

# International Law, Access to Courts and Non-Retrogression: *Law Society v President of the Republic of South Africa*

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**ABSTRACT:** In 2014, the President of the Republic of South Africa signed a Protocol to the SADC Tribunal aimed at stripping the Tribunal of its jurisdiction to hear matters brought by individuals. This followed the President's 2010 decision not to reappoint judges to the SADC Tribunal, rendering it inoperative. In *Law Society v President of the Republic of South Africa*, the Constitutional Court considered an application for confirmation of the High Court's order declaring these two acts unconstitutional. The Court held that the President's conduct was irrational, unlawful and unconstitutional on three grounds. I focus particularly on the ground that the President's conduct violated or threatened to violate the Bill of Rights.

The right of access to justice is guaranteed through the right of access to courts under s 34 and the right to the enforcement of the Bill of Rights under s 38 of the Constitution. In *Law Society*, the Court interpreted s 34 expansively, extending the *domestic* right of access to courts to *international* tribunals. The Court held that the Bill of Rights guarantees the right to access the SADC Tribunal (subject to the Tribunal's jurisdictional pre-requisites). The President was held to have breached his s 7(2) duty to respect, protect, promote and fulfil the right. The reasoning is sparse, leaving several unanswered questions.

While agreeing with the overall outcome, I argue that the Court should have properly applied the constitutional scheme detailing the relationship between international and domestic law. The Court could have justified the outcome in one of two ways: either through a finding that the relevant provisions of the SADC Treaty and Protocol were self-executing (*directly* applicable) under s 231(4); or by applying international law indirectly in terms of s 39(1)(b) of the Constitution when interpreting the right in s 34. It did neither, seemingly applying international law *directly* but without explaining the basis for its approach. Further, in applying the principle of non-retrogression without clarifying its scope, content and limits, the Court missed an opportunity to illustrate to which *international* courts the right of access to courts applies and when (if ever) the state may take away existing access to an international court aimed at protecting human rights. The Court's approach creates a risk of rendering the constitutional scheme redundant in service of outcome-oriented application of international law.

**KEYWORDS:** access to courts, non-retrogression, public international law, relationship between international and domestic law, self-executing treaties

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## I INTRODUCTION

In 2014, the President of the Republic of South Africa signed a Protocol aimed at stripping the South African Development Community (SADC) Tribunal of its jurisdiction to hear matters brought by individuals. This matter, along with the President's 2010 support for a decision not to reappoint judges to the SADC Tribunal rendering it inoperative,<sup>1</sup> was heard at the Constitutional Court in *Law Society v President of the Republic of South Africa* in August 2018.<sup>2</sup> The relief sought was confirmation of the North Gauteng High Court's order of constitutional invalidity.<sup>3</sup> The Court held that the President's conduct was irrational, unlawful and unconstitutional on three grounds. In this article, I analyse the ground that the President's conduct violated or threatened to violate the Bill of Rights, specifically the right of 'access to justice', and was therefore unconstitutional. I focus solely on this ground.

The right of access to justice is guaranteed through the right of access to courts under s 34 and the right to the enforcement of the Bill of Rights under s 38 of the Constitution. The right of access to courts ensures that rights-bearers have an effective remedy through the formal systems of justice. In *Law Society*, the Court adopted an expansive interpretation of s 34 to extend South Africans' right of access to domestic courts, to international tribunals as well. The Court held that South Africans have a right guaranteed by the Bill of Rights to access the SADC Tribunal. The President, in stripping the Tribunal of its individual jurisdiction and effectively suspending its operations, breached his duty to respect, protect, promote and fulfil the right under s 7(2). The reasoning behind this conclusion, however, is sparse. This leaves several unanswered questions and concerns about the implications of the judgment and about the proper interpretation of the relationship between international law and domestic law by the Court.

In Part II of this article I provide a brief summary of the facts and holding in the case. In the rest of the article, whilst agreeing with the outcome, I point to the gaps in the Court's reasoning. I highlight how the Constitution of the Republic of South Africa, 1996 (the Constitution) offers a framework for these gaps to be filled, and I briefly trace the various reasons that may have been employed by the Court in justifying its decision. In doing so, I split my analysis into three parts: first, in Part III, I locate the Court's holding in relation to the twin rights of access to justice, on which the Court relied, in the Constitution and in the SADC Treaty. I map the relevant passages in the majority judgment to outline what exactly the Court meant when it referred to the 'right of access to justice' in the Constitution (which I locate principally in s 34) and in the SADC Treaty (and its attendant 2000 Protocol, which contains the provision at issue). Then, in Part IV, I analyse s 34 and its extended application to the international plane. Until *Law Society*, s 34 had been interpreted as access to domestic South African courts rather than international courts. The decision in *Law Society* significantly expands the interpretation of s 34. It extends s 34 to include an individual right of access to those international tribunals to which South Africa has acceded. I point out how the Court's holding is an assertion rather than a reasoned conclusion, despite the existence of tenable lines of argument in the oral and written argument before it.

<sup>1</sup> This is explained in Part II of the article.

<sup>2</sup> *Law Society of South Africa & Others v President of the Republic of South Africa & Others* [2018] ZACC 51, 2019 (3) BCLR 329 (CC), 2019 (3) SA 30 (CC).

<sup>3</sup> *Law Society of South Africa & Others v President of the Republic of South Africa & Others* [2018] ZAGPPHC 4; [2018] 2 All SA 806 (GP) ('*Law Society HC*').

Third, in Part V, I analyse the finding that there is a directly applicable ‘Treaty right’ emerging from the SADC Treaty and its attendant 2000 Protocol. The majority judgment suggests that this ‘Treaty right’ could conceivably arise in two ways: first, as a free-standing application of a provision of an international treaty under s 231 of the Constitution, and second, as the application of international law as an interpretive guide under s 39(1)(b) of the Constitution for the proper interpretation of the right in s 34. In relation to the first, I explain that the Court *assumes* the direct applicability of art 15 of the 2000 Protocol read with the SADC Treaty. The proper application of s 231 would entail a careful analysis of the applicable sub-section (whether it is s 231(2) or s 231(4)) in order to determine the nature of the obligations that these instruments impose on the state. In relation to the second, I argue that the Court errs in omitting to apply s 39(1)(b) to use international law in interpreting the Bill of Rights, instead resting on the assumption that international law applies *directly*. I then provide an overview of possible ways of carrying out these two forms of analysis, explaining what the Court should have done.

Further, in Part VI, I go on to analyse the corresponding duty arising from a proper interpretation of s 34 and the contours of this duty. I argue that although *Law Society* does not explicitly invoke the principle of non-retrogression, the Court applied the principle in a novel way to hold the President accountable under s 7(2). I explore the extent and limits of this holding, and explain that it is arguably in line with existing constitutional commitments. Finally, in Part VII, I discuss the implications of the *Law Society* majority judgment: for international dispute resolution mechanisms created by ratified treaties; the relationship between international and domestic law in South Africa; and access to justice. I conclude by analysing how *Law Society* may be read as strengthening South Africa’s international commitment to the enforcement of human rights law within and outside of the country.

## II *LAW SOCIETY*: FACTS AND HOLDING

*Law Society* came before the Constitutional Court as an application for confirmation of an order of constitutional invalidity handed down by the North Gauteng High Court in March 2018.<sup>4</sup> The High Court had declared two acts of the President to be unlawful, irrational, and thus unconstitutional.<sup>5</sup> The impugned acts were the President’s involvement in the suspension of the SADC Tribunal in 2011 and in removing the Tribunal’s individual jurisdiction. The first impugned act — the suspension — consisted of the President’s participation in decisions not to reappoint Tribunal members whose terms expired in August 2010, as well as those whose terms expired in October 2011, effectively suspending the Tribunal’s operations.<sup>6</sup> The second impugned act consisted of the President’s signature of the 2014 Protocol removing the *individual* jurisdiction of the SADC Tribunal, thus limiting member states’ access to the Tribunal to resolving inter-state disputes.<sup>7</sup>

In order to map the context in which the Constitutional Court interpreted the right of access to courts more fully, I set out here the legal architecture of the Tribunal. The Southern African Development Community (SADC), of which South Africa is a member, came into existence through a Treaty in 1992 aiming to ensure, amongst other things, the ‘guarantee of

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<sup>4</sup> *Law Society* (note 2 above) at paras 18 and 97.

<sup>5</sup> *Law Society* HC (note 3 above) at paras 67 and 72.

<sup>6</sup> *Ibid* at para 26.

<sup>7</sup> *Ibid* at para 11.

democratic rights, observance of human rights, and rule of law'.<sup>8</sup> South Africa acceded to the SADC Treaty in 1994, and the accession was approved by the Senate and National Assembly in 1995.<sup>9</sup> This is akin to the procedure provided for in s 231(2) of the Constitution. I will return to this point later.

Article 16 of the SADC Treaty, as amended in 2001, provides for the establishment of a Tribunal, with an attendant Protocol that describes its composition and functioning. It also mandates member states to appoint members (judges) to the Tribunal. Vitally, the Treaty provides for the Tribunal itself to be the forum in which disputes about the interpretation or application of the Treaty and the Protocols concluded in connection with the Treaty are to be settled.<sup>10</sup> The Protocol on the Tribunal in the SADC (2000 Protocol), adopted in 2000, established the jurisdiction of the Tribunal. Article 14 of the 2000 Protocol provides that the jurisdiction of the Tribunal extends to disputes and applications that are referred to it that relate to the interpretation and application of the SADC Treaty, its attendant Protocols, subsidiary agreements concluded within the SADC framework and its institutions, as well as all other instruments concluded between member states or within the SADC framework that explicitly provide for the Tribunal to have jurisdiction. The scope of the Tribunal's jurisdiction is laid out in Article 15. It provides that 'the Tribunal shall have jurisdiction over disputes between [Member] States, and between natural or legal persons and [Member] States'.<sup>11</sup> This is followed by a qualification for disputes brought by natural and legal persons — that domestic remedies should have been exhausted or that such persons are unable to proceed under their domestic jurisdiction. The Tribunal was thus available as a forum for individual complaints (provided that the other two conditions had been fulfilled).<sup>12</sup>

The Constitutional Court, through *Fick*, had a role to play in the events leading up to *Law Society*. The purpose for the creation of the SADC Tribunal was to ensure that individuals and states had recourse to a dispute resolution forum in the event that a SADC state acted to undermine the agenda of development through 'human rights, rule of law and democracy'.<sup>13</sup> The dispute before the SADC Tribunal in *Fick* was brought by Zimbabwean farmers who challenged the expropriation of their farms without compensation by the Zimbabwean government, as well as Zimbabwe's land reform policy that included ouster clauses to prevent their access to domestic courts. The Tribunal decided against the Government of Zimbabwe and held that Zimbabwe's acts violated the SADC Treaty. Moreover, the Tribunal ordered Zimbabwe to take all necessary measures to prevent the dispossession of the farmers as well as to pay compensation to the complainants. However, the state refused to comply with the decision.<sup>14</sup> The Tribunal then, as per the procedure prescribed in the SADC Treaty and 2000 Protocol, referred the matter to the SADC Summit along with a costs order. The Zimbabwean government failed to comply with the Summit's decision in this regard. The Zimbabwean

<sup>8</sup> Treaty of the Southern African Development Community (1993) 32 *International Legal Matters* 116, Preamble and Article 4(c) ('SADC Treaty'). *Government of the Republic of Zimbabwe v Fick and Others* [2013] ZACC 22, 2013 (5) SA 325 (CC), 2013 (10) BCLR 1103 (CC) at para 6. I explain *Fick* in more detail in due course.

<sup>9</sup> *Ibid* (*Fick*) at para 30.

<sup>10</sup> SADC Treaty (note 8 above) art 14.

<sup>11</sup> *Ibid* at art 15(1).

<sup>12</sup> *Law Society* HC (note 3 above) at para 19.

<sup>13</sup> *Fick* (note 8 above) at para 2.

<sup>14</sup> *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe* [2008] SADCT 2 (28 November 2008).

farmers then approached the North Gauteng High Court in South Africa<sup>15</sup> for the execution of Zimbabwean property in South Africa as fulfilment of the costs order. The Government of Zimbabwe moved the North Gauteng High Court to suspend the execution of the costs order as well as rescind its registration and service. The High Court dismissed these claims.<sup>16</sup> The Government of Zimbabwe appealed to the Supreme Court of Appeal and once again, the Zimbabwean farmers were successful.<sup>17</sup> The Government of Zimbabwe further appealed this decision in the Constitutional Court of South Africa in *Fick*,<sup>18</sup> which upheld the decision of the High Court and dismissed Zimbabwe's appeal with costs.<sup>19</sup> The events that followed took place in the aftermath of this litigation. They constitute the two impugned acts that were the focal points of the *Law Society* case.

### A The first impugned act: Suspension of the SADC Tribunal

In 2010, in a meeting of Heads of State in Windhoek, Namibia, the issue of Zimbabwe's lack of compliance with decisions of the SADC Tribunal was raised. At this meeting, the SADC Summit took a decision not to reappoint the members of the Tribunal whose terms were due to expire at the end of August 2010. In addition, the Heads of State decided that a committee be set up, comprising of Ministers of Justice and Attorneys General from the region, to review the 'role and responsibilities' of the Tribunal. Any further decisions were to be taken only after the report was received.<sup>20</sup> At the subsequent meeting of the Heads of State in May 2011, the decision not to reappoint those members whose terms expired in August 2010 was confirmed. It was also decided not to reappoint those members whose terms expired in October 2011. These decisions were taken notwithstanding the report of the SADC countries' Ministers of Justice and Attorneys General that the SADC Treaty *mandated* the creation of the Tribunal and its staffing; that the 2000 Protocol had been validly concluded; and that the Tribunal had been properly constituted and its rules of procedure were valid.<sup>21</sup> In essence, the decisions not to reappoint members of the Tribunal violated art 16 of the SADC Treaty. This violation of the SADC Treaty was attributable to South Africa, as a matter of international law,<sup>22</sup> through

<sup>15</sup> *Fick & Others v Government of the Republic of Zimbabwe*, Case No 77880/2009, North Gauteng High Court, Pretoria, 13 January 2010, unreported (leave to begin proceedings) and *Fick & Others v Government of the Republic of Zimbabwe*, Case No 77881/2009, North Gauteng High Court, Pretoria, 25 February 2010, unreported (registration of the costs order to enable enforcement in South Africa).

<sup>16</sup> *Government of the Republic of Zimbabwe v Fick and Others* [2011] ZAGPPHC 76 (application for leave to appeal against enforcement of costs order).

<sup>17</sup> *Government of the Republic of Zimbabwe v Fick & Others* [2012] ZASCA 122, [2013] 3 LRC 316.

<sup>18</sup> *Fick* (note 8 above) at para 3–4.

<sup>19</sup> *Ibid* at para 106.

<sup>20</sup> *Ibid* at paras 20–22.

<sup>21</sup> *Ibid* at para 25.

<sup>22</sup> Article 2 and Article 4 of the International Law Commission's Articles of State Responsibility (Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at <http://www.un.org/law/ilc>) indicates that in order for a state to be held responsible for internationally wrongful acts, first, there must be a breach of an international obligation incumbent upon that state; and second, that this breach must be attributable to the same state. I have *prima facie* asserted here that the impugned acts constitute breaches of international obligations incumbent upon South Africa and that these acts are attributable to South Africa. A detailed analysis of South Africa's international responsibility in this regard is outside the scope of this article

President Zuma's attendance and participation: the President attended and participated in the meeting in August 2010, and although he was not present in May 2011, he was represented and a decision taken on his authority.<sup>23</sup> The issue that concerned the High Court, and subsequently the Constitutional Court, was whether the President acted in accordance with the South African Constitution in taking these decisions.

## **B The second impugned act: Removal of individual jurisdiction**

In August 2014, a new Protocol on the Tribunal was concluded (2014 Protocol) at a meeting of the Heads of State.<sup>24</sup> Article 33 of the 2014 Protocol was amended to provide that the Tribunal shall have jurisdiction over disputes brought by Member States in relation to the interpretation and application of the SADC Treaty and its attendant Protocols. This deleted the part of the provision that previously provided for the Tribunal's individual jurisdiction. In other words, this amendment removed the possibility of individuals and other non-state actors moving the Tribunal that was previously guaranteed by the 2000 Protocol. The issue that concerned the High Court, and subsequently the Constitutional Court, was whether the President acted in accordance with the Constitution in signing the 2014 Protocol.

## **C The court proceedings in *Law Society***

The High Court held that the impugned acts were unlawful, irrational and thus unconstitutional.<sup>25</sup> The order was subsequently referred to the Constitutional Court for confirmation. The Constitutional Court, on 11 December 2018, unanimously confirmed the unconstitutionality of the President's impugned acts. The Court additionally directed the President to withdraw South Africa's signature from the 2014 Protocol.<sup>26</sup> Mogoeng CJ wrote for the majority, with Froneman and Cameron JJ delivering a separate judgment, in which two other Justices concurred. The minority judgment concurred in the order proposed by the majority, but held that the unlawfulness of the President's acts emerged from his dereliction of constitutional duty under ss 8(1) and 7(2) rather than stemming from a violation of the SADC Treaty.<sup>27</sup> In the subsequent section, I unpack the ground that both judgments seem to agree on — that the President's acts violated s 34, the right of access to courts, in the Bill of Rights.

## **III THE TWIN RIGHTS OF ACCESS TO COURTS**

*Law Society* appears to locate access to courts on two planes: the Bill of Rights, domestically, and the SADC Treaty and 2000 Protocol, internationally. The majority judgment in *Law Society* referred to the right of access to *justice* a total of 18 times in its 97 paragraphs, and the concurrence referred to the right of access to justice twice in its eight paragraphs. The Court relied directly on the right of access to justice as a substantive cause of action and referred to it as a right emerging from the Bill of Rights and the SADC Treaty.<sup>28</sup> The Court did so despite neither instrument containing a right styled 'access to justice'. As the Court referred to access

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<sup>23</sup> *Fick* (note 8 above) at para 26.

<sup>24</sup> *Ibid* at paras 6–7.

<sup>25</sup> *Ibid* at para 72.

<sup>26</sup> *Law Society* (note 2 above) at para 97.

<sup>27</sup> *Ibid* at paras 98–105.

<sup>28</sup> *Ibid* at para 29.

to justice as a 'right' in both the Constitution and the SADC Treaty, it could not have been employing the term simply as a value or a rhetorical flourish. However, the Court failed to explain or directly situate the right in terms of any source of domestic or international law binding on South Africa. In this section, I locate the right of access to justice, on which the Court relied, in specific provisions of the Constitution and the SADC Treaty.

I deal with the Bill of Rights first. In this section I tease out what the Court may have meant by the 'right of access to justice', based on the oral and written submissions made before the Court during the proceedings; the judgment itself; and the text of relevant provisions in the Constitution. All of these considerations indicate that the Court was relying on the right of access to courts in s 34 of the Constitution, possibly in conjunction with s 38. In particular, one of the *amici* in the case (the Southern African Litigation Centre (SALC)) argued that the right of access to courts in s 34 includes the right of access to the SADC Tribunal, the President's impugned acts infringed this right, and were not justifiable under s 36 limitations analysis.<sup>29</sup>

Since the case arrived at the Constitutional Court as an application for the confirmation of a declaration of constitutional invalidity of the President's conduct in the North Gauteng Division of the High Court (Pretoria), the High Court judgment is also material to locating this right. There are only two references to the right of access to justice in the judgment of the High Court, whilst 13 references are to the right of access to the SADC Tribunal and 5 references are to the right of access to courts. Moreover, the First Applicant before the High Court (the Law Society) contended that the impugned acts of the President violated s 34 of the Constitution — the right of access to courts.<sup>30</sup> This argument, in relation to the interpretation of s 34 of the Constitution in an international and regional context, was raised by SALC (as *amicus* in the case at the High Court as well).

The right of access to justice may be interpreted narrowly or broadly — but on any interpretation includes, as an integral part of the right, access to a court or another formal or informal mechanism with the power to adjudicate upon a dispute.<sup>31</sup> In other words, whatever else access to justice may entail, it includes within it the right to take a justiciable dispute to a court or other appropriate forum and have it adjudicated. Reading *Law Society* in the context of the High Court judgment and the arguments advanced at the High Court and Constitutional Court, it is clear that the Court held this component of access to justice to have been infringed — that is, the right of access to courts (here, the SADC Tribunal). The

<sup>29</sup> Southern African Litigation Centre, Written Submissions in *Law Society* (note 2 above) at paras 19, 20, available at <https://www.southernafricanlitigationcentre.org/wp-content/uploads/2014/08/SALC-Amicus-HOA.pdf>. This argument was advanced by the appellants in the *Swissbourgh Diamond Mines and Others v the Kingdom of Lesotho*, Permanent Court of Arbitration Case-2013-29, but the award has not been made public. The access to courts argument is referred to by the appellants in *Van Zyl and Others v the Government of the Republic of South Africa and Others* 2008 (3) SA 294 (SCA) where the Supreme Court of Appeals dismissed the claims of the appellants and held in favour of the respondents. For a detailed account of the right of access to courts argument raised in respect of the Kingdom of Lesotho's participation in the same conduct and its treatment by the Permanent Court of Arbitration and beyond, see D Tladi, 'The Constitutional Court's Judgment in the *SADC Tribunal* Case: International Law Continues to Befuddle' 10 *Constitutional Court Review*, 129

<sup>30</sup> *Law Society* HC (note 3 above) at paras 8, 21.

<sup>31</sup> D McQuoid-Mason 'Access to Justice in South Africa' (1999) 17 *Windsor Yearbook of Access to Justice* 230. See also, A Pillay 'Accessing Justice in South Africa' (2005) 17(3) *Florida Journal of International Law* 463, 476. See further, South African Human Rights Commission 'Access to Justice Pamphlet' (14 October 2015), available at <https://www.sahrc.org.za/home/21/files/Access%20to%20Justice%20Pamphlet.pdf>.

Constitution recognises that courts are integral to the enforcement of the guarantees provided for in the Bill of Rights in s 34. I thus locate the right of access to justice, as it appears in the Constitutional Court judgment, primarily in s 34 of the Constitution, read with s 38.

Section 34 is titled ‘access to courts’ and states that ‘[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.’ Where a right in the Bill of Rights is engaged, this must be read with the relevant part of s 38, titled ‘enforcement of rights’, which states that ‘[e]veryone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.’ In this section, I draw from language in the judgment that makes it clear that the Court is indeed referring to s 34 in its reliance on ‘access to justice’.

At the start of the judgment, the first reference to access to justice was to the effect of the impugned acts of the President as having deprived South Africans (and the citizens of other SADC member states) of their access to the SADC Tribunal for the vindication of their human rights.<sup>32</sup> Subsequently, the Court went on to analyse the impact of the 2014 Protocol on the constitutional rights of South Africans. It did so by quoting from *Geuking v President of the Republic of South Africa* to reinforce what is explicit in s 38 — that a threat to a right in the Bill of Rights is substantively sufficient for an individual to have standing before a competent court under s 38 of the Constitution (as long as the person falls within the categories outlined in s 38).<sup>33</sup> This means that there need not be a prospective applicant to the Tribunal whose right of access to courts has been actually violated by the President’s acts in order to bring a constitutional challenge. It is enough for a threat to exist. The Court identified the right in the Bill of Rights that was under threat as the right of access to justice.<sup>34</sup> The threat in this case was identified as the 2014 Protocol, which stripped the Tribunal of its individual jurisdiction. In effect, it no longer allows citizens of SADC member states access to the SADC Tribunal, *once it comes into force*. Formulated differently, the threat here was to the right of access to the SADC Tribunal which the Court understood to fall within the remit of s 34.

At various points, the Court referred to twin rights of access to justice conferred upon individuals by the SADC Treaty and by the Bill of Rights.<sup>35</sup> This was further explained by the Court to mean that:

We [South Africa] are about access to justice and access to all appropriate justice-dispensing platforms. [The President] thus lacked the authority to sign any international agreement that seeks to frustrate the pre-existing right of South Africans to access justice, that was secured for them by our supreme law-making body. As long as fundamental rights, like access to justice, that are protected by an international agreement also remain an integral part of our Constitution, the President may not, without a prior and proper amendment to remove those rights, initiate a process that constitutes a threat to them.<sup>36</sup>

This brings me to the second possible location of the right of access to courts — on the international plane. The judgment must be read to have held that, in addition to s 34 of the

<sup>32</sup> *Law Society* (note 2 above) at para 15.

<sup>33</sup> *Ibid* at para 29, quoting *Geuking v President of the Republic of South Africa* [2002] ZACC 29, 2003 (3) SA 34 (CC) 2004 (9) BCLR 895 (CC) at para 33.

<sup>34</sup> *Law Society* (note 2 above) at para 29.

<sup>35</sup> *Ibid* at paras 29, 83, 84, 101.

<sup>36</sup> *Ibid* at para 77.

Constitution, there is a twin right of access to justice in the SADC Treaty, and the impugned acts of the President violate this right as well. *Law Society* refers to ‘Treaty rights’<sup>37</sup> that guarantee access to justice.<sup>38</sup> More concretely, the judgment referred to ‘[t]he individual right of access to the Tribunal [that] was still protected by the Treaty when the President signed the impugned [2014] Protocol.’<sup>39</sup> A reading of the SADC Treaty indicates that the parties to whom it applies are member states rather than individuals. So what was the judgment referring to when it discussed the ‘Treaty rights’ of *individuals* to access justice?

A closer look at the SADC Treaty indicates that its Protocols are considered to be ‘instruments of implementation of the Treaty’. The Court, in its reference to ‘Treaty rights’, is alluding to the specific provision in the 2000 Protocol (drafted in fulfilment of Article 16(2) of the SADC Treaty) that details the jurisdiction of the Tribunal. It states that, ‘[t]he Tribunal shall have jurisdiction between States, and between natural or legal persons and States’.<sup>40</sup> The subject-matter jurisdiction of the Tribunal includes the interpretation and application of the SADC Treaty and other instruments and acts relating to the SADC community.<sup>41</sup> The Court focused primarily on the right of individuals to bring disputes relating to human rights, democracy and the rule of law before the Tribunal through its individual jurisdiction.<sup>42</sup> I will return to this characterisation below when I consider the Court’s use of the principle of non-retrogression. In characterising the 2000 Protocol’s provision on individual jurisdiction as a ‘Treaty right’, the Court also referred to South Africa’s international treaty obligation under the SADC Treaty to create and sustain SADC institutions such as the Tribunal.<sup>43</sup>

The judgment’s assertive finding that the President’s impugned acts infringed s 34 has two implications — first, that s 34 must be interpreted expansively to encompass an individual right of access to *international* courts such as the SADC Tribunal (the ‘application’ question), and secondly that any unjustifiable state interference that hinders access to the SADC Tribunal infringes the right (the ‘content’ question).<sup>44</sup> I deal with these two questions of application and content in the next section. Second, the majority referred to an additional right of access to courts emanating from the Treaty. In the subsequent section, I explain what the Court *did* in relation to this issue; what it *did not do*; and whether, and if all when, it is possible for the SADC Treaty to directly create rights for South African citizens and impose obligations upon the state, under the scheme of s 231 of the Constitution.

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<sup>37</sup> Ibid at para 29.

<sup>38</sup> Ibid at para 85. The African Commission, in disposing of the same issue in Communication 409/12 — *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola & Thirteen Others*, held that the African Charter on Human and Peoples’ Rights *did not* contain a specific right of access to the SADC Treaty. Rather the right of access to justice, guaranteed both jointly and separately in Articles 7 and 26 of the African Charter, was limited to guaranteeing access to *national* courts (at para 139). Where national courts failed to provide a fair trial, that other international fora such as the Commission, amongst others, were still available to the parties even if the SADC Tribunal was suspended at the time of application (at para 142).

<sup>39</sup> Ibid at para 83.

<sup>40</sup> 2000 Protocol art 15.

<sup>41</sup> Ibid art 14.

<sup>42</sup> *Law Society* (note 2 above) at paras 14–15.

<sup>43</sup> Ibid at paras 50–51.

<sup>44</sup> Ibid at para 75.

#### IV THE CONSTITUTIONAL RIGHT OF ACCESS TO COURTS: BEFORE AND AFTER *LAW SOCIETY*

In the previous section, I showed how the Court's reasoning in *Law Society* indicated that the right of access to courts under s 34 was the right under threat in that case. In this section, I explain what it means to read the judgment as having expansively interpreted s 34 to apply to *international* courts. First, I provide an overview of the scope of the right of access to courts protected by s 34 up to the judgment in *Law Society*. As I have explained above, *Law Society* extended the domestic right of access to courts to encompass international and regional courts — but it is not clear to what *extent* the right, as developed in the domestic context, will apply internationally.

I consider the interpretation of the following elements of s 34, namely 'access', 'dispute', and 'court, or ... independent and impartial tribunal or forum' before *Law Society*. I also briefly outline its relationship with s 38, and the interpretation of 'competent court' in that section. I then discuss the Constitutional Court's expansion of the content of s 34 in *Fick*, by developing the common law on the enforcement of foreign judgments to include the enforcement of the decisions of international courts. I point out that, even though this expansion dealt with enforcing *international* decisions, it was still primarily concerned with access to South African courts on the *domestic* plane. *Fick* therefore does not provide much assistance in understanding how far the application of s 34 extends when dealing with international courts. The approach in *Law Society* is novel as it is the first time the scope of s 34 has been expanded to include access to justice on an international plane.

##### A Access to courts before *Fick* and *Law Society*

The right of access to courts is related to all the substantive rights in the Constitution. This is because it obliges the state to provide for meaningful access to an impartial forum for the resolution of disputes arising out of the infringement or threat of infringement of substantive rights, including those in the Bill of Rights. The most significant elements of the right of access to courts are 'access'; 'fair hearing'; 'public'; 'dispute that can be resolved by the application of law' and 'court, or where appropriate, another independent and impartial tribunal or forum'. The case law so far has revolved around the interpretation of these elements.<sup>45</sup> Important areas of development have included: the development of the principle of open justice, which requires proceedings and court records to be open to the public; equality of arms; and state-funded legal representation amongst others.<sup>46</sup> The right to enforcement of a remedy under s 38 is also a significant development, drawing on the interpretation of access to courts as 'meaningful

<sup>45</sup> J Brickhill & A Friedman 'Access to Courts' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd ed, 2007) ch 59.

<sup>46</sup> For open justice and public hearing, see *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa & Another (Independent)* [2008] ZACC 6, 2008 (5) SA 31 (CC), 2008 (8) BCLR 771 (CC), for public access to hearings and documents see *Mail and Guardian Media Ltd & Others v Chipu NO & Others* [2013] ZACC 32, 2013 (11) BCLR 1259 (CC), 2013 (6) SA 367 (CC), for right to legal representation see *Legal Aid South Africa v Magidiwana & Others* [2015] ZACC 28, 2015 (6) SA 494 (CC), 2015 (11) BCLR 1346 (CC).

access' under s 34,<sup>47</sup> thus imposing an obligation on the state to provide 'effective' relief.<sup>48</sup> In all of these cases, the state's obligations have been developed in relation to access to *domestic* courts and dispute resolution mechanisms.<sup>49</sup> Additionally, the disputes in question have been those that have arisen on the *domestic* plane.<sup>50</sup>

## B Access to courts after *Fick*

Until the Constitutional Court's decision in *Fick*, 'dispute' and 'court' had been interpreted to mean *domestic* disputes capable of resolution by law in a *domestic* court (or alternative forum within the country). *Fick* and *Law Society* have their origins in the same underlying dispute involving land reform in Zimbabwe. I have already provided an overview of *Fick* in Part II. In brief, the *Fick* case involved the enforcement of a decision of the SADC Tribunal against Zimbabwe. The matter at the Tribunal was brought in 2007, by affected white Zimbabwean farmers who challenged the Zimbabwean government's agrarian reform policy. The policy consisted of expropriation without compensation of identified tracts of agricultural land by the state's 'acquiring authority' as appointed by the President. Further, the policy barred any challenges to it in domestic Zimbabwean courts.<sup>51</sup> The Tribunal held in favour of the farmers. It ordered that compensation must be paid by the Zimbabwean government to those whose lands have been expropriated, and that existing ownership, possession and occupation should be protected.<sup>52</sup> When Zimbabwe failed to comply, the case was referred to the Summit and a costs order passed against Zimbabwe. Due to further non-compliance on part of the Zimbabwe government, the farmers approached South African courts for service, registration and execution of the costs order in South Africa.<sup>53</sup>

The key issue before the Constitutional Court was whether South African courts had the jurisdiction to enforce the Tribunal's costs order against Zimbabwe. In answering this question, *Fick* developed the common law to include international 'disputes', to enable access to South African domestic courts for the enforcement of SADC Tribunal decisions. It stated that '[s]ection 34 of the Constitution must therefore be interpreted, and the common law developed, so as to grant the right of access to our courts to facilitate the enforcement of the decisions of the Tribunal in this country. This, as said, will be achieved by regarding the Tribunal as a foreign court, in terms of our common law.'<sup>54</sup> Regardless of the implications of treating the SADC Tribunal as a 'foreign court' for the purposes of enforcement,<sup>55</sup> it is clear that *Fick's* expansive interpretation of s 34 broadened the ambit of 'dispute' to include

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<sup>47</sup> Brickhill & Friedman (note 45 above) at 59–98.

<sup>48</sup> *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) at para 46.

<sup>49</sup> G Budlender, 'Access to Courts' (2004) 121(2) *South African Law Journal* 339, 346, 357.

<sup>50</sup> *Modderklip Boerdery* (note 48 above) at para 38.

<sup>51</sup> *Fick* (note 8 above) at para 12.

<sup>52</sup> *Ibid* at para 14.

<sup>53</sup> *Ibid* at para 15.

<sup>54</sup> *Ibid* at para 69.

<sup>55</sup> These implications are explored in E de Wet 'The Case of *Government of the Republic of Zimbabwe v Louis Karel Fick*: a first step towards developing a doctrine on the status of international judgments within the domestic legal order' (2014) 17(1) *PER: Potchefstroomse Elektroniese Regsblad* 554–612.

disputes within the jurisdiction of international courts and tribunals based on the international agreements that bind South Africa.<sup>56</sup> The Court in *Fick* explained that:

[t]o give practical expression to the enjoyment of this right [s 34], even in relation to judgments or orders of the Tribunal, articles 32(1) and (2) of the Tribunal Protocol and s 34 of the Constitution must be interpreted generously to grant successful litigants access to our courts for the enforcement of orders, particularly those stemming from human rights or rule of law violations provided for in treaties that bind South Africa.<sup>57</sup>

But the definition of ‘courts’ and of ‘access’ for the purposes of enforcement remained confined to South African *domestic* courts in the *Fick* judgment, until *Law Society*.

### C Access to courts after *Law Society*

*Law Society*, on the other hand, appears to interpret both ‘disputes’ and ‘courts’ to extend to the *international* plane, significantly modifying the pre-existing position. After *Law Society*, the scope of the right of access to courts under s 34 includes access to international courts for the resolution of international disputes. The judgment describes the President’s acts as having denied South Africans and SADC citizens access to justice at a regional level including those disputes that relate to ‘human rights, democracy and the rule of law’.<sup>58</sup> In interpreting the scope of application of s 34, the Court recognised that access to the Tribunal reinforced the existing right of individual access to courts guaranteed by the Constitution.<sup>59</sup> Effectively, the Court held that since the right of access to courts already existed in the Bill of Rights, and that the Tribunal served as a means to vindicate that right, the President could not act so as to curtail or threaten to curtail the realisation of that right. Doing so would be a violation of the President’s obligation to respect, protect, promote and fulfil s 34, under s 7(2) and s 8(1) of the Constitution.<sup>60</sup> The Court went on to hold that ‘[t]he obligation to respect, protect, promote and fulfil the rights in the Bill of Rights, which includes the right of access to justice, does not only find application at a domestic level. It is inseparable from whatsoever is done in the name of the State, regardless of where and with whom’.<sup>61</sup>

Even the minority judgment (the concurrence), which differed from the majority on the first and second grounds (legality and rationality review),<sup>62</sup> held that—

[b]y agreeing to amend the Treaty and by thus agreeing to strip away pre-existing rights of access to justice that the Treaty had conferred on South Africans, the President failed to fulfil his obligation, under our Constitution: to ‘respect, protect, promote and fulfil’ the rights in the Bill of Rights. That failure was a breach of the Constitution. The unlawfulness of the President’s conduct derived from its breach of ss 7(2) and 8 of the Constitution. It did not derive directly from any violation of international treaty provisions’.<sup>63</sup>

Although the concurring judgment did not analyse the extent of state obligations in relation to an expansive interpretation of s 34, it seemed to ground its basis for review of presidential power in ss 7(1) and 8(2) stemming from the violation of a right in the Bill of Rights, best

<sup>56</sup> *Fick* (note 8 above) at para 53.

<sup>57</sup> *Ibid* at para 62.

<sup>58</sup> *Law Society* (note 2 above) at para 15.

<sup>59</sup> *Ibid* at para 75, 83.

<sup>60</sup> *Ibid* at para 101.

<sup>61</sup> *Ibid* at para 78.

<sup>62</sup> *Ibid* at paras 98–102. I do not explore these grounds in this article. Other contributions to this volume do so.

<sup>63</sup> *Ibid* at para 101.

understood to be the right of access to courts.<sup>64</sup> On this reading of *Law Society*, it is clear that there the Court relied on s 34 as the right in the Bill of Rights (to which both judgments refer) that had been infringed by the President. Since his conduct was not a law of general application, and rather in the nature of executive acts, the infringing acts could not be saved through a s 36 limitations analysis. The establishment of s 34 having been infringed by the President was sufficient.

What the Court effectively *did* was assert that s 34 henceforth applied to international and regional courts. The Court, however, *did not* raise and answer the following questions: What interpretive considerations support this expansive construction? What are its implications? To which particular international and regional courts and tribunals does this right extend? Consequently, what is the extent of the state's obligation to respect, protect, promote and fulfil in relation to the expansive interpretation of the right? And what are the limitations to this right? I outline possible responses to these questions briefly in the final Part of the article.

As an immediate next step, though, I discuss what the Court did in relation to outlining the 'Treaty right' of access to justice. Recall that the majority referred to twin rights of access to justice on the international and domestic planes and repeatedly relied on a '[t]reaty right'<sup>65</sup> in addition to the Constitution. In my view, the Court's reasoning is best understood here as invoking the SADC Treaty and the 2000 Protocol. The 'Treaty right' is the 'pre-existing right of individual access to the Tribunal'.<sup>66</sup> I also raise the questions that the Court *did not*, and in my view, *should have* asked in relation to the domestic applicability of the SADC Treaty and the 2000 Protocol. This is inextricably linked to the provisions of the Constitution that regulate the relationship between international and domestic law.

#### IV 'TREATY RIGHTS' AND THE RELATIONSHIP BETWEEN INTERNATIONAL AND DOMESTIC LAW

Careful treatment of the relationship between international and domestic law is necessary to understand the domestic effect of South Africa's acts on the international plane. In this Part, I first provide an overview of what the Court *did* in relation to asserting the existence of a 'Treaty right' that was capable of generating domestic obligations. Second, I discuss what the Court *did not do*, in relation to its lack of a close analysis of s 231 of the Constitution, and the implications of this lacuna. Finally, I outline the questions that the Court *should have* asked, and provide the beginnings of possible avenues of analysis.

The Court identified, as described above in Part II, a treaty-based right of access to the SADC Tribunal emanating from the 2000 Protocol, read with the principles and Preamble of the SADC Treaty. Individuals of all SADC member states, including citizens of South Africa are the rights-bearers as recognised by the judgment.<sup>67</sup> The judgment also recognised that the impugned acts of the President were contrary to South Africa's binding international obligations and cited the following passage from *Fick* in support of its holding.<sup>68</sup>

South Africa has essentially bound itself to do whatever is legally permissible to deal with any attempt by any Member State to undermine and subvert the authority of the Tribunal and

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<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid* at para 29.

<sup>66</sup> *Ibid* at para 72.

<sup>67</sup> *Ibid* at para 15.

<sup>68</sup> *Fick* (note 8 above) at para 59, cited in *Law Society* (note 2 above) at paras 54, 73.

its decisions as well as the obligations under the Amended Treaty. Added to this, are our own constitutional obligations to honour our international agreements and give practical expression to them, particularly when the rights provided for in those agreements, such as the Amended Treaty, similar to those provided for in our Bill of Rights, are sought to be vindicated.

The Court appeared to *assume* direct applicability of this right to South Africans and citizens of SADC member states throughout the judgment, without substantiation.<sup>69</sup> In determining the constitutionality of the President's impugned acts, the Court held that the President acted *ultra vires* his powers under s 231 in 'sign[ing] away [South Africans]... treaty right of access to justice'.<sup>70</sup> In doing so, the Court began its analysis of s 231(1) by asking whether the President had been permitted to 'take away a pre-existing individual right of access to the Tribunal'.<sup>71</sup> It went on to limit the exercise of Presidential power to negotiate international agreements under s 231(1) by stating that '[t]he President may ... not approve anything that undermines our Bill of Rights and international law obligations'.<sup>72</sup>

Neither the minority nor the majority interrogated the above assumption. Neither judgment closely interpreted and applied the constitutional scheme in s 231 to the SADC Treaty and 2000 Protocol. This affects the strength of the assertion of a treaty-based right as well as the extent of corresponding obligations imposed upon the state in fulfilling this treaty-based right. In other words, the Court did not analyse the legal status of the SADC Treaty and 2000 Protocol: do the relevant provisions in these instruments impose obligations upon South Africa to facilitate access to the Tribunal? If so, which provision of the Constitution enables the recognition and vindication of this right?

Section 231 recognises four categories of treaties: first, agreements that require Parliamentary approval *before* internationally binding South Africa (s 231[2]); second, agreements that are required to be tabled in Parliament *after* South Africa has consented to be bound internationally by them (s 231[3]); third, agreements that are considered to have the effect of domestic law but only once enacted by Parliament (s 231[4]); fourth, certain provisions of agreements under s 231(2) that are directly applicable as long as these provisions are consistent with the Constitution (also covered by s 231[4]); and fifth, treaties that have already been entered into before the democratic era (s 231[5]). Section 231 reads as follows:

231. (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

<sup>69</sup> Direct applicability of a treaty provision means that that provision is applied by courts and governmental organs as if it were a provision of domestic law within the state, without the need for any additional legislative or administrative steps to be taken. The second half of this Part deals with direct applicability in more detail.

<sup>70</sup> *Law Society* (note 2 above) at para 85.

<sup>71</sup> *Ibid* at para 72.

<sup>72</sup> *Ibid* at para 77.

(4) Any 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.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

The consequence of incorporation under s 231(4) is that after the enactment of domestic legislation, the domestic law forms the source of enforceable legal rights and obligations on the domestic plane. The international agreement is not directly enforceable domestically in South Africa. What is directly enforceable is the domestic law that incorporates this agreement. The international agreement only has domestic interpretive effect which I will return to later. In the event of conflicting domestic legislation, s 233 is applicable. Section 233 states that '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'. This set of incorporated agreements, is a small subset of the larger category of agreements under s 231(2), which do not attain the status of domestic law, but still remain binding on the international plane<sup>73</sup> and provide domestic interpretive guidance.

Before *Glenister II*,<sup>74</sup> in order for an international treaty provision to create direct rights and obligations (and if the provision at issue was not a self-executing one), s 231(4) required that the treaty be domesticated through an Act of Parliament.<sup>75</sup> *Glenister II* complicated this position by holding the government in breach of its duty under s 7(2) without specifying a single right in the Bill of Rights or a single provision in the Constitution. Rather, the majority decision was based on a general obligation underlying the realisation of *all* rights in the Bill of Rights as well as various cited provisions of the Constitution to determine the duty of the state to fight corruption by establishing an independent anti-corruption unit.<sup>76</sup> The position in South African law after *Glenister II* is that it is now possible to determine that the state has enforceable domestic obligations from a right that underlies both the Bill of Rights *and* a treaty approved by Parliament and ratified by South Africa under s 231(2). This has been critically analysed in a number of academic articles,<sup>77</sup> but it is nevertheless echoed in the logic behind the *Law Society* decision, as I explore below.

The second part of s 231(4) recognises that certain 'self-executing' provisions of those treaties approved by Parliament (ss 231(2) treaties) may, without more, be considered to be on par with domestic law without the necessity for additional domestic legislation. This means

<sup>73</sup> This explanation is derived from J Dugard & A Coutsooudis '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: A South African Perspective* (2019) 74–81.

<sup>74</sup> *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC) ('*Glenister II*').

<sup>75</sup> *Ibid* at 99.

<sup>76</sup> *Ibid* at paras 175–176.

<sup>77</sup> B Meyersfeld 'Domesticating International Standards: The Direction of International Human Rights Law in South Africa' (2015) *Constitutional Court Review* 399; F Sucker 'Approval of an International Treaty in Parliament: How Does Section 231(2) "Bind the Republic"?' (2015) 7 *Constitutional Court Review* 417; J Tuovinen 'What to Do with International Law? 3 Flaws in *Glenister*' (2015) 7 *Constitutional Court Review* 435; G Ferreira & A Ferreira-Snyman, 'The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy between Monism and Dualism' (2014) 17(4) *Potchefstroomse Elektroniese Regsblad* 1471–1496.

that these ‘self-executing’ provisions of treaties are a direct source of rights and obligations and enforceable *as* domestic law would be in South African courts. Although this argument was not brought up by any of the parties in oral or written submissions, I explore below the possibility that the jurisdiction provision detailing the jurisdiction of the SADC Tribunal is self-executing.

At the outset, however, it is important to outline what it means for a treaty to *bind* South Africa. There are two planes on which South Africa as a state may be bound — the more familiar, domestic and constitutional plane, and the international plane. The consequence of South Africa being bound at international law is that other states and treaty bodies may hold South Africa responsible for lack of compliance or breaches of treaty obligations in an international forum having jurisdiction in the matter.<sup>78</sup> This would take place if an aggrieved state were to establish that South Africa had committed an internationally wrongful act (breach of its international treaty obligations, for instance) that was attributable to South Africa. The domestic effect of South Africa being bound internationally, on the other hand, includes the possibility that its citizens could hold the state accountable in domestic courts to enforce certain treaty provisions or to require the state to act consistently with such provisions. The majority judgment’s treatment of the Vienna Convention on the Law of Treaties (“VCLT”) — particularly its reference to art 26, the obligation on states to act in good faith in performing their treaty obligations — should be read to reflect this distinction rather than applying to the President himself as suggested by some parts of the text.<sup>79</sup> This is one of the points made by the brief concurring judgment and addressed in detail by other authors in this volume.<sup>80</sup>

Returning to the key questions: what are the obligations that directly arise from s 231(2) treaties on the domestic plane, if any? Is s 231(4) on self-executing provisions of treaties applicable here? If so, what are the obligations that arise domestically? These are the questions that the Court *should* have asked in *Law Society*, in order to determine the nature of the rights conferred by the SADC Treaty and the 2000 Protocol, if any. As described above, the 2000 Protocol conferred jurisdiction on the SADC Tribunal over individual disputes. It effectively created an international obligation upon member states of SADC to facilitate individual access to the SADC Tribunal. The majority assumed that this right was directly enforceable under South African domestic law without considering the role of s 231. Assuming direct applicability of a treaty provision to citizens of South Africa, as the majority did, thereby creating enforceable domestic obligations, muddies the interpretive landscape and runs the risk of rendering s 231’s system of treaty classification redundant.

The SADC Treaty, as noted above, was not *enacted* by Parliament in terms of s 231(4). This is in contrast to the Implementation of the Rome Statute of the International Criminal Court Act,<sup>81</sup> for instance, that *was* domestically enacted to implement the Rome Statute in South Africa. Instead, the SADC Treaty was approved by Parliament following a procedure akin to that which is prescribed by s 231(2) and no further action was taken to domesticate

<sup>78</sup> Articles on Responsibility of States for Internationally Wrongful Acts (note 22 above). The provisions on definition of internationally wrongful act and attribution have widely been accepted to codify principles of customary international law. On this point, see J Crawford ‘State Responsibility’ in *Max Planck Encyclopedia of Public International Law* (2006).

<sup>79</sup> *Law Society* (note 2 above) at paras 54, 79, 80.

<sup>80</sup> See for instance, D Tladi (note 29 above).

<sup>81</sup> 27 of 2002.

it. It is therefore clearly binding upon South Africa internationally, but what domestic effect does it have, if any? The Court is silent on this issue.

I advance two possible ways in which the obligations imposed upon South Africa by the SADC Treaty could have been analysed by the Court. The first is that, despite the language of ‘Treaty right’, international law was simply being used to interpret s 34 of the Constitution. The second is that the relevant provisions of the 2000 Protocol and SADC Treaty were self-executing. I consider each in turn.

The first possibility is that any rights created by the SADC Treaty and the 2000 Protocol, if mirrored in the Bill of Rights, trigger the set of obligations under ss 7(2) and s 8(1) of the Constitution (the *Glenister II* approach).<sup>82</sup> Even in *Glenister II* though, the Court was at pains to highlight that the obligation in that case was ‘not an extraneous obligation, derived from international law and imported as an alien element into our Constitution’.<sup>83</sup> In *Law Society*, we do not even need to go that far — because here the Court has already identified a specific right in the Bill of Rights (s 34) rather than stating that the underlying premise of all the rights in the Bill of Rights is threatened or violated by the impugned acts as was the case in *Glenister II*. In light of this, the proper interpretation of the obligations generated by the ‘Treaty right’ would necessarily take place as a facet of s 34 of the Bill of Rights. This means that the substantive obligation here is one that stems from a violation of s 34 — and the ‘Treaty right’ enters the analysis through the application of s 39(1)(b) to the interpretation of s 34. Apart from a cursory mention of s 39(1)(b) at the start of the judgment, the Court *does not* apply the section in interpreting s 34, the constitutional right of access to courts.<sup>84</sup> Section 39(1)(b), which enjoins courts to take into account international law in interpreting the Bill of Rights, would provide an interpretive bridge to the provision in the 2000 Protocol detailing the Tribunal’s individual jurisdiction. It would explain the Court’s recognition of ‘access to the Tribunal as an important instrument for the *reinforcement of the constitutional right* of access to justice in South Africa’ (emphasis added).<sup>85</sup> The significance of individual jurisdiction may be understood through the prism of the development of international human rights law — specifically, the rise of international treaty bodies dealing with the implementation, monitoring and adjudication of human rights obligations.<sup>86</sup>

Second, the alternative argument is that the provision outlining the Tribunal’s jurisdiction in the 2000 Protocol is self-executing and does not require domestic enactment for enforcement of obligations domestically. This argument was not considered by the Court. Although the parties did not bring it up in the oral or written submissions, given its significance to the case, the Court may have called for directions on the issue, as it occasionally does,<sup>87</sup> or brought

<sup>82</sup> This is endorsed by *Law Society* (note 2 above) at para 77.

<sup>83</sup> *Glenister II* (note 74 above) at para 197.

<sup>84</sup> *Law Society* (note 2 above) at para 5, fn 5.

<sup>85</sup> *Ibid* at para 75.

<sup>86</sup> ‘Human Rights Treaty Bodies’ in Office of the United Nations High Commissioner for Human Rights, *Working with the United Nations Human Rights Programme: A Handbook for Civil Society* (2008), available at [https://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook\\_en.pdf](https://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook_en.pdf) at 37–38. See also K Mechlem ‘Treaty Bodies and the Interpretation of Human Rights’ (2009) 42 *Vanderbilt Journal of Transnational Law* 905.

<sup>87</sup> As it has done several times, for parties to make written submissions on a point of law — for instance, recently in *Jacobs & Others v S* [2019] ZACC 4, 2019 (5) BCLR 562 (CC).

it up *mero motu* in oral argument.<sup>88</sup> The latter half of s 231(4) encapsulates the relationship between self-executing provisions of treaties approved by Parliament, and the Constitution. Self-executing treaty provisions become law in the Republic without any further steps, whilst other treaty provisions require an act of Parliament for the same effect. The question that the Court should have asked at this stage is: What does a self-executing provision of a treaty look like? This issue has been written about extensively in the context of the United States of America's declarations at the time of ratifying international human rights treaties.<sup>89</sup> The South African Constitution imported this phrase from the US<sup>90</sup> — but there has been little to no engagement with it by the courts,<sup>91</sup> even when it is arguably applicable.<sup>92</sup> The Constitutional Court had ample opportunity to develop the law on this point in *Quagliani*<sup>93</sup> and has been criticised by commentators for not doing so,<sup>94</sup> despite the fact that the High Court in *Goodwin* interpreted the phrase and took the position that it was applicable, in contrast with the High Court in *Quagliani*.<sup>95</sup> In *Claassen*, there was cursory treatment given to the question of whether the International Covenant on Civil and Political Rights (ICCPR) was a self-executing treaty. The Court briefly stated the conclusion that the ICCPR is not a self-executing treaty, because for the provision in question to be given its full effect, domestic legislation is required.<sup>96</sup> No further analysis was undertaken.

To underscore my argument on the relevance and application of this provision to *Law Society*, it is helpful to lay out the substantive test for self-executing provisions developed in international law and the US.<sup>97</sup> Courts in the US have consistently held that a provision of a treaty is self-executing if it does not require an additional domestic legislative step to be

<sup>88</sup> *Maphango & Others v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2, 2012 (3) SA 531 (CC), 2012 (5) BCLR 449 (CC).

<sup>89</sup> D Sloss 'The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties', (1999) 24 *Yale Journal of International Law* available at <http://digitalcommons.law.yale.edu/yjil/vol24/iss1/4>. See also LA Malone 'Chapter 4. The Effect of U.S. Ratification as a "Self-Executing" or as a "Non-Self-Executing" Treaty' in J Todres, ME Wojcik & C Revaz, *United Nations Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of US Ratification* (2006).

<sup>90</sup> N Botha 'Treaty-making in South Africa: A Reassessment' (2000) 25 *South African Yearbook of International Law* 69 at 91; Dugard & Coutsooudis (note 73 above) at 82.

<sup>91</sup> As I have described through the case law cited in this article. See also, Dugard & Coutsooudis (note 73 above) at 85 arriving at the same conclusion 'South African courts are reluctant to explore the meaning of the term "self-executing".'

<sup>92</sup> For instance, in *Krok v Commissioner SARS* [2015] ZASCA 107, 2015 (6) SA 317 (SCA) at para 24. However, in *Krok*, the SCA held that s 108 operates as a deeming provision in the Income Tax Act 58 of 1962 to pre-emptively incorporate double-taxation avoidance agreements thus avoiding any discussion of self-executing treaties.

<sup>93</sup> *President of the Republic of South Africa & Others v Quagliani, President of the Republic of South Africa & Others v Van Rooyen & Another; Goodwin v Director-General, Department of Justice and Constitutional Development & Others* [2009] ZACC 1; 2009 (4) BCLR 345 (CC); 2009 (2) SA 466 (CC).

<sup>94</sup> N Botha 'Rewriting the Constitution: The "strange alchemy" of Justice Sachs, indeed!' (2009) 34 *South African Yearbook of International Law* 253. See also W Scholtz & G Ferreira 'The Interpretation of Section 231 of the South African Constitution: a Lost Ball in the High Weeds!' (2008) 41(2) *Comparative and International Law Journal of Southern Africa* 324–338.

<sup>95</sup> Dugard & Coutsooudis (note 73 above) at 84; J Dugard 'South Africa' in D Sloss *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2014) at 454–455.

<sup>96</sup> *Claassen v Minister of Justice and Constitutional Development & Another* [2009] ZAWCHC 190, 2010 (2) SACR 451 (WCC), [2010] 4 All SA 197 (WCC) at para 36.

<sup>97</sup> This is a method of constitutional interpretation (s 39(1)(b) as analysed above that mandates courts to consider international law, and s 39(1)(c) that allows courts to consider foreign law).

operational.<sup>98</sup> In other words, if the provision is *directly applicable* in the state, it is on par with domestic law.<sup>99</sup> Moreover, the Permanent Court of International Justice has also confirmed this interpretation in its *Danzig* case in the context of direct applicability of certain treaty provisions enabling railway employees to make domestically enforceable claims on the basis of an international agreement.<sup>100</sup>

In relation to identifying self-executing treaties, Judge Yuji Iwasawa, before his appointment to the International Court of Justice, laid out a set of criteria that emerge from the US and European case law on the issue, to be taken into account by the relevant body in identifying whether a provision is self-executing.<sup>101</sup> I will provide an overview of those subjective and objective factors as they relate to the VCLT and domestic law. Since the task before a court adjudicating upon this matter is essentially one of treaty interpretation, the factors include the text of the treaty as well as its surrounding context taken together with subsequent practice of states and other relevant rules of international law as enshrined in art 31 of the VCLT; the *travaux préparatoires* and intention of the drafters under art 32 of the VCLT to confirm the interpretation; the nature of the obligation incumbent upon the contracting parties, if any; the subject matter of the provision; the laws to be passed or any further measures that would be required to be taken in the state in order to ensure that the provision is operative, if any. Iwasawa also chronicles the debate on whether treaty provisions may be self-executing even if they do not create individual rights and obligations<sup>102</sup> — however, for the purposes of *Law Society*, it is clear that the provision in dispute *does* indeed create the individual right of access to the Tribunal as has been repeatedly held by the Court in this judgment. Applying the rest of Iwasawa's criteria — essentially engaging in an exercise of treaty interpretation of the SADC Treaty and the 2000 Protocol — it is certainly arguable that the provision guaranteeing individual jurisdiction of the Tribunal is self-executing. No additional domestic legislation or other step was necessary to allow individuals to make use of the jurisdiction of the Tribunal. The jurisdiction provisions of the SADC Treaty and the Protocol appear to be self-executing. This would provide a framework for the Court's ultimate conclusion that a pre-existing right was taken away solely by the President's impugned conduct on the international plane, without any corresponding acts on the domestic plane.

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<sup>98</sup> *Medellín v Texas* 552 U. S. 491, 504-5 (2008) citing *Foster v Neilson*, 2 Pet. 253, 315 (1829), *United States v Percheman*, 7 Pet. 51 (1833) and *Whitney v. Robertson*, 124 U. S. 190, 194 (1888) on the point. Even the dissent in *Medellín* affirms the fundamental understanding of self-executing treaties that has been outlined above, however differs on the methods of identifying a self-executing provision of a treaty.

<sup>99</sup> K Kaiser 'Treaties, Direct Applicability' in *Max Planck Encyclopedia of Public International Law* (2013).

<sup>100</sup> *Advisory Opinion on Jurisdiction of the Courts of Danzig* (1928) *PCIJ Series B* no 15 at 37.

<sup>101</sup> Y Iwasawa 'Domestic Application of International Law' (2016) 378 *Collected Courses of the Hague Academy of International Law / Recueil des Cours de l'Académie de Droit International de la Haye* 65–91, 100–129.

<sup>102</sup> *Ibid* at 87–90, 125–129.

A similar approach, substantively limited to human rights treaties, has been proposed by some academic commentators in the South African context.<sup>103</sup> Insofar as the self-executing provision is consistent with the Constitution and existing legislation, it must be given effect to on par with domestic law, and without the need for additional legislation. Given the Court's emphasis on the nature of the SADC Treaty and its attendant 2000 Protocol, and the recognition that individual jurisdiction is particularly important to resolve disputes concerning 'human rights, rule of law and democracy', self-executing provisions have an important role to play in this case.

I have thus outlined two possible frameworks of analysis that the Courts could have carried out in arriving at the outcome it reached. It is worrying that the Court at best assumed the first framework of analysis in its judgment, and entirely ignored the second framework. In any event, in order to understand the future implications of the outcome as well as of the thin reasoning of the Court, I will explore the extent of obligations that both of these possible analyses impose upon South Africa in my next section.

## V THE PRINCIPLE OF NON-RETROGRESSION

After having analysed the twin rights invoked in the Court's judgment — first, the extension of s 34 to international courts, and second, the 'Treaty right' under the SADC Treaty and attendant Protocols — I now turn to the obligations that are imposed upon the state as flowing from these twin rights. In this Part, I engage with the extent of the state's obligation in relation to the expanded right of access to courts on the international plane. *Law Society* offers a novel application of the principle of non-retrogression to the right of access to courts, in all but name. The term 'non-retrogression' is not expressly used in the judgment. In this Part, I explain how the principle of non-retrogression nevertheless underpins the Court's approach to the extent of the state's duty to protect and fulfil the right of access to courts under s 34. I first provide an overview of the principle of non-retrogression and point out how it is not alien to South African constitutional jurisprudence. I then locate *Law Society's* use of the principle in the language and reasoning of the majority. Following this, I explain that, although the Court does not spell this out, this principle may be used to qualify the expanded duty incumbent upon the state under s 34. I offer an analysis of the contours of this principle and its limitations — in other words, when (if ever) the state may 'regress' by taking away existing access to an international court following *Law Society*.

What is the principle of non-retrogression? The principle is found in international environmental law and socio-economic rights as a corollary and extension of the doctrine of progressive realisation.<sup>104</sup> Progressive realisation requires the state to take steps towards the realisation of a right; non-retrogression bars it from moving backwards or 'regressing' once it

<sup>103</sup> EM Ngoelele 'The Content of the Doctrine of Self-Execution and its Limited Effect in South African Law' (2006) 31 *South African Yearbook of International Law* 153. See also, ME Olivier 'Exploring the Doctrine of Self-Execution as Enforcement Mechanism of International Obligations' 27 (2002) *South African Yearbook of International Law* 99. For an example of self-executing treaty provisions, see S Liebenberg, 'South Africa and the International Covenant on Economic, Social and Cultural Rights: Deepening the Synergies', *South African Judicial Education Journal* (forthcoming 2020) using international human rights law jurisprudence to argue that certain provisions of the International Covenant on Economic, Social and Cultural Rights may be considered to be self-executing under s 231(4) of the South African Constitution.

<sup>104</sup> BTC Warwick 'Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights' (2019) 19(3) *Human Rights Law Review* 467–468.

has taken these steps to realise a right. The principle of non-retrogression (also known as the principle of non-regression) thus encapsulates an integral step towards the realisation of human rights — a move to a more just and equal society, without turning back. It guarantees that once the state has taken a step forward to realise a right, it must at the very least maintain that new standard of protection. In other words, the state may not renege on the positive, progressive measures that it may have taken in order to fulfil certain rights. The Committee on Economic, Social and Cultural Rights (CESCR) has derived the principle of non-retrogression from the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which South Africa is a party. In General Comment No 3 the CESCR states that:

any deliberately retrogressive measure in respect of economic, social and cultural rights would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the ICESCR and in the context of the full use of the maximum available resources.<sup>105</sup>

The principle of non-retrogression may be understood in normative and empirical terms. The adoption of a legal measure with the effect of undermining or reducing existing legal guarantees undertaken by the state would fall within the category of normative retrogression, whilst the state's failure to act in a situation where a social need for additional legal protection arises would fall within the category of empirical retrogression.<sup>106</sup> In this case, we are concerned with normative retrogression, where there is a withdrawal of a legal entitlement of South Africans and members of SADC countries to access the SADC Tribunal. This principle is not new to South African courts. The Constitutional Court has quoted the above passage from the ICESCR to apply the principle of non-retrogression in *Mazibuko*, to determine the scope of the state's obligation in relation to the right to water,<sup>107</sup> even though the Court did not ultimately find that a retrogressive step had been taken by the state. The same passage was also quoted in *Grootboom*,<sup>108</sup> but for the purpose of describing the scope of progressive realisation rather than non-retrogression. The main judgment in *Shoprite Checkers* invoked this principle in the context of resisting the use of pre-constitutional notions to limit the scope of the right to property under the Constitution.<sup>109</sup> Moreover, this principle has been advanced in argument by one of the parties in *Glenister II*,<sup>110</sup> the *ICC Withdrawal* case,<sup>111</sup> *C v Department of Health and*

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<sup>105</sup> General Comment No. 3, UN Committee on Economic, Social and Cultural Rights, UN Doc E/1991/23 (14 December 1990) at 9.

<sup>106</sup> A Nolan, NJ Lusiani & C Courtis, 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic, Social and Cultural Rights' in A Nolan (ed.) *Economic and Social Rights after the Global Financial Crisis* (2014) at 123.

<sup>107</sup> *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28, 2010 (3) BCLR 239 (CC), 2010 (4) SA 1 (CC) at para 40.

<sup>108</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46, 2000 (11) BCLR 1169 (CC) at para 45.

<sup>109</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape & Others* [2015] ZACC 23, 2015 (6) SA 125 (CC), 2015 (9) BCLR 1052 (CC) at para 59.

<sup>110</sup> *Glenister II* (note 73 above) at paras 73, 157.

<sup>111</sup> *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 53, 2017 (3) SA 212 (GP), [2017] 2 All SA 123 (GP) at para 72.

*Social Development, Gauteng*,<sup>112</sup> *Law Society of South Africa v Minister for Transport*,<sup>113</sup> *Joseph v City of Johannesburg*.<sup>114</sup> In all of these cases, however, the Court did not base its decision on the principle of non-retrogression.

Internationally, the principle has been affirmed by the UN Special Rapporteur on the right to safe drinking water.<sup>115</sup> The regional Inter-American Human Rights System has applied and developed this principle in cases concerning the right to health,<sup>116</sup> social security,<sup>117</sup> and more recently labour rights<sup>118</sup> on the textual basis of art 26<sup>119</sup> of the Inter-American Charter, whilst the European Court of Human Rights has briefly done so (albeit in a minority judgment) in the context of non-discrimination and parental leave.<sup>120</sup> The principle has also been applied in relation to equality of citizenship, particularly in Northern Ireland,<sup>121</sup> and in the UK, in relation to the environment<sup>122</sup> and economic, social and cultural rights.<sup>123</sup> Additionally, the recent Indian Supreme Court decision that decriminalised homosexuality applied this principle,<sup>124</sup> as well as a recent decision of the Hong Kong Court of Final Appeal.<sup>125</sup> The Colombian Constitutional Court has upheld this principle in relation to affirming the fundamental right to health (despite resource implications)<sup>126</sup> and gender equality in relation to taxation policy.<sup>127</sup>

<sup>112</sup> *C & Others v Department of Health and Social Development, Gauteng & Others* [2012] ZACC 1, 2012 (2) SA 208 (CC), 2012 (4) BCLR 329 (CC) at para 17.

<sup>113</sup> *Law Society of South Africa & Others v Minister for Transport & Another* [2010] ZACC 25, 2011 (1) SA 400 (CC), 2011 (2) BCLR 150 (CC) at para 87.

<sup>114</sup> *Joseph & Others v City of Johannesburg & Others* [2009] ZACC 30, 2010 (3) BCLR 212 (CC), 2010 (4) SA 55 (CC) at para 32.

<sup>115</sup> C de Albuquerque, 'Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation' *Human Rights Council*, 24th Session, A/HRC/24/44 at paras 13–17.

<sup>116</sup> *Miranda Cortez v. El Salvador*, Case 12.249, IACComm.HR, Report No. 27/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009) at paras 105–106.

<sup>117</sup> *Five Pensioners v Peru* IACtHR, Series C no 98, February 28 2003 at para 147.

<sup>118</sup> *Dismissed Employees of Petroperu et al v Peru*, IACtHR Series C no 344, 23 November 2017 at para 196. See also *Lagos del Campo v Peru*, IACtHR Series C no 340, 31 August 2017 as cited in *Case of Dismissed Employees of Petroperu et al v Peru*.

<sup>119</sup> *Acevedo Buendía ("Discharged and Retired Employees of the Comptroller") v. Peru*, IACtHR Series C no 198, 1 July 2009 at paras 102–103 developing the content of art 26 even though it held that art 26 was not violated in this case.

<sup>120</sup> Partly Concurring Partly Dissenting Opinion of Judge Pinto de Albuquerque in *Konstantin Markin v Russia* [2010] ECHR 1435 (7 October 2010) at 61–62.

<sup>121</sup> D Holder, 'Equality of Citizenship and the GFA — What do we Know So Far about the EU Rights of Irish and British Citizens in Northern Ireland in the BREXIT era?' *BrexitLawNI*, available at <https://brexitlawni.org/blog/equality-of-citizenship-and-the-gfa/>.

<sup>122</sup> Scottish Human Rights Commission 'UK NHRIs express concern to UN Human Rights Council on Human Rights Impact of Leaving the EU' (20 September 2019) available at <http://www.scottishhumanrights.com/news/uk-nhris-express-concern-to-un-human-rights-council-on-human-rights-impact-of-leaving-the-eu/>. See also, D Boffey 'EU will Seek "Non-Regression" Clause to Tie UK to Environmental Standards' *The Guardian* (10 April 2018), available at <https://www.theguardian.com/environment/2018/apr/10/eu-will-look-for-non-regression-clause-to-tie-uk-to-environmental-standards>.

<sup>123</sup> "Gaping Holes Where Our Rights Should Be": Liberty's Analysis of the Great Repeal Bill White Paper' *Liberty* (30 March 2017) available at <https://www.libertyhumanrights.org.uk/news/press-releases-and-statements/gaping-holes-where-our-rights-should-be-libertys-analysis>.

<sup>124</sup> *Navej Singh Johar v Union of India* AIR 2018 SC 4321 at paras 188–189.

<sup>125</sup> *Kong Yunning v Director of Social Welfare* (2013) 16 HKCFAR 950 at paras 179–180 (Bokhary NPJ).

<sup>126</sup> Colombian Constitutional Court, Decision T- 760 of 2008.

<sup>127</sup> Colombian Constitutional Court, Decision C-111 of 2018.

The Joint Human Rights Committee in the UK, in detailing the UK's international obligations under the ICESCR also affirmed the applicability of the principle of non-retrogression.<sup>128</sup>

Two recent developments, however, indicate the international community's consideration of the principle as having wider application, in situations that are arguably analogous to *Law Society*. First, in the context of 'Brexit', a report by stakeholders in the UK outlined the need for a non-retrogression clause in the Withdrawal Agreement from the European Union. This was in relation to equality and non-discrimination laws, to ensure that the UK did not renege on the EU standards of protection after Brexit.<sup>129</sup> Second, in the South African context, this principle was argued before the High Court in relation to treaty withdrawal — that South Africa's withdrawal from the Rome Statute constituted a retrogressive measure which engaged s 7(2) through a violation of the state's duty to protect, promote, respect and fulfil the Bill of Rights. The decision in that case was ultimately made on procedural irregularities and so the Court did not go into the merits of the substantive grounds. Commentators have analysed the implications of this argument as meaning that the state, through the executive and legislature, may not withdraw from international treaties if the courts hold that such a withdrawal violates or threatens to violate rights in the Bill of Rights.<sup>130</sup> Taking this argument at its highest: 'the courts would be vested with the power to require the state to remain a party to certain treaties in perpetuity'.<sup>131</sup> The implication is that courts would be able to check the treaty-making power of the executive and legislature to the extent to which it is unconstitutional. The holding in *Law Society* is based on similar reasoning, as I describe below.

*Law Society* does not explicitly refer to the principle of non-retrogression as such. However, it uses equivalent language and offers an account of what the application of the principle of non-retrogression looks like in practice. The judgment characterises the impugned acts of the President as having 'unabashedly sought to put us [South Africa] and the people of SADC in a position that is worse than before'.<sup>132</sup> It further states, in relation to the state's obligations under s 7(2), that the proper exercise of the President's power must comply with the obligations to respect, protect, promote and fulfil the rights under the Bill of Rights — '[t]here is just no room for deviation, particularly where citizens' existing rights are likely to be *undermined or extinguished at any level where they used to be enjoyed*'.<sup>133</sup> Most explicitly, although it still does not use the term 'non-retrogression', the Court states that 'it is constitutionally impermissible, as long as our Constitution and the Treaty remain unchanged, for the President to align herself with and sign a *regressive* international agreement that seeks to *take away* the citizens' right of access to justice at SADC level'.<sup>134</sup> This analysis falls squarely within the category of normative non-retrogression as described above.

<sup>128</sup> UK Joint Committee on Human Rights, Twenty-First Report (Session 2003–04) at para 50.

<sup>129</sup> S Fredman, A Young et al 'The Impact of Brexit on Equality Law', *Oxford Human Rights Hub Report* (2017), available at <http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2017/11/The-Impact-of-Brexit-on-Equality-Rights.pdf>. See also, M Campbell 'The Impact of Brexit on Equality Law', *The UK in a Changing Europe: Kings College London* (10 December 2017), available at: <https://ukandeu.ac.uk/the-impact-of-brexit-on-equality-law/>.

<sup>130</sup> H Woolaver 'Domestic and International Limitations on Treaty Withdrawal: Lessons from South Africa's Attempted Departure from the International Criminal Court' (2017) 111 *American Journal of International Law Unbound* (2017) 450, 452–453.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Law Society* (note 2 above) at para 79. (Emphasis added.)

<sup>133</sup> *Ibid* at para 78. (Emphasis added.)

<sup>134</sup> *Ibid* at para 82. (Emphasis added.)

What work does the principle of non-retrogression do in this judgment? A reading of these passages in the judgment, along with the provisions on the right of access to justice in the Constitution indicates that to the extent to which the principle of non-retrogression is applicable, it may be characterised as a qualification of the duties imposed upon the state under s 7(2). This formulation is in effect an application of the principle of non-retrogression, where the breach of the President's duty under s 7(2) is found in his acts that circumscribed the expanded protection of s 34 offered to South Africans through the accession to the SADC Treaty and its attendant 2000 Protocol. The principle of non-retrogression here is a manifestation of the President's duty to protect and fulfil the s 34 right of access to courts as interpreted along with s 39(1)(b). It is also a manifestation of the duty to respect the right of access to courts in that the state must not act so as to take away or inhibit its realisation in any way.<sup>135</sup>

## VI IMPLICATIONS OF *LAW SOCIETY*

What are the principal implications of the *Law Society* judgment? Does the right of access to courts extend to *any* international dispute resolution mechanism that affords a right of individual communication? What is the content of the principle of non-retrogression and what are its limitations ie, are there circumstances in which the state may withdraw or diminish existing protections? I offer some provisional views on these questions in this final part.

First, I deal with the limits to the expanded scope of application of the right of access to courts. This has a procedural and a substantive dimension. The procedural limits relate to the status of the relevant international treaties under South African domestic law. It cannot be that the decision in *Law Society* guarantees a right of access to *any* international court in the world established under *any* treaty. Quite obviously, it cannot apply to international courts to which people in South Africa would not ordinarily have access, such as the Inter-American Court of Human Rights or the European Court of Human Rights.<sup>136</sup> But beyond the clearly inapplicable scenarios, what are the limits to the Court's decision? It is here that the majority's loose approach to international law does not provide any clarity. If the Court had addressed the precise nature of the domestic of treaties ratified by South Africa pursuant to s 231(2) but not enacted into domestic law pursuant to s 231(4), the limits of the scope of application would have been clearer. Moreover, the Court missed an opportunity to develop the jurisprudence on self-executing provisions under s 231(4) as outlined above. Given South Africa's recent ratification of treaties providing for international complaints procedures and individual jurisdiction, it was timely and relevant for the Court to have clarified the domestic effect of *actually* facilitating access to such mechanisms. Since the SADC Treaty followed a process akin to that outlined in s 231(2), arguably the holding in *Law Society* applies to all treaties that South Africa has ratified under s 231(2). Put simply, this includes those treaties that South Africa has ratified pursuant to s 231(2), which contain within their relevant constitutive document access to an international human rights dispute resolution mechanism.

Importantly, though, *Law Society* incentivises litigants (and by extension courts) to *avoid* properly interpreting the scheme under s 231. Simply put, *Law Society's* approach does not

<sup>135</sup> This is similar to the reasoning on negative obligations under the right to housing in *Jaftha v Schoeman & Others, Van Rooyen v Stoltz & Others* [2004] ZACC 25, 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC).

<sup>136</sup> This is not to ignore the possibility of a person in South Africa having a right to access such an international court on the basis that their rights were violated while they were in another country that is party to an appropriate court.

require that any questions be asked beyond: has South Africa ratified a treaty pursuant to s 231(2)? If this question is answered in the affirmative, according to *Law Society*, there is no need to analyse whether the treaty has been domesticated under s 231(4) (or indeed if any of the provisions are self-executing) at all in order to determine the scope and content of rights and obligations that arise from it, and whether or not these rights and obligations are directly domestically enforceable. The only other inquiry that must be undertaken is whether the treaty at issue is mirrored in the Bill of Rights, or underlies the Bill of Rights as a whole. A key example of this reasoning is found in *Chang*— the first international law based decision emerging from a South African court after *Law Society*.<sup>137</sup> The Court merely asked the question of whether South Africa had been party to the Protocol. After having answered this in the affirmative, the Court moved on to directly examine the state's conduct in relation to ss 7(2) and 8(1), thus assuming rather than interrogating South Africa's domestic obligations.<sup>138</sup> This has shifted South Africa's position significantly from explicit constitutional dualism on international agreements to what has been described as 'creeping monism',<sup>139</sup> thus running the risk of rendering s 231(4) redundant in the process.

Another recent example would be South Africa's ratification of the Optional Protocol to the UN Convention Against Torture ('OP-CAT').<sup>140</sup> *Law Society* enables any person in South Africa to assert a right of access to the Committee Against Torture to file complaints, and a corresponding obligation upon the state to respect, protect, promote and fulfil that right. In particular, on the *Law Society* approach, the state has an obligation not to withdraw from OP-CAT or otherwise impede access to it, as this would amount to retrogression. It is even arguable that, after *Law Society*, the state now has a *positive* obligation to ratify additional protocols to international human rights treaties that provide for dispute resolution mechanisms, particularly if those treaties have resonance with the Bill of Rights. An example would be the Optional Protocol to ICESCR (which South Africa has not yet ratified), which allows individual complaints to be made, especially since South Africa has now ratified ICESCR itself. Another example, closer to home, would be the African Court on Human and People's Rights whose explicit mission is 'strengthening the human rights protection system in Africa and ensuring respect for and compliance with the African Charter on Human and Peoples' Rights, as well as other international human rights instruments'.<sup>141</sup> Whilst South Africa has ratified the Protocol that allows for complaints to be made against states parties, it is notably *not* among the nine states that have made a declaration enabling non-governmental organisations and individuals to file complaints. Does South Africa have a positive obligation to deposit a declaration of this nature or sign the Optional Protocol to the ICESCR? This would arguably take *Law Society's* interpretation of the state's obligations flowing from s 34 to its logical end. However, given that s 34 does not refer to 'progressive realisation', it may be more definitively argued that the state's obligations are negative ie, limited to non-retrogression, rather than

<sup>137</sup> *Chang v Minister of Justice and Correctional Services & Others; Forum de Monitoria do Orcamento v Chang & Others* [2019] ZAGPJHC 396.

<sup>138</sup> *Ibid* at paras 70–71.

<sup>139</sup> MA Waters 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *Columbia Law Review* 628.

<sup>140</sup> A Katz & E Cohen 'Bound by law: South Africa returns to the international legal stage' *Daily Maverick* (4 July 2019) available at <https://www.dailymaverick.co.za/article/2019-07-04-bound-by-law-sa-returns-to-the-international-legal-stage/>.

<sup>141</sup> African Court on Human and Peoples Rights 'Mission', available at <https://www.african-court.org/en/index.php/about-us/mandate-vision-mission-values>.

extending to a positive obligation to actively accede to and thereby confer access to further international dispute resolution mechanisms.

The Court in *Law Society* placed great emphasis on ‘human rights, democracy and the rule of law’,<sup>142</sup> as foundational to the SADC Treaty and the South African Constitution. It would be appropriate to infer a substantive limit to the extended application of s 34 from this, namely that the right of access to courts is expanded to those international courts (subject to the procedural limit of s 231(2) ratification and approval) that allow for the realisation of the rights guaranteed in the Bill of Rights guarantees. Again, the Optional Protocol to ICESCR would be a good example, as it enables access to complaints mechanisms for socio-economic rights that are also guaranteed in the Constitution. South Africa is not a party to this protocol. However, what about international dispute resolution mechanisms that are not so closely related to rights in the Bill of Rights, such as international trade and investment dispute fora? It remains open for the courts to extend this to dispute resolution mechanisms less directly connected to human rights in future, but the language of *Law Society* suggests that it applies only where the particular international mechanism does relate substantively to a right in the Bill of Rights. This brings me to the principle of non-retrogression.

In response to the second question posed above, there is a need to clarify the content of the principle of non-retrogression that the Court appears to have applied. Might empirical retrogression, as described above, now found a cause of action in the South African courts? Or is it only normative retrogression that triggers a breach of the state’s duty under s 7(2)? The recent High Court decision requiring government to reinstate the National School Nutrition Programme during the global pandemic explicitly applied the principle of non-retrogression to the right of access to basic nutrition, and held that the justification advanced by the government for having taken retrogressive steps was not valid and amounted to a breach of the state’s constitutional and statutory duty.<sup>143</sup> What are the criteria that need to be fulfilled for a measure to be a ‘deliberately retrogressive measure’ that is impermissible in international human rights law? Regard may be had to General Comment No 3 that lays out certain criteria that may be followed to make this determination: first, whether the measure is one that is ‘backwards’ or that withdraws protection; second, whether the maximum resources available to the state are being used; third, whether the measure was taken deliberately; fourth whether there was ‘careful consideration’ given before taking the measure; and fifth, whether the measure is justifiable in relation to the other rights protected by the ICESCR.<sup>144</sup> Regard may also be had to General Comment No 19 which provides a further six factors that may aid the determination of a deliberately retrogressive measure.<sup>145</sup> They are: first, whether the justification for the action was reasonable; second, whether there were alternative courses of action that were comprehensively considered; third, whether the groups who are affected by the measure had the opportunity to adequately participate in examining the measure and its alternatives; fourth, whether the

<sup>142</sup> *Law Society* (note 2 above) at paras 51–53, 69, 81, 91.

<sup>143</sup> *Equal Education & Others v Minister of Basic Education & Others* [2020] ZAGPPHC 306 at 46–60. The court cited General Comment 3 as cited by *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19, 2001 (1) SA 46, 2000 (11) BCLR 1169 (CC) as well as CRC, ‘General Comment 19: Public Budgeting for the Realization of Children’s Rights (art 4)’ (2016) UN Doc CRC/C/GC/20.

<sup>144</sup> Warwick (note 104 above) at 478, distilling the criteria provided by General Comment No 3. See also, CESCR, ‘General Comment 3: The Nature of States Parties Obligations (art 2, para 1 of the Covenant)’ (1990) UN Doc E/1991/23.

<sup>145</sup> CESCR, ‘General Comment 19: The Right to Social Security (art 9)’ (2007) UN Doc E/C12/GC/19.

measure discriminates in any form on the basis of protected characteristics; fifth, whether there will be a ‘sustained impact’ on the realisation of the right in question or whether the measure deprives individuals or groups from realising the right at the ‘minimum essential level’; and sixth, whether these measures were domestically reviewed at the national level.<sup>146</sup> It is thus clear that content *must* be given to the principle of non-retrogression should it be substantively applied in future cases. Insights may also be drawn from regional systems such as the Inter-American Human Rights System which has developed and applied the content of this principle as cited in the previous Part of this article.

Moreover, regarding the limits to the principle of non-retrogression, it cannot be that the state is barred ever, for all time and in any imaginable circumstances, from withdrawing from or restricting access to an international court or tribunal to which there is currently access. The standard cannot be absolute. Regard may be had to how the Court has treated progressive realisation in relation to socio-economic rights in formulating such limits.<sup>147</sup> The Court has held that the meaning of ‘progressive realisation’ in the ICESCR carries the same meaning in the context of the Constitution. In light of this, any step that degrades protection of a right ‘need[s] to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources’.<sup>148</sup> This offers one possible threshold by which withdrawal from an international dispute resolution mechanism may be justified by the state, namely that any step backwards must be ‘fully justified’. An alternative might be that any retrogression requires justification under s 36 of the Constitution or that it must be ‘reasonable’, often the default standard for rights inquiries. There are thus a range of possible limitations that may be developed.

Moreover, *Law Society* has broader implications for executive competence and the reviewability of executive action on the international plane. The rest of the judgment holds that international executive action is reviewable at the same standard as domestic executive action, within the framework of s 7(2) and s 8(1) of the Constitution.<sup>149</sup> In effect, this means that any act of the executive, whether international or domestic, is also subject to legality review.<sup>150</sup> Thus, in its future treaty negotiations, or arguably even Security Council or UN General Assembly voting practices, the executive branch of the government must act to ‘respect, protect, promote and fulfil’ the Bill of Rights.<sup>151</sup> In other words, South Africans may hold the executive to account in a court of law in South Africa, in the event that the executive does not fulfil its duties under s 7(2) in any of these circumstances or acts *ultra vires* its competence on both — the international and domestic planes.<sup>152</sup>

Thus, while several questions as to the procedural and substantive limits of the decision in *Law Society* remain, the decision has nevertheless entrenched heightened protection for

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<sup>146</sup> Ibid. See also Warwick (note 104 above) at 478.

<sup>147</sup> *Grootboom* (note 108 above) at para 45.

<sup>148</sup> Ibid.

<sup>149</sup> *Law Society* (note 2 above) at para 46–47.

<sup>150</sup> Ibid at para 48.

<sup>151</sup> A Katz ‘The Constitution Watches over Foreign Affairs’ *Daily Maverick* (14 December 2018), available at <https://www.dailymaverick.co.za/article/2018-12-14-the-constitution-watches-over-foreign-affairs/>.

<sup>152</sup> A detailed analysis of the reasoning behind and the implications of extending the application of legality review are outside the scope of this paper. This question is explored more fully in A Coutsoudis & M Du Plessis, ‘We Are All International Lawyers; Now What? Taking Seriously the Constitutional Injunction to Integrate International Law Obligations into South African Law’ (2020) 10 *Constitutional Court Review* 155.

individuals (and groups) against any conduct by the state that would take away existing access to an international human rights dispute resolution forum or indeed any international court that seeks to protect rights mapping onto the Bill of Rights. The same result, in my view, could have been arrived at by the Court with a careful analysis of international law so as to ensure that provisions of the Constitution are properly interpreted, not rendered redundant, and South Africa's constitutional relationship with international law remains intact. *Law Society's* methodological missteps have highlighted the importance of proper engagement with international law in South African courts as South Africa is an important actor on the international plane and its domestic acts may have international implications for interpreting and applying international law. This article is thus an attempt to read the judgment in its best light, laying bare its assumptions to aid future jurisprudence on the treatment of international law in domestic courts.

