Approval of an International Treaty in Parliament: How Does Section 231(2) 'Bind the Republic'?

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I Introduction

Here's a question that exorcises jurist and academic alike: When and how is South Africa bound by an international treaty[1] at the international level and/or the domestic level?

This uncertainty has been made patently obvious in several judgments of the Constitutional Court.[2] *Glenister v President of the Republic of South Africa* ('*Glenister*') is the most recent manifestation.[3] In *Glenister*, this question of how and when South Africa is bound arose because the relevant international treaty, the United Nations Convention against Corruption 2003 (Corruption Convention)[4], was signed and ratified by the national executive,[5] but not incorporated in South African law.[6]

The Court was unable to establish whether the Corruption Convention was approved by resolution in the National Assembly and the National Council of Provinces (Parliament) as required in FC s 231(2).[7] In justifying its conclusions, the *Glenister* Court focuses on para 2 of FC s 231 and the binding effect of such

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1 International treaties, agreements and conventions are used as synonyms in terms of art 2(1) VCLT, see especially J Dugard *International Law: A South African Perspective* (2011) 60.

2 See, eg, *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6, 2010 (4) SA 618 (CC), 2010 (5) BCLR 457 (CC); *President of the Republic of South Africa v Quagliani and Others* [2009] ZACC 1, 2009 (2) SA 466 (CC), 2009 (4) BCLR 345 (CC) at 355.

3 *Glenister v President of the Republic of South Africa* ('*Glenister*') [2011] ZACC 6, 2011 (3) SA 347 (CC). For more related case discussions, see MD Stubbs 'Three-Level Games: Thoughts on *Glenister*, *Scaw* and International Law' (2011) 4 *Constitutional Court Review* 137; S Choudhry '"He had a Mandate": The South African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1; M Lewis & P Stenning 'Considering the *Glenister* Judgment: Independence Requirements for Anti-Corruption Institutions' (2012) 39 *SA Crime Quarterly* 11.

4 United Nations Convention against Corruption, 31 October 2003, 2349 *UNTS* 41 (Doc A58/422); (2004) 43 *ILM* 37. The Convention entered into force on 14 December 2005.

5 South Africa signed the Convention on 9 December 2003 and ratified it on 22 November 2004, available at http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-14&chapter=18&lang=en (accessed on 22 August 2013).

6 For more detailed background on the case, see B Meyersfeld 'Domesticating International Standards: The Direction of International Human Rights Law in South Africa' in this issue.

7 *Glenister* (note 3 above) at para 85, fn 64 (Court, in fn 64, explains that it was unable to find a 'notice in the *Government Gazette* for the general information of the public'.)

an approval for South Africa. It's worth noting that a closely split minority and majority disagree as to how an international treaty approved by resolution in Parliament binds South Africa.[8]

The *Glenister* Court contends that an approval has direct effect in terms of the Republic's obligations at international law[9] and domestic constitutional effect,[10] when international obligations entered into are 'intrinsic to the Constitution itself'.[11] The minority counters that an approval binds South Africa only on the international plane.[12]

This judicial disagreement must give us pause. For we have, as yet, no definitive answer to the question as to how an approval of an international treaty by resolution in Parliament, binds South Africa.

According to FC s 231(2) '[a]n international agreement binds the Republic only after it has been approved by resolution in' Parliament, 'unless it is an agreement referred to in subsection (3)'.[13] In contrast to both the minority and majority judgment, I suggest that an approval, as required in FC s 231(2), does not bind South Africa at the international level. Thus, in order that the endorsement 'binds the Republic' to have legal effect, it must have domestic effect in terms of a good faith obligation. This requirement, in turn, has significant implications for the reasoning in *Glenister*.

II INTERNATIONAL LEVEL

A International treaty-making by the national executive

International treaty-making concerns the negotiating of and entering into treaties. The manner in which international treaties are negotiated and entered into is governed by the intention and consent of the parties.[14] In summary, the different steps of the international treaty-making process and their legal effects are as follows:

[8] For further questionable features of the judgment, see J Tuovinen 'What to Do with International Law? Three Flaws in *Glenister*' in this issue.

[9] *Glenister* (note 3 above) at para 181.

[10] *Glenister* (note 3 above) at para 182: 'An international agreement approved by Parliament becomes binding on the Republic. But that does not mean that it has no domestic constitutional effect. The Constitution itself provides that an agreement so approved "binds the Republic". That … has significant impact in delineating the state's obligations in protecting and fulfilling the rights in the Bill of Rights.'

[11] Ibid at para 195: '[The] duty in international law to create an anti-corruption unit that has the necessary independence … exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere.'

[12] Ibid at paras 89 & 92: '[A]n international agreement signed by the executive does not automatically bind the Republic unless it is an agreement of a technical, administrative or executive nature. To produce that result, it requires, second, the approval by resolution of Parliament … An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane.'

[13] Constitution of the Republic of South Africa, 1996 ('Constitution' or 'FC').

[14] See, eg, art 24 VCLT.

> The successful outcome of negotiations is the adoption[15] and authentication[16] of the agreed text. Authentication can be achieved for example by signature or incorporating the text in the final act of a conference.[17] The purpose of adoption and authentication is to agree on one final version of the text with which to work. It does not, by itself, express consent to be bound by the international treaty.

According to art 11 Vienna Convention on the Law of Treaties (VCLT[18]), consent to be bound by a treaty towards other signatory states to fulfil the treaty, to honour the provisions of the treaty and to execute the treaty in good faith[19] can be expressed by signature, ratification, acceptance[20] or accession. In addition, consent may be accomplished by any other means, if so agreed between the parties.[21] These conditions are worth spinning out in slightly more detail.

Where a treaty is not subject to ratification or acceptance, the signature of the national executive establishes consent to be bound towards other signatory states to fulfil the treaty.[22]

Where a treaty is subject to ratification,[23] a formal exchange or deposit[24] of the instruments of ratification, as provided for in the treaty, is necessary to bring the treaty into force. Formal international treaties usually require ratification or acceptance after their signature. When this occurs, the signature of South Africa's national executive will not establish consent to be bound, nor will it

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15 Art 9 VCLT: '(1) The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2. (2) The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.'

16 Art 10 VCLT: 'The text of a treaty is established as authentic and definitive: (a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or (b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.'

17 I Brownlie *Principles of Public International Law* (2008) 610.

18 Vienna Convention on the Law of Treaties (2005) 1155 *United Nations Treaty Series* 331, adopted 23 May 1969, entered into force 27 January 1980.

19 Art 26 VCLT places an obligation upon a state that has become a party to a treaty to execute the treaty in good faith.

20 Acceptance (or approval) is sometimes used in place of ratification and does not equal the procedure described in s 231(2) of the Constitution. According to art 2(1) VCLT acceptance, approval and accession 'mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty'. This is a matter of terminology not of substance. See P Malanczuk *Akehurst's Modern Introduction to International Law* (1997) 134.

21 See, eg, exchange of instruments constituting a treaty, art 13 VCLT.

22 Art 12 VCLT lists the circumstances under which a signature is binding. See MN Shaw *International Law* (2008) 910; United Nations *Yearbook of the International Law Commission* (1966) Vol II 196. In *Glenister,* the Court does not account for these situations 'the actions of the executive in negotiating and signing an international agreement do not result in a binding agreement'. *Glenister* (note 3 above) at para 95.

23 In general, treaties indicate whether ratification is required. Where no indication is present, the intention of the parties will have to be ascertained from the surrounding circumstances (art 14 VCLT). As to whether ratification is required or not see, eg, G Fitzmaurice 'Do Treaties need Ratification?' (1934) 15 *British Yearbook of International Law* 129; H Blix 'The Requirement of Ratification' (1953) 30 *British Yearbook of International Law* 352; Malanczuk (note 20 above) at 132.

24 Malanczuk (note 20 above) at 132: 'Usually treaties provide that instruments of ratification shall be deposited with a state or international organisation which is appointed by the treaty to act as the depositary.'

create an obligation to ratify the treaty.[25] It 'will mean no more than that the state representatives have agreed upon an acceptable text, which will be forwarded'[26] to the South African government for its internal decision as to whether to accept or reject the treaty.[27] Rather, according to art 18(1) of the VCLT, a signature of this ilk binds South Africa to refrain from acts which would defeat the object and purpose of the treaty, at least until such time as it has made its intention clear not to become a party to the treaty.[28]

According to art 2(1) of the VCLT, ratification, acceptance, approval[29] or accession[30] are in each case international acts 'whereby a State establishes on the international plane its consent to be bound by a treaty'. Thus, ratification of an international treaty by the national executive through formal exchange or deposit of the instruments of ratification binds South Africa at the international level. This international procedure must therefore be distinguished conceptually from an approval in the internal constitutional sense: a required consent by resolution in the South African Parliament. There is, however, an important link.[31]

For all forms of treaty consent, the same obligation of good faith applies. Countries must refrain from acts that are calculated to frustrate the objects of the treaty, 'pending the entry into force of the treaty and provided that such entry into force is not unduly delayed'[32].

The question of the identity of the representative of the state vested with international treaty-making power will depend upon each state's domestic (constitutional) law and varies from state to state.[33] International law leaves it to each state to determine who may negotiate and enter into treaties on its behalf.[34]

In *Glenister*, the Constitutional Court states that the national executive is assigned 'the authority to negotiate and sign'[35] international treaties, 'whereas the

[25] Brownlie (note 17 above) at 610.

[26] Shaw (note 22 above) at 911.

[27] South Africa has signed many treaties which have not been ratified (eg, the International Covenant on Economic Social and Cultural Rights (CESCR), signed 1994). According to the ICJ such signed but not ratified 'treaties may constitute an accurate expression of the understanding of the parties at the time of signature', *Qatar v Bahrain* ICJ Reports (2001) 40, 68.

[28] Confirmed in *Certain German Interests in Polish Upper Slesia*, PCIJ, Ser A no 7 (1926) 30; L McNair *The Law of the Treaties* (1986) 199–205; Brownlie (note 17 above) at 610; J Klabbers 'How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Towards Manifest Intent' (2001) 34 *Vanderbilt Journal of Transnational Law* 283. For example, the Clinton administration signed the Rome Statute of the International Criminal Court on behalf of the US (31 December 2000). On 6 May 2002, the Bush administration withdrew its signature and announced 'that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature.' Statement available at <http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm> (accessed on 30 July 2013).

[29] Malanczuk (note 20 above) at 132.

[30] Accession occurs when a state did not sign the treaty but formally accepts its provisions. It can also be the only means of becoming a party to an instrument eg a convention approved by the General Assembly of the United Nations, see eg Brownlie (note 17 above) 611; Shaw (note 22 above) 913.

[31] See Brownlie (note 17 above) at 610.

[32] Art 18(2) VCLT.

[33] See also Shaw (note 22 above) at 908.

[34] See, eg, *Cameroon v Nigeria* ICJ Reports (10 October 2002) (2002) 303, 429.

[35] *Glenister* (note 3 above) at para 89.

ratification … fall[s] within the province of parliament'.[36] However, according to FC s 231(1): 'The negotiating and signing of all international agreements is the responsibility of the national executive'. Thus, treaties are negotiated and signed by the national executive.[37] This provision does not differentiate further between the different steps of international treaty-making such as adoption, authentication, ratification, accession or acceptance and is silent regarding the respective competent authority. Ratification and accession of international treaties are mentioned in sub-s (3) merely with regard to the determination of whether approval by resolution in Parliament in terms of sub-s (2) is required or not.[38] In particular, sub-s (2) does not empower Parliament to ratify international treaties. It may only internally approve them as a precondition for the national executive to legally ratify them.[39] On an *argumentum e contrario*, therefore, sub-s (1) is to be understood as referring to all official acts on behalf of South Africa relating to international treaty-making, including expressing South Africa's intention and/or consent to be bound by, and to enter into an international treaty.

It follows that international treaty-making in South Africa falls exclusively within the competence of the national executive. Given that this power embraces the international procedure to endorse an earlier signature which brings the treaty into force by a formal exchange or deposit of instruments of ratification, the national executive has the power to ratify international treaties.

B Approval by Resolution in Parliament

In order to demonstrate that, pace the position of the *Glenister* Court,[40] approving a resolution in Parliament as required in FC s 231(2) has no binding effect at international level, the (legal) nature of such an approval demands clarification.

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[36] *Glenister* (note 3 above) at para 95. Dugard adopts a self-contradictory position regarding treaty-making power. On the one hand he argues that '[n]ow under the 1996 Constitution, the executive and Parliament *share* [treaty-making] power. In terms of s 231 the national executive has the responsibility of negotiating and signing international agreements' (Dugard (note 1 above) at 416 (my emphasis)). He seems to include the approval by resolution in Parliament in the treaty-making power, because he carries on to explain when an approval is required. On the other hand, he states: 'Section 231(1) confers on the 'national executive' the responsibility for the making of treaties[;] … the power to enter into treaties' (Dugard (note 1 above) at 60). The confusion by the Court and Dugard flow from the fact that both do not seem to differentiate between the official (external) ratification and the (internal) approval. The latter appears to hold true for H Strydom & K Hopkins 'International Law & International Agreements' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2008) (They, at the same time, accept exclusive treaty-making power of the national executive.) This confusion is further explained below.

[37] According to FC s 85: 'The executive authority of the Republic is vested in the President' and 'the President exercises the executive authority, together with the other members of the Cabinet'. In practice, the Department of International Relations and Cooperation is responsible for the drafting and the negotiation of treaties. See N Botha 'Treaty Making in South Africa: a reassessment' (2000) 25 *South African Yearbook of International Law* 69, 73, 74.

[38] FC s 231(3): 'An international agreement of a technical, administrative or executive nature, or *an agreement which does not require* either *ratification* or *accession*, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.' (my emphasis).

[39] See below II.B.

[40] *Glenister* (note 3 above) at para 91.

FC s 231(2) requires that the national executive obtain consent in the form of an approval by resolution in Parliament before endorsing the earlier signature and ratifying the international treaty.[41] More specifically, this paragraph determines that, should a treaty be subject to ratification (or accession), or not be of a technical, administrative or executive nature (in terms of sub-s (3)), approval by resolution in Parliament is necessary. Viewed in this light, FC s 231(2) and s 231(3) are provisions solely related to internal constitutional requirements of how South Africa effects ratification (or accession) and that they serve to secure parliamentary participation in the decision-making process when entering into rights and obligations at international level. As noted above, such internal procedural rules will vary from country to country. International law articulates no regulation as to how national legal systems are to give effect to ratification or accession.[42] We can now see why compliance with such internal constitutional requirements is utterly irrelevant for the entering into force of international treaties and does not influence whether an international treaty is binding for South Africa at the international level.

Let's illustrate the aforementioned point in greater detail: If Parliament approves an international treaty by resolution and the national executive does not, for whatever reason, endorse the earlier signature thereafter, then the international treaty does *not* bind South Africa at the international level. Only the formal exchange of the official instruments required for the ratification, accession or acceptance usually conveys the intention and consent to be bound by the treaty.[43] In terms of the language of FC s 231(2), no indication exists that the endorsement – 'binds the Republic' – was intended to commit South Africa towards other signatory states until the exchange of official binding ratification documents by national executives. The words '*only after* it has been approved' intimates that the drafters anticipated some commitment at some point in time by Parliament to the treaty concerned. That intimation is just that: and it buttresses my contention that the language of FC s 231 does not speak (clearly) to the matter.

Let's turn the problem around. If the national executive, as the representative of South Africa, ratifies a treaty without approval by resolution in Parliament, namely, without obtaining parliamentary consent, then it would constitute a violation of FC s 231(2)[44] and of their obligation to act in a collaborative manner in exercising its authority.[45] However, according to art 27 of the VCLT, South Africa cannot invoke a violation of its internal laws and procedures as justification for its failure to discharge its duties in terms of the international treaty in question

[41] A similar approach is followed in the US. The US Senate must approve all treaties. Malanczuk (note 20 above) at 65.

[42] See also Shaw (note 22 above) at 912 (States that the question is a matter for internal law alone and lies outside the scope of international law.)

[43] Cf *Glenister* (note 3 above) at para 91: 'The approval … conveys South Africa's intention … to be bound at the international level by the provisions of the agreement.' See II.A.

[44] Note that the Court could not establish whether the Corruption Convention was in fact approved by resolution in Parliament or not. See *Glenister* (note 3 above) at para 85, fn 64.

[45] See *President of the Republic of South Africa v Quagliani and Others* (note 2 above.)

and/or to comply with its international obligations to other states.[46] Thus, whether approved by resolution in Parliament or not, as long as the national executive acts in the scope of its full powers in terms of art 7 VCLT[47] and other signatory states can rely on the national executive being authorised to do so, the international treaty in question will bind South Africa at international level and consequently incur international responsibilities towards other signatory states to fulfil the objects of the treaty.[48] Where the national executive does not do so, it may be found in breach of international laws. The endorsement in FC s 231(2) that '[a]n international treaty binds the Republic only after it has been approved' can neither prevent a breach nor serve as a justification for the state's failure for discharging its international responsibilities.[49] A violation of FC s 231(2) by the national executive would only be subject to internal domestic procedures and remedies. The effect would extend no further than that.[50]

Again: It follows that an approval by resolution in Parliament has no binding effect at international level. To produce that result, only an official formal act by the national executive expressing consent is required.

C The Confusion: Merging of Approval in Parliament and Ratification by the Executive

The different results in *Glenister* – as opposed to the correct reading offered with regard to both the treaty-making power and the binding effect of an approval by resolution in Parliament at international level – are caused by a rather simple

[46] Art 27 is a codification of the general rule of international law 'that a state cannot plead a rule of or a gap in its own municipal law as a defence to a claim based on international law'; Malanczuk (note 20 above) at 64. The rule was confirmed in *Free Zones Case* by the PCIJ, series A/B, no 46, 167: 'It is certain that France cannot rely on her own legislation to limit the scope of her international obligations;' see L Weber 'Free Zones of Upper Savoy and Gex Case' (1995) *EPIL II* 483 et seq; also in *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* PCIJ (4 February 1932) Advisory Opinion, series A/B, no 44, 24.

[47] In more detail to the full powers of executive and statesman in art 7 VCLT, see eg Shaw (note 22 above) at 908. Any act relating to the making of a treaty by a person not authorised as required will be without any legal effect, unless the state involved afterwards confirms the act (see art 8 VCLT).

[48] But see *Glenister* (note 3 above) at para 95: 'Legislative action is required before an international agreement can bind the Republic.' Ibid at para 180: 'An agreement that the executive has concluded does not without more bind the Republic. For that to happen, the agreement must be approved by resolution in both the National Assembly and the National Council of Provinces.'

[49] Dugard (note 1 above) at 57. Dugard suggests that the prevention of being bound by an international treaty before an approval by resolution in Parliament is in fact the intention of sub-s (2). He further states that '[s]ection 231(2) is intended to establish that an international agreement binds South Africa on the international level only after it has been approved by both houses of parliament.'

[50] For this reason, (internal) domestic remedies were suggested by some scholars to exist in *Harkson,* where the President of South Africa unilaterally committed to extradite. See Strydom & Hopkins in Woolman & Bishop (eds) *Constitutional Law of South Africa* (note 36 above) at 30–10, fn 1. For more on this behaviour (unilateral binding commitments) as unconstitutional, see J Dugard & G Abraham 'Public International Law' (2000) *Annual Survey of South African Law* 114.

semantic confusion. The use of the wording 'ratified by resolution',[51] on the one hand, and of 'approved by resolution',[52] on the other, for the same action in Parliament (giving parliamentary consent to the ratification), indicates the incorrect merging of two distinct procedural acts necessary for the proper ratification (or accession) of an international treaty in South Africa. The first act concerns the act of the appropriate organ of state, which in South Africa is the *approval by resolution* in Parliament. It has no binding effect at international level.[53] The second act engages the international procedure that brings the treaty into force by a formal exchange or deposit of the instruments of ratification as defined in art 2(1) of the VCLT. In South Africa, the *ratification by the national executive* binds South Africa towards other signatory states.[54]

In *Glenister*, the international treaty in question, the Corruption Convention was ratified by the national executive.[55] It thus binds South Africa at the international level towards other signatory states. Irrespective of parliamentary approval, South Africa must fulfil the treaty, honour its provisions, and execute it in good faith.

D Why is this Distinction Important?

I assume that the endorsement 'binds the Republic' in FC s 231(2) confers a meaning to an approval by resolution in Parliament beyond the fulfilment of an internal constitutional requirement for the ratification process.

Assuming further, as one must do, that the drafters of FC s 231(2) were aware of the previously described sequences of legal effects, and did not discount these effects nor want to include legally ineffective wording,[56] the endorsement 'binds the Republic' cannot be understood as binding South Africa at the international level. The official formal act by the national executive expressing consent to be bound by the international treaty in question has this result. That proposition holds true whether the executive consent to be bound is approved by resolution in Parliament or not. However, the endorsement 'binds the Republic' needs to

[51] *Glenister* (note 3 above) at para 92: 'An international agreement that has been *ratified by resolution* of Parliament is binding on South Africa on the international plane. … An international agreement that has been *ratified by Parliament* under section 231(2), however, does not become part of our law until and unless it is incorporated into our law by national legislation.' See also para 96 'the *ratification* of an international agreement *by a resolution of Parliament*'. Strydom and Hopkins are similarly confused: 'Parliament then *ratifies them [treaties] by means of resolution*.' (Strydom & Hopkins in Woolman & Bishop (eds) *Constitutional Law of South Africa* (note 36 above) at 30–9). See also Dugard (note 1 above) 53–54 (With regard to s 231(2) in the Interim Constitution, he writes 'were to be *ratified by Parliament*' although the section in fact reads 'Parliament shall … be competent to *agree to the ratification* of or accession to an international agreement'. Similarly with regard s 231(3) in the Interim Constitution, he writes 'treaties *ratified* by resolution *of the two houses of Parliament*' although the section in fact reads '[w]here Parliament *agrees to the ratification* of or accession to an international agreement' (all my emphasis).

[52] *Glenister* (note 3 above) at para 89: 'To produce that result, it requires, second, the *approval by resolution* of Parliament' (my emphasis).

[53] In detail above under (II.B).

[54] I have covered this argument in detail in II.A above.

[55] The Court was not able to establish whether Parliament had approved the Convention, see above under (I) and (note 7 above).

[56] But see Dugard (note 1 above) at 57. Dugard claims that the intention of FC s 231(2) is 'to establish that an international agreement binds South Africa on the international level only after it has been approved by both houses of Parliament'.

have some significance *at the domestic level* if it is to be meaningful and not legally ineffective. I examine this proposition below.

III Domestic level

A Is there a Duty to Ratify an Approved International Treaty?

A duty for the national executive to secure ratification of an approved treaty by resolution in Parliament would not *necessarily* interfere with the separation of powers doctrine. After all, it is the role of the national executive to enforce the law as written by the legislature and interpreted by the judicial system.

Nevertheless, pursuant to FC s 231(3), should no ratification be required, an international treaty 'binds the Republic' upon the mere signature of an organ of the national executive without the need for parliamentary approval. Since no ratification is necessary, and assuming that the same wording in one section has the same meaning in the other, as a matter of logic, one cannot read the phrase 'binds the Republic' in sub-s (2) as imposing a duty upon the national executive to ratify an approved treaty.

B Does Endorsement Imply Incorporation of an Approved International Treaty into Domestic Law?

The simple answer is no. The endorsement 'binds the Republic' cannot, without more, have the effect of inferring implied incorporation of an international treaty into domestic law merely because Parliament has approved it.

Before 1994, South Africa followed a similar approach to that of the United Kingdom.[57] Treaties were negotiated, signed, ratified and acceded to by the national executive without requiring parliamentary approval.[58] In order to avoid the conferral of wide law-making powers on the national executive, and to secure parliamentary participation in the treaty-making process, international treaties, in most instances, did not become part of South African domestic law without some act of legislative transformation.[59]

In most of the democratic states 'outside the Commonwealth, the legislature, or part of the legislature, participates in the process of ratification, so that ratification becomes a legislative act, and the treaty becomes effective in international law and municipal law simultaneously'.[60] This approach was followed by South African in the Interim Constitution (IC).[61] According to IC s 231(3), an international treaty became part of South African law where Parliament agreed to its ratification, 'provided Parliament expressly so provides'. Therefore, Parliament was not

[57] In the UK, no approval is necessary, but incorporation into domestic law is required. See Malanczuk (note 20 above) at 65.

[58] Section 6(3)*(e)* of the Republic of South Africa Constitution Act 110 of 1983: 'The State President shall, subject to the provisions of this Act, have the power to enter into and ratify international conventions, treaties and agreements.' Regarding the need for legislation to transform a treaty into South African law pre-1994 in more detail, see Dugard (note 1 above) at 48, 53.

[59] See more detailed Dugard (note 1 above) at 48, especially fn 42.

[60] Malanczuk (note 20 above) at 66 referring to the US as an example.

[61] Act 200 of 1993.

required to incorporate an approved international treaty via legislative enactment for it to become part of South African law. The purpose of IC s 231 was to facilitate the incorporation of international treaties into domestic law[62] and 'to bring international law and domestic law in harmony with each other'.[63]

The Final Constitution departed therefrom. FC s 231(4) explicitly states that only those international treaties enacted into law by national legislation become part of South African law.[64] Thus, the drafters of the Final Constitution returned to the dualist pre-1994 position regarding the incorporation of treaties.[65] Yet the Final Constitution kept the requirement of parliamentary participation in the form of an approval during the ratification process. As a result, two forms of parliamentary control are now required before an international treaty becomes law in South Africa. Consequently, approval of an international treaty is not sufficient to imply incorporation into domestic law. If an international treaty alone is insufficient to imply incorporation into domestic law, it cannot have binding effect for domestic courts to enforce South Africa's international obligations. In other words, even if the *Glenister* Court would have been able to establish parliamentary approval of the Corruption Convention,[66] this approval alone would not imply incorporation into South African law.[67]

C Does a Duty Exist to Incorporate an Approved International Treaty into Domestic Law?

Some might argue that the endorsement 'binds the Republic' imposes a duty on the legislative to incorporate the approved treaty into domestic law. Does it?

According to FC s 231, the domestication of international treaties follows the dualistic approach. As has been shown above, in South Africa, the first step is the commitment by the national executive at the international level to fulfil the

[62] See Dugard (note 1 above) at 53.

[63] R Keightley 'Public International Law and the Final Constitution' (1996) 12 *South African Journal on Human Rights* 405, 412.

[64] See, confirmed, *Azapo v President of the Republic of South Africa* [1996] ZACC 16, 1996 (4) SA 671 (CC) at 688, 1996 (8) BCLR 1015 (CC) para 28: 'International conventions and treaties do not become part of the municipal law of our country, [and are not] enforceable at the instance of private individuals in our courts, until and unless they are incorporated into municipal law by legislative enactment.' See also *Progress Office Machines v SARS* [2007] ZASCA 118, 2008 (2) SA 13 (SCA) at para 6. According to John Dugard, three principal methods exist. Dugard (note 1 above) 55.

[65] Before 1994 treaties were negotiated, signed, ratified and acceded to by the national executive. There was no internal procedural constitutional requirement for the ratification of treaties. Only those treaties incorporated by Act of Parliament became part of South African law; see s 6(3)*(e)* of the Republic of South Africa Constitution Act 110 of 1983. The former socialist/communist countries followed a strict dualistic approach and required a specific national legislative act before international treaty obligations could be implemented and had to be respected by national authorities. See, eg, art 24 of the 1978 USSR Law of the Procedure for the Conclusion, Execution and Denunciation of International Treaties (1978) 17 *ILM* 1115. With regard to the constitutional reforms and changes regarding this strict approach, see Malanczuk (note 20 above) 68. The UK, India and Canada recognise direct domestic effect without legislative enactment. See Malanczuk (note 20 above) 66 and MW Janis *An Introduction to International Law* (1993) 96.

[66] See Section I above, and, in particular, note 7 above.

[67] The proposition was confirmed in *Glenister*. *Glenister* (note 3 above) at para 195.

international treaty, in due form, and if required, after Parliament's approval.[68] The second step is an Act of Parliament to incorporate the international treaty into South African law.[69]

The rationale for parliamentary participation in this process of domestication originates from the separation of powers doctrine: 'If treaties could become part of domestic law without any participation or endorsement from the legislature, then wide law-making powers would be conferred on the executive.'[70] Once the treaty is approved, Parliament has, in fact, participated in a domestic law-making process.[71] But one cannot, from the fact of such occasional participation, contend that Parliament possesses a duty to incorporate an approved treaty into domestic law.

FC s 231(4) makes it quite apparent that the Constitution does not obligate Parliament to incorporate approved and ratified international treaties into domestic law. Parliament must decide whether to incorporate a treaty and how to adopt appropriate domestic measures to comply with South Africa's international obligations. Even when a general duty obtains for states to bring domestic law into conformity with international obligations at the international level,[72] international law leaves the method of achieving this result to the domestic organs of a given state.[73] South Africa is free to decide how to translate its international obligations into South African law and to determine their legal status domestically. Other permissible mechanisms may be used to fulfil its international obligations. Incorporation by Parliament of the relevant international treaty is but one instrument. The endorsement 'binds the Republic', therefore, cannot infer a duty for the legislature to incorporate the approved treaty into domestic law.

In practice, international treaties are approved and ratified but not incorporated into domestic law unless domestic implementation is essential for compliance with South Africa's international obligations.[74] This current custom means that South Africa often becomes party to major human rights treaties without incorporating them into domestic law.[75] The consequence, it must be made clear, is that it is impossible for individuals to rely on the obligations found in the provisions in those treaties. This practice, John Dugard has written, 'represents an abandonment on the idealism of 1993 [as reflected in the Interim Constitution] that sought to bring international law and domestic law into harmony with each other.'[76]

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[68] See FC s 231(1), (2) and (3).

[69] See FC s 231(4).

[70] Strydom & Hopkins (note 36 above) at 30–9.

[71] For detail on the lengthy and comprehensive process of Parliament's decision to approve or to reject a treaty, see Meyersfeld (note 6 above).

[72] Customary international law and art 26 VCLT provide that treaties in force are binding upon the parties to them and must be performed by them in good faith.

[73] Malanczuk (note 20 above) at 64.

[74] D van Wyk et al *Rights and Constitutionalism: The New South African Legal Order* (1994) 192. Even the UN Charter has not been incorporated into domestic South African law.

[75] For example, the ICCPR was ratified by South Africa in 1998, but has not yet been incorporated into domestic law. E de Wet 'South Africa' in D Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (2011) 567, 578.

[76] Dugard (note 1 above) at 54, referring to Keightley (note 63 above) at 412.

D What Duty Do the Courts Have to Use an Approved International Treaty as a Tool for Constitutional Interpretation?

Another argument that might be notionally available is that the endorsement 'binds the Republic' would infer a duty to use an approved international treaty as a tool for interpretation. Two sections in the Final Constitution are designed to ensure that South African law is interpreted so as to comply with international law: FC s 39(1)*(b)* and FC s 233.[77]

FC s 39(1)*(b)* obligates the courts to take international law into account when interpreting the Bill of Rights. According to the Constitutional Court, this obligation ought to be extended to both non-binding and binding international law.[78] Since this obligation embraces international treaties to which South Africa is not party, South African courts are *already* obligated to take approved international treaties into account (even if not ratified by the national executive) when interpreting the Bill of Rights. No meaningful benefit would flow from attempting to stretch FC s 231's 'binds the Republic' in a manner that obliges courts to use approved treaties as a tool for interpretation. The scope of FC s 39(1)*(b)*, properly understood, makes such a reading unnecessary.

FC s 233 obliges our courts to 'prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law' when interpreting any legislation where a provision of the Bill of Rights is not at issue.

However, according to John Dugard, international treaties to which South Africa is not a party are transactions between others only (*res inter alios acta*) and, in the ambit of this section, 'may not be considered *qua* treaty, although [they] may be considered as evidence of a customary rule'.[79] This reading of FC s 232 and FC s 233 applies also to an international treaty approved by Parliament, but which the national executive has, for whatever reason, not ratified.[80] Under these circumstances, the endorsement 'binds the Republic' *might* add some weight to the contention that the courts must also use international treaties that have

[77] FC s 233 codifies the common-law presumption requiring a court to interpret legislation in compliance with international law. See, eg, *S v Basson* [2004] ZACC 13, 2005 (1) SA 171 (CC) at para 100. See also L du Plessis 'Interpretation' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2008) Chapter 32; GE Devenish *Interpretation of Statutes* (1992) 212.

[78] See *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 35: 'In the context of section [39(1)*(b)*] public international law would include non-binding as well as binding law.' With respect to non-human-rights treaties, see, eg, *Prince v President of the Law Society, Cape of Good Hope* 1998 (8) BCLR 976 (C) at 985C–D and *Prince v President, Cape Law Society* [2002] ZACC 1, 2002 (2) SA 794 (CC) at 824, 837, 851, 858–9. Somewhat confusing in this regard is the statement by Yacoob J in *Government of the Republic of South Africa & Others v Grootboom* [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) considering the use of international law for the right to housing in FC s 26: 'The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.' This is inaccurate. Even a binding international treaty is not directly applicable and serves merely as a tool for interpretation in form of either a consideration (s 39(1)*(b)*) or a preference to an interpretation consistent with international law (s 233) unless incorporated into South African law, see III.B.

[79] Dugard (note 1 above) at 63 referring to *S v Petane* 1988 (3) SA 51 (C).

[80] See II.B.

been approved, but not ratified, to arrive at a preferred interpretation. While this reading would in fact confer legal meaning to the endorsement, the scope of its application would be rather small indeed.

E Is there a Duty to Protect and Fulfil International Obligations in the Domestic Sphere when Intrinsic to the Constitution?

The majority of the Court's judgment presents a formula for the integration of international obligations into domestic law. Accordingly, approval in Parliament can – in addition to being 'directed at the Republic's legal obligations under international law'[81] – have domestic constitutional effect.[82] That is, international obligations entered into through treaty have to be fulfilled by the state in the domestic sphere when 'intrinsic to the Constitution itself'.[83]

The majority reaches this conclusion in two steps. The first step is to hold that the argued[84] international obligation established 'a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices'[85] and 'to create an anti-corruption unit that has the necessary independence'. According to the majority, this obligation is indeed intrinsic to the Constitution itself, 'and [the Constitution] draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere'.[86] The obligation would appear well on its way to becoming a constitutionally imposed requirement.

Identifying the heart of the Constitution constitutes the second step. The *Glenister* Court holds that FC ss 7(2) and 8(1) impose a positive obligation on the state and its organs to take reasonable and effective steps to respect, protect, promote and fulfil constitutional rights.[87] To *interpret* s 7(2) of the Constitution in order to determine what such reasonable and effective measures are, the majority then deploys FC s 39(1)*(b)* and orientates that determination towards the dictates of international law.[88]

Now, the use of FC s 39(1)*(b)* to *interpret* s 7(2) and to clarify its meaning *is* plausible. After all, the Court is obligated to consider international law 'when interpreting the Bill of Rights'. The Bill of Rights consists of all of Chapter 2 of the Constitution. FC s 7 is the first provision in chapter 2 and thus technically falls within the interpretive scope of FC s 39(1)*(b)*.

But should it?

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[81] *Glenister* (note 3 above) at para 181.

[82] Ibid at para 182: 'An international agreement approved by Parliament becomes binding on the Republic. But that does not mean that it has no domestic constitutional effect. The Constitution itself provides that an agreement so approved "binds the Republic". That … has significant impact in delineating the state's obligations in protecting and fulfilling the rights in the Bill of Rights.'

[83] Ibid at para 195. See also *Glenister* (note 3 above) at para 189.

[84] Whether there is in fact such an international obligation for South Africa or not, lies outside the scope of this article.

[85] *Glenister* (note 3 above) at para 175.

[86] Ibid at para 189.

[87] Ibid at paras 189–190.

[88] Ibid at para 192.

No harm is inflicted upon the language of s 7(2) where it is used as an operational provision to clarify the *substantive rights* in the Bill of Rights (FC ss 9–35).[89] It is not to be read as a substantive constitutional right in itself.

The *Glenister* Court's interpretation of FC s 7(2) does something entirely different. It ignores the fact that the state's obligation to take reasonable and effective measures is directed at the 'respect, protection, promotion and fulfilment' of '*the rights* in the Bill of Rights'.[90] In determining the relevant constitutional right, the majority refers to numerous principles in various parts of the Constitution to which the absence of corruption is inherent, such as principles of governmental accountability, transparency, budgetary accountability, responsiveness and openness.[91] Even though these principles could indeed amount to a constitutional commitment undertaken by the state to establish an independent and efficient anti-corruption mechanism, none of them are a *substantive right* in the Bill of Rights as required by FC s 7(2).[92]

Thus, even if an obligation to create an anti-corruption unit that has the necessary independence is 'intrinsic to the Constitution itself',[93] to rely on s 7(2) for its fulfilment is inconsistent with the express wording of the Constitution as it stands. Properly interpreted, therefore, the international obligation in question admits of no domestic effect by deploying FC s 39(1)*(b)*.

For FC s 39(1)*(b)* to do the work the *Glenister* Court has in mind, it would be obliged to identify in some detail the provisions in the Bill of Rights deleteriously effected by the absence of an independent and effective corruption unit. This additional work the *Glenister* Court does not do.

[89] On the relationship between FC s 7 and other provisions in the Bill of Rights, and the Constitution as a whole, see T Roux 'Democracy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 10; J Fowkes 'Founding Provisions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 6, 2014) Chapter 13; S Woolman & H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS 2007) Chapter 34; S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 262–269.

[90] My emphasis.

[91] *Glenister* (note 3 above) at para 176: 'Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public. In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy. Similar requirements apply to public procurement, when organs of state contract for goods and services. It is equally clear that the national police service, amongst other security services, shoulders the duty to prevent, combat and investigate crime, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law. In turn the national prosecuting authority bears the authority and indeed the duty to prosecute crime, including corruption and allied corrupt practices.'

[92] But see Meyersfeld (note 6 above) (Meyersfeld argues for a right to have a government oppose corruption which is '*the same* as a right to a transparent and accountable government'.)

[93] Note 11 above.

F Other Domestic Effect of an Approval in Parliament: Good Faith Obligation

As stated earlier, the endorsement 'binds the Republic' in FC s 231(2) must be interpreted to confer a meaning beyond the fulfilment of an internal constitutional requirement for the ratification process. Apart from the Court's potential obligation (with extremely limited scope of application) to engage approved but unratified international treaties when interpreting national legislation in terms of FC s 233,[94] the endorsement has no effect on the Court's interpretive obligations.

The endorsement 'binds the Republic' imparts domestic effect to a parliamentary approval in two other ways.

First, based on the rationale of art 18 of the VCLT, it confers a duty of the South African government and its organs to act in good faith domestically and to refrain from acts which would defeat the object and purpose of an international treaty until the legislative branch has made its intention clear as how to fulfil South Africa's international obligation.[95] (I assume, for purposes of argument, that the national executive has expressed its will to be bound by the international treaty and the entry into force is not unduly delayed.)

Second, the approval of an international treaty should be seen as a positive parliamentary affirmation to the citizens of South Africa that Parliament, subject to the provisions of the Constitution, will *act* in accordance with the approved treaty when exercising legislative power.

This understanding would contribute to the previously stated aim to bring international law and South African domestic law into harmony with one another. It is compatible with the separation of powers doctrine, facilitates the principles of governmental accountability, transparency, responsiveness and openness, and acknowledges the obligatory nature of international treaties (when ratified) to perform the treaty obligations in good faith (art 26 VCLT[96]). Moreover, it would not interfere with Parliament's discretion as to how best to give domestic effect to South Africa's international obligations. It would merely demand, by some means, that it does so.

IV Implications for the reasoning in Glenister

How do both the majority judgment and the minority opinion in *Glenister* fare after we have drawn these various and sundry conclusions about the appropriate role of international law in our constitutional framework? Not well. Not at all well.

Not well at all.

Recall that the judgment concerned the constitutional validity of the National Prosecuting Authority Act 56 of 2008 (NPAA Act) and the South African Police Service Amendment Act 57 of 2008 (SAPSA Act).[97]

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[94] See above III.D.

[95] See, generally, Shelton (note 75 above).

[96] Art 26 VCLT goes back to the customary international law principle that agreements are binding (*pacta sunt servanda).*

[97] *Glenister* (note 3 above) at introduction.

The minority found these two legislative enactments to be compatible with the Constitution, in particular with FC ss 179 and 205(3). First, the minority found that an approval by resolution in Parliament binds South Africa only on the international plane.[98] Second, it opined that even if the Corruption Convention had been incorporated into South African domestic law, it could have not been incorporated in a manner that creates constitutional rights and/or obligations.[99] The minority concluded that no constitutional obligation to establish an independent anti-corruption unit exists.[100] Although it confirmed that, as an interpretative tool, the Convention engages the requirements of the Constitution,[101] it does not apply FC s 233. That would have been the surest route to reading FC ss 179 and 205(3) in a manner consistent with the Corruption Convention obligations.

The majority judgment found the impugned laws incompatible with the Constitution because they violated international obligations that were 'intrinsic to the Constitution itself'.[102] It presented a formula for the integration of international obligations into domestic law by use of FC ss 7(2) and 39(1)*(b)*.

The analysis above suggests the following fundamental infirmities with the minority opinion and the majority judgment. The minority's argument that an approval by resolution in Parliament binds South Africa *only* on the international plane is incorrect for two reasons. First, as shown above, an approval does not bind South Africa at international level at all. Second, an approval must therefore have some domestic effect, as suggested above, in form of a good faith obligation. The majority errs in relying upon s 7(2) to give domestic constitutional effect to the Corruption Convention. An obligation that is 'intrinsic to the Constitution' does not equate to a justiciable *substantive right* in the Bill of Rights.[103]

An appropriate understanding of the role of international law in our constitutional framework could have been established by the *Glenister* Court in one of the following two ways:

First, the impugned laws could have been held inconsistent with FC s 205(3), read with FC s 179, of the Constitution, which provides that the objective of the national police service shall be 'to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'. Surely this set of ends would embrace the prevention, combat and investigation of corruption.[104]

[98] Note 10 above.

[99] *Glenister* (note 3 above) at para 102: 'Firstly, insofar as provisions in the [Corruption Convention] give rise to rights and obligations under domestic law, these rights and obligations flow from, and are limited by, the extent to which the domestic legislation incorporating the agreement includes those provisions. [Second,] [t]he incorporation of an international agreement does not transform the rights and obligations embodied in the international agreement into constitutional rights and obligations. It only transforms them into statutory rights and obligations that are enforceable in our law under the national legislation incorporating the agreement.'

[100] Ibid at para 113.

[101] Ibid at paras 96, 115.

[102] Ibid at para 195. Ibid at para 189.

[103] See III.E.

[104] See *Glenister* (note 3 above) at para 111.

When interpreting any legislation where the substantive provisions of the Bill of Rights are not at issue, FC s 233 must be applied. Thus, in order to determine whether FC s 205(3) of the Constitution requires creating an independent anti-corruption unit outside the SAPS, the Court is obligated to 'prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'. In other words, should more than one interpretation of FC s 205(3) be available, the one consistent with international law *has to be preferred*, not merely 'considered',[105] (as the more lax requirements of any interpretation of the Bill of Rights under FC s 39(1)*(b)* would demand).[106] As noted earlier, this article does not aim to evaluate the exact contours of South Africa's international obligations as imposed by the Corruption Convention. Let's assume that it does indeed call for an independent corruption service; then the Bill of Rights need never have entered the picture.

What FC s 233 demands is that where *lacunae* exist in the express wording of the Constitution, they ought to be interpreted in a manner that ensures the consistency of national legislation with international legal standards. Had the majority properly understood the purpose of FC s 233, a rather straightforward interpretation of the Corruption Convention would have yielded the desired result.

A second preferred basis for a finding of constitutional inconsistency turns on a correct understanding of FC s 231(2). Given that Parliament has approved the Corruption Convention, and therefore that it does have effect at the domestic level, and provided that the Corruption Convention does impose an obligation to establish an independent anti-corruption service, the impugned laws could be found inconsistent, on the one hand with the positive statement by Parliament to *act* in accordance with the approved agreement when exercising legislative power, and on the other with the obligation, derived from FC 231(2), to act in good faith domestically and to refrain from acts that would defeat the object and purpose of the Corruption Convention.

V Conclusion

The reasoning employed in the two judgments in *Glenister* provides us with an opportunity to identify a number of apparent points of confusion about when and how South Africa is bound by an international treaty and to reflect on the meaning of FC s 231(2).

First, international treaty-making in South Africa falls exclusively within the competence of the national executive. This competence encompasses the ratification of international treaties and is not shared with Parliament.

Second, an approval by resolution in Parliament as required in FC s 231(2) does not bind South Africa at the international level. It speaks merely to how

[105] For more on what it means to 'consider' international law, see Tuovinen (note 8 above).

[106] In *Glenister* (note 3 above) at para 115 the Court confirms that '[t]he [Corruption] Convention may be used as an interpretive aide in understanding the nature and scope of the constitutional obligation to effectively combat corruption and organised crime'. Despite the use of the wording *may* instead of *has to*, the Court seems to have FC s 39(1)*(b)*, but not FC s 233, in mind.

South Africa effects ratification internally. To produce that result, only an official formal act by the national executive expressing consent is required.

Given this article's reading of FC s 231(2), the final question is what form of domestic effect does an approval of an international treaty obligation have. This article has identified three possibilities. First, it could impose an obligation on the court called upon to interpret national legislation in terms of FC s 233 to include international treaties that are approved, but not ratified, in its interpretation.[107] Second, it could impose a duty upon the South African government and its organs to act in good faith domestically and to refrain from acts which would defeat the object and purpose of the international treaty.[108] Third, parliamentary approval could be interpreted as a positive statement that Parliament will act in accordance with the approved treaty when exercising legislative power.

So with respect to the question of the domestic effect of both an international obligation and parliamentary approval, a treaty that has been signed, approved, ratified and incorporated provides straightforward answers. An unincorporated treaty poses rather more nuanced questions about the role of international law under the Constitution: More nuanced, but not without meaningful and dispositive answers. Indeed, as the flaws in the *Glenister* majority judgment and the minority opinion reflect, these answers may be of greater import.

[107] See III.D.
[108] See III.F.