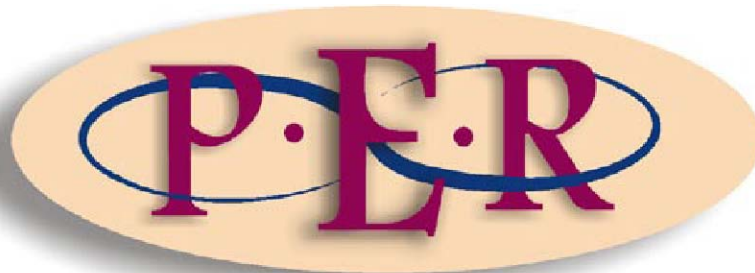


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THE INCORPORATION OF PUBLIC INTERNATIONAL LAW INTO MUNICIPAL LAW AND REGIONAL LAW AGAINST THE BACKGROUND OF THE DICHOTOMY BETWEEN MONISM AND DUALISM

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1 Introduction

John Dugard observes as follows concerning the relationship between public international law and municipal law:¹

Whatever the jurisprudential basis for the application of international law in municipal law may be, the undeniable fact is that international law is today applied in municipal courts with more frequency than in the past. In so doing courts seldom question the theoretical explanation for their recourse to international law.

This phenomenon has profound consequences for certain basic concepts in public international law, in particular the traditional dichotomy between monism and dualism. It is the aim of this contribution to briefly discuss the recent developments in South African and European Union law with regard to this issue.

2 The distinction between monism and dualism

Monism and dualism represent two different approaches towards the relationship between public international law and municipal law. Broadly speaking, the former views public international law and municipal law as a single system of law, whereas the latter regards these two areas of law as separate and distinct legal systems that exist alongside each other. According to a monist approach public international law is therefore directly enforceable before municipal courts without any need for incorporation into municipal law. A dualist approach, on the contrary, implies that public international law has to be formally incorporated into municipal law before it would be enforceable before a municipal court. A complicating factor is that not all

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¹ Dugard *International Law* 43.

legal systems are clearly and distinctly either monist or dualist. Some legal systems display elements of both.

The dichotomy between monism and dualism is no longer relevant to only the relationship between public international law (including regional law) and municipal law,² but since the development of regional organisations such as the European Union it also exerts an influence on the relationship between public international law and regional law. It is the purpose of this contribution to discuss the latest developments concerning the relationship between public international law and municipal law with specific reference to the distinction between monism and dualism as evident from recent court decisions in South Africa and the European Union.

3 South African law

The relationship in South Africa between public international law and municipal law is regulated by the *Constitution of the Republic of South Africa, 1996*.³ From the

² On the topic of the authority of European Union law in the domestic law of member states, see for example, Martinico and Pollicino *Interaction between Europe's Legal Systems* 18-56. Also see in this regard Van Ooik "European Court of Justice" 11-40; Wessel "Integration by Stealth" 41-50.

³ Apart from ss 231 and 232 of the *Constitution of the Republic of South Africa, 1996*, which will be the focus of this contribution, the following can be referred to: Preamble: It is evident from the outset that South Africa is prepared to adhere to public international law insofar as the preamble to the *Constitution* declares that the *Constitution* is adopted as the supreme law of the Republic so as to build a united and democratic South Africa *able to take its rightful place as a sovereign state in the family of nations*.³ The implication is clear: a state can take its rightful place in the family of nations only if it abides by public international law. This attitude is further embodied in a number of specific provisions of the *Constitution* regarding the importance of public international law in South African municipal law. Chronologically the following provisions of the *Constitution* are relevant: S 35(3)(l): Every accused person has the right not to be tried for an act or an omission that is not an offence under either national law or international law. S 37(4)(b)(i): A declaration of a state of emergency may derogate from the Bill of Rights only to the extent that the particular legislation is consistent with the Republic's obligations under international law applicable to states of emergency. S 39(1)(b): When interpreting the Bill of Rights a court must consider international law. S 84: In terms of s 84(2)(h) the President is responsible for receiving and recognising foreign diplomatic and consular representatives, and according to s 84(2)(h) for appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives. S 198: In terms of s 198(b) national security in South Africa is governed by the principle that any one of its citizens is precluded from participating in armed conflict, nationally or internationally, except as provided for in terms of the *Constitution* or national legislation. S 198(c) provides that national security must be pursued in compliance with the law, including international law. S 199(5): The security services of South Africa must act and must teach and require their members to act in accordance with the *Constitution* and the law, including customary international law and international agreements binding on the Republic. S 200(2): The primary object of the defence force is to defend and protect South Africa, its

provisions of especially sections 231 and 232 of the *Constitution* it is clear that the South African approach is a combination of both the monist and dualist schools. These provisions determine *inter alia* as follows: In terms of section 231(2) an international agreement binds South Africa only after it has been approved by resolution in both the National Assembly and the National Council of Provinces. Section 231(3) provides that some international agreements, such as those of a technical, administrative or executive nature, or those which do not require either ratification or accession, bind South Africa without approval by the National Assembly and the National Council of Provinces. According to section 231(4) any international agreement becomes law in South Africa when it is enacted into law by national legislation, excluding a so-called self-executing provision of an agreement, unless it is inconsistent with the *Constitution* or an act of Parliament. Section 232 determines that customary international law is law in South Africa unless it is inconsistent with the *Constitution* or an act of Parliament. In view of these provisions one can therefore say that South Africa follows a monist approach with regard to customary international law, but a dualist one as far as treaties are concerned. The result is that customary international law is directly enforceable before a South African court, while treaty law must first be incorporated into South African legislation before it becomes enforceable in municipal law. Dugard⁴ suggests that the nature of South Africa's approach can be described as one of harmonisation, because it is primarily aimed at harmonising public international law and South African domestic law.

territorial integrity and its people in accordance with the *Constitution* and the principles of international law regulating the use of force. S 203(1): The President as head of the executive may declare a state of national defence. Unlike previous constitutions under the Westminster system, the President is not authorised in terms of the current *Constitution* to declare war, the reason being that such an action would be in violation of those public international law norms prohibiting the use of force between states. This section, however, confirms South Africa's right to act in self-defence as regulated in a 51 of the *Charter of the United Nations*. S 233: When interpreting any legislation, a court must prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law. S 235: The right of the South African people as a whole to self-determination is recognised, including the right to self-determination within a specific territory of any community sharing a common cultural and language heritage.

⁴ Dugard *International Law* 42-43.

A number of issues embodied in the provisions on the relationship between public international law and municipal law need further clarification. Firstly, the *Constitution* does not deal with the binding nature of *jus cogens* norms and *erga omnes* obligations in South African law. Without attempting to discuss these concepts exhaustively, it can be stated that these so-called higher norms of international law are peremptory in nature, may not be deviated from and are thus binding on states even without their consent. Although it is by no means always clear which international law norms and obligations qualify for the status of *jus cogens*⁵ and *erga omnes*⁶ obligations (and whether and to what extent these concepts coincide), the applicable principle is nevertheless evident. Despite the fact that the binding nature of public international law is based on the consent of states, once there is certainty that a particular norm or an obligation has attained the status of *jus cogens* or an obligation *erga omnes*, all states, irrespective of their consent, are deemed to be bound thereby. As a matter of principle the provisions in the South African *Constitution* subjecting by implication *jus cogens* norms and *erga omnes* obligations to acts of Parliament and even the supreme *Constitution* therefore might in themselves (depending on the circumstances of a particular case) amount to a violation of the public international law norm regulating the binding nature of *jus cogens* norms and *erga omnes* obligations.⁷ Secondly, the (foreign) concept⁸ of a

⁵ Article 53 of the *Vienna Convention on the Law of Treaties* (1969) introduced the concept of *jus cogens* into international law. Although the doctrine seems to be well-entrenched in international law, the precise content of *jus cogens* and how to determine whether a particular rule qualifies for this status or not is not completely clear. There is little doubt that the prohibition of aggression is peremptory, while the prohibitions against slavery, genocide, racial discrimination (including apartheid), torture and the denial of self-determination enjoy widespread support to qualify for this status. See in this regard Dugard *International Law* 38-39.

⁶ The concept of *erga omnes* obligations was formulated in 1970 by the International Court of Justice in *Barcelona Traction, Light and Company Pty Ltd* 1970 ICJ Reports 3 para 32. The concept has subsequently on several occasions been mentioned by the International Court of Justice and described as obligations towards the international community as a whole, which include the outlawing of acts of aggression and genocide; principles and rules concerning the basic rights of the human person, such as protection from slavery and racial discrimination; the rights of peoples to self-determination and certain obligations under humanitarian law. As such, the concept concerns a matter of state responsibility. See Kadelbach "Jus Cogens" 35.

⁷ Paulus 2005 *Nordic J Int'l L* 320 points out that the extent to which states would recognise the application of *jus cogens* in their domestic systems would depend on whether or not the particular state recognises the direct effect of international law in its domestic law. In contrast to the South African position, Switzerland, for example, recognises the superiority of *jus cogens* to the state *Constitution* by excluding any derogation from *jus cogens* by amendments to the *Constitution*. See in this regard Peters "Globalization of State Constitutions" 269-270.

self-executing provision is not defined by the *Constitution*. Once again, without attempting to discuss this issue in depth, it would suffice to state that despite a number of court cases and various academic articles dealing with this issue, South African law has thus far not succeeded in clarifying the legal position by giving a South African-specific content to this provision.⁹ Thirdly, section 231(4) seems to limit the precedence of the *Constitution* and acts of Parliament over international agreements to only a (specific) self-executing provision of an international agreement, and not an agreement as a whole. It is suggested that a broad interpretation of section 231(4) should be followed in this regard to also include international agreements in their entirety. The superiority of the *Constitution* is explicitly confirmed in section 2 of the *Constitution* in so far as it is elevated to the status of the supreme law of South Africa. However, the precedence that an act of Parliament takes over a self-executing provision of an international agreement stands in tension with section 233 in terms of which legislation must be construed to give effect to international law rather than to be inconsistent with international law. In view of this, an act of Parliament should take precedence over a self-executing provision only if it is not possible to interpret the act in line with the self-executing provision.

It must be emphasised that the relationship between municipal law and international law is by no means static. Although as a general observation it can be stated that municipal law enjoys precedence on the national level and international law on the international level, two processes running concurrently are indicative of the ever changing nature of the divide between these two systems of law, namely the so-called constitutionalisation of international law and the internationalisation of constitutional law. The final outcomes of these processes are by no means clear, but they could eventually result, on the one hand, in state constitutions displaying remarkable similarities and, on the other hand, in the development of a single

⁸ Foreign in the sense that it is an American legal concept that has been imported into South African law. See, for example, Ngolele 2006 *SAYIL* 141-172.

⁹ See, for example, De Wet "South Africa" 573-578; Botha 2009 *SAYIL* 253-267; Scholtz and Ferreira 2008 *CILSA* 324-338.

international constitution for the entire international community.¹⁰ Ginsberg, Chernykh and Elkins¹¹ argues that the functions of public international law should not be considered only from an interstate but also from an intrastate perspective. The authors show that the interaction between domestic law and international law as reflected in the dichotomy between monism and dualism varies considerably between states.¹² Notwithstanding these differences, the authors eventually conclude that

internationalization, broadly speaking, has increased over time, with more constitutions incorporating specific treaties, providing for treaty superiority over domestic legislation, and making customary law directly applicable, even as the scope of customary law has expanded dramatically.¹³

The provisions of national legislation incorporating an international agreement into South African law would normally be applied by the courts even if they are contradictory to the provisions of the incorporated international agreement because it is left to Parliament to decide if and to what extent an agreement should be incorporated. This is understandable in view of the fact that South Africa follows a dualist approach with regard to international agreements, and that the binding nature of public international law, and in particular treaty law, is based on the consent of the parties to the agreement. However, the *Children's Act*¹⁴ is an exception in this regard. Section 256(2) provides with regard to the *Hague Convention on Inter-Country Adoption* that "where there is a conflict between the ordinary law of the Republic and the Convention, the Convention prevails". Ordinary law in this sense probably includes both statutory law and common law. The implication of this provision is that under certain circumstances the Convention is superior to South African law and as such the latter portrays signs of a monist approach.¹⁵

¹⁰ See, for example, Ferreira and Ferreira-Snyman 2008 *SAYIL* 147.

¹¹ Ginsberg, Chernykh and Elkins 2008 *U III L Rev* 237.

¹² Ginsberg, Chernykh and Elkins 2008 *U III L Rev* 204-205.

¹³ Ginsberg, Chernykh and Elkins 2008 *U III L Rev* 210.

¹⁴ *Children's Act* 38 of 2005.

¹⁵ See in this regard *Glenister v President of the Republic of South Africa* [2011] ZACC 6 para [100] (hereafter *Glenister*).

With regard to the Bill of Rights the *Constitution* in section 39(1)(b) employs public international law only as an aid to interpret the rights contained in the Bill. In this respect, based on a similar provision in the *Interim Constitution* (section 35(1)),¹⁶ the Constitutional Court in *S v Makwanyane*¹⁷ confirmed that this provision includes public international law that is both binding and not binding on South Africa. The Court nevertheless emphasised that there is in terms of this provision no duty on South Africa to give effect to public international law – it merely requires a court to consider it in view of the peculiarities of the South African Bill of Rights.¹⁸ What has to be enforced is the Bill of Rights and not so much the relevant norms of public international law. As a general proposition, however, one can state that South African law requires courts to follow public international law where possible. This is borne out by section 233 of the 1996 *Constitution* which provides that a court must prefer any reasonable interpretation of legislation that is consistent with international law.¹⁹ In terms of the *Constitution*, public international law fulfills the role of an interpretative aid not only with regard to the *Constitution's* Bill of Rights but also in respect of all forms of South African legislation (section 233). The requirement in the *Constitution* that international law must be employed as an interpretative aid might, however, have a profound influence on the incorporation of international law principles into South African law insofar as mere interpretation, without any (constitutionally prescribed) formal incorporation might result in the adoption of international law principles into the domestic law of South Africa. In a sense this could be viewed as a form of monism.

In some instances the *Constitution* explicitly states that public international law is binding on South Africa without any reference to the need for legislative incorporation into domestic law, for example the determination in section 231(2) that an international agreement binds South Africa once it has been approved by

¹⁶ S 35(1) of the *Constitution of the Republic of South Africa* 200 of 1993.

¹⁷ *S v Makwanyane* 1995 3 SA 391 (CC) para [35]. See also *Glenister* para [39].

¹⁸ *S v Makwanyane* 1995 3 SA 391 (CC) paras [36]-[37].

¹⁹ For the application of s 233, see *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* [2010] ZACC 6 paras [42]-[44], [83]-[85]. In this regard reference should also be made to the well-known presumption in South African law which entails that a legislative enactment is not aimed at violating international law. See Du Plessis *Re-interpretation of Statutes* 173.

resolution in both the National Assembly and the National Council of Provinces. The *Constitution* does not state in this instance on what level South Africa is bound, but it can be accepted that it is on the international level (that is *vis-à-vis* other states), particularly in view of the fact that the *Constitution* in terms of section 231(4) requires legislative incorporation of public international law into municipal law before it can be enforced domestically.

Section 231(2) played a pivotal role in the decision of the Constitutional Court in *Glenister*²⁰ against the background of monism and dualism. As has been shown above, the *Constitution* as the supreme law of South Africa extensively determines the relationship between public international law and municipal law. However, the Constitutional Court's decision in *Glenister* has important implications for the question of whether a monist or a dualist approach should be followed in a particular instance. In *Glenister* the Court was divided on the correct interpretation of a number of constitutional provisions dealing with the binding nature of international treaties in South African law.

The facts leading to the decision in *Glenister* can for purposes of this note briefly be summarised as follows:²¹ The Directorate of Special Operations (DSO), a specialised crime fighting unit located within the National Prosecuting Authority (NPA), was disbanded and replaced with the Directorate of Priority Crime Investigation (DPCI) situated within the South African Police Service (SAPS). In *Glenister* the Constitutional Court was then requested *inter alia* to deal with the question of whether the *Constitution* requires Parliament to establish an independent anti-corruption unit, and if so, whether Parliament complied. In addition, the Court was asked to establish if any rights in the Bill of Rights were infringed by the acts of Parliament which gave practical effect to the situation before the Court.²²

Chief Justice Ngcobo, supported by three other Constitutional Court judges, delivered a minority judgement in which he argued as follows: section 231(2) does not imply that an international agreement approved (ratified) by Parliament becomes

²⁰ *Glenister*. For a discussion, see Swanepoel 2013 *LitNet Akademies (Regte)*.

²¹ *Glenister* para [1].

²² *Glenister* para [54].

law in the Republic upon such approval. It becomes law in the Republic only once it has been incorporated in terms of section 231(4) into domestic law by an act of Parliament.²³ The minority judgement emphasises that ratification is not without consequences. It is an indication of South Africa's intention to be bound on the international level by the provisions of the particular agreement and a failure on South Africa's part to honour its provisions may therefore result in responsibility towards the other state parties to the agreement.²⁴ Ratification does not result in transforming the rights and obligations contained in an international agreement into constitutional rights and obligations.²⁵ Domestic enforcement is dependent on incorporation: "[T]he legislative act which incorporates the international agreement into domestic law has the effect of transforming an international obligation that binds the sovereign at the international level into domestic legislation that binds the state and citizens as a matter of domestic law."²⁶ The minority judgement is at pains to point out that firstly, the use of public international law as an interpretive aid "do[es] not create rights and obligations in the domestic legal space",²⁷ for that would be tantamount to "incorporat[ing] the provisions of the unincorporated convention into our municipal law by the back door".²⁸ He secondly argues that "the incorporation of an international agreement does not transform the rights and obligations embodied in the international agreement into *constitutional* rights and obligations. It only transforms them into *statutory* rights and obligations that are enforceable in our law under the national legislation incorporating the agreement".²⁹

The majority judgement delivered by Deputy Chief Justice Moseneke and Judge Cameron and supported by three other Constitutional Court judges differs radically from that of the minority. The majority judgement reasons as follows with reference to a number of regional and international instruments concerning the prevention of corruption: The court points out that section 231(2) is primarily directed at the

²³ *Glenister* para [89]-[92].

²⁴ *Glenister* paras [91]-[92].

²⁵ *Glenister* para [103].

²⁶ *Glenister* para [94].

²⁷ *Glenister* para [96].

²⁸ *Glenister* para [98]. Justice Ngcobo refers in this regard with approval to the Canadian case of *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] 183 CLR 273 286-287.

²⁹ *Glenister* para [102]. Our emphasis.

Republic's legal obligations under international law, rather than aimed at transforming the rights and obligations contained in international agreements into constitutional rights and obligations. Although the section provides that the agreement binds the Republic it must be read in conjunction with section 231(4). The latter provides that an international agreement becomes law in the Republic only when it is enacted into law by national legislation. In view of the fact that section 231(4) expressly provides for the domestication of international agreements, the court argues that section 231(2) does not have the effect of giving binding internal constitutional force to agreements merely because Parliament has approved them. The incorporation of an international agreement creates ordinary domestic statutory obligations. Incorporation by itself does not transform the rights and obligations contained in such an instrument into constitutional rights and obligations.³⁰

The majority judgement confirms that section 231(2) has consequences in the international sphere. This means that an international agreement approved by Parliament becomes binding between the Republic and other states parties to the agreement on the international level. But the court is adamant that this fact does not necessarily imply that section 231(2) has no domestic effect whatsoever. On the contrary, the fact that section 231(2) itself provides that an agreement so approved binds the Republic has a significant impact on the state's domestic obligations in protecting and fulfilling the Rights in the Bill of Rights.³¹

The obligations in the international agreements³² referred to by the court impose on the Republic the duty in international law to create an anti-corruption unit that is endowed with the necessary independence. The court once again emphasises that this duty exists not only in the international sphere, and is enforceable not only on that level. The *Constitution* itself requires the state to fulfil the duties contained in the said international agreements in the domestic sphere also. In coming to this

³⁰ *Glenister* para [181].

³¹ *Glenister* para [182].

³² The international and regional conventions referred to by the Court (para [167]) include *inter alia* the *United Nations Convention against Corruption* (2004) and the *African Union Convention on Preventing and Combating Corruption* (2004).

conclusion the court argues as follows: section 7(2) requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights. Implicit in section 7(2) is the requirement that the state has to take positive steps to respect, protect, promote and fulfil the rights in the Bill of Rights. These steps must be reasonable and effective.³³ In this regard section 39(1)(b) is also of major importance. It provides that when interpreting the Bill of Rights a court is obliged to consider international law. And the relevant international instruments taken into account by the court unequivocally require of South Africa to establish an anti-corruption entity with the necessary independence.³⁴

The court is at pains to reiterate that the result of its approach is not to incorporate international agreements into the *Constitution*. The said approach simply implies that the court is faithful to the *Constitution* itself by giving meaning to the ambit of the duties it creates in accordance with its own clear interpretive injunctions. The conclusion reached by the court, namely that the *Constitution* requires the state to create an anti-corruption entity with adequate independence is therefore intrinsic in the provisions of the *Constitution* itself.

The question that immediately arises is what is the practical effect of the majority judgement's reasoning concerning the relationship between public international law and municipal law? The main difference between the minority and majority judgements for the purposes of this contribution has to do with the interpretation of section 231(2). The minority judgement's interpretation seems to confirm the traditional dualist position in terms of which an international agreement ratified but not incorporated is binding on the international level only. To have any domestic effect it has to be incorporated into domestic law in terms of section 231(4). The majority judgement prefers a different interpretation of section 231(2). It is unequivocal in its statement that this section has implications for both international law and domestic law. The effect it has on domestic law can be described as follows: The *Constitution* in section 231(2) makes a ratified (but not incorporated) international agreement binding on South Africa on the international level and can

³³ *Glenister* para [189].

³⁴ *Glenister* para [192].

be viewed as a codification of the traditional international law position. If, however, section 231(2) is read in conjunction with section 7(2) the former might also bring about a domestic law duty for South Africa in the field of human rights. One could therefore probably say that the *Constitution* elects to extend the implications of section 231(2) also to domestic law in those instances where a duty in an international human rights agreement has been accepted by ratification of the said agreement. Section 7(2) forces the state to take reasonable steps to give effect to that particular duty in domestic law and in that way respect, protect, promote and fulfill the rights in the Bill of Rights. Section 39(1) in turn obliges a court to take international law into account when interpreting the Bill of Rights, and this includes any international human rights duties the state has accepted by ratification of the particular agreement. Although the majority judgement is at pains to point out that its approach must not be understood to amount to an incorporation of an international agreement (that position is regulated in terms of section 231(4)), one must, however, also point out that the practical effect of the majority judgement's interpretation of the relevant provisions of the *Constitution* is to allow the *Constitution* to impose a monist approach insofar as a human rights duty on a state contained in an international agreement and accepted by South Africa by ratification of the said agreement finds application in domestic law without formal incorporation in terms of national legislation. It must be emphasised that the majority judgement's approach, although limited to Bill of Rights issues, is to be welcomed as it is fully in line with the Constitutional Court's earlier findings that the Bill of Rights must be interpreted extensively which, it is suggested, should relate not only to the contents of the individual rights but also to any unnecessary stumbling blocks in the way of realising the particular rights.³⁵

It is interesting to note that one of the constitutional court judges who delivered the majority judgement in *Glenister*, Justice Edwin Cameron, recently published a discussion of the case in which he explicitly states that the majority decision "goes far further" than merely interpreting legislation in the light of the relevant

³⁵ See *S v Zuma* 1995 2 SA 642 (CC) para [14].

international law provisions.³⁶ He emphasises that the *Glenister* approach "draws international law directly into the domestic sphere, using the provisions of the *Constitution* itself. Yet it does so without adopting a monist approach".³⁷ He formulates the effect of section 231 of the *Constitution* as follows:³⁸

While section 231 does not have the effect of elevating all international obligations to the status of constitutional obligations, it does mean (when read with other provisions of the Constitution) that the state's international obligations are enforceable to some degree on the domestic plane, by domestic actors.

Justice Cameron's viewpoint that the approach of the majority in *Glenister* does not amount to the adoption of a monist approach may be questioned. Even though the approach of the majority is based on the (interpretation of the) provisions of the *Constitution* itself, the practical effect is undeniably that certain international obligations accepted by South Africa form part and parcel of South African law and may be enforced accordingly.³⁹ The further question arises as to whether or not the Court could have employed any alternative approaches to avoid the requirements of section 231(4), namely incorporation into South African law by national legislation. Two possibilities seem to be available. Firstly, the Court could have argued that the international treaty provision concerning the independence of the investigating unit is a self-executing provision which in terms of section 231(4) does not require legislative incorporation. Secondly, the Court could have investigated the possibility that the said international treaty provision has attained the status of customary international law which, according to section 232, is part of South African law and therefore does not need to be legislatively incorporated into South African law. Both of these possibilities are unfortunately surrounded by a lot of uncertainty and it is understandable that the Court elected to follow an approach that favours legal certainty. It must nevertheless be emphasised that the Court's approach itself is not devoid of any uncertainty. In fact, the Court's decision is not entirely clear on the circumstances under which its approach should or could be followed. As a result the boundaries between sections 231(2) and 231(4) are becoming increasingly blurred.

³⁶ Cameron 2013 *Duke J Comp Int'l L* 405.

³⁷ Cameron 2013 *Duke J Comp Int'l L* 405.

³⁸ Cameron 2013 *Duke J Comp Int'l L* 406.

³⁹ The question of whether or not such treaty obligations may be viewed as self-executing provisions in terms of s 231(4) is not dealt with in this contribution.

In a number of instances the *Constitution* seems to determine by implication that public international law is binding on South Africa without any legislative incorporation. A case in point is section 198(c), that requires national security to be pursued in compliance with international law, and section 195(5), that places a duty on the security services to act in accordance with customary international law and international agreements binding on South Africa. In this regard customary international law presents no problem as it forms part of South African law and is therefore automatically binding on South Africa. The uncertainty relating to the provisions in question concerns the binding nature of international agreements. What are the implications for the enforcement of these provisions if the relevant international agreements have not been incorporated into South African law? The *Constitution's* reference to international law should be understood to include both customary international law and treaty law. Insofar as the provisions under discussion refer to international agreements binding on the Republic, incorporation is clearly required. The provision that national security must be pursued in compliance with international law is formulated as a *principle* that governs national security in South Africa and should not be taken to have done away with the requirement of incorporation. It is suggested, however, that in this regard the international duties incurred by South Africa in terms of international agreements could be enforced by following the approach espoused by the majority judgement in *Glenister*.

Barber,⁴⁰ with reference to public international law, observes that "rules of international law that are not incorporated into domestic law may still be followed by state officers and institutions". He cites the example of the *European Convention on Human Rights*, which was ratified by the United Kingdom in 1951 but was transformed into domestic law only in 1998, when the *Human Rights Act* came into force. During this period it was nonetheless widely accepted that both the legislature and the executive were bound by the Convention in the sense that that they were expected to legislate and act in line with its provisions.

⁴⁰ Barber *Constitutional State* 80.

This viewpoint of Barber immediately brings into question the value of the dualist approach adhered to by the United Kingdom (and South Africa). It is suggested that whereas the monist tradition might result in conflicting rules between domestic law and international law, the dualist approach to a large extent eliminates this possibility insofar as only those international law rules that comply with domestic law are incorporated into the latter. The example referred to by Barber, however, may be seen as an illustration of the diminishing importance of the dualist tradition. Where a conflict between domestic law and international law occurs, it could be resolved by applying constitutional provisions such as sections 232 and 233 of the South African *Constitution*.

4 European Union law

The relationship between European Union law and public international law has been explained by the European Court of Justice in *Kadi v Council of the European Union and Commission of the European Communities*.⁴¹ The Court had to decide on the validity of a European regulation that implemented a resolution of the Security Council of the United Nations in terms of which certain restrictions were placed on specific individuals who were suspected of having ties with terrorist organisations. The Court followed a dualist approach by accepting that European Union law and public international law represent two distinct legal systems, and that the latter could permeate the former only insofar as is permitted by the constitutional principles of the European Union.⁴² International agreements do not trump European

⁴¹ *Kadi v Council of the European Union and Commission of the European Communities* joined cases C-402/05 P and C-415/05 P (3 September 2008).

⁴² As articulated in paras 21 and 24 of the opinion of Advocate General P Maduro delivered on 16 January 2008. (*Kadi v Council of the European Union and Commission of the European Communities* joined cases C-402/05 P and C-415/05 P (3 September 2008)). This is in accordance with earlier statements by the European Court of Justice on the status of European Community law: in *NV Algemene Transport- en Expeditie Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen (Netherlands Inland Revenue Administration)* ECR Case 26/62 (5 February 1963) 1 12 the European Court of Justice stated that the Community "constitutes a new legal order of international law". In the subsequent *Flaminio Costa v ENEL (reference for a preliminary ruling by the Giudice Conciliatore di Milano)* ECR Case 6/64 (15 July 1964) 585 593 the Court confirmed this separate character of Community law by maintaining that "[b]y contrast with ordinary international treaties, the ECC has created its own legal system". In *Commission of the European Economic Community v Grand Duchy of Luxembourg and Kingdom of Belgium* ECR Case 90, 91/63 (13 November 1964) 625 631 the Court holds a similar view by determining that "the Treaty is not limited to creating reciprocal obligations

Union law, and "cannot have the effect of prejudicing the constitutional principles of the EC Treaty ..."⁴³

However, in the recent case of *Hungary v Slovak Republic*⁴⁴ the European Court of Justice seems to have diverted from its previous position to a more monist approach.⁴⁵ The issue decided on in *Hungary* briefly concerned the following: the Hungarian president was to visit the Slovakian town of Komárno on 21 August 2009. Due to Slovakian sensitivities still surrounding the invasion of the former Czechoslovakia on 21 August 1968 by five Warsaw Pact countries including Hungary, the Slovakian government formally refused the Hungarian president entry into the Slovak Republic for security reasons. European Union law accepts that security reasons may constitute a valid exception to the right which granted all European Union citizens the right to move freely within the member of European Union. The dispute between the two countries was eventually brought before the European Court of Justice by Hungary. The Court dismissed Hungary's claim that Slovakia had violated European Union law by refusing him entry into its territory. The Court confirmed that article 21 of the *Treaty on the Functioning of the European Union* granted every citizen of the European Union the right to move freely within the Union. The question before the Court was whether the fact that a person's status as head of state constituted a valid limitation on his or her right to free movement. In order to answer this question, the Court formulated its point of departure as follows: "... EU law must be interpreted in the light of the relevant rules of international law, *since international law is part of the European Union legal order and is binding on*

between the different natural and legal persons to whom it is applicable, but establishes a new legal order which governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognizance of and penalising any breach of it". In an analysis of the question of whether or not European law constitutes a separate legal system from international law, Hartley 2001 *BYIL* 10-17 reaches the conclusion that the special features of the Community treaties do not conclusively indicate that the member states intended to exclude international law in the functioning of Community law. However, the European Court of Justice has on numerous occasions, as indicated here above, held otherwise. Since the decision of the Court on the interpretation of the Community treaties is conclusive, Hartley accepts that, to the fullest extent permitted by international law, the legal system of the European Union is separate from international law.

⁴³ *Kadi v Council of the European Union and Commission of the European Communities* joined cases C-402/05 P and C-415/05 P (3 September 2008) para 285.

⁴⁴ *Hungary v Slovak Republic* Case C-364/10 (16 October 2012).

⁴⁵ See in this regard Anon 2013 *Harv L Rev* 2425.

the institutions..."⁴⁶ In view of this point of departure the Court found that the question as to whether or not a person's status as head of state constituted a limitation on his or her right to free movement must be decided in terms of international law. The Court eventually found that heads of state enjoy a particular status in international relations which, as a result, impose a duty on the host state to guarantee their protection. Thus, the Slovakian government was able to deny the president of Hungary entry into its territory on the ground that his safety could not be guaranteed.

The decision in *Hungary*, when contrasted with the same Court's findings in *Kadi*, creates uncertainty as to the relationship between international law and European Union law. *Kadi* was rather explicit in its viewpoint that European Union law enjoys supremacy over international law insofar as the latter may be applied only to the extent that is allowed by European Union law. In direct contrast to *Kadi*, the same Court in *Hungary* unequivocally stated that international law is part of European Union law. An anonymous author evaluates the decision in *Hungary* as follows:⁴⁷

The ECJ's decision in *Hungary* espoused the view that international law concepts can control the outcome even when core EU constitutional principles, such as the right of free movement,⁴⁸ are at stake. In so doing, the ECJ may have defined some of the limits of the dualist principle articulated in *Kadi*, according to which EU and international law are separate and distinct, and perhaps even presaged a shift toward a more monist view, whereby the two are intertwined. While the scope of *Hungary* is unclear and the case may prove to be a context-specific exception to the ECJ's otherwise dualist approach, it might instead suggest a broader role for international law within the EU than had previously been thought.

The practical consequences of the decision in *Hungary* are described as follows by the said anonymous author:⁴⁹ If *Hungary* could be interpreted to imply a move away from dualism towards monism, it may have profound implications for law-making in the European Union. A dualist approach and any decision on the incorporation of international law norms into European Union law would normally depend on the

⁴⁶ *Hungary v Slovak Republic Case C-364/10* (16 October 2012) para 44. Our emphasis.

⁴⁷ Anon 2013 *Harv L Rev* 2429-2430.

⁴⁸ The right to free movement of people within the European Union is one of the so-called four freedoms of the Union. The other three are the freedom to move goods, services and capital freely across the borders of the member states of the European Union. See in this regard O'Neill *EU Law for UK Lawyers* 13.

⁴⁹ Anon 2013 *Harv L Rev* 2433-2434.

actions of formal law-making institutions such as the European Commission, the Council of Europe and the European Parliament. A move towards a monist approach would shift this decision-making power away from the legislative institutions of the European Union towards the international community as a whole insofar as directly applicable international law principles are formed either by international agreement or by customary law, which is based on the practice of states and accepted by them as a legal obligation.⁵⁰ The practical effect of the decision in *Hungary* is thus formulated as follows by the anonymous author:⁵¹

In essence, by enhancing the impact of international law on the EU, the Hungary court may have increased the capacity of actors outside the EU to shape the EU. This may create an EU more reflective of global norms, but perhaps less able to adapt to European priorities.

Apart from its influence on the relationship between international law and European Union law, the anonymous author also points out that *Hungary* might also have profound consequences for the relationship between international law and the domestic law of a number of member states of the European Union.⁵² In terms of the concepts of direct effect and supremacy developed by the European Court of Justice, European Union law relating to individual rights trumps the domestic law of member states.⁵³ Broadly speaking, these concepts underline the direct applicability and supremacy of European Union law in member states. These facts, coupled with the decision in *Hungary*, pose a serious problem for those member states following a dualist approach as far as the relationship between their domestic law and international law is concerned. Because European Union law is *directly* applicable in member states (a monist approach) and because international law in terms of *Hungary* is *directly* incorporated into and forms part of European Union law (a monist approach), international law becomes *directly* applicable in the domestic law of member states, including even those following a dualist approach with regard to

⁵⁰ Anon 2013 *Harv L Rev* 2433.

⁵¹ Anon 2013 *Harv L Rev* 2433.

⁵² Anon 2013 *Harv L Rev* 2434.

⁵³ See in this regard Ferreira-Snyman 2009 *CILSA* 201-208.

the relationship between their domestic law and public international law.⁵⁴ The result of these developments for the latter states is explained as follows by the anonymous discussion of *Hungary*.⁵⁵

Such states could be bound by international provisions that they had not affirmatively accepted through either their national legislatures or their political representatives in the EU. But because of the principle of supremacy, they cannot opt out of such obligations via national legislation.

In a recent publication, Marcello Neves⁵⁶ touches upon the role of monism in what he refers to as "transconstitutionalism". He points out that the fragmentation of (common) constitutional problems would remain unstructured (and, one might add, unsolved) if every legal order tried to address them on its own in every case.⁵⁷ A need therefore exists for so-called transconstitutional "conversation" or "dialogue" between, for example, the courts of the different legal orders. The question, however, remains as to how to finally settle such disputes arising from the different interpretations of the various legal orders involved. When a (monist) choice is made between so-called competing legal orders, "the order in question would be 'blind' to competition from other orders because they would be merely lower layers of a single order".⁵⁸ If such a choice is not made, the different legal orders will exist alongside each other in a dualist way (and will in some instances probably be equated with legal pluralism).⁵⁹

⁵⁴ Member states of the European Union following a monist approach include the Netherlands and France, while the United Kingdom is an example of those member states adhering to a dualist doctrine.

⁵⁵ Anon 2013 *Harv L Rev* 2434.

⁵⁶ Neves *Transconstitutionalism* 78-80.

⁵⁷ Neves *Transconstitutionalism* 78.

⁵⁸ Neves *Transconstitutionalism* 79.

⁵⁹ See Hesselink "How Many Systems of Private Law are there in Europe?" 199-247. On 246-247 he comes to the following conclusion from a private law perspective: "In conclusion, therefore, the answer to the question of how many systems of private law there are in Europe is: one single, composite system. It is based on the monist postulate of the unity of law. However, the relationship between the different elements, coming from national, European and international lawmakers, is not a matter of epistemological axioms but of political deliberation. The main procedural requirement is inclusion of everyone affected. The aim should be the rational reconstruction of the world of private law in terms of substantive principles of private and constitutional law. In very practical terms, this means we do not have a final answer to our question, only preliminary answers. However, that condition of uncertainty and provisionality is fundamentally different from the certainty that pluralists claim to have that there is no unity of national, European and international law". From an international perspective La Torre "Poverty of Global Constitutionalism" 63 seems to be in favour of a more dualist approach with regard to global constitutionalism: "Actually, what we are often offered by 'global constitutionalists' is an

5 Conclusion

Globalism, and one of its more limited forms embodied in regionalism, has not left the relationship between international law, regional law and municipal law untouched. The modern world and the international community of states have in many respects developed into a global village and an international society facing common problems. In many ways they share a common destiny, and as a result have to collectively deal with complicated issues affecting all of them.

The developments concerning the dichotomy between monism and dualism within the European Union must be noted by the African Union and its member states. The *Constitutive Act* of the African Union envisages the harmonisation of the laws of member states and eventually the political unification of the African continent. The role of international law, especially with regard to the protection of human rights in individual member states, is indispensable. The dualist doctrine, in contrast with the monist approach, may prove to be a stumbling block in allowing international law to take its rightful place in African Union law and the domestic law of its member states. However, a major reason why some states are reluctant to follow a monist approach with regard to the relationship between international law and municipal law could be ascribed to the fact that these states are extremely protective of their sovereignty and might view accepting the implications of the monist approach as subjecting themselves to an extra-territorial legislature.

In this regard the approach of the South African Constitutional Court in *Glenister* is to be welcomed as it fully recognises the important role of international law in the domestic law of South Africa and in terms of an extensive interpretation of section 231(2) of the *Constitution* (allowing its consequences to extend not only to the international, but also to the domestic level) follows a monist approach and thus

extensive or analogical interpretation of constitutionalism, or just a rhetorical reference or appeal to it. It is a deracinated constitutionalism that is paraded here; it is *constitutionalism without a constitution* that we are served. The extensive, metaphorical use of the notion happens in such a way that constitutionalism's normative and pragmatic core comes out as watered down and radically impoverished. There is thus a programmatic poverty of global or supranational constitutionalism that is the outcome of its more or less explicit need to redefine, and by redefining to belittle, the intense and demanding normativity of modern constitutions".

ensures the maximum protection afforded by international law to individuals in South Africa. One cannot but fully agree with the following observation by Justice Cameron:⁶⁰

Perhaps the most profound lesson of *Glenister* is that in a globalized world there should be no cover from properly undertaken international law obligations in the thicket of domestic law. There should be consonance, not dissonance, between what governments say and do domestically. Our role as lawyers, and our duty, is to reduce the gap where it exists.

⁶⁰ Cameron 2013 *Duke J Comp Int'l L* 409.

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BYIL	British Yearbook of International Law
CILSA	Comparative and International Law Journal of Southern Africa
DPCI	Directorate of Priority Crime Investigation
DSO	Directorate of Special Operations
Duke J Comp Int'l L	Duke Journal of Comparative and International Law
Harv L Rev	Harvard Law Review
Nordic J Int'l L	Nordic Journal of International Law
NPA	National Prosecuting Authority
SAPS	South African Police Service
SAYIL	South African Yearbook of International Law
U III L Rev	University of Illinois Law Review