above) at para 22. A similar view was expressed in the recent decision of *Chang v Minister of Justice and Correctional Services & Others; Forum de Monitoria do Orcamento v Chang & Others* [2019] ZAGPJHC 396, [2020] 1 All SA 747 (GJ) (*Chang*). The case dealt with a review of the Minister of Justice's decision to extradite Mr Chang (a former Minister of Finance of Mozambique) to Mozambique. The court held that, '[o]ur Constitution reveals a clear and uncompromising commitment to ensure that *the Constitution* and South African law *are interpreted to comply with international law* and in particular international human rights law. Firstly, s 233 requires legislation to be interpreted in compliance with international law; secondly, s 39(1)(b) requires courts, when interpreting the Bill of Rights, to consider international law; finally, s 37(4)(b)(i) requires legislation that derogates from the Bill of Rights [in a state of emergency] to be "consistent with the Republic's obligations under international law applicable to states of emergency."' (para 67, emphasis added)

[78] For further discussion, see *SADC Tribunal* (note 3 above) at paras 75 and 77, and the discussion of this decision in part IIC.

[79] Drafting Conclusion 15 in the Draft Conclusions on Identification of Customary International Law (note 62 above).

[80] *Glenister* (note 1 above) at para 89.

1 *The executive's limited power to negotiate and sign international agreements*

The first aspect that one notices in considering s 231 is that it expressly makes '[t]he negotiating and signature of all international agreements … the responsibility of the *national executive*'.[81] In the *ICC Withdrawal* case, the full bench of the high court held that s 231(1) only gives the national executive limited power to undertake the 'exploratory work' of negotiating and signing international agreements, but this does not bind South Africa to such international agreements.[82] Moreover, the high court held, no doubt on the basis that s 231(2) makes clear that South Africa is only bound by a treaty once Parliament has approved it, that an executive's signature of an international agreement 'has no direct legal consequences'.[83] However, in the *SADC Tribunal* matter the Constitutional Court, without referring to the *ICC Withdrawal* case, found that the signature on an international agreement is of some legal significance. The Court found this to be the case in particular because of art 18 of the Vienna Convention of the Law of Treaties (the Vienna Convention).[84] The Court held that art 18 formed part of customary international law, and therefore was binding on South Africa, even though South Africa was not a party to the Vienna Convention.[85] Article 18 provides, in relevant part, that a 'State is obliged to refrain from acts which would defeat the object and purpose of a treaty when … it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, *until it shall have made its intention clear not to become a party to the treaty*.'[86] The International Law Commission (ILC) has pointed out, that '[i]t is unanimously accepted that article 18, paragraph (a), of the Convention does not oblige a signatory state to respect the treaty, but merely to refrain from rendering the treaty inoperative prior to its expression of consent to be bound'.[87] In its judgment, the Court in *SADC Tribunal* did not undertake a detailed analysis of the nature of the obligation created by art 18. However, the Court appeared to accept that art 18 does not mean that by signing a treaty that must still be ratified that, absent ratification, such signature binds South Africa to comply with the treaty. Rather, art 18 creates a good faith obligation not to act in such a way as to defeat the object and purpose of the treaty which, inter alia, requires a state not to act in ways that would render future compliance with the treaty, if and when it is ratified and has come into force, impossible.[88] In particular, the Court held that '[a]rticle 18 alludes to the need for Parliament to still ratify. It does no more than restrain a State that has signed a treaty from acting in a manner inconsistent with the spirit of that treaty or its own commitment as borne out by the

[81] Emphasis added.

[82] *ICC Withdrawal* (note 71 above) at para 55. The court made its decision in the context of an international agreement that needed to be approved by Parliament, under s 231(2) to be made binding. An international agreement that does not require parliamentary approval, and can be tabled under s 231(3) before Parliament, may mean that the executive has a different role. We discuss s 231(3) below.

[83] *ICC Withdrawal* ibid at para 47.

[84] Vienna Convention of the Law of Treaties 1969.

[85] *SADC Tribunal* matter (note 3 above) at para 39.

[86] Emphasis added.

[87] Report of the International Law Commission (Fifty-ninth session 2007), General Assembly Official Record, Sixty-second Session Supplement No.10 (A/62/10) at 67 (italics in the original).

[88] See ILC Report ibid. For a general and detailed discussion of art 18 and its interpretation see chapter by L Boisson de Chazournes, A La Rosa & MM Mbengu 'Article 18' in *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford Commentaries on International Law) 2011 at 369ff.

signature, pending ratification.'[89] It was on the basis of this finding, as to the limited effect of art 18, that the Court was willing to hold that the customary international law principle as embodied in art 18, was not in conflict with s 231(2) of the Constitution, and therefore formed part of our domestic law (in terms of s 232). This was so since the Court recognised that if art 18 were to render South Africa bound by the terms of a treaty (which is subject to ratification) merely on signature by the executive, this would be inconsistent with s 231(2) of the Constitution, which makes clear that South Africa is only bound by an international agreement if the international law agreement was approved by Parliament.[90] But, given the effect of art 18, and the manner in which the Court dealt with that in the *SADC Tribunal* matter, the high court's statement in the *ICC Withdrawal* decision — that signature 'has no direct legal consequences'[91] — is too emphatic, and its statement requires some qualification. It would be better to say that as a matter of international law, signature has such legal effects as provided for in the agreement signed, as read together with art 18 (which, by virtue of s 232, is part of our law).

2 *The executive's and legislature's delineated functions when binding South Africa to international agreements*

Our consideration as to the effect of giving the executive the power to negotiate and sign international agreements leads to a consideration of the second key aspect of s 231. The section creates a delineation of functions between the executive and legislature in relation to binding South Africa to international agreements. In particular, if after negotiating and signing an international agreement, the executive wishes South Africa to agree to be bound by an international agreement, the executive must first table the international agreement before both houses of Parliament for their consideration and approval (s 231(2)). As is made clear in the *ICC Withdrawal* case:

> the executive does not have the power to bind South Africa to [an international] agreement. The *binding power comes only once parliament has approved the agreement* on behalf of the people of South Africa as their elected representative. It appears that it is a deliberate constitutional scheme that the executive must ordinarily go to parliament (the representative of the people) to get authority to do that which the executive does not already have authority to do.[92]

[89] To an extent this elucidation of the limited effect of art 18, appears to be inconsistent with what is said earlier in the judgment (albeit in passing) that appears to suggest that the Court viewed the effect of mere signature of the Protocol would, by virtue of art 18, meant that 'if an individual were to take South Africa to the Tribunal now, South Africa would be obligated to object to or resist its jurisdiction in obedience to the dictates of Article 18.' (para 39). The Court does not attempt to explain why this would be the effect of the limited obligation created by art 18, and the Court's suggestion is inconsistent with its own later pronouncement as to the limited effect of art 18, and seems to fall foul of the fallacy warned against by Aust, who opines in his work on the law of treaties that, 'Article 18 requires a state 'to refrain from acts that would defeat the object and purpose of a treaty' when … it has signed the treaty ... subject to ratification, until it shall have made its intention clear not to become a party to the treaty ... It is sometimes argued (especially by law students) that a state that has not yet even ratified a treaty must, in accordance with art 18, nevertheless comply with it or, at least, do nothing inconsistent with its provisions. *This is certainly wrong, since the act of ratification would then have little or no purpose, the obligation to perform the treaty then not being dependent on ratification and entry into force.*' (A Aust *Modern Treaty Law and Practice* (3rd ed, 2013) at 107, (emphasis added.)

[90] Save in the limited circumstances governed by s 231(3).

[91] *ICC Withdrawal* (note 71 above) at para 47.

[92] *ICC Withdrawal* (note 71 above) at para 55, emphasis added.

As Ngcobo CJ held in *Glenister,* '[u]nder our Constitution, therefore, the actions of the executive in negotiating and signing an international agreement *do not result in a binding agreement. Legislative action is required before an international agreement can bind the Republic*.'[93] As the high court held in *ICC Withdrawal*, the corollary to requiring parliamentary approval to make an international agreement binding is that this equally requires parliamentary approval before the executive can give notice of withdrawing South Africa from an agreement that Parliament has previously approved. There is a limited exception to the need to approach Parliament for approval, in respect of agreements that fall within the ambit of s 231(3), which we deal with below.

3 *Public participation in the approval of international agreements*

The third important aspect of s 231's scheme flows from the requirement for parliamentary involvement in s 231(2). That is the need for public participation in that approval process. While the Constitutional Court has not expressly pronounced on this issue, it flows from the express obligations in the Constitution. The Constitution obligates both houses of Parliament to facilitate public participation in their legislative and other activities.[94] Therefore, by requiring international agreements to be tabled before Parliament for its approval, the Constitution envisages that Parliament would generally be obligated to conduct appropriate public participation processes when considering whether to approve an international agreement.[95]

The high court took account of this in the *Earthlife Africa* decision (which dealt with procurement of nuclear power, and the international agreements entered into pursuant thereto).[96] In finding that the government had acted unlawfully in tabling an international agreement with Russia in respect of nuclear procurement, not under s 231(2), but under s 231(3) (which as we discuss below dispenses with the need for parliamentary approval), the court held that 'tabling of an [inter-governmental agreement] under s 231(3) permits the executive to bind South Africa to an agreement without parliamentary approval or *the public participation that often accompanies any such parliamentary-approval process*.'[97]

The fact that s 231(2) may require Parliament to undertake a public participation process when considering whether to approve an international agreement takes on particular import given the Court's consideration, in the *SADC Tribunal* matter, of the issue of whether the executive was under any obligation to consult with the public when negotiating and signing international agreements. In the *SADC Tribunal* matter, one of the amici had argued that the executive bore a general constitutional duty to consult with the public prior to signing international agreements.[98] The Court was emphatic in rejecting this submission, referencing the fact that public consultation was specifically provided for in the Constitution as a *parliamentary* obligation, not an executive obligation. The Court held that:

> Public participation in the law-making process is a requirement, specifically provided for in our Constitution, that must be met by our law-making institutions. But, participatory democracy is

[93] *Glenister* (note 1 above) at para 95, emphasis added.
[94] Sections 57(1)(b) and 72(1)(a) of the Constitution.
[95] *Earthlife Africa Johannesburg & Another v Minister of Energy & Others* [2017] ZAWCHC 50, 2017 (5) SA 227 (WCC) at para 114.
[96] *Earthlife Africa* ibid.
[97] Emphasis added.
[98] *SADC Tribunal* (note 3 above) at para 86.

> not provided for in similar terms in relation to the exercise of presidential or executive power. The negotiation and signing of international agreements like the impugned Protocol is an exercise of executive power. And there is no legal provision or principle that even remotely imposes an obligation on the Executive to invite the public to participate in its decision-making processes as proposed. Desirable though it might be, we would be straining even the scheme of the Constitution if we were to elevate public consultation to the level of a requirement. It is always open to the Executive, whenever it deems it fitting to do so, to involve the public. But a failure to do so, however enriching to the decision-making process it might otherwise have been, can never rise to the level of a failure to fulfil a constitutional obligation to consult the public.[99]

4 *The intersection of domestic and international law*

The fourth aspect of s 231 that bears careful consideration is the interplay between domestic and international law that s 231(2) represents. Whether an international agreement is binding on South Africa, qua sovereign state on the international plane, is a question ultimately answered, not by South Africa's domestic law (the domestic law of only one of the parties to such agreement), but by international law.[100] Therefore, correctly understood s 231(2) should be interpreted as providing the jurisdictional requirements in domestic law that specify when, as a matter of domestic law, the government (the executive together with Parliament) may take steps on the international plane to ensure that South Africa is bound as a matter of international law. This is precisely why s 231(2), quite correctly, refers to an international agreement binding South Africa 'only after' it has been approved by resolution in both houses of Parliament, rather than stating that Parliament ratifies the international agreement, or binds South Africa, itself. Section 231(2) establishes the jurisdictional requirement (parliamentary approval of the international agreement) that is required by our law before the executive may take the necessary steps on the international plane to notify other state parties (by means of ratification) that South Africa agrees to be bound by the relevant international agreement. As a matter of international law, it is only once other state parties have been notified that South Africa agrees to be bound by the international agreement (by means of ratification) that South Africa will in fact be bound by that international agreement. If and when both houses of

[99] *SADC Tribunal* (note 3 above) at para 87.

[100] For example, the Vienna Convention arts 27 and 46; Aust (note 90 above) at 274; MN Shaw *International Law* 8th ed (2017) at 712; and *Land and Marine Boundary between Cameron and Nigeria (Cameroon v. Nigeria)* 2000 ICJ Reports 303, where the International Court of Justice (ICJ), was faced with the submission by Nigeria that it was not bound by an international agreement with Cameroon (the Maroua Declaration, 1975) because the agreement was invalid since Nigeria's domestic constitutional requirements for the entering into of international agreements had not been complied with. However, the ICJ determined the validity of the Declaration having regard to the requirements of art 46 of the Vienna Convention, which made clear that a 'state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.' The Court noted that the Nigerian head of state had signed the Declaration and that 'Nigeria further argues that Cameroon knew, or ought to have known, that the Heald of State of Nigeria had no power legally to bind Nigeria without consulting the Nigerian Government.' (at para 266). However, the Court held at para 266 that 'there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States.' Therefore, the Court found that since it was the head of state that signed the Declaration and it is accept by international law that heads of state 'are considered as representing their State for the purpose of performing all acts relating to the conclusion of a treaty', any domestic constitutional limitation on the Nigerian head of state's capacity to enter into the Declaration was not 'manifest' (see para 265–266).

Parliament approve an international agreement, as required by s 231(2), then South Africa can be bound to the agreement as a matter of international law.[101] However, the structure of s 231 suggests that there is usually a further step in the process to complete South Africa's journey towards being bound as a matter of international law. That further step is (depending on the terms of the treaty in question) for the executive (normally the Minister of International Relations) formally to give notice that South Africa agrees to be bound by the international agreement. This typically occurs by depositing an instrument of ratification with the relevant body designated in the international agreement.[102] For instance, the treaty at issue in the *SADC Tribunal* matter, the 2014 Tribunal Protocol, required that states that had signed the international agreement would then need to ratify the agreement after compliance with their own constitutional procedures, and it was then a requirement that 'all Instruments of Ratification and Accession shall be deposited with the Executive Secretary of SADC who shall transmit certified copies to all Member States.'[103] And, as noted by the court in the *ICC Withdrawal* case, 'prior parliamentary approval is required before instruments of ratification may be deposited with the United Nations'.[104]

Although s 231 does not deal with this expressly, it seems clear from the structure and nature of s 231, and the courts' analysis of the section that, as discussed above, once Parliament has approved an international agreement, so that it may become binding under international law, the executive is then obligated to take the necessary steps to notify the other state parties to the agreement, generally by depositing an instrument of ratification. Therefore, it would certainly be unlawful for the executive to fail to deposit an instrument of ratification once Parliament had approved the international agreement.

The domestic and international law steps that are necessary to bind South Africa to an international agreement are well illustrated by, and will often be set out in, an instrument of ratification deposited by South Africa. By way of example, the instrument of ratification in respect of the SADC Protocol on Culture, Information and Sport, provided as follows:[105]

> WHEREAS the Southern African Development Community (SADC) Protocol on Culture, Information and Sport (hereinafter referred to as "the Protocol") was adopted at Blantyre, Malawi on 14 August 2001;
>
> AND WHEREAS the Protocol was signed on behalf of the Government of the Republic of South Africa on 14 August 2001;
>
> AND WHEREAS Article 38 of the Protocol provides for ratification thereof;
>
> AND WHEREAS the Government of the Republic of South Africa desires to become a Party to the Protocol;
>
> AND WHEREAS ratification of the Protocol was approved by the South African Parliament in accordance with the requirements of South African law;
>
> NOW THEREFORE I, NKOSAZANA CLARICE DLAMINI ZUMA, MINISTER OF FOREIGN AFFAIRS OF THE REPUBLIC OF SOUTH AFRICA, declare that the Government of the Republic of South Africa, having considered the Protocol, hereby confirms and ratifies the same.

[101] *Glenister* (note 1 above) at para 181.

[102] *ICC Withdrawal* (note 71 above) para 51. Similarly, international agreements, in addition to allowing for ratification, may also allow for accession. This is the process of formally agreeing to be bound by a treaty (by depositing an instrument of accession) to which a state had not been party to the negotiation of and therefore had not signed.

[103] Article 55(1) of 2014 Protocol.

[104] *ICC Withdrawal* (note 71 above) at para 51.

[105] A copy of the instrument of ratification is on file with the authors.

5 *When can an international agreement be made binding absent parliamentary approval?*

We now come to the next important aspect of s 231; the limited exception it includes for ensuring that international agreements are only made binding after they are approved by Parliament. Section 231(3) provides that, '[a]n 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 National Council of Provinces, *but must be tabled in the Assembly and the Council within a reasonable time*.'[106]

The Constitutional Court has not yet definitively pronounced on how s 231(3) should be interpreted or how the interplay between sub-ss 231(2) and (3) operates. However, the interpretation and application of s 231(3) were directly at issue in *Earthlife Africa*. The court's interpretation of s 231(3) formed the basis for its declarations of invalidity regarding the tabling of three international agreements (one with Russia, one with America, and one with South Korea). The court held that s 231(3) permits the executive to bind South Africa to a small subset of international agreements 'without parliamentary approval or the public participation that often accompanies any such parliamentary approval process, by tabling the agreement within a reasonable time.'[107] The court emphasised that the international agreements that can be tabled under s 231(3) are —

> a limited subset of run of the mill agreements (or as Professor Dugard puts it, agreements 'of a routine nature, flowing from daily activities of government departments') which would not generally engage or warrant the focussed attention or interest of Parliament.[108]

Thus, international agreements that are not run-of-the-mill and routine and would warrant Parliament's attention would have to be approved by Parliament in terms of s 231(2) before they can bind South Africa. International agreements which would have any effect on the public or on any citizens' domestic or international rights, would evidently warrant parliamentary attention, and would therefore have to be tabled under s 231(2). The executive could only table an agreement under s 231(3), and thus bypass the need for parliamentary approval and the concomitant public participation, if the agreement is of such a nature that there would be no rational need to consult with the public as to its content. Of course, if the executive were to bypass s 231(2)'s requirement for parliamentary approval (and therefore public participation), by tabling an agreement under s 231(3), which does require Parliament's attention, then this would be unconstitutional and should be set aside by the courts. This is precisely what occurred in *Earthlife Africa*.

At the centre of the *Earthlife Africa* matter, was an international intergovernmental agreement between South Africa and Russia (the Russian IGA) which provided for the procurement of nuclear power. Although the government sought to argue that the Russian IGA was merely a broad, non-specific, cooperation agreement, the terms of the agreement gave the lie to these assertions. As the high court found, the plain terms of the agreement set it apart from a mere cooperation agreement (in contradistinction to nuclear cooperation agreements that South Africa had signed with other states). The Russian IGA was truly remarkable for its content: it included a number of terms giving firm commitments that would have required South Africa to use Russia to construct a new fleet of nuclear power plants, to the exclusion of third party

[106] Emphasis added.
[107] *Earthlife Africa* (note 96 above) at para 114.
[108] Ibid.

states (save by Russian agreement), with the agreement to favourable tax arrangements and an indemnification of Russia in the event of any harm arising from the operation or construction of the nuclear power plants.[109] Despite these significant and far-reaching terms, the Russian IGA did not expressly provide for ratification (the depositing of instruments of ratification). Rather, the IGA provided that '[t]his Agreement shall enter into force on the date of the receipt through diplomatic channels of the final written notification of the completion by the Parties of internal government procedures necessary for its entry into force.'[110]

The high court had no difficulty in holding that the content of the international agreement made clear that it was not an agreement 'of a technical, administrative or executive nature'. Therefore, the court held that the Russian IGA had to be tabled before Parliament for approval under s 231(2) (and could not be tabled under s 231(3)).[111] Notwithstanding that the Russian IGA was a far-reaching and substantial international agreement that would have committed South Africa to procure power plants from Russia, at a cost that could have exceeded R1 trillion, the government had nevertheless sought to table the agreement before Parliament for mere noting under s 231(3), thus bypassing parliamentary oversight that is normally required, and therefore public participation, entailed in the s 231(2) procedure. This was evidently unconstitutional, and thus was set aside by the court. The high court emphasised that requiring the agreements such as the Russian IGA to be tabled under s 231(2) for parliamentary approval, 'would give optimal effect to the fundamental constitutional principles of the separation of powers, open and accountable government, and participatory democracy.' The government did not appeal this decision, presumably accepting that it had been unlawful to use s 231(3) to seek to circumvent the constitutionally provided process for making treaties such as the Russian IGA binding.

Even when the executive is entitled to make use of s 231(3) to bind South Africa to an international agreement absent parliamentary approval, the section does not allow it to dispense with Parliament completely. Section 231(3) provides that if the executive wishes to make an international agreement that falls within s 231(3) binding on South Africa it must still table the international agreement before Parliament within a reasonable time.[112] In *Earthlife Africa*, the court held that the tabling before Parliament in a reasonable time is a jurisdictional requirement for the executive to exercise the power under s 231(3).[113] There are sound practical and principled reasons for this. In accordance with the separation of powers, the tabling allows Parliament to scrutinise the relevant agreement to ensure that the executive has not mischaracterised an international agreement, in order to bypass the s 231(2) approval process. This gives due regard to the constitutional principles of openness and accountability.[114] And as the *Earthlife Africa* case confirms, the risk of such an attempted bypass is not imaginary. The court held that if there has been a failure to table an agreement in a reasonable time then this would mean that the executive had acted unconstitutionally, and the tabling under

[109] *Earthlife Africa* (note 96 above) at para 114.

[110] Russian IGA art 17.1. A copy of the Russian IGA is on file with the authors.

[111] *Earthlife Africa* (note 96 above) at para 114.

[112] Section 231(3), and *Earthlife Africa* (note 96 above) at para 126.

[113] *Earthlife Africa* (note 96 above) at para 126.

[114] Ibid at para 126, referring to s 41 of the Constitution. The court noted that 'Section 41(1) requires all spheres of government and all organs of state within each sphere to "provide effective, transparent, accountable and coherent government for the Republic as a whole" whilst s 1 of the Constitution sets out these attributes as founding values in a multiparty system of democratic government.'

s 231(3) would be unconstitutional. It was on this basis that the court set aside the tabling of international cooperation agreements with the US and South Korea (these agreements, years after they had been signed, had been very belatedly tabled together with the Russian IGA, in a manner that the applicants in the *Earthlife Africa* argued, was meant to act as window-dressing to obscure the substantive and unique commitments made to Russia in the Russian IGA). The US agreement was only tabled 20 years after it was signed, and the South Korean agreement was only tabled five years after being signed. Given these significant delays, the court found that these agreements were accordingly not tabled within a reasonable time.[115] It accordingly declared the tabling under s 231(3) of both agreements to be unconstitutional and unlawful and set aside the tabling.

In *Earthlife Africa*, although the court did not wish to prescribe to the government what if any steps it should take consequent upon the setting aside of the tabling of the US and South Korean IGAs, it opined that it may well have been open to the government to utilise the more onerous procedure set out in s 231(2) of the Constitution. The court held that in its 'view that procedure is non-exclusive in the sense that the executive is not precluded from utilising its provisions in relation to treaties which fall within the ambit of s 231(3).'[116] The court's conclusion may be supported on the following reasoning.

The constitutional structure of s 231 creates two procedures for tabling international agreements before Parliament in order to meet the domestic constitutional requirements for international agreements to be made binding. If the executive wishes to make use of the more expedited parliamentary procedure (under s 231(3)), created to avoid unnecessary delay (and assuming that in substance the agreement falls within the ambit of s 231(3) as an everyday bureaucratic agreement), then it is required to table the agreement within a reasonable time. If the government does not table an international agreement, which would otherwise fall within s 231(3) in a reasonable time, then it can no longer make use of s 231(3)'s expedited procedure, and must use s 231(2). This is so since s 231(2) applies to all international agreements, save for those agreements 'referred to in subsection (3)'. The type of agreements referred in 231(3) are those that are of a 'technical, administrative or executive nature, or [agreements] which [do] not require either ratification or accession' but which have been tabled 'within a reasonable time'. Thus, if an international agreement which, for instance, is technical, administrative and executive in 'nature', has not been tabled within a reasonable time, then s 231(3) does not apply to it. By definition, it is not an agreement referred to in s 231(3), because tabling within a reasonable time is an integral feature of the type of agreements that fall within the terms of s 231(3). Therefore, the executive would be at liberty to table that agreement before Parliament, under s 231(2), to seek its approval.

6 *The domestication of international agreements and the SADC Tribunal decision*

Section 231(2) and (3) only deals with the domestic constitutional obligations that must be complied with in order for international agreements to be made binding on South Africa on the international plane (for instance, the need for parliamentary approval). Section 231(4) expressly provides for domestication of international agreements. Generally, speaking, in terms

[115] *Earthlife Africa* (note 96 above) at para 128.
[116] *Earthlife Africa* (note 96 above) at para 137.

of s 231(4),[117] to form part of our law an international agreement must be enacted domestically by the passing of legislation by Parliament.[118] As the court held in the *ICC Withdrawal* case, 'once parliament approves the agreement, internationally the country becomes bound by that agreement. Domestically, the process is completed by Parliament enacting such international agreement as national law in terms of s 231(4).'[119]

At issue in *ICC Withdrawal* case was the Rome Statute of the ICC, which after South Africa had ratified it, had been given domestic effect by the enacting of the ICC Act.[120] However, s 231(4) of the Constitution provides an exception to the need for Parliament to pass domestic legislation to incorporate international agreements into South Africa law. It provides that '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.' The exception is limited to international agreements that have been approved by Parliament. This qualification is important. It means that only international treaties, and their provisions, approved by Parliament in terms of s 231(2), may automatically become part of our law, regardless of whether they have self-executing provisions. Thus, a section-231(3) treaty, which binds South Africa absent parliamentary approval, and has merely been tabled before Parliament under s 231(3) within a reasonable time for notification, cannot form part of our law without legislation, regardless of whether its provisions may be considered to be self-executing.[121]

This background then brings us to an important issue that arises from the way that the Constitutional Court, in the *SADC Tribunal* matter, treated the President's conduct that was inconsistent with South Africa's treaty obligations. The nub of the issue is this. If an international agreement is not incorporated into our law by legislation in terms of s 231(4), and assuming that it is not self-executing, then absent such domestic legislative step to incorporate the treaty (or self-execution of a treaty that has been approved by Parliament, as per s 231(4)), are domestic rights and obligations created by the treaty? The answer that appears to be given by the Court in *Glenister* is, 'no'. The majority held that:

> In our view the main force of s 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 with and within the limits of the Constitution, the provision must be read in conjunction with the other provisions within s 231. Here, s 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 s 231(4) expressly creates a path for the domestication of international agreements *may* be an indication that

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

[118] See *Glenister (*note 1 above*)* at para 181.

[119] *ICC Withdrawal* (note 71 above*)* at para 35.

[120] *ICC Withdrawal* (note 71 above*)* at para 9.

[121] For a discussion as to when a treaty will be considered to be self-executing see J Dugard & A Coutsoudis, 'The Place of International Law in South African Municipal Law' in J Dugard, M du Plessis, T Maluwa & D Tladi (eds) *Dugard's International Law* (5th ed, 2018) at 81–86.

> s 231(2) cannot, without more, have the effect of giving binding internal constitutional force to agreements merely because Parliament has approved them.'[122]

The Court's reasoning is consistent with the structure of s 231, and the requirement in s 231(4). Section 231(4) creates an express avenue for the domestication of international agreements. Of course, the Court in *Glenister* was only broadly describing the position under s 231. It was careful, when setting out its interpretation of the structure of s 231 not to be too definitive ('may be an indication'), nor did it wish to rule out exceptions or nuances to its general proposition ('cannot, *without more*,' — the 'more' that may prove an exception to the tentative principle annunciate, is not explained, but this has been left open for future decision [emphasis added]).

In the *Torture Docket* decision, the Court in its introductory summary of the place of international law in the Constitution, pointed out that, in contradiction to customary international law, 'international treaty law only becomes law in the Republic once enacted into domestic legislation'.[123] But the Court's decision in *SADC Tribunal* provides a certain nuance to that simple assertion. In the *SADC Tribunal* decision, the Court held that an organ of state that acts in violation of South Africa's international law obligations, even where those obligations have not been domesticated by legislation, acts unlawfully and unconstitutionally. The organ of state's conduct will therefore be reviewable before South African courts. The Court's findings in relation to this unlawfulness were discussed in part II above, and will be further analysed in part IV below. In summary, the Court made it clear that '[a]ll presidential or executive powers must always be exercised in a way that is consistent with [inter alia] international law obligations'.[124] Moreover, the Court also held that the obligation to comply with binding international treaties, even when unincorporated, is sourced, inter alia, in the obligations created by s 231(2). The Court held that the President's actions (as the representative of South Africa) that were in violation of the SADC Treaty which incorporated the Tribunal Protocol were, inter alia, unconstitutional since '[b]oth Houses of our Parliament resolved, in terms of the predecessor of s 231(2) of our Constitution, to ratify the Treaty. *For this reason*, no constitutional office-bearer, including our President may act, on behalf of the State, contrary to its provisions.'[125] In other words, implicit in s 231(2) is the fact that it is unlawful and unconstitutional to act in violation of international agreements made binding on the international plane, by Parliament's approval.

To properly contextualise the Court's decision in the *SADC Tribunal* matter, it is important to appreciate that the Court was faced with actions that were found to be inconsistent with international agreements, that while binding on South Africa, had not been incorporated into our law by legislation. There is no domestic legislation that has been enacted to give effect to the SADC Treaty incorporating the Tribunal Protocol. Similarly, there was no suggestion in the judgment that either the Treaty or the Protocol were given effect to by virtue of complying

[122] *Glenister* (note 1 above) at para 181. For the more emphatic statement, as to the fact that unincorporated treaties do not create domestic rights and obligations see the minority decision at paras 89–97 (cautioning, in relation on UK and Australian authority that 'treating international conventions as interpretive aids does not entail giving them the status of domestic law in the Republic. To treat them as creating domestic rights and obligations is tantamount to "incorporat[ing] the provisions of the unincorporated convention into our municipal law by the back door".')

[123] *Torture Docket* decision (note 12 above) at para 24.

[124] *SADC Tribunal* (note 3 above) at para 3.

[125] *SADC Tribunal* (note 3 above) at para 76, emphasis added.

with the requirements for self-executing treaties in s 231(4). This is not surprising. The 2000 Protocol, which provided for the Tribunal's jurisdiction over individual complaints (and forms an integral part of the SADC Treaty) could not have been automatically part of our law in terms of s 231(4), even if one were to argue that its provisions may be self-executing. This is so because neither the 2000 Protocol, nor the Amendment to the Treaty to incorporate the 2000 Protocol into the Treaty (in terms of art 16, as amended), was ever approved by Parliament. Instead, as recognised by the Constitutional Court earlier in *Fick*,[126] the Summit took a decision in 2002 to bring the 2000 Protocol (which currently provides for the functioning and jurisdiction of the Tribunal) into operation by amending the SADC Treaty to incorporate 2000 Protocol, thus bringing it into force absent ratification by member states. The Summit did this by using its power, provided in the SADC Treaty to amend the Treaty and to amend Protocols. The Summit chose to exercise this power because there had been insufficient ratification to bring the 2000 Protocol into force (indeed South Africa had not ratified the 2000 Protocol), so the ratification requirement in the 2000 Protocol was removed in terms of the Summit's amendment of the Treaty and the 2000 Protocol.[127] This may all sound terribly complicated, but in simple words: the SADC Tribunal was amended by the SADC Summit in terms of an amendment approved by the Summit, rather than by way of an international agreement approved by Parliament.

Thus, despite the relevant treaty obligations not being domesticated in terms of s 231(4), the Court held that the President's conduct that violated (or more appropriately, caused South Africa to violate) these obligations was unlawful, and domestically reviewable in South Africa.

One might reconcile the approach taken by the Court in *Glenister* (and the terms of s 231(4)) and the decision in *SADC Tribunal* on the basis that in *SADC Tribunal* the Court was not concerned with whether the SADC Treaty and 2000 Tribunal Protocol, neither of which had been domesticated by legislation, created domestic rights and obligations in South Africa. The Court was focused on a different issue. The Court was engaged primarily with the question of whether the President, in conducting South Africa's international relations (participating in an international organisation and negotiating and signing an international agreement on behalf of South Africa) may act in such a way as to cause South Africa to breach its international obligations. In essence, for the reasons stated above, the Court held that so to act would be unconstitutional. That was for reasons less to do with whether international treaty law can create domestic rights, but rather the domestic demands of our Constitution: because all exercises of public power are subject to the Constitution and the rule of law, an organ of state exercising such power, even when representing South Africa on the international plane, cannot lawfully act inconsistently with South Africa international obligations. The Court made clear that the principle (that it was unconstitutional to violate international agreements binding on South Africa) applied to all exercises of power, not merely the conducting of international relations.[128]

The finding that it is unconstitutional for the executive to exercise public power in a manner that is inconsistent with South Africa's international law treaty obligations did not in truth domesticate the international treaty and make the obligations, in toto, part of our law (which the Court in *Glenister* suggested would normally require domestic legislation as required by

[126] *Fick* (note 36 above) at para 9.

[127] As noted above in footnote 37, the Agreement amending the Protocol on the Tribunal (2002) provided that the 2000 Protocol was amended to enter into force upon the adoption of the Agreement Amending the Treaty of the SADC on 14 August 2001. See also *Fick* (note 36 above) at paras 9, 10; and *Fick* (SCA) (note 37 above) at paras 35, 36.

[128] *SADC Tribunal* (note 3 above) at paras 3, 48, 75.

s 231(4)). Rather it effectively ensures that the lawful exercise of power, which must comply with the principle of legality (and the implied obligation in s 231(2) not to violate international agreements that Parliament has approved), cannot be exercised in a way that would cause a violation of international obligations binding on South Africa. Thus, one should view the *SADC Tribunal* decision as providing a fuller more nuanced treatment of the question of when organs of state can constitutionally act in a way that is inconsistent with South Africa's international law obligations, even when not incorporated, given specific facts with which the Court was faced. This is certainly not in conflict with, but rather provides greater detail to, the broad outline of the constitutional architecture created by s 231 enunciated in *Glenister*.

C When will violation of South Africa's international law obligations be unconstitutional? Is a Bill of Rights hook required?

In the *SADC Tribunal* matter the Court held that the executive had an obligation not to act in violation of South Africa's international obligations. The source of this constitutional obligation is discussed above. However, a question that needs to be considered is whether, for actions that are inconsistent with South Africa's international obligations, it is necessary to find further that the actions are also in breach of a domestic constitutional obligation to respect, fulfil, and protect the rights in the Bill of Rights, as provided in s 7(2)? In other words, is some Bill of Rights hook required, for our courts to find executive action unconstitutional because it is in conflict with South Africa's international obligations.

Again, *SADC Tribunal* and *Glenister* point to the answers. The *SADC Tribunal* case can be seen as the latest in a line of international-law-centric decisions by the Constitution. *Glenister* is its obvious forerunner. *Glenister* dealt with the government's failure to create a sufficiently independent corruption-fighting unit. In that matter the Constitutional Court grappled with the manner in which actions by the state, not in accordance with international law, would ground a challenge to the constitutionality of the government's actions. The Court ground this obligation on South Africa's international law obligations. But, it did so through the lens of the state's obligation to protect, promote, and fulfil the rights in the Bill of Rights, as provided for in s 7(2) of the Bill of Rights. It held this section was implicated because corruption negatively impacts all the rights in the Bill of Rights. Thus, the Court reasoned that when determining whether the state had acted reasonably in taking steps to protect and fulfil the rights in the Bill of Rights, the Court could look to South Africa's international law obligations in relation to corruption fighting. It was within that context that the Court had regard for the government's failure to fulfil South Africa's international law obligations. As the Court held —

> our Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and *makes them the measures of the State's conduct in fulfilling its obligations in relation to the Bill of Rights*.[129]

It was therefore within this context that the Court held that the failure to create a corruption fighting unit was in violation of s 7(2)'s requirement to respect and fulfil the rights in the Bill of Rights.

In the *SADC Tribunal* case the Court found that the right of access to courts (protected by s 34 of the Bill of Rights and also given effect to by the 2000 Tribunal Protocol) was

[129] *Glenister* (note 1 above) at para 178, emphasis added.

implicated, because the effect of suspending the Tribunal meant that citizens that previously had access to this regional international body no longer did (and the 2014 Protocol, which had been signed but not ratified, would, if it were to come into force, remove permanently the right of individuals to bring complaints before the Tribunal). However, the Court made clear that it was unconstitutional for the government to violate South Africa's international law obligations, not merely when rights in the Bill of Rights are implicated, or where there is a failure to respect, protect, promote and fulfil those rights. One can see at various points in the Court's decision that it emphasises that the unlawfulness and unconstitutionality of the President's conduct flows both (and separately) from a failure to comply with the Bill of Rights *and* to act in accordance with South Africa's international law obligations. The Court was clear that the President's actions that violated international law (in particular the obligations in the SADC Treaty incorporating the 2000 Tribunal Protocol)[130] were unconstitutional, because they violated the principle of legality flowing from the rule of law enshrined in s 1(c), and because they violated s 232(2).[131] This was in addition to being unconstitutional for failure to protect, promote and fulfil the rights in the Bill of Rights.[132]

This suggests that where the government's actions are inconsistent with and cause a violation of South Africa's international law obligations, although often one would expect the rights in the Bill of Rights to be implicated (as was the case in *Glenister* and *SADC Tribuna*l), this is not a necessary requirement for a finding that the conduct is unconstitutional. Hence, even if no right in the Bill of Rights were at issue, a breach of international obligations would be unconstitutional. Why do we say this?

First, the Court makes plain that this is how it interprets the effect of the requirement in s 231(2) that international treaties become binding on the Republic after Parliament has approved them. The Court views this section as creating an (implicit) obligation on the government not to act in breach of international agreements approved by Parliament. Thus, it states that because both houses of our Parliament approved the SADC Treaty, in terms of s 231(2), 'no constitutional office-bearer, including our President may act, on behalf of the State, contrary to its provisions.' There is no suggestion that some specific Bill of Rights violation is required.

Second, as noted above, customary international law is made part of the law of South Africa by virtue of s 232, thus evidently it would be unlawful (and in breach of the principle of

[130] For a discussion of why the Court held that the Treaty had been violated see *SADC Tribunal* (note 3 above) at paras 51–52. The Court drew attention to its previous finding in *Fick* as to the relevant international law obligations that the SADC Treaty placed on South Africa: 'The Amended Treaty, incorporating the Tribunal Protocol, places an international law obligation on South Africa to ensure that its citizens have access to the Tribunal and that its decisions are enforced.' (*SADC Tribunal* (note 3 above) at para 77, quoting from *Fick* (note 36 above) at para 69. And the *SADC Tribunal* high court decision (note 39 above), the court held at para 63 that, '[w]e have referred to the relevant articles of the Treaty and especially article 9(1)(g), which establishes the SADC Tribunal as an integral organ of SADC. We have referred to the founding principles relating to "human rights, democracy and the Rule of Law", and the obligation of Member States to act in accordance with them as per article 4(c). It is clear that Member States are also precluded from "taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty". (Article 6(1)).' And the Court went on to find that 'any act which detracted from the SADC's Tribunal's exercise of its human rights jurisdiction, at the instance of individuals, was inconsistent with the SADC Treaty itself, and violated the Rule of Law.' (Para 64.)

[131] *SADC Tribunal* (note 3 above) at paras 71, 79.

[132] *SADC Tribunal* (note 3 above) at paras 71, 79.

legality) for government to act in a way that is in violation of customary international law, since it forms part of our law. Interestingly, this may also have implications for the government's obligation not to exercise public power in a way that leads to a violation of international treaty obligations. The Court held that art 26 of the Vienna Convention — which provides that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith' — was part of customary international law.[133] That being so, it is a requirement of our domestic law, by virtue of s 232, that treaty obligations are binding (when the treaty is in force) and that those obligations must be performed, and performed in good faith. In the *SADC Tribunal* matter, the Court appeared, therefore, to reason that since this customary international law obligation was part of our law and binding on the government, it would be an unlawful violation for the government, as the representative of South Africa, to then act in a way that failed to ensured that South Africa was in good faith complying with all its binding treaty obligations. This appeared from the fact that, when the Court chronicled the grounds for finding that the President's conduct in signing the 2014 Protocol had been unlawful, it expressly pointed out that '[the President] may also not act as if article 26 of the Vienna Convention, duly undergirded by customary international law, is not binding.'[134] And the Court held that, 'it cannot be overemphasised that [the President's] conduct was *also unlawful* in that he failed to act in good faith and in pursuit of the object and purpose of the Treaty we have bound ourselves to [as required by customary international law as codified in art 26].'[135]

Third, the Court made it clear that the principle of legality is also violated where there is a failure to comply with international treaty obligations. The Court held that the President in signing the 2014 Protocol that provided for the replacement of the 2000 Protocol, which was an integral part of the Treaty, was in violation of the Treaty, since the proper amendment procedure in the Treaty had not been followed. This therefore rendered the President's decision 'unlawful' and 'irrational'.[136] Similarly, the Court found that the suspension and non-appointment of judges of the Tribunal had been unlawful — since the Summit, which the President had participated in as a member thereof, did not have the power to fail to appoint judges to the Tribunal — the Court held that they were obligated to make such appointments.[137] It was on this basis that the Court expressly held that the President's decision

[133] *SADC Tribunal* (note 3 above) at para 39.

[134] *SADC Tribunal* (note 3 above) at para 79.

[135] For example, see *SADC Tribunal* (note 3 above) at para 56, emphasis added.

[136] *SADC Tribunal* (note 3 above) at para 56, where the Court held that: 'Our President thus acted unlawfully by following an impermissible or irregular procedure. Worse still, not only did he not have the power to not appoint or renew the terms of Members of the Tribunal but also lacked the authority to suspend its operations. This illegality of his conduct also stems from purporting to exercise powers he does not have. *And it cannot be overemphasised that his conduct was also unlawful in that he failed to act in good faith and in pursuit of the object and purpose of the Treaty we have bound ourselves to.*' (our emphasis)

[137] *SADC Tribunal* (note 3 above) para 56

violated the doctrine of legality, flowing from the rule of law, as enshrined by s 1(c) of the Constitution.[138]

Fourth, of course, we should not forget that the Constitution provides expressly in s 199(5) that the security forces must act in accordance with international law, and failing to do so would violate s 199(5) and therefore be unconstitutional.

In none of these instances is it a necessary precondition that a right in the Bill of Rights is affected or violated, in order to make it unconstitutional for government to act in a way that is inconsistent with South Africa's international law obligations. Therefore, although in the *SADC Tribunal* decision, s 7(2) (the state's obligation to respect, protect, promote and fulfil the rights of the Bill of Rights) was also violated, that is not a necessary prerequisite for governmental conduct which causes South Africa to violate international law obligations to be unlawful and constitutional.[139] Naturally, as is often the case, a violation of international law obligations may also violate rights in the Bill of Rights, and thus this would provide an additional and separate basis for finding that such conduct was unconstitutional. But the mere concurrence of separate bases of unconstitutionality in any particular case does not suggest that they are not self-standing grounds of unlawfulness and unconstitutionality. Indeed, the Court held that its finding that the President's participation in the suspension of the Tribunal and attempt to amend the Tribunal's jurisdiction through the Protocol was 'unlawful' and

[138] *SADC Tribunal* (note 3 above) at para 83, where the Court held that 'Our President's signature on the Protocol that required a lesser majority support to take away the right of access to justice [then that provided for in the Treaty] flouts the principle of legality which is an incident of the rule of law – one of the foundational values of our democracy.' In para 49, the Court also emphasised that the unlawfulness of the President's conduct, which required it to be declared unlawful and unconstitutional, was, inter alia, sourced in the failure to comply with the terms of the Treaty: 'Whatever the President does must accord with the Constitution and the law. The Protocol that operationalised the Tribunal is an integral part of the Treaty. The jurisdiction of the Tribunal may therefore only be lawfully tampered with in terms of the provisions of the Treaty that regulate its amendment. And it cannot properly be amended in terms of a protocol. It may only be amended by three-quarters of the SADC Member States. The Summit, however, sought to amend the Treaty through a protocol, thus evading compliance with the Treaty's more rigorous threshold of three-quarters of all its Member States. The protocol route would have been an easy way out in that it only requires the support of ten Member States to pass. But, it is not a legally acceptable procedure for stripping the Tribunal of the most important aspect of its jurisdiction.'

[139] Even the minority concurring judgment which is cautious to emphasise that it was preferable to make clear that the unlawfulness flowed from a violation of the Constitution, not because the President himself violated international treaty obligations (and therefore relied on ss 7 and 8 of the Constitution as the basis for the unlawfulness), nevertheless, held that 'the Constitution enswathes the President with the obligation to ensure that his conduct does not result in a breach of South Africa's international obligations.' (*SADC Tribunal* (note 3 above) para 100). Thus, while the minority and majority might have some differences as to the constitutional basis for the obligation not to act in ways that breach South Africa's international law obligations, they both agree that it is a constitutional obligation, and the executive's conduct would be constitutionally invalid if the obligation is breached. The minority also emphasises in conclusion that it seeks only to avoid the suggestion that the President should himself be viewed as the violator of the international obligations rather than the State, on whose behalf he acts. It accepts, albeit with some differences of semantics and legal reasoning, the same conclusion as the majority: the conduct of the President was unconstitutional because it led to a violation of South Africa's treaty obligations. Thus the minority held that '[t]his approach also spares us the need to engage in the debate on the President's individual capacity in the realm of the law of treaties. But what remains clear is that the President's conduct, resulting as it did in a breach by South Africa of its obligations under an international treaty as a State, was impermissible under the Constitution, as irrational and unlawful.' (*SADC Tribunal* (note 3 above) para 105)

'irrational' since it violated the SADC Treaty was '*one more* ground for the invalidation and setting aside of the President'.[140]

IV AVOIDING PITFALLS IN THE USE OF INTERNATIONAL LAW

The integrative approach to international law that our Constitution requires means that we are now, by constitutional direction, all international lawyers. However, as lawyers and courts that primarily deal with and understand 'law' within a domestic law paradigm, it is essential to appropriately appreciate the subtle, yet material, ways that international law, and its interpretation and identification, differ from domestic law. This requires paying attention to certain important principles, and being rigorous and consistent when applying the constitutional injunctions discussed above.

A The dangers to avoid when interpreting and applying international law

In general, there are at least two broad, and interrelated, dangers that one must seek to avoid, in order to adroitly incorporate international law into our law as envisaged by the Constitution. First there is the danger of *jurisprudential cherry-picking*. That is the danger of selecting, on a piece-meal basis, only those international law principles that support the case the court or a practitioner wishes to make, rather than taking account, on a holistic basis, of all the relevant international law, and setting any specific principles that appear, at first, favourable to the approach that one wishes to take, within its broader international law context. The second danger is failing to appreciate the subtle manner that international law operates in distinctly different ways to domestic law. Thus, for instance, a domestic lawyer might erroneously approach an international agreement on the basis that it should be understood and interpreted as something akin to a piece of domestic legislation, when in reality within the often consensual setting of international law, it may be more akin (broadly) to a private agreement between equal parties.

B The *SADC Tribunal* decision's illustration of these dangers

The *SADC Tribunal* decision provides an illustration of how these twin dangers may arise, and the difficulties they may cause.[141] In the *SADC Tribunal* decision, the Constitutional Court held that President Zuma's signature of the 2014 Tribunal Protocol had been procedurally irrational and unlawful. The Court held that this was so since seeking to use the 2014 Protocol to replace the 2000 Protocol (the 2014 Protocol provided that once it entered into force it would replace the 2000 Protocol), the Summit had adopted an incorrect procedure that violated the Treaty and purported to exercise powers it did not have. The reason the Court held that the procedure used by the Summit was incorrect, is that art 16 of the SADC Treaty provided that the Protocol adopted by the Summit that governed the Tribunal's jurisdiction was an integral part of the SADC Treaty (as discussed above, at the time that art 16 was amended to provide for this integration, the Protocol that had been adopted by the Summit, but not ratified, was the 2000 Protocol). Therefore, the Court reasoned that since the SADC Treaty had specific provisions that provided for the amendment of the Treaty, these had to

[140] *SADC Tribunal* (note 3 above) at para 71.

[141] Certain of the analysis below is a recast and updated version of some of the arguments that we initially raised in footnotes in Coutsoudis & du Plessis (note 2 above).

be used to amend the 2000 Protocol, rather than adopting an entirely new protocol to replace the previous Protocol. However, when reaching this conclusion, the Court simply made this finding as if there could be no question or debate as to how the Treaty should be interpreted in this respect. Yet, art 16, as amended by the Summit, which made the Protocol in respect of the Tribunal an integral part of the Treaty, included no express provisions as to whether a new Protocol in respect of the Tribunal could be adopted to replace the original or whether because the original Tribunal Protocol had become an integral part of the Treaty, by virtue of art 16, this meant that the Protocol could only be amended by the amendment provisions in the Treaty. And, as the Court knows, in all areas of interpretation, whether of contracts, or domestic statutes or international treaties, one does not simply look at the text, but rather one applies the applicable rules of interpretation to determine the meaning.[142] This was certainly required in respect of the SADC Treaty in relation to the process for amending the 2000 Protocol, particularly since no other domestic or international courts had pronounced on the question (and indeed, the Court did not refer to any academic writing considering the proper interpretation of the Treaty). However, the Constitutional Court failed to even reference (nor does it appear to have had regard to or applied) the trite principles for interpreting treaties, as codified in art 31 of the Vienna Convention, or any other relevant principles of international law in relation to the replacement of treaties.[143] Although, South Africa is not a party to the Vienna Convention, art 31 of the Vienna Convention, which deals with interpretation of treaties, forms part of customary international law,[144] which the Court itself took note of,[145] and therefore forms part of our law.[146]

Article 31 of the Vienna Convention provides inter alia that treaties must be interpreted using a textual and purposive approach. Article 31(3)(b) also provides that '[t]here shall be taken

[142] For example, see *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13, 2012 (4) SA 593 (SCA) at para 18; *Cool Ideas* (note 74 above) at para 28.

[143] For instance, given that the 2014 Protocol was adopted by consensus by the members of Summit, representing all the member states of SADC, it was for instance, relevant that international law has no difficulty per say with all the parties to one treaty agreeing to terminate that treaty and replace that treaty with another later treaty, if that is what the later treaty expressly provides. Thus, art 59(1) of the Vienna Convention specifically provides that: 'A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and: (*a*) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (*b*) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. 2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.'

[144] As Shaw *International Law* (8th ed, 2017) 707 points out the International Court of Justice has affirmed on a number of occasions that art 31 of the Vienna Convention reflect customary international law. See e.g. *Namibia (Advisory Opinion)* 1971 ICJ Rep 16, para 22.

[145] Similarly, in *SADC Tribunal* (note 3 above) held, at para 38, that 'Professor Greenwood's authoritative article, which was published by the United Nations, and the ICJ decisions also confirm that the major provisions of the Vienna Convention like *articles on interpretation doctrines* and the good faith doctrine amount to a codification of customary international law.'

[146] As the Court held in *SADC Tribunal* (note 3 above) at para 36, '[a]lthough South Africa is not party to the Vienna Convention, it is bound by some of its major provisions like articles 18 and 26. That is so for two reasons. One, an official pronouncement that the Vienna Convention is accepted by South Africa as customary international law has been posted on Parliament's website and that of the Office of the Chief State Law Advisor. And that, as indicated, is universally recognised evidence of a State's acceptance of international custom and its binding effect on it. In line with trite international law practice, the binding effect of the Vienna Convention is limited to its main provisions that are by now known to be part of customary international law.'

into account ... any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. This principle is, we know, appreciated by the Constitutional Court. In *Glenister* the Court held that, '[i]n terms of art 31(3)(b) of the Vienna Convention … the subsequent practice of states in applying a treaty can be used to indicate how the states have interpreted the treaty and thus give content to treaty obligations.'[147] Yet, in the *SADC Tribunal* decision, it does not appear that the Constitutional Court considered or applied these principles. It simply assumed on its reading of the Treaty that the wrong procedure was used, notwithstanding that the process was approved by the Summit. There was no evidence that any state objected to the procedure being used, and the procedure was adopted by consensus decision of Summit, which meant that all member states, represented in the Summit by their heads of state, agreed to the procedure, with no state formally objecting to this procedure.[148] Moreover, the procedure adopted was in fact agreed to some two years prior to the adoption of the 2014 Protocol (as the Constitutional Court itself had taken account of in *Fick*) when the Summit had, in 2012, made a decision to adopt a new protocol to limit the jurisdiction of the Tribunal. Therefore, when the Court was considering whether, given the specific provision in the SADC Treaty for the amendment of the Treaty, the 2000 Protocol could be replaced by the adoption of a new Protocol, the practice of the SADC member states in applying the Treaty was therefore particularly relevant. In addition, within the context of international treaty making, subsequent practice can go beyond acting as a mere guide to interpretation. As Dörr and Schmalenbach in their commentary on the Vienna Convention stress, '[s]ince the parties, acting collectively through their concordant practice, *are the masters of their treaty*, they cannot only take interpretation further than could a body charged with the role of independent interpretation, but also bring about an *implicit treaty amendment by practice*.'[149] Similarly, Aust in his work on the law of treaties gives an example of this in practice, pointing out that:

> [d]espite an amendment procedure having been built into it, the CITES Convention 1973 (International Trade in Endangered Species) was *effectively modified by a resolution of the Conference of the Parties in 1986. Subsequent practice in the application of a treaty by one or more parties can also have the effect of modifying it if there is tacit or implied consent to it by the other party or parties*. This is possible only if it, or they, had the possibility of raising objections to a regular course of conduct, but did not. International law does not have a principle of *act contraire*.[150]

A decision by the ICJ provides another example of this, in a context that is somewhat closer to home. In *Namibia (Advisory Opinion)*[151] the ICJ was required to consider a decision-making process that was adopted by an international organisation which was argued not to be in accordance with the procedural rules laid down by the relevant treaty — a situation not

[147] *Glenister* (note 1 above) (majority judgment) footnote 43, referring to Article 31(3)(b) which provides that '*[t]here shall be taken into account ... any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*'.

[148] Consensus is generally understood to be mean the taking of a decision in the absence any formal objection. For instance, in art 167(7)(e) of the UN Convention on the Law of the Sea, 1982, consensus is defined as 'the absence of any formal objection.' For a discuss of the meaning of consensus decision making in international law, see also Aust (note 90 above) at 80–82.

[149] O Dörr & K Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A commentary* (2012) at 523, emphasis added.

[150] Aust (note 90 above) at 233.

[151] *Namibia (Advisory Opinion)* 1971 ICJ Rep 16.

dissimilar to the one facing the Constitutional Court in the *SADC Tribunal* matter. The well-known matter required the ICJ to determine the legal consequences of the continued presence of South Africa in Namibia, which remained in Namibia notwithstanding UN Security Council resolution 276 (1970) (which resolution declared the continued presence of South Africa in Namibia to be illegal and called upon states to act accordingly). In terms of a further resolution (Resolution 284), the Security Council requested the ICJ to provide an Advisory Opinion. South Africa objected to the ICJ dealing with the matter on the basis that Resolution 284 was invalid. South Africa argued that in the voting on the resolution two permanent members of the Security Council abstained, and therefore the resolution was not passed in compliance with the express terms and requirements in Article 27(3) of the Charter of the United Nations, which requires all resolutions to be passed with 'the concurring votes of the permanent members'[152]. The ICJ dismissed South Africa's objection relying on the subsequent practice of the Security Council and the acceptance thereof by the members of the United Nations. In particular, the Court held, that:

> the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of art 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.[153]

As Aust opined, '[t]he practice was upheld by the International Court of Justice in Namibia (South West Africa) (Legal Consequences for States of the Continued Presence of South Africa), *even though, ironically, it is clear from the travaux of the Charter that it was not what had been originally intended by the members most directly affected: the permanent members*.'[154]

The Court's apparent failure to have due regard to the practice of SADC member states in determining whether the procedure adopted violated the Treaty, may have been compounded by a certain inadequacy in the Court's consideration of the nuances in the provisions of the Treaty relating to the amendment of the Treaty and those that deal with the entering into of new Protocols.[155] In essence the Court held that the Summit should not have sought to amend the 2000 Protocol by way of the adoption and opening for signature and ratification of a new Tribunal Protocol that would replace the previous Tribunal Protocol, because the process used was a less onerous procedure than the Treaty amendment procedure.[156] The general procedure for new Protocols to be adopted and come into force (in terms of art 22) and the procedure for amending the Treaty (in art 36) are, indeed, substantially different. But which is more onerous than the other, is somewhat more complicated. Under art 22 of the SADC

[152] *Namibia (Advisory Opinion)* ibid at paras 20, 21.

[153] *Namibia (Advisory Opinion)* ibid at para 22.

[154] Aust (note 90 above) at 215, emphasis added.

[155] The Court initially took account of the fact that it is the Summit's members (albeit on behalf of their states) who have the power to amend the Treaty (*SADC Tribunal* (note 3 above) at para 55) but it appears not to consider the importance of this distinction when comparing the rigours of the two procedures.

[156] *SADC Tribunal* (note 3 above) at para 55.

Treaty, protocols must be adopted by the Summit. The article then requires signature and ratification by two-thirds of the Member States in order for the protocols to enter into force and be binding on those Member States. On the other hand, art 36 of the Treaty provides that amendments to the Treaty require only that three-quarters of the *members of the Summit* (that is the heads of state) to vote in favour of the amendments. In suggesting that the amendment procedure was more stringent, the Constitutional Court focused on the different percentages required (two-thirds vs three-quarters) without considering, or failing to reflect properly on, the important difference between the decision-makers. For a new Protocol to come into force, two-thirds of the member states must take the decision to enter into the new Protocol, by ratification, which would invariably require domestic parliamentary approval. For Treaty amendments it is three-quarters of the heads of state, as members of the Summit, must vote in favour of the amendment. Moreover, in terms of art 22, before a Protocol can be opened for signature and ratification, it must first be adopted by consensus of the Summit.[157] Article 22 therefore appears to suggest that a protocol may not be adopted (a necessary precursor to the treaty than being open for signature and ratification by member states) in circumstances where there is a formal objection from any member of Summit to the adoption. Had the Treaty (incorporating the 2000 Tribunal Protocol) been amended using art 36, as the Court seems to suggest was the appropriate process, all that would have been required was a vote by 12 of the 15 heads of state (three-quarters of the members of the Summit). Therefore, had the Summit used art 36 permanently to change the jurisdiction of the Tribunal, even if the South African President, as a member of Summit, had voted against such amendment, he could have been outvoted. Moreover, SADC's past practice, as well known to the Court, reveals that requiring ratification of a Protocol, appears to be, in practice, more onerous than using the amendment procedure. This is made clear by the history of the entry into force of the 2000 Protocol, which created the Tribunal's jurisdiction to hear individual complaints. As we discussed above, the 2000 Protocol only entered into force by virtue of a Summit amendment of the Treaty, used as an expedient to bring the Protocol into force because the requisite ratifications of the Protocol (10 of the 15 member states) had not been received (possibly because states and their Parliament may have been anxious, on reflection, of agreeing to give an international tribunal jurisdiction over them to hear complaints from individuals). The Court took account of precisely this fact in *Fick*, where it noted that:

> The coming into effect of the Tribunal Protocol *depended on its ratification by two-thirds of the Member States*. *It appears that the requisite number of ratifications was not obtained. As a result, the Tribunal Protocol did not come into operation*. This *hurdle was overcome through the amendment of the Treaty by the SADC supreme policy-making body known as the Summit*, which comprises the Heads of State or Government of SADC Member States. *It has the power to amend the Treaty*. And such amendment becomes operative only after adoption by the prescribed three-quarters of all Members of the Summit. The amendment alluded to above was effected by the Summit in terms of the Agreement Amending the Treaty of the Southern African Development Community (Amending Agreement). Article 16(2) of the Treaty was amended to provide for the Tribunal Protocol to be an integral part of the Treaty, obviously subject to the adoption of the Amending Agreement. This was notwithstanding the provisions of article 38 of the Tribunal Protocol which required ratification of the Tribunal Protocol by two-thirds majority before it could come into operation. *This amendment, therefore, removed the ratification requirement*.' [158]

[157] SADC Treaty, art 22(2) read with art 10(9).

[158] *Fick* (note 36 above) at paras 9–10.

In this context, it is also interesting to note that in the *SADC Tribunal* matter, the Constitutional Court did, in a portion of the decision that is obiter, raise concerns about the jurisdiction conferred on the Tribunal by the current 2000 Protocol (brought into force by the Summit's amendment of the Treaty). The Court held that art 15 of the Protocol —

> seems to imply that disputes relating to issues provided for by both the Treaty and national constitutions are 'appealable' or justiciable before the Tribunal even after the highest court of any SADC country has finally disposed of the matter. The precondition for a natural or legal person to have access to the Tribunal only after he or she has 'exhausted all available remedies ... under domestic jurisdiction' seems to allude to that possibility. And that might mean that the Tribunal could even set aside the decisions of apex courts.[159]

The Court, therefore, noted that:

> [i]t may well be that the Executive and Legislature need to reflect on whether there is a need to do anything at all about these apparently conflicting positions. And it really cannot do any harm but could do a lot of good to our constitutional democracy and good governance to alert them to the possible conflict in case they are not alive to it.[160]

Now leaving aside the question of how art 15 ought to be interpreted and whether it is ever appropriate to refer to an international court 'setting aside' the decision of a domestic court, the key point for current purposes is that because the 2000 Protocol was not ratified using the normal procedure for bringing Protocols into force (in terms of art 22 of the Treaty) but came into force by virtue of the Summit amending the Treaty, the 2000 Protocol was never tabled before Parliament for approval so that it could be ratified. Thus, the South African legislature never had an opportunity to consider and approve art 15 or any of the other articles of the 2000 Protocol. Whatever specific jurisdiction the Tribunal has over South Africa as provided in the 2000 Protocol, the Tribunal has absent parliamentary approval. Rather, the head of state of South Africa, as a member of Summit, brought the Protocol into force by voting in favour of the amendment of Treaty (as the Court discussed in *Fick*). It is precisely for this reason that the amendment power given to the Summit in art 36 of the Treaty, while evidently perfectly permissible from an international law perspective, raises serious questions from a domestic constitutional perspective. In essence, art 36 appears to allow for an amendment to a treaty that is binding on South Africa to occur without prior parliamentary approval (since the amendment is not by way of new international agreement, which must be ratified with parliamentary approval, but by way of a vote of the heads of state as members). Moreover, the vote to amend need not be unanimous. Thus, even if South Africa's President voted against an amendment, the amendment could still pass if approved by three-quarters of the other heads of state. Yet, in the *SADC Tribunal* matter, the Constitutional Court did not raise any constitutional difficulties with the amendment power given to the Summit, and in fact, based its decision in the *SADC Tribunal* matter on the submission that President Zuma was constitutionally obligated to make use of the amendment power together with other members of the Summit, if there was a desire to change the Tribunal's jurisdiction, even though this would apparently have excluded parliamentary involvement.

All of this is not to say that the Court was incorrect in finding that the procedure used by the Summit to replace the 2000 Protocol with a new Protocol that would, if ratified, have changed the Tribunal's jurisdiction, violated the Treaty. Rather, our point is that before

[159] *SADC Tribunal* (note 3 above) at para 59.

[160] Ibid. at para 60.

reaching such a conclusion, there were significant international law principles and issues that warranted careful consideration, but appear to have been glossed over or looked at fleetingly.

C Some practical suggestions on avoiding the dangers

There are a number of ways that the Court may seek to avoid the pitfalls that sometimes arise in relation to engaging with international law. We merely make two suggestions.

First, the Court may expressly seek to call for international law experts to provide independent, expert submissions on the relevant international law issues facing the Court, as amici curiae in matters. This is precisely the approach that the Constitutional Court itself adopted in *Okah*. In that case the Court was confronted with a submission by Mr Okah that his prosecution was precluded by s 1(4) to the Terrorist Act.[161] This section excludes certain acts committed during a struggle by the people 'in the exercise or furtherance of a legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, in accordance with the principles of international law') from being determined to be terrorist activities. Albeit less than two weeks before the hearing, the Court issued directions drawing the relevant legal submissions (Mr Okah and the State's response) to the attention of certain organisations and persons with expertise in international law. Given the short time available, in response to these directions, only two organisations brought urgent applications to be admitted as amici and subsequently made written and oral submissions on the international law issues confronting the Court. The Court's attempt to obtain the opinions of experts in international law is a commendable approach and there is obviously value in the Court adopting this as a regular practice when cases before it turn primarily on international law issues. Moreover, it is an approach that not only the Constitutional Court, but the high court too may seek to emulate. No doubt, the academy and other international law institutions would be ready and willing to assist our courts in interpreting and applying international law within the South Africa context. What would be helpful then from either the Constitutional Court or any other court, would be to recognise as early as possible in the process that international law expertise will be required. Once that assessment has been made, it would then be helpful to provide timeous notice when issuing any directions, so that a full range of international law organisations might be encouraged and able to assist the Court.

Second, while there are many excellent writings on international law, there is much value in the Court ensuring that it gives sufficient attention to any relevant work by the ILC that deals with issues before it. The ILC is the UN's specialised expert body tasked with the progressive development of international law and its codification.[162] The ILC's many and varied

[161] Section 1(4) provides that: 'Notwithstanding any provisions of this Act or any other law, any act committed during a struggle waged by peoples including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, in accordance with the principles of international law, especially international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the said Charter, shall not, for any reason, including for the purposes of prosecution or extradition, be considered as terrorist activity as defined in subsection.'

[162] For example, art 1(1) of the Statute of the International Law Commission (1947) provides that, '[t]he International Law Commission shall have for its object the promotion of the progressive development of international law and its codification'.

programmes of work that deal with broad swathes of international law, and which consider, explain, synthesise and codify that law, may often be of particular assistance to a domestic court seeking clear and authoritative guidance on contested issues of international law. For instance, in the *Grace Mugabe* case, where the court was required to settle the arguments as to whether customary international law recognised immunity for the spouses of heads of state, the court had comforting and detailed regard to the work of the ILC and its special rapporteur in relation to immunity from foreign criminal jurisdiction. This played an important role in assisting the court to find that the Minister's submissions as to the position of such spouse in international law were incorrect.

V CONCLUSION

Over the last decade, our courts have heeded the Constitutional Court's clarion call to take seriously the inescapable constitutional injunction to integrate, in ways envisaged by the Constitution, international law obligations into our domestic law. The Constitution's international law trifecta has now begun to be entrenched in our courts' jurisprudence. The Constitutional Court has it made clear that public officials are, absent a conflict with the Constitution, required by the Constitution to act in accordance with international law binding on South Africa, including international law which prescribes the procedures to be followed by an international organisation to which South Africa is a party. If they fail to do so, their actions, including on the international plane, can be reviewed and set aside by domestic courts. And while there are many issues that have, of course, not been fully, or satisfactorily, resolved, we have little doubt that in subsequent cases, the courts will continue to fully and progressively ensure that international law is properly integrated in our domestic law, and that officials are held to account where their actions are in conflict with South Africa's international law obligations. Obviously, in view of the power and responsibility given to South Africa courts by the Constitution's integrative injunction, and the features of its international trifecta, as courts which can and are indeed required to interpret and apply international law directly, they should do so in a manner that best integrates international law into our domestic realm.