What to Do with International Law? Three Flaws in *Glenister*

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I Introduction

In *Glenister v President of the Republic of South Africa & Others (Helen Suzman Foundation as Amicus Curiae),* the Constitutional Court was faced with questions of great legal and political moment.[1] As we shall see, the answers to these questions turned largely on the meaning of a single word: 'consider'.[2]

At issue was the constitutionality of the controversial disbandment of the Directorate of Special Operations (known as the 'DSO' or, more popularly, as 'the Scorpions') and their replacement with the Directorate for Priority Crime Investigation (the 'DPCI' or 'the Hawks'). The problem, that split the Court five to four, was the weight to be given to 'consider' in FC s 39(1)*(b)*.[3] The text states that when interpreting the Bill of Rights – and applying it to any law or conduct – a court 'must consider international law'. Much of the disagreement between the majority and minority can be attributed to their different ways of understanding this requirement.

The purpose of this comment is to reflect upon the arguments made and conclusions reached in *Glenister* and to answer three discrete, if related, questions:

(i) What is meant by 'must *consider* international law?
(ii) What kind of arguments can and must be made in terms of international law when adjudicating Bill of Rights disputes? and
(iii) Did the *Glenister* Court use international law in a satisfactory manner?

A Relevant Background

In many respects, *Glenister* presents a relatively ordinary instance of the use of international law in the interpretation of a provision of the Bill of Rights. Two Acts – the National Prosecuting Authority Act 56 of 2008, and the South African Police Service Amendment Act 57 of 2008 – had the effect of disbanding the DSO and establishing the DPCI. The applicant levelled a number of challenges against

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[1] *Glenister v President of the Republic of South Africa and Others (with the Helen Suzman Foundation as amicus curiae)* [2011] ZACC 6, 2011 (3) SA 347 (CC)('*Glenister*').

[2] On the significance of *Glenister* and other similar cases in both the political and constitutional law domain see S Choudhry '"He had a mandate" The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1.

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

the constitutionality of the promulgated laws and the institutions dismantled or created.

The majority judgment held that s 7(2) of the Constitution ('FC'), read in conjunction with provisions on the status of international law in municipal law (FC s 231) and the constitutional obligations of the security services (FC s 205), imposed a positive obligation on the state and its organs 'to provide appropriate protection to everyone through laws and structures designed to afford such protection'[4] and that the steps taken to realise this obligation must be reasonable (and not merely rational).[5] In particular, the *Glenister* Court found that international law requires that states create an independent anti-corruption unit and that FC s 7(2), read with FC s 205 and FC s 231, supports its conclusion that the state's FC 7(2) obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights' is filled out and buttressed by South Africa's international law duties as filtered through the Constitution.[6] It considered a number of factors in reaching this conclusion: the structural and operational independence of the police and prosecutorial authority,[7] as well as the public perception thereof.[8] The majority held that the DPCI fell short in two primary regards: the lack of security of tenure and remuneration of the head of the unit, and the overweening degree of political control. It consequently declared the impugned legislation unconstitutional.[9]

The minority in *Glenister* agreed with the majority that FC s 7(2) imposes a duty on the state to take positive measures to promote the rights in the Bill of Rights. However, it reasoned that the obligation to prevent and to combat corruption must first and foremost be understood in terms of FC s 205.[10] Subsections 205(2) and 205(3), read together, require the state to 'establish the powers and functions of the police service' in order to 'enable the police service to discharge its responsibilities effectively'.[11] These two desiderata require that the police service be free from undue influence – at least to some degree.[12] In the minority's view, international law should then be used to interpret these obligations alone, and not to give independent content to FC s 7(2).[13] Read in light of something more akin to a rationality standard, the minority in *Glenister* concluded that the DPCI was, in fact, sufficiently independent.

[4] *Glenister* (note 1 above) at para 189.

[5] Ibid at para 86, following *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20, 2005 (2) SA 359 (CC).

[6] See MD Stubbs 'Three Level Games: Thoughts on *Glenister*, *SCAW* and International Law' (2012) 4 *Constitutional Court Review* 137 (Offers an analysis of the difficulties that a decision such as *Glenister* potentially creates for the state in the conduct of its international relations. My analysis of *Glenister* focuses primarily on the Court's interpretation of FC s 39(1)*(b)*).

[7] Ibid at paras 206–207.

[8] Ibid.

[9] Ibid at para 251.

[10] Ibid at para 115.

[11] Ibid at para 111. For more on FC s 205, which I do not discuss here, see S Woolman 'Security Services' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa*' (2nd Edition, RS 3, 2011) Chapter 23B.

[12] Ibid at para 116.

[13] Ibid at para 115.

B Three Flaws

The reasoning in both the majority and minority judgments in *Glenister* gives rise to three intimately connected questions about the relationship of the Bill of Rights and international law. The first query speaks to the different types of authority international law can possess within a constitutional scheme.

Traditionally the relationship between international and domestic law has been captured in debates about monist and dualist approaches to international law.[14] However, a more nuanced contemporary approach offers international law a more *graduated authority*. This new relationship arises from the manner in which international law is used to interpret domestic provisions of constitutions and statutes. The *Glenister* Court, whilst upholding this distinction rhetorically, conflates it with other distinctions. That's the first flaw in *Glenister*.

The second flaw and the third flaw flow directly from this first methodological error.

The second flaw in *Glenister* reflects a lack of engagement with the particular characteristics of international law. The idea of graduated authority carries with it the implication that the authority of an international law instrument is evaluated, in part at least, against the particular characteristics of that instrument.[15] In sum, not all international law is the same. It is produced differently, according to different processes. Some processes are more transparent and democratic than others. Different types of international law also embody different values and address questions of differing degrees of import. Instead of openly addressing these differences, the *Glenister* Court adopted such an expansive notion of international law that it now embraces documents to which South Africa is not a signatory and is not bound. In *Glenister*, the majority collapsed binding law and non-binding 'soft' law. In reaching its conclusion, it treated an Organization for Economic Cooperation and Development (OECD) report as binding international law for the purposes of South African constitutional analysis. This over-inclusiveness itself is not the biggest problem. This comment concerns itself with a tendency to ignore the important differences between the different types of international law and the consequences those differences ought to have for the interpretation of domestic law.

The third flaw turns on the manner in which international law is used to interpret FC s 7(2). The Constitution, like many other post-World War II constitutions, institutionalises a shift in judicial reasoning away from formal reasons to substantive reasons. This shift means that when interpreting the Constitution, courts must engage various political, philosophical, social, economic and scientific foundations that give a particular provision content. In *Glenister*, international law appears to displace the substantive reasons that might

[14] J Dugard *International Law: A South African Perspective* (3rd Edition, 2010). See also K Hopkins and H Strydom 'International Law' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa*' (2nd Edition, 2008) Chapter 30.

[15] See M Kumm 'Democratic Self-Governance Meets International Law: The Rules of Engagement' in S Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 256–293.

be derived from substantive provisions of the Bill Rights and, at best, accord them a secondary role in the interpretation of FC s 7(2).

II Flaw 1: The Nature of the Authority of International Law

The first flaw relates to the different roles that international law can play in the constitutional scheme. Both judgments struggle with the difference between international law as formally valid law within the domestic system, on the one hand, and its having to be 'considered' in the interpretation of the Bill of Rights, on the other. In *Glenister*, although the Court correctly differentiated between these two types of relationships at a doctrinal level, both judgments appear to misunderstand the *kind* of authority that international law may carry in constitutional interpretation.

The starting point is to differentiate between two different kinds of authority that international law may carry *within* a domestic legal system. The first, more traditional, relationship between international and national law, centers on the question of when international law forms binding law within a state. This relationship between domestic and international law has been captured by the distinction between monistic systems and dualistic systems.[16] A monistic system sees international and domestic (including constitutional) law as part of one system. In such a system, it is possible for a claimant, for example, to base a claim on international law in a domestic court.[17] In a dualistic system, international law does not form part of the domestic law of a country unless and until it is made to be so by an enactment of the domestic legislature. The South African legal system is generally dualistic in its approach to international law.[18] FC s 231 provides for a range of measures in terms of which treaties become domestic law. Importantly, treaties that have not been incorporated in terms of FC s 231 are not applicable within South Africa's municipal legal system. Some exceptions to this strict duality exist. For example, FC s 231 gives international custom priority over common law (but again, not over Acts of Parliament).

Such provisions tell us when international law becomes binding in a domestic system and when it falls outside it. However, there is another sense in which international law may manifest in internal legal disputes in South Africa. FC s 39(1)*(b)* requires that any court adjudicating a constitutional dispute 'must consider international law'. This requirement clearly imposes a fundamentally different kind of obligation than that contemplated in two sections which regulate the incorporation of international law into the domestic system. This distinction is probably what the *Makwanyane* Court had in mind when it concluded that 'international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue'[19] and that '[i]nternational

[16] Ibid.

[17] The Netherlands operates under a monistic system.

[18] Constitutional requirements must be satisfied before law that binds the state on the international plane becomes domestically binding. These requirements are found at FC ss 231–233. (On such requirements, in general, see J Dugard *International Law a South African Perspective* (3rd Edition, 2010)).

[19] *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC) at para 34.

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 … may *provide guidance* as to the correct interpretation of particular provisions of [the Bill of Rights]'[20]. International law, then, serves as a source of inspiration. It provides an insight into the 'transnational constitutional reality which helps determine the [meaning of the Constitution]',[21] as well as arguments for and against possible interpretations of various provisions found within the Bill of Rights. In this sense, international law is much like foreign law: it provides a sounding board for ideas that may or may not prove dispositive of a dispute.[22]

Thus, under FC s 39(1)*(b)*, the authority that international law carries is fundamentally different from the authority of formally binding law. Unlike the strict binary form of enforceability contemplated in FC s 231 and FC s 232, the requirement that international law must be considered creates a situation in which international law is given what has been referred to as 'graduated authority'.[23] The role played by international law in constitutional adjudication in this graduated sense cannot be captured by the binding/non-binding dichotomy. Instead, the authority of international law is simultaneously *more* and *less* than that of treaties incorporated through FC s 231 or that of customary law in terms of FC s 232. It is *less* because it is not binding. The authority of international law is not absolute in terms of FC s 29(2) in the sense that it can always be overridden by other relevant considerations. However, it can also amount to *more* than incorporated treaties by potentially shaping the content of constitutional rights and duties. In *Glenister*, the Court correctly recognised that, in terms of the interpretative provisions, incorporated international law would indeed amount to less than a constitutional provision, because it could only ever have the authority of ordinary statutory law.[24]

In *Glenister*, both the majority and the minority judgments confuse and conflate the distinction between persuasive authority and the binding/non-binding dichotomy found within a dualistic system.[25] Both judgments correctly distinguish between giving international law formal authority and merely using it as an interpretative guide.[26] Both judgments unfortunately go awry when they attempt to put international law into action.

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[20] Ibid at para 35.

[21] L du Plessis 'Interpretation' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa*' (2008, OS, 2nd edition) at 32–172.

[22] Indeed, the Court and commentators often consider international law together with foreign law in this context. Lourens du Plessis notes this manner of engagement by collapsing the two different bodies of law under the subtitle 'Comparative Interpretation (or Transnational Contextualization)'. Ibid.

[23] Kumm (note 15 above) 291–293.

[24] *Glenister* (note 1 above) at paras 95–104.

[25] See J Tuovinen 'The Role of International Law in Constitutional Adjudication' 2013 *South African Law Journal* (Show how the Court conflates the two uses of international law elsewhere.)

[26] See *Glenister* (note 1 above) at paras 93 and 108, where the Court held that 'treating international conventions as interpretive aids does not entail giving them the status of domestic law in the Republic', and that a 'distinction must be drawn between using international law as an interpretive aid, on the one hand, and relying on international law as a source of rights and obligations, on the other'.

The main problem with the majority judgment is that it is very difficult to discern how international law impacts on the interpretation of FC s 7(2). Although the judgment often refers to the role of international law, its references are almost exclusively mere assertions of the importance of international law in constitutional interpretation. The majority states that the fact that an international agreement has been approved in terms of FC s 231(2) means it is binding within South Africa. This status, in turn, 'has significant impact in delineating the state's obligations in protecting and fulfilling the rights in the Bill of Rights'.[27] The effect of such an approval for the majority is that the 'Constitution appropriates the obligation [which already binds South Africa in international law] for itself, and draws it deeply into its heart, by requiring the state to fulfill it in the domestic sphere.'[28] The majority explains that the key to understanding the role of international law lies in the requirement in FC s 7(2) to 'protect, promote, respect and fulfill' the rights in the Bill of Rights'. However, as to how the status of a given form of international law determines the meaning of a provision of the Bill of Rights, the majority merely states that 'in the present case [it] is clear, and direct' and that 'that question must be answered in part by considering international law'[29]. Two paragraphs later, the majority again baldly states that the international law obligation to create an independent anti-corruption unit is of the 'foremost interpretive significance'.[30] But why and how it does not say.

The *Glenister* Court does not clarify *why* international law matters, or how it enables a court to determine the outcome of a case. They simply repeatedly assert international law's importance. Ultimately, the impact of the international law is found in one sentence of a rather convoluted paragraph:

> That the Republic is bound under international law to create an anti-corruption unit with appropriate independence is of the foremost interpretive significance in determining whether the state has fulfilled its duty to respect, protect, promote and fulfil the rights in the Bill of Rights, as section 7(2) requires. Section 7(2) implicitly demands that the steps the state takes must be reasonable. To create an anti-corruption unit that is not adequately independent would not constitute a reasonable step. In reaching this conclusion, the fact that section 231(2) provides that an international agreement that Parliament ratifies 'binds the Republic' is of prime significance. *It makes it unreasonable for the state, in fulfilling its obligations under section 7(2), to create an anti-corruption entity that lacks sufficient independence.*[31]

The phrase, 'it makes it', is ambiguous at best. It leaves the exact impact of international law in any given matter unclear. Moreover, an important conceptual shift occurs here: from international law is no longer just 'considered'. It *affects reasonableness analysis*. Unfortunately, this important significant shift is shrouded in colloquial and imprecise language. The language employed suggests that international law in the Bill of Rights may have a determinative character that goes beyond being merely persuasive. This impression arises from an apparent shift in this paragraph away from interpreting the obligation in FC s 7(2) (what

[27] Ibid at para 182.
[28] Ibid at para 189.
[29] Ibid at para 192.
[30] Ibid at para 194.
[31] Ibid. (Emphasis added).

the majority claims to be doing), to using international law to determine whether that obligation has been breached. If the international law standard is not satisfied, then FC s 7(2) has been unjustifiably limited because the steps taken to give effect to FC s 7(2) must be viewed as unreasonable. The content of international law has been transformed into the criteria by which compliance with FC s 7(2) is determined. This construction of 'consider' comes awfully close to making international law – of any form employed by a court – formally binding.

Notwithstanding the above, the majority argued that the effect of its reasoning did not amount to an incorporation of international law. Its reasons are utterly unpersuasive. They amount to little more than asserting that the Court is not incorporating international law but merely following interpretive injunctions.[32] They claim, for example, that the obligation at issue was not 'an 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'.[33] The *Glenister* majority further contends that:

> [I]t is possible to determine the content of the obligation section 7(2) imposes on the state without taking international law into account. But section 39(1)*(b)* makes it constitutionally obligatory that we should. This is not to use the interpretive injunction of that provision, as the main judgment suggests, to manufacture or create constitutional obligations. It is to respect the careful way in which the Constitution itself creates concordance and unity between the Republic's external obligations under international law, and their domestic legal impact.[34]

The Court then seemingly goes a step further when it states that '[t]here is, thus, *no escape* from the manifest constitutional injunction to integrate, in a way that the Constitution permits, international law obligations into our domestic law. We do so willingly and in compliance with our constitutional duty.'[35] Again, nothing in these assertions elucidates the role international law plays in constitutional reasoning. The fundamental flaw in the majority's reasoning would appear to be confusion about the kind of authority that international law should have when a court interprets the Bill of Rights.

Although it draws opposite conclusions, the minority opinion seems to suffer from the same confusion. Ngcobo CJ contends that:

> It does not follow from the fact that corruption can have a deleterious impact on the enjoyment of certain rights that the conventions addressing corruption and organised crime create a constitutional obligation on the state, through the operation of section 7(2),

[32] See *Glenister* (note 1 above) at para 195 (The majority holds as follows: 'This is not to incorporate international agreements into our Constitution. It is to be faithful to the Constitution itself, and to give meaning to the ambit of the duties it creates in accordance with its own clear interpretive injunctions. The conclusion that the Constitution requires the state to create an anti-corruption entity with adequate independence is therefore intrinsic to the Constitution itself.')

[33] Ibid at para 197.

[34] Ibid at para 201.

[35] Ibid at para 202.

> to establish an independent anti-corruption unit in the mirror image of those envisioned in the conventions'.[36]

The Chief Justice then goes on to state that:

> To read the obligation to consider international law as creating, in conjunction with the obligation to protect the rights in the Bill of Rights, a constitutional obligation to establish an independent anti-corruption unit, as the amicus invites us to do, inevitably would result in incorporating the provisions of the Convention into our Constitution by the back door. This would, in effect, amount to giving the Convention a status equal to the provisions of the Constitution…'[37]

Ngcobo CJ is certainly correct when he says FC s 39(1)*(b)* does not require the incorporation of international treaties. However, he is wrong to the extent that he claims that the inclusion of such an obligation via the Constitution would amount to incorporating the treaties by the backdoor. Taken to its logical conclusion, this line of argument implies that, through constitutional litigation, we would witness an unwarranted incorporation of particular international legal instruments: international instruments rejected by South Africa, or unincorporated as required in terms of FC s 231 and FC s 232. That proposition is absurd. The compliance with the interpretive injunction in FC s 39(1)*(b)* cannot depend on whether the content of a constitutional obligation in the end matches the content of a like international law obligation. To so fear the reach of FC s 39(1)*(b)*, as the Chief Justice appears to do, would be tantamount to making FC s 231 and FC s 232 redundant.

Again: the error in the minority's reasoning is it equates the imperative of considering international law with a requirement that a constitutional duty or right must map on to the duties and rights found in international law.

Of course, that FC s 39(1)*(b)* does not require incorporation – not even close – does not, however, mean that a court would be prohibited from effectively doing so in a given matter. The Constitution in FC s 39(1)*(b)* says absolutely nothing about whether any given cohort of international law norms must be adopted or not. In terms of FC s 39(1)*(b)*, a court is always free to reject a particular interpretation of a provision of the Bill of Rights, whether it is based on international law or not, if that interpretation does not 'fit' within established constitutional precedent or is otherwise deemed inconsistent with demands of South Africa's basic law. International law poses no discernable threat to constitutional supremacy: it simply has a discernable role to play within our constitutional scheme.

Besides conflating formal binding authority with graduated authority, the *Glenister* majority and minority opinions reveal an unease with according a clear and proper place for international law in constitutional interpretation. At the heart of this confusion lies an unwillingness to engage with the normative nature of international law.

How to characterise the normative pull of a body of law that does not bind parties or states or courts legally? One can imagine different answers to this

[36] Ibid at para 110.
[37] Ibid at para 112.

question.[38] For example, that international law provides a 'framework to understand the Bill of Rights', as the *Makwanyane* put it, may be one answer.[39] The idea that international law creates a presumption in favour of one interpretation over another interpretation may be another, slightly different one.[40] But to merely say, repeatedly, that international law is important does no work. This insufficiency is the first of *Glenister's* flaws in its engagement with international law.

III Flaw II: Reasoning Based on a Broad Approach to International Law

The second flaw stems from the Constitutional Court's very generous and inclusive approach to what it understands to be international law.[41] The problem is a flattening of international law, policy and commentary. *Glenister,* for example, tends to treat all international legal interventions as if they had the same heft. They should not. The *Glenister* Court both effaces critical differences in international law and places a dubious emphasis upon certain features and functions.

The Court's tendency to treat all international law as alike, can be traced all the way back to *Makwanyane*. The *Makwanyane* Court noted that international law encompassed both binding and non-binding international law.[42] The Court went further and found that *travaux préparatoires* also fell within the ambit of international law, at least to the extent to which they could be used to interpret international law.[43] That decision, although it has been criticised as misrepresenting the academic authority upon which it relied,[44] continues to be the backbone of the South African Constitutional Court's all-inclusive approach to international law.

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[38] Foreign law suffers from similar misconceptions. See S Choudhry 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' 74 *Indiana Law Journal* (1999) 819.

[39] *Makwanyane* (note 19 above) at para 35.

[40] The question of the existence of such a presumption within the context of the Bill of Rights is intriguing. The text of FC s 39(1)*(b)*, by requiring that international law be considered, stops short of creating a presumption. Nor, however, does it explicitly preclude it. There are a number of arguments that can be made in favour of the existence of such a presumption. First, it might be arguable that international law creates a presumption to be followed 'simply by virtue of it being the law of the international community'. See M Kumm (note 15 above) 262. International law consists of an agreed upon framework for deciding questions and those answers should be given at least prima facie weight when deciding questions of constitutional importance. Interestingly, the chapter on international law in the Constitution contains a provision, FC s 233, that seems to create such a presumption in favour of following international law, which in itself may make the case for applying international law somewhat stronger. Yet, in *Glenister*, the Court seems to relegate the importance of FC s 233 to second class status and merely uses that section to support its argument. In *Azanian Peoples Organisation (AZAPO) and Others v President and Others,* the Court also stated that 'International law … [is] … relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law' ([1996] ZACC 16, 1996 (4) SA 671 (CC) at para 26). Whether such a presumption exists under the Constitution is, then, open to question and often, like in *Glenister*, it is a question to which reference is seldom made.

[41] Du Plessis (note 21 above) 32–176 to 32–178.

[42] *Makwanyane* (note 19 above) at para 35.

[43] Ibid at para 16, especially fn 23.

[44] Du Plessis (note 21 above) at 32–175.

Despite this generous approach, the Court has said little about the weight carried by different instruments of international law. An exception, referred to as 'an important qualification' by one commentator,[45] came in *Grootboom*. The *Grootboom* Court held that '[t]he 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'.[46] Thus, despite its recognition of the potentially different valences of international law in the South African municipal context, the Court has not sought to elucidate the principles according to which the weight of distinct forms of international law must be measured.

Glenister illustrates the dangers of combining an inclusive approach to international law with an unprincipled approach as to the weight of its component parts. In interpreting the requirements of the various anti-corruption treaties, the court relied on a report by the OECD. The OECD Report is a comparative study of a number of countries and the different mechanisms that they have employed to battle corruption. Some of the conclusions of the report are then included in *Glenister's* valid domestic interpretations of the anti-corruption treaties.[47] *Glenister* states that the Report 'is not in itself binding in international law, but can be used to interpret and give content' to the Conventions.[48] The *Glenister* Court then supports this proposition with a footnote that contains a number of domestic and international law arguments.[49] The primary argument in that footnote is based on the Vienna Convention on the Law of Treaties, 1969 (VCLT). It relies on VCLT article 31(3)(b): the 'subsequent practice' of states 'shall be taken into account' when interpreting a treaty. The Court then proceeded to note that although South Africa has not ratified the VCLT, that treaty is used in 'formulating' the practice of the state, and it backed this statement with a reference to an academic article.[50]

The first problem with the majority's footnote is a straightforward point about international law. The point is that the term 'subsequent practice', in international law, has a relatively circumscribed meaning. As regards the OECD Report, there are several reasons why it may not satisfy the requisite criteria. Subsequent practice refers to a 'practice that clearly establishes the understanding of all parties' with respect to the interpretation of a treaty provision.[51] Such a practice has to be 'concordant, consistent and common'.[52] The OECD Report, however, merely reflects academic research into how certain states have combated corruption and evaluates the factors that led to success or failure.[53] Although this kind of report might contain evidence of the kind of practices that would satisfy the VCLT's

[45] Ibid at 32–178.

[46] *Government of SA v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC) at para 26.

[47] *Glenister* (note 1 above) at paras 187–189.

[48] Ibid at para 187.

[49] Ibid at fn 43.

[50] A Schlemmer 'Die Grondwetlike Hof en die Ooreenkoms ter Vestiging van die Wêreldhandelsorganisasie' (2010) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 749.

[51] See, eg, I Brownlie *Principles of International Law* (1998) 635.

[52] *Advisory Opinion on the Legality of the Threat or Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Reports 226.

[53] See Executive Summary of the OECD Report (YEAR) 9 - 16.

requirements for relevant 'subsequent practice', it would, at the very least, have been incumbent upon the *Glenister* Court to engage that question in more depth.

The second problem in the *Glenister* Court's analysis of graduated authority relates to the way in which the majority brought the VCLT, and specifically article 31, into the decision. The majority judgment states that '[a]lthough South Africa has neither signed nor ratified this Convention, commentators observe that South Africa employs the Convention in formulating its practice regarding treaties'.[54] Before turning to an analysis of this statement, it should be noted that article 31 is part of customary international law.[55] As such, it would have been binding on South Africa in the same way as the VCLT, and the question of 'subsequent practice' would arguably not arise.[56] Even if it did, however, the *Glenister* Court's interpretation of the term 'subsequent practice' gives rise to further difficulties. The first of them is that the court seems to rely on a descriptive account of its practice in order to give the observation normative force. This, of course, is the wrong way around. Even if a court uses the VCLT in its approach to international law, it would have to use it in a way that is justifiable in law if its use is to have some normative force. In other words, the practice must actually *be practised* in order for it to become binding. The second difficulty is that, when the *Glenister* Court was busy constructing the argument supporting the outcome, it had already decided that international law should be interpreted in line with the VCLT. It did so in *Makwanyane*.[57] That being so, the Court could have simply relied on its own precedent for its semi-novel approach.

On their own, these difficulties are minor cavils. Taken together, however, they add to one's concern about the weakness of the *Glenister* Court's arguments as to the relevance of the OECD Report. What the majority judgment lacked was a careful and deliberate engagement with what it was that the OECD Report actually said, and with the question as to whether or not its recommendations – premature as international law – ought to be followed by South Africa .

An ever-increasing body of literature exists on the normative aspects of engaging international law in domestic adjudication. Mattias Kumm, for example, has identified four principles which may form a basis for evaluating the legitimacy of a rule of international law. These are, first, *presumption* in favour of the application of international law, secondly, questions of *jurisdiction*, thirdly, *procedural legitimacy* and fourthly, principles related to *outcomes*.[58]

The first leg of Kumm's analysis is self-explanatory. The second question concerns jurisdiction: it asks whether a particular question is best answered in

[54] *Glenister* (note 1 above) at fn 43.

[55] See, eg, *Arbitral Award of 31 July 1989* ICJ Reports 1991 at para 48.

[56] Although the internal effect of treaties and customary law is different, pursuant to FC ss 231 and 232, both can become binding in domestic law. That's what concerns us here.

[57] *Makwanyane* (note 19 above) at para 16. This point has been criticised by Lourens du Plessis as importing an international law obligation into the domestic system without justification. L du Plessis (note 21 above) at 32-174 – 32-170. I find it preferable to view international law as one system, where the interpretations and rules of interpretation are viewed as inseparable from the individual provisions themselves.

[58] I discuss the idea of international law forming a presumption in favour of a particular interpretation over another very briefly at note 40 above.

international fora or a domestic tribunal (or elsewhere). The third enquiry entails an assessment of whether the international law in question was produced in a procedurally legitimate manner. This inquiry raises issues of accountability and of transparency in the international law-making process. The final question engages the legitimacy of the outcome of a particular interpretation, and it asks whether human rights will indeed be respected if it is followed.

Each one of Kumm's principles is relevant to the determination of the weight to be given to a rule of body of international law when interpreting the Constitution. In *Glenister*, however, the Court does not ask such questions. If it had, it would have been forced to deal with the OECD Report's express recognition, for example, that domestic constitutional arrangements must be respected and that an independent unit must be created in a manner that *fits* the demands of local conditions.[59] Clearly, the OECD Report's recognition of different domestic arrangements should bracket any course of action followed. Even if the OECD Report *does* contain recommendations, it should not displace a principled engagement with its conclusion. It would seem – without going into the matter in depth – that most of these principles could have been satisfied in *Glenister*. If anything, however, that makes it more disconcerting that the Court chose to highlight the formal criteria of the OECD Report over other criteria regarding the legitimacy of international law and the degree of legitimacy to be accorded the report.

The one place where the court *does* hint at the importance of considering the weight of international law occurs when it emphasises that the conventions in question had been ratified. The *Glenister* Court states that '[i]n reaching this conclusion [ie that the Constitution requires the creation of an independent anti-corruption unit], the fact that section 231(2) provides that an international agreement that Parliament ratifies – binds the Republic is of prime significance'.[60] Here, the *Glenister* Court acknowledged that the treaties have been ratified, and that in terms of FC s 231 they bind the Republic. This recognition augurs well. While the formally binding effect of this provision is limited to the international sphere,[61] its ratification by Parliament constitutes an important consideration when evaluating the weight to be given to an international treaty. That the *Glenister* Court did not run with a principled approach with respect to the rest of the international law it engaged reflects a lost opportunity.

In sum, the second flaw in *Glenister* Court illustrates the dangers of an overly inclusive understanding of international law coupled with an underdeveloped approach to evaluating the normative weight a law, a treaty or a report should be accorded. In *Glenister*, the absence of a rubric or hierarchy led the Court to rely on the treaties and the OECD Report in an untoward manner.

That's not to say that the OECD Report could not play an important role in the interpretation of FC s 7(2). It can. What *Glenister* illustrates, rather, is the need

[59] *Glenister* (note 1 above) at para 188.
[60] Ibid at para 194.
[61] Ibid.

for a sound normative jurisprudential framework that accommodates the broad variety of international instruments that must be 'considered' under FC s 39(1)*(b)*.

IV Flaw III: The Relationship Between International Law and Other Reasons

The third problem is rooted in the *Glenister* Court's preference for deciding the meaning of FC s 7(2) (almost) entirely on the basis of international law. It should have engaged other provisions in the Bill of Rights, specifically, and in the Constitution, more generally. (It did, of course, do so – but only in the most cursory fashion.) In this section, the comment explores the meaning of the injunction to 'consider' international law and suggests those elements that are necessary for reaching a conclusion about the desirability or otherwise of following an international-law norm or report in a given constitutional law dispute.

To be clear, this question answered here recognises that the Constitution requires legal analysis based on substantive grounds. South African courts review the constitutionality of actions, pieces of legislation, the common law and customary against relevant and publicly acceptable understandings of the basic law, and more general views about South African constitutional jurisprudence.[62]

A broad literature exists on the nature of that engagement and how far courts need to go in establishing sophisticated theories about the content of a right (or rights) upon which resolution of a constitutional matter rests. The comment can hardly revisit those debates here. What matters is that the Constitution itself requires some degree of engagement with general understandings of the meaning of a right – by now determined by the Court itself – and other forms of reasoning that informs our often contested views about the content of our basic law. (Else why litigate a constitutional matter?)

In *Glenister*, international law (broadly construed) *takes the place* of an engagement with substantive rights. The Court, having reached its conclusion that international law made it 'unreasonable'[63] to create an anti-corruption unit that is not independent, turned to the question of whether any rights in the Bill of Rights had been infringed. The *Glenister* Court states that the 'architecture of the Constitution'[64] and the erosion of a number of rights – equality, dignity, security of the person and a variety of socio-economic rights – would have triggered FC s 7(2) as well. They do not take this proposition any further.[65] In truth, all of the real interpretative work in determining the content of FC s 7(2) took place through the Court's consideration of international law. Other considerations – the rights to be promoted and protected by FC s 7(2) – play an oddly subsidiary role.

[62] See E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal of Human Rights* 31; A Cockrell 'Rainbow Jurisprudence' (1996) 12 *South African Journal of Human Rights* 1; S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762.

[63] *Glenister* (note 1 above) at para 194.

[64] Ibid at para 199.

[65] Ibid at para 200.

International law, properly understood, and the legal reasoning that takes place during normal rights analysis are to be considered as part and parcel of the same process. Substantive reasons should be offered for the weight international law is given, just as we expect courts to give content to constitutional rights. So understood, those arguments that arise from international law may legitimately form part of a court's ordinary process of reasoning. In *Grootboom,* the Court, when faced with the still vexed question of a minimum core for socio-economic rights – a position already adopted at international law – considered the desirability of leaving this question for the courts to decide.[66] Ultimately, the *Grootboom* Court rejected the international law on point. It concluded that it lacked both the necessary information for the determination of a minimum core and that a minimum core was not necessary for the determination of the case.[67] In *Glenister*, no such engagement between substantive provisions of the Bill of Rights and international law takes place. Instead the *Glenister* Court states that the substantive provisions that it mentions (and upon which substantive arguments could have been built regarding the corrosion of the architecture of the Constitution) serve merely as Emperor's clothing. The Court's decision was reached, in any event, without them.[68]

If all of the reasons, emanating from international law and the substantive provisions of the Bill of Rights, point to the same conclusion, then the way in which the majority lays out its argument probably does not do much real harm. However, as a matter of principle, and for international law to play its role properly in the future, the kind of approach adopted in *Grootboom* with respect to the evaluation of international law seems more desirable than the way in which the Court handled international law and substantive provisions of the Bill of Rights in *Glenister*.

V Conclusion

As I noted at the outset, each one of the flaws identified above turns on the question of the meaning of FC s 39(1)*(b)*'s injunction that a court must 'consider' international law. While I have considered the three dimensions of this concern discretely, for the purposes of clarity, they are naturally interwoven. If the Court proferred greater clarity about the normative basis for considering international law, then it would be easier to determine the different factors that go into rights analysis and how international law relates to substantive provisions in the Bill of Rights and other provisions in the Constitution.

FC s 39(1)*(b)* indicates an 'openness and receptiveness to the norms and values of the international community'[69] and that the Constitution is 'embedded in a transnational constitutional reality'.[70] However, the provision simultaneously concerns itself with ensuring that the Bill of Rights is interpreted in line with

[66] *Grootboom* (note 46 above) at paras 29–30.
[67] Ibid at para 33.
[68] *Glenister* (note 1 above) at para 199.
[69] S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 101.
[70] L du Plessis (note 21 above) at 32–172.

existing precedent or accepted understandings about the meaning of particular provisions of the Bill of Rights. FC s 39(1)*(b)* should *enhance* the reasons given in constitutional adjudication, not merely nod to international law, or in the alternative, supplant accepted understandings of South Africa's basic law. In *Glenister*, the Court engages international law – but does so in a convoluted and unstructured manner. They fall short of what ought to be the appropriate standard. Finally, the international law considered is never ever given a chance to fill out our understanding of our own Constitution. I hope that I have, in the preceding pages, suggested parameters which would lend structure to future use of international law in constitutional matters.