Monism or Dualism: The Dilemma in The Application of International Agreements Under the South African Constitution

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1. **Introduction.**

The interaction between international and municipal (national domestic) laws has been classified as taking three forms; monism[1], dualism[2] and a hybrid of both monism and dualism (monist-dualist). The application by states, in their national or municipal courts, of international law or agreements and their general application thereof define whether a state's observance of international law is either monist, dualist or a combination of the two.

This paper interrogates the position under the South African Constitution, particularly Sections 231 and 233 thereof against the principles and elements that define monism and dualism with a view to determining whether the South African Constitution espouses either of the two approaches or a hybrid of both models in its recognition and application of international law. Critical to this discourse is an analytical dissection and dichotomy of the interpretation of Section 231 of the South African Constitution by the diametrically opposed and in some respects sharply contrasting opinions of the majority and minority Judges of the Constitutional Court of South Africa in its decision in *Glenister v President of South Africa and Others.*[3]

In the ultimate, this research is an inquiry into the fundamental question, whether South Africa subscribes to either monism or dualism in its observance of international law, or whether South African law exhibits an interaction of partly monist and partly dualist (monist-dualist) complementary application of international law and domestic law.

First, the paper will briefly highlight the salient features of the three theories.

1.1 Monism

The Monist approach in the application of international law essentially entails the direct observance of international law as part of the laws of the state without the necessity of domesticating the enabling treaty or convention. Treaties and Conventions therefore apply as a source of law of the party state upon the signing thereof and ratification. Some states exhibit the monist approach either by direct application or by express provision in their Constitutions that bespeak international law as a source and part and parcel of the state's law. A case in example is the Constitution of the Republic of Kenya.[4]

1.2 Dualism

Dualism distinguishes, in its elementary sense, national domestic sources of law (such as the state's constitution and statutes) from international law instruments such as treaties and conventions. Dualist states provide, usually in their constitutions, that international law instrument entered into by the state do not automatically form part of the sources of law of the state party. The same only become applicable after domestication through domestic statutes and legislative processes.

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[1] Those writers who subscribe to this theory are also referred to as naturalists-see the definition of the theories by Shaw, M.N. 2008. *International Law.* p. 131

[2] Also known as Positivist-dualism. *Ibid.*

[3] (CCT 48/10) [2011] ZACC6; 2011(3) SA 347(CC); 2011 (7) BCLR 651 (CC) (17 March 2011).

[4] Article 2(5) and 2(6) of the Constitution of Kenya provides:

> "(5) The general rules of international law shall form part of the law of Kenya
> (b) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution".

The dualist approach is informed, partly at least, by the conventional universal constitutional principle of separation of powers inherent in the political governance of states to the effect that parliaments enact laws while the executive (which binds states to treaties and conventions in international law) usually implement the law.[5] It is therefore based on this constitutional truism that many dualist constitutions find it necessary to require the domestication of international norms and instruments through domestic parliamentary legislation. The majority opinion in *Glenister* seems to readily accept this basis in the following terms:

> "To summarise, in our constitutional system, the making of international agreements falls within the province of the executive, whereas the ratification and the incorporation of the international agreement into our domestic laws fall within the province of parliament. The approval of an international agreement by the resolution of parliament does not amount to its incorporation into our domestic laws. Under our constitution, therefore, the actions of the executive in negotiating and signing an international agreement do not result in a binding agreement. Legislative action is required before an international agreement can bind the Republic".

The other reason advanced in favour of the dualist approach is the fact that some international treaties and conventions are not self-executing and may rely on municipal laws for enforcement[6]. It is also suggested that the process of domestication aids in mitigating and/or obviating inconsistencies and probable contradictions of international agreements with existing national laws.[7]

The dualist approach is also fortified in Articles 11, 14, 15 and 16 of the *Vienna Convention on the Law of Treaties*[8]. The convention underscores that treaties do not automatically become part of the corpus of a state party's laws unless and until the same have been domesticated pursuant to national legislation providing for the procedure therefor.

1.3 The "Hybrid" approach (Monist-Dualist approach)

The monist-dualist approach exhibits traits or tendencies of both the monist and dualist approach depending on the international law to be interpreted or applied. Monist-dualist's justify their hybrid approach to the practicality and peculiarity that attends the observance of international law norms, particularly treaties in their multifarious forms. International law instruments, they opine, fall into two categories; those that are self-executing and those that require the aid of domestic mechanisms for enforcement or execution. The former are often said to apply without the necessity of domestication. The latter category, which include more complex or involving international agreements and cover the rest of the agreements including those creating human rights obligations, require domestication.

2 The South African Constitutional Context

2.1 Section 231 of the South African Constitution

The application of international agreements in South Africa is principally defined in Section 231 of the Constitution of South Africa. The provision underscores that international agreements do not apply

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[5] The principle of separation of powers is attributed to the 18th century French philosopher Montesquieu who is also referred to as the 'father of the constitution'.

[6] These may include international agreements on human rights whose enforcement often require domestic interventions.

[7] See a deeper discussion of the doctrine of *lex posterior derogate prior* below at part 3.

[8] Concluded in 1966 and which came into force in 1980. Articles 11, 14, 15 and 16 of the convention are reproduced and discussed extensively under part 2.2.1 of this work. The convention is the primary and principal instrument that codifies principles of interpreting international treaties and agreements.

directly nor are they binding upon South Africa unless approved by the National Assembly and the Council of provinces save for agreements of technical, administrative or executive nature, and which agreements do not require either ratification or accession before application but must be tabled in the National Assembly and the Council within a reasonable time.[9]

Additionally, the subject international agreement must not be inconsistent with the Constitution or an Act of Parliament. Further, even a self-executing provision of an international agreement that has been approved by Parliament applies only with the qualification that it should be consistent with the Constitution and Acts of Parliament[10]. However, international agreements which were binding before the promulgation and effect of the Constitution remain so binding[11].

The foregoing provisions of the South African Constitution have been interrogated and interpreted in at least two decisions of the Constitutional court of South Africa and form the crux of the next part of my discourse. I will briefly now discuss the same.

2.2 *Glenister v President of South Africa and Others*[12]

2.2.1 The Majority Decision

The majority decision of the South African Constitutional Court in *Glenister* interpreted Section 231 of the Constitution of South Africa to the effect that international agreements, save for those of administrative, technical or executive nature, must be domesticated by ratification/approval of the National Assembly and Council of provinces. The majority decision essentially bespeaks the South African observance of international law as one of dualism.

The decision furthermore emphasises the provisions of Section 231 of the Constitution of South Africa which also requires international agreements to accord with the Constitution and Acts of Parliament. The majority decision seems to underscore the sovereignty of the state and conformity with the principles enunciated in the *Vienna Convention on the Law of Treaties (the Vienna Convention).*

The Vienna Convention, concluded in 1969 and which came into force in 1980, is perhaps the most elaborate effort by international law in codifying its fundamental principles of interpretation of international treaties, conventions and protocols. It seeks to ensure harmony and uniformity in this regard. Articles 11, 12, 14, 15, 16, 26 and 27 (as read with Article 46) of the convention are instructive with regard to this discourse.

Articles 11, 12, 14, 15 and 16 of the Vienna Convention deal with the manner of conclusion and consent by states of international agreements. They define the process of ratification, accession, signature and the date of taking effect of an international agreement. They underline consent of the state by signing and ratifying a treaty as an unequivocal expression of its intention to be bound thereby, failing which would invite sanctions.

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[9] Section 231 of the Constitution of South Africa reads: -

> "(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
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> (2) An international agreement shall bind the Republic only after it has been approved by resolution in both the National Assembly and the National Council of provinces, unless it is an agreement referred to in Subsection (3)
>
> (3) An international agreement of technical, administrative or executive nature, or an agreement which does not require the ratification or accession entered into by the national executive binds the Republic without approval by the National Assembly and the National Council of provinces, but must be table in the National Assembly and the Council within a reasonable time
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> (4) Any international agreement becomes law in the Republic when it is enacted into by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or Act of Parliament.
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> (5) The Republic is bound by international agreements which were binding on the Republic when the constitution took effect"

[10] *Ibid*, S.231 (4)

[11] *Ibid*, S.231(5)

[12] *Supra*, note 2.

The majority decision in *Glenister* penned by former Chief Justice Ngcobo makes reference and places reliance on an earlier decision of *Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa and Others.*[13] In *AZAPO*, precedent was set that perhaps put the dualist slant to the South African application of international agreements most succinctly thus:

> *"International agreements do not become part of municipal law of our Country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into municipal law by legislative enactment".*

The majority opinion of the Constitutional Court in *Glenister* exemplifies an unyielding positivist interpretation of Section 231 of the South African Constitution. This constricted literal and restrictive construction thereof invites the conclusion that the majority of the Supreme Court favours a dualist approach to the application of international agreements by South Africa. This it does in the following terms:-
The positivist- dualist approach taken by the majority in interpreting section 231 of the South Africa Constitution is largely informed by the international principle of general application of separation of powers between the various arms of government, in this regard the executive and legislature. The former cannot enact laws but only gives effect to what the latter has legislated upon.

2.2.2 The Minority Opinion

The dissenting view of the Constitutional Court in *Glenister* makes for the case that state parties to international treaties and agreements are under a duty to fulfil their obligations entered into in international agreements and international law in general. This duty, they underscore, in the context of South Africa is a creature of the Constitution. The minority see this duty as a direct consequences or requirement of section 7 of the Constitution of South Africa which enjoins the state to ensure protection and fulfilment of fundamental rights.[14] As such, they observe that international obligations cannot be divorced or made subservient to domestic laws. They interpret Section 233 of the Constitution of South Africa as requiring domestic legislation to be interpreted consistently with international law.[15] The minority opinion does not therefore reject the dualist approach underlined in the majority view but underscores the place of international law in the South African Constitutional order as complimentary and not subservient to domestic laws.
They find fortitude and another justification in section 232 of the Constitution. Section 232 expressly recognizes customary international law as the law of the Republic except if it is inconsistent with the Constitution or an Act of parliament. They therefore conclude by regarding international and domestic laws as being in "concordance" and not discordance.
The minority opinion is not without intellectual and jurisprudential support, none less than the doyen jurist of international law Sir Hersch Lauterpatch.[16]Sir Lauterpatch is of the persuasion that states cannot invoke their municipal laws so as to avoid or fail to fulfil their obligations under international law, this is what is generally known in international law parlance as the doctrine of *Pacta Sunt Servanda*. Sir Lauterpatch famously states that municipal law and indeed the very concepts of sovereignty and

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[13] 1996 ZACC 16' 1996 (4) 671 CC; 1996(8) BCLR1015 (CC) quoted in *Glenister* at page 45.

[14] Section 7(2) reads;

> "The State must respect, protect, promote and fulfil the rights in the bill of Rights".

[15] Section 233 reads

> "international customary law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament"

[16]Lauterpatch, H. (ed.) *The Development of International law by the International Court* .1982.

recognition of the states are functions of international law. The two concepts, he emphasises, can only exist in an international context and legal system.[17] Simply put, national laws or indeed a state cannot exist or function in a vacuum or outside an international legal system. The latter gives validity and existence to the state and therefore by extension to national laws. States only exist in the context of an international legal system. In other words there cannot be a state or for that matter national laws in the absence of international law or an international legal systems.

A strict monist approach can be further broken down to two categories. First, the one which Sir Lauterpatch subscribes to which advocates for supremacy of international law on the basis of human rights, and one which favours monism for "formalistic legal grounds" like Kelsen.[18]

Though not espousing a monist approach, what comes through from a reading of the minority opinion in *Glenister* is the liberal or flexible approach the minority take in the application of international agreements which mirrors some monist elements such as the universality of the application of customary international law, *jus cogens* and *Pacta Sunt Servanda* as enduring irreducible principles of international law. The minority emphasise that a contextual reading of Section 231 of necessity involves a reading of Section 233 of the Constitution of South Africa which they opine implies or requires domestic laws to be read in concordance, consonance or consistently with international laws particularly those which bespeak human rights obligations. This view almost suggests that contrary to the majority decision in *Glenister* and the decision in *AZAPO* which emphasise domestication before justiciability (enforceability in Courts) of the international agreements or instruments in South Africa, the same can have direct application in view of Sections 7, 232 and 233 of the South African Constitution.

Perhaps it is now opportune to discuss what I prefer to call the twin doctrines of *Pacta Sunt Servanda* and *Lex Posterior derogate prior*, and the import of these two principles to the notions of dualism and monism in the context of the majority and minority opinions of the Constitutional Court in *Glenister.*

3 Monism and Dualism in Light of the Principles of "*Pacta Sunt Servanda"* Versus *"Lex Posterior Derogate Prior*"

Though referred to as twin principles, Pacta Sunt Servanda and Lex Posterior *derogate prior* can only be fraternal twins. Whereas they both impact on the application of international law by national courts and other domestic fora, the two doctrines present diametrically opposed prepositions in terms of observance of international agreements by state parties thereto.

3.1 Pacta Sunt Servanda

This principle essentially denotes that international treaties or agreements are to be applied or observed by state parties in good faith. It is a moral high calling to all who subscribe to international agreements to do all that is required under national legislation or otherwise, to give effect to the agreement. *Pacta Sunt Servanda* as a principle in application of treaties, is underscored by Article 26 of the *Vienna Convention on Law of Treaties.* The article reads:

> "PACTA SUNT SERVANDA"
> Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

It is therefore the monist thinking that international law through the doctrine of *Pacta Sunt Servanda* amplifies in the aforequoted provision of the Vienna Convention that underwrites the direct application of

[17] *Ibid.*

[18] *Per* Hans Kelsen, quoted in Malcom, *supra* note 1 page 131.

international law and requires state parties to observe international agreements without reduction, qualification or their subjection to rigorous recognition processes. The Vienna Convention aforequoted and this doctrine echo the substance of the view taken by Sir Hersch Lauterpatch afore-stated to the effect that it is a principle of international law that states cannot invoke their municipal laws so as to avoid or fail to fulfil their obligations under international law. Indeed, Article 27 of the same said Vienna Convention is emphatic in this respect thus:

> "INTERNATIONAL LAW AND OBSERVANCE OF TREATIES
> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46"[19]

The International Court of Justice (ICJ), in the *Applicability of the obligation to arbitrate case*[20] was emphatic that international law overrides national or domestic laws. *In the Lockerbie case*[21] the international court underlined that "*the rights guaranteed under the Vienna Convention are Treaty rights which the United State has undertaken to comply with in relation to the individual concerned, irrespective of the due process right under the United States Constitutional law".*

The ICJ has also underscored that it is not its function to interpret national laws of states or to give effect to the same on the international plane but it will only concern itself with national laws merely as evidence of the fact of a state's breach or observance of international law. The International Court is also of the considered view that it can equally examine statutes and Constitutions of states to ascertain whether their enactment or provisions amount to breach or the undermining of international law purely as evidentiary material on observance of international law.[22]

In essence, the majority decision of the Constitutional Court of South Africa in the *Glenister case* can be critiqued when its opinion is exclusively looked at through the prism of the principle of *Pacta Sunt Servanda* and Article 26 and 27 of the Vienna Convention afore-quoted. One can argue that the South African state, as a member of the international Community, cannot be permitted to invoke its Constitution (which is a domestic or municipal law) so as to avoid or fail to fulfil its international obligations. In other words, contrary to the majority Constitutional Court's opinion, the South African Constitution cannot be invoked so as to limit its citizens' citing and seeking relief pursuant to international agreements, particularly those which South Africa has signed and ratified.

3.2 Lex Posterior Derogate Prior

On the other hand, *Lex posterior derogate prior* provides that even after ratification and domestication, in a pure dualist approach, the international rule or agreement which thereby becomes part of the national law is a mere legislation or statute that can then be overridden by another national law subsequently enacted to replace the prior law that domesticated the international rule or agreement.

The dualist approach seems to be preferred or founded upon at least four justifications. First, that the state, even under international law, retains the sovereign mandate to determine the laws that govern its territory. Secondly, that international agreements are often entered into by the executive arm of the state

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[19] Article 46 deals with competence of a treaty found to be invalid on account of a manifest breach of a fundamental international law which vitiates the consent of the person who entered into such treaty on behalf of a state party.

[20] Quoted in Malcom, *supra* note 1 at page 135. The international Court in *Cameroun V Nigeria* also rejected the argument that the 1995 treaty between the two states was invalid on account of non-ratification. It was found to be enough that it was signed. *ICJ Reports*, 2002 p.303, 403.

[21] *Ibid.*

[22] See for instance the International Court's decision in *Certain German Interests in Polish Upper Silesia case* PCIJ Series A No. 7 P.19 A.D.P.5 *Benin v Niger* ICJ Reports 2005 pp.90, 125 and 148.

while the law making mandate is mostly exercised by legislatures or parliaments, hence the requirement of the international norms being incorporation or translated into national laws through the domestic legislative processes.

Thirdly, there is always the apprehension that international agreements may contradict existing national laws hence the need for alignment of international law with national law so as to achieve consistency. Fourth, is also a latent fear that the complex and multidisciplinary international law may not be readily competently understood by domestic judges hence the need to "translate" international legal norms into the more familiar territory of national laws or statutes for easier application by domestic courts.

From the aforegoing discourse it is increasingly apparent and decipherable that the contestation between the majority and minority opinion of the Constitutional Court of South African in *Glenister* is an ideological confrontation on the hierarchical order of legal norms within the South African legal system. The majority seems to be inclined towards the view that the national laws of South Africa take precedence over international agreements while the minority look at international agreements as part and parcel of domestic law with direct application without the need for translation, incorporation or domestication into municipal laws.

To enrich this discourse, very brief insights from other jurisdictions will suffice.

4 Comparative Perspectives

4.1 The United Kingdom

The contestations between dualism and monism as theories of application of international norms is equally live in the United Kingdom. In the UK the positivist- dualist theory has evolved into what is referred to as *"transformation"* while the monist approach is referred to as the doctrine of *"incorporation"*. Under the transformation doctrine, domestic and international law form two separate and distinct sets of law and, that international instruments to which the UK is a party require legislative enactment into domestic laws for them to have force of law domestically.

Malcom[23] draws the frontiers and contours of the doctrine of "transformation" in the following words:

> *"…is based upon the perception of two quite distinct systems of law, operating separately, and maintains that before any rule or principle of international law can have an effect within the jurisdiction it must be expressly and specifically "transformed" into municipal law by the use of appropriate Constitutional machinery such as an Act of Parliament".*

The "incorporation" doctrine is perhaps best put by Lord Atkin in *Chung Chi Chengu v R,* thus:

> *"International law has no validity except in so far as its principles are adopted and accepted by our domestic laws... The Courts acknowledge the existence of a body of rules which nations accept among themselves on any judicial issue they seek to ascertain what the relevant rules is, and having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals".*[24]

Incorporation, which takes a monist slant, recognises international law norms as having been adopted as part and parcel of domestic laws of the state upon ratification or signing the treaty or convention and does

[23] *Supra* note 1 at 139.

[24] [1939] AC 160: 9AP P.264. See also *Commercial and Estates of Egypt V Board of Trade, 1925* 1KB 127, 295; 2AAD P. 423.

not require legislation or enactment through domestic statute of the party state. Incorporation, as an approach, is best captured in the words of Blackstone, who is his commentaries states:-

> *"The Law of nations, whenever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and it is held to be a part of the law of the land".*[25]

The dilemma in the approach in the UK almost mirrors the competing views in *Glenister*. The *transformation* and *incorporation* approaches in the UK reflect the difficulty attendant in the treatment of international agreements even within the entrenched and long standing and developed common law.
The line between the transformation and incorporation theories, in the UK and therefore by extension in other common law seems to get blurred with the development of case law.[26] This lends more difficulty in ascertaining the principles applicable in observance of international law particularly in common law legal system, especially under its most prominent feature of *stares decisis* or precedent. It is therefore only natural that jurisdictions which apply or import common law practices and tendencies will face similar if not a more confounding or confusing dilemma as was confronted in *Glenister.*

4.2 The Kenyan Experience: Article 2 of the Constitution of Kenya, 2010 and *Beatrice Wanjiku and Another v The Attorney General* [27]

The Constitutional Court of Kenya in interpreting Articles 2(5) and 2(6) of the Constitution of Kenya 2010 compares and contrasts the position under the current Constitution and the former Constitution. The current Kenyan Constitution of Kenya, under the aforesaid provisions, international law including its rules, forms part of the law of Kenya and that any treaty or convention ratified by Kenya equally forms part of the law of Kenya[28]. The previous constitution took a dualist approach which required domestication before legal recognition and application of international law, including treaties.[29]

4.3 The United States of America

This fairly recent American case of *Medellin v Texas*[30] throws a spin to the hitherto settled legal preposition by introducing the Monist –dualist (Hybrid) approach into the United States of America (USA). The case underscores that this hybrid approach is informed by some treaties not being self-executing hence requiring domestic legislation to give them effect. This mixed approach is also said to be in acknowledgement and appreciation of the United States of America's lack of a homogeneous legal system with semi-autonomous states applying either a monist or dualist approach. The US position seems to have been similar to the UK, at least in the early 1900 through to the 1990's with the only difference being requirement of the international agreement's compliance with the US Constitution.[31] Article VI of the US Constitution directly recognises treaties as part of the law of the US. Section 2 thereof instructively reads:

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[25] Quoted in Malcom *supra* note 1 at P. 140.
[26] See for instance *West Rand Gold Mining Co case (1905) 2KB 391* wherein Lord Alverstone declared that "whatever had received the common-law consent of civilized nations must also have received the consent of Great Britain and as such would be applied by municipal tribunals". Lord Denning and Shaw L J in *Tredex (1977)* ZWLR 356 elucidated that international law is oblivious of the rule of *stares decisis* and therefore where international law changed, the court could implement that change, "without waiting for the House of Lords to do it".
[27] Petition No 190 of 2011, eKLR.
[28] *Supra* note 4 above.
[29] Per Odunga J in *Beatrice Wanjiku Supra*, note 28.
[30] US 491(2008).
[31] See US Supreme Court decision in *Boss V Bary 99L* Ed 2d stated: "it is of course correct that the United States has a vital national interest in complying with international law".

> "All treaties made or which shall be made with the authority of the United States shall be Supreme Law of the land and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding".

The Supreme Court of the US as early as 1900 in the *Paquete Habana case*[32] emphasised that *"international law is part of our law"*. The Supreme Court also asserted that international law would not be applied if it contradicted or was inconsistent with a legislative, executive, or judicial act to the contrary. The US therefore exemplifies a mixed (dual –monist) approach, guided by national interest (mostly security and economic) and supremacy of domestic laws, particularly its Constitution.[33] There is therefore a remarked difference between the UK, USA and South Africa.

4.4 Australia

The Australian case of *Minister for Immigration and Ethnic Affairs v Toeh*[34] bespeaks the preposition similar to the majority decision in *Glenister* and *AZAPO*. It demonstrates that that Australian jurisprudence seems to favour a dualist approach on similar basis as espoused in the *Glenister* case.

The principal foundation and rationale for the dualist approach in Australia is perhaps most aptly captured by the Australian High Court in the said case of *Toeh* in the following terms: -

> "It is well established that the provisions of an international treaty which Australia is a party, do not form part of Australian law unless those provisions have been *validly incorporated* into our municipal law by statue. This principle has its foundation in the preposition that in our constitutional system the making and ratification of treaties fall within the province of the executive in the exercise of its prerogative power whereas the making and alteration of the law fall with the province of parliament, not the executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law".[35] (*Emphasis added*).

The "incorporation" referred to in Australian decision aforequoted seems to reflect the "transformation" theory in the United Kingdom and not the "incorporation" theory. This confusion notwithstanding, the Australian position in general principle seems to mirror the UK and South African approach.

5 Conclusions

In the ultimate, the odyssey that is the analysis of the competing concepts of monism and dualism as appreciated by the majority and minority opinions of the Constitutional Court in *Glenister* in its interpretation of the import of Sections 231 of the South Africa Constitution leads to two inescapable conclusions.

First, that the South African Constitution primarily prefers and typifies a dualist approach with some limited elements of monism. It also shows some elements of the mixed or hybrid (monist-dualist) approach to the observance and application of international norms or agreements. For the administrative, technical and executive international agreements, the constitution permits a direct monist automatic application without the necessity of domestication through legislation and subject only to the international

[32] 175 Us 677 1900.

[33] *Committee of United States Citizens living in Nicaragua-v- Reagan 859 F.2d* 929 (1988) the Court of Appeals stated that "no enactment of congress can be challenged on the ground that it violates customary international law". It is however a general presumption in US law that legislation is meant to accord with international law- See *Schroeder v Bissell* 5F.2d 838 1925 and also *MacLeod v US* 229 Us 416(1913).

[34] [1995] 183 CLR 273.

[35] *Ibid*, at 268 – 7.

agreements' presentation to the national assembly and council of provinces within reasonable time, while all other agreements must be translated into domestic laws of South Africa for them to have the force of law.

Secondly, that the primary concern of international law is that its obligations are observed, but the manner and form of observance of its obligations seem to largely be to the election and realm of domestic laws of individual state parties Although international law (including the Vienna Convention under Article 27 and the International Courts (ICJ) advocates for direct application of international treaties) the reality is largely quite the opposite. Whether observance in good faith of international norms is ultimately achieved by either transformation or incorporation (dualism or monism) is not something the Vienna Convention is useful on. The Convention leaves a lot of room for non-observance of international law and invites legal excuses therefor, contrary to its very basic objective. This in itself is an area for further debate and potential or possible reform. For purposes of this discourse, however, both the majority and minority opinions espousing dualism and monism respectively are valid in their interpretation of section 231 of the South African Constitution to the extent that the application of either self-executing administrative, executive and technical international agreements on the one hand do not require domestication through legislation, while those which require domestic assistance in enforcement and which primarily regard national security, political, social economic and cultural rights and interest, on the other hand require domestication through municipal legislative processes. The distinction between technical and non-technical international agreements as drawn in section 231 of the South African Constitution is easier said in theory than in practice. It is not clear what technical international agreements would import as anything of any serious substance can be said to be technical and therefore fall thereunder. Worse still it is not clear whose role it is to determine what agreements fall within the ambit of technical and which ones do not, particularly in the event of a dispute. This lacuna in the South African Constitution requires attention.

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(ii) *Beatrice Wanjiku and Another v The Attorney General* Petition No. 1990 of 2011 eKLR.

(iii) *Glenister v President of South Africa and others* (CCT 48/10) [2011] ZACC6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011).

(iv) *Medellin v Texas* 522 US 49 (2008).

(v) *Minister of State for Immigration and Ethic Affairs v Toeh* (1995) HCA 20; 1995 183 CLR 273.