Domesticating International Standards: The Direction of International Human Rights Law in South Africa

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I Introduction

All nation states, to varying degrees, participate in the international political order. Such participation usually triggers an engagement with the global rules that comprise international law. This global system of laws often comes into tension with a state's national laws and policies. This dynamic relationship raises a challenge every nation state faces: How do the two systems of law – international law and domestic law – intertwine, and how should the state's courts, executive and legislature engage this system?

As a general matter, the friction between a state's law and international law often revolves around the rights of the individual. International human rights law requires states to respect a panoply of human rights. National laws and policies are quite often found to be inconsistent with international human rights law.

This article analyses this tension in respect of South Africa. South Africa's engagement with international law, both during and after apartheid, presents a most interesting evolution. This piece traces the arc from the antagonistic days of apartheid, when the state and its institutions denied the application of international law,[1] to the robust inclusion of international law in the Interim Constitution[2] to the more layered articulation of international law in the (Final) Constitution of the Republic of South Africa, 1996 ('FC').

In 2014, after 20 years of rich constitutional jurisprudence, we can now see an embryonic resistance to international law that characterises the responses of so many governments. South Africa is, in some *formal* respects, emulating the same antagonism towards international law as was present under apartheid. Of course, this article does not to compare the two regimes in a fashionably crude fashion: The difference between rule under a fascist, minority, racist government and life,

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[1] J Dugard 'The Conflict between International Law and South African Law: Another Divisive Factor in South African Society' (1986) 2 *South African Journal on Human Rights* 1.

[2] Constitution of the Republic of South Africa, Act 200 of 1993 ('Interim Constitution').

however challenging, under a new constitutional democracy expressly committed to the rule of law and human rights could not be starker. The objective, rather, is to be clear about the current positioning of international human rights law with our constitutional framework and the extent to which our own human rights standards in South Africa may be impeded by the persistent resistance to international norms in favour of national policies.

This article focuses primarily on FC s 231. FC s 231 regulates the implementation of treaty law in South Africa. This provision sets out the steps the executive and the legislature must take in order for a treaty to be part of South African law: (1) the executive signs the treaty; (2) Parliament approves the treaty in order for the treaty to bind the Republic; (3) Parliament must then enact legislation to make the treaty part of domestic or municipal South African law.

FC s 231 is, however, not alone. FC ss 232 and 233, when read with FC s 231, raise a host of thorny questions: (a) What is the distinction between *being bound* by an international agreement, on the one hand, and an international agreement *being law* in South Africa, on the other? (b) How does the answer to this first question square with the requirements of FC s 232, namely that customary international law 'is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'? and (c) How *should* our country engage the complex rubric of international human rights law?[3]

The nub of the international law question discussed in this article is as follows. If South Africa has signed an international agreement or treaty but has not yet incorporated the treaty's obligations into domestic law, what does that mean for the state's obligations vis-à-vis that treaty's content? In particular, where a treaty addresses human rights, can South Africa sign an undertaking to be bound vis-à-vis states at the international level and *not* vis-à-vis South Africans until it has been ratified by Parliament?

II The History of International Human Rights Law in South Africa

During apartheid, international law played a powerful role in undermining the South African government's policies.[4] International *human rights* law delineated global standards of racial integration, equality and democratic governance. International law became the touchstone by which South African lawyers

[3] Lilian Chenwi offers a third reason, which underwrites the arguments herein: namely, that international human rights law 'sets more precise norms than the Bill of Rights in the Constitution and provides clarity with regard to the adoption, content and interpretation of national laws'. L Chenwi 'Using International Human Rights Law to Promote Constitutional Rights: The (Potential) Role of the South African Parliament' (2011) 15 *Law, Democracy and Development* 314.

[4] See J Dugard *International Law: A South African Perspective* (3 Ed, 2010) 23–24. Dugard provides some rich examples. International law on the right to movement was used by anti-apartheid activists, Desmond Tutu and Robert Sobukwe, in challenging restrictions placed on their right to travel. See *Tutu v Minister of Internal Affairs* 1982 (4) SA 571 (T); *Sobukwe v Minister of Justice* 1972 (1) SA 693 (A). The human rights provisions of the Charter of the United Nations were used to challenge the segregation of South African cities along racial lines. See *S v Adams*; *S v Werner* 1981 (1) SA 187 (A). Political activists, kidnapped from neighbouring countries, argued that their arrest was contrary to the principles of international law. See *Nduli v Minister of Justice* 1978 (1) SA 893 (A); *S v Ebrahim* [1991] ZASCA 3, 1991 (2) SA 553 (A)).

operating in apartheid could refer and on which they could rely to challenge the validity and legitimacy of apartheid laws. Equally, with the passion and ideology that galvanised the democratic transition in the early 1990s, almost all principles of international human rights law were embraced, integrated and, at times, enhanced in the new South African constitutional order.[5]

International law, therefore, has been both the mirror to reflect the disgrace of apartheid and a source of law that has guided the construction of the current South African constitutional democracy. Given this positive reading of the relationship, and South Africa's maturation, it is intriguing to consider the current rapport between international human rights law and South African constitutional law.

The Constitutional Court regularly hears arguments that connect the position of international law vis-à-vis a particular provision of the Bill of Rights. FC s 39 provides that a court '*must* consider' international law when interpreting the Bill of Rights. This consideration, and its complexity, came to the fore in *Glenister v President of the Republic of South Africa* ('*Glenister*').[6] *Glenister*, the latest in a line of cases regarding the application of international law in South Africa, involved a challenge to the constitutionality of the legislative framework that created the Directorate for Priority Crime Investigation (commonly referred to as the Hawks) and the disbandment of its predecessor body, the Directorate of Special Operations (commonly referred to as the Scorpions). One of the key questions was whether this new legislative framework was consistent with South Africa's constitutional and international obligations to combat corruption.

The *Glenister* Court held that South Africa's constitutional obligations, read together with its regional and international undertakings, impose very specific obligations on government to have an anti-corruption unit with particular 'structural and operational attributes'.[7] A minority of the *Glenister* Court strongly opposed this interpretation of international human rights law (as well as majority's construction of the constitutional provisions at issue).

The tension between the closely split majority judgment and minority opinion reveals an increasing discomfort with international human rights law in South Africa. This review of the position of international human rights law and treaties in South African law is necessary not only from the point of view of legal doctrine, but also because the government's arguments in *Glenister* echo, in a

[5] See FC Chapter 2. FC s 9, for example, incorporates international standards of non-discrimination and expands these standards by including sexual orientation as an expressly prohibited ground of discrimination. See *Kaunda and Ors v President of the Republic of South Africa* [2004] ZACC 5, 2005 (4) SA 235 (CC) at para 35 (Chaskalson CJ notes that the 'Bill of Rights is extensive and covers conventional and less conventional rights in detail.') See also J Dugard 'Kaleidoscope: International Law and the South African Constitution' (1997) 1 *European Journal of International Law* 84.

[6] *Glenister v The President of the Republic of South Africa and Others* [2011] ZACC 6, 2011 (3) SA 347 (CC) ('*Glenister*'). This case is often referred to as '*Glenister II*'. *Glenister I* involved a challenge by Mr Hugh Glenister against a decision taken by Cabinet to initiate legislation dissolving the Directorate of Special Operations (commonly known as the Scorpions). The Constitutional Court, relying on principles of separation of powers, dismissed the application. See *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19, 2009 (1) SA 287 (CC). *Glenister II*, as described herein, is the case which I engage in this article.

[7] *Glenister* (note 6 above) at para 174.

decidedly disquieting register, the apartheid government's chauvinistic approach to international human rights law.

An important caveat is in order. I do not suggest that *all* international law should be incorporated into South African law. On the contrary; international law itself must be reviewed and interrogated for its own laissez-faire predisposition toward capitalist, mercantilist and authoritarian economic frameworks alike. The critique in this article focuses solely on international human rights law. The government's opposition to certain principles of international economic law, for example, may well be necessary to achieve the very values imposed by the international human rights law regime.[8] This article focuses solely on the legal position of international human rights law subsequent to the legal and political quagmires that characterise the arguments heard and the judgments rendered in *Glenister*.

III The Facts and Context of Glenister

The facts of, and background to, *Glenister* are mired in the conflict between former president Thabo Mbeki and current president, Jacob Zuma. The divergent ideologies of the two ANC leaders led to the early resignation of Mr Mbeki from The Presidency and the appointment of Mr Zuma as the president of the ANC. (the deputy president at the time became the interim leader of the country).

One of the points of conflict between Mr Mbeki and Mr Zuma was the role of the Scorpions. The Scorpions were an elite crime-fighting unit within the National Prosecuting Authority (NPA). They were armed with three unique characteristics. They possessed unique powers of search and seizure and interrogation (unique powers). They were mandated to combat organised crime and corruption (unique mandate). Although they were a policing and investigatory unit, they were not housed within the South African Police Service, but rather, in the NPA (unique location). The combination of these three characteristics gave the Scorpions the independence and the power to investigate allegations of criminal conduct within the police and the government without fear of intervention. The Scorpions were accountable to the Director of the NPA. The NPA imposed checks and balances on the unit's use of its statutory powers.[9]

During Mbeki's term of office, the Scorpions began investigations into Mr Zuma and his financial advisers. Mr Zuma proclaimed his innocence, accusing the Scorpions of malicious investigation and of being an instrument of persecution by Mr Mbeki. The Khampepe Commission of Inquiry, established to review the DSO, recommended that the Scorpions should remain within the NPA (albeit with certain adjustments).[10]

[8] The impact of international economic law on the development of human rights law and black economic empowerment at a national level came to the fore in the matter of *Piero Foresti, Laura De Carli v Republic of South Africa*, 2010, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651_En&caseId=C90>

[9] *Glenister* (note 6 above) at paras 139–140.

[10] Ibid at para 6.

Soon thereafter, at the ruling party's national conference in December 2007, two seminal political episodes transpired. First, the party passed a resolution that President Mbeki should step down as leader of the party. Mr Zuma would, as a consequence, take up the position of ANC president. Second, the party adopted a resolution calling for a single police service and the dissolution of the Scorpions. This decree became known as the Polokwane Resolution.[11]

Two years after the Polokwane Resolution, President Zuma enacted legislation that disbanded the Directorate of Special Operations (the Scorpions) and replaced it with the Directorate of Priority Crime Investigation (DPCI).[12] The mandate of the new unit, the Hawks, remained the same as that of the Scorpions. It retained the same powers. The key difference, however, was its placement in the governance of South Africa, moving from the national prosecuting authority to the police service.

Hugh Glenister, a South African citizen, challenged the new legislative framework. The core issue facing the Court was whether this new investigative unit was sufficiently independent to fulfil South Africa's obligation to prevent and combat corruption. This inquiry raised several questions. Was South Africa obliged to combat corruption under the South African Constitution and/or under international law? If this obligation did exist, how specific is that obligation?

IV The Majority Decision in Glenister

A Finding the Legal Source of the Obligation to Prevent and Combat Corruption

In the absence of express provisions in the Constitution, the Court had to determine whether the South African government is legally obliged to combat and prevent corruption. The *Glenister* Court ultimately decided this query in the affirmative. In reaching this conclusion, it spent a great deal of time considering the source of this obligation. The *Glenister* Court was presented with two options. The obligation to combat and prevent corruption could be read into the various provisions of the Constitution that reflect a commitment to transparency, effective governance and the enforcement of fundamental rights. Alternatively, the obligation could be said to emanate directly from very specific international law obligations to prevent and to combat corruption in specific ways, including the United Nations Convention against Corruption (Convention against Corruption),[13] as refracted to various provisions in the Constitution committed to the incorporation of international law into domestic law.

The applicant argued that South Africa was bound by international law and, specifically, by the international law standards of independence for a state's anti-corruption body.[14] The applicant first asked the *Glenister* Court to hold that South

[11] Ibid at para 8.

[12] Ibid at paras 1–2.

[13] United Nations Convention Against Corruption, 31 October 2003, 2349 *United Nations Treaty Series* 41 (A/58/422). South Africa signed the Convention against Corruption on 9 December 2003 and ratified it on 22 November 2004.

[14] *Glenister* (note 6 above) at para 17.

Africa has an obligation to create an independent anti-corruption unit to fight corruption.[15] It did so on the grounds that the Convention against Corruption is law in South Africa and requires the government to place the anti-corruption unit in the prosecuting authority as opposed to the South African Police Service (SAPS).[16] The respondent conceded that the government was obliged to combat and prevent corruption but that such obligations, and their contours, are to be found in the text of the Constitution. The respondent argued that the Constitution contained no specific requirement(s) regulating the composition or the location of the government's anti-corruption body.

The point of contention, therefore, was not whether the government has an obligation to combat and prevent corruption. Rather, the two crisp points for determination were: (i) What is the source of this obligation; and (ii) How does one interpret that obligation with regard to the location of an anti-corruption unit in our country's governance structures?[17]

The first question, the question of source, highlights the tension between national and international law. If the *Glenister* Court found international law as the source of the anti-corruption obligation, then the government would not only be obliged 'to establish and maintain an independent body to combat corruption and organised crime'.[18] In addition, such a unit would be obliged to have specific 'structural and operational attributes' to be said to be independent.[19]

The question of source, therefore, was a seminal precursor to the ultimate point of dispute: Were the Hawks independent enough? The analysis of these questions reveals a methodology of aligning national and international law in South Africa that should not be lost in the politically fraught debate around the Hawks.

B Question One: The Source of the Obligation to Create an Anti-Corruption Unit

The majority of the *Glenister* Court held that the legislative framework creating the Hawks was indeed unconstitutional. In placing the Hawks in the SAPS, the state was in breach of South Africa's obligations to create a genuinely independent anti-corruption unit.

The majority's point of departure, however, is based not on South Africa's international law obligations. The Court is unambiguous: The obligation to eradicate corruption *in a specific manner* lies firmly within the Constitution. The majority's reasoning is that the various components of the Constitution would be rendered meaningless *without* 'a concrete and effective mechanism to

[15] Ibid at para 17.
[16] Ibid at para 163.
[17] Ibid.
[18] Ibid.
[19] Ibid at para 174.

prevent and root out corruption and cognate corrupt practices'.[20] The principles of governmental accountability, transparency, budgetary accountability, and responsiveness are notions that have inherent to them the absence of corruption.[21] The right to have a government oppose corruption is *the same* as a right to a transparent and accountable government.

The Court confirmed that corruption is a 'scourge in our country',[22] 'poses a real danger to our developing democracy',[23] and undermines the ability of the government to 'meet its commitment to fight poverty and to deliver on other socio-economic rights'.[24] This connection between corruption and individual rights is further reinforced in the majority judgment of Moseneke DCJ and Cameron J as follows:

> There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.[25]

For the majority, therefore, an anti-corruption unit is inextricably linked to the fulfilment of our Bill of Rights.[26]

C Question Two: The Content of the Obligation to Create an Anti-Corruption Unit

This axiomatic point leads the Court to the second question. Is there a standard specified set of requirements for the creation of such a unit in order for it to meet the standard of independence inherent in this obligation? Put pithily: Is there a requirement that an anti-corruption unit should be placed outside the police?

The *Glenister* Court then engages international law 'to understand the content of the constitutionally imposed requirement of independence'.[27] This move brings squarely into focus the nature of South Africa's international law obligations.

The specific international law instrument vis-à-vis corruption is the Convention against Corruption. The South African government had signed this Convention but, at the time of the case, it had not yet been incorporated into South African law.

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[20] Ibid at para 175. See *Khumalo v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)(O'Regan reiterates basic point of constitutional interpretation: No provision of constitution can be rendered redundant as the result of the interpretation of another constitutional provision or meaningless after the disposition of a constitutional matter.)

[21] *Glenister* (note 6 above) at para 176.

[22] Ibid at para 57.

[23] Ibid.

[24] Ibid.

[25] Ibid at para 166.

[26] Ibid at para 177.

[27] Ibid at para 178.

This raises a number of questions. Could the Convention against Corruption be used to inform the content of the obligation to establish an anti-corruption unit? Was the Convention against Corruption *law* in South Africa? Was the Convention binding, in which case could its constitutive elements be used as a benchmark of the independence of the Hawks? Or was the Convention extraneous to South Africa's obligation because it had not yet been ratified by the state?

V The Constitutional Framework vis-à-vis International Human Rights Treaties

South African law contains a number of provisions regarding the role and status of international law in South Africa.

A Process of Treaty Implementation

What about treaties? Two procedures must be followed for the implementation of treaty law in South Africa. The state must first sign the treaty, at which point the state is bound by the treaty, at the international law. The treaty, however, does not become domestic or municipal law in South Africa until it is enacted as such by the legislature. The detail of, and distinction between, these two parts of treaty law are described below.

The critical constitutional provision for understanding the status and force of treaty obligations is FC s 231(2). This section provides that: '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 the agreement is a self-executing treaty.

Parliament acts as a 'check' on the executive. It must sign off on the executive's conduct under FC s 231(1) by signing international agreements. In practice, therefore, the executive may sign as many 'international agreements' as it deems fit. But these agreements will not be incorporated into South African domestic law unless and until they are approved by parliamentary resolution.

What, in practice, does this process entail?[28] According to the Rules of the National Assembly,[29] when Parliament's approval is sought for an international agreement in terms of FC s 231(2), 'a copy of the agreement must be submitted to the Speaker together with an explanatory memorandum'.[30] The explanatory memorandum (a) must address the history, objectives and implications of the agreement;[31] (b) must provide a legal opinion by a state law adviser 'as to whether the agreement is consistent with the domestic law of the Republic, including the Constitution, with the international obligations of the Republic and with

[28] This process was described in *President of the Republic of South Africa and Ors v Quagliani, President of the Republic of South Africa and Ors v Van Rooyen and Another; Goodwin v Director-General, Department of Justice and Constitutional Development and Others* [2009] ZACC 1, 2009 (4) BCLR 345 (CC) at paras 16–17.

[29] Rules of the National Assembly, available at <http://www.pmg.org.za/docs/2009/NArules0811.pdf>.

[30] Ibid at Rule 306(1).

[31] Ibid at Rule 306(2)(a).

international law in general';[32] (c) must identify any self-executing provisions;[33] (d) must proffer an account of the projected financial and other costs of the agreement for the state;[34] and (e) must supply any other information necessary to enable the National Assembly to render a decision.[35]

Once the agreement and explanatory memorandum is tabled (by the Speaker of the National Assembly),[36] the matter is then referred for 'consideration and report' to the relevant parliamentary portfolio committee or any other relevant parliamentary committee.[37] The committee investigates the subject of the international agreement, consulting with other portfolios if necessary, and then reports back to the National Assembly, stating whether it recommends approval or rejection of the treaty.[38] This decision is then placed on an Order Paper for decision.[39] In this way, Parliament is able to enquire into the suitability of the proposed international agreement for incorporation into South African law.

If Parliament is satisfied that the treaty is suitable for South Africa, then it will enact the necessary legislation. FC s 231(4) therefore imposes a further layer of parliamentary control by providing that an international agreement 'becomes law in the Republic when it is enacted into law by national legislation…'.

B The Tension in FC s 231 When Interpreting International Human Rights Treaties

The Constitution envisages a two-part process to South Africa's incorporation of international agreements. The first stage requires Parliament to *approve* the international agreement by resolution in order for it to *bind* the Republic on a domestic level. It then requires the national executive to ratify the international agreement in order for it to bind the Republic on an international level[40]. The second part requires an *Act* of Parliament in order for the international agreement to become *part* of domestic South African law.

What is the distinction between the Republic *being bound* by an international agreement, on an international level, on the one hand, and an international agreement *being law* in South Africa, on the other? And how does this square with FC s 232? FC s 232 provides that customary international law 'is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'? Once we answer these two technical questions, we can answer a third, perhaps more pertinent, inquiry: How *should* our country engage the complex rubric of international human rights law?[41]

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[32] Ibid at Rule 306(2)(b).

[33] Ibid at Rule 306(2)(c). For a discussion regarding self-executing provisions, see Dugard 'Kaleidoscope' (note 5 above) at 83.

[34] Rule 306(2)(d) of the Rules of the National Assembly (note 29 above).

[35] Ibid at Rule 306(2)(e).

[36] Ibid at Rule 307(1)(a).

[37] Ibid at Rule 307(1)(b).

[38] Ibid at Rules 307(2)–(3).

[39] Ibid at Rule 307(4).

[40] For further discussion see F Sucker 'Approval of an International Treaty in Parliament: How does Section 231(2) "Bind the Republic"?' (2013) 5 Constitutional Court Review 417.

[41] Chenwi (note 3 above) at 314.

C The Glenister Court's Approach to these Tensions

In *Glenister*, the majority of the Constitutional Court held that:

> [The duty to combat corruption] 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.[42]

This act of 'appropriation' is a refreshingly novel concept. At first blush, this notion seems to endorse a monist approach to incorporation of international law. But this appropriation, according to the *Glenister* Court, is not about incorporation of an externally defined international norm directly into South African law. Rather, the appropriation occurs via FC s 7(2), read together with FC s 8(1), which collectively impose an obligation on the government to take positive steps to respect, protect, promote and fulfil constitutional rights.

The Court then turns to international law to *interpret* what such reasonable effective steps might be. In other words, the majority does not recognise that international law alone could ground Glenister's claim. The Court uses international law to interpret the Bill of Rights as it is so mandated by FC s 39(1)*(b)*. It has done so since *S v Makwanyane*.[43] Instead of recognising that international law alone could ground Glenister's claim, the Court holds that the act of appropriation does not 'incorporate international agreements into our Constitution'[44] nor does it import some type of 'extraneous obligation, derived from international law and imported as an alien element into our Constitution: It is sourced from our legislation and from our domesticated international obligations and is therefore an intrinsic part of the Constitution itself and the rights and duties it creates.'[45]

The strong language of international law's 'otherness' may disappoint international law theorists committed to monism. However, the judgment accurately represents the constitutional position that, bar certain exceptions, treaties do not become law in South Africa until entrenched by an Act of Parliament. It also pushes back against the notion that the obligation to combat corruption is absent from the Constitution. As far as international human rights law is concerned, however, these dual propositions create a strange anomaly. South Africa may sign international human rights law treaties and thereby undertake to protect the human rights of South Africans. But these rights will not be enforceable by citizens of South Africa 'unless and until' Parliament passes the necessary enacting legislation (or you have a set of wise, sympathetic judges

[42] *Glenister* (note 6 above) at para 189.

[43] *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC) at paras 13–14 (The Court notes that public international law may be used 'as tools of interpretation. International agreements and customary international law accordingly provide a framework within which the Bill of Rights can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate case, reports of specialized agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]'.)

[44] *Glenister* (note 6 above) at para 195.

[45] Ibid at para 197.

who understand the need to integrate international law and constitutional law in a politically tense climate). While it is true that South Africa, when ratifying these agreements, will be bound vis-à-vis other states, this is meaningless in respect of human rights treaties which are enforced, not by other states (although technically this is possible) but by individuals in domestic courts.[46]

VI To Whom is the State Responsible when Ratifying a Human Rights Treaty?

This potential frustration raises a fundamental question of international human rights law in terms of the South African Constitution: To whom is the state responsible under international law? If our state is only responsible under international human rights law to other states, then the bi-partite process of FC s 231 is an acceptable approach to international human rights law. However, if a state is responsible not only towards other states but also individuals, it then becomes less clear whether the staggered approach of FC s 231 to treaty incorporation makes sense. Can we somehow find a more appealing degree of consistency between the principles of international law and the South African Constitution's approach to its incorporation? Put differently, does a constitutionally compliant, more streamlined approach exist for the incorporation of human rights treaties into South African law? It is this question to which I now turn.

A State Responsibility in International Human Rights Law: State Responsibility to the Individual

While traditionally international law only bound states vis-à-vis other states, it has morphed into a system which now also binds the state vis-à-vis individuals.[47] A brief history of state responsibility supports this article's contention that South Africa may have to adopt a more robust approach to international human rights law and its incorporation into our domestic or municipal law.

Historically, international law was rooted in and limited by the notion of state sovereignty. What happens within the boundaries of a state is the exclusive concern of that state. Two narrow exceptions obtained. In the context of diplomatic relations and the protection of foreign nationals living abroad, states had an obligation to respect the rights of individuals.[48] These rights, however, flowed from the legal fiction that the individuals in question constituted part of the state and that a violation committed against the foreign national constituted a violation against the state from which that individual hailed.[49]

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[46] See briefly HJ Steiner & P Alston *International Human Rights In Context* (2000, 2nd edition) 987, noting that the 'international human rights system does not typically place delinquent states in political bankruptcy and through some form of receivership take over the administration of a country in order to ensure the enjoyment of human rights'.

[47] See MN Shaw *International Law* (6 Ed, 2008) 131 and BC Meyersfeld *Domestic Violence in International Law* (1 Ed, 2010) 195.

[48] See Steiner & Alston (note 46 above) at 82.

[49] Meyersfeld (note 47 above) at 195–196 and 258. For an extensive and still relevant discussion of these principles, see AV Freeman *The International Responsibility of States for Denial of Justice* (1938) and C Eagleton *The Responsibility of States in International Law* (1928). See also Shaw (note 47 above) at 131.

In the late 19th to early 20th century, the state-centric nature of international law began subtly to shift.[50] Human rights law and humanitarian intervention were some of the first areas of international law to recognise the rights of the individual, especially in cases 'in which a State maltreats its subjects in a manner which shocks the conscience of mankind'.[51] These doctrines introduced the notion that a state could be liable, not only for conduct committed against another state, but also for conduct committed against a state's own citizens. This shift led to the question as to whether an individual possesses, or can possess, rights given to her or him directly by customary international law or treaties.[52] Underlying this movement was the issue of so-called 'fundamental rights' of the individual. As fundamental, these rights could be protected by international law as against the sovereign power of the state.[53] John Locke had originally articulated this duty as the government's obligation not to act capriciously towards its citizens.[54]

This change reached its pinnacle after the Holocaust. The establishment of the United Nations created a set of supra-standards of political and legal instruments which spoke, not only to states, but also to the rights, interests and freedoms of the individual. According to Lauterpacht, the Charter of the United Nations finally recognises the dual proposition that 'the individual human being …[is] entitled to fundamental human rights and freedoms' and 'fundamental human rights [are] superior to the law of the sovereign State'.[55] The reverberation of 'never again' resulted in the tapestry of the Universal Declaration of Human Rights in 1948[56] and, in 1966, the two rights covenants, namely the International Covenant on Economic, Social and Cultural Rights[57] and the International Covenant on Civil and Political Rights.[58] These treaties, together with authoritative statements from the International Court of Justice, confirmed that states are not the only relevant actors in international law and that individuals can acquire international rights under treaties.[59]

The most authoritative guidance on the responsibility of states is the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles).[60] The ILC Articles provide a

[50] H Lauterpacht *International Law and Human Rights* (1968) 32.

[51] Ibid.

[52] Ibid. See also Freeman (note 49 above) at 18.

[53] Lauterpacht (note 50 above) at 49.

[54] J Locke *Questions Concerning the Law of Nature with an Introduction* (text and translation by R Horwitz, J Straus Clay and D Clay) (1990) 213.

[55] Lauterpacht (note 50 above) at 38.

[56] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).

[57] International Covenant on Economic, Social and Cultural Rights (CESCR) (adopted 16 December 1966, entered into force 3 January 1976) 993 *United Nations Treaty Series* 3.

[58] International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 *United Nations Treaty Series* 171.

[59] Lauterpacht (note 50 above) at 23.

[60] International Law Commission, *Report of the International Law Commission on the Work of its Fifty-Third Session: Draft Articles of Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) UN Doc A/56/10, 43 (ILC Articles). For commentary regarding the status in international law of these articles, see J Crawford *The International Law Commission's Articles on State Responsibility* (2002); O Schachter 'United Nations Law' (1994) 88 *American Journal of International Law* 5; and Meyersfeld (note 47 above) at 194.

comprehensive description of the circumstances in which a state is responsible for internationally wrongful acts, the obligation of states to remedy such acts and applicable reparations. The introductory commentary to the ILC Articles confirms that the articles apply irrespective of 'whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole'.[61] Article 33(1) of the ILC Articles provides that a delinquent state may be responsible to one or more states or to the international community as a whole but that this is 'without prejudice to any right, arising from the international responsibility of a state, which may accrue directly to any person or entity other than a State'. Therefore, where a state's international obligation is owed to its citizens, those citizens may invoke the principles of state responsibility to compel states to remedy their breach of the duties in question. The former special rapporteur on state responsibility, James Crawford, points out that:

> A State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights.[62]

Although not beyond contention,[63] it is now largely accepted that an individual may be a subject of international law, bearing both rights and responsibilities.[64]

Interesting precedent for this statement exists in the European Court of Justice (ECJ). In *Francovich*, the ECJ asked whether, under the system of European Community Law, a private individual who has been adversely affected by the failure of a member state to implement a directive (Directive 80/897) is 'entitled to require the State itself to give effect to those provisions of that directive which are sufficiently precise and unconditional, by directly invoking the Community legislation against the Member State in default so as to obtain the guarantees which that State itself should have provided'.[65] In contrast, the South African Constitutional Court, as in *Glenister*, has not incorporated the provisions of international or regional law into its reasoning. It has relied on FC s 7(2) (correctly) to reflect the international principles of 'respect, promote and protect' human rights.

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[61] ILC Articles (note 60 above) at para 5 of Commentary.

[62] Crawford (note 60 above) 209.

[63] See Lauterpacht (note 50 above) at 5 (Describes the debate regarding the status of individuals in international law and whether they may be subjects of the law of nations). See, generally, JH Currie *Public International Law* (2008) 18 (Argues in favour of the status of an individual as a subject in international law). See also A Randelzhofer 'The Legal Position of the Individual under Present International Law' in A Randelzhofer & C Tomuschat (eds) *State Responsibility and the Individual: Reparations in Instances of Grave Violations of Human Rights* (1993) 231, 235.

[64] Crawford (note 60 above) at 5.

[65] See Case C-6/90 *Andrea Francovich and Danila Bonifaci v Italian Republic* 1991 ECR I-5357, 31. The European Court of Justice held that, based on broad principles of state responsibility, individuals may be entitled to redress, since 'the possibility of obtaining redress from the Member State is particularly indispensable … where the full effectiveness of Community rules is subject to prior action on the part of the State … It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.'

B State Responsibility in International Human Rights Law: State Autonomy versus International Human Rights Obligations

It is a trite principle of international law that 'a state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law'.[66] Therefore, if a state is responsible under international law both to other states *and* to individuals, then the prohibition against using internal mechanisms as an excuse not to be bound should apply both when a claim is made against a delinquent state by another state *and* when a claim is made by an individual citizen. *Glenister* reflects the second type of claim.

When a government signs a human rights treaty, it is bound internationally to perform the obligations contained therein and not to act in any manner that is inconsistent with the treaty provisions.[67] South Africa should not be able to say (as minority's logic would have it): We are bound to comply with the Convention against Corruption vis-à-vis Germany or the United Kingdom or any other state signatory of the Convention against Corruption, but not vis-à-vis our own citizens.

One cannot ignore, however, the importance of the separation between the three arms of government. The executive dominates this domain in a manner that it does not enjoy with respect to wholly domestic affairs. The minority opinion in *Glenister* speaks emphatically to the separation of powers and the importance of judicial abstinence in questioning political judgments.[68]

Ngcobo J explains the practicalities of this separation. He expresses the view that the government's judgment to transfer the anti-corruption unit out of the NPA and into the SAPS 'is political and may not always coincide with views of social scientists or other experts'.[69] This statement is a truism. It does not, however, entirely denude the Court of its responsibility to challenge political decisions in constitutional matters, especially in respect of international law.[70]

The Court will always struggle with the balance between executive deference versus judicial oversight of the executive. This is a tension that is designed into the fabric of a constitutional democracy and this debate will be the benchmark of a successful and robust court.

When entering this debate, we must be wary of undue deference. An over-simplification of the judicial deference to the executive 'may yield cramped results' in constitutional decision-making and this includes the application and

[66] Article 27 of the Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 1155 *United Nations Treaty Series* 331.

[67] Article 18 of the VCLT.

[68] *Glenister* (note 6 above) at para 67.

[69] Ibid.

[70] FC s 167(5) provides that the Constitutional Court may decide whether an Act of Parliament or conduct of the President is constitutional. On the ability of courts to challenge unconstitutional acts undertaken by the executive beyond our border, or its obligations to vouchsafe the rights of foreign nationals within our borders, see S Woolman 'Application' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS 2006) Chapter 31.

integration of international human rights law in South Africa.[71] To be clear, the primary responsibility for the protection of vulnerable groups properly rests with the executive and the legislature, and, according to the clear separation of powers imposed by our constitutional framework, it is proper that policies for their protection should be determined by the elected arms of government. As Ngcobo J writes:

> There is no requirement that the state must use the best method possible or the most effective methods to combat crime including corruption. While this is an ideal to strive for, it is not a constitutional requirement. The state must 'enable the police service to discharge its responsibilities effectively.' That is all that the obligation entails.[72]

Ncgobo J is correct that international law does not prescribe overly-specific mechanisms to combat corruption and that the Constitution is not prescriptive in this regard. He is correct in maintaining that the Constitution does not specifically require that an anti-corruption unit be placed in the NPA versus SAPS. But the Constitution does not dispose of most of the public law or private law disputes prior to their arrival before a court of law.

For example, the Constitution did not say that Nevirapine must be supplied to South Africans living with HIV/AIDs (*Treatment Action Campaign*) or that the death penalty is unlawful (*Makwanyane*). And yet in both matters, and with respect to hundreds of other specific laws and government policies, the Constitutional Court has not only found policies unconstitutional but also directed the government to adopt alternative policies.[73]

Ncgobo J's position that the government is not bound to adopt the *most* effective methods of implementing its human rights obligations is susceptible to challenge.[74] International law increasingly requires a standard of efficacy when implementing human rights obligations. For example, General Comment 9 on the domestic application of the International Covenant on Economic, Social and Cultural Rights engages the key principle that a state must use the most effective method at the domestic level to implement the provisions of the ICESCR.[75] The means of domestication 'should be consistent with the full discharge of its

[71] See D Davis & K Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 2 *South African Journal on Human Rights* 15.

[72] *Glenister* (note 6 above) at para 111.

[73] *Minister of Health and Others v Treatment Action Campaign (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC) and *Makwanyane* (note 43 above).

[74] See, eg, S Woolman & H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS 2006) Chapter 31 citing *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18, 1998 (2) SA 38 (CC), 1998 (1) SACR 227 (CC), 1997 (12) BCLR 1675 (CC) (As the Constitutional Court recognised in *Sanderson*, rights and remedies under the South African Constitution are both linked and flexible. Justice Kriegler, on behalf of the *Sanderson* Court writes: 'Our flexibility in providing remedies may affect our understanding of the right.' At the same time, the Court has acknowledged that its role, in Bill of Rights litigation, does not give it the power to supplant a government policy with what it believes to be the optimal solution to a social problem. The government's policy need be only reasonable and justifiable.)

[75] Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights Draft General Comment No 9: The domestic application of the Covenant, adopted at the 51st meeting on 1 December 1998 E/C.12/1998/24 3 December 1998 (General Comment No 9).

obligations by the State party'[76] and 'account should be taken of the means which have proved to be most effective …in ensuring the protection of other human rights'.[77]

At the very least, a state must give effect to its international obligations in a manner that is adequate and effective. To the extent that a state uses means that differ from established effective methodologies, such differences must be justified.[78] This approach resonates with our own limitations clause jurisprudence that requires a prima facie violation of a fundamental right to be a reasonable and justifiable (but *not perfect)* abrogation of constitutional obligations.[79] Similar statements exist in respect of the right to education. General Comment No 13 provides that the right to education it should be 'interpreted to be of continuing nature for moving as expeditiously and effectively as possible towards the realization of this right and is of immediate effect'.[80] The progressive realisation of the right to education has been interpreted to mean that 'States parties have a specific and continuing obligation "to move as expeditiously and effectively as possible" towards the full realization of article 13'.[81]

As regards corruption, international human rights law has articulated clear principles regarding best practices. There is no reason why the South African government should not meet – and indeed surpass – international best practices.

While a commitment to the separation of powers is part of the intrinsic structure of the Final Constitution, one must take care that this fundamental feature of our political order does not undermine the text's clear commitment to fundamental human rights and values.[82] Yet even the *Glenister* Court majority judgment, with its singularly nuanced approach towards the incorporation of international anti-corruption standards, engages the language of deference to executive power in the field of foreign relations. It describes the independence requirement of an anti-corruption unit as not some type of 'extraneous obligation, derived from international law and imported as an alien element into our Constitution'[83] but rather an intrinsic feature of our basic law. This may be rhetorical but it speaks to a genuine divide that the Court perceives between that which is truly South African and that which is foreign. Future cases will test the spirit in which those words were written.

[76] Ibid at para 5.

[77] Ibid at para 7.

[78] Ibid at paras 6–8.

[79] See S Woolman & H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (note 74 above).

[80] General Comment No 13 on the Right to Education (Art 13 of the International Covenant on Economic, Social and Cultural Rights) 3.

[81] Ibid at para 44.

[82] For a theory on how to square the foundational commitment to a constitutional scheme predicated on the separated of powers with a text equally committed to promotion, protection and fulfilment of fundamental rights, see J Fowkes 'Founding Provisions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 6, 2014) Chapter 13. For other recent theories, see T Roux *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013); S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013).

[83] Ibid at para 197.

VII An Assessment of International Law: A Non-Coercive Compliance Theory

Perhaps one of the strongest mechanisms for integrating international human rights law into domestic law is not through the formal portals of courts and treaties but rather through amorphous but still powerful techniques of naming and shaming. Elsewhere I have referred to these powerful techniques of naming and shaming as the non-coercive compliance theory. This theory relies on an array of international and transnational processes through which international law permeates states' boundaries, influencing their conduct vis-à-vis other states and vis-à-vis their own citizens.[84]

The non-coercive compliance theory distinguishes between compliance that stems from force or compulsion and compliance that flows from enlightened self-interest.[85] Of course, not all states care about their reputation. Many states are quite satisfied to be rogue states. (Interestingly enough, many rogue states seek to justify their actions with regard to international law standards). Outliers notwithstanding, most states engage in some manner of international or diplomatic engagement in which they would like to be presented in the best possible light. Such mechanisms encompass reporting and supervision procedures. Periodic country reports are reviewed by UN treaty monitoring committees. On other occasions, special rapporteur assessments and committee reports note discrepancies between the requirements of international law and state conduct. These 'soft', non-coercive assessments of compliance are augmented by complaints procedures for individuals or states under optional protocols.[86]

The name and shame approach is by no means meant to supplant having principles of international human rights law made justiciable at the national level.[87] But as Louis Henkin eloquently observes:

> The purpose of international law is to influence states to recognise and accept human rights, to reflect these rights in their national constitutions and laws, to respect and ensure their enjoyment through national institutions and incorporate them into national ways of life.[88]

For the moment international law works in South Africa. Its objectives and 'essence' are, through one mechanism or another, incorporated into the Constitution and South African domestic law. But we must be clear that it does so *without* the direct application or incorporation of human rights treaties. The success of international law can best be traced to this country's liberation as well as its amorphous spirit of transformation.

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[84] See Meyersfeld (note 47 above) at 253.

[85] For a discussion of the motives that compel states to comply with international law, see Koh's discussion of Chayeses' managerial model versus Franck's fairness theory. HH Koh 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599, 2610–2611.

[86] Schachter (note 60 above) at 10–16. See also Meyersfeld (note 47 above) at 257.

[87] See F Viljoen *International Human Rights Law in Africa* (1995) 8.

[88] L Henkin 'International Human Rights and Rights in the United States' in T Meron (ed) *Human Rights in International Law: Legal and Policy Issues* (1984) 25.

Ideally, South Africans should be able to found a claim based on the provisions of a human rights treaty which has been concluded by the executive – even in the absence of parliamentary approval. The *Glenister* Court could have interpreted the provisions of FC s 231 as demanding compliance with international law (as it is required to do by FC s 39(1)*(b)* read together with FC ss 230–233) and held that South Africans have a right to be free from corruption and that that right exists in part because of the treaty obligations undertaken by the South African government. When the government signs and ratifies a human rights treaty, its purport and object should distinguish it from other treaties and bind the government not only vis-à-vis other states but also at home, in its own courts – even if it has not yet been adopted by Parliament.[89] Fortunately, as noted above, FC s 39(1)*(b)* continues to ensure that the government's international commitment to human rights remains a reality, domestically, for those living in South Africa, at home.

VIII Conclusion

The Constitutional Court remains dedicated to finding solutions to disputes in our basic law and extant domestic law rather than international law. Believers in the power of international law may find this approach frustrating. However, it may well be the appropriate approach: Especially in politically volatile disputes in which courts are asked to intervene.[90] Notwithstanding this preference for the domestic, the Court has refined the use of FC s 39 in *Glenister*.[91] The Court has set a precedent for the grounding of a government obligation in the Constitution, while creating a clear pathway for the specificity and content of the obligation to be understood with reference to international law standards, including in respect of treaties which South Africa may have signed but not yet incorporated.

The Court did not need international law to found the obligation to prevent and combat corruption. It did, however, need international law to interpret the reach and content of that obligation. And this is perhaps the most powerful take home point about *Glenister*: International law is at its most powerful when it can be used, consistent with national law, to manoeuvre legal justice around the antics of powerful political factions that characterise any government regime.

[89] See further Sucker (note 40 above).

[90] For good reasons why the Court shied away from such intervention during a period when it had to establish and to protect its own institutional legitimacy, see T Roux *The Politics of Principle* (note 82 above).

[91] For a more extensive, nuance and critical analysis of the use of the term 'must consider international law' in FC s 39(1)*(b)* in *Glenister*, see J Tuovinen 'What to Do with International Law? Three Flaws in *Glenister*' (2013) 5 *Constitutional Court Review* 435.