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Dinah shelton

# International Law and Domestic Legal Systems

Incorporation, Transformation, and Persuasion

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*Incorporation, Transformation, and Persuasion*

Edited by
DINAH SHELTON

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# *Editor's Preface*

The International Academy of Comparative Law was founded in 1924 in The Hague for the purpose of comparative study of the world's legal systems. As one of its main functions, the Academy convenes an international congress every four years to allow the examination of current problems being faced by all legal systems. The XVIII Congress of the Academy, held in Washington DC from 25 July to 1 August 2010, included the topic of international law in domestic systems as part of its varied and rich programme.

Most of the chapters in this volume were prepared initially for the XVIII Congress and were revised thereafter. Prior to the Congress, rapporteurs for 25 countries submitted national reports. The geographic distribution was heavily weighted towards Europe: nine reports concerned western European countries[1] and an additional seven came from central and eastern Europe.[2] Nine reports came from other regions: three from Latin America,[3] two from North America,[4] three from the Asia/Pacific region,[5] and one from Israel.

A few of the national studies submitted to the Congress are omitted from this collection, because the authors chose not to revise them for publication. On the other hand, the relative lack of reports prepared for countries outside Europe led the editor to solicit additional contributions from authors in Asia and Africa. The editor is particularly grateful to the latter group of persons, who agreed to undertake the preparation of studies in a short period of time and did so with great efficiency and excellence.

All of the authors worked from a questionnaire, which is included as the appendix to this volume. The editor prepared a draft of the questionnaire, which was reviewed by colleagues at the George Washington University Law School. Thanks are due in particular to Sean Murphy, Susan Karamanian, and Ed Swaine for their helpful suggestions to improve the draft. Professor Karen Brown was also an invaluable resource in answering questions about the Academy and the Congress.

Highest praise and thanks are due to Cherish Adams (GWU, JD 2011), who raised the bar for quality research assistance during the nearly year-long process of completing this volume. Her work has been flawless, tireless, and invaluable.

The chapters have been organized to facilitate cross-country comparisons as much as possible, following the structure of the questionnaire. Each chapter begins

[1] Austria, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom.
[2] Bulgaria, Czech Republic, Hungary, Poland, the Russian Federation, Serbia, and Slovakia.
[3] Argentina, Uruguay, and Venezuela.
[4] Canada and the United States.
[5] Australia, Japan, and New Zealand.

with a general introduction to the legal system of the country. The issues presented thereafter address the hierarchy of legal sources within the country, the major sources of international law, treaty and custom, other sources of law and the use of non-binding norms as persuasive authority. A further section is added for federal states, to discuss the specific relationship between international law and federal systems. The common structure helps identify the similarities and differences among the states represented herein and their relationship to the increasingly complex international legal system.

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# 1

# Introduction

*Dinah Shelton*

The international legal system has changed considerably since the International Academy of Comparative Law was founded in 1924. One major evolution has been the increasing codification of international law, leading to less frequent citation of custom as the source of obligation in respect to many topics.[1] Other particularly significant developments include the growth and proliferation of global and regional institutions (including courts and other tribunals with the power to adopt binding decisions), the development of international human rights and international criminal law, the increasing use of informal agreements, such as memoranda of understanding, and the recourse to executive instruments negotiated and implemented outside formal treaty-making processes. The relationship between international and domestic law has also been complicated by the proliferation of international administrative or regulatory bodies like the International Civil Aviation Organization and conferences or meetings of treaty parties that have the power to adopt regulatory decisions, sometimes subject to 'opt out' procedures.

The reports in this volume demonstrate how these developments have in turn influenced domestic legal systems, especially new constitutions and constitutional law. Informal agreements and international regulatory measures today now often by-pass formal treaty-approval procedures. There also appears to be a trend to give human rights treaties preferential treatment in domestic constitutions.[2] Declarations, codes of conduct, and other normative instruments adopted by international organizations and conferences—commonly described as 'soft law'—appear to have increasing impact in domestic legal systems, in particular in interpreting constitutional and statutory provisions. Domestic courts are also adopting the international doctrine of peremptory norms or *jus cogens*. In sum, the growing complexity and

[1] As discussed below, in national legal systems today customary international is invoked most often on issues of state immunities and the law of treaties. In regard to the latter, the Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 1155 UNTS 331, 8 ILM 679 (1969) has been ratified by 111 states as of the end of 2010. States parties apply the VCLT qua treaty, while other states cite to it as largely a codification of customary international treaty law. The references to domestic law in this introduction come from the chapters that follow and are discussed more fully therein.

[2] In addition to the states discussed in this volume, Mexico adopted in 2011 an amendment to Article 1 of its constitution which will give constitutional standing to international human rights treaties once a majority of the Mexican states approve the change.

content of international law-making finds an echo in domestic legal systems, in practice even in those countries where the constitutions have not been formally amended.

The place of international law in domestic legal systems has been especially affected by the post-war emphasis on human rights and democratic governance. Those countries that have experienced dictatorships or foreign occupation generally reveal greater receptivity to international law, often incorporating or referring to specific international texts in their post-repression constitutions. The failures of the domestic legal order appear to have inspired these countries to turn towards an international 'safety net'. This is evident not only in the new constitutions of Central and Eastern Europe, but also in those of Argentina, South Africa, and, from an earlier period, Spain and Portugal. Luxembourg, which owes its creation to a series of treaties, and has been dependent on international co-operation for its economic well-being and even its sovereignty, shows similar respect for international law, giving it primacy in the domestic system.

Countries that have not had such experiences, like France and the United States—the latter having the oldest written Constitution among the states discussed herein—appear less likely to adhere to international agreements or to incorporate and apply customary international law in judicial decisions.

## 1. International and Domestic Legal Systems in Theory: the Classic Debate

Throughout the twentieth century, international legal scholarship divided over whether the international and domestic legal orders constitute a single system (monism) or whether each domestic legal system rests self-contained, separate from others and from the international system (dualism).[3] This division between monism and dualism encompasses numerous possibilities in theory and in practice. First, both monists and dualists may accept the concept that some international law (peremptory norms/*jus cogens*) is automatically binding, irrespective of a state's consent or domestic legal order—creating a sub-category of monist norms even for dualist systems. These peremptory norms may exist alongside other international norms that only become binding after they are adopted by the state according to its domestic constitutional processes, either through direct incorporation or through transformative legislation. A second possibility is that domestic systems may consider themselves monist for one source of international law (eg custom) and dualist for another (treaty law). Third, a court in a dualist state might give direct effect to international law during litigation involving transnational issues, using choice of law principles, because the relevant other legal system is a monist state. Fourth, states taking a dualist approach to treaty incorporation may nonetheless

[3] For an introduction to the historical debate, see Janne Nijman and Andre Nollkaemper (eds), *Introduction, in New Perspectives on the Divide between National and International Law* (Oxford: OUP 2007) 1 (hereinafter '*New Perspectives*').

automatically apply adjustments or decisions of treaty bodies that further define the obligations set out in the treaty, as if they were monist.[4]

Despite these various possibilities, some scholars argue that the fundamental principle of sovereign equality of states dictates dualism as a starting point: it is for each state to organize its legal system and determine the process for giving its consent to be bound by norms of international law.[5] Treaties generally contain final clauses that specify for purposes of international law how a state's consent should be expressed, usually by ratification or accession, but the domestic process required to obtain ratification or accession is not set out, because that is an internal legal matter for each state. There is a similar division between international and domestic law once a state has become party to a treaty. It must comply with the obligations it has accepted, but the treaty will often leave to the state the determination of how that compliance is to occur; many treaty provisions set out only the result that must be achieved,[6] sometimes adding 'by legislation if necessary'.[7] Such provisions seem to support a dualist notion in respect to the relationship between international and domestic law.

It may be questioned, however, whether other developments in international law lead to a more monist conception, in particular the role of international law vis-à-vis individuals. Certainly, international criminal law as it has developed since the Nuremberg trials has made clear that domestic permission or duty to perform or refrain from certain actions is subordinate to the dictates of international law. Domestic mandates provide no defence to prosecution for violating international proscriptions. In this respect, international law overrides domestic law and imposes its own normative construct on individuals, whether or not the individual's state of nationality or residence, or the state where the conduct occurs, approves, immunizes or requires the act in question. At the same time, international criminal law is created by states and still depends on states to investigate, prosecute and punish, or, at least, to arrest suspects and deliver them to an international tribunal pursuant to domestic norms and procedures. The 2010 judgment of a Kenyan appellate court that it lacks jurisdiction to try Somali pirates because the crime occurred in international waters, notwithstanding the classic international law doctrine of universal jurisdiction, reflects common judicial understanding of domestic courts as creatures of domestic law.

While academic discourse on the relationship between international law and domestic legal systems continues in large part to refer to monism and dualism, the contributions to this volume suggest that it is rare to find a system that is entirely

[4] An example would be the amendments and adjustments to obligations under the Montreal Protocol to the Vienna Convention for the Protection of the Ozone Layer (1985).

[5] For a passionate defence of dualism, see Gaetano Arangio-Ruiz in *New Perspectives*, ibid 15.

[6] The European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222, Europ TS No 5 ([hereinafter 'European Convention on Human Rights') prescribes in Article 1 that the Contracting Parties 'shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.

[7] Article 2 of the International Covenant on Civil and Political Rights, for example, prescribes the adoption of 'such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant'.

one or the other. In relation to treaty law, as Emmanuel Decaux states in his report on 'monist' France, the direct application of a treaty properly adopted is by no means automatic. This is also true of other so-called 'monist' states, whose courts may invoke doctrines like self-execution or political question to limit the domestic legal effect of ratified treaties. Dualist states, on the other hand, are often monist when it is a matter of customary international law; for treaties, courts in dualist systems sometimes find that even implementing legislation is not self-executing, because it is insufficiently precise to allow the court to apply the norms incorporated from a treaty. In sum, there is some convergence in the approach of courts to the issue of applying treaty law.

In general, older constitutions that largely pre-date the creation of international organizations and multilateral ('law-making') treaties often make few references to international law. In addition, many legal systems based on British common law have relatively long-standing constitutional traditions that are difficult to change in practice. Neither the United Kingdom nor New Zealand[8] has a written constitution,[9] while the constitutions of other common law countries sometimes comprise both written and unwritten elements, with little mention of international law. Australia's 1901 Constitution, which remains almost completely as it was when enacted,[10] contains a single reference to treaties.[11] The US Constitution of 1789 is also terse on international law and leaves many issues unresolved.

Leaving aside the textual references to international law in domestic constitutions, international human rights and humanitarian law seem to be influencing some judges and others in government to take a more monist view. Judges from British Commonwealth and other common law countries participating in a series of colloquia on the relationship between international and domestic law adopted a statement in 1998 that 'the universality of human rights derives from the moral principle of each individual's personal and equal autonomy and human dignity. That principle transcends national political systems and is in the keeping of the judiciary'.[12] It is striking that such a statement issued from judges whose legal systems are traditionally dualist. Melissa Waters correctly reads this declaration to imply that the international law of human rights is the 'primary, authoritative source for human rights norms: Domestic legal sources are merely derivative of

[8] As discussed below, scholars have traditionally described New Zealand as having a 'dualist' approach to international treaties and a 'monist' approach to international custom, but practice suggests a system somewhere between the two, influenced by the growth of international norms, particularly in the field of human rights. See, eg, *R v Pora* [2001] 2 NZLR (CA) and *Simpson v A-G* (*Baigent's* case) [1994] 3 NZLR 667 (CA).

[9] Israel also has no formal, written constitution, but the *Knesset* has enacted Basic Laws that define the respective roles of the *Knesset*, the Government, the Judiciary and the President. The Basic Laws do not address the relationship between international law and domestic law.

[10] It has had few amendments, the last being enacted in 1977.

[11] Section 51, Constitution of Australia ('in all matters—(i) arising under any treaty; . . . the High Court shall have original jurisdiction').

[12] 'The Challenge of Bangalore: Making Human Rights a Practical Reality' in Developing Human Rights Jurisprudence, Volume 8: Eighth Judicial Colloquium on the Domestic Application of International Human Rights Norms: Bangalore, India, 27–30 December 1998, 267 at 268 (London: Commonwealth Secretariat, 2001) (1998 Colloquium, Bangalore, India).

international human rights law'.[13] Under this approach, the role of judges is to harmonize domestic law with the superior law in an integrated legal order, a role that recent case-law indicates some judges are fulfilling by implying rights, presuming that statutes are intended to conform to international norms (even those not in force for the state), and developing the normative content of the common law.[14] Such judicial incorporation clearly raises separation of powers issues, because it circumvents both the treaty-making power of the executive and the legislative role in treaty approval. Not surprisingly, it has proven controversial in several countries.

## 2. Hierarchy and Sources of Law

In general, the place of international law in the domestic legal system depends on the source of the international law in question: whether it is a treaty, customary international law, a general principle of law, or derives from the decision of an international organization.

### 2.1 Treaties

For treaties, an initial distinction may be made between those states like the Netherlands that place international treaties at a constitutional rank and those that place it below the constitution. A few states separate out human rights treaties for enhanced (constitutional) status,[15] while leaving other agreements at the same level as legislative enactments.[16]

States that place international treaties below the constitution may be divided further into those that grant treaties supremacy over legislation[17] and those that do not. States with common law systems generally rank treaties as equivalent to domestic legislation, meaning that the later in time prevails in case of conflict. Courts, however, generally apply a presumption that the legislature intends to

[13] Melissa A. Waters, 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties' 107 Colum L Rev 628, at 648 (2007).

[14] In addition to the chapters in this volume, see the study of Waters, ibid. See also Vicki Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' 119 Harv L Rev 109 (2005); F.G. Jacobs & S. Roberts (eds), *The Effect of Treaties in Domestic Law* (London: Sweet & Maxwell, 1987).

[15] In Argentina, Slovakia, and Venezuela, special status is given to human rights treaties. The Argentine Constitution mentions a number of human rights treaties, giving them constitutional status; they cannot be repealed by the legislature. Similarly, the 1999 Venezuelan Constitution, Article 23, grants human right treaties constitutional hierarchy to the extent that those treaties contain provisions more favourable than domestic legislation. Austria and Italy require a parliamentary supermajority to give treaties the same status as constitutional provisions. Slovakia's Constitution, Article 154c, provides that human rights treaties adopted prior to 1 July 2001 have this status only if the rights are of greater scope than those provided in the constitution. For further examples, see Thomas Buergenthal, 'Modern Constitutions and Human Rights Treaties' 36 Colum J Transnat'l L 211 (1997).

[16] Eg the Czech Republic, Slovakia, Venezuela.

[17] Eg Bulgaria, France, Germany, Greece, Portugal, Russia.

conform domestic law to international obligations and will attempt to reconcile the two if possible.[18]

A few constitutions appear to leave the issue of hierarchy between treaties and domestic law unresolved,[19] either failing to mention the topic or doing so in terms that are ambiguous about the place of international law in the domestic legal system. Some constitutions simply make reference to the principles and norms of international law or to international obligations.[20]

Entry into the European Union (EU) has complicated the situation for European states. Member states must now implement and apply the legal norms issued by EU institutions and also the international commitments undertaken at the regional level. Some member states leave it to the courts to find a solution.[21] In contrast, constitutional amendments have been enacted in some states to ensure that the provisions of treaties governing the European Union and the rules issued by its institutions apply directly in national law, as provided by European Union law.[22] Beyond the legislative parameters of the EU, the jurisprudence of the European Court of Justice (as well as that of the European Court of Human Rights) has added a new dimension to the interaction of domestic and international law within Europe.

## 2.2 Custom

Many countries lack a clear rule on the place of custom in the domestic legal order.[23] For example, whether or not customary international law overrides common law precedent in Canada is unclear, but it does yield to clearly inconsistent statutory language. To avoid conflict, courts in Canada as well as some other common law countries, have developed and entrenched an interpretive doctrine that presumes legislative intent to conform domestic law to international customary

[18] Eg Canada, United States. Canada's domestic implementing legislation sometimes explicitly provides that interpretation of legislation should be consistent with the relevant international agreement. See eg, North American Free Trade Implementation Act, SC 1993, c 44, s 3.

[19] Article 98 of the Japanese Constitution provides, without further elaboration in the text, that the Constitution is the supreme law of the land and that 'The treaties concluded by Japan . . . shall be faithfully observed.'

[20] Examples include the constitutions of the Czech Republic, the Republic of Hungary, Portugal and Slovakia.

[21] Eg Italy. See Constitutional Court, *Frontini*, Decision No 183 of 18 December 1973), discussed below.

[22] This is the case with Portugal and the Slovak Republic. Article 7(2) of Slovakia's Constitution provides: The Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its powers to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Article 120 para 2.

[23] Like many other constitutions, the Netherlands Constitution is silent on customary international law. The Portuguese Constitution also does not clearly indicate hierarchy. Authors almost unanimously ascribe a superior value to general international law, but opinions are divided as to its hierarchical position in relation to the constitution.

as well as treaty law. As a consequence, courts must interpret domestic law in conformity with international legal obligations where possible. Domestic legislation continues to prevail, however, when it cannot be reconciled with international law. Indeed most systems, whether common law or civil law in origin, privilege written law over unwritten custom.

In contrast, customary international law has the force of constitutional law in some countries. In Italy, for example, any domestic law in conflict with custom is held to violate indirectly the Italian Constitution and can be repealed by the Constitutional Court; however, the Constitution and basic human rights guarantees prevail over the observance of international customary law in case of conflict. In Greece as well, the generally recognized rules of international law are stated in the Constitution to be an integral part of domestic Greek law and to prevail over any contrary provision of the law. This seems to be a minority position among states today, subject to increasing recognition of *jus cogens*, discussed in the next section.

## 2.3 *Jus Cogens*

Issues of hierarchy have become more complex with the emergence of the doctrine of peremptory norms (*jus cogens*) that override all other sources of law, international and national. The concept is growing in acceptance, but remains controversial. Japanese courts have not recognized *jus cogens*, indeed, as the chapter on Japan discusses, one court denied its existence, but at the same time the court recognized that no legal system could give effect to illegal agreements that conflict with 'public order and good morals' in international law.

Other courts have recognized the doctrine, identified *jus cogens* norms and given effect to them. In Argentina, for example, *jus cogens* has been recognized in reference to crimes against humanity, to give effect to an extradition without applying the normal statute of limitations. The Hungarian Constitutional Court considers that certain *jus cogens* norms have priority over all domestic law, while Austrian courts have referred to the doctrine of *jus cogens*, without resting a judgment on it thus far.[24] Canadian, Czech, German, Russian, UK and US courts have also recognized the existence of *jus cogens*, but consider that very few norms of this quality have emerged and even fewer have an effect on the outcome of specific cases.

Some legal systems have been particularly receptive to assertions of *jus cogens* norms. Although not discussed in this volume, Switzerland adopted a constitutional amendment to give supremacy to *jus cogens* norms over domestic law.[25] In the well-known *Ferrini* case, Italy's Corte di Cassazione held that Germany is not entitled to sovereign immunity for violations of human rights *jus cogens* carried out

[24] Austria's Supreme Court appears to view certain human rights as having the status of *jus cogens* and prevailing over binding UN Security Council resolutions.

[25] Article 139 of the revised Swiss Federal Constitution of 1999 provides that no peoples' initiative to amend the constitution can be adopted that violates norms of *jus cogens*. For a discussion of the amendment and background to it, see Erika de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law' 15 EJIL 97–121 (2004).

by German occupying forces during World War II.[26] The Israeli courts have recognized a relatively lengthy list of *jus cogens* norms, including not only the prohibitions of genocide, crimes against humanity, and torture, but also the prohibition on corrupt practices and money laundering.

## 3. Treaties and Domestic Legal Systems

### 3.1 The Process of Adherence

In all the countries discussed herein, there is some form of democratic participation in the process of introducing treaties into domestic law. Legislative approval has increasingly become a precondition for the internal effect of treaties, as there has been a gradual extension of the categories of treaties subject to such approval. France has perhaps evolved the furthest away from its tradition of a strong executive towards greater legislative and judicial involvement in the role of international law in the domestic system.

In most states, the head of state or government concludes treaties that then must be approved by all or part of the legislature prior to ratification. Practice differs about whether it is sufficient for one part of the legislature to approve,[27] or whether, in states with bicameral legislatures, both bodies must consent.[28] Treaties that involve a transfer of governmental powers to international institutions often require a super-majority[29] and administrative agencies as well as the legislature may play a role in the conclusion of treaties.[30] Some constitutions provide for pre-ratification judicial review of the conformity to the constitution of a proposed treaty.[31] A few federal states, like Austria, require consent to an international agreement by component states or provinces if the agreement affects them. Other federal states, notably Australia, Russia, and the United States, consider external affairs to be an exclusively national subject area.

A second group of states, mostly following British tradition, does not require prior approval of treaties, but insists on post-ratification incorporation by legislation for a treaty to have domestic effect. Finally, in some countries both pre-ratification approval and subsequent incorporation are required. Some courts have found that even the implementing law requires further action through

[26] See *Corte di Cassazione*, *Ferrini*, Judgment No 5044 of 2004.

[27] Eg United States.

[28] Eg Argentina, Japan, Venezuela.

[29] This is frequently required in countries within the European Union, eg, Czech Republic, Greece, Luxembourg, Slovakia. Austrian law establishes three types of approval while Polish law distinguishes four modes of ratification, two of which require a super-majority for treaties concerning international organizations or institutions.

[30] Hungary.

[31] In Hungary the Constitutional Court has competence to carry out an *ex ante* review of the constitutionality of provisions of an international treaty and if the Constitutional Court finds a problem, the treaty cannot be ratified until the unconstitutionality is repaired. Articles 1(1), 36 of the Act on the Constitutional Court.

regulations or more detailed legislation before the provisions can be judicially enforced.

The contributions to this volume indicate that domestic legal systems increasingly recognize a distinction between formal treaties that require ratification and less formal agreements, often of a political or administrative nature, that can be approved through a simplified process or implemented by the executive without legislative involvement.[32] Some constitutions expressly recognize the existence of such agreements. Other constitutions are silent on the issue, with the result that, as the practice has increased, courts have had to affirm or deny the constitutionality of such agreements and their place in the legal system. Today, executive or administrative agreements largely outnumber formal ratified treaties, reflecting the growth in international administrative and regulatory practice.[33] In general, the practice of concluding executive or administrative agreements has grown up without a clear constitutional mandate. This leaves issues about the legal status of such agreements somewhat uncertain.[34]

## 3.2 Automatic or Legislative Incorporation of Treaties

Many countries automatically incorporate into domestic law a treaty to which the state has become a party.[35] In Serbia, as in several other countries, separate constitutional provisions govern human rights and treaties concerning the status of minorities.[36] Venezuela's Constitution also gives special treatment to human rights treaties, granting them direct and immediate application by courts and public offices.

[32] For examples, Article 87, para 8, of the Italian Constitution specifies that the President of the Republic 'ratifies international treaties which have, where required, been authorised by the Houses'. Article 80 indicates that authorization by law is required for the ratification of international treaties 'which are of a political nature, or which call for arbitration or legal settlements, or which entail changes to the national territory or financial burdens or changes to legislation'. Article 89 provides for further governmental control on the President's power of ratification by requiring the proposing minister—usually the President of the Council of Ministers –, to countersign, assuming the political responsibility, the act of ratification for it to be valid. Argentina, Austria, Germany, Poland, the United States and Venezuela also have simplified procedures or recognize executive agreements.

[33] See D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000).

[34] The courts in the United States have long affirmed that the Article II advice-and-consent process is not the exclusive route by which the United States can enter into binding international agreements. Congressional-executive agreements became an increasingly important part of the landscape more than a century ago and today, there is a proliferation of so-called sole-executive agreements. Controversy remains over how far the President can enter into binding international agreements without formal approval by one or both houses of Congress and about the extent to which the political branches experiment with new procedures for entering into international agreements. Status of forces agreements, weapons sales, and claims settlements have been concluded on the sole authority of the president, sometimes triggering heated political debate.

[35] Eg Greece, Bulgaria, Serbia.

[36] In addition, some Serbian constitutional provisions on human rights have been copied verbatim from international human rights treaties, notably the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Constitution provides that obligations arising from such treaties may not be subject to referendum.

So-called dualist countries require legislation to transform treaties into domestic law.[37] Most common law countries based their practice on that of the United Kingdom, according to which ratified treaties do not automatically become part of UK law, but their contents must be enacted into law by Parliament.[38]

## 3.3 Interpretation of Treaties

The Vienna Convention on the Law of Treaties (VCLT)[39] is considered in large part to codify the customary rules on the conclusion and interpretation of treaties. The political branches and courts of many states[40] thus use the VCLT when issues related to a treaty arise, including the preliminary question of distinguishing a binding treaty from a non-binding instrument or political commitment. Constitutions generally do not define the term 'treaty' and it has been left up to the courts in most instances to identify treaties and determine the rules by which to interpret them.[41]

Most legal systems accept that treaty interpretation is a legal matter to be determined by the courts. In Britain, for example, once a treaty has become incorporated into domestic law, it is the task of the courts to interpret that treaty and there appear to be no instances in which courts have deferred to executive interpretations, although there can be, and sometimes are, statutory instructions to the courts as to interpretation, made part of the law at incorporation. The courts are bound to follow any such statutory commands. In contrast, the courts of the United States are unusual in deferring to the political branches on issues of treaty interpretation,[42] but this deference is not without limits.[43] Taking a middle position, the legal systems of France and Luxembourg reveal a certain tension between the role of the courts as interpreters of the law and the role of the Minister

[37] In the Italian legal system, like treaties are incorporated by means of the laws of ratification and must be consistent with the Constitution. After the 2001 constitutional reform, the new Article 117, para 1, reads: 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU-legislation and international obligations.' The Italian Constitutional Court clarified the meaning of this provision in its Decisions Nos 348 and 349 of 24 October 2007.

[38] The one notable exception to this general principle is treaties concluded by the institutions of the EU with non-EU states. These treaties have been held, as a matter of European Community law, to be directly enforceable within the member states.

[39] VCLT, above n 6.

[40] Eg the Italian domestic courts interpret treaties on the basis of Articles 31 and 32 of the Vienna Convention on the Law of Treaties. See the discussion of *Corte di Cassazione*, Judgment No 9321 of 16 December 1987; *Corte di Cassazione*, Judgment No 7950 of 21 July 1995).

[41] Argentina is not a party to the VCLT but utilizes it in determining what is a treaty. Poland, Russia and Venezuela do the same.

[42] US courts have long accorded deference to the executive branch's views as to the meaning of a treaty to which the United States is a party. See eg *Medellín v Texas* 128 S Ct 1346 (2008); *Medellín v Dretke* 544 US 660 (2005); *Chan v Korean Air Lines, Ltd* 490 US 122 (1989); *United States v Stuart* 489 US 353 (1989); see generally Scott Sullivan, *Rethinking Treaty Interpretation* 89 Tex L Rev 777, 789 (2008) (describing contemporary treaty interpretation as involving 'near-total deference'.)

[43] As with statutory interpretation, judicial analysis focuses on the precise words used in the treaty, even more than the treaty's overriding object and purpose. US courts rarely make reference to the Vienna Convention's rules on treaty interpretation.

of Foreign Affairs who should be consulted to obtain the view of the government about the interpretation of clauses in a treaty.[44]

While many courts appear to use the rules of interpretation contained in the VCLT, they do not always cite its provisions in their judgments and opinions.[45] Almost no cases are reported of courts considering matters of reservations, although some of them have the power to determine whether a statement is or is not a reservation.

## 3.4 Self-Execution or Direct Applicability

Courts utilize different terminology in deciding whether or not to enforce a treaty provision invoked by one of the parties to a pending case. The courts of several countries, including the United States and Japan, refer to the doctrine of 'self-executing' treaties, while European courts tend to discuss 'direct applicability' or 'direct effect'. In all these instances, however, the courts are similarly examining the question of whether the treaty provision in question is capable of judicial enforcement or whether an intervening legislative or executive act is required.[46]

Constitutions rarely refer specifically to this issue[47] although Slovakia's constitution appears to provide that all human rights treaties are self-executing or directly applicable. For states without explicit textual mandates, the doctrines of self-executing treaties and direct applicability have developed as judicial doctrine, rooted in notions of separation of powers. Most courts look for (1) expressions of the intent of the parties, (2) whether or not the agreement creates specific rights in private parties, and (3) whether the provisions of the treaty are capable of being applied directly.

[44] However, according to the President of the Cour de cassation, the court applies the ECHR extensively directly—cf Guy Canivet, The Use of Comparative Law before the French Private Law Courts, in: Canivet et al, *Comparative Law before the Courts* (London: BIICL 2005) 181, 189f.

[45] In Japan, the courts apply the general rules of treaty interpretation and have cited Articles 31 and 32 of the VCLT. There is no particular deference accorded the views of the government, except as concerns the issue of the constitutionality of a treaty or concerning whether a statement is a reservation or an interpretive declaration. The Tokushima District Court, in its judgment on 15 March 1996 in a case claiming state compensation for a prisoner who was obstructed by prison guards in efforts to see his counsel concerning a civil suit (*Hanrei Jihō*, vol 1597, p 115), reproduced the provisions of Article 31, para 3(a), (b), (c) in detail in examining the relevance of the jurisprudence of the European Court of Human Rights on Article 6, para 1 of the European Convention of Human Rights for the purpose of interpretation of Article 14, para 1 of the ICCPR.

[46] Even dualist countries where treaties must be incorporated into domestic law face this issue. The exception seems to be Israel, where it has been accepted that treaties are not automatically accepted into domestic law but need to be implemented by primary legislation, or by secondary legislation if such implementation was previously authorized in principle by primary legislation. Non-implemented treaties are not devoid of any legal effect, though, since the courts have adopted a rule of interpretation and a rule of presumption which ensure, to the extent possible, the compatibility of Israeli domestic law with Israel's international commitments. The incorporation doctrine and practice means there is very limited scope for the notion of self-executing treaties in Israel.

[47] Article 91(1) of the Polish Constitution is rare in requiring not only that the treaty should be ratified and promulgated but also that the norm should be suitable for direct application. According to the Constitutional Court, a treaty norm can be applied directly if it contains all normative elements essential for its judicial application (a norm has to be complete).

The factors utilized by national courts in deciding on the direct application of a treaty provision are strikingly similar,[48] relying on the language of the treaty and an assessment of whether or not the provision can be applied directly consistent with the appropriate functions of the judiciary. While courts often refer to the intent of the parties, the decisive criterion most commonly cited is whether or not the provision is sufficiently precise to be capable of judicial enforcement.[49] Some courts have referred to this test as one of the 'self-sufficiency' of the provision.[50]

The approach of the Netherlands courts is typical: the criteria mix international and domestic law and the outcome does not entirely depend on the intention of the States parties. Domestic courts may examine the way in which the engagements of the states parties to a treaty have been couched, including whether implementation is gradual and whether the conduct required is 'positive' or 'negative'; whether the provision is suitable to be applied by the courts; whether it sufficiently concrete; whether the provision is binding on the State in its relations to other states only.

Even where treaties are not self-executing or directly applicable they may have persuasive effect in interpreting domestic law. In New Zealand[51] it is now settled that international agreements can be an aid to statutory interpretation, although to what extent varies according to judicial interpretation of the relevant treaty and the domestic context.

Although the application of a treaty in litigation would appear to present quintessentially judicial questions, the political branches may attempt to direct the outcome during the treaty approval process. The US Senate, for example, often attaches declarations to its approval of treaty ratification declaring that a treaty is non-self-executing. The legal effect of such declarations has not been tested. The judicial approach to treaty application appears to be changing. In *Sanchez-Llamas v Oregon*,[52] a majority of the US Supreme Court referred to what it characterized as 'a long-established presumption that treaties and other international agreements do not create judicially enforceable individual rights', ignoring long-standing precedents that held that a treaty is directly applicable federal law 'whenever its provisions prescribe a rule of law by which the rights of the private citizen or subject may be determined' and 'when such rights are of a nature to be enforced in a court of

[48] In the Czech Republic, as in most other states, a ratified treaty is regarded as self-executing if the rights and obligations stipulated therein are sufficiently specific that such a treaty can be applied in the legal order without any further legislative specification in a separate act. In Greece, similarly, international agreements have a 'self-executing' character if their provisions have sufficiency and fullness and either attribute or recognize rights of private persons, capable to support legal actions before tribunals, or prescribe obligations of the executive which private persons can invoke before tribunals. 'Non-self-executing' treaties are those international conventions which do not produce direct legal effects in the internal legal order, either because their application requires the promulgation of supplementary measures in the internal field, or because their purpose is not the recognition or the attribution of rights capable of being pursued by judicial procedures.

[49] Cf Administrative Court, Collection No 5819 F, 21 October 1983; Supreme Court, Decision No 7Ob1/86, 20 February 1986.

[50] *Ann dr lux* 5 (1995) 307.

[51] See C. Geiringer, 'Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law' 21 NZULR 66 (2004).

[52] 548 US 331 (2006).

justice'.[53] Recent judgments of the Supreme Court suggest that fewer treaties will be found to be self-executing in the United States in the foreseeable future.

## 4. Custom

National constitutions rarely use the term customary international law or custom. It is much more common for the phrase 'general principles and norms of international law' to appear or, in some older constitutions, the term 'law of nations'.[54] Most continental European constitutions call for direct incorporation of such 'norms', 'general principles' or 'rules' of international law.[55] The Constitution of the Russian Federation thus provides that the universally-recognized principles and norms of international law shall be a component part of its legal system. The 1997 Polish Constitution similarly declares generally that 'the Republic of Poland shall respect international law binding on it'. Interestingly, judges in Poland invoke this provision not only in reference to customary law but also to the decisions of international organs or organizations.

The British common law has long held that customary international law that does not conflict with legislation automatically forms part of the common law and has direct legal effect in courts without the need for incorporation. Countries whose legal systems are based on common law generally follow this tradition. Thus, in Canada, lower court decisions have been explicit in supporting the adoption of customary international law. New Zealand's constitutional framework recognizes the principles of customary international law as part of the common law of New Zealand. In Israel, as well, customary international law is 'part of the law of the land', but in a recent case the Supreme Court held that the burden to prove the existence of a custom falls upon the party which pleads its existence.[56] This is in contrast to the commonly held position that judges have the power to take judicial notice of the existence of customary international law.

German courts tend to apply customary international law in practice if the parties to the case rely on it, facilitated by a special so-called norm verification procedure that allows any German Court, when confronted with a norm of universal customary law to refer questions of interpretation to the Federal Constitutional Court.[57] After having obtained a decision from the Federal Constitutional Court, the original court will apply the norm of customary law in the case.

[53] 548 US at 373 quoting *Head Money Cases* 112 US 580, 598–9 (1884).

[54] Article 98 of the Japanese Constitution, for example, states that 'the established laws of nations' shall be faithfully observed. The US Constitution refers to the law of nations in Article 1.

[55] Austria's Federal Constitution, Article 9(1) provides that 'generally recognized rules of international law form part of federal law.' Similarly, Germany's Article 25 GG provides: 'The general rules of public international law are an integral part of federal law. They take precedence over statutes and directly create rights and duties for the inhabitants of the federal territory.' The Greek Constitution also refers to 'generally recognised rules of international law'.

[56] *Abu'Aita v Commander of the Judea and Samaria Region*, 37(2) PD 197 (1983), at 241. Cf Lapidoth, ibid 454.

[57] For a practical example see Press Release No 97/2003 of 13 November 2003—Extradition to the United States of America, <http://bundesverfassungsgericht.de/en/press/bvg97-03en.html/>.

Greece, Italy and Poland automatically incorporate international customary law into domestic law. Their domestic courts have the competence to verify the existence or the content of international customary rules and the changes that automatic incorporation produces in the legal system. In Luxembourg, in the absence of a constitutional provision, the courts have concluded that it is possible to apply customary international law if the norm is of direct applicability. There is no need for the norm to be proven as a fact, since the issue is one of law.

In general, issues of customary international law mostly arise in matters concerning sovereign or diplomatic immunity[58] and treaty law, but cases can also be found concerning customary law of the sea, the political offence exception to extradition, non-refoulement, human rights and principles of armed conflict. Other judicial decisions have pronounced on customary norms concerning territorial sovereignty, self-determination, state succession, state jurisdiction, *ne bis in idem*, the obligation of a state not to require foreign citizens to serve in the army, and immunity of state officials from foreign criminal jurisdiction.

As the chapters herein indicate, legal systems differ over the extent to which courts defer to the views of the executive branch on the content of custom. In general, however, judicial notice is to be taken of customary international law and the courts do not defer to the executive or legislative branches with respect to the existence or content of customary international law.

## 5. Other Sources of International Law

Few constitutions, apart from those of EU member states, contain references to other sources of international law, whether declarations and other acts of international organizations or the decisions of international tribunals.[59] Argentina's constitution is unusual in referring specifically to the Universal Declaration of Human Rights and the American Declaration on the Rights and Duties of Man.[60] Most references to 'soft law' (declarations and resolutions of international organizations) occur in judicial decisions, and occur with increasing frequency.

Another form of 'soft law' from the perspective of domestic courts consists of unratified treaties as well as those that have been ratified but not incorporated in domestic legislation. Courts may give these instruments some juridical weight, by using them as persuasive authority in interpreting domestic law. This appears to be an increasing practice, especially in common law countries, with respect to human

[58] On immunities, see R. van Alebeek, *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law* (Oxford: OUP, 2008); Arthur Watts, 'The Legal Position in International Law of Heads of States, Head of Governments, and Foreign Ministers' in 247 Recueil des Courts 1994-III (1995); Hazel Fox, *The Law of State Immunity* (Oxford: OUP, 2005).

[59] There is nothing in the Japanese and Austrian Constitutions or the Israeli Basic Laws, for example. The Constitutional Court of Austria deems a decision of an international organization to become domestic law after it is published in the Federal Law Gazette, while the Administrative Court seems to require implementing legislation.

[60] Article 75(22) of the Constitution.

rights treaties. The chapters on Canada, New Zealand, and the United States present examples of this practice.[61] A majority of the US Supreme Court, for example, has relied on treaties to which the United States is not a party, as well as non-self-executing treaties, to hold that the juvenile death penalty is unconstitutional, finding that such treaties provide evidence of 'the overwhelming weight of international opinion . . . '[62] which, 'while not controlling . . . does provide respected and significant confirmation' for the court's conclusions.[63] This by-passing of the legislative role in treaty-making has proven controversial; historically, common law dualism developed to ensure a role for Parliament in making domestic law, providing an important check on the executive's sole prerogative to make treaties.

## 5.1 Declarations, Resolutions, and Recommendations

The recent growth of international institutions with power to render decisions, judgments and issue recommendations has presented courts with a new body of normative texts that may be utilized for a variety of purposes. The relatively recent development of this body of norms, coupled with lack of consensus about the juridical status of much of it, has left courts to develop their own approaches to the legal weight to be afforded 'soft law.' The courts have responded with varying degrees of receptiveness and modes of legal analysis. The general view seems to be to view such texts as 'persuasive' but not legally binding.

Austrian, Canadian, German,[64] Greek, and Israeli[65] courts have interpreted domestic laws using non-binding texts such as recommendations, declarations, and judicial or quasi-judicial decisions of international tribunals, as well as treaties

[61] British Commonwealth judges, in the Bangalore Principles, acknowledged the growing tendency for national courts to have regard to international human rights norms for the purpose of 'gap-filling' in deciding cases where the domestic law is uncertain or incomplete. Developing Human Rights Jurisprudence, Volume 1: First Judicial Colloquium on the Domestic Application of International Human Rights Norms: Bangalore, India, 24–26 February 1988 at ix (London: Commonwealth Secretariat, 1988). In 1998, the judges went further, adopting a statement that claimed it to be a 'vital' duty of the judiciary 'to interpret and apply national constitutions and . . . legislation in harmony with international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law'. 8 Developing Human Rights Jurisprudence, Volume 8, 267, 268 (Commonwealth Secretariat, 2001), n 12.

[62] *Roper v Simmons* 543 US 551, 574–7.

[63] Ibid at 578.

[64] German courts consider that non-binding declarative texts may play a role in the interpretation of legally binding acts such as treaties. In addition, such declarative texts may be used in order to illustrate societal developments which have indirect effects on the evolution of legal concepts. However, there is no systematic use of such sources in the jurisprudence of German courts.

[65] In determining the appropriate Israeli standards for the treatment of prisoners, the Supreme Court considered as both authoritative and relevant the UN Standard Minimum Rules on the Treatment of Prisoners, 1955 (ss 10 and 19), as well as the UN Center for Human Rights Basic Principles for the Treatment of Prisoners, 1990 (Articles 1, 5). The Supreme Court further considered the European Prison Rules, 1987 (rr 15, 24), as well as legislation in European countries and the US. HCJ 4634/04 *Physicians for Human Rights—Israel v Minister of Public Security and Commissioner of the Prisons Service*, tak-Supreme 2007(1), 1999. As the chapter on Israel, below, indicates, Israeli Courts have cited, on occasion, decisions of the ICJ, decisions of the International Criminal Tribunal for Yugoslavia, the European Court of Justice, and, especially, numerous decisions of the European Court of Human Rights.

and custom. In particular the Supreme Court of Canada has suggested some deference to decisions of the ICTY and the ICTR when interpreting domestic criminal law on crimes against humanity. Some members of the Supreme Court have also noted the utility and relevance of the teachings of publicists. The Supreme Court has also found persuasive non-binding sources like model laws, but carefully distinguishes them from binding treaties.

In Argentina, reports of the Human Rights Committee and the Inter-American Court of Human Rights are considered relevant in interpreting domestic law. The Netherlands considers non-binding declarative texts like the Universal Declaration of Human Rights[66] and the UN and European standards for the treatment of prisoners as relevant and often authoritative for the courts. Non-binding texts can also be considered to have become legally binding if enhanced by later developments. Similarly, in Serbia, courts have relied on the 1948 Universal Declaration on Human Rights and recommendations of the Committee of Ministers of the Council of Europe.

Italian domestic courts use non-binding normative texts for a different purpose, sometimes making reference to them in order to verify *opinio juris* among states and consequently demonstrate the existence or content of an international customary rule. Italian courts do not apply or enforce any decision or recommendation of a non-judicial treaty body, but may take them into consideration to confirm an interpretation of binding international or national rules.

The Russian Federation considers that recommendations of international organizations are not legally binding, but recommendations of Conferences or Meetings of treaty parties may be used as a subsidiary source of interpretation or application of international treaties by courts. The Constitutional Court of the Russian Federation has also referred in its decisions to documents of the Conference on Security and Co-operation in Europe.

In the United States, declarative texts in the field of international law can serve as evidence of the formation of customary international law, particularly as to international human rights law, but a non-binding text, standing alone, has no legal effect within the US legal system.[67] For example, in citing the United Nations' Standard Minimum Rules for the Treatment of Prisoners, the Supreme Court listed the document among many obliging the state to provide medical treatment to prisoners unable to care for themselves.[68] Some texts like the Universal Declaration of Human Rights[69] have achieved considerable influence in decisions at all levels of the federal court system.

[66] HR 28 November 1950, *NJ* 1951, 137 (Tilburg).

[67] See, eg, *Natural Res. Def. Council v EPA*, 464 F3d 1, 8–9 (DC Cir 2006) (holding that consensus decisions by state parties to the Montreal Protocol reached after treaty ratification are 'not law' within the meaning of the Clean Air Act and thus not enforceable in US courts); *Flores v S. Peru Copper Corp.* 414 F3d 233, 263 (2d Cir 2003) (finding the Rio Declaration on Environment and Development not legally binding and therefore not the basis for a human rights suit under the Alien Tort Claims Act).

[68] *Estelle v Gamble* 429 US 97, 103–4 & n 8 (1976).

[69] GA Res 217A (III), U.N. GAOR, 3rd Sess., UN Doc A/810 at 73 (1948).

## 5.2 Decisions of International Tribunals

Within Europe, Article 46 of the European Convention on Human Rights (ECHR)[70] makes judgments of the European Court against a state party binding on it. This has resulted in several new laws in European states. In Austria[71] and Serbia,[72] the law now allows for the reopening of criminal proceedings in some instances following a judgment of the European Court of Human Rights. There are also examples when Serbian domestic courts were asked to enforce international decisions of treaty bodies other than the European Court, including a case before the UN Committee against Torture (CAT).[73]

Hungary provides that the compulsory decisions of international courts and other organizations relating to interpretation of agreements must be enacted and promulgated in *Magyar Közlöny*, while the Czech Constitution provides that the Constitutional Court can decide on the measures necessary for executing a decision of an international tribunal that is binding for the Czech Republic, 'if it cannot be executed in any other way'.[74] Like the example of Serbia, mentioned above, the Czech Constitutional Court has also addressed some of the opinions of the ICCPR's Human Rights Committee,[75] refusing to apply the Committee's conclusions, while taking cognizance of them. Under the constitution, the Constitutional Court is not entitled to apply and enforce decisions of the bodies that do not fall under the legislative definition of an international court.

The German Federal Constitutional Court decided in 2004[76] that all provisions in the German legal order have to be construed in accordance with the ECHR so as to avoid any conflict, but if an avoidable conflict arises with provisions of the Basic Law, the constitution outranks the ECHR. German administrative authorities and courts must take into account decisions of the European Court of Human Rights against Germany in interpreting relevant German law.

The Netherlands Constitution places in juxtaposition the provisions of both treaties and decisions of international organizations 'which may be binding on all persons by virtue of their contents'.[77] The binding force or *erga omnes* effect of

[70] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), 213 UNTS 222, entered into force 3 September 1953.

[71] This is also the case in the Netherlands. The Code of Criminal Procedure in Article 957 para 1 sub 3 provides for reopening of the contested proceedings.

[72] Article 428(2) of the Criminal Procedure Act provides for a remedy against the final judgment in criminal matters and re-opening of the criminal proceeding.

[73] UN Comm. Against Torture, Comm. No 113/1998, *Ristić v Yugoslavia*, UN Doc CAT/C/26/D/113/1998 (2001), (11 May 2001).

[74] Article 87, s 1, letter i.

[75] International Covenant on Civil and Political Rights, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

[76] Federal German Constitutional Court, Press Office, Press Release No 92/2004 of 19 October 2004.

[77] As discussed in the Netherlands chapter, the Supreme Court rejected an argument that the Universal Declaration of Human Rights qualified as 'a decision of an international institution'; it found that the United Nations General Assembly from which the Declaration originates has no power to issue decisions that are binding on the Netherlands. HR 7 November 1984, *NJ* 1985, 247.

judgments of the European Court of Human Rights has been explained as a form of incorporation, because the case-law of the court constitutes an authoritative interpretation of the ECHR and, therefore, has the same binding force as has been attributed to the Convention itself. The courts also have applied this reasoning to the views of the UN Human Rights Committee supervising the Covenant on Civil and Political Rights and other international bodies monitoring the interpretation and application of human rights, though formally non-binding.[78]

Outside of Europe, the approach to the incorporation and implementation of judgments of international tribunals is decidedly mixed. In Canada, courts have rejected enforcement of the decisions of human rights treaty bodies,[79] including instances where the UN Human Rights Committee issued interim measures of protection. In one case,[80] the majority held that the enforcement of interim measures must be rejected because it would convert a non-binding request into a binding obligation enforceable in Canada by a Canadian court, and into a constitutional principle of fundamental justice. The court noted that the Committee itself had said that its 'decisions' are not binding.

In Japan, views of the Human Rights Committee, as well as its general comments and final observations, have been invoked in domestic litigation, but the number of decisions referring to them remains relatively small. The courts are divided, with some denying any juridical weight to views of international treaty bodies but instead considering them as non-binding statements of opinion.

In the United States, the *Medellín* case[81] centered on a request for the Supreme Court to give direct domestic effect to a ruling of the International Court of Justice. The Supreme Court affirmed the ruling of the lower US court and declined to follow the course of action suggested by the ICJ. Figuring prominently in the Supreme Court's analysis was the wording of Article 94 of the UN Charter, by which each UN member state 'undertake to comply with' ICJ decisions.[82] That formulation, according to a majority of the justices, evidences that ICJ judgments were not intended to be directly applicable in the legal systems of UN member states. Thus a 5–4 majority held that Article 94 constitutes a promise to take action in the future rather than a duty to accord the ICJ judgment immediate domestic effect.

## 6. Indirect Application: Using International Law to Inform Domestic Law

The courts of most states have adopted a presumption that domestic law is intended to conform to international law. Among common law countries, Australia, Canada, the United Kingdom, and the United States, in particular, have a doctrine of

[78] Occasionally, Netherlands courts also refer to General Comments of the Committee supervising the ICESCR.

[79] *Ahani v Canada (Attorney General)* and *Suresh v Canada (Minister of Citizenship and Immigration)*.

[80] *Ahani v Canada (Attorney General)*, ibid, at para 33.

[81] *Medellín v Texas* 128 S Ct 1346 (2008).

[82] UN Charter, Article 94(1), quoted in *Medellín* 128 S Ct at 1354.

statutory interpretation that laws will, so far as possible, be interpreted by the courts to conform to treaty and customary obligations, but Australian law seems to suggest that a treaty should be used only to resolve ambiguities in the domestic law. British courts presume, when interpreting legislation (or statutory instruments or orders in council), that the British Parliament did not intend to legislate in violation of Britain's international obligations. This general presumption is rebuttable and it has been rebutted on several occasions. Regarding the European Convention on Human Rights specifically, there is a statutory instruction to British courts to interpret statutes and subordinate legislation, '[s]o far as it is possible to do so', in a manner compatible with the European Convention.[83] In addition, treaties, as well as customary international law, can be used to develop the common law.[84]

As a matter of statutory construction, the presumption of conformity between international and domestic law has not proven to be particularly controversial. Debate has arisen, however, over the use of international norms to interpret and apply the provisions of national constitutions. Israeli courts turn quite often to international law to substantiate constitutional rights. Canadian courts also use human rights obligations when construing the fundamental guarantees of the Canadian Charter of Rights and Freedoms. As early as 1989, the Supreme Court held that the Charter 'should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified'.[85]

There are many examples of the indirect application of treaties in Polish practice as well, that is to say application for the purposes of interpretation of domestic law. The Polish courts sometimes refer to treaties to which Poland is not a party in interpreting or applying domestic law, including constitutional matters. Similarly, in a very few instances Serbian courts applied international treaties that were not binding upon Serbia to illustrate of the content of certain international human rights or as additional argument to support the conclusion reached on other grounds.

Courts in the Netherlands and Austria refer to human rights treaties, in particular, in interpreting or applying domestic law, including constitutional matters. In one Austrian case[86] interpreting Article 7 of the ECHR and Article 4 of Protocol No 7, the court referred to comparable provisions in the American Convention on Human Rights,[87] finding its provisions relevant to interpreting the ECHR. In contrast, Italian courts do not make reference to treaties to which Italy is not a party in interpreting domestic law, including constitutional matters.

Japanese courts use of international law for the purpose of affirming and supporting the interpretation of domestic law. Indeed, this is reportedly favoured and more easily accepted by the courts than is direct application of international law. The courts have developed case-law concerning 'indirect application' of the

[83] Human Rights Act 1998, s 3.

[84] *Mabo v State of Queensland (No 2)* [1992] 175 CLR 1 (3 June 1992); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288.

[85] *Slaight Communications Inc. v Davidson* [1989] 1 SCR 283.

[86] Constitutional Court, Decision No B559/08, 2 July 2009.

[87] American Convention on Human Rights, 22 November 1969, 1144 UNTS 123.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which the Diet has not implemented by legislation. At the same time, courts in Japan tend to decline using international law to interpret constitutional provisions. In particular they have rejected arguments based on human rights treaties, assuming that the Constitution is as protective of human rights as the treaty cited. The Supreme Court recently, however, did take provisions of a human rights treaty into account in interpreting the Constitution.

In both the United States[88] and Australia,[89] the highest courts have split over the role of international law in interpreting the respective national Constitutions. In recent matters, some members of the US Supreme Court cited international instruments in referring to the near global consensus against capital punishment for minors and for the mentally retarded. Other members of the Court criticized any reliance on international sources such as the United Nations Convention on the Rights of the Child and the International Covenant on Civil and Political Rights.[90] Supreme Court justices have also referred to the Convention on the Elimination of Racial Discrimination and the jurisprudence of the European Court of Human Rights.[91] The matter remains highly controversial in the United States, with voters in the state of Oklahoma approving a referendum in November 2010 to bar state judges from citing international law in state court decisions.[92]

## 7. Federal Systems

Three main issues concerning international law arise in federal systems. The first is the extent to which, if at all, foreign affairs matters, including the conclusion of treaties, are reserved exclusively for the national government. The second issue is

[88] See *Roper v Simmons* 543 US 555 (2003); *Atkins v Virginia* 536 US 304, 316 n 21 (2002) (referring to practices in other countries in concluding that execution of mentally retarded persons violates the Eighth Amendment); *Thompson v Oklahoma* 487 US 815, 830–1 & n 34 (1988) (Stevens J.) (plurality opinion) (invalidating state practice of executing defendants under 16 years of age and referring to 'other nations that share our Anglo-American heritage' and citing treaties signed but not ratified by the United States).

[89] In a 2004 case, an Australian justice concluded that requiring the constitution to be read consistently with the rules of international law would make those rules part of the Constitution, contrary to the amendment process set forth in the Constitution. *Al-Kateb v Godwin* (2004) 208 ALR 124 at 140–4, 168–9.

[90] See *Roper v Simmons* 543 US 555, 624 (Scalia J, dissenting) ('[T]he basic premise of the Court's argument—that American law should conform to the laws of the rest of the world-—ought to be rejected out of hand.').

[91] See *Lawrence v Texas* 539 US 558, 572–3 (2003).

[92] The text of the Oklahoma referendum included the following provision: 'C. The Courts provided for in subsection A of this section, when exercising their judicial authority shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States, provided the law of the other state does not include Sharia Law, in making judicial decisions. The Court shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.'

the place of international law in the law of the component parts of the federal system, including the problem of 'federalizing' local matters through exercise of the treaty-making power. Finally, debate has arisen over the extent to which local authorities may regulate local matters through adoption of international law.

It is in respect to the first issue that federal systems differ the most. In all federal states, foreign affairs, including issues of international law, are generally considered matters for the national government. Nonetheless, some states grant a role to the component parts of the federal state. In Austria, for example, constituent states were granted limited authority in 1988 to negotiate specific international agreements according to Article 16(1) of the Federal Constitution.[93] In addition to granting a treaty-making mandate, the Austrian constitution requires that constituent states be given occasion to comment on treaties that require implementing measures by them and treaties that touch on their autonomous sphere of competence. Italy and Germany also distribute foreign relations powers between the federation and component units.

In contrast to the European examples, the US Constitution expressly reserves foreign affairs for federal rather than state authority. First, the Supremacy Clause of Article VI subordinates the laws of the component states to the nation's treaty obligations.[94] Second, under Article I treaty-making is an exclusively federal activity, with the role of the states limited to Senate approval prior to ratification.[95] Yet, states of the United States have entered into agreements among themselves and with foreign countries as far back as the eighteenth century.[96]

Finally, in many federal systems, like those of Austria, Australia, Russia, and the United States, the component states may provide more extensive guarantees than those provided under federal law. In Australia, while the national constitution does not contain a bill of rights, the Australian Capital Territory has incorporated international human rights law into its local legal system through the Human Rights Act 2004 (ACT). It provides that the term human rights as defined in the Act 'is not exhaustive of the rights an individual may have under domestic or international law'. It makes specific reference to 'rights under the ICCPR not listed

[93] The authority added by Article 16(1) is narrowly drawn; it allows constituent states to negotiate agreements only on subject matters within their own sphere of competence and only with states bordering Austria and their respective constituent states. There are also specified procedures that must be followed, including obtaining the consent of the federal government before the treaty is concluded by the Federal President on behalf of the state. Moreover, the treaty must be terminated if the Federal Government so requests due to a predominant federal interest. This limited treaty-making power of states has not been used to date.

[94] US Const, Article VI[3]: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

[95] US Const, Article I, s 10. The safeguards of federalism in this realm are political rather than juridical. Each state sends two senators to the US Senate, the body that gives 'advice and consent' on proposed treaties, and each state sends a delegation to the House of Representatives, which often enacts implementing legislation in order to carry out treaty obligations.

[96] See, eg, Virginia-Maryland Compact of 1785 (governing fishing and navigation rights in the Potomac River, the Pocomoke River, and the Chesapeake Bay).

in this Act' and elsewhere notes that the primary source for the Act was the ICCPR. Section 31 provides that international law, including the judgments of foreign and international courts and tribunals, relevant to a human right, may be considered in interpreting the right.

In sum, as the chapters in this book will indicate, international law is a growing and intertwined part of domestic legal systems throughout the world. They in turn give back new ideas and approaches to resolving matters of international concern. The dynamic sub-systems of national, regional, and international law together create an inter-dependent global system of law.

# 2

# Australia

*Alice de Jonge*

## 1. Introduction

Australia is a democratic constitutional monarchy with a federal state system. The Constitution of Australia was passed by the British Parliament in 1900. In 1942 the Statute of Westminster Adoption Act officially established Australia's complete autonomy in both internal and external affairs, while the Australia Act in 1986 eliminated almost all remaining vestiges of British legal authority. However, the Queen of England, Queen Elizabeth II, is also the Queen of Australia and the Head of State. She is represented federally by the Governor-General and in each state by a Governor. Australia is a member of the Commonwealth.

Australia has a bicameral Federal Parliament, which consists of the Senate and the House of Representatives. The Prime Minister, the head of the government, is formally appointed by the Governor-General, and is usually the leader of the majority party in the House of Representatives. The legal system is based on the English common law system and is presided over by the High Court of Australia, which has general appellate jurisdiction over all other federal and state courts, and possesses the power to review legislation for constitutionality. Australia was one of the founding members of the United Nations, accepts compulsory ICJ jurisdiction with reservations, and accepts International Criminal Court jurisdiction with conditions.

Section 51 of the Australian Constitution provides that 'In all matters . . . arising under any treaty . . . the High Court shall have original jurisdiction.' Apart from this reference, there is no reference to international law, international agreements or treaties in the Australian Constitution at all. Indeed, the word 'international' does not appear in the Constitution at all. Instead, the Constitution is more preoccupied with the relationship between the various states (former colonies) that came together to form the Commonwealth of Australia than it is with Australia's place in the world.

Even Chapter II, which deals with the executive government, simply states in section 61 that 'the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'. There is thus no express mention of any executive power to sign treaties or enter into international agreements. Rather, the Constitution relies

on the common law to fill in the relevant gaps through a long (albeit British) history of doctrine relating to the implied powers of the executive government, largely inherited from the English courts.[1]

That said, section 51, which lists the various legislative powers of the Commonwealth Parliament, does recognize the need for Parliament to make decisions relating to Australia's international relationships. Section 51 thus provides that the Parliament shall, 'have power to make laws for the peace, order and good government of the Commonwealth with respect to:

. . . (xxix) External affairs'.[2]

## 1.1 History and the Constitution

The Australian Constitution is quite exceptional in this failure expressly to deal with the role or status of international law in the national legal system. The reason for this lies largely in history. While many think of Australia as a young country, constitutionally speaking it is one of the oldest in the world. The Australian Constitution is difficult to amend,[3] and remains almost completely as it was when enacted in 1901.

As far back as 1967 Australia was described by Geoffrey Sawer as 'Constitutionally speaking . . . the frozen continent.' This statement is even more applicable today.[4] The period since 1977 is now the longest without any change to the Australian Constitution.[5] In the late 1800s when the Australian Constitution was being drafted, there was no League of Nations, and the birth of the United Nations was still over half a century away. There was thus little concept of an 'international community' that Australia might be joining following independence.

[1] British common law was effectively binding on Australian courts until the right of appeal to the British Privy Council from Australian courts was finally abolished altogether by the Australia Act 1986 (Cth) and complementary legislation passed by each of the Australian states and by the United Kingdom. Section 11 abolished all appeals to the Privy Council from or in respect of the decisions of all Australian courts as from 3 March 1986.

[2] Other powers listed in s 51 relevant to Australia's international relations include the power to make laws with respect to:-

'(i) Trade and commerce with other countries, . . .
(vi) The naval and military defence of the Commonwealth . . .
(xix) Naturalization and aliens,
(xx) Foreign corporations, . . .
(xxvii) Immigration and emigration;.
(xxix) External affairs . . . '

[3] Section 128 of the Constitution provides that the Constitution shall not be altered except by a proposed law passed by absolute majority of each House of Parliament *and* approved at a national referendum by a majority of electors in a majority of states *and* approved by a majority of all electors voting.

[4] The last successful vote to change the Australian Constitution came in 1977 when it was amended, among other things, to set a retirement age of 70 years for High Court justices. A further eight unsuccessful proposals have been put to the people since that time.

[5] By contrast, over 56 per cent of the member states of the United Nations made major changes to their constitutions between 1989 and 1999.

There was also little awareness that Australian independence might oblige Australia to play a role in the development of international law. Australia was still a British colony when the Constitution was being drafted, and it was expected that Britain would continue to play a significant role in Australia's future even after independence. So far as Australia's international relations were concerned, it was expected that Britain would essentially continue to dictate the terms of those relations even after independence. Thus, on 3 September 1939 the Australian Prime Minister could announce to the nation: 'It is my melancholy duty to inform you officially that . . . Great Britain has declared war (on Germany) and that, *as a result, Australia is also at war.*'[6] Moreover, as Kirby J noted in *Re East, ex p Nguyen*:

> At the time the Constitution was adopted, it was certainly not contemplated that the Commonwealth, on behalf of Australia, would be engaged in the kind of treaty participation which has marked recent decades. Initially, [Section] 51(xxix) of the Constitution included a reference to treaties. However, this was deleted in the drafting stages.[7]

The Constitutions of the various Australian states go back even further in time than 1901, as early as the 1850 Imperial Act titled 'An Act for the better Government of Her Majesty's Australian Colonies'.[8] That Act provided the legal basis for constitutional self-government in Victoria (1854), South Australia (1855),[9] New South Wales (1856), Tasmania, Queensland, and Western Australia (1889). No reference to international law or treaties appears in the original or current versions of Australia's six state constitutions, with one minor exception.[10]

The Northern Territory achieved (albeit limited) self-government in 1978 with the passing of the Northern Territory (Self-Government) Act 1978 (Cth). The Australian Capital Territory (ACT) achieved self-government ten years later in 1988 (Australian Capital Territory (Self Government) Act 1988 (Cth)). Interestingly, it is the ACT government, Australia's youngest independent government, that has gone further than any other to incorporate international law in the area of human rights into the local legal system.

## 1.2 Human Rights

Australia remains the only modern democracy without a national-level human rights instrument.[11] In 2004 the ACT became the first Australian jurisdiction

[6] Emphasis added. See further J. J. Dedman, 'Defence Policy Decisions before Pearl Harbour' (December 1967) 13(3) Australian Journal of Politics and History 331–45, especially at 335.

[7] [1998] HCA 73; (1998) 196 CLR 354; at para 71, citing Cheryl Saunders, 'Articles of Faith or Lucky Breaks? – The Constitutional Law of International Agreements in Australia' (1995) 17 Sydney Law Review 150.

[8] Act of the Imperial Parliament, 13 and 14 Vict, c 59.

[9] The Constitution Act (No 2 of 1855) was repealed by the Constitution Act (1934) (SA).

[10] Section 60 of the Western Australian Constitution provides that 'It shall not be law for the Legislature of the Colony to . . . enforce any dues or charges upon shipping contrary to or at variance with any treaty concluded by Her Majesty with any foreign Power.'

[11] See Gareth Griffith, 'The Protection of Human Rights: A Review of Selected Jurisdictions' (*Briefing Paper No 3*, Parliament of New South Wales, 2000); New Matilda.com, A Human Rights Act for Australia <http://www.humanrightsact.com.au> (New Matilda is an online magazine and policy

with its own human rights bill, the Human Rights Act 2004 (ACT). Part 2 of the Act defines the term 'Human Rights' and, in section 7, provides that the Act 'is not exhaustive of the rights an individual may have under domestic or international law.' Section 7 is unusual in that it is supplemented by a list of 'Examples of other rights,' amongst which are 'rights under the ICCPR not listed in this Act.' Part 3 of the Act then lists a number of 'Civil and political rights', expressly noting that 'The primary source of these rights is the International Covenant on Civil and Political Rights.' Part 4 of the Act then deals with the 'Application of human rights to Territory laws. Section 31 provides that 'International law, and the judgments of foreign and international courts and tribunal, relevant to a human right may be considered in interpreting the human right.'

This express recognition of the relevance of international law in the ACT Human Rights Act can be compared to the approach taken by the drafters of the Commonwealth level Human Rights and Equal Opportunity Commission Act 1986 (Cth). The main purpose of that Act is essentially to establish the Human Rights and Equal Opportunity Commission, and not to incorporate the terms of the ICCPR or any other treaty into Australian law. Rather, the ICCPR and other human rights treaties are simply appended to the Act as the benchmark for human rights standards when the Commission carries out its statutory duties. So while Australia is a party to the ICCPR, it has been said by the High Court that the Covenant has not been implemented by legislation, and thus affords no direct protection to individuals in Australia.[12] Similar comments can be made in relation to the Scheduling of the International Convention on the Elimination of All Forms of Racial Convention to the Racial Discrimination Act 1975 (Cth),[13] and the Convention on the Elimination of All Forms of Discrimination Against Women to the Sex Discrimination Act 1984 (Cth).[14] Australia is, in fact, party to many treaties that have not been implemented through municipal legislation.

## 1.3 The Status of International Law

The Australian approach to international law and its status in domestic law can be described as one of strict dualism. International law has no effect in the domestic legal system unless, and only to the extent that, it is given such effect by valid local legislation. This approach has two important results. The first is that the Australian courts have no jurisdiction over an international law crime, or in respect of an

portal providing a forum for commentary on significant Australian and international issues). See also George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (Sydney: UNSW Press, 2004), ch. 5.

[12] See eg *Dietrich v The Queen* (1992) 177 CLR 292 at 259–60 (per Toohey J; but compare *Collins v State of South Australia* [199] SASC 257.

[13] (New York, 7 March 1966, 660 UNTS 195); implemented by the Racial Discrimination Act 1975 (Cth). Section 7 simply approves the ratification by Australia of the Convention.

[14] (New York, 18 December 1979, 1249 UNTS 13); implemented by the Sex Discrimination Act 1984 (Cth).

international law right, whether by treaty or customary law, unless and until legislation has been implemented to apply the crime or the right in domestic law.

Thus, in *Nulyarimma v Thompson*[15] the Full Court of the Federal Court concluded that genocide was not an offence under Australian law. While the Genocide Convention Act 1949 (Cth) had approved Australia's ratification of the Genocide Convention, it did not specifically implement its terms.[16] Rather, it merely scheduled the Convention to the legislation. It has been the position of successive Australian governments that domestic criminal laws relating to murder and manslaughter were sufficient to enable Australia to meet its obligations under the Genocide Convention were it to decide to prosecute for genocide. A similar reliance upon known and predictable national criminal laws was made in the War Crimes Amendment Act 1988 (Cth). It was not until the International Criminal Court (Consequential Amendments) Act 2002 (Cth) amended the Criminal Code Act 1955 (Cth) that genocide as such became an offence under Australian law.[17]

A similar conclusion has been reached in relation to the terms of the ICCPR, which are appended as Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986 (Cth). Article 50 of the ICCPR provides that 'The provisions of the present Covenant shall extend to all parts of federal States without limitations or exceptions.' Section 6(1) of the Act, however, provides that 'This Act binds the Crown in right of the Commonwealth . . . but, except as otherwise expressly provided by this Act, does not bind the Crown in right of a State.' In *William John Minogue v Human Rights and Equal Opportunity Commission*,[18] the applicant argued that section 6(1) was invalid because it was inconsistent with Article 50 of the ICCPR. Marshall J of the Federal Court rejected the application on the ground that 'There is considerable High Court Authority to support the proposition that legislation which purports to implement an international convention is not invalid if it only partly takes up obligations referred to in the convention.'[19] Marshall J also rejected outright the proposition that the terms of the ICCPR form part of the municipal law of Australia, holding as axiomatic that a treaty to which Australia is party has no direct application in domestic law in the absence of implementing legislation. He further accepted the submission made on behalf of the respondent that 'whether or not Australia has breached its international obligations . . . is not a matter justiciable at the suit of a private citizen'.[20]

The second result of Australia's approach to international standards in the domestic legal system is that even when international standards (rights and liabilities) are

[15] [1999] FCA 1192; (1999) 165 ALR 621.

[16] Similarly, s 7 of the Racial Discrimination Act 1975 (Cth) provides that 'approval is given to ratification by Australia' of the *Convention on the Elimination of all Forms of Racial Discrimination* (New York, 7 March 1966, 660 UNTS 195).

[17] With effect from 1 July 2002. For discussion see Gillian Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law' [2003], Sydney Law Review 23.

[18] [1998] FCA 1283 (12 October 1998).

[19] At para 15.

[20] At para 20, citing *Tasmanian Wilderness Society Inc. v Fraser* [1982] HCA 37; (1982) 153 CLR 270 at 274 per Mason J. See also Dietrich at 305–6, 321, 348 and 359–60.

implemented by local legislation, that legislation can be repealed or amended at any time by the government in power because it has no higher status than any other legislation. Thus, when the Howard government passed the Northern Territory National Emergency Response Act 2007 (Cth), it had no difficulty suspending the operation of the Racial Discrimination Act 1975 (Cth) in respect to the 'National Emergency Response' (otherwise known as The Northern Territory Intervention).[21] The suspension of the Racial Discrimination Act was deemed necessary because of the way in which the National Emergency Response legislation[22] focused specifically upon Aboriginal persons and Aboriginal communities in providing for targeted and highly discriminatory measures.[23]

## 2. Treaties and Other International Agreements

### 2.1 The Executive and the Treaty-Making Power

There is a long history of (mainly English) custom and judicial explication behind section 61 of the Australian Constitution, which vests the executive power of the Commonwealth in the Queen to be exercised by the Governor-General. This body of common law and custom makes it certain that under section 61, the executive branch of government is vested with the exclusive and unlimited power to enter

[21] Section 132 of the Northern Territory National Emergency Response Act 2007 (Cth) provides that:

> The provisions of this Act, and any acts done under or for the purposes of those provisions, are, for the purposes of the *Racial Discrimination Act* 1975, special measures.

In relation to the specific meaning and significance of attempting to characterize the Emergency Response measures as 'special measures', see Article 1(4) of the Convention on the Elimination of All Forms of Racial Discrimination. The United Nations Human Rights Committee condemned the suspension of the RDA in its 'Concluding Observations' of Australia's performance under the *International Covenant on Civil and Political Rights*, and called upon the Australian Government to reinstate the *Racial Discrimination Act* as soon as possible: see Human Rights Committee, 95th Sess, Geneva 16 March – 3 April 2009, *Consideration of Report Submitted by State Parties Under Article 40 of the Covenant*, CCPR/C/AUS/CO/5 (2 April 2009), paras 14–16.

[22] The National Emergency Response legislation collectively includes the Northern Territory National Emergency Response Act 2007 (Cth); the Families, Community Services and Indigenous Affairs (Northern Territory Emergency Response and Other Measures) Act 2007 (Cth) and the Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth). For discussion and criticism, see Brooke Greenwood, 'The Commonwealth Government's North Territory Emergency Response Act: Some Constitutional Issues' (2009) V Cross-sections 21; available at <http://eveiw.anu.edu.au/cross-sections/vol5/pdf/02.pdf> and Law Council of Australia, 'Northern Territory 'National Emergency Response' published at <http://www.lawcouncil.asn.au/programs/national-policy/indigenous/nt-emergency/nt-emergency_home.cfm>.

[23] Aboriginal communities have been subjected to mandatory acquisition and leaseback of native title and other Aboriginal-held land. Aboriginal communities and townships have also been subjected to mandatory restrictions on the sale of alcohol and mandatory installation of censorship software (filters) on publicly funded computers. Aboriginal families living in a 'declared relevant Northern Territory area' have also become targets of a new mandatory income-management regime limiting their access to welfare payments and their ability to spend such payments on non-essential items. See Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth). See especially s 4 in relation to the application of the Racial Discrimination Act 1975 (Cth) to the new income-management regime.

treaties. In *Commonwealth v Tasmania* (the *Dams* case) (1983), Dawson J said 'It has not been questioned in recent years that the treaty making power of [the Executive] of this country is unlimited.' In practice, the Prime Minister and other Senior Ministers (cabinet) advise the Governor-General on the exercise of executive power. The executive is responsible for representing Australia internationally and conducting Australia's international affairs. It therefore plays a key role in determining Australia's attitude and practice with respect to developing norms of customary international law. The executive also has the sole power to enter into treaties. Despite legislation such as the Genocide Convention Act 1949 (Cth) and the Racial Discrimination Act purporting to 'approve' the ratification of a particular treaty, such parliamentary approval is neither necessary nor effective to make ratification of a treaty valid either under Australian law or international law.[24]

During the 1980s and 1990s the Constitutional monopoly exercised by the executive over the treaty-making power was increasingly criticized as having a 'democratic deficit'. It was felt that Parliament, being much more representative, as well as a more transparent forum, should play a much greater role in the treaty-making process. In addition, the proliferation of multilateral law-making treaties in the second half of the twentieth century saw a vast increase in the ability of the central government in Canberra to pass legislation in areas of law traditionally seen as the domain of the states. For example, in the 1983 *Dams* case[25] the Commonwealth was able to pass legislation based on the 1972 Convention for the Protection of the World Cultural and Natural Heritage to prevent the Tasmanian government from proceeding with the construction of the Gordon below Franklin Dam hydro-electric project. Accordingly, the Australian states began to assert rights in the treaty-making process in order to protect their historic areas of legislative competence.

In short, following an inquiry into the treaty-making power by the Senate Legal and Constitutional References Committee in 1995, a number of important reforms were made to Australia's treaty-making practice in 1996. The key reforms, aimed at improving scrutiny, transparency and consultation in the treaty-making process, are discussed below.

The establishment of a permanent Parliamentary Joint Standing Committee on Treaties (JSCOT) has been the most influential of the 1996 reforms.[26] Comprising 16 members from both Houses of Parliament and from all political persuasions, JSCOT's main role is to hold public inquiries into, and then report on, treaties before the government takes binding action. JSCOT is empowered to inquire into and report upon:

(i) matters arising from treaties and related national interest analyses and proposed treaty actions and related explanatory statements presented or deemed to be presented to Parliament;

[24] Eg for the purposes of conforming to Articles 11–17 of the Vienna Convention on the Law of Treaties.

[25] *Commonwealth v Tasmania* (1983) 158 CLR 1.

[26] Prior to 1996, treaties could be referred to existing Senate Standing Committees, but attempts to do so usually failed for political reasons.

(j) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by: either house of Parliament or a Minister; and

(k) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.

The JSCOT process works in tandem with the tabling of treaties in Parliament; the second reform introduced in 1996. Treaties must be tabled for at least 15 (or in some cases 20)[27] sitting days before binding action is taken, and the JSCOT must review treaties within that time, although extensions are possible in exceptional circumstances. 15–20 sitting days (30–100 calendar days) has proved to be a manageable time for JSCOT to scrutinize treaties. There is an exception to this practice allowed in cases where international events demand treaty action by the government before the expiration of 15 sitting days. This exception was used, for example, in relation to the Bougainville Peace Monitoring Agreement and the 1996 Agreement with Japan concerning Tuna Long Line Fishing.

The third reform introduced in 1996 was the requirement for a National Interest Analysis (NIA) to be prepared for each treaty. An NIA analyses such things as the foreseeable economic, environmental, social and cultural effects of a treaty action; the obligations imposed by the treaty, the domestic implementation implications of a treaty action and the nature of consultations that has occurred. NIAs are tabled in Parliament at the same time as the relevant treaty, and are considered by JSCOT along with public submissions during the treaty scrutiny process.

1996 also saw the establishment of the Treaties Council as an adjunct to the Council of Australian Governments (COAG) to facilitate greater consultation with the states and territories. The Treaties Council officially comprises the Prime Minister, state Premiers and territory Chief Ministers. It was meant to have an advisory function to consider treaties and other international instruments of particular sensitivity and importance to the states and territories, and was meant to meet annually. By mid 2006 (ten years after the 1996 reforms were introduced), however, the Treaty Council had met only once, on 7 November 1997. Instead of through the Treaty Council, consultation with the states and territories has occurred through other avenues, such as the Standing Committee on Treaties (the SCOT). SCOT was established following a Premiers' Conference in 1991 and so existed before the 1996 reforms. It consists of senior Commonwealth and state and territory officers and meets twice a year, or more if required, to co-ordinate intergovernmental monitoring of the treaty-making process, including by facilitating the nomination of state and territory representatives on treaty-making delegations.

The Australian Treaties Library was established on the internet in 1996. The Treaties Library provides public access to treaty texts, copies of NIAs, JSCOT

[27] Following an announcement by the Minister for Foreign Affairs in August 2002, the original 15 sitting days period for tabling of treaties established in 1996 was extended to 20 days for treaty actions considered less routine or potentially controversial.

reports, explanatory material, status lists and indexes. There is also a treaties database launched as part of the Department of Foreign Affairs and Trade website in 2002. The treaties database provides access to the text of treaties Australia has signed or where Australia has taken other treaty action. The JSCOT website also provides copies of treaty texts, NIAs, Committee reports, submissions to JSCOT hearings and public hearing transcripts.

The executive arm of government has a constitutional monopoly over the treaty-making power, and may take treaty action that binds Australia at international law, even though there is no implementing legislation. For those treaties that concern Australia's external relations alone, and that impose no obligation in respect of Australia's domestic legal system, the executive and its agencies can also implement the terms of the treaty.

As further discussed below, a number of High Court cases have established that the executive arm of government has a limited obligation to give domestic effect to treaties ratified by Australia. In *Minister for Immigration and Ethnic Affairs v Teoh*, the High Court ruled that entry into a treaty gave individuals within Australia a 'legitimate expectation' that administrative decision-makers would act in accordance with the terms of that treaty. When treaty ratification gives rise to a 'legitimate expectation', this does not mean that administrative decision-makers are compelled to follow the terms of the treaty. However, the fact that the treaty has been ratified by Australia is a relevant consideration in administrative decision-making. If the terms of the treaty are not adhered to, the decision-maker must give the person affected by the decision a hearing, and an opportunity to put forward the case for adhering to the treaty.

## 2.2 The Legislature and External Affairs: Binding and Non-Binding Norms

A distinction between legally-binding international texts and merely 'aspirational' or political commitments has been recognized by Australian courts in the context of the Commonwealth parliament's power to legislate with respect to external affairs. The distinction has proved useful in reconciling the tension between federalism, which imposes limits upon Commonwealth legislative powers on the one hand, and the need for a national level approach to the implementation of international obligations on the other. In essence, the courts have held that for legislation to be valid solely on the basis of the external affairs power, that legislation must represent the fulfilment (so far as that is possible in the case of laws operating locally) of obligations assumed under the convention. It follows that an international instrument expressive of no more than political aspirations could not, alone, form the basis for valid Commonwealth legislation. The concern has been to not allow the Commonwealth to use the external affairs power as an avenue for exercising plenary powers over an increasingly wide range of subject matters dealt with by treaties.

The *Tasmanian Dams* case of 1983[28] was the first case to affirm the broad scope of the external affairs power to authorize the enactment of legislation to implement clearly binding and well-defined treaty obligations. But the case left open the question of the extent to which the external affairs power alone would support the passing of legislation in pursuance of less clear international instruments. In *Victoria v Commonwealth (Industrial Relations Act* case*)*[29] the court rejected the narrow reading of the external affairs power argued for by Victoria, but nevertheless made it clear that not all treaty provisions can be implemented under that power. Merely aspirational treaty provisions, not giving rise to binding obligations under international law, for example, would not allow the Commonwealth Parliament to legislate in an area that was otherwise the domain of State legislative power. The Court also left open the question of whether recommendations of international organizations could constitute a free-standing basis upon which to enact legislation pursuant to section 51(xxix).

In *Thomas v Mowbray*,[30] Kirby J considered whether a Security Council Resolution (Resolution 1373)[31] could provide a constitutional basis for new Criminal Code provisions providing for the making of 'interim control orders' aimed at restricting and supervising the movements of individuals suspected of having terrorist connections. He began by noting that not all treaties provide a basis for the enactment of legislation by the Commonwealth Parliament:

> Accepting . . . that the agreement by nations to take common action in pursuit of a common objective amounts to a matter of external affairs, the objective must, nonetheless, be one in relation to which *common* action can be taken. Admittedly, this raises questions of degree; but a broad objective with little precise content and permitting widely divergent policies by parties does not meet the description.[32]

Kirby J then noted:

> These words . . . apply with even greater force in the case of a resolution, even one of the Security Council, which (as here) lacks the features of specificity, particularity, definitions and express obligations such as are common in most treaties. The requirement to '[t]ake the necessary steps to prevent the commission of terrorist acts,' arising out of Resolution 1373 and Art 25 of the Charter, is a phrase of almost limitless reach. It provides no guidance for this Court to 'ascertain whether [Div 104 of the Criminal Code] is [a law] giving effect to it.' The requirement does not provide a specific constitutional basis for the Commonwealth to pursue any goal that it might regard as preventative. As Dixon J observed in *R v Burgess, Ex parte Henry*: '[U]nder colour of carrying out an external obligation the

[28] *Commonwealth v Tasmania* (1983) 158 CLR 1. See also *Koowarta v Bjelke-Peterson & Others* (1982) 153 CLR 168 esp per Mason J at 231; per Brennan J at 260; per Stephen J at 216.

[29] *Victoria v Commonwealth* (1996) 187 CLR 416, esp at 486.

[30] *Thomas v Mowbray* [2007] HCA 33 (2 August 2007).

[31] Resolution 1373, 'Threats to international peace and security caused by terrorist acts', adopted by the Security Council on 28 September 2001. Available at the Security Council website: <http://www.un.org/Docs/scres/2001/sc2001.htm>.

[32] [2007] HCA 33 at para 284, quoting from Leslie Zines, *The High Court and the Constitution* (4th edn, Annandale, NSW: The Federation Press, 1997), 291 (emphasis in the original).

Commonwealth cannot undertake the general regulation of the subject matter to which it relates.'[33]

Other members of the High Court disagreed however, holding that the relevant provisions of the Criminal Code were a valid exercise of the Commonwealth's power to legislate with respect to external affairs. They confirmed that the scope of the external affairs power is not confined to the implementation of treaties, and noted that 'the external affairs power at least includes power to make laws in respect to matters affecting Australia's relations with other countries'. They then concluded that 'The commission of 'terrorist acts' in the sense defined in [the Criminal Code] is now, even it has not been in the past, one of these matters.'[34] Moreover, the new provisions of the Criminal Code were aimed at the prevention through an interim control order system of 'terrorist acts' done or threatened with the intention of influencing by intimidation the government or public of a foreign country. As such, they were laws with respect to a 'matter or thing' lying outside the geographical limits of Australia, and thus a justifiable exercise of the external affairs power.

Another matter for consideration is whether the Commonwealth's ability to rely upon a treaty depends on the status of that treaty. It is common in Australia for the Commonwealth to initially sign multilateral treaties and then deliberate for some time over whether they should be ratified—a practice justified by the desire to consult with the states and other stakeholders before a treaty is fully accepted. But is it possible for the Commonwealth to rely upon section 51(xxix) to implement a treaty that it has signed but not ratified? The obligation under international law not to act in a manner that would defeat the object or purpose of treaty to which Australia is signatory is not a duty requiring any active implementation. To circumvent the uncertainties inherent in implementing a treaty not yet binding on Australia, or ratifying a treaty first without the necessary legislation to implement it, an attempt is often made to ensure that implementing legislation comes into force on the same date that Australia becomes bound by the terms of the treaty being implemented. This approach can sometimes be problematic, however. For example, some complex multilateral treaties may not enter into force internationally until well after Australia has ratified them. If Australia is to show support for such a treaty, it is important that the treaty is not just ratified, but also implemented into domestic law. However, without the treaty's entry into force, the Commonwealth's constitutional basis for enacting domestic legislation may be missing. It may also be missing in the case of a treaty that has been suspended or terminated.

The problem is less than it might at first appear, however, because of the various other aspects of the external affairs power. The scope of the legislative power under section 51(xxix) 'is not confined to the implementation of treaties'. The modern doctrine as to the scope of the power conferred by section 51(xxix) was adopted in

[33] [2007] HCA 33 at para 285, citing Leslie Zines, *The High Court and the Constitution*, 291–2 and *R v Burgess, ex p Henry* [1936] HCA 52; (1936) 55 CLR 608 at 674–5.

[34] [2007] HCA 33 at para 151, per Gummow and Crennan JJ, citing *Suresh v Canada Minister of Citizenship and Immigration* (Supreme Court of Canada) (2002) 1 SCR 3 at 50.

*Polyukhovich v The Commonwealth* (*War Crimes Act* case).[35] Dawson J expressed the doctrine in these terms:

> [T]he power extends to places, persons, matters or things physically external to Australia. The word 'affairs' is imprecise, but is wide enough to cover places, persons, matters or things. The word 'external' is precise and is unqualified. If a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase 'external affairs'.[36]

Again, however, there must be evidence that, so far as legislation based on the external affairs power has domestic implications, that legislation is needed for the purpose of meeting Australia's international obligations. Whether or not a particular law is actually so needed may be a question of fact on which judges may differ—as they did in *Thomas v Mowbray*.

Although the *Tasmanian Dams* case[37] did not deal with the implementation of customary international law obligations, at least one commentator has pointed out that the reasoning used in the case 'extends to the implementation of obligations under customary international law'.[38] As in the case of treaty provisions, a distinction needs to be recognized between international law obligations of sufficient clarity to authorize the enactment of legislation under the external affairs power, and those aspects of customary international law that would not justify such legislation. The distinction to some extent mirrors the various meanings given in the international law sphere to the concept of 'soft law'.

One way of meeting the need to justify implementing legislation by reference to binding international obligations is to provide expressly in the legislation that it is subject to Australia's obligations under international law, including under treaties to which Australia is a party. A similar approach is to say that a particular organization or person will exercise powers under a statute consistent with Australia's international obligations.

This method was highlighted by the decision of the High Court in the *Blue Sky* case.[39] A bilateral obligation between Australia and New Zealand under the Closer Economic Relations Services Protocol (the CER Services Protocol) required Australia to give market access to New Zealand services and service providers on terms no less favourable to those given to Australian services and service providers.

[35] *Polyukhovich v Commonwealth* ('*War Crimes Act* case') [1991] HCA 32; (1991) 172 CLR 501 (14 August 1991).

[36] [1991] HCA 32; (1991) CLR 501 at para 1 of Dawson J's judgment.

[37] *Commonwealth v Tasmania* ('*Tasmanian Dams* case') [1983] HCA 21; (1983) 158 CLR 1 (1 July 1983).

[38] This view was confirmed in *Polyukhovich v Commonwealth* (*War Crimes Act* case) (1991) 172 CLR 501, when the High Court found that the *War Crimes Amendment Act*, passed to facilitate the prosecution of those accused of war crimes committed during World War II, was a valid exercise of Parliament's external affairs power. Both Brennan J and Toohey J discussed the customary law principle of universal jurisdiction to prosecute perpetrators of war crimes and other international crimes, and concluded that '. . . a law which vested in an Australian court a jurisdiction recognised by international law as a universal jurisdiction is a law with respect to Australia's external affairs': Brennan J at 562–3. See also Toohey J at 661.

[39] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 153 ALR 490.

The Broadcasting Services Act 1992 (Cth) provided for the Australian Broadcasting Authority (ABA) to set Australian content standards. Section 160(d) of the Act required the ABA to do so in a manner consistent with Australia's obligations under any convention to which Australia was a party or any agreement between Australia and a foreign country. The High Court found that the then existing Australian content standard for films was inconsistent with the obligation under the Act to ensure that such standards complied with the CER Services Protocol. The standard was therefore unlawfully made—not because it breached the CER Services Protocol, but because it breached the requirements of the Broadcasting Services Act.

Legislation can also enable regulations to be issued for the purpose of implementing Australia's treaty obligations. For example, the Charter of the United Nations Act 1945 (Cth) permits regulations to be made to give effect to sanctions imposed by the UN Security Council under Chapter VII of the UN Charter. More recently, the Anti-Money Laundering and Counter-Terrorism Financing Act was passed in 2006[40] to fulfil Australia's obligations under various United Nations Conventions and Security Council Resolutions.

It is quite clear that while implementing legislation passed in reliance on a treaty must be in furtherance of obligations under that treaty, there is no need for such legislation to adopt the same wording as the treaty, or even to implement all of the treaty or be in full compliance with it. Indeed, the preferred method of giving effect to treaties is to translate the relevant provisions of the treaty into traditional legislative language. In so doing, a statute might refer to particular terms in a treaty but use the language of domestic law to give effect to the majority of obligations. Two examples of this approach are the Space Activities Act 1998, implementing several conventions dealing with space activities, and the Anti-Personnel Mines Convention Act 1998, which implements the convention of that name.

One problem is to ensure that the legislation passed can be said to 'conform to the treaty and carry its provisions into effect'.[41] For example, in *Polyukhovich v Commonwealth* (*War Crimes Act* case),[42] both Brennan J and Toohey J agreed that international law allowed an Australian court to exercise universal jurisdiction to try suspected war criminals and that a law conferring such jurisdiction upon an Australian court was a law with respect to external affairs. The problem, however, was that the definition of 'war crime' in the War Crimes Act 1945 (Cth) did not correspond to the international law definition of international crimes at the relevant time (during World War II). Brennan J concluded that the Act exposed to prosecution persons guilty of acts that would not have fallen within the definition of a crime in the international law sense

[40] Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth). The AMLCTF Act served to expand the role and powers of AUSTRAC and the number and type of institutions required to report to it. The Act received the Royal Assent on 12 December 2006 and has since been implemented in stages, with different obligations in respect of customer identification, record keeping, and the establishment of an AML/CTF program coming into effect a day, six months and 12 months after 12 December 2006 respectively. Ongoing customer due diligence and reporting obligations came into effect on 12 December 2008.

[41] Mason J, in the *Tasmanian Dams* case: *Commonwealth v Tasmania* [1983] HCA 1.

[42] [1991] HCA 32; (1991) CLR 501 (14 August 1991).

at the time when the act was done. Consequently, there was such disconformity between the Act and international law that section 51(xxix) could not be relied upon to validate the Act. Gaudron J and Deane J agreed with Brennan J that the relevant provisions of the War Crimes Act 1945 were invalid.

Brennan J was, however, in the minority in *Polyukhovich*, as four judges upheld the validity of the War Crimes Act 1945. Mason CJ, Dawson, Toohey and McHugh JJ all agreed that there was no necessity for legislation to be in strict conformity with international law. Any discrepancies between definitions set out in the Act, and international law definitions of the same terms, did not mean that the Act, as a whole, was not in conformity with international law.

Legislation that is valid under the Australian Constitution is not rendered invalid simply because it is in breach of international law. In *Polites v Commonwealth*,[43] the plaintiffs were Greek citizens residing in Australia who had been conscripted into military service. The plaintiffs argued that there was a rule of customary international law that prohibited a state from imposing an obligation of military service upon alien residents within its territory. The High Court rejected this argument, however, and upheld the validity of the conscription legislation being challenged. The Court held that 'The Commonwealth Parliament can legislate on [matters listed in section 51] in breach of international law, taking the risk of international complications .... [L]egislation otherwise within the power of the Commonwealth Parliament does not become invalid because it conflicts with a rule of international law.'[44]

More recently, in *Horta v Commonwealth*[45] the plaintiffs challenged the legality of both the Timor Gap Treaty between Australia and Indonesia[46] and the Commonwealth legislation implementing that treaty into domestic law.[47] The High Court gave the plaintiffs' argument short shrift, holding that:

> [E]ven if the Treaty were void or unlawful under international law or if Australia's entry into or performance of the Treaty involved a breach of Australia's obligations under international law, the Act and the Consequential Act would not thereby be deprived of their character as laws with respect to 'External affairs' for the purposes of [Section] 51(xxix). Neither [Section] 51(xxix) itself nor any other provision of the Constitution confines the legislative power with respect to 'External affairs' to the enactment of laws which are consistent with, or which relate to treaties or matters which are consistent with, the requirements of international law.[48]

[43] (1945) 70 CLR 60.

[44] (1945) 70 CLR 60 per Latham CJ at 69.

[45] *Horta v Commonwealth* (1994) 181 CLR 183.

[46] Treaty between Australia and the Republic of Indonesia on the Zone of Co-operation in an Area between the Indonesian Province of East Timor and Northern Australia [1991] ATS 9 (entry into force 9 February 1991).

[47] Petroleum (Australia-Indonesia Zone of Co-operation) Act 1990 (Cth) and see Australia-Indonesia Zone of Co-operation (Privileges and Immunities) Regulations (Amendment) 1991. See also *Commonwealth v WMC Resources Ltd* [1998] HCA 8; 194 CLR 1; 152 ALR 1; 72 ALJR 280 (2 February 1998); *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* [2003] FCAFC 3 (3 February 2003), and see discussion in Gillian Triggs, 'Legal and Commercial Risks of Investment in the Timor Gap' [2000] Melbourne Journal of International Law 5.

[48] [1994] HCA 32; (1994) 181 CLR 183 (18 August 1994) at para 10 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

## 2.3 The Courts and International Treaties

As noted above, a treaty that has not been expressly incorporated into Australian municipal law by legislation cannot operate as a direct source of individual rights and obligations under that law. In other words, treaties signed by the executive branch of government are not thereby incorporated into Australian law. The terms of a treaty are not incorporated into Australian law until and unless the Parliament enacts legislation to give effect to that treaty. Moreover, treaties can only become part of Australian law in so far as they are expressly made part of Australian law by legislation.

If Parliament merely adds the terms of treaty in the form of a Schedule to an Act, this is not enough to incorporate those terms into Australian law. Thus, although the International Covenant on Civil and Political Rights is a schedule (Schedule II) to the Australian Human Rights Commission Act 1986 (Cth), the terms of that treaty are not part of Australian law. Nor are the terms of any of the other human rights treaties scheduled to the Act. International treaties can, however, have a significant *indirect* effect on Australian law.

## 2.4 Treaty Ratification and Legitimate Expectations

In *Minister for Immigration and Ethnic Affairs v Teoh*,[49] Mr Teoh had been convicted on drug charges and he was not an Australian citizen. He was going to be deported from Australia, despite the fact that he had a number of children in Australia who were Australian citizens. Mr Teoh argued that the decision to deport him was taken in disregard of Australia's obligation under Article 3 of the United Nations Convention on the Rights of the Child 1989 to ensure that: 'In all actions concerning children, ... undertaken by ... administrative authorities ... the best interests of the child shall be a primary consideration.' The Convention came into force on 2 September 1990 and was ratified by Australia with effect from 16 January 1991. Although the Convention appears as a schedule (Schedule 3) to the Human Rights and Equal Opportunity Commission Act 1986 (Cth), its terms have never been incorporated into Australian law. The Court in *Teoh* held:

> [While] the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute ... ratification of an international convention is not to be dismissed as a merely platitudinous or ineffectual act. ... Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention.[50]

[49] [1995] HCA 20; 128 ALR 358.

[50] *Minister of Immigration and Ethnic Affairs v Ah Hin Teoh* ('*Teoh's* case') [1995] HCA 20; 128 ALR 358 at para 34.

The doctrine of 'legitimate expectation' as expounded by the High Court meant that immigration officials had to give Mr Teoh an opportunity to argue that the terms of the Convention on the Rights of the Child should be taken into account in any decision to deport him from Australia.

If accepted, a rule that ratification of a treaty alone is sufficient to give rise to a legitimate expectation in relation to government actions provides an important avenue for international conventions to have a major impact on Australian law. If developed further, such a principle could also allow other international instruments, such as memoranda of understanding or decisions of international organizations that have obtained Australian approval, to enter into and alter Australian common law.

It did not take long for the Howard government to realize the implications of the decision in *Teoh* and to issue its response. The Minister for Foreign Affairs and the Attorney-General issued a joint Executive Statement on 10 May 1995 in an attempt to reverse the decision. Seizing upon the acknowledgement in the judgment of Mason CJ and Deane J that a legitimate expectation can be displaced by 'statutory or executive indications', the Statement made it expressly clear that '[i]t is not legitimate, for the purpose of applying Australian law, to expect that the provisions of a treaty not incorporated by legislation should be applied by decision-makers'. Following a change of government, a replacement Joint Statement to the same effect was issued by the new Minister for Foreign Affairs and the Attorney-General on 25 February 1997.[51]

Both statements signalled the introduction of legislation to reverse the result in *Teoh*. But three attempts made since 1997 to introduce bills to that effect have failed,[52] and the current government is unlikely to continue pursuing the aim. Moreover, a number of High Court cases have indicated that the 1995 and 1997 ministerial statements, by themselves and without legislation, are not sufficient to displace the doctrine of legitimate expectation as developed in *Teoh*.[53] However, so far as Australia's immigration law is concerned, a detailed Ministerial Direction issued on 21 December 1998 does appear to have left no room in relevant cases for

[51] Joint Statement by Minister for Foreign Affairs Alexander Downer and Attorney-General and Minister for Justice Douglas Williams, 'The Effect of Treaties in Administrative Decision Making' 25 February 1997.

[52] Administrative Decisions (Effect of International Instruments) Bill 1995; Administrative Decisions (Effect of International Instruments) Bill 1997; Administrative Decisions (Effect of International Instruments) Bill 1999. Each of these Commonwealth Bills lapsed.

[53] *Department of Immigration and Ethnic Affairs v Ram* (1996) 69 FCR 431; *Tien v Minister for Immigration and Multicultural Affairs* (1998) 53 ALD 32; *Davey Browne v Minister for Immigration and Multicultural Affairs* [1998] 566 FCA (29 May 1998); but see *Baldini v Minister for Immigration and Multicultural Affairs* (2000) 115 A Crim R 307. For further discussion, see Ryszard Piotrowicz, 'Unincorporated Treaties in Australian Law: The Official Response to the Teoh Decision' (1997) 71 Australian LJ 503; Wendy Lacey, 'In the Wake of Teoh: Finding an Appropriate Government Response' (2001) 29 Federal Law Review 219; Michael Taggart, 'Legitimate Expectation and Treaties in the High Court of Australia' (1996) 112 L Quarterly Rev 50 and Brian R Opeskin and Donald R Rothwell (eds), *International Law and Australian Federalism* (Melbourne: Melbourne University Press, 1997). For discussion of potential future developments in the doctrine of legitimate expectation, see Matthew Groves, 'Substantive legitimate expectations in Australian administrative law' (August 2008) 32(2) Melbourne University Law Review 470.

any legitimate expectation on the part of a potential deportee that the interests of his child will be a 'primary consideration'. The Ministerial Direction was titled 'General Direction—Criminal Deportation—No 9' and described as 'Australia's Criminal Deportation Policy.' It provided, inter alia:

> The Government is mindful of the need to balance a number of important factors in reaching a decision whether or not to deport a potential deportee. In making such a decision, a decision maker should have regard to two primary considerations and a number of other considerations. A decision maker should have regard to the importance placed by the Government on the two primary considerations, but should also adopt a balancing process which takes into account all relevant considerations.
>
> . . . [the] two primary considerations [are]:
>
> (a) the expectations of the Australian community; and
> (b) in all cases involving a parental relationship between a child or children and the potential deportee, the best interests of the child or children.

In *Baldini v Minister for Immigration and Multicultural Affairs*,[54] the court stated that Ministerial Direction No 9, read together with section 499 of the Migration Act (which requires immigration decision-makers to comply with written directions given by the Minister), was

> a successful attempt by the Legislature and the Executive to overcome the difficulties . . . that the government of the day encountered in seeking to displace the Teoh principle. . . . [T]he Direction . . . [leaves] no room [for] finding in Australia's ratification of the Convention a basis for any legitimate expectation on the part of a potential deportee that the interests of his child will be . . . 'a primary consideration'.[55]

Only one of the state governments successfully legislated its own response to the decision in the *Teoh* case. In 1995, the South Australian government passed the Administrative Decisions (Effect of International Instruments) Act 1995 (SA). The Act begins by defining an 'international instrument' as 'a treaty, convention, protocol, agreement or other instrument that is binding in international law'; or part of any such treaty, convention etc., thereby distinguishing between binding and non-binding instruments in international law. Section 3 of the Act then provides that:

> (1) An international instrument (even though binding in international law on Australia) affects administrative decisions and procedures under the law of the State only to the extent the instrument has the force of domestic law under an Act of the Parliament of the Commonwealth or the State.
> (2) It follows that an international instrument that does not have the force of domestic law under an Act of the Parliament of the Commonwealth or the State cannot give rise to any legitimate expectation that—
>  (a) administrative decisions will conform with the terms of the instrument; or

[54] (2000) 115 A Crim R 307.

[55] Per Drummond J at 316. See also *Rokobatini v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 583.

(b) an opportunity will be given to present a case against a proposed administrative decision that is contrary to the terms of the instrument.

(3) However, this Act does not prevent a decision-maker from having regard to an international instrument if the instrument is relevant to the decision.

## 2.5 Interpreting Treaty Terms and the Vienna Convention on the Law of Treaties

When legislation is drafted so as to expressly give the force of domestic law to the provisions of a treaty, it is usually left up to the courts to decide what the particular provisions of the treaty mean. If there is a statute giving the terms of a treaty the force of law in Australia, then the approach adopted by the courts has been to interpret treaty terms in accordance with the Vienna Convention on the Law of Treaties. For example, in *A v Minister for Immigration & Ethnic Affairs*[56] McHugh J of the High Court noted that section 4(1) of the Migration Act 1958 (Cth) defines the term 'refugee' as having the same meaning as it has in Article 1 of the Refugee Convention[57]). He then said:

In Australia, treaties are interpreted in accordance with the requirements of the Vienna Convention on the Law of Treaties ('the Vienna Convention'). Article 31 of the Vienna Convention, referred to in this Court as the 'leading general rule of interpretation of treaties,' . . . provides:

Article 31

General rule of interpretation

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The first paragraph of the article contains three separate but related principles. First, an interpretation must be in good faith, which flows directly from the rule *pacta sunt servanda*. Second, the ordinary meaning of the words of the treaty are presumed to be the authentic representation of the parties' intentions. This principle has been described as the 'very essence' of a textual approach to treaty interpretation. Third, the ordinary meaning of the words are not to be determined in a vacuum removed from the context of the treaty or its object or purpose.

Australian decisions provide no clear answer as to whether Art 31 requires or merely allows recourse to the context, object and purpose of a treaty in interpreting one of its terms. It is clear that such recourse is, in some circumstances, permissible. On numerous occasions, Australian courts have sought to discern the purpose of a treaty so as to construe a treaty term. What is not clear from the decided cases, however, are the circumstances which require or allow recourse to the context, object and purpose of a treaty. Nor have those cases clarified the nature of the relationship between the context, object and purpose of a treaty and the 'ordinary' textual analysis of one of its provisions.

[56] *A v Minister for Immigration & Ethnic Affairs* [1997] HCA 4; (1997) 190 CLR 225; (1992) ALR 331 (24 February 1997).

[57] The Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol Relating to the Status of Refugees done at New York on 31 January 1967.

However, in my view, the opinion of Zekia J in the European Court of Human Rights in *Golder v United Kingdom* states the correct approach for interpreting Art 31 . . . .

Zekia J emphasised an ordered yet holistic approach. Primacy is to be given to the written text of the Convention but the context, object and purpose of the treaty must also be considered. Similar sentiments were expressed by Murphy J in *The Commonwealth v Tasmania* (*Tasmanian Dams* case) where, in reference to the UNESCO Convention for the Protection of the World Cultural and National Heritage, his Honour said: 'The Convention should be interpreted giving primacy to the ordinary meaning of its terms in their context and in the light of its object and purpose. (Art 31(1) Vienna Convention on the Law of Treaties). In my opinion, the approaches of Zekia J and Murphy J are correct and should be followed in this country.'[58]

It follows from the above that a statute giving the force of law to treaty terms cannot form the basis for regulations giving the executive branch of government the discretion to replace its own definition of treaty terms for the meaning that those terms would otherwise have. For example, section 7 of the Diplomatic Privileges and Immunities Act 1967 (Cth) gives articles 1, 22–24 and 27–40 (inclusive) of the Vienna Convention on Diplomatic Relations (the 'Diplomatic Convention') the force of law in Australia. Neither the Act nor the Convention defines what amounts to an 'impairment of the dignity of the Mission' within the meaning of Article 22 of the Convention. Therefore, the meaning of that phrase must be defined in accordance with the principles set down in the Vienna Convention on the Law of Treaties.[59]

In *Re Geraldo Magno and Ines Almeida v Minister for Foreign Affairs and Trade*[60] Olney J of the Federal Court held that a regulation (regulation 5A) effectively giving the Minister power to define the words in Article 22 differently than the meaning bestowed upon them by the Vienna Convention, was invalid. His honour began by noting that section 15 of the Act provided for the making of regulations 'not inconsistent with this Act, prescribing all matters required or permitted to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act'. Olney J then held that:

Neither the Convention nor the Act seeks to define what is to be regarded as conduct which amounts to a 'disturbance of the peace of (a) mission or impairment of its dignity'. If it had chosen to do so, Parliament may well have defined what, for the purpose of Australian law, the concepts of disturbance of the peace and the impairment of dignity are to convey but it did not take that course, and accordingly the terms of the Convention, in so far as they have the force of law in Australia must be construed according to the usual principles of construction . . . .

[58] [1997] HCA 4 at 19; (1997) 190 CLR 225 at 240 per McHugh J.

[59] See also *In the Marriage Of: Stephanie Selina Hanbury-Brown (Appellant/Wife) and Robert Hanbury-Brown (Respondent/Husband) and Director General of Community Services (Central Authority)* [1996] Fam CA 23 (14 March 1996) and *Minister for Immigration & Multicultural Affairs v Savvin (& statement by Katz J of 26 April 2000)* [2000] FCA 478 (12 April 2000).

[60] *Re Geraldo Magno and Ines Almeida v Gareth Evans, Minister of Foreign Affairs and Trade of the Commonwealth of Australia; Commissioner of the Australian Federal Police and Commonwealth of Australia* [1992] FCA 165 (16 April 1992).

Nothing in the Act indicates that the provisions of Articles 22 or 29 are to have a meaning in Australian law otherwise than the meaning that the words used in the articles convey. A regulation that enables the meaning of the words of the Convention to be either expanded or contracted is not a regulation 'not inconsistent with (the) Act' and would therefore fall outside the power conferred by section 15.

The effect of regulation 5A is to permit the Minister to decide that an object constitutes a threat to the peace or an impairment of the dignity of a mission and further that the removal of the object will be an appropriate step to prevent such threat or impairment. He does this simply by forming an opinion that the removal of a particular prescribed object or class of prescribed objects would be an appropriate step under article 22 or article 29 and certifying to that effect.

The regulation making power clearly does not extend to authorising regulations to be made defining the meaning of terms used in the Act. Nor does it contemplate that regulations may authorise the Minister, or indeed any other person or authority, to be the arbiter of what constitutes a threat to the peace, or an impairment of the dignity, of a mission or of what steps are appropriate to prevent any disturbance of the peace of the mission or impairment of its dignity. To achieve either of those ends very specific powers would be required in the Act itself.

What the regulations purport to do is something that Parliament has neither done itself nor delegated to the regulation making authority the power to do. The regulations are neither necessary nor convenient for giving effect to the Act. They are clearly inconsistent with the Act. For these reasons the regulations are not a valid exercise of power under section 15 of the Act.[61]

## 3. Customary International Law

As Sir Anthony Mason pointed out in a chapter on 'International Law as a Source of Domestic Law'[62] the conceptual difficulties in the so-called 'incorporation' and 'transformation' theories make them less than useful as a framework for discussing the relationship Australian law has formed with international custom. Nor has any Australian court ever clearly adopted either approach—although as Mason also pointed out, the transformation theory, which holds that customary international law is not part of Australian law unless its recognition is permitted or required by statute, currently seems to hold sway.

The early High Court appears on occasions to have accepted that customary international law forms part of Australian law.[63] In 1945, in *Polites v Commonwealth*,[64] the High Court held that regulations having the effect of conscripting aliens were valid, notwithstanding customary international law forbidding such conscription (save in limited circumstances). The Australian Parliament had

[61] Olney J, paras 36–41, 16 April 1992 [1992] FCA 165.

[62] Sir Anthony Mason, 'International Law as a Source of Domestic Law' in Brian R. Opeskin and Donald R. Rothwell (eds), *International Law and Australian Federalism* (Melbourne: Melbourne University Press, 1997), p 210.

[63] See for example *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479 at 495 per Griffith CJ, 506–7 per Barton J and 510 per O'Connor J.

[64] (1945) 70 CLR 60.

evinced a legislative intention to give the executive an unqualified discretion to call up aliens, and the Court was bound to give effect to that intention. That conclusion made it unnecessary for the court to consider the relation between international law and Australian law. However, Williams J, referring to the English case of *Chung Chi Cheung*,[65] observed that when customary international law 'has been established to the satisfaction of the courts [it] is recognised and acted upon as part of English municipal law so far as it is not inconsistent with the rules enacted by statutes or finally declared by the courts'.[66] His honour thus appears to have accepted that parliamentary intention as evidenced by statute is sufficient to displace customary law.

The role of international customary law was again before the High Court in *Chow Hung Ching v The King*.[67] The issue before the court was whether civilians accompanying a Chinese army team, who were convicted of assault and other offences in the then Australian Trust Territory of Papua New Guinea, had immunity from the jurisdiction of the court under customary international law because they were members of a visiting armed force and thus not subject to the local criminal jurisdiction. The court held that as the accused were not members of the military force of the Republic of China they did not have immunity from the jurisdiction of the Supreme Court of the Territories.[68] Latham CJ summarized the common law's recognition of customary international law as follows: 'International law is not as such part of the law of Australia (*Chung Chi Cheung v The King*, and see *Polites v The Commonwealth*), but a universally recognised principle of international law would be applied by our courts: *West Rand Central Gold Mining Co v The King*.'[69]

Starke J cited with approval and applied the observations of Lord Atkin in *Chung Chi Cheung*[70] as did McTiernan J.[71] Dixon J considered the issue at some length, and finally agreed with Professor J L Brierly and Sir William Holdsworth that 'The true view . . . is that international law is not a part, but is one of the sources, of English law.' He also stated that '[i]n each case in which the question arises the court must consider whether the particular rule of international law has been received into, and so become a source of, English law'.[72]

Dixon J then examined whether the rule of immunity had been 'received into' Australian common law, and found that even though there was 'little authority' on the question, the immunity of foreign armed forces had been 'held to be part of our municipal law'. Windeyer J appears to have agreed with this approach in *Bonser v La Macchia*[73] when he said that 'the present case must be decided by the law of Australia, not by recourse to doctrines of international law, except so far as they

[65] *Chung Chi Cheung v The King* (1939) AC 160 (at 168).
[66] (1945) 70 CLR 60 at 80–1.
[67] (1949) 77 CLR 449.
[68] Penelope Mathew, Wayne Morgan and Donald Anton, *International Law Cases and Materials* (Pyrmont, NSW: Law Book Co, 2006), pp 408–9.
[69] (1949) 77 CLR 449 at 462.
[70] (1949) 77 CLR 449 at 470–1.
[71] (1949) 77 CLR 449 at 487.
[72] (1949) 77 CLR 449 at 477.
[73] (1969) 122 CLR 177.

have been taken into and become part of the law of the land'.[74] Similar observations were made in the *Seas and Submerged Lands* case by Jacobs J[75] and by Gibbs J.[76]

*Mabo v Queensland (No 2)* was the first case in which developments in customary international law had a decisive impact on the High Court's decision. In 1992 the High Court of Australia was asked to reconsider the doctrine of *terra nullius* upon which the occupation of Australia was founded, and upon which the Crown's ownership of Australian land and waters depended. The Court examined, among other things, the critical analysis of the theory of *terra nullius* in the ICJ Advisory Opinion on Western Sahara of 16 October 1975, and concluded that 'the international law notion that inhabited land may be classified as terra nullius no longer commands general support'. In the words of Brennan J, the court accepted that:

> Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports .... A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench [such] a discriminatory rule.

The Court then went on to overturn previous cases that had accepted the doctrine of *terra nullius* as the basis of Crown title in Australia. In the result, six members of the Court (Dawson J dissenting) agreed that the common law of Australia recognizes a form of native title that, wherever it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands. On the facts of the case before it, the court found that the land entitlement of the Murray Islanders in accordance with their laws or customs had been preserved, as native title, under the law of Queensland.

The decision in *Mabo v Queensland (No 2)* has been followed, and the concept of native title further developed in a number of cases since.[77] The approach adopted in the *Mabo* case shows that in the right set of circumstances, in the face of a generally accepted and well-evidenced customary law principle, and in the absence of any

[74] (1969) 122 CLR 177 at 214.

[75] [1975] HCA 58; (1975) 135 CLR 337 at 496.

[76] [1975] HCA 58; (1975) 135 CLR 337 at 407. On the other hand, Murphy J in the *Seas and Submerged Lands* case (*New South Wales v Commonwealth* (1975) 135 CLR 337) at 500–2, and later also in *A Raptis & Son v South Australia* (1977) 138 CLR 346 at 394–5 appeared to support the 'incorporation' view put forward in Blackstone's Commentaries that '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 is held to be a part of the law of the land.

[77] *Wik Peoples v Queensland ('Pastoral Leases* case*')* [1996] HCA 40; (1996) 187 CLR 1; (1996) 141 ALR 129. See also *Northern Territory of Australia & Another v Arnhem Land Aboriginal Land Trust & Others* [2008] HCA 29 ('*Blue Mud Bay* case') (High Court of Australia, 30 July 2008).

inconsistent statutory rule, the High Court in Australia retains the discretion to give effect to a relevant customary law principle in Australia.[78]

More recently, in *Nulyarimma v Thompson*; *Buzzacott v Hill*,[79] the court was asked to consider whether the customary law against genocide could be relied upon by the plaintiffs as part of Australian law. While the Genocide Convention Act had already been passed (in 1949) to provide parliamentary 'approval' for the ratification of the Genocide Convention, the Act did not itself serve to 'transform' the terms of the Convention into Australian law. Nor was there, in 1999, any other legislation making genocide a crime in Australia.

In *Nulyarimma v Thompson*, the applicants claimed that certain federal Ministers and Members of Parliament had committed acts of genocide. The case began as an action by indigenous people in the ACT Supreme Court seeking to compel the issue of arrest warrants for the alleged crime of genocide in connection with the development of laws and policies designed to extinguish the native title rights of indigenous peoples. In a similar vein, *Buzzacott v Hill* involved an action by the plaintiff on behalf of the Arabunna people against the Commonwealth and its Ministers for the Environment and Foreign Affairs and Trade. The action alleged that the refusal to proceed with an application for World Heritage Listing of Arabunna lands and thus failing to protect the lands imposed conditions of life upon the Arabunna people that were likely to destroy them.

Since genocide was not a crime under Commonwealth, state or territory legislation, the applicants claimed that the customary norm of international law prohibiting acts of genocide was automatically incorporated into the common law of Australia. It was claimed that since the universal crime had been incorporated into the common law of Australia, it could give rise to criminal liability for acts of genocide. Central to this claim was the question of whether customary international law is automatically incorporated into the common law of Australia, or whether it needs to be transformed (by legislation) into municipal law.

The majority (Wilcox J and Whitlam J) decided that the customary prohibition on genocide was not part of Australian law and could not be relied upon by the plaintiffs as the basis of a cause of action. The majority was concerned that the introduction of a new crime into Australian domestic law (even though it was an existing crime at international law) would raise questions concerning retrospective punishment and would require Australian courts to create a new crime even though it was more properly the role of Parliament to define new crimes.

[78] For further discussion, see Henry Burmester and Susan Reye, 'The Place of Customary International Law in Australian law: Unfinished Business' (2000) 21 Australian Yearbook of International Law 39; Henry Burmester, 'The Determination of Customary International Law in Australian Courts' (2004) 4 Non-State Actors and International Law 39–47; Gillian Triggs, 'Customary International Law and Australian Law' in M. P. Ellinghaus, Adrian J. Bradbrook & A. J. Duggan (eds), *The Emergence of Australian Law* (Belrose, NSW: Butterworths, 1989) 376 and Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, *The Fluid State: International Law and National Legal Systems* (Annandale: The Federation Press, 2005).

[79] (1999) 165 ALR 621.

In the minority on this point, Merkel J in *Nulyarimma* acknowledged that Australian authorities do not support an automatic 'incorporation' approach. However, he said that it remains open for the judiciary to decide to apply a norm of customary international law, and developed a six-point test for deciding whether to adopt a particular norm of customary international law:

(1) A recognised prerequisite of the adoption in municipal law of customary international law is that the doctrine of public international law has attained the position of general acceptance by or assent of the community of nations 'as a rule of international conduct evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decision'.
(2) The rule must not only be established to be one which has general acceptance but the court must also consider whether the rule is to be treated as having been adopted or received into, and so become a source of English law: see Holdsworth at 268 and *Chow Hung Ching* at 477 per Dixon J.
(3) A rule will be adopted or received into, and so a source of, domestic law if it is 'not inconsistent with rules enacted by statue or finally declared by [the courts]': *Chung Chi Cheung* at 168 per Lord Atkin. Plainly, international law cannot be received if it is inconsistent with a rule enacted by statute. However, the position is less clear with a rule that might be inconsistent with the common law. To the extent that international law is to be received into domestic law, it will have necessarily altered or modified the common law and, to that extent, might be said to be inconsistent with it . . . . , in my view a strict test of inconsistency could not have been intended. I would accept Sawer's observation that inconsistency with the common law (that is, the rules declared by the courts) means 'inconsistency with the general policies of our law, or lack of logical congruence with its principles': see Sawer, Australian Constitutional Law in Relation to International Relations and International Law and Australian Law' in O'Connell, International Law in Australia (1965), p 50 and Mason at 215.
(4) A rule of customary international law is to be adopted and received unless it is determined to be inconsistent with, and therefore 'conflicts' with, domestic law in the sense explained above. In such circumstances no effect can be given to it without legislation to change the law by the enactment of the rule of customary international law as law: . . . This approach subordinates rules of customary international law to domestic law thereby avoiding a fundamental difficulty of the incorporation approach which, by requiring the common law to invariably change to accord with rules of international law, subordinates the common law to customary international law.
(5) The rules of customary international law, once adopted or received into domestic law, have the 'force of law' in the sense of being treated as having modified or altered the common law. The decision of the court to adopt and receive a rule of customary international law is declaratory as to what the common law is. Upon a court so declaring the common law to be different from what it was earlier perceived to be effect will be given to the declaration 'as truly representing the common law': see *Western Australia v Commonwealth* (1995) 183 CLR 373 at 485. A rule, once so declared, is applicable to both civil and criminal proceedings in a domestic court: see . . . *Chung Chi Cheung* and *Chow Hung Ching*.

(6) As *Trendtex Trading* demonstrates, international law evolves and changes from time to time. However, unlike the common law, the evolution of, and change in, international law is established by evidence and other appropriate material. Thus, it may be that in certain instances the adoption will only be as from the date the particular rule of customary law has been established.[80]

In conclusion, it remains open for an Australian court to recognize widely accepted doctrines of customary international law in the development of the common law. This possibility is constrained, however, by the need to work within the boundaries set by national legislation.

## 4. International Law in Constitutional and Statutory Interpretation

Section 76 provides that the Parliament may make laws conferring original jurisdiction on the High Court in any matter '[a]rising under this Constitution, or involving its interpretation'. This has been done in section 40 of the Judiciary Act 1903 (Cth), which provides for the removal into the High Court, under an order of that court, of any 'cause or part of a cause arising under the Constitution or involving its interpretation that is at any time pending in a federal court other than the High Court or in a court of a State or Territory'.

A number of High Court cases dealing with the Constitution have required the court to consider the role of international law in interpreting that Constitution. These cases were reviewed by the Court as recently as 2004, in *Al-Kateb v Godwin*.[81] In that case, McHugh and Kirby JJ both dealt with the question of whether international law was a relevant tool in construing the Constitution in accordance with Australia's international obligations. McHugh J concluded:

> The claim that the Constitution should be read consistently with the rules of international law has been decisively rejected by members of this court on several occasions . . . .[R]eading the Constitution up or down to conform to the *rules* of international law is to make those rules part of the Constitution, contrary to the direction in [section] 128 that the Constitution is to be amended only in accordance with the referendum process.

Kirby J disagreed. In *Kartinyeri v The Commonwealth*, he had already expressed the view that:

> [T]here is a strong presumption that the Constitution, adopted and accepted by the people of Australia for their Government, is not intended to violate [international law principles of] fundamental human rights . . . Where there is ambiguity in the common law or a statute, it is legitimate to have regard to common law. Likewise, the Australian Constitution, which is a special statute, does not operate in a vacuum. It speaks to the people of Australia. But it also

[80] *Nulyarimma v Thompson; Buzzacott v Hill* (1999) 165 ALR 621, at 642–51.
[81] *Al-Kateb v Godwin* (2004) 208 ALR 124, at 140–4, 168–9.

speaks to the international community as the basic law of the Australian nation which is a member of that community.

In *Al-Kateb*, Kirby J reiterated this view, arguing that:

> [T]he complete isolation of constitutional law from the dynamic impact of international law is neither possible nor desirable today. That is why national courts and especially national constitutional courts such as this, have a duty, so far as possible, to interpret their constitutional texts in a way that is generally harmonious with the basic principles of international law, including as that law states human rights and fundamental freedoms . . . .The Constitution provides both for formal amendment and judicial reinterpretation. From the earliest days of federation both means of adjustment and change have been followed, to the advantage of the Commonwealth and its people. It is idle to suggest otherwise. This court has played its role in adapting the Constitution to changing times where that was proper and compatible with the constitution text and legal principle. The developments of international law since 1945 represent no more than another change requiring adaptation.

Apart from Kirby J, however, no other High Court justice has so firmly accepted the use of international law for the interpretation of the Constitution. Thus, the view that finally prevailed in *Al-Kateb*'s case was McHugh J's view. By a majority of 4 to 3, the Court held that provisions in Australia's Migration Act 1958 providing for indefinite, and perhaps permanent, mandatory detention were a valid exercise of the Commonwealth government's power to legislate in respect of 'naturalisation and aliens' (section 51(xix) of the Constitution). The Court rejected any argument that Parliament's legislative powers under the Constitution could be limited by reference to Australia's international law obligations.[82]

So far as ordinary statutes are concerned, the first rule of interpretation is that statutes will, so far as possible, be interpreted by the courts so as to conform to Australia's treaty obligations. In *Polites v Commonwealth* Latham CJ said that 'every effort should be made to construe Commonwealth legislation so as to avoid breaches of international law and international comity'.[83] In *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs*,[84] Brennan, Deane and Dawson JJ said: 'We accept the proposition that the courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty.'[85] Mason CJ and McHugh J emphasized the need for ambiguity in the legislation before international law might be used as an aid to interpretation. If the ordinary meaning of the legislation is clear, there is no need to resort to extrinsic material.

[82] See further Kristen Walker, 'International Law as a Tool of Constitutional Interpretation' (2002) 28 Monash University Law Review 85.

[83] (1945) 70 CLR 60 (10 April 1945) at p 69.

[84] [1992] HCA 64; (1992) 176 CLR 1 (8 December 1992).

[85] (1992) 176 CLR 1 at 38, citing *Garland v British Rail Engineering Ltd* (1983) 2 AC 751, 771; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, per Lord Goff of Chieveley at 283; *Derbyshire CC v Times Newspapers Ltd* [1992] 3 All ER 65, 77–8, 86–7, 92–3.

Mason J in *Yager v R*[86] considered that a treaty could be used to resolve ambiguities in a statute only where the statute was intended to give effect to the treaty. Both of these limitations on the use of international law in statutory interpretation accord with the wording now found in section 15AB of the Acts Interpretation Act 1901 (Cth), which expressly points to international agreements 'referred to in the Act' when providing for the use of treaties as a tool of statutory interpretation:

15AB Use of extrinsic material in the interpretation of an Act

(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
   (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
   (b) to determine the meaning of the provision when:
      (i) the provision is ambiguous or obscure; or
      (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes: . . .
   (d) any treaty or other international agreement that is referred to in the Act.

The second rule of interpretation is that international law is a valid aid in the development of the common law in Australia. For example, in *Mabo v State of Queensland (No 2)*,[87] Brennan J spoke of the influence of international human rights law on the common law: 'The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law.' This principle was endorsed in *Minister for Immigration and Ethnic Affairs v Teoh*, where the Court confirmed that:

> Apart from influencing the construction of a statue or subordinate legislation, an international convention may play a part in the development by the courts of the common law. The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law.[88]

Mason CJ and Deane J went even further than this. They confirmed that, 'the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law' and went on to hold that the executive government's ratification of a treaty gave rise to a 'legitimate

[86] [1977] HCA 10; (1977) 139 CLR 28 (25 February 1977).

[87] *Mabo v Queensland (No 2)* ('*Mabo* case') [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992).

[88] (1995) 183 CLR 273 per Mason CJ and Deane J at 288. Citing *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 per Brennan J (with whom Mason CJ and McHugh J agreed); *Dietrich v The Queen* (1992) 177 CLR 292, 321 per Brennan J, 360 per Toohey J; *Jago v District Court of New South Wales* (1988) 12 NSWLR 558, 569 per Kirby P.

expectation' (at least in the absence of governmental indications to the contrary) that administrative decision-makers will act in conformity with that Convention.

## 5. Jurisdiction

Section 75 of the Constitution vests the High Court of Australia with original jurisdiction in respect to all matters 'arising under any treaty'. Section 38 of the Judiciary Act 1903 then serves to make this jurisdiction exclusive. Section 38 provides: 'Subject to sections 39B and 44, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States in the following matters: (a) matters arising directly under any treaty.'

In *Scott v Bowden*, the plaintiffs asserted that section 38(a) of the Judiciary Act was invoked by the fact that the offence allegedly committed 'was one of torture as defined under the Convention against Torture, for which the Commonwealth bears a responsibility to bring the perpetrators to justice and a responsibility to compensate the family of a deceased victim of an Act of torture—murder by Government Officials'.[89] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was signed at the United Nations on 10 December 1984, and came into force generally on 26 June 1987. The Convention entered into force for Australia on 7 September 1989 and appears as a schedule to the Crimes (Torture) Act 1988. In 2002, however, McHugh J rejected the plaintiffs' argument that the High Court had original jurisdiction because the 'matter' was one 'arising under a treaty'. He held that it was well established that a treaty which had not been enacted into Australian law could not give rise to any legally enforceable rights, saying:

> [T]he Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is not part of the municipal law of Australia. It creates no legally enforceable rights. A dispute concerning the application of a treaty that has not been enacted as part of the law of Australia gives rise to no justiciable controversy and is incapable of being the subject of a matter for the purpose of [section] 75 of the Constitution or [section] 38(a) of the Judiciary Act. Whatever the meaning of [section] 75(i) of the Constitution, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment gives no 'immediate right, duty or liability to be established by the determination of the Court'.[90]

In 1998, in *Re East, ex p Nguyen*, Kirby J noted that the High Court had 'not previously purported to exercise jurisdiction under 75(i)'.[91] In that case, he was the

[89] *Scott v Bowden* [2002] HCA 60; (2002) 194 ALR 593 (17 December 2002) at para 6.

[90] [2002] HCA 60; (2002) 194 ALR 593; para 7, citing *In re Judiciary and Navigation Acts* [1921] 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ. See also *Re East; ex p Nguyen* [1998] HCA 73; (1998) CLR 354 at 362 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

[91] [1998] HCA 73; (1998) CLR 354 at 362, at para 67, citing *Lane's Commentary on the Australian Constitution* (2nd edn, Pyrmont, NSW: Law Book Co. of Australasia, 1997) at 558.

only judge on a seven-member full bench of the High Court to accept a broad reading of section 75(i) that would give the High Court original jurisdiction in any case where a 'matter' had no other connection with a treaty than that it 'depend[ed] on the construction or effect' of that treaty.[92]

In short, Australian courts have not exercised universal jurisdiction founded solely upon customary international law or solely on a treaty power or obligation. Instead, they have left it to the Commonwealth Parliament to decide how Australia's treaty obligations in respect to international crimes should be given effect. As noted above, the external affairs power provides a wide licence to Parliament when enacting laws to give effect to such obligations. Since the end of World War II, Parliament has passed a number of pieces of legislation purportedly in exercise of Australia's obligations under a number of treaties relating to genocide, war crimes, torture and other crimes attracting universal jurisdiction in international law. The following legislation has been in place for decades, but has not been successful in either attracting prosecutions or gaining convictions:

The Genocide Convention Act 1949 does not provide universal jurisdiction for genocide. The Federal Court in *Nulyarimma v Thompson* confirmed that genocide did not exist as a crime under Australian law, despite Australia's ratification of the Genocide Convention 1948 and the enactment of the Genocide Convention Act. Wilcox and Whitlam JJ for the majority in *Nulyarimma* accepted that, apart from the growing body of treaty law dealing with genocide, genocide was a customary norm of international law attracting universal jurisdiction, being a peremptory norm from which there could be no derogation. Despite the *jus cogens* status of the crime of genocide in international law, however, they adopted the approach taken by the House of Lords in *R v Bow Street Metropolitan Stipendary Magistrate; ex p Pinochet Ugarte (No 3)*, [2000] 1 AC 147, that there could be no jurisdiction over an international crime, whether created by treaty or customary law, unless legislation had been implemented to apply the crime in domestic law.

The War Crimes Amendment Act 1988 applies only to acts committed during World War II—between 1 September 1939 and 8 May 1945 and then only to the war in Europe, excluding any application to the Pacific or elsewhere. The War Crimes Amendment Act 1988 is unusual in that, unlike the UK or Canadian war crimes legislation, it did not create crimes of genocide, war crimes or crimes against humanity. Rather, the legislation defined 'war crimes' by reference to 'serious crimes' that were 'ordinary crimes' under Australian criminal law. Prosecutions thus depended upon proof of murder, manslaughter, aiding and abetting and conspiracy. Primarily for lack of credible or available evidence, each of the three prosecutions brought under this legislation failed. Emphasis on domestic criminal law by the War Crimes Amendment Act did not, quite apart from the procedural

[92] At para 72, citing with approval Isaacs J in *Pirrie v McFarlane* [1925] HCA 30; (1925) 36 CLR 170 at 198, and also agreeing with the broad view of s 38(a) of the Judiciary Act adopted by McLelland J in the Supreme Court of New South Wales in *Bluett v Fadden* (1956) 56 SR(NSW) 254. Rejecting the narrower approach to the interpretation of s 38 of the Judiciary Act adopted by Miles CJ in *R v Donyadideh* (1993) 115 ACTR 1.

difficulties, meet the legal or moral dimensions of war crimes, genocide or crimes against humanity.

The Geneva Conventions Act 1957 applies to crimes that are grave breaches of the four Geneva Conventions of 1949. While this legislation has been available for war crimes prosecutions over the last decades, no attempt has been made to prosecute for alleged offences, probably because there has been little interest in prosecuting acts arising after 1957.

The Defence Force Discipline Act 1982 applies to members of the Defence Forces and is very occasionally employed in relation to acts that might constitute war crimes.

The Crimes (Torture) Act 1988 extends Australian jurisdiction to extraterritorial acts and, while not as yet the basis for any prosecutions, has a wide potential.

The International War Crimes Tribunals Act 1995 relates only to the UN Security Council ad hoc tribunals and is not effective beyond the specific mandates of these bodies.

In 1998 when the Rome Statute of the International Criminal Court[93] was signed by Australia there were concerns that ratification of the Convention could place Australia's jurisdictional sovereignty at risk. To address these and other community concerns, and consistent with its practice, Australia added a qualification to its acceptance of the compulsory jurisdiction of the International Criminal Court. Australia's ratification of the Rome Statute is accompanied by a declaration in which the following points are made:

- Australia 'notes' that a case is not admissible before the ICC if it is being investigated or prosecuted by a state.
- Australia affirms the primacy of its criminal jurisdiction in relation to crimes within the jurisdiction of the ICC.
- No person will be surrendered to the Court by Australia until it has had a full opportunity to investigate or prosecute any alleged crimes.
- No person can be arrested on a warrant issued by the ICC or surrendered to the Court by Australia without the consent of the Attorney-General.
- Genocide, crimes against humanity and war crimes will be interpreted and applied 'in a way that accords with the way they are implemented in Australian domestic law'.[94]

No other state party to the Rome Statute has attempted to restrict its ratification of the Rome Statute in any manner similar to that of Australia.[95]

[93] Rome Statute of the International Criminal Court, opened for signature 17 July 1998, [2002] ATS 15 (entered into force 1 July 2002), UN Doc A/CONF 183/9. Entered into force for Australia on 1 September 2002.

[94] For discussion of the status of this 'declaration' see further Gillian Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law' [2003] Sydney Law Review 23.

[95] For further discussion see Gillian Triggs, [2003] Sydney Law Review 23.

Once the Rome Statute was ratified, the problem was that existing legislation, discussed above, was insufficient to enable prosecutions in Australia for crimes within the jurisdiction of the ICC. If Australia was to ensure that it could assert its primary right to prosecute for war crimes, crimes against humanity and genocide, new legislation was needed.

The new legislation was the International Criminal Court Act 2002 (ICC Act) and the International Criminal Court (Consequential Amendments) Act 2002 (Consequential Amendments Act). The offences created by these two Acts replace or supplement the laws discussed above for the prosecution of war crimes and other similar offences. The Consequential Amendments Act aims to create offences in Australian law that are 'equivalent' to the crimes listed in the Rome Statute. It does this by amending the Criminal Code Act 1995 to create a new Division 268 in the Schedule to that legislation, adding 124 new sections on 'Genocide, Crimes Against Humanity, War Crimes and Crimes Against the Administration of Justice of the International Criminal Court.' The new offences replicate in large part, but not entirely, the states parties' *Elements of Crimes*[96] describing the offences created by the Rome Statute.[97]

The ICC Act deals with the more practical aspects of Australia's working relationship with the ICC. In particular, it contains 189 sections setting out detailed procedures for all aspects of Australia's compliance with requests from the ICC, including those for arrest, search and seizure, protection of witnesses, etc. The ICC Act also affirms the primacy of Australia's right to exercise its jurisdiction over crimes within the jurisdiction of the ICC. No person can be arrested or surrendered at the request of the ICC without a certificate signed by the Attorney-General that it is appropriate to do so. The Attorney-General has 'absolute discretion' whether to provide such a certificate—a discretion that can be reviewed only by reference to prerogative remedies within constitutional limits. The ICC Act sets out various factors the Attorney-General must take into account when deciding requests for the surrender of an accused person. These factors include the fact that if the ICC deems a refusal to surrender the person to be contrary to the Rome Statute, the ICC has the power to refer the matter to the Assembly of State Parties or to the Security Council.[98] But the Attorney-General only has to take this power of the ICC into account. She retains 'absolute' discretion under Australian law to refuse to co-operate with the ICC, even when this will or might constitute a breach of the Rome Convention. As Gillian Triggs has noted:

[96] Assembly of State Parties, Report, ICC-ASP/1/3, Pt II.B *Elements of Crimes* in Assembly of States Parties to the Rome Statute of the International Criminal Court: First Session, United Nations publication, Sales No. E.03.V.2 (2002).

[97] For discussion of the detail of the Australian offences and how they relate to the Elements of Crimes, see Gillian Triggs, [2003] Sydney Law Review 23.

[98] Section 15 of the ICC Act 2002 provides that 'In determining what action to take in relation to a request for co-operation, the Attorney-General must take into account the power of the ICC to refer the matter to the Assembly of States Parties or to the Security Council in accordance with paragraph 7 of article 87 of the Statute if the ICC finds that, contrary to the provisions of the Statute, Australia has failed to comply with the request.'

If, for example, a member of the Australian armed forces were to be the subject of a request for surrender from the ICC in relation to offences committed during the recent conflict in Iraq, Australia could refuse the request on the ground that any trial would be conducted before Australian courts under the principle of complementarity. If, however, no genuine efforts were made to try the perpetrator in Australia, the ICC could assert its secondary jurisdiction and again request surrender. A failure by Australia to cooperate with the ICC in these circumstances would be in breach of Australia's obligations under the Rome Statute . . . it would not, however, conflict with the ICC Act.[99]

## 6. Conclusion

Australian courts have repeatedly refused to accept that international law principles and norms, whether based on treaty or customary law, can be incorporated into the common law without the need for prior legislation. Despite some promising signs in the *Mabo* case that developments in international law can have an indirect influence on the development of the common law, Australian judges have consistently failed to take advantage of opportunities for analysing the relationship between international law and national law. Nor has the ability to use treaties as extrinsic evidence in the interpretation of ambiguous statutory language been enough to allow for a genuine analysis of the place of international law in Australian law. This has left jurisprudence uncertain, imposing a chilling effect on the pursuit of international legal rights through the Australian courts. Legislation such as the International Criminal Court Acts have provided, at best, an ad hoc but reliable means of ensuring that some international crimes (such as genocide) can be prosecuted before national courts.

[99] Gillian Triggs, [2003] Sydney Law Review 23.

# 3

# Austria*

*Elisabeth Handl-Petz***

## 1. Introduction

Austria is a federal republic whose Federal Constitution (*Bundes-Verfassungsgesetz*)[1] was first enacted in 1920 and reinstated in 1945 after a period of authoritarian and totalitarian rule from 1934–1945. The Austrian Federal Constitution vests legislative authority in the Federal Parliament which consists of two chambers, the National Council (*Nationalrat*) and the Federal Council (*Bundesrat*). While the members of the National Council are directly elected by popular vote, the members of the Federal Council are chosen by the parliaments of the constituent states (*Länder*). The highest executive organs are the Federal President (*Bundespräsident*), the federal government (*Bundesregierung*) and the federal ministers. The Federal President is elected by popular vote and appoints the Federal Chancellor (*Bundeskanzler*) and, on the basis of the Federal Chancellor's proposal, the Vice-Chancellor and the other ministers of the federal government. The highest courts in Austria are the Constitutional Court (*Verfassungsgerichtshof*), which has the power of judicial review of legislative acts; the Administrative Court (*Verwaltungsgerichtshof*), which is in charge of exercising legal control over the public administration; and the Supreme Court (*Oberster Gerichtshof*), which is the court of highest instance for civil and criminal cases.

Austria entered the European Union in 1995 and is a member of the United Nations. It participates, inter alia, in the Organization for Economic Co-operation and Development and the Organization for Security and Co-operation in Europe. Austria also accepts compulsory jurisdiction of the International Court of Justice.

Article 44 of the Federal Constitution does not require that constitutional amendments be incorporated into the text of the Federal Constitution.[2] Thus,

* An earlier version of the Austrian national report has been published as 'International Law in the Austrian Legal System' in Bea Verschraegen (ed), *Austrian Law—An International Perspective* 287–342 (Vienna: Jan Sramek Verlag, 2010). This version of the report is published with the permission of Jan Sramek Verlag.

** This chapter reflects the opinion of the author only.

[1] Federal Law Gazette No 1/1930 (republished version) as amended.

[2] Article 44, para 1 provides that federal constitutional laws and constitutional provisions in federal statutes can be passed by the National Council in the presence of at least half the members and by a two-thirds majority of the votes cast. Article 44, para 2 provides for the same quorum in the Federal

over the years, numerous federal constitutional laws (*Bundesverfassungsgesetze*) and federal statutes containing constitutional provisions have been enacted. Moreover, many international agreements and provisions in international agreements have been given constitutional status.[3] Therefore, the structure of Austrian federal constitutional law is fragmented. Nevertheless, the Federal Constitution is the core document for provisions relating to international law.[4]

## 1.1 Federal Constitutional Provisions Concerning International Agreements

### *1.1.1 Article 3, paragraph 2 Federal Constitution*

The first provision in the Federal Constitution referring to international agreements is Article 3, paragraph 2. Article 3 deals with the state territory and changes thereof. Since Austria is a federal state, paragraph 2 provides that the constituent states that are affected by an international agreement that changes the Austrian borders have to consent to such an agreement.

### *1.1.2 Article 9, paragraph 2 Federal Constitution*

The second provision in the Federal Constitution that refers to international agreements is Article 9, paragraph 2. According to the prevailing view, the Federal Constitution exclusively enumerates the state authorities that may exercise sovereign powers.[5] Moreover, it creates a monopoly for Austrian state organs to exercise sovereign powers on Austrian territory and thereby also limits their exercise of sovereign powers to Austrian territory.[6] Accordingly, any transfer of powers to

Council if such a new constitutional law or provision restricts the competences of the nine Austrian constituent states. According to Article 44, para 3, a referendum is necessary whenever a new constitutional law or provision interferes with any of the core principles of Austrian constitutional law which are democracy, federalism, rule of law (*Rechtsstaat*), separation of powers, human rights and republican design of the constitution.

[3] On that practice, see eg, Manfred Stelzer, *An Introduction to Austrian Constitutional Law* 4–5 (2nd edn, Vienna: LexisNexis, 2009); Harald Eberhard and Konrad Lachmayer, 'Constitutional Reform 2008 in Austria—Analysis and Perspectives' 2 ICL-Journal 112, 113–6 (2008). Until 2008, Article 50 of the Federal Constitution provided that National and Federal Council could apply the constitutional quorum set out in Article 44 in order to give constitutional status to international agreements or to provisions in international agreements. In 2008, however, Article 50 was amended. This amendment brought about some significant changes as regards the possibility to give constitutional status to international agreements. In addition, other amendments further reduced the need for constitutional laws and constitutional provisions in federal statutes such as the amendment of Article 9, para 2 of the Federal Constitution.

[4] Special federal constitutional laws, however, may provide for exceptions to these rules. See eg n 123 below.

[5] See eg, Legislative Materials on the European Free Trade Association Agreement, 156 BlgNR 9. GP, 318 et seq.; Legislative Materials on the 1981 amendment of the Federal Constitution introducing Article 9, para 2, 427 BlgNR 15. GP, 9; see also Theo Öhlinger, *Der völkerrechtliche Vertrag im staatlichen Recht* [*The International Treaty in National Law*] 202–5 (Vienna: Springer, 1973) with further references to state practice.

[6] See eg, Legislative Materials on the 1981 amendment of the Federal Constitution introducing Article 9, para 2, 427 BlgNR 15. GP, 10; see Karl Weber, 'Artikel 3' in Karl Korinek and Michael

another state or an intergovernmental organization as well as the exercise of powers abroad or the exercise of powers by foreign states or intergovernmental organizations in Austria would require the enactment of a provision amending constitutional law. In order to avoid a proliferation of such constitutional provisions, Article 9, paragraph 2 provides for a general constitutional authorization regarding the transfer of powers, the exercise of powers abroad and the exercise of powers by foreign state organs or organs of intergovernmental organizations in Austria.[7]

The first sentence of Article 9, paragraph 2 of the Federal Constitution refers to international treaties in so far as it authorizes the transfer of single sovereign powers to other states or intergovernmental organizations,[8] inter alia, by means of an international agreement approved by the Federal Parliament.[9] Moreover, according to the second sentence of Article 9, paragraph 2, Austrian state organs may be authorized, inter alia, by means of such an international agreement, to exercise sovereign powers abroad. Also, foreign state organs as well as the organs of intergovernmental organizations may be authorized to exercise sovereign powers in Austria.[10] The second sentence of Article 9, paragraph 2 further provides that single powers of other states or intergovernmental organizations may be transferred to Austrian state organs, inter alia, by such an international agreement.[11] Finally, the third sentence of Article 9, paragraph 2 provides that such an agreement may also entitle organs of other states or intergovernmental organizations to instruct Austrian organs and vice versa.[12]

### *1.1.3 Article 10 Federal Constitution*

Article 10 of the Federal Constitution concerns the allocation of legislative and executive powers between the federation (*Bund*) and the constituent states.[13] Article 10, paragraph 1, No 2 provides that—notwithstanding the competence of

Holoubek (eds), *Österreichisches Bundesverfassungsrecht—Textsammlung und Kommentar* [*Austrian Federal Constitutional Law—Collection of Texts and Commentary*] MN 7 (Vienna: Springer, 9 Lfg., 2009).

[7] Since the number of constitutional provisions authorizing the transfer of powers to intergovernmental organizations, the exercise of sovereign powers abroad or the exercise of powers by foreign state organs in Austria increased in the 1970s, Article 9, para 2 was already introduced in 1981 but was significantly amended in 2008. Federal Law Gazette No 350/1981 and Federal Law Gazette I No 2/2008. See also Theo Öhlinger, 'Artikel 9, Absatz 2' in Karl Korinek and Michael Holoubek (eds), *Österreichisches Bundesverfassungsrecht—Textsammlung und Kommentar* [*Austrian Federal Constitutional Law—Collection of Texts and Commentary*] MN 1 et seq. (Vienna: Springer, 9 Lfg., 2009).

[8] Note that in its 1981 version, Article 9, para 2 only authorized the transfer of federal powers to intergovernmental organizations or their organs. The 2008 constitutional amendment made it possible to also transfer powers of the constituent states.

[9] For the participation of the Federal Parliament in the conclusion of international agreements see section 1.1.10 below. Note that the Austrian accession to the European Union required more than the transfer of single powers. For further details on the accession see n 55 below.

[10] Note that in its 1981 version, Article 9, para 2 only authorized the exercise of sovereign powers abroad by Austrian organs and the exercise of powers by foreign state organs in Austria.

[11] This authorization was introduced with the 2008 amendment.

[12] This authorization was introduced with the 2008 amendment.

[13] See also n 22 below.

the constituent states to conclude specific international agreements according to Article 16, paragraph 1 of the Federal Constitution[14]—it is a federal competence to conclude international agreements. Accordingly, the federation may conclude an international treaty regardless of whether the subject-matter of the treaty falls, in whole or in part, within the legislative or executive competence of the constituent states.[15]

Article 10, paragraph 3 provides that with regard to certain treaties, the constituent states must be given the opportunity to comment on the envisaged treaty before it is concluded. This right exists in relation to treaties that require the constituent states to take implementing measures as well as treaties which otherwise touch upon the constituent states' autonomous sphere of competence. If the constituent states make a joint statement, the federation is bound by that statement and may only deviate from it for compelling reasons of foreign policy. This provision is one of a few provisions in the Federal Constitution meant to give the constituent states a role in foreign policy. In particular, it gives the constituent states a voice in balancing foreign policy interests and constituent state interests.[16]

### *1.1.4 Article 14, paragraph 10 Federal Constitution*

In general, the National Council approves international agreements by simple majority. Article 14, paragraph 10 of the Federal Constitution, however, requires a majority of two-thirds in the National Council for the approval of international agreements concerning certain important education-related matters.[17]

### *1.1.5 Article 16 Federal Constitution*

Article 16, paragraph 1 of the Federal Constitution entitles the nine constituent states of Austria—Burgenland, Carinthia, Lower Austria, Salzburg, Styria, Tyrol, Upper Austria, Vienna and Vorarlberg—to conclude international agreements. Paragraphs 1–3 were inserted into the Federal Constitution in 1988 in order to meet a long-standing wish of the constituent states to strengthen their role in foreign policy matters.[18] Until 1988, the states were only used to enforce international agreements concluded by the federation as (now) provided for in Article 16,

[14] See also at section 1.1.5 below.

[15] Constitutional Court, Collection No 3.741, 18 June 1960. See also the Legislative Materials on the 1988 constitutional amendment which introduced the competence of the constituent states to conclude specific international agreements (607 BlgNR 17. GP, 6); it is noted there that this new competence of the constituent states notwithstanding, the federation may continue to conclude international agreements the subject-matter of which falls within the constituent states' autonomous sphere of competence. For the various forms of constituent state competences see n 22 below.

[16] See the Legislative Materials on the 1974 amendment of the Federal Constitution, 182 BlgNR 13. GP, 15.

[17] See, for example, Treaty concluded between the Holy See and the Republic of Austria on certain school-education related matters, Federal Law Gazette No 273/1962.

[18] Federal Law Gazette No 685/1988. See also Stefan Hammer, 'Artikel 16' in Karl Korinek and Michael Holoubek (eds), *Österreichisches Bundesverfassungsrecht—Textsammlung und Kommentar* [*Austrian Federal Constitutional Law—Collection of Texts and Commentary*] MN 6 (Vienna: Springer, 2 Lfg., 1999).

paragraph 4 and 5 of the Federal Constitution. The duty to implement federal international agreements, however, did not give the constituent states a specific role in matters of foreign policy. Rather, it served to keep Austria from incurring international responsibility for not implementing international agreements.[19] Thus, Article 16, paragraph 1, which entitles constituent states to conclude international agreements, may be deemed the most important provision on the role of the constituent states in foreign policy matters.[20]

So far, however, no constituent state has used this authorization. One of the reasons the constituent states have not yet concluded international agreements might be the limited character of the Article 16 entitlement.[21] Paragraph 1 provides that the constituent states may conclude treaties only on subject-matters falling within their autonomous sphere of competence, and only with states bordering Austria and—if these states are federal states—with their respective constituent states. The treaty-making competence of the constituent states is thus limited in two ways. First, they may conclude only treaties regarding matters that according to Articles 10–15 of the Federal Constitution—the provisions concerning the allocation of legislative and executive competences between federal and state level[22]—fall within their autonomous sphere of competence.[23] Second, the constituent states may conclude treaties only with a small number of states.[24]

Paragraph 2 of Article 16 details the procedure to be followed when a constituent state concludes a treaty. According to that provision, the governor of a constituent state (*Landeshauptmann*) has to inform the federal government about such a treaty before negotiations are initiated and the Federal President must give authorization for the initiation of negotiations upon the suggestion of the respective constituent state government (*Landesregierung*) and with the countersignature of the respective governor. Before a treaty is concluded, the federal government's approval has to be

[19] Ibid MN 4.

[20] Ibid MN 1.

[21] See ibid MN 25, 32.

[22] Article 10–15 of the Federal Constitution allocate powers as follows: Article 10 of the Federal Constitution lists subject-matters in regard to which only the federation may legislate and take enforcement action. Article 11 lists subject-matters in regard to which only the federation may legislate, while the constituent states may take enforcement action. Article 12 of the Federal Constitution lists subject-matters in regard to which the federation may enact principled legislation, while it is for the constituent states to translate these principles into law and enforce them. Article 15 of the Federal Constitution provides that all subject-matters not explicitly falling within the competence of the federation fall within the competence of the constituent states as regards legislation and enforcement.

[23] Accordingly, the constituent states may conclude international treaties modifying or supplementing law in matters where they have legislative competences. Moreover, they may conclude treaties in matters which are within their competence to take enforcement action. These treaties, however, may neither modify nor supplement law. The Legislative Materials on the 1988 constitutional amendment which introduced Article 16, para 1–3 note that the competence of the constituent states to conclude international agreements might in particular gain relevance in matters such as hunting and fishing, tourism or fire brigades. See Legislative Materials, 607 BlgNR 17. GP, 6; Hammer (n 18) MN 32. It has to be noted that in comparison with other federal states such as the United States, the constituent states in Austria have less important competences. For example, civil and criminal law are exclusively federal matters and all courts are federal institutions.

[24] The neighbouring states of Austria are: Germany, Czech Republic, Slovak Republic, Hungary, Slovenia, Italy, Switzerland and Liechtenstein.

obtained by the governor. Eventually, the Federal President concludes the treaty for the respective constituent state upon the suggestion of the respective constituent state government and with the countersignature of the respective governor. Thus the competence of the constituent states to 'conclude' treaties is basically confined to negotiating a treaty and to suggesting its conclusion to the Federal President.[25]

From a public international law perspective, Article 16 of the Federal Constitution may result in a partial and particular recognition of a constituent state as a subject of international law.[26] Such recognition is partial because it only relates to the conclusion of international agreements and it is particular because the constituent state is only recognized by the state with which it concludes the treaty.

Paragraph 3 provides that a constituent state has to terminate an international treaty concluded according to paragraph 1 upon request of the federal government. However, the federal government may request a constituent state to terminate a treaty only if there is a predominant federal interest that justifies termination.[27] Moreover, paragraph 3 provides that if the constituent state fails to duly comply with this obligation, the competence to terminate passes to the federation.

Paragraphs 4 and 5 of Article 16 of the Federal Constitution deal with the implementation of international agreements by the constituent states. Paragraph 4 provides that the constituent states are under a duty to take all measures necessary for the implementation of international agreements the subject-matter of which falls within their autonomous sphere of competence. Even though the federation may conclude treaties the subject-matter of which falls within the competence of the constituent states to legislate, the implementation of these treaties nevertheless follows the allocation of competences pursuant to Articles 10–15 of the Federal Constitution.[28] Accordingly, constituent states are not only responsible for the implementation of their own agreements concluded on the basis of Article 16, paragraphs 1–2, but also (and in particular) for the implementation of federal agreements that fall within their autonomous sphere of competence. Paragraph 4 further states that if a constituent state fails to duly take the necessary implementing measures, the competence to take such measures passes to the Federation. If, however, the defaulting constituent state subsequently takes its own implementing measures, the respective federal implementing measures become invalid. Paragraph 5 provides that in implementing treaties, the constituent states are under federal supervision. Consequently, the Federation may, inter alia, issue instructions for the implementation of treaties.[29]

### *1.1.6 Article 18, paragraphs 1 and 2 Federal Constitution*

Article 18, paragraph 1 of the Federal Constitution contains the principle of legality, which requires the entire public administration to be based on law.

[25] The Federal President may, however, delegate the presidential treaty-making power in certain cases to the respective constituent state government. See below section 1.1.12.
[26] Hammer (n 18) MN 20.
[27] Ibid MN 68.
[28] Hammer (n 18) MN 71. See also n 22 above.
[29] Hammer (n 18) MN 76, 84.

Accordingly, the executive branch may only take action on the basis of a legal authorization from the legislature,[30] and is subordinate to the legislature.[31]

Article 18, paragraph 2 specifically deals with the power of the executive branch to issue legally binding executive orders (*Verordnungen*). It provides—in accordance with the principle of legality spelled out in paragraph 1—that executive orders may not create new law but may only specify existing law. The legal act that is specified by an executive order has to predetermine the content of the executive order.

The same applies to international treaties.[32] Consequently, the executive branch may conclude an international treaty without approval of the Federal Parliament if that treaty has a sufficient legal basis as required by Article 18, paragraph 2. In the context of international agreements, Article 18, paragraph 2 thus plays a role when approval by the Federal Parliament is required.[33]

### *1.1.7 Article 48 Federal Constitution*

Article 48 inter alia provides that international agreements approved by the Federal Parliament shall be published with reference to the respective approval decision of the National Council.

### *1.1.8 Article 49, paragraph 2 Federal Constitution*

Article 49, paragraph 2 regulates in detail the publication of treaties that were approved by the Federal Parliament:[34] First, it states that the Federal Chancellor is responsible for the publication of these treaties. Second, it notes that these treaties must be published in the Federal Law Gazette. Third, it provides that the National Council may decide upon approval that the treaty or parts thereof shall not be published in the Federal Law Gazette but in another manner. In practice, the National Council often takes such a decision if, for example, a treaty is very voluminous because it is authentic in more than one language.[35] If the National Council decides for another form of publication (such as making the treaty available for public inspection in a Federal Ministry), this decision has to be published in the Federal Law Gazette.

[30] See Stelzer (n 3) 49 et seq.

[31] See Theo Öhlinger, 'Artikel 50' in Karl Korinek and Michael Holoubek (eds), *Österreichisches Bundesverfassungsrecht—Textsammlung und Kommentar* [*Austrian Federal Constitutional Law—Collection of Texts and Commentary*] MN 36 (Vienna: Springer, 9 Lfg., 2009).

[32] See Öhlinger, *Der völkerrechtliche Vertrag* [*The International Treaty*] (n 5) 213 et seq.

[33] See further section 1.1.10.

[34] On the publication of treaties not approved by the Federal Parliament see section 2.3 below.

[35] Rudolf Thienel, 'Artikel 48, Artikel 49' in Karl Korinek and Michael Holoubek (eds), *Österreichisches Bundesverfassungsrecht—Textsammlung und Kommentar* [*Austrian Federal Constitutional Law—Collection of Texts and Commentary*] MN 50 (Vienna: Springer, 1 Lfg., 1999). See, for example, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Federal Law Gazette III No 132/2009: Since the treaty is authentic in 23 languages, only the German text was published in the Federal Law Gazette while it was decided that the other texts are to be made available for public inspection in the Ministry of European and Foreign Affairs.

Moreover, Article 49, paragraph 2 regulates the entry into force on the national level of international agreements that were approved by the Federal Parliament. Regarding an agreement's entry into force *ratione temporis*, paragraph 2 establishes that—unless provided otherwise—it enters into force the day after its publication in the Federal Law Gazette. If only the decision of the National Council to provide for another form of publication is published in the Federal Law Gazette, the agreement enters into force the day after the publication of that decision, unless provided otherwise. As regards the entry into force of an agreement *ratione loci*, Article 49, paragraph 2 sets out that an international agreement applies within the entire territory of Austria, unless provided otherwise.

The last sentence of Article 49, paragraph 2 makes clear that a treaty neither gives rise to individual rights and duties, nor to any authorization for executive organs, if the National Council has decided that this treaty requires implementing legislation.[36]

### *1.1.9 Article 49a Federal Constitution*

Article 49a of the Federal Constitution authorizes the Federal Chancellor together with the competent federal ministers to republish international agreements in the Federal Law Gazette (*Wiederverlautbarung*). Article 49a also provides what kind of changes may be made. Unlike Articles 48 and 49, the wording of Article 49a is not limited to international agreements that were approved by the Federal Parliament. Rather, it authorizes the republication of all international agreements that actually have been published in the Federal Law Gazette.[37]

### *1.1.10 Article 50 Federal Constitution*

One of the most important provisions dealing with the conclusion of international agreements is Article 50 of the Federal Constitution. Even though it is the Federal President who is authorized by the Federal Constitution to conclude international agreements,[38] it would be against the principle of separation of powers if the Federal President were able to alter law without the participation of the legislator.[39] Therefore, Article 50 provides that both chambers of the Federal Parliament, the National Council and the Federal Council, shall take part in the conclusion of international agreements.

According to paragraph 1 of Article 50, there are four types of international agreements that require the approval of the National Council. The first type is the so-called 'political' agreement. Political agreements are agreements whose content

[36] Thienel (n 35) MN 60. On the entitlement of the National Council to make such a decision see section 1.1.10 below. Regarding the acceptance into the domestic legal system and self-executing character of agreements requiring implementing legislation see sections 2.3 and 2.4 below.

[37] See also Michael Rohregger, 'Artikel 49a' in Karl Korinek and Michael Holoubek (eds), *Österreichisches Bundesverfassungsrecht—Textsammlung und Kommentar* [*Austrian Federal Constitutional Law—Collection of Texts and Commentary*] MN 20 (Vienna: Springer, 2 Lfg. 1999). On the necessity of publication see section 2.3 below.

[38] See section 1.1.11 below.

[39] Stelzer (n 3) 60.

touches upon the very existence of the state, its territorial integrity or its independence.[40] This type of agreement, however, is often blended with the second kind of agreement in need of the National Council's approval, namely: an agreement that modifies existing law (*gesetzändernd*).[41] An agreement modifies law if its content contradicts existing law.[42] The third type of agreement requiring the approval of the National Council is one that supplements existing law (*gesetzesergänzend*). As mentioned above, Article 18, paragraph 2 of the Federal Constitution provides that the executive branch may issue an executive order only on the basis of existing law that predetermines the content of the executive order. The same applies to an international agreement the content of which does not modify existing law: it may only be concluded without the approval of the National Council if there is a sufficiently determined basis in existing legislation.[43] If no such basis exists, the international agreement must be approved by the National Council, and consequently, will supplement existing law.[44] The fourth type of agreement mentioned in Article 50, paragraph 1 is an agreement that modifies the treaty foundations of the European Union.[45] This type of agreement was inserted into Article 50 only in 2008. The first treaty of that kind approved by the National Council pursuant to Article 50 was therefore the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community.[46] Before 2008, international agreements modifying the treaty foundations of the European Union required the enactment of a special constitutional law authorizing the competent organs to conclude such an agreement.[47]

Moreover, by referring to treaties that 'modify or supplement law and do not fall under Article 16, paragraph 1,' Article 50, paragraph 1 clarifies that international agreements of the constituent states do not require approval of the National Council. However, this 'clarification' in Article 50 paragraph 1 would not have been necessary, for it only states the obvious.[48]

Paragraph 2 of Article 50 specifically deals with political agreements and agreements that modify or supplement existing law: First, it establishes that if such a treaty provides for a simplified revision procedure, the National Council, upon approval of the treaty,[49] must reserve its right to also approve amendments made on

[40] Öhlinger, 'Artikel 50' (n 31), MN 47.

[41] Ibid.

[42] Ibid MN 50.

[43] Treaties that received parliamentary approval may also serve as such legal basis. Öhlinger, 'Artikel 50' (n 31) MN 51.

[44] Ibid MN 50.

[45] For the meaning of 'treaty foundations' see also the Legislative Materials, 314 BlgNR 23. GP, 8–9.

[46] See n 35 above.

[47] See eg, Federal Constitutional Law on the Conclusion of the Treaty of Amsterdam, Federal Law Gazette I No 76/1998. See also Federal Constitutional Law on the Accession of Austria to the European Union, Federal Law Gazette No 744/1994, which started this practice and has served as a model ever since.

[48] See Öhlinger, 'Artikel 50' (n 31) MN 10.

[49] Barbara Weichselbaum, '"Staatsverträge neu" im Geist von Verfassungsbereinigung und völkerrechtlicher Handlungsfähigkeit: eine kritische Analyse' ['The New Provisions on State Treaties in Spirit of the Constitutional Clean-up and the Capacity to Act Internationally: a Critical Analysis'], JRP

the basis of the simplified revision procedure (Article 50, paragraph 2, No 1). If the National Council fails to reserve its right to approve such amendments, these amendments do not have to pass the Federal Parliament. Second, paragraph 2 provides that if such a treaty has been approved by the National Council, it requires in addition the approval of the Federal Council to the extent it regulates subject-matters falling within the autonomous sphere of competence of the constituent states (Article 50, paragraph 2, No 2). Third, paragraph 2 authorizes the National Council to decide upon approval that such a treaty or parts thereof require implementing legislation (Article 50, paragraph 2, No 3).

Likewise, paragraph 3 specifically deals with political agreements and agreements that modify or supplement existing law. Paragraph 3 concerns the participation of the Federal Council in the conclusion of these types of treaties when they do not cover subject-matters falling within the autonomous sphere of competence of the constituent states. It provides that Article 42, paragraph 1–4 of the Federal Constitution shall be applied to the approval decisions of the National Council and to its decisions that a treaty requires implementing legislation. Accordingly, these decisions have to be transmitted to the Federal Council that may veto them. A veto of the Federal Council, however, may subsequently be overridden by the National Council and is, thus, only suspensive in nature. Therefore, with the exception of treaties that require the approval of the Federal Council according to Article 50, paragraph 2, No 2 (and paragraph 4), the participation of the Federal Council is limited to the possibility of vetoing the decisions of the National Council approving a treaty or requiring implementing legislation.

Before the 2008 constitutional amendment, Article 50, paragraph 3 in addition provided that:

> if an international agreement modifies or supplements constitutional law, Article 44, paragraph 1 and 2 have to be applied. In an approval decision [...] such international agreement or such provisions as are contained in international agreements shall be explicitly labelled as 'modifying the constitution'.

Paragraph 1 and 2 of Article 44 of the Federal Constitution provide for the quorum necessary in the National and Federal Council for the enactment of constitutional laws and provisions.[50] The 2008 constitutional amendment, however, eliminated the above-cited text from Article 50, paragraph 3.[51] Accordingly, it is no longer possible to conclude international agreements on a constitutional level.[52] If an

211, 213 (2007); Ingrid Siess-Scherz, 'Staatsverträge und Bundesverfassung: Weiterhin ein nicht ganz unproblematisches Verhältnis—eine Auseinandersetzung mit Teilaspekten des Art 50 B-VG' ['State Treaties and Federal Constitution: Still a Not Unproblematic Relationship—an Analysis of Some Aspects of Article 50 Federal Constitution'], in Georg Lienbacher and Gerhart Wielinger (eds), *Jahrbuch Öffentliches Recht 2009* 77, 79 [*Public Law Yearbook*] (Vienna: NWV, 2009); Öhlinger, 'Artikel 50' (n 31) MN 76.

[50] See also above n 2.

[51] See the Legislative Materials on the 2008 amendment of the Federal Constitution, 314 BlgNR 23. GP, 10.

[52] Ibid. See also n 3 above. Note that in addition, quite a number of international agreements and provisions in international agreements were deprived of their constitutional law status. For a list of

international agreement concluded after the entry into force of the 2008 constitutional amendment modifies or supplements constitutional law, a specific constitutional law will have to be enacted that provides that this agreement shall have the status of constitutional law.[53]

Paragraph 4 specifically deals with agreements modifying the treaty foundations of the European Union and was inserted into Article 50 in 2008. It provides that the conclusion of such agreements always requires the approval of the National and Federal Council. Moreover, it provides for a specific quorum for these approval decisions that equals the quorum necessary for constitutional amendments as provided for in Article 44, paragraph 1 and 2 of the Federal Constitution. However, even though an agreement modifying the treaty foundations of the European Union is approved on the basis of a constitutional quorum, it does not become formal constitutional law.[54] If such a treaty interferes with core principles of Austrian constitutional law,[55] a special constitutional law authorizing the conclusion of that treaty has to be drawn up and subject to a referendum according to Article 44, paragraph 3 before its enactment.[56]

Paragraph 5 provides that the National and the Federal Council have to be informed without delay when negotiations of a treaty that falls under paragraph 1 of Article 50 are initiated.

### *1.1.11 Article 65, paragraph 1 Federal Constitution*

Article 65, paragraph 1 entitles the Federal President to conclude international agreements.[57] The right to conclude treaties, however, does not include the right to terminate treaties.[58] Accordingly, the Federal President has to terminate international

these treaties and treaty provisions see Federal Law Gazette I No 2/2008. Some very important agreements, however, retained their constitutional law status such as the Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention on Human Rights—ECHR'), 4 November 1950, ETS No 5, Federal Law Gazette No 210/1958 as amended.

[53] See the Legislative Materials, 314 BlgNR 23. GP, 10. There has, however, not yet been a test case. See also Article 149, para 1 of the Federal Constitution which might serve as a model.

[54] See also Weichselbaum (n 49) 214 who notes that in order to become formally part of constitutional law, the respective treaty would also have to be labelled as 'modifying the constitution' as provided for in Article 44 of the Federal Constitution. Article 50, para 4, however, does not provide for such a labelling.

[55] The accession of Austria to the European Union interfered with core principles (see n 2 above) of the Austrian constitution. Accordingly, the Federal Constitutional Law authorizing the conclusion of the accession treaty was subject to a referendum before its enactment. See n 47 above.

[56] See the Legislative Materials, 314 BlgNR 23. GP, 9. But see Öhlinger, 'Artikel 50' (n 31) MN 69–71 who argues that since the 2008 constitutional amendment, the treaty itself may be subject to a referendum.

[57] The power to conclude treaties means that the Federal President may take those acts by which Austria consents to be bound by an international treaty. See Öhlinger, *Der völkerrechtliche Vertrag* [*The International Treaty*] (n 5) 297.

[58] Bernhard Raschauer, 'Artikel 65' in Karl Korinek and Michael Holoubek (eds), *Österreichisches Bundesverfassungsrecht—Textsammlung und Kommentar* [*Austrian Federal Constitutional Law—Collection of Texts and Commentary*] MN 43 (Vienna: Springer, 1 Lfg., 1999).

treaties on the basis of the Federal President's general representation competence, which is also enshrined in Article 65, paragraph 1.[59]

Moreover, Article 65, paragraph 1 entitles the Federal President to order upon conclusion of a treaty that it requires implementation by executive order. The Federal President may make such an order with regard to treaties that do not fall under Article 50 of the Federal Constitution and thus do not need parliamentary approval. Moreover, the Federal President may make such an order with regard to treaties of the constituent states pursuant to Article 16, paragraph 1 that neither modify nor supplement law.

### *1.1.12 Article 66, paragraphs 2 and 3 Federal Constitution*

Article 66, paragraph 2 entitles the Federal President to delegate—for the conclusion of certain categories of treaties which neither fall under Article 50, nor under Article 16, paragraph 1 of the Federal Constitution—the presidential treaty-making power to the federal government or to competent members of the federal government. The delegation of treaty-making power entails a delegation of the Federal President's power to order that a treaty be implemented by executive order.

With the Executive Order of 31 December 1921,[60] the Federal President made use of that right and delegated the presidential treaty-making power with regard to the following three categories of treaties: (1) 'governmental agreements' (*Regierungsübereinkommen*), which are agreements that affect more than one federal ministry, shall be concluded by the federal government; (2) 'department agreements' (*Ressortübereinkommen*), ie agreements concerning only one federal ministry, shall be concluded by the competent federal minister in consultation with the Foreign Minister; and, (3) 'administrative agreements' (*Verwaltungsübereinkommen*), ie agreements of a merely technical or administrative nature in the interest of one federal ministry, shall be concluded by the competent federal minister. In this order, however, the Federal President has reserved the right to nevertheless conclude agreements which bear the heading of 'State Treaty' or which are concluded by an exchange of ratification documents.

According to Article 66, paragraph 3 the Federal President may delegate the presidential treaty powers to the government of a constituent state with regard to treaties pursuant to Article 16, paragraph 1 that neither modify nor supplement state law. But, the Federal President may only delegate this competence to a constituent state government upon the suggestion of the constituent state government and with

[59] Ibid. In practice, however, the competence to conclude a treaty is perceived as embracing the competence for the *actus contrarius*, ie the termination of a treaty. Accordingly, the Federal President may not terminate an agreement if the competence to conclude that agreement has been delegated.

[60] Federal Law Gazette No 49/1921. On the three categories of treaties named in the Executive Order see in more detail: Georg Posch, 'Regierungsübereinkommen—Ressortübereinkommen—Verwaltungsübereinkommen' ['Governmental Agreements—Department Agreements—Administrative Agreements'] 34 Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht 201–15 (1983).

the countersignature of the respective governor. The delegation of treaty-making power according to paragraph 3 also entails a delegation of the Federal President's power to order that a treaty be implemented by executive order. So far, however, the Federal President has not made use of that authorization.

### *1.1.13 Article 67 Federal Constitution*

Article 67 provides that the Federal President may only act upon suggestion of the federal government (or a federal minister authorized by the federal government). Moreover, Article 67 states that the acts of the Federal President require for their validity the countersignature of the Federal Chancellor or the competent ministers. Article 67 thereby reveals that the position of the President in Austria is rather weak since the Federal President may not take action on her or his own motion.

Consequently, the Federal President may conclude international agreements only upon suggestion of the federal government (or an authorized minister) and with the countersignature of the Federal Chancellor or the competent ministers.[61] Likewise, the Federal President may delegate the presidential treaty-making power (as provided for by Article 66, paragraph 2 of the Federal Constitution) only upon suggestion of the federal government (or an authorized minister) and with the countersignature of the Federal Chancellor or the competent ministers.[62] The organs made competent to conclude treaties pursuant to the Federal President's delegation of the presidential treaty-making power are not bound by Article 67. The requirement of a suggestion and a countersignature only applies to the Federal President.

### *1.1.14 Article 89 Federal Constitution*

Article 89 provides that courts are not entitled to review the legality of, inter alia, international agreements or republications of international agreements. Only the Constitutional Court is empowered to exercise this function.[63] Therefore, Article 89 establishes that courts have to ask the Constitutional Court to review the legality of international agreements or of republications of international agreements.[64] If, however, an international agreement has not been published properly, the agreement does not exist[65] and consequently, the courts cannot request the Constitutional Court to review it.[66]

[61] Note the parallel provision of Article 16, para 2 of the Federal Constitution for the conclusion of treaties on behalf of the constituent states.

[62] See the parallel provision in Article 66, para 3 for treaties of the constituent states.

[63] See below section 1.1.19.

[64] See also below section 1.1.17 and 1.1.19.

[65] See for example, Administrative Court, Decision No 91/16/0077, 2 July 1992 (noting that it cannot consider as a source of law a treaty which has not been published).

[66] Heinz Mayer, *Das österreichische Bundes-Verfassungsrecht—Kurzkommentar* [*The Austrian Federal Constitution—Short Commentary*] 319 (4th edn, Vienna: Manz, 2007) with references to the relevant case-law of the Constitutional Court.

### *1.1.15 Articles 130 and 131 Federal Constitution*

According to Article 130 of the Federal Constitution, the Administrative Court reviews the legality of administrative decisions (*Bescheide*). The review may involve an examination of whether an administrative decision violates an international agreement. If the Administrative Court comes to the conclusion that an administrative decision is illegal, it has to repeal the decision.[67] According to Article 131 of the Federal Constitution, an application for review may be filed by individuals[68] and, in relation to administrative decisions on certain matters, also by a federal minister or a constituent state government.

### *1.1.16 Article 139 Federal Constitution*

Article 139 gives the Constitutional Court the authority to review the legality of executive orders issued by a federal or state authority. In doing so, the Court may also examine whether an executive order is in violation of an international agreement of a higher normative rank.[69] If the Court comes to the conclusion that an executive order violates a higher-ranking international agreement, it will repeal the order. An application for review may be filed, inter alia, by any court or by individuals.[70]

### *1.1.17 Article 139a Federal Constitution*

Article 139a provides that the Constitutional Court reviews the legality of republications of international agreements. If it finds a republication illegal, it has to repeal it. Applications for review may be filed, inter alia, by any court or by individuals.[71]

### *1.1.18 Article 140 Federal Constitution*

According to Article 140, the Constitutional Court reviews the constitutionality of federal and state statutes.[72] Since some international agreements still have constitutional law status, the Court may thereby also observe whether a statute is in conformity with such a higher-ranking international agreement. If the Court holds that a statute violates an international agreement with constitutional law status, it has to repeal that statute.[73] Article 140 furthermore regulates that, inter alia, the

[67] Section 42 Administrative Court Law (*Verwaltungsgerichtshofgesetz*), Federal Law Gazette No 10/1985 as amended.

[68] For further details on individual applications see section 2.5.1 below.

[69] See Josef Walter Aichlreiter, 'Artikel 139' in Heinz Peter Rill and Heinz Schäffer (eds), *Bundesverfassungsrecht—Kommentar* [*Federal Constitutional Law—Commentary*] 14 (Vienna: Verlag Österreich, 4 Lfg., 2006). On the normative rank of international treaties see section 4.1 below.

[70] For further details on individual applications see section 2.5.1 below.

[71] For further details on individual applications see section 2.5.1 below.

[72] See in that context also section 4.1 below on the normative hierarchy.

[73] For details on when and to what extent the Constitutional Court will repeal statutes see Article 140, para 3.

Supreme Court, the Administrative Court, any appellate court, individuals[74] and—as regards federal statutes—one-third of the members of the National Council may file an application for review.

### *1.1.19 Article 140a Federal Constitution*

Article 140a authorizes the Constitutional Court to scrutinize whether an international agreement violates domestic law of a higher normative rank.[75] International agreements may thereby also be measured against other international agreements or customary law forming part of the domestic legal system, but not against European Union law.[76] An international agreement might be illegal either because of its content or because of the treaty-making procedure that has been used. If, for example, an agreement is concluded without giving the constituent states an occasion to comment on a treaty pursuant to Article 10, paragraph 3 of the Federal Constitution, the conclusion of the treaty is unconstitutional and thus, in violation of a higher-ranking national norm.

When the Constitutional Court finds that a treaty violates domestic law, the treaty may no longer be applied within the domestic legal system.[77] Such a decision of the Constitutional Court, however, does not affect the validity of the agreement under international law. Therefore, Austria might incur international responsibility if the Constitutional Court declares a treaty to be inapplicable in the national legal system and Austria is unable to fulfil its international obligations arising under that treaty as a result.

An application for review of international agreements that were approved by the Federal Parliament and agreements of the constituent states that modify or supplement law may be filed, inter alia, by the Supreme Court, the Administrative Court, any appellate court, individuals[78] and—as regards treaties that were approved by the Federal Parliament—by one-third of the members of the National Council. An application for review of international agreements the conclusion of which was not approved by the Federal Parliament as well as agreements of the constituent states that neither modify nor supplement law may be filed, for example, by any court or by individuals.[79]

[74] For further details on individual applications see section 2.5.1 below.

[75] On the normative hierarchy see section 4.1 below.

[76] Theo Öhlinger, 'Artikel 140a' in Karl Korinek and Michael Holoubek (eds), *Österreichisches Bundesverfassungsrecht—Textsammlung und Kommentar* [*Austrian Federal Constitutional Law—Collection of Texts and Commentary*] MN 11 (Vienna: Springer, 7 Lfg., 2005). Constitutional Court, Collection No 16.634, 27 September 2002 and Collection No 16.628, 26 September 2002 (the Constitutional Court is not competent to declare inapplicable treaty provisions in violation of European Union law).

[77] Consequently, such a treaty has the same status as a non-self-executing treaty. See Öhlinger, 'Artikel 140a' (n 76) MN 6. On the doctrine of self-executing and non-self-executing treaties in Austria see section 2.4 below.

[78] For further details on individual applications see section 2.5.1 below.

[79] For further details on individual applications see section 2.5.1 below.

So far, however, the Constitutional Court has never declared an international agreement to be in violation of domestic law.[80] The most recent treaty the Constitutional Court was asked to scrutinize was the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 17 December 2007. The Constitutional Court, however, declined to review this treaty.[81] The Court rejected two applications for review of the Treaty of Lisbon that were filed before the Treaty's publication in the Federal Law Gazette because without publication the Treaty had not yet become part of domestic law.[82] But the Court also rejected two review applications which were filed after the Treaty's publication because it found that the Treaty did not directly interfere with the legally protected interests of the applicants.[83]

### *1.1.20 Articles 144 and 144a Federal Constitution*

Pursuant to Article 144 and Article 144a, the Constitutional Court may examine whether administrative decisions and decisions of the Asylum Court violate the constitutional rights of an individual (which might also arise from international treaties having constitutional status)[84] or whether they were taken on the basis of, inter alia, an illegal international agreement or an illegal republication of an international agreement. An application for review under these articles may only be filed by individuals.[85] If the Constitutional Court shares, for example, an applicant's doubts regarding the legality of an international agreement, it may, *sua sponte*, initiate review proceedings on the basis of Article 140a. When the Constitutional Court finds that an administrative decision or a decision of the Asylum Court was taken on the basis of an illegal international agreement or of an illegal republication of an international agreement or violates a right of the applicant derived from an international treaty with constitutional law status, it will repeal the decision.[86]

### *1.1.21 Article 145 Federal Constitution*

Article 145 of the Federal Constitution provides: 'The Constitutional Court has jurisdiction over violations of international law according to the provisions of a

[80] See eg, the following decisions each of which declares inadmissible the respective application for review: Constitutional Court, Collection No 16.772, 12 December 2002; Collection No 13.952, 30 November 1994; Collection No 13.132, 25 June 1992; Collection No 12.717, 10 June 1991; Collection No 11.888, 28 November 1988.

[81] Constitutional Court, Collection No 18.576, 30 September 2008; Collection No 18.740, 11 March 2009; Decision No SV1/10, 12 June 2010; Decision No SV2/10, 27 September 2010.

[82] On the publication requirement see also above section 1.1.8 and section 2.3 below.

[83] On the requirements for filing an individual review application see section 2.5.1 below.

[84] Even though it is in general the Administrative Court which is called upon to review the legality of administrative decisions (see Article 130 and 131 of the Federal Constitution), claims that an administrative decision violates an individual's constitutional rights have to be filed with the Constitutional Court.

[85] For further details on individual applications see section 2.5.1 below.

[86] Section 87 Constitutional Court Law (*Verfassungsgerichtshofgesetz*), Federal Law Gazette No 85/1953 as amended.

special federal statute.' Hence, Article 145 does not only refer to violations of international agreements but to violations of 'international law' in general.

Since a special federal statute—as required by Article 145—has never been enacted, the competence of the Constitutional Court under that Article has remained dormant.[87] According to the prevailing view, which has also been adopted by the Constitutional Court,[88] Article 145 was meant to endow the Constitutional Court with a special criminal court competence for the prosecution of individuals who acted in violation of international law.

### *1.1.22 Article 149, paragraph 1 Federal Constitution*

Article 149, paragraph 1 provides that, inter alia, certain parts of the State Treaty of Saint-Germain of 10 September 1919[89] shall have constitutional law status.

## 1.2 Federal Constitutional Provisions Referring to Customary International Law

Article 9, paragraph 1 of the Federal Constitution states: 'Generally recognized rules of international law form part of federal law.' According to the prevailing view, the phrase 'generally recognized rules of international law' refers to customary international law as mentioned in Article 38, paragraph 1, letter b of the Statute of the International Court of Justice (ICJ Statute).[90]

## 1.3 Federal Constitutional Provisions Referring to Other Sources of International Law

According to the prevailing view, the wording 'generally recognized rules of international law' in Article 9, paragraph 1 of the Federal Constitution, not only refers to customary international law, but also includes general principles of law as referred to in Article 38, paragraph 1, letter c of the ICJ Statute.[91] Accordingly, general principles of law form part of Austrian federal law like customary international law does.

However, no mention is made in the Federal Constitution of other sources of international law, such as decisions of international tribunals, decisions of international organizations or declarative texts, such as resolutions of the United Nations

[87] See eg, the following decisions in which the Constitutional Court rejected applications under Article 145 for lack of such a special federal statute: Constitutional Court, Decision No 12.615, 25 February 1991; Decision No 11.874, 12 October 1988.

[88] See eg, Ulrich Zellenberg, 'Artikel 145' in Karl Korinek and Michael Holoubek (eds), *Österreichisches Bundesverfassungsrecht—Textsammlung und Kommentar* [*Austrian Federal Constitutional Law—Collection of Texts and Commentary*] MN 11 (Vienna: Springer 1 Lfg., 1999) (with further references) and Constitutional Court, Decision No 14.990, 16 October 1997.

[89] State Law Gazette No 303/1920.

[90] Theo Öhlinger, 'Artikel 9, Absatz 1' in Karl Korinek and Michael Holoubek (eds), *Österreichisches Bundesverfassungsrecht—Textsammlung und Kommentar* [*Austrian Federal Constitutional Law—Collection of Texts and Commentary*] MN 6 (Vienna: Springer 5 Lfg., 2002).

[91] Ibid.

General Assembly. It is the general scholarly opinion that the wording 'generally recognized rules of international law' in Article 9, paragraph 1 of the Federal Constitution does not cover any sources of international law other than customary international law and general principles of law.[92] Article 9, paragraph 1 is meant to cover only unwritten international law.[93] Other sources of international law such as decisions of international tribunals, decisions of international organizations or declarative texts, in contrast, are written documents.

Even though Article 9, paragraph 2 of the Federal Constitution authorizes the transfer of sovereign powers to international (intergovernmental) organizations,[94] it does not address decisions taken by international organizations in the exercise of these powers. Since treaties become part of domestic law upon publication,[95] it might be argued that publication is also a sufficient condition for the acceptance into domestic law of decisions of international organizations. Whether or not a published decision is then applicable, ie is self-executing, depends on whether it meets the requirements of the principle of legality enshrined in Article 18 of the Federal Constitution.[96] The Constitutional Court followed this approach and deems it sufficient for a decision of an international organization to become domestic law that it is published in the Federal Law Gazette.[97] The Administrative Court, in contrast, requires implementing legislation.[98] According to scholarly opinion, the absence of a provision in the Federal Constitution regulating this matter in relation to decisions of international organizations is indeed a strong argument in favour of requiring implementing legislation.[99]

## 1.4 Federal Constitutional Provisions Calling for the Application of International Law

Article 15a of the Federal Constitution authorizes the federation and the constituent states to conclude agreements with each other in matters within their respective spheres of competences (*Gliedstaatenverträge*). These agreements are a means of co-operation between these entities and cannot create directly applicable law.[100] Article 15a, paragraph 3 calls for the application of 'principles of international treaty law' to such agreements.

[92] Ibid MN 6, 8, 11–12.
[93] Ibid MN 6.
[94] See section 1.1.2 above.
[95] See section 2.3 below.
[96] See sections 1.1.6 above and 2.4 below.
[97] Constitutional Court, Collection No 12.281, 1 March 1990.
[98] Administrative Court, Collection No 13.373 A, 29 January 1991.
[99] Öhlinger, 'Artikel 9, Absatz 2' (n 7) MN 23 (with references). See eg also Federal Law on the Implementation of International Sanctions (*Sanktionengesetz*), Federal Law Gazette I No 36/2010, on the basis of which executive orders and administrative decisions to implement legally binding sanction decisions may be issued.
[100] Stelzer (n 3) 48.

## 1.5 International Law References in the Constitutions of the Constituent States

The constitutions of most of the nine constituent states contain provisions that refer to international law. These provisions may be grouped into four categories.

The first category of provisions deals with the making of international law by the constituent states through the conclusion of treaties. As already outlined in section 1.1.5 above, Article 16, paragraph 1 of the Federal Constitution entitles the constituent states to conclude international agreements. Accordingly, some constituent state constitutions repeat in whole or in part the relevant parts of Article 16 of the Federal Constitution.[101] Moreover, some constituent state constitutions contain provisions on the participation of constituent state parliaments in the conclusion of these treaties[102] and on their publication.[103]

A second category of provisions repeats the wording of Article 15a, paragraph 3 of the Federal Constitution and calls for the application of principles of international treaty law to agreements between a constituent state and the federation or between two or more constituent states according to Article 15a of the Federal Constitution.[104]

The third category of provisions concerns the United Nations Convention on the Rights of the Child.[105] Some constituent state constitutions explicitly refer to that Convention and stipulate that they aim to protect children in accordance with the provisions of the Convention.[106]

The fourth category of provisions refers to specific duties of notification or information arising from international agreements.[107]

[101] Article 80, para 1 of the Burgenland State Constitution, State Law Gazette No 42/1981 as amended; Article 42, paras 1–3 and 5 of the Carinthia State Constitution, State Law Gazette No 85/1996 as amended; Article 49, para 1 of the Salzburg State Constitution, State Law Gazette No 25/1999 as amended; Section 7b of the Styria State Constitution, State Law Gazette No 1/1960 as amended; Article 71a of the Tyrol State Constitution, State Law Gazette No 61/1988 as amended; Article 57 of the Upper Austria State Constitution, State Law Gazette No 122/1991 as amended; Article 54 of the Vorarlberg State Constitution, State Law Gazette No 9/1999 as amended.

[102] Article 81, paras 1 and 3 of the Burgenland State Constitution; Article 42, para 4 of the Carinthia State Constitution; Article 49, paras 2 and 3 of the Salzburg State Constitution; Section 7b of the Styria State Constitution; Article 71a of the Tyrol State Constitution; Article 57 of the Upper Austria State Constitution; Article 54 of the Vorarlberg State Constitution.

[103] Article 35 of the Burgenland State Constitution; Article 49, para 2 of the Salzburg State Constitution; Article 54, para 6 of the Vorarlberg State Constitution.

[104] Article 82 of the Burgenland State Constitution; Article 45 of the Lower Austria State Constitution, State Law Gazette No 0001-13; s 7a (5) of the Styria State Constitution; Article 71, para 7 of the Tyrol State Constitution; Article 56, para 5 of the Upper Austria State Constitution; Article 53, para 6 of the Vorarlberg State Constitution.

[105] Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, Federal Law Gazette No 7/1993.

[106] Article 9 of the Salzburg State Constitution; Article 13, para 2 of the Upper Austria State Constitution; Article 8, para 3 of the Vorarlberg State Constitution.

[107] Section 14a of the Styria State Constitution (providing that laws on issues which are subject to a notification duty under international law, may only be adopted after notification); Article 32, para 1 of the Carinthia State Constitution (providing that laws on issues which are subject to a process of information or notification according to an international agreement having constitutional rank, may only be adopted after the respective process has been concluded).

## 1.6 Constitutional Regulation of Authority in Matters of International Law

### *1.6.1 Federalism*

As regards the division of powers in matters concerning international law between the federation and the constituent states, Article 10, paragraph 1, No 2 of the Federal Constitution provides that foreign affairs and, in particular, the conclusion of international treaties are a matter of federal competence. Nevertheless, Article 3, paragraph 2, Article 10, paragraph 3, Article 16, Article 50, Article 66, paragraph 3, Article 139, Article 139a, Article 140, and Article 140a of the Federal Constitution give the constituent states a say in matters of international law.

First and foremost, the constituent states are authorized to conclude specific international treaties (Article 16, paragraph 1–2, Article 66, paragraph 3). In addition, they play a certain role in the process of concluding federal international agreements: a constituent state must consent to a treaty changing its borders (Article 3, paragraph 2); the constituent states have to be given opportunity to be heard before the conclusion of certain treaties (Article 10, paragraph 3); the Federal Council has to approve agreements that touch upon the constituent states' autonomous sphere of competence (Article 50, paragraph 2, No 2) or that modify the treaty foundations of the European Union (Article 50, paragraph 4); moreover, the Federal Council may veto, inter alia, a decision of the National Council to approve a treaty that does not concern a subject-matter falling within the constituent states' autonomous sphere of competence (Article 50, paragraph 3); finally, the Federal Council has to be informed without delay when negotiations of a federal treaty that requires parliamentary approval are initiated (Article 50, paragraph 5).

Apart from the conclusion of international agreements, constituent states play a role in the implementation of treaties: the constituent states are obliged to implement their own international agreements as well as federal agreements the implementation of which falls within their autonomous sphere of competence (Article 16, paragraph 4).

Moreover, a constituent state government may trigger proceedings before the Constitutional Court for the review of: the constitutionality/legality of federal international agreements (Article 140a); the conformity of federal executive orders (Article 139) and federal statutes (Article 140) with international law forming part of domestic law; and, the legality of the republication of federal international agreements (Article 139a).

### *1.6.2 Division of authority between the branches of government*

The Federal Constitution reveals to what extent the federal legislative, executive and judicial branch have a say in matters concerning international law.

The role of the federal executive branch is determined by Article 16, paragraph 2–5, Article 49, paragraph 2, Article 49a, Article 65, paragraph 1, Article 66,

paragraph 2 and 3, Article 67, Article 139, Article 139a, Article 140, and Article 140a of the Federal Constitution, all discussed in section 1.1. Accordingly, the federal executive branch has the authority to conclude international agreements, ie to take those acts by which consent is given to be bound by a treaty under international law (Article 65, paragraph 1, Article 66, paragraph 2 and 3, Article 67). In addition to concluding international agreements, the federal executive branch also plays a role in the publication of agreements (Article 49, paragraph 2 of the Federal Constitution and the Federal Law on the Federal Law Gazette)[108] and the republication of international agreements (Article 49a). Moreover, the federal executive branch is entitled to supervise the constituent states in implementing international treaties (Article 16, paragraphs 3–5). Furthermore, the Federal Government may file a review application with the Constitutional Court regarding whether state statutes or executive orders issued by a constituent state authority are in conformity with international law forming part of domestic law (Articles 139, 140); or, regarding the constitutionality/legality of international agreements concluded by the constituent states (Article 140a) or the legality of a republication of an international agreement by a constituent state (Article 139a).

Article 9, paragraph 2, Article 14, paragraph 10, Article 18, Article 49, paragraph 2, Article 50, Article 140, and Article 140a of the Federal Constitution, discussed in section 1.1, determine the role of the federal legislature in relation to international law. The Federal Parliament has to approve the conclusion of certain types of international agreements (Article 18, Article 50). Article 9, paragraph 2 of the Federal Constitution allows the Federal Parliament, inter alia, to agree to a transfer of powers without a constitutional majority. While Article 14, paragraph 10 provides for a higher quorum in the National Council in specific matters of education, Article 50, paragraph 4 provides for a higher quorum in the National and the Federal Council for agreements that modify the treaty foundations of the European Union. Moreover, Federal Parliament has an influence on whether or not a treaty is self-executing (Article 50) and on how a treaty has to be published (Article 49, paragraph 2). In addition, both chambers have to be informed without delay when negotiations of a federal treaty that requires parliamentary approval are initiated (Article 50, paragraph 5). Furthermore, a third of the members of the National or Federal Council may file an application with the Constitutional Court for review of the constitutionality of federal statutes and federal international agreements (Article 140, Article 140a).

Article 89, Article 131, Article 139, Article 139a, Article 140, Article 140a, Article 144, Article 144a, and Article 145 of the Federal Constitution, discussed in section 1.1, determine the role of the judicial branch in relation to international law. While all other courts have to apply all properly published international agreements (Article 89), the Constitutional Court is charged with reviewing the

[108] While Article 49, para 2 of the Federal Constitution only concerns agreements that were approved by the Federal Parliament, the Federal Law on the Federal Law Gazette (Federal Law Gazette I No 100/2003) provides that the Federal Chancellor is also responsible for the publication of other international agreements of the federation.

legality of international agreements (Article 140a). In so doing, the Constitutional Court ensures that the executive and the legislative branch act in accordance with the Austrian legal order when concluding international agreements. Moreover, various procedures before the Constitutional Court (Article 139, Article 139a, Article 140, Article 144, Article 144a and Article 145) and the Administrative Court (Article 131) ensure the proper enforcement of international law, ie that the executive and the legislative branch act in conformity with international law forming part of the Austrian legal order.

## 2. 'State Treaties'

### 2.1 Definition of 'State Treaty'

According to Article 2, paragraph 1, letter a of the Vienna Convention on the Law of Treaties (Vienna Convention),[109] a treaty is—for the purpose of the Vienna Convention—defined as 'an international agreement concluded between States in written form and governed by international law'.

The Austrian Federal Constitution refers to international treaties as 'state treaties' (*Staatsverträge*).[110] Even though in practice the term 'state treaty' is reserved for very important international agreements,[111] the term denotes for the purpose of the Federal Constitution all agreements governed by international law that are concluded with other subjects of international law.[112] Since the term 'state treaty' in the Federal Constitution also includes agreements concluded with other subjects of international law than states (such as international organizations),[113] it is broader than the Vienna Convention's definition. For the qualification of an agreement as 'state treaty' it is of no importance whether that agreement is entitled 'Covenant,' 'Agreement,' 'Protocol' or the like.[114] Article 50, Article 65, paragraph 1 and Article 66, paragraph 2 of the Federal Constitution, however, imply that a state treaty for the purpose of (at least) these provisions of the Federal Constitution is a written agreement.[115]

An important factor for whether or not a document constitutes a state treaty is whether it is meant to create legal rights or obligations. Mere political or moral commitments entered into by the executive branch do not qualify as a state treaty. In 1998, for example, the Constitutional Court had to deal with an application filed under Article 140a of the Federal Constitution[116] in which it was asked to

[109] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Federal Law Gazette No 40/1980.

[110] Only Article 16, para 5 of the Federal Constitution uses the term 'international treaty' (*völkerrechtlicher Vertrag*).

[111] See eg, the State Treaty of Saint-Germain, section 1.1.22 above. See also the Federal President's Executive Order of 31 December 1921, section 1.1.12 above.

[112] Öhlinger, 'Artikel 50' (n 31) MN 12.

[113] Mayer (n 66) 237.

[114] Öhlinger, 'Artikel 50' (n 31) MN 13.

[115] Ibid.

[116] See section 1.1.19 above.

review a document entitled 'Common Declaration of Intent Regarding the Reform of German Orthography'.[117] The document was signed by representatives of several German-speaking states. For Austria the document was signed by the Minister of Education and Cultural Affairs. The applicants argued that the document constituted a state treaty and, therefore, was amenable to review under Article 140a of the Federal Constitution. The Constitutional Court, however, held—and rightly—that according to the language used in the document ('declaration of intent,' 'the undersigned intend to make it their concern to secure', 'the commission of experts will work towards a uniform application'), there was no intent to create a legally binding document. Thus, in the Court's view, the document did not qualify as a state treaty.

When deciding issues of treaty law, Austrian courts rely on international law. In 1996, for example, the Supreme Court addressed the question of whether Germany had become a party to an international agreement.[118] Germany had only initialled the agreement in question. Referring to the Vienna Convention, the Supreme Court concluded that by merely initialling the agreement, Germany has not expressed its consent to be bound by the agreement. In a similar case in 2002 the Supreme Court was asked whether a treaty entered into force when it was signed, even though the treaty terms required ratification.[119] The Court held that, on the basis of the Vienna Convention, such a treaty may not be deemed to be in force. In yet another case, the Supreme Court addressed the question whether extradition may be refused on the basis of national law even though an extradition treaty requires extradition.[120] The Court held that refusing extradition on the basis of national law would violate the extradition treaty. In particular, the Court noted that according to Article 27 of the Vienna Convention, a state party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

It this context, it is interesting to note that practice also subsumes unilateral acts relating to an international agreement under the term 'state treaty'. Accordingly, unilateral acts such as terminating, withdrawing or suspending a treaty or making a reservation or an interpretative declaration to a treaty are dealt with as international agreements and are subject to the constitutional treaty-making process.[121] Sometimes, the constitutional rules on international treaties are even applied to unilateral acts which do not relate to an international agreement.[122]

[117] Constitutional Court, Collection No 15.234, 25 June 1998.
[118] Supreme Court, Decision No 12Os66/96, 5 September 1996.
[119] Supreme Court, Decision No 10ObS21/02i, 29 January 2002.
[120] Supreme Court, Decision No 11Os139/98, 15 December 1998.
[121] See Öhlinger, 'Artikel 50' (n 31) MN 14 with references to state practice.
[122] For example, Austria's declaration under Article 36, para 2 of the ICJ-Statute was submitted to the Federal Parliament for approval because it was perceived as modifying Austrian law. See Federal Law Gazette No 249/1971 and Öhlinger, *Der völkerrechtliche Vertrag* (n 5) 377.

## 2.2 Constitutional Procedures for the Conclusion of International Treaties

The Federal Constitution provides for several procedures for concluding international agreements.[123] First, the types of international agreements mentioned in Article 50, paragraph 1 need the approval of the Federal Parliament. After the approval is granted, the Federal President concludes the agreement upon suggestion of the federal government (or a federal minister authorized by the government) and with the countersignature of the Federal Chancellor or the competent ministers according to Article 65, paragraph 1 and Article 67.[124]

Second, treaties that neither fall under Article 50, paragraph 1 (and thus, do not need to be approved by the Federal Parliament), nor bear the heading of 'State Treaty', or require the exchange of ratification documents are concluded (1) by the federal government if they concern more than one ministry, (2) by the minister heading the ministry concerned in consultation with the foreign minister if the treaty concerns only that one ministry, or (3) by the minister heading the ministry concerned if the treaty is of merely technical or administrative nature (according to Article 66, paragraph 2 and the Federal President's Executive Order of 1921).[125]

Third, the Federal President—provided that competence was not delegated to a constituent state government according to Article 66, paragraph 3—concludes international agreements on behalf of a constituent state according to Article 16, paragraph 1 and 2. The Federal President may do so upon suggestion of the respective constituent state government and with the countersignature of the respective constituent state governor.[126] Whether or not such an agreement, if it modifies or supplements law, needs prior approval by the respective constituent state Parliament is a matter regulated by the law of the respective constituent state.[127]

It is, however, important to note that the Federal Constitution refers to an international agreement as 'state treaty' regardless of which treaty-making process was applied. When the Federal Constitution distinguishes between the different kinds of state treaties, it explicitly refers to either 'state treaties pursuant to Article 16, paragraph 1',[128] which are the international agreements concluded by the constituent states, or 'state treaties approved according to Article 50,

[123] But see eg, s 5 of the Federal Constitutional Law on Cooperation and Solidarity when Sending Abroad Troops and Individuals (*Bundesverfassungsgesetz über Kooperation und Solidarität bei der Entsendung von Einheiten und Einzelpersonen in das Ausland*), Federal Law Gazette I No 38/1997, which authorizes the federal government to conclude international agreements that govern the implementation of such a sending of troops. The Legislative Materials note that s 5 is meant to establish an exception to Article 65, Article 66 and Article 50 of the Federal Constitution. Accordingly, the federal government may conclude such an agreement without parliamentary approval even if it modifies or supplements existing law. Section 5 of this special federal constitutional law therefore enlarges the treaty-making capacity of the executive branch.

[124] See section 1.1.10, 1.1.11, 1.1.13.

[125] See section 1.1.12.

[126] See section.1.1.5 above.

[127] See eg, section 1.5 above.

[128] See for example, Article 66, para 3 of the Federal Constitution.

paragraph 1'[129] which are the agreements concluded by the Federal President with parliamentary approval, or 'state treaties not falling under Article 50, paragraph 1'[130] which are the international agreements concluded without parliamentary approval.

Accordingly, courts must accept all state treaties as legally binding, not just agreements that were approved by the Federal Parliament. If, however, a document is not intended to be legally binding, it does not qualify as a state treaty under the Federal Constitution. Whether a document entitled 'Memorandum of Understanding' is legally binding and thus, qualifies as a state treaty depends on its content.[131]

## 2.3 Acceptance of Treaties into Domestic Law

Regarding the acceptance of agreements into domestic law, a distinction must be drawn between treaties approved by the Federal Parliament, treaties concluded by the executive branch without parliamentary approval and treaties of the constituent states (which may or may not require approval by the respective constituent state Parliament).

According to Article 49, paragraph 2 of the Federal Constitution, treaties that were approved by the Federal Parliament have to be published in the Federal Law Gazette. It is generally accepted that such treaties become part of domestic law upon publication in the Federal Law Gazette.[132] Even if the National Council decides upon approval that a treaty requires implementing legislation,[133] the prevailing view is that this treaty still becomes part of domestic law upon publication in the Federal Law Gazette.[134] Thus, the decision of the National Council according to which a treaty or parts thereof require implementing legislation only results in the non-self-executing character of that treaty. Accordingly, even though the treaty became part of domestic law upon publication, individual rights and duties do not derive from it, nor may it serve as a rule of decision for courts and authorities.[135]

[129] See for example, Article 9, para 2 of the Federal Constitution.

[130] See for example, Article 65, para 1 of the Federal Constitution.

[131] See Ferdinand Trauttmansdorff, 'Der Abschluß völkerrechtlicher Verträge—einige Streiflichter aus der österreichischen Praxis' ['The Conclusion of International Treaties—Some Highlights of Austrian Practice'], in Wolfram Karl and Ulrike Brandl (eds), *Völker- und Europarecht. 24. Österreichischer Völkerrechtstag und 9. Herbert-Miehsler-Gedächtnisvorlesung* [*Public International and European Law. 24th Meeting of the Austrian Society of International Law and 9th Lecture in Memory of Herbert Miehsler* ] 127, 132 (Vienna: Verlag Österreich, 2000).

[132] See the decisions of the Constitutional Court (n 81); see also the Legislative Materials on the 1964 amendment of the Federal Constitution, 287 BlgNR 10. GP, 4; Öhlinger, 'Artikel 50' (n 31) MN 27; Thienel (n 35) MN 11 (with further references) and MN 83.

[133] See section 1.1.10 above.

[134] Thienel (n 35) MN 11; Öhlinger, 'Artikel 50' (n 31) MN 77, 86. But see the Legislative Materials on the 1964 amendment of the Federal Constitution, which seem to proceed on the understanding that if the National Council declares a treaty to require implementing legislation, the treaty does not become part of the domestic legal system: 287 BlgNR 10. GP, 4.

[135] Thienel (n 35) MN 11.

Notwithstanding the non-self-executing character of such a treaty, it has certain effects within the domestic legal system. These effects show that the treaty actually became part of the domestic legal system upon publication. For example, account may be taken of such a treaty when it comes to interpret national law in accordance with international law[136] and the Constitutional Court may review such a treaty on the basis of Article 140a of the Federal Constitution.[137]

Treaties that were not approved by the Federal Parliament are not mentioned in Article 49, paragraph 2 of the Federal Constitution. However, these treaties must also be published in the Federal Law Gazette according to section 5, paragraph 1, No 1 of the 2004 Federal Law on the Federal Law Gazette.[138] While some scholars argue that these treaties therefore also only become part of the domestic legal system upon publication in the Federal Law Gazette,[139] others argue that these treaties do not need to be published to become part of the domestic legal order.[140] It has to be noted that in practice not all these treaties are published in the Federal Law Gazette.[141]

Article 49, paragraph 2 of the Federal Constitution also does not mention treaties of the constituent states according to Article 16, paragraph 1. The publication of such treaties is a matter of state (constitutional) law.[142] As illustrated above, some constituent state constitutions contain provisions on the publication of such treaties while others do not.[143] Treaties of the constituent states have to be published in the respective state law gazette and may not be published in the Federal Law Gazette.[144] While some argue that treaties of the constituent states become part of the domestic legal order without publication, others regard their publication as a necessary prerequisite.[145]

[136] Öhlinger, 'Artikel 50' (n 31) MN 87.

[137] Thienel (n 35) MN 11.

[138] Federal Law Gazette I No 100/2003; see also Philipp Lindermuth, 'Das Recht der Staatsverträge nach der Verfassungsbereinigung—Eine verfassungsrechtliche Analyse der Neuregelung des Art 50 B-VG durch die Novelle BGBl I 2/2008' ['The Law of State Treaties After the Constitutional Clean-up—A Constitutional Law Analysis of the New Provisions of Article 50 Federal Constitution introduced by amendment BGBl I 2/2008'], ZÖR 299, 303 (2009); Thienel (n 35) MN 27 (who discusses an older version of the Federal Law Gazette Law which, however, also could be read as providing for a duty to publish these treaties in the Federal Law Gazette); Trauttmansdorff (n 131) 132 (also referring to the old version of the Federal Law Gazette Law). Similar to Article 49, para 2 of the Federal Constitution, s 5, para 3 of the Federal Law on the Federal Law Gazette authorizes the Federal Chancellor to order that treaties which were not approved by the Federal Parliament shall be published not in the Federal Law Gazette but in another manner, if they are of little interest to the general public while their publication would be very costly. Such an order has to be published in the Federal Law Gazette. Moreover, similar to Article 49, para 2 of the Federal Constitution, ss 11 and 12 of the Federal Law on the Federal Law Gazette contain provisions on the entry into force of treaties.

[139] Thienel (n 35) MN 83 and in particular n 290; see also Administrative Court, Decision No 91/16/0077 (n 65) and the Legislative Materials on the 1964 amendment of the Federal Constitution, 287 BlgNR 10. GP, 4 and 7.

[140] Lindermuth (n 138) 303.

[141] Trauttmansdorff (n 131) 132–3.

[142] Thienel (n 35) MN 27.

[143] See section 1.5 above.

[144] Thienel (n 35) MN 27.

[145] Ibid n 28 with further references.

The general practice in Austria is that treaties are only published after their entry into force on the international level.[146] Moreover, it has to be noted that, so far, the National Council has made only little use of its competence to decide upon approval of a treaty that it requires implementing legislation.[147]

## 2.4 The Doctrine of Self-Executing Treaties

The case-law of the Austrian Supreme Court, the Constitutional Court and the Administrative Court demonstrates that Austrian courts recognize the doctrine of self-executing treaties.[148] Before 1964, it was for the courts and state authorities to decide whether a treaty was self-executing. The 1964 amendment of Articles 50, 65 and 66 of the Federal Constitution, however, changed the situation. It entitled the National Council to decide upon approval that a treaty requires implementing legislation.[149] Moreover, it entitled executive organs concluding a treaty without parliamentary approval to order upon conclusion of this treaty that it requires implementing executive orders.[150] When such a decision or order is made upon approval/conclusion of a treaty, the courts and state authorities have to accept that the treaty is non-self-executing.[151]

If, however, no such decision or order is made in relation to a given treaty, the courts and state authorities are not bound to accept the treaty as self-executing.[152] Rather, the Constitutional Court held that in such a case there exists a rebuttable presumption that the treaty is self-executing.[153] That presumption may be overcome if there exist subjective and/or objective factors that weigh against the treaty's

[146] Ibid MN 26.

[147] See Trauttmansdorff (n 131) 140 (noting that in 1998 only six out of 61 treaties were declared to require implementing legislation).

[148] Constitutional Court, Collection No 12.558, 30 November 1990 and Collection No 13.952, 30 November 1994; Supreme Court, Decision No 4Ob406/87, 31 May 1988 (a provision of the General Agreement on Tariffs and Trade is self-executing); Supreme Court, Decision No 10Ob21/04t, 23 May 2005 (Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is self-executing); Supreme Court, Decision No 17Ob18/08h, 26 August 2008 (Article 27, para 1 and Article 70, para 2 first sentence of the Agreement on Trade Related Aspects of Intellectual Property Rights is self-executing); Administrative Court, Decision No 92/15/0146, 14 December 1992 (Article 23 of the 1951 Convention Relating to the Status of Refugees is self-executing); Administrative Court, Decision No 2004/03/0116, 8 June 2005 (Article 14 of the Soil Protection Protocol to the Convention on the Protection of the Alps is self-executing).

[149] See also section 1.1.10 above. Since the 2008 amendment of Article 50 of the Federal Constitution, the National Council is also entitled to decide that only parts of a treaty require implementing legislation. The respective wording of Article 65, para 1 and Article 66, paras 2 and 3 of the Federal Constitution, which authorizes the Federal President (and those to whom treaty-making power was delegated) to order that a treaty requires implementing executive orders, however, has not been amended in that regard.

[150] Since the 1988 constitutional amendment, the Federal President may make such an order also in relation to treaties concluded on behalf of a constituent state which neither modify nor supplement law.

[151] Constitutional Court, Collection No 12.558, 30 November 1990 (regarding a decision of the National Council); Collection No 13.952, 30 November 1994 (regarding an order of the executive organ concluding the treaty). The Supreme Court and the Administrative Court follow the Constitutional Court in that regard. See Supreme Court, Decision No 17Ob18/08h, 26 August 2008 and Administrative Court, Decision No 2004/03/0116, 8 June 2005.

[152] Ibid.

[153] Ibid.

self-executing character.[154] The subjective factor taken into account is the intent of the state parties.[155] If, for example, a treaty is explicitly addressed to the legislative organs of a state, it is clear that the state parties did not intend the treaty to be self-executing.[156] The decisive criterion, however, is the objective factor of whether or not a treaty is sufficiently determined.[157] Whether or not a treaty is sufficiently determined is measured against Article 18 of the Federal Constitution[158] and thus, depends on national law.[159] The Constitutional Court noted, for example, that a treaty is not sufficiently determined and thus, non-self-executing if it is not possible—not even on the basis of the national legal order as a whole—to determine which domestic organs are required to enforce the treaty.[160] Likewise, the Constitutional Court will find a treaty to be non-self-executing if it is not at all possible to determine who the treaty rules are addressed to or how claims arising under the treaty are to be enforced.[161]

## 2.5 Invocation and Enforcement of Treaties in Litigation by Private Parties

### *2.5.1 Public law litigation*

The Constitutional Court deals with international agreements when reviewing: executive orders pursuant to Article 139 of the Federal Constitution, the republication of international agreements pursuant to Article 139a of the Federal Constitution, statutes pursuant to Article 140 of the Federal Constitution, international agreements pursuant to Article 140a of the Federal Constitution, and administrative decisions and decisions of the Asylum Court according to Article 144 and Article 144a of the Federal Constitution.

[154] For the factors used see eg, Constitutional Court, Collection No 11.585, 12 December 1987 (Article 7, No 3 of the 1955 Austrian State Treaty is self-executing), Collection No 12.281, 1 March 1990 (Treaty between Austria and Italy on the facilitation of trade in goods between the Austrian constituent states of Tyrol and Vorarlberg and the Italian region Trentino-Alto Adige is self-executing); Collection No 12.558, 30 November 1990; Collection No 13.952, 30 November 1994. See also Supreme Court, Decision No 17Ob18/08h, 26 August 2008.

[155] See eg, Constitutional Court, Collection No 11.585, 12 December 1987.

[156] Öhlinger, 'Artikel 50' (n 31) MN 81.

[157] See Administrative Court, Collection No 5819 F, 21 October 1983. See also Supreme Court, Decision No 7Ob1/86, 20 February 1986.

[158] See section 1.1.6 above. Administrative Court, Collection No 5819 F, 21 October 1983.

[159] Article 18 of the Federal Constitution, however, does not apply to treaties which have a constitutional rank. Nevertheless, the Constitutional Court requires a certain degree of determination in treaties having constitutional rank. See, for example, Constitutional Court, Collection No 11.585, 12 December 1987 concerning Article 7, No 3 of the 1955 Austrian State Treaty which is a constitutional provision. See also Öhlinger, 'Artikel 50' (n 31) MN 80, 82.

[160] Constitutional Court, Collection No 12.558, 30 November 1990; see also Administrative Court, Decision No 2004/03/0116, 8 June 2005 (where the Court concluded that even though Article 14 of the Soil Protection Protocol to the Convention on the Protection of the Alps does not name a specific state organ to execute that provision, it is clear on the basis of the national legal order which organ is competent to do so).

[161] See eg, Constitutional Court, Collection No 12.281,1 March 1990.

Except for proceedings under Article 144 and Article 144a, the requirements for filing an individual application for review are the same for all the above-mentioned proceedings, regardless of whether the contested legal act is said to violate a higher-ranking national or international norm. First, the contested legal act has to interfere with the applicant's rights. Second, the applicant must be directly affected by the contested legal act. This requirement means that the individual must be affected by the contested legal act itself and not by an administrative decision or a court judgment issued against the individual on the basis of that act. In practice, however, the Constitutional Court interprets these two requirements as follows: An individual application is admissible if the contested legal act directly interferes with the legally protected interests of the applicant and the applicant has no other reasonable recourse to legal action (*Umwegzumutbarkeit*).[162] Note, however, that if the contested legal act is an international treaty, that treaty will only directly interfere with the applicant's legally protected interests if it is self-executing and contains individual rights and duties.[163]

The requirements for filing an individual application for review under Article 144 and Article 144a of the Federal Constitution also do not distinguish between individual claims that relate to an international agreement and individual claims that relate to a purely domestic statute. Rather, an application is admissible whenever an individual applicant makes a plausible claim that an administrative decision or a decision of the Asylum Court issued against the individual (1) violates his constitutional rights (which might also arise from an international treaty with constitutional status); or, (2) violates his rights because the decision was taken on the basis of a legal act (which might also be an international agreement) in violation of a higher-ranking national or international norm.[164] The individual has no standing, however, if repealing the administrative decision would not change his legal position.[165]

The Administrative Court, in contrast, deals with individual applications concerning international agreements on the basis of Article 131 of the Federal Constitution.[166] Pursuant to that provision, an individual may file an application for review of the legality of an administrative decision. An individual application, however, will only be admissible if the applicant makes a plausible claim that the administrative decision interferes with his public law rights other than his constitutional rights.[167] This condition applies regardless of whether the allegedly violated right is found in a domestic statute, an executive order or an international agreement. Again, the individual has no standing, however, if repealing the administrative decision would not change his legal position.[168]

[162] See eg, Mayer (n 66) 469.
[163] See eg, Constitutional Court, Collection No 13.952, 30 November 1994.
[164] See eg, Mayer (n 66) 502 et seq.
[165] Constitutional Court, Collection No 8.951, 25 October 1980.
[166] See section 1.1.15 above.
[167] See eg, Mayer (n 66) 437. See also n 84 above.
[168] See eg, Administrative Court, Decision No 2006/05/0156, 31 July 2006.

### *2.5.2 Private law litigation*

Individuals may also invoke and enforce treaties in private law litigation. The legal prerequisites for having a court decide a claim are the same regardless of whether a claim relates to an international treaty or a purely domestic statute.[169] Whether a specific international agreement may serve as the rule of decision in private law litigation very much depends on the content of the respective agreement, ie whether it is self-executing and whether it creates individual rights and obligations.

In 1993, for example, the Supreme Court had to decide whether a plaintiff could bring a claim with regard to a violation of the 1951 Convention for the Use of Appellations d'Origine and Denominations of Cheeses.[170] This Convention reserved certain names of origin to cheese manufactured or matured in traditional regions and obliged state parties to take all measures necessary to ensure the enforcement of the Convention. The plaintiff claimed that the defendants had misused a name of origin protected by the Convention. The defendants, on the contrary, argued that the Convention was non-self-executing since it explicitly required state parties to enact implementing legislation. The Supreme Court, however, held that the Convention only required implementing legislation if it was necessary for ensuring the proper enforcement of the principles enshrined in the Convention (which was not necessary in Austria). Accordingly, the Convention was found to be self-executing and the plaintiff was entitled to sue the defendants for a violation of the Convention on the basis of national competition law.

Another agreement that is sometimes applied in private party litigation is, for example, the United Nations Convention on Contracts for the International Sale of Goods.[171] It is a self-executing treaty that provides unified law for specific sales contracts between private parties.

## 2.6 Treaty Interpretation

Austrian courts interpret international agreements by applying international rules on treaty interpretation.[172] They thereby cite to the Vienna Convention.[173] When interpreting provisions of international agreements, Austrian courts do not defer to

[169] See Walter H. Rechberger and Daphne-Ariane Simotta, *Zivilprozessrecht* [*Civil Procedure Law*] MN 508 (7th edn, Vienna: Manz, 2009).

[170] Supreme Court, Decision No 4Ob16/93, 18 May 1993.

[171] United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980, 1489 UNTS 3, Federal Law Gazette No 96/1988. See eg, Supreme Court, Decision No 9Ob75/07f, 19 December 2007; Decision No 6Ob257/06x, 30 November 2006.

[172] See eg, Constitutional Court, Collection No 15.129, 11 March 1998; Collection No 11.073, 14 October 1986; Administrative Court, Decision No 87/16/0071, 3 September 1987; Supreme Court, Decision No 2Ob294/99w, 18 November 1999; Öhlinger, 'Artikel 50' (n 31) MN 34. See also section 1.4 above.

[173] See eg, Constitutional Court, Collection No 11.073, 14 October 1986; Administrative Court, Decision No 87/16/0071, 3 September 1987; Supreme Court, Decision No 2Ob294/99w, 18 November 1999.

the views of the executive branch.[174] This is because of the theory of separation of powers, which provides that the courts are independent from the executive branch and therefore are free to interpret treaties without guidance from the executive branch.[175]

## 2.7 Role of Courts in Relation to Treaty Reservations

Reservations and interpretative declarations are treated as if they were international agreements.[176] Accordingly, they are subject to the same constitutional rules as treaties. Thus, pursuant to Article 89 of the Federal Constitution, courts other than the Constitutional Court may not review the legality of properly published reservations and interpretative declarations.[177] The Constitutional Court may review their legality on the basis of Article 140a of the Federal Constitution.[178] The Constitutional Court as well as all other courts, however, may interpret reservations and interpretative declarations.[179]

## 2.8 Relevance of Treaties to which Austria is not a Party

Austrian courts refer to treaties to which Austria is not a party when interpreting or applying domestic law, including constitutional law. In 2009, the Constitutional Court was asked to determine whether punishing a person for the same acts on the basis of administrative law as well as criminal law was in violation of the principle *ne bis in idem*.[180] To answer this question the Court needed to interpret Article 7 of the European Convention on Human Rights (ECHR) and Article 4 of Protocol No 7 to the ECHR both of which have constitutional law status in Austria. The Court thereby, inter alia, referred to comparable

[174] See eg, Constitutional Court, Decision No G 15/75-8, 21 October 1975, translated in ILR 77, 427. In this decision, the Court explicitly rejected the Federal Government's interpretation of the Agreement between Austria and Poland for the Settlement of Certain Financial Questions (Federal Law Gazette No 74/1974).

[175] See eg, Constitutional Court, Collection No 6.278, 14 October 1970 (declaring unconstitutional a statutory provision mandating that courts are bound by the views of the Ministry of Justice with regard to the question whether or not a defendant enjoys immunity under international law; the answer to that question in certain cases also depended on the Ministry's interpretation of relevant international agreements); see also Ignaz Seidl-Hohenveldern, 'Relation of International Law to Internal Law in Austria' Am J Int'l L 451, 466 (1955).

[176] See section 2.1 above.

[177] See section 1.1.14 above.

[178] See Robert Walter, Heinz Mayer, and Gabriele Kucsko-Stadlmayer, *Grundriss des österreichischen Bundesverfassungsrechts* [*Outline of Austrian Federal Constitutional Law*] 542 (10th edn, Vienna: Manz, 2007). But see Constitutional Court, Collection No 12.223, 29 November 1989 (where the Court declines to review the legality of certain treaty reservations due to a flawed application for review).

[179] See eg, Constitutional Court, Collection No 12.002, 7 March 1989 (observing whether a specific law falls within the scope of Austria's reservation to Article 5 of the ECHR); Collection No 10.024, 9 June 1984 (dealing with the question whether a reservation attached to the International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171, Federal Law Gazette No 591/1978, has an influence on the interpretation of a reservation attached to the ECHR).

[180] Constitutional Court, Decision No B559/08, 2 July 2009.

provisions in the American Convention on Human Rights (ACHR)[181] to which Austria is not a party. The Court noted that human rights documents such as the ACHR provide indications on how to interpret said provisions of the ECHR and its Protocol No 7.

## 3. Customary International Law

### 3.1 Incorporation of Customary International Law

Customary international law is automatically incorporated into domestic law. The relevant constitutional provision is Article 9, paragraph 1 of the Federal Constitution, which provides that customary international law forms part of federal law.[182] Accordingly, customary international law applies as federal law even if the subject-matter of a customary rule falls within the legislative competence of the constituent states.[183] Article 9, paragraph 1 provides for a permanent and dynamic adoption of customary international law into the domestic system.[184]

### 3.2 Application of Customary International Law by Courts

Since Article 9, paragraph 1 of the Federal Constitution provides that customary international law forms part of federal law, state organs—including courts—have to apply customary international law.[185] To a large extent, customary international law provides the legal basis for the foreign relation powers of the executive branch.[186] However, it is questionable whether customary rules are always sufficiently determined to meet the requirements of the strict principle of legality as enshrined in Article 18 of the Federal Constitution.[187] If a rule of customary international law is insufficiently determined, it is non-self-executing and, thus, it cannot be applied by courts or state authorities.

In several cases, the Constitutional Court has held that no individual rights arise from 'generally recognized rules of international law'.[188] Notwithstanding these decisions of the Constitutional Court, it rather seems correct that whether or not a customary rule actually provides for individual rights or obligations is a

[181] American Convention on Human Rights, 22 November 1969, 1144 UNTS 123.

[182] See section 1.2 above.

[183] See Constitutional Court, Collection No 1.375, 10 January 1931; see also Öhlinger, 'Artikel 9, Absatz 1' (n 90) MN 16.

[184] See ibid MN 19 (discussing differing opinions). See, eg, Supreme Court, Decision No SZ 23/143, 10 May 1950, translated in ILR 77, 155 (in which the Court identifies a change in customary international law and subsequently applies a new customary rule).

[185] See Öhlinger, 'Artikel 9, Absatz 1' (n 90) MN 30.

[186] Ibid MN 31.

[187] Ibid MN 32. On the principle of legality see above section 1.1.6.

[188] See eg, Constitutional Court, Collection No 11.508, 15 October 1987; see also Administrative Court, Collection No 14.941 A, 2 July 1998. Note that the Constitutional Court and the Administrative Court have held in several cases that no individual rights arise from Article 9, para 1 of the Federal Constitution.

matter of the content of that rule and thus, should be determined on a case-by-case basis.[189] If a customary rule concerns individual interests, it seems safe to assume that incorporating the rule into the domestic legal order creates individual rights.[190] Customary international criminal law, for example, even directly addresses individuals and creates individual obligations.[191]

### 3.3 Role of the Executive Branch in Determining the Existence/Content of Customary International Law

It would violate the principle of separation of powers, if the courts were required to defer to the views of the executive branch when applying customary international law. But the executive branch may advise courts on questions of immunity under international law. For, when it is questionable whether a defendant enjoys such immunity, Article IX, paragraph 3 of the Introductory Law to the Law on the Jurisdiction of Civil Courts (*Jurisdiktionsnorm-Einführungsgesetz)*[192] provides that the courts shall ask the Ministry of Justice for advice. However, the Constitutional Court has repealed parts of that provision, so that the courts are not bound by the respective views of the Ministry of Justice.[193]

Moreover, Article 9, paragraph 1 of the Federal Constitution refers to 'generally recognized' rules of international law. Consequently, courts have to apply a rule of international law as soon as a sufficient number of states have recognized that rule. Whether also the Austrian executive branch has recognized the rule or taken part in its formation is thereby irrelevant.[194]

### 3.4 Judicial Notice and Subject Areas of Customary International Law

According to the principle *iura novit curia* ('the court knows the law') that applies in the Austrian legal system,[195] judges take judicial notice of customary international law.[196]

Many of the cases in which the Supreme Court dealt with customary international law concerned the immunity of states and international organizations and their organs.[197] Austria does not have a special immunity law such as the United

[189] See also Öhlinger, 'Artikel 9, Absatz 1' (n 90) MN 33. [190] Ibid.

[191] Unfortunately, however, customary international criminal law does not meet the requirements of Article 18 of the Federal Constitution. See Ingeborg Zerbes, 'Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Österreich' ['Basis for Prosecuting International Crimes in Austria'], in Albin Eser et al. (eds), *Nationale Strafverfolgung völkerrechtlicher Verbrechen* [*National Prosecution of International Crimes*] (Berlin: Duncker & Humblot, 2004) Volume iii 85, 94.

[192] Reich Law Gazette No 110/1895 as amended.

[193] Constitutional Court, Collection No 6.278, 14 October 1970.

[194] See Öhlinger, 'Artikel 9, Absatz 1' (n 90) MN 8.

[195] On civil courts see eg, Rechberger and Simotta (n 170) mn 764; on criminal courts see eg, Stephan Seiler, *Strafprozessrecht* [*Criminal Procedure Law*] 111 (2nd edn, Vienna: WUV-Universtiätsverlag, 1999).

[196] See eg, Supreme Court, Decision No 6Nd503/89, 13 April 1989.

[197] See eg, Supreme Court, Decision No 2Ob258/05p, 20 March 2007; Decision No 6Ob150/05k, 1 December 2005; Decision No 6Ob94/71, 28 April 1971. See also Stephan Wittich, 'Recent Austrian Cases on Questions of Jurisdictional Immunities' 8 ARIEL 309–21 (2003).

States' Foreign Sovereign Immunities Act.[198] Accordingly, questions of state immunity are solved on the basis of customary international law, unless the case is governed by a treaty.[199] In a landmark decision in 1950, for example, the Supreme Court found that absolute state immunity was no longer customary international law.[200]

The Supreme Court has also discussed customary international law in other contexts. It observed, for example, that customary international law is relevant in order to solve questions of state succession and that customary international law provides that state assets after a *dismembratio* are to be split according to the principle of equity.[201] Moreover, the court dealt with customary international law in cases concerning the legality of extraterritorial jurisdiction.[202]

In several cases, however, the Supreme Court only referred to the 'generally recognized rules of international law as provided for in Article 9, paragraph 1 of the Federal Constitution' without explicitly distinguishing between custom as referred to in Article 38, paragraph 1, letter b of the ICJ Statute and general principles as referred to in letter c of Article 38, paragraph 1.[203] In some decisions, for example, the Supreme Court referred to the principle of territorial sovereignty as such a generally recognized rule.[204] In other cases, the Constitutional Court and the Administrative Court accorded this status to the principle *pacta sunt servanda*.[205]

## 4. Hierarchy

### 4.1 The Austrian Hierarchy of Legal Norms

At the top of the Austrian hierarchy of legal norms are the core principles of constitutional law.[206] They prevail over federal constitutional law, which is the next layer in the hierarchy. Federal constitutional law prevails over federal statutory law and federal statutory law prevails over executive orders. Federal constitutional law also prevails over state constitutional law that prevails over state statutory law. The Austrian hierarchy of legal norms may be illustrated as follows:

[198] Reprinted in 15 ILM 1388 (1976).

[199] A relevant treaty in this regard is, for example, the European Convention on State Immunity, 16 May 1972, ETS No 74, Federal Law Gazette No 432/1976.

[200] Supreme Court, Collection No SZ 23/143, 10 May 1950, translated in ILR 77, 155.

[201] Supreme Court, Decision No 1Ob2313/96w, 28 January 1997; Decision No 4Ob2304/96v, 17 December 1996. See also Supreme Court, Decision No 5Ob152/04w, 9 November 2004.

[202] Supreme Court, Decision No 8Ob105/99w, 25 November 1999, Decision No 6Nd503/89, 13 April 1989. See also Constitutional Court, Collection No 15.395, 17 December 1998.

[203] See eg, Supreme Court, Decision No 9ObA170/89, 14 June 1989.

[204] Supreme Court, Decision No 3Ob100/99y, 30 March 1999 and No 3Ob98/95, 18 December 1996 and No 3Ob113/94, 26 April 1995.

[205] See eg, Constitutional Court, Collection No 7.478, 1 March 1975; Administrative Court, Decision No 98/17/0333, 18 October 1999; Collection No 7.232 F, 27 October 1997; Collection No 6943 F, 24 November 1994.

[206] See n 2 above.

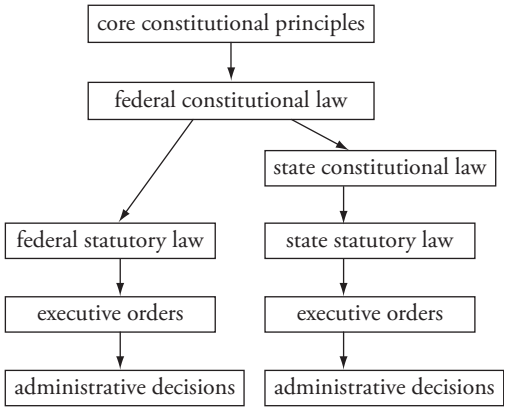


**Figure 3.1** The Austrian Hierarchy of Legal Norms illustrated

## 4.2 Customary International Law in the Austrian Hierarchy of Legal Norms

Pursuant to Article 9, paragraph 1 of the Federal Constitution, customary international law applies as federal law.[207] The case-law of the Constitutional Court and scholarly opinions, however, differ in regard to the normative rank of customary international law within federal law. According to the Constitutional Court, customary international law has the status of federal statutory law.[208] Some scholars, in contrast, argue that customary law takes a position between federal statutory law and federal constitutional law.[209] But the majority view is that the level of a rule of customary international law within federal law depends on the content of that rule.[210] According to that theory, a rule of customary international law will have the rank of federal constitutional law, if the federal legislator would need to enact a constitutional law to create a national rule with the same content. If the federal legislator would need to enact a federal statute to regulate the specific subject-matter, the respective rule of customary international law on such matter will enjoy the rank of federal statutory law. A third group of scholars, however, argues that customary international law always has the rank of federal constitutional law.[211]

[207] See section 1.2 above.

[208] Constitutional Court, Collection No 2.680, 24 June 1954. The Administrative Court expressed agreement. See Administrative Court, Decision No 96/17/0425, 27 October 1997 and Decision No 98/17/0333, 18 October 1999.

[209] Öhlinger, 'Artikel 9, Absatz 1' (n 90) MN 28 (with references).

[210] Mayer (n 66) 18.

[211] See references at Öhlinger 'Artikel 9, Absatz 1' (n 90) MN 23.

## 4.3 International Treaties in the Austrian Hierarchy of Legal Norms

Agreements concluded without the approval of the Federal Parliament share the rank of executive orders.[212] Agreements concluded with the approval of the Federal Parliament rank as federal statutory law. With the 2008 amendment of the Federal Constitution, it became impossible to give international agreements and provisions in such agreements the normative rank of federal constitutional law.[213] Nevertheless, some of the treaties that have been given constitutional status in the past retained that status even after 2008.[214]

Agreements of a constituent state rank as state constitutional law if they were approved by that constituent state's Parliament as modifying or supplementing state constitutional law.[215] Agreements of a constituent state rank as state statutory law when they were approved by that constituent state's Parliament as modifying or supplementing state statutory law.[216] If an agreement was not approved by a constituent state Parliament, it shares the rank of an executive order.[217]

## 4.4 The Doctrine of *Jus Cogens*

Austrian courts take note of the doctrine of *jus cogens*. In 2008, the Supreme Court was asked whether the Republic of Austria had to compensate an airport employee of Egyptian origin for his loss of salary. The employee had lost his job at an Austrian airport due to official security information that qualified him as a security risk.[218] According to the Law on State Liability (*Amtshaftungsgesetz*),[219] the Republic of Austria has to compensate individuals for damages incurred due to illegal and culpable acts of state organs. The Supreme Court noted that it was the Republic's burden to prove that its organs acted neither illegally, nor culpably. Therefore, the Republic had to establish that it was reasonable to assume that the employee was a security risk. The Republic, however, refused to produce such evidence. It argued that it needed to keep the evidence, in particular the sources of information, a secret.

The Supreme Court, however, rejected this argument and held that the Republic has to compensate the employee due to its failure to prove that its organs acted neither illegally, nor culpably. In its reasoning, the Supreme Court referred, inter alia, to the case-law of the Court of First Instance of the European Union regarding the listing of persons suspected of having terrorist links and noted that the Court of First Instance had observed whether resolutions of the UN Security Council mandating such listing conformed to *jus cogens* human rights norms, such as the right to be heard and the right to an effective judicial remedy.

[212] Öhlinger, 'Artikel 50' (n 31) MN 38.
[213] Ibid; see also section 1.1.10 above.
[214] See also n 52 above.
[215] See Hammer (n 18) MN 14, 55–7 and Öhlinger, 'Artikel 50' (n 31) n 118.
[216] Ibid. [217] Ibid.
[218] Supreme Court, Decision No 1Ob225/07f, 30 September 2008.
[219] Federal Law Gazette No 20/1949.

The Supreme Court referred to *jus cogens* also in the context of extradition. In that case, the Supreme Court noted that—according to the facts as established by the lower courts—'it has to be left open whether in the light of Article 8 of the ECHR the extradition should have been refused for reasons of compulsory norms of public international law'.[220]

## 4.5 Role of International Law in Interpreting the Law and Constitution

In order to reconcile domestic law with international law, Austrian courts interpret domestic law (including constitutional law) in conformity with international law.[221] The Administrative Court held that a duty to interpret national law in conformity with Austria's obligations under international law arises under the principle *pacta sunt servanda*, which forms part of the Austrian legal order pursuant to Article 9, paragraph 1.[222] However, national provisions are interpreted in conformity with international law only if this is possible on the basis of their wording.[223] In 1997, for example, the Administrative Court was asked whether a constitutional provision in the 1986 Law amending the Fiscal Equalization Law (*Finanzausgleichsgesetz*)[224] was in violation of Article 6 of the ECHR that also enjoys the rank of constitutional law.[225] The Court held that—because of its wording—the respective constitutional provision in the 1986 Law could not be interpreted in conformity with Article 6 of the ECHR. Moreover, the 2009 decision of the Constitutional Court concerning the *ne bis in idem* principle illustrates that international law not in force for Austria is also taken into account when interpreting constitutional provisions concerning fundamental rights.[226]

## 4.6 Recognition of a Higher Status of Specific Parts of International Law

In its decision of 2008 mentioned in section 4.4, the Supreme Court referred to decisions of the Court of First Instance of the European Union, in which the Court of First Instance had observed whether UN Security Council resolutions (but presumably only those issued on the basis of chapter VII of the UN Charter) conformed to *jus cogens* human rights norms.[227] It may be argued that by referring to these decisions, the Supreme Court endorsed the view of the Court of First

[220] Supreme Court, Decision No 11Os139/98, 15 December 1998.
[221] See eg, Administrative Court, Collection No 5.819 F, 21 October 1983.
[222] See eg, Administrative Court, Collection No 6.943 F, 24 November 1994 and section 3.4 above.
[223] See eg, Administrative Court, Collection No 5.819 F, 21 October 1983 (noting that domestic laws have to be interpreted in conformity with international obligations 'if this is not prohibited by their wording').
[224] Federal Law Gazette No 384/1986.
[225] Administrative Court, Decision No 96/17/0425, 27 October 1997.
[226] See section 2.8 above.
[227] See n 219 above.

Instance that certain international norms have a higher status, ie that certain core human rights having the status of *jus cogens* prevail even over UN Security Council resolutions issued under chapter VII of the UN Charter.

Regarding the Austrian hierarchy of legal norms, it ought to be emphasized that the ECHR and the Protocols thereto ratified by Austria enjoy constitutional law status. The normative rank of decisions of international (intergovernmental) organizations, however, is unclear.[228]

## 5. Jurisdiction

### 5.1 Universal Criminal Jurisdiction

Since Austrian criminal courts do not apply foreign criminal law[229] (in contrast to civil courts that apply foreign civil law), jurisdiction to prescribe and adjudicate go hand in hand.[230] Accordingly, Austrian criminal courts only claim to have jurisdiction if Austrian criminal law applies. In other words, the extent to which Austria exercises prescriptive criminal jurisdiction is decisive for the extent to which it may exercise adjudicative criminal jurisdiction.

According to section 64, paragraph 1, No 4, No 5 letter d, No 9 letter f and No 10 letter b of the Penal Code (*Strafgesetzbuch*),[231] Austrian penal law applies to a number of crimes committed abroad between foreigners regardless of whether these acts are criminal acts under the law of the state on the territory of which the acts were committed, provided that the alleged perpetrator is present in Austria and may not be extradited.[232] These crimes are, for example, abduction for the purpose of blackmailing (section 102 of the Penal Code), aircraft high-jacking and related crimes (sections 185 and 186 of the Penal Code), slave trade (section 104 of the Penal Code), human trafficking (section 104a of the Penal Code), various terrorist acts and various drug crimes. Thus, if an alleged perpetrator of any such crime is present in Austria and may not be extradited, Austrian courts may exercise jurisdiction over that person, even though there is no link to Austria other than that person's presence.

[228] See Stelzer (n 3) 62. But see Öhlinger, 'Artikel 9, Absatz 2' (n 7) MN 25. See also section 1.3 above. The question of the normative rank of decisions of international organizations, however, only arises when there is no implementing legislation.

[229] Diethelm Kienapfel and Frank Höpfel, *Strafrecht—Allgemeiner Teil* [*Criminal Law—General Part*]318 (13th edn, Vienna: Manz, 2009).

[230] 'Jurisdiction to prescribe' denotes a state's authority to make its law applicable to a person while 'jurisdiction to adjudicate' refers to a state's authority to subject a person to its judicial process. See eg, Restatement (Third) of the Foreign Relations Law of the United States, s 401 (1987).

[231] Federal Law Gazette No 60/1974 as amended.

[232] Note that according to s 28 of the Law on Extradition and Judicial Assistance (*Auslieferungs- und Rechtshilfegesetz*), Federal Law Gazette No 529/1979 as amended, the Minister of Justice has to ask the state on the territory of which a crime was committed whether it wants to request extradition. Pursuant to Article 16 of this Law, however, an alleged perpetrator will not be extradited if Austrian courts have jurisdiction, unless Austrian courts would only exercise jurisdiction 'in representation of' another state (see n 237 below) or it seems more appropriate that another state exercises jurisdiction.

Moreover, pursuant to section 64, paragraph 1, No 6 of the Penal Code, Austrian penal law applies to other crimes committed abroad between foreigners if Austria is under a duty to prosecute these crimes regardless of whether these acts are criminal acts under the law of the state on the territory of which the acts were committed. Since the Penal Code was enacted in 1975, scholarly views differ as to whether said provision applies in relation to all obligations to prosecute or only to those Austria incurred after 1975.[233] If one takes the latter view, section 64, paragraph 1, No 6 of the Penal Code would, for example, provide no basis for the prosecution of grave breaches of the four 1949 Geneva Conventions.[234] When interpreting section 64, paragraph 1, No 6 of the Penal Code in conformity with international law, however, one has to come to the conclusion that this provision has to apply to all international obligations to prosecute regardless of whether they were incurred before or after 1975.

According to section 65, paragraph 1, No 2 of the Penal Code, Austrian penal law applies if an act committed abroad between foreigners is also punishable in the state where it has been committed and the alleged perpetrator was found in Austria and may not be extradited. If there is no functioning criminal jurisdiction in the state where the act was committed, Austrian courts may exercise jurisdiction when the act is only punishable under Austrian law.[235] However, in cases in which Austria would base its jurisdiction solely on section 65, paragraph 1, No 2 of the Penal Code, the public prosecutor may refrain from prosecuting when there is no public interest involved.[236]

Depending on the underlying concept of universal jurisdiction, even some of the above-mentioned provisions in the Austrian Penal Code might not be considered as providing for universal jurisdiction. If universal jurisdiction refers to jurisdiction exercised for serious crimes under international law without a territorial, nationality or sovereign interest link but subject to the presence of the perpetrator and/or a subsidiarity requirement, section 65, paragraph 1, No 2 of the Penal Code does not provide for universal jurisdiction. For, pursuant to section 65, paragraph 1, No 2 of the Penal Code, Austrian jurisdiction depends on whether the acts are punishable under the law of the state where the crime was committed. Therefore, the conclusion is justified that this provision refers to representative rather than universal

[233] See eg, Zerbes (n 192) 129–30 (with further references).

[234] Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31, Federal Law Gazette No 155/1953; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85, Federal Law Gazette No 155/1953; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135, Federal Law Gazette No 155/1953; Geneva Convention Relative to the Protection of Civilian Person in Time of War, 12 August 1949, 75 UNTS 287, Federal Law Gazette No 155/1953. A Convention which indisputably falls within the scope of s 64, para 1, No 6 is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 23 ILM 1027 (1984), Federal Law Gazette No 492/1987.

[235] Penal Code s 65, para.3.

[236] Law on Extradition and Judicial Assistance s 9, para 3.

jurisdiction.[237] In addition, it is questionable whether all the crimes enumerated in s 64, paragraph 1, No 4, No 5 letter d, No 9 letter f and No 10 letter b of the Penal Code qualify as serious crimes under international law.

In 1994, the Supreme Court decided whether Austria had criminal jurisdiction over a Bosnian-Serb for acts of genocide committed in Bosnia against Bosnian-Muslims.[238] The Supreme Court found that there was no jurisdiction under section 64, paragraph 1, No 6 of the Penal Code for lack of an international duty to prosecute genocide on the basis of universal jurisdiction. Nevertheless, it affirmed jurisdiction on the basis of section 65, paragraph 1, No 2 of the Penal Code. The Supreme Court reasoned that genocide was also punishable under the *lex loci delicti commissi* and that an extradition was not possible as a functioning court system in Bosnia was lacking due to the war at that time. The Court thus decided to exercise representative rather than universal jurisdiction.

## 5.2 Universal Civil Jurisdiction

The US Alien Tort Statute (ATS) provides US district courts with jurisdiction over tort claims arising out of torts committed abroad between foreigners and in violation of international law.[239] Austria does not have such a special statute or statutory provision. Accordingly, the question arises as to whether Austrian courts might nevertheless exercise jurisdiction in a case such as *Filártiga v Pena-Irala*[240] which was decided by a US court on the basis of the ATS. In this case, citizens of Paraguay had filed a tort claim against another citizen of Paraguay for acts of torture committed in violation of international law in Paraguay.

When determining jurisdiction in cases concerning tort claims,[241] Austrian courts have to apply Council Regulation (EC) No 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[242] because the Regulation prevails over national provisions on jurisdiction. Article 2, paragraph 1 of the Regulation provides that—if the defendant has his domicile (*Wohnsitz*) in a member state of the European Union—the courts of that member state may exercise jurisdiction. Moreover, Article 5 No 3 of the Regulation provides that—if the defendant has his domicile in a member

[237] For the difference between universal and representative jurisdiction see eg, Cedric Ryngaert, *Jurisdiction in International Law* 102–4 (New York: OUP, 2008).

[238] Supreme Court, Decision No 15Os 99/94, 13 July 1994.

[239] 28 USC s 1350.

[240] 630 F2d 876 (2d Cir 1980).

[241] As already mentioned above (section 5.1.), civil courts may also apply foreign law. Accordingly, the jurisdiction of civil courts does not depend on whether Austrian tort law applies. In cases where Austrian courts can establish jurisdiction, they subsequently have to determine the applicable law either on the basis of the Austrian Law on Conflict of Laws (*Gesetz über das internationale Privatrecht*), Federal Law Gazette No 304/1978, or, as regards events that occurred after 20 August 2007, on the basis of Council Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), EU Official Journal L No 2007/199, 40. The focus of this section, however, is on the establishment of jurisdiction to adjudicate.

[242] EU Official Journal L No 2001/12, 1. Note that the Regulation applies to claims filed after 28 February 2002.

state—the courts of another member state may exercise jurisdiction over tort claims when the harmful events occurred in that member state. Since the harmful events in the *Filártiga* case occurred in Paraguay, this provision would not give jurisdiction to Austrian courts. Accordingly, under the Regulation, Austrian courts could establish jurisdiction only if the defendant has his domicile in Austria.

If, however, the defendant does not have a domicile in a member state of the European Union, Article 4 of the Regulation provides that the jurisdiction of the courts of a member state shall be determined by the procedural law of that member state.[243] Thus, in such a case, Austrian courts would have to establish jurisdiction on the basis of the Law on the Jurisdiction of Civil Courts (*Jurisdiktionsnorm*).[244]

According to section 27a, paragraph 1 of this Law, Austrian civil courts have jurisdiction to hear cases with a foreign element (*internationale Gerichtsbarkeit*) whenever an Austrian court has personal jurisdiction (*örtliche Zuständigkeit*)[245] over the defendant. Pursuant to section 66, paragraph 2 of the Law on the Jurisdiction of Civil Courts, personal jurisdiction over a defendant may, for example, be established if he has his habitual residence (*gewöhnlicher Aufenthalt*) in Austria. Moreover, section 67 of the Law on the Jurisdiction of Civil Courts provides that if a defendant neither has a domicile or habitual residence in Austria, nor abroad, personal jurisdiction over that defendant may be based on his mere presence in Austria. In addition, if personal jurisdiction over a defendant cannot be established on the basis of sections 66 and 67, personal jurisdiction may be established over that defendant if he has assets in Austria (section 99 of the Law on the Jurisdiction of Civil Courts). Accordingly, Austrian courts could exercise jurisdiction in a case such as *Filártiga*, if the defendant has a habitual residence in Austria, is present in Austria and has no domicile or habitual residence elsewhere, or—as a fallback option—has assets in Austria.

In addition, section 28, paragraph 1, No 2 of the Law on the Jurisdiction of Civil Courts provides that—if personal jurisdiction over the defendant may not be established in Austria—the Supreme Court may nevertheless determine a court which shall have jurisdiction over a tort claim, if the plaintiff has a domicile or habitual residence in Austria and if it is unreasonable or impossible for the plaintiff to file suit abroad. A strong argument can be made that it will be unreasonable for a plaintiff to bring a tort claim for acts of torture against a state official in a state where such acts are an instrument of state policy such as was the case in *Filártiga*.

However, given the definition of universal jurisdiction put forward in section 5.1, it is doubtful as to whether jurisdiction exercised by Austrian courts on the

[243] See also Article 4 of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 16 September 1998, Federal Law Gazette No 448/1996 and Article 4 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 26 September 1968, Federal Law Gazette III No 209/1998. Both Conventions likewise refer to national procedural law if the defendant is not domiciled in a contracting state.

[244] Reich Law Gazette No 111/1895.

[245] Note that the Austrian concept of personal jurisdiction does not match the US concept of personal jurisdiction.

basis of the Regulation or any of the above-mentioned domestic provisions can actually be referred to as universal civil jurisdiction. First, it does not matter at all for the establishment of jurisdiction under these provisions that the torts were committed in violation of international law. Second, some of these provisions (eg Article 2, paragraph 1 of the Regulation and section 66, paragraph 2 of the Law on the Jurisdiction of Civil Courts) make jurisdiction dependent on a closer connection to Austria than the mere presence of the tortfeasor.

## 6. Other International Sources

### 6.1 Role of Non-Binding Texts in Interpreting Domestic Law

A review of the case-law of the Supreme Courts and the Administrative Court of the last 15 years reveals that the courts occasionally use non-binding texts to interpret domestic law. In several cases concerning the interpretation of provisions of the Civil Code (*Allgemeines bürgerliches Gesetzbuch*),[246] the Supreme Court, for example, took note in its reasoning of recommendations of the Council of Europe.[247] Moreover, the Administrative Court, for example, took into account decisions of UNHCR's Executive Committee (EXCOM) when interpreting Austrian asylum law.[248]

### 6.2 Enforcement of Decisions of International Courts/Tribunals

According to Article 46 of the ECHR, Austria is bound to abide by the judgments of the European Court of Human Rights in any case to which it was a party. The judgments of the Court are thus legally binding for Austria.[249] Depending on the content of a judgment of the European Court of Human Rights, the Austrian legal order offers different means of implementation. If, for example, the European Court of Human Rights comes to the conclusion that criminal proceedings in Austria were conducted in violation of the ECHR, the Austrian Code of Criminal Procedure (*Strafprozessordnung*) offers a possibility to renew the proceedings, if the violation of the ECHR might have had a detrimental effect on the outcome of the case for the applicant.[250] According to Article 41 of the ECHR, the Court may also

[246] Law Collection of the Monarchy No 946/1811 as amended.

[247] Eg, Supreme Court, Decision No 2Ob90/05g, 21 April 2005; Decision No 2Ob141/04f, 1 July 2004; Decision No 2Ob84/01v, 16 May 2001. See also Supreme Court, Decision No 8Ob135/04t, 17 March 2005 which contains a summary of a lower court's decision revealing that the lower court had taken into account a legally non-binding UNCITRAL-model law.

[248] Administrative Court, Decision No 2001/01/0429, 23 January 2003. It has to be noted, however, that already the legislative materials referred to the EXCOM-decision.

[249] See also Supreme Court, Decision No 1Ob236/03t, 18 November 2003. The Supreme Court held that national authorities are bound by a judgment of the European Court of Human Rights finding a violation of the ECHR insofar as they may not any more qualify the concerned act of state as conforming to the ECHR.

[250] Section 363a Code of Criminal Procedure, Federal Law Gazette No 631/1975 as amended.

afford just satisfaction to an injured party. Judgments awarding damages, however, only raise a theoretical question of how they may be enforced in Austria because Austria generally pays promptly.[251]

Under rule 39 of the Rules of Court, the European Court of Human Rights may also indicate interim measures. A failure to comply with interim measures indicated by the Court constitutes a violation of Article 34 of the ECHR.[252] Many interim measures indicated by the Court concern deportation cases.[253] Section 50, paragraph 3 of the Austrian Aliens' Police Act 2005 (*Fremdenpolizeigesetz*)[254] mandates national authorities to abide by such interim measures indicated to Austria. It provides that aliens 'shall not be deported contrary to an interim measure indicated by the European Court of Human Rights'.

## 6.3 Enforcement of Decisions/Recommendations of Non-Judicial Treaty Bodies

In 2008, for example, the Supreme Court was asked[255] whether a plaintiff could sue the Republic of Austria for damages and thereby 'enforce' a view issued by the Human Rights Committee (HRC) pursuant to the International Covenant on Civil and Political Rights (ICCPR) and the Optional Protocol II thereto.[256]

The plaintiff was a former employee of an Austrian municipality who was dismissed from service due to professional shortcomings. His dismissal was confirmed by the Administrative Court. Since the plaintiff was of the opinion that the dismissal proceedings were conducted in violation of his human rights, he submitted a communication to the HRC. The HRC found that the facts before it actually revealed a violation of the ICCPR and noted that according to Article 2, paragraph 3 of the ICCPR, 'the State party is under an obligation to provide the author with an effective remedy, including payment of adequate compensation'.[257] Consequently, the plaintiff brought a claim against the Republic of Austria on the basis of the Austrian Law on State Liability.[258]

The Supreme Court held that the views of the HRC were not legally binding. Moreover, since section 2, paragraph 3 of the Austrian Law on State Liability provides that no claims for compensation may be based on decisions of the Administrative Court, the Supreme Court confirmed the lower courts' dismissals of the plaintiff's claim.

[251] See Wolfram Karl, 'Zur Bedeutung der Entscheidungen des EGMR in der Praxis der österreichischen Höchstgerichte' ['On the Relevance of Decisions of the ECtHR in the Jurisdiction of Austrian Highest Courts'], RZ 130, 137 (2007).

[252] ECHR, *Mamatkulov and Askarov v Turkey*, 4 February 2005, Appl. No 46827/99 and 46951/99 [128].

[253] See ibid [104].

[254] Federal Law Gazette I No 157/2005 as amended.

[255] Supreme Court, Decision No 1Ob8/08w, 6 May 2008.

[256] ICCPR (n 180); Optional Protocol to the ICCPR, 16 December 1966, 999 UNTS 171, Federal Law Gazette No 105/1988.

[257] CCCPR, Communication No 1015/2001, 20 August 2004.

[258] See also section 4.4 above.

# 4

# Bangladesh

*Bianca Karim* and Tirza Theunissen*

## 1. Introduction

The Constitution of Bangladesh, an independent country since 1971, was enacted in 1972 and subsequently revised several times, most recently in 2004. Bangladesh is a parliamentary democracy, where the President, who is the chief of state, holds a largely ceremonial post except during the tenure of a caretaker government. Under the 13th Amendment, passed by Parliament in March 1996, the President assumes power temporarily to oversee general elections after dissolution of the Parliament. Once the new Parliament is elected, the President's role reverts to being ceremonial.

Generally, executive power is held by the Prime Minister, who is the head of government. The Prime Minister is appointed by the President of the members of the unicameral Parliament, all of whom are elected by universal suffrage at least every five years. A 2004 amendment to the Constitution reserved 45 seats for women, to be distributed among political parties in proportion to each party's numerical strength in Parliament. The judicial system is based on the English common law system, and is presided over by a Supreme Court whose justices are appointed by the President.

Bangladesh has been a member of the United Nations (UN) since 1974, but has not accepted the compulsory jurisdiction of the International Court of Justice (IJC). Bangladesh has ratified many international treaties particularly in the area of international human rights law. As a country with a dualistic common law tradition, Bangladesh requires incorporation of international agreements within domestic law in order for them to be given effect. Yet most international treaties ratified by Bangladesh have not been incorporated into domestic legislation. As a result, the status of international law within the domestic legal order remains in many ways unclear and international treaties are not implemented.

This chapter is based on the limited primary and secondary sources that are available on international law within the Bangladesh legal system. The Bangladesh Code, containing all existing acts of Parliament, ordinances and President's orders

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(except regulations and purely amending laws) was first published in 2007. Also, during 2010, the Ministry of Law Justice and Parliamentary Affairs made the laws of Bangladesh (without the subordinate rules and regulations) available on the internet. There are at least six law reports in Bangladesh,[1] almost all of which basically contain the judgments, orders and decisions of the Supreme Court of Bangladesh. The decisions of the lower courts are not reported in any law report.[2] Furthermore, not all appellate decisions are published, in particular those that relate to international law. Therefore, there may be cases or subordinate legislation that speak directly to the issue of domestic implementation of international law that were not published and, therefore, have not been included in this report.

## 1.1 Provisions of the National Constitution Referring to International Law

The Constitution of Bangladesh contains two main provisions that refer to international law. Article 25 of the Constitution of Bangladesh contains the basic principle of customary international law as a fundamental principle of state policy. It provides in relevant part:

> The State shall base its international relations on the principles of respect of national sovereignty and equality, non-interference with the internal affairs of other countries, peaceful settlement of international disputes, and respect of international law and the principles enunciated in the United Nations Charter, and on the basis of those principles shall:
>
> (a) Strive for renunciation of the use of force in international relations and general and complete disarmament;
> (b) Uphold the right of every people freely to determine and build up its own social, economic and political system by ways and means of its own free choice; and
> (c) Support oppressed peoples throughout the world waging a just struggle against imperialism, colonialism or racialism.

Article 145A of the Constitution of Bangladesh governs the adoption and codification of international treaties in domestic law. It states in relevant part:

> All treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament, provided that any such treaty connected with national security shall be laid in a secret session of Parliament.

The above constitutional provision requires a treaty to be put forward to Parliament only for discussion, not for ratification. Nevertheless, Parliamentary discussion can be useful in the domestic context as a means to scrutinize international treaties and

[1] The most popular law report in Bangladesh is Dhaka Law Reports (popularly known as DLR), which started its publication in 1948. Bangladesh Legal Decisions (BLD) is published under the authority of the Bangladesh Bar Council. The other law reports are Bangladesh Law Chronicles, Law Guardian, Bangladesh Law Times, Mainstream Law Reports.

[2] The Chancery Research and Consultants Trust (CRC-Trust), a socio-legal research organization launched the first searchable interactive Bangladeshi legal information website (<http://www.clcbd.org>). This site contains an online law report ie Chancery Law Chronicles.

to identify potential problems that may arise with codification and implementation of the treaty.

Treaty-making is an executive and not legislative act in Bangladesh. Under the Constitution, the President is conferred the power to enter into treaties with foreign nations.[3] In particular, Article 48(2) of the Constitution of Bangladesh provides that the President shall, as head of state, exercise and perform duties conferred and imposed on him by the Constitution and by any other law. Article 55(4) of the Constitution of Bangladesh provides that all executive actions of the government shall be taken in the name of the President. However, Bangladesh has a parliamentary form of government in which the President is the nominal head of state and the executive powers are performed by the Prime Minister and the cabinet.[4] The Second Proclamation Order No IV of 1978 has clarified this function by empowering the Prime Minister and the cabinet to determine the treaty-making policies of Bangladesh.

When there is clear domestic legislation on an issue, the courts will give effect to the domestic law, rather than looking to international law. In *Bangladesh v Sombon Asavhan*, the Appellate Division of the Supreme Court held that 'it is well settled that where there is municipal law on an international subject the national court's function is to enforce the municipal law within the plain meaning of the statute'.[5] The Court further held that even though the issue in the particular case involved international law, because the three fishing trawlers involved were captured in an area where Bangladesh claims sovereignty, the court could refrain from 'entering into long discussion of diverse laws, conventions, rules and practices of international law' since there was a complete code on the issue provided by Bangladeshi municipal law.[6] Therefore, the courts in Bangladesh primarily rely on domestic law, when available, prior to relying on international sources in their decision-making process.

## 2. Treaties and Other International Agreements

### 2.1 Process of Treaty Ratification and Incorporation

The Constitution of Bangladesh, the supreme law of the land, does not contain any express provision pertaining to ratification of a treaty.[7] It also does not contain any

[3] Bangladesh is a parliamentary republic, and therefore, the head of state is elected by the Parliament and known as the Prime Minister. The Prime Minister, as the head of government, forms the cabinet and runs the day-to-day affairs of state. While the Prime Minister is formally appointed by the President, she must be a member of Parliament who commands the confidence of the majority of Parliament. Background Note: Bangladesh, US Department of State, May 2007. The President is the head of state but mainly a ceremonial post elected by the Parliament. Ibid. The President therefore, has specified duties.

[4] Sheikh Hafizur Rahman Karzon and Abdullah Al-Faruque, 'Status of International Law under the Constitution of Bangladesh: and Appraisal' (1999) 3(1) Bangladesh Journal of Law 23.

[5] 32 DLR (1980) 198 (Supreme Court of Bangladesh).

[6] Ibid 202.

[7] Sheikh Hafizur Rahman Karzon and Abdullah Al-Faruque, 'Status of International Law under the Constitution of Bangladesh: and Appraisal' (1999) 3(1) Bangladesh Journal of Law 23, 40.

express provision requiring legislative approval of treaties.[8] Article 145A merely provides that a treaty shall be laid down by the President for discussion in the Parliament. Therefore, it is unclear whether treaties require implementing legislation or parliamentary approval. It is perhaps because of the ambiguity in this provision that few treaties have been placed before the Parliament for approval.[9]

In the absence of an explicit constitutional provision on the status of international law within the domestic legal order, courts have adhered to the generally accepted view that Bangladesh, as a common law country following the dualist theory, requires *all* international treaties to be incorporated into domestic legislation before they can take effect and be enforced in court.

Domestic courts do not recognize the doctrine of self-executing and non-self-executing treaties. As a general principle, courts in Bangladesh will not enforce treaties and conventions, even if ratified by the state, that are not part of the *corpus juris* of the state. They must be incorporated in the municipal legislation.[10] However, the court does utilize international conventions and covenants as an aid to interpretation of the provisions of Part III of the Constitution, particularly to determine the rights implicit in the instrument, like the right to life and the right to liberty, but not enumerated within the Constitution.[11]

The first case to deal with this issue was *Kazi Mukhlesur v Bangladesh*[12] in which the petitioner challenged the constitutionality of an agreement between Bangladesh and India regarding the transfer of the Berubari enclave to India in exchange for the Dahagram and Angurpurta enclaves. The treaty provided that it would be subject to ratification by the governments of the two countries. The petitioner argued that the treaty was equivalent to cession of the territory of Bangladesh and would violate the rights of citizens of Bangladesh, particularly the right to movement anywhere in Bangladesh. More precisely, the petitioner argued that the cession of the southern half of Berubari impeded and denied his right to freedom of movement to and in this particular area of Bangladesh.

The Court dismissed the application on the ground that it was not ripe for decision. However, the Court did examine the treaty-making power of the executive under the Constitution of Bangladesh. According to the Court, the executive power of the Prime Minister shall be exercised in accordance with the Constitution, which imposes limitations on its treaty-making power, particularly when boundary settlement is involved. Article 143(2) of the Constitution provides: 'Parliament may from time to time by law provide for the determination of the boundaries of the territory of Bangladesh and of the territorial waters and the continental shelf of Bangladesh.' The Court held that:

[8] Ibid 41.

[9] Pursuant to domestic case-law, implementing legislation is a legal requirement for treaties relating to any change of boundaries of the country: *Kazi Mukhlesur v Bangladesh,* 26 DLR (1974) 44.

[10] *Chaudhury and Kendra v Bangladesh*, Writ petition, No 7977 of 2008, 29 BLD (HCD) (2009); *Bangladesh v Hasina*, 60 DLR (AD)(2008) 90.

[11] Ibid.

[12] 26 DLR (1974) 44.

Ours is a written Constitution. We have already seen that the head of the Executive, namely, the Prime Minister cannot unilaterally determine the boundaries of Bangladesh which has to be done by a law of Parliament under Article 143 (2) of the Constitution. It cannot but be more so when cession of territory is involved. This limitation on the part of the head of the Executive of Bangladesh is on the face of it such a 'manifest and notorious' restriction on his treaty-making power that any such treaty entered into by a foreign state with Bangladesh without the sanction of Parliament of Bangladesh will be ultra vires and cannot pass title.[13]

The territory constituted an inseparable and integral part of Bangladesh in view of Article 2(a) of the Constitution which defines the territory of Bangladesh. The court further held:

There can thus be no escape from the position that though treaty-making falls within the ambit of the executive power under Art. 55 (2) of the Constitution, a treaty involving determination of boundary, and more so involving cession of territory can only be concluded with the concurrence of Parliament by necessary enactment under Art. 143 (2) and in case of Parliament by necessary enactment under Article 143 (2) and in case of cession of territory by amending Art. 2(a) of the Constitution by taking recourse to Article 142.[14]

The Court held that treaties signed and ratified by the Bangladesh government require implementing legislation or constitutional amendment to be applied within its domestic jurisdiction if the treaty '(i) involves alteration of the existing laws; (ii) confers new powers on the executive; (iii) imposes financial obligation upon the citizens; [or] (iv) involves alienation or cession of any part of the territory of Bangladesh.'[15]

The view that implementing legislation is a legal requirement for *all* treaties to take effect has become a general principle. Thus in the case of case of *Hussain Muhammad Ershad v Bangladesh,*[16] the court held that 'it is [true] that Universal Human Rights norms, whether given in the Universal Declaration or in the Covenants, are not directly enforceable in national Courts. But if their provisions are incorporated into the domestic law, they are enforceable in national Courts'.

Bangladesh has ratified seven out of the nine core international human rights instruments.[17] It has also ratified the Optional Protocols to the Convention on the Rights of the Child (CRC), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of

[13] 26 DLR (1974) 57. [14] Ibid.

[15] Sheikh Hafizur Rahman Karzon and Abdullah Al-Faruque, 'Status of International Law under the Constitution of Bangladesh: and Appraisal' (1999) 3(1) Bangladesh Journal of Law 23, 45.

[16] 21 BLD (AD) (2001) 69.

[17] Bangladesh is a Party through ratification/accession to the International Covenant on Civil and Political Rights (ICCPR) (23 March 1976, 999 UNTS 171), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (3 January 1976, 993 UNTS 3), the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (11 July 1979, 660 UNTS 195), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (3 September 1981, 1249 UNTS 13), the Convention on the Rights of the Child (CRC) (2 September 1990, 1577 UNTS 3), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (5 October 1998, 1465 UNTS 85), the Convention on the Rights of Persons with Disabilities (CRPD) (30 November 2007, A/RES/61/106, Annex I).

Persons with Disabilities (CPRD); seven out of eight fundamental International Labour Organization (ILO) Conventions;[18] and has signed and ratified the Rome Statute on the International Criminal Court.[19]

Additionally, as a member of South Asian Association for Regional Co-operation (SAARC), Bangladesh is a party to many regional conventions relating to human rights and has concluded various bilateral agreements with its neighboring countries. Through ratification, Bangladesh has agreed to be bound by the obligations spelled out in these documents and to ensure implementation and protection of the human rights enshrined therein. Yet, very few human rights instruments have been incorporated through the enactment of specific legislation by Parliament or through an amendment of existing legislation to ensure the effective enjoyment of the individual rights provided in the treaties.[20]

Various treaty bodies have expressed concern about the unclear status of international treaties in Bangladeshi domestic law and the lack of conformity between the international treaties and the domestic law. For example, the CEDAW Committee in its Concluding Observations 2004[21] on the State Report of Bangladesh stated that:

> 237. The Committee expresses concern that, while the Constitution guarantees equal rights to men and women, the definition of discrimination in the State party's legislation is not in line with the Convention.
>
> 238. The Committee requests that the definition of discrimination against women be brought into conformity with Article 1 of the Convention, and in particular that the State party's responsibility to eliminate all forms of discrimination against women be extended to discrimination perpetrated by private actors.
>
> 239. The Committee is concerned that the Convention has not yet been incorporated into domestic law and its provisions cannot be invoked before the courts.
>
> 240. The Committee calls upon the State party to incorporate without delay the provisions of the Convention into its domestic law and requests the State party to ensure that the provisions of the Convention be fully reflected in the Constitution and all legislation.

Similarly, the Committee on the Rights of the Child in its concluding observations of 2009 on the State Report of Bangladesh stated:

[18] Bangladesh has ratified/acceded to 33 ILO Convention including the following fundamental ILO Conventions: Nos 29, 87, 98, 100, 105, 111 and 182. It has not ratified ILO Convention No 138.

[19] 23 March 2010, 2187 UNTS 90.

[20] For example, Article 2(2) of the ICCPR provides that 'where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant'. See similarly, Article 2(a) and (b) of CEDAW and Article 4 of the CRC.

[21] CEDAW/C/2004/II/CRP.3/Add.2/Rev.1.

1. The Committee appreciates that specific laws have been adopted or amended in efforts to achieve more consistency with the Convention, including laws on birth registration and citizenship. However, the Committee remains concerned that some aspects of domestic legislation continue to be in conflict with the principles and provisions of the Convention and regrets that there is no comprehensive law to incorporate the Convention into domestic legislation. In particular, the Committee is also concerned that the 1974 Children's Act has not been revised in line with the Convention.
2. The Committee recommends that the State party continue to harmonize its legislation with the principles and provisions of the Convention and incorporate the Convention into domestic legislation, ensuring that the Convention can be invoked as a legal basis by individuals and judges at all levels of administrative and judicial proceedings. The Committee also recommends that the 1974 Children's Act be revised to cover comprehensively the rights of the child. Finally, the Committee encourages the State party to carry out an impact assessment of how new laws affect children.

Bangladesh in most cases has not implemented the recommendations of the treaty bodies relating to legislation. It has undertaken legislative reform in certain areas through minor amendments to outdated provisions in national laws.[22] However, in most cases no action has been taken. Bangladesh has often defended on this issue by arguing that most of the rights provided under the treaties are also enshrined in the Bangladesh Constitution and therefore, no further legislation is necessary. Bangladesh has also argued that its laws are adequate and in conformity with international treaties. However, various legal reviews conducted by international development agencies have demonstrated that many rights are not provided for under the Constitution and many national laws are not in conformity with international treaties. In the absence of comprehensive legislative reform to incorporate treaty provisions or to ensure conformity through amendments of existing law, the status of the international treaties in domestic law remains unclear.

In the *suo moto* ruling in the case of *State v Md. Roushan Mondal Hashem,*[23] this legal limbo was summarized as follows:

Whether or not provisions of international instruments are binding was discussed in the case of *State v Metropolitan Police Commissioner*, *60 DLR 660*. In this regard we may again refer to the decision in the case of *Hussain Muhammad Ershad vs. Bangladesh and others, 21 BLD (AD) 69*, where his lordship B.B. Roy Chowdhury, J. pointed out that although the provisions of international instruments are not binding unless they are incorporated in the domestic law, they should not be ignored. His Lordship went further to say that beneficial provisions of the international instruments should be implemented as is the obligation of a signatory State. We note that in the same vein we mentioned in the case of *State vs. Metropolitan Police Commissioner,*

[22] For example it has raised the Minimum Age of Criminal Responsibility (MACR) through the Penal Code Amendment Act of 2004 from seven to nine years. However, this still remains below the MACR recommended by the CRC Committee in its General Comment No 10 on the Children's Rights in Juvenile Justice.

[23] 26 BLD (HCD) (2006) 549.

*60 DLR 660* that as signatory Bangladesh is obliged to implement the provisions of the CRC. We also stated in that case that if the beneficial provisions of the international instruments do not exist in our law and are not in conflict with our law, then they ought to be implemented for the benefit and in the greater interests of our children. But sadly the provisions of the International Instruments are rarely, if at all, implemented. Moreover, proper implementation of the provisions of our existing law is sadly lacking and often ignored. We find that the neglect of the Bangladesh Government to implement the provisions of the CRC has led to numerous anomalies in our judicial system when dealing with cases where an offender and/or the victim are children.

We are dismayed that today Bangladesh is still lagging far behind in caring for its children. Because of our failure to implement the beneficial provisions of the CRC, the plight of our children has not improved to any measurable extent. The fact that we are lagging behind is only too apparent from the persistent recommendation of the Committee of CRC for Bangladesh to incorporate and implement the provisions of the international instrument.

## 2.2 Private Rights of Action

Since international treaties require incorporation into domestic law in order to take effect, private parties cannot directly rely on an international treaty as a source of rights and obligations. Instead, parties must base their claim on national legislation. However, they can invoke international law as a source of interpretation for unclear or absent provisions of national law. The courts have held that beneficial provisions of international treaties should be applied when these do not exist in national law and do not conflict with national law.

## 2.3 Treaty Interpretation

When referring to international law in the interpretation of a provision of domestic law, the courts usually do so without deference to the views of the government or legislature unless this would be necessary. Courts do not apply the international rules of treaty interpretation and most judges are not aware of these rules. As Bangladesh has not signed or ratified the Vienna Convention on the Law of Treaties,[24] usually no reference is made to the Convention by the courts as a guide to the interpretation of treaties. To date no case has arisen whereby the courts needed to decide whether statements attached to a treaty constitute reservations. It can be presumed however that courts will be hesitant to do so out of concern for the principle of separation of powers. Courts in Bangladesh mostly rely on international treaties to which Bangladesh is a party when interpreting and applying international law. However, they in some cases do refer to non-binding international instruments such as guidelines, rules, resolutions, etc.[25]

[24] 1155 UNTS 331.
[25] See further discussion in section 6 below.

## 3. Customary International Law

### 3.1 Status of Customary Law

There is no constitutional provision regarding the status of customary international law in the domestic legal order. However, it is a generally accepted principle in Bangladesh that customary international law is binding on Bangladesh and part of the law of the land if it is not contrary to domestic law. In the case of *Bangladesh v Unimarine S.A. Panama,*[26] the first case before the Supreme Court on the application of customary international law, the court held that customary international law is binding on states and states generally give effect to rules and norms of customary international law.[27] The court cited the rule of immunity of foreign missions, envoys, etc. as a good example of customary international law that would be binding on states. The issue in this case was whether private foreign companies enjoy immunity from arrests and seizures.[28] The court found that 'Immunity is available under Public International Law to persons and properties of classified persons mentioned in the list which is usually filed by foreign missions and international agencies.'[29]

### 3.2 Application of Customary Law in Practice

In practice, courts tend not to apply customary international law but instead to refer to domestic legislation containing similar norms. The principle is that where there is clear domestic legislation on the disputed issue, the courts will give effect to the domestic law, rather than cite the customary norms of international law.[30]

### 3.3 Customary Law, the Constitution, and *Jus Cogens*

Article 25 in Part II of the Constitution concerning Fundamental Principles of State Policy has been interpreted as containing certain basic principles of customary international law which are considered to be *jus cogens*.

Relatively few cases in Bangladesh have involved customary law. In the case of *Saiful Islam Dilder v Government of Bangladesh,*[31] a writ was filed to stay a government order of extradition for Anup Chetia, leader of ULFPA, an Assamese secessionist movement, to Indian authorities. The court examined a number of customary principles of international law such as extradition and the right to self-determination. The petitioner contended that Anup Chatia should not be

[26] 29 DLR (1977) 252 (Supreme Court of Bangladesh).

[27] Sheikh Hafizur Rahman Karzon and Abdullah Al-Faruque, 'Status of International Law under the Constitution of Bangladesh: and Appraisal' (1999) 3(1) Bangladesh Journal of Law 23, 30.

[28] Ibid.

[29] Ibid.

[30] M. Shah Alam, *Enforcement of International Human Rights Law by Domestic Courts* (Dhaka: New Warsi Book Corp., 2007) 103.

[31] 50 DLR (1998) 318.

extradited because he was fighting for the right to self-determination, which was generally exempted from the extradition treaty. He substantiated his contention by arguing that the right to self-determination had been recognized as a principle of customary international law through judicial decisions and was inserted in international human rights instruments and therefore, is a principle binding on the members of the United Nations. According to the petitioner, Bangladesh was bound to grant Anup Chetia refugee status in accordance with the principles of international law and extradition of Anup Chetia would violate provisions of Article 25 of the Constitution.[32]

The petitioner also contended that the Bangladesh Government had not signed any extradition treaty with India and extradition of Chetia to India in the absence of such treaty would violate the provisions of Article145A of the Constitution of Bangladesh. The Court rejected this contention, holding:

> Rather, the Government may take help of Article 25 of the Constitution for the extradition of Anup Chetia to Indian authority in order to base its international relations on the principles of respect for national sovereignty and equality, non-interference in the international affairs of other countries' . . . Article 25 (1) (c) enjoins upon state to support throughout the world waging just war against imperialism, colonialism or racialism. We are afraid to accept the contention that as because Anup Chetia is struggling for self-determination for the people of Assam handing over him to India would be violative of Article 25 of the Constitution. The struggle in which ULFA and its secretary-general Anup Chetia is involved is not in our opinion 'waging a just struggle against imperialism, colonialism or racism.' . . . Nor can it be said that the right to 'self-determination' as canvassed in this petition falls within any of the three exception viz. 'imperialism', 'colonialism' or 'racialism' as used in Article 25(1) (c) of the Constitution.[33]

In *M. Saleem Ullah v Bangladesh*,[34] the petitioner also relied on Article 25(I) and *jus cogens*, claiming that the Bangladesh government's decision to participate in the United Nations sponsored multinational force to Haiti was illegal because the operation of multinational forces in Haiti was in fact a US-led aggressive war. The petitioner further argued that the government decision violated Article 63, which empowers the President to declare war with the assent of the Parliament.[35] The Court observed:

> The decision of the Government to participate in the UN sponsored multinational force to Haiti to help the restoration of the legitimately elected government was taken pursuant to the UN Resolution No.940 and Bangladesh being a member state, has taken the decision on the authority of the constitutional framework and international commitment. The decision is not derogatory to any provision of the Constitution including Art.7.[36]

[32] Sheikh Hafizur Rahman Karzon and Abdullah Al-Faruque, 'Status of International Law under the Constitution of Bangladesh: an Appraisal' (1999) 3(1) Bangladesh Journal of Law 23, 31.

[33] Ibid.

[34] 47 DLR (1995) 218.

[35] M. Shah Alam, *Enforcement of International Human Rights Law by Domestic Courts* (Dhaka: New Warsi Book Corp., 2007) 107.

[36] 47 DLR (1995) 219.

The Court further held:

> Our reading of this sub-article 25 (1) (b) vis-à-vis chapter VII of the UN Charter and the Resolution No. 940 does not impress us to hold that there is any infringement of sub-art. 1(b) of Art. 25 in taking decision to participate in UN sponsored multinational force in Haiti and to send troops. Sub-Articles (1) (c) and (2) have no relevancy for our purpose. Rather the decision, in our view, has been taken on the principles enunciated in the UN Charter which is in no way against the Fundamental Principles of State Policy and in accordance with Chap. VII of the Charter of the UN.[37]

Thus the Court adhered strictly to the constitutional provisions. It has ruled similarly in relation to statutory law.

In the next case with relevance to international law, *Bangladesh v Sombon Asavhan,*[38] the Appellate Division of the Supreme Court held: 'It is well settled that where there is municipal law on an international subject the national court's function is to enforce the municipal law within the plain meaning of the statute.'[39] The case concerned the navy's capture of three Thai fishing trawlers for illegal fishing in the territorial waters of Bangladesh. The question arose whether the trawlers were within the territorial waters or inside the economic zone. The court held:

> [T]he point touches international law, since three fishing trawlers are involved and they have been captured from a place over which Bangladesh claims sovereignty. We are relieved from entering into long discussion of diverse laws, conventions, rules and practices of international law since there is a complete code provided by our municipal law.[40]

The Court held that Article 143(1)(B) of the Constitution confers full competence on Parliament to legislate on the boundaries of territorial waters and other boundaries of Bangladesh. Accordingly, the Bangladesh Territorial Waters & Maritime Zones Act 1974 lays down specific provisions for the conservation zone, contiguous zone, continental shelf, economic zone and territorial waters.[41]

Thus it is clear that in the case of a conflict between statutory and customary international law, the court will give effect to the statute. Customary international law on its own cannot alter or add to the municipal law; nor can it supersede a Bangladeshi statute. Legal scholars have interpreted this practice to suggest the following:

> The trend in Bangladesh court practice is to follow the municipal law when such law on a given subject exists. This strictness in following the state law imposes a certain amount of responsibility on the lawmakers not to make laws as it would encroach upon the accepted boundaries of the international community.[42]

[37] 47 DLR (1995) 224.
[38] 32 DLR (1980)198.
[39] 32 DLR (1980)198, 201.
[40] Ibid.
[41] M. Shah Alam, *Enforcement of International Human Rights Law by Domestic Courts* (Dhaka: New Warsi Book Corp., 2007) 31.
[42] S.M. Hussain and M.M. Haque, 'Status of International Law in Bangladesh Courts' (1984) 7(2) Law and International Affairs 71.

There are no reported cases where the courts have deferred to the government or legislature on the existence or content of customary international law. From the cases cited above, it can be inferred that it falls upon the judiciary to determine whether a norm is part of customary international law. In case of national law contrary to customary law, the courts would be bound to apply the former while pointing out any inconsistencies.

In most cases, judges only take notice of customary law if the issue is raised by a party. However, some judges are diligent and take notice of customary law themselves. There are no guidelines issued by the Supreme Court on the use of customary law. Hence, it is the individual judge's prerogative to alert learned advocates to customary law issues. Whether judges will do that very much depends on their mindset toward international law in general.

## 4. Hierarchy

The Constitution of Bangladesh is silent on the hierarchy of international law within the domestic legal order. Article 7(2) of the Constitution states that the Constitution is the 'supreme law of the Republic, and if any other law is inconsistent with this Constitution the other law shall, to the extent of the inconsistency, be void'. It can be inferred from this that the Constitution overrides both national laws and international law. Thus, in case of a conflict between the Constitution and international law, the Constitution prevails. The case-law has further clarified that in case of conflict between national and international law, national law prevails.

The Supreme Court has given detailed guidance on the relationship between international and national law. In the case of *Hussain Muhammad Ershad v Bangladesh*,[43] Justice Bimalendu Bikash Roy Choudhury held:

> 2. True it is that Universal Human Rights norms, whether given in the Universal Declaration or in the Covenants, are not directly enforceable in national Courts. But if their provisions are incorporated into the domestic law, they are enforceable in national Courts.(. . . . . ) The national Courts should not, I feel, straightaway ignore the international obligation, which a country undertakes. If the domestic laws are not clear enough or there is nothing therein, the national Courts should draw upon the principles incorporated in the international instruments. But in the cases where the domestic laws are clear and inconsistent with the international obligation of the state concerned, the national Courts will be obliged to respect the national laws, but shall draw the attention of the law makers to such inconsistencies.

Thus, in case of conflict, national law will apply. If national law is unclear or non-existent, the courts should turn to international law to interpret national law.

On various occasions, the Supreme Court has referred back to these guiding principles on the application of international law. Interestingly, it has also often referred to case-law from other common law jurisdictions such as Australia, India,

[43] 21 BLD (AD) (2001) 69.

the United Kingdom and the United States. Thus, in the case of *State v Metropolitan Police Commissioner,*[44] the Court took into consideration an Australian decision in *Minister for Immigration and Ethnic Affairs v Teoh.*[45] Similarly, in the case of *State v Metropolitan Police Commissioner*,[46] the Court took into consideration the Indian Supreme Court case of *People's Union for Civil Liberties v Union of India*,[47] which held that the 'provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by Courts as facets of those fundamental rights and hence, enforceable as such'.

Therefore it is an accepted principle that international covenants, conventions, treaties and other instruments signed by state parties are not binding unless they are incorporated into the laws of the land. However, such covenants may be used to interpret fundamental rights in the constitution and to develop common law on the matter.

Further deliberation was done on the issue in *State v Metropolitan Police Commissioner*:

> 30. Let us consider some of the relevant provisions of the UNCRC in juxtaposition to our Constitution and laws. We bear in mind that Article 28(4) of the Constitution permits favourable laws to be enacted with regard to children even though it might be otherwise discriminatory . . . The Children Act, 1974 has promulgated succinct provisions aimed at giving special treatment for children. The UNCRC goes further to provide more beneficial provisions dealing with children. It is stated in the preamble of the UNCRC that the child for the good and harmonious development of his or her personality should grow up in a family environment, in an atmosphere of happiness love and understanding. It is also stated in the UNCRC, quoting from the Declaration of Rights of the Child, 'the child by reason of his physical and mental immaturity needs special safeguards and care including appropriate legal protection before as well as after birth.[48]
>
> Furthermore, Article 3(1) states as follows:
>
> In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

After discussing the beneficial provisions of the CRC, one of the recommendations the Court made was as follows: 'The Legislature should consider amending the Children Act, 1974 or formulating new laws giving effect to the provisions of the UNCRC, as is the mandate of that Convention upon the signatories.'

Similarly, in the case of *State v Md. Roushan Mondal Hashem,*[49] the Court held that:

[44] Suo Moto Judgment, 60 DLR (2008) 660.
[45] (1995) 69 Aus LJ 423. See the discussion in Australia, at n 49 above.
[46] 60 DLR (2008) 660.
[47] 1997 SCC (Cri) 434.
[48] 60 DLR (2008) 660.
[49] 26 BLD (HCD) (2006) 549.

So far as our Children Act, 1974 is concerned, it must be commended as a forward-thinking piece of legislation, which encompasses much of the suggestions and directives of the international covenants and other instruments discussed above. However, it is 32 years old and was enacted long before the UNCRC of 1989 . . . Bangladesh ratified the UN Convention on the Rights of the Child in August of 1990. As a signatory to the Convention Bangladesh is duty bound to reflect the above Article as well as other articles of the CRC in our national laws. We are of the view that the time is ripe for our legislature to enact laws in conformity with the UNCRC . . . Let a copy of this judgment be sent to the Ministry of Law Justice and Parliamentary Affairs for recommending legislation in line with the views expressed by us in this judgment.

## 5. International Law in the Interpretation of Domestic Law

The framers of the Constitution of Bangladesh were particularly impressed by the formulation of the basic rights in the Universal Declaration of Human Rights.[50] A comparison of Part III of the Constitution with the Universal Declaration of Human Rights (UDHR) reveals that most of the rights enumerated in the Declaration have found place in some form or other in Part III and some have been recognized in Part II of the Constitution.[51] Therefore, courts look into international conventions and covenants as an aid to interpretation of the provisions of Part III of the Constitution, particularly to determine the rights implicit in the instrument, like the right to life and the right to liberty, but not enumerated within the Constitution.[52] A number of cases where the courts have relied on international law to interpret the Constitution are mentioned below.

### 5.1 Torture

In *Salma Sobhan v Government of Bangladesh,*[53] the High Court Division referred to the Convention against Torture to reason that the practice of chaining prisoners with bar fetters (danda-berri) is cruel, inhuman and degrading treatment and therefore constitutes a violation of fundamental rights.

In a case combining three writ petitions,[54] the Supreme Court held that rules imposing extra-judicial punishment were without lawful authority and had no legal effect. The Court held that:

the failure of the State to take any systematic action to address such incidents of imposition and execution of extra judicial penalties involves a breach of its obligations under the

[50] *Chaudhury and Kendra v Bangladesh*, Writ petition, No 7977 of 2008, 29 BLD (HCD) (2009).
[51] Ibid.
[52] Ibid.
[53] Unreported case as cited in Ridwanul Hoque and Mostafa Mahmud Naser, 'The Judicial Invocation of International Human Rights Law in Bangladesh: Questing a Better Approach' (2006) 46 (2) Indian Journal of International Law 151, 163.
[54] *Bangladesh Legal Aid and Services Trust v Bangladesh* ['Fatwa' Case], Writ Petition No 5863 of 2009, Writ Petition No.754 of 2010, Writ Petition No.4275 of 2010. <http://www.blast.org.bd/content/judgement/ejp-judgment-8July2010.pdf> accessed 30 December 2010.

Constitution and international law to ensure the right to freedom from cruel, inhuman and degrading treatment or punishment.[55]

The court went on to hold that the international legal prohibition of torture or other ill-treatment is binding on Bangladesh and the government has an obligation under international law to prevent, prohibit and punish torture and other cruel, inhuman or degrading treatment or punishment.[56] This obligation is contained in a number of international treaties binding on Bangladesh including Article 7 of the International Covenant on Civil and Political Rights (ICCPR); Articles 2 and 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and General Comment No 7 of the Human Rights Committee.[57] Furthermore, the universally recognized prohibition of torture or other ill-treatment is also a basic principle of customary international law.[58]

The court did caution however, that the 'Courts of Bangladesh will not enforce those Covenants as treaties and conventions, even if ratified by the State as they are not part of the corpus juris of the State unless those are incorporated in the municipal legislation.'[59] Nonetheless, the court can look into these conventions and covenants as an aid to interpretation of the provisions of Part III of the Constitution.[60]

## 5.2 Health

In *Professor Nurul Islam v Government of Bangladesh,*[61] the High Court banned tobacco advertisements and related products on the basis of an interpretation of the right to life because of the health hazards of consuming tobacco. In its judgment, the court relied heavily on a resolution of the World Health Organization and reminded the government of its constitutional obligations under Article 25 to respect principles and norms of international law contained in the United Nations Charter and in other instruments.

## 5.3 Statelessness

In *Bangladesh v Professor Golam Azam,*[62] the Appellate Division also referred to the 1961 Convention on Reduction of Statelessness in its decision on citizenship in favour of the petitioner based on the Constitution.

[55] *Bangladesh Legal Aid and Services Trust v Bangladesh* ['Fatwa' Case], Writ Petition No 5863 of 2009, Writ Petition No.754 of 2010, Writ Petition No.4275 of 2010. <http://www.blast.org.bd/content/judgement/ejp-judgment-8July2010.pdf> accessed 30 December 2010.

[56] Ibid. [57] Ibid. [58] Ibid. [59] Ibid. [60] Ibid.

[61] 52 DLR (HCD) (2000) 413.

[62] 46 DLR (AD) (1994) 1994.

### 5.4 Women's Rights

In the case of *Bangladesh National Women Lawyers Association v Government of Bangladesh,*[63] concerning sexual harassment, the Court made explicit reference to international instruments when interpreting constitutional rights relating to gender equality. It held that:

> The fundamental rights guaranteed in chapter III of the Constitution of Bangladesh are sufficient to embrace all the elements of gender equality including prevention of sexual harassment or abuse . . . Protection from sexual harassment and right to education and work with dignity [are] universally recognised as basic human rights. The common minimum requirement of these rights has received global acceptance. Therefore, the International Conventions and norms are of great significance in the formulation the guidelines to achieve this purpose.

## 6. Other International Sources

The Bangladesh Supreme Court in various instances has referred to non-binding instruments on the interpretation and application of domestic law. It did so in the case of *Dr Mohiuddhin Farooque v Bangladesh*,[64] where the right to life protected under the constitution was discussed by reference to the resolutions of the World Health Organization. Similarly, the Supreme Court has discussed child rights in various cases such as *Roushan Mondal*,[65] by referring to the United Nations Standard Minimum Rules for the Administration of Justice (Beijing Rules) adopted by the General Assembly Resolution 40/33 of 29 November 1985, the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990 and the Guidelines for Action on Children in the Criminal Justice System Recommended by Economic and Social Council resolution 1997/30 of 21 July 1997.

## 7. Jurisdiction

### 7.1 Criminal jurisdiction

Courts in Bangladesh do not exercise universal jurisdiction over international crimes. The International Crimes (Tribunals) Act 1973 provides for jurisdiction for a tribunal to 'try and punish any person irrespective of his nationality, who, being a member of any armed, defence or auxiliary forces commits or has committed, *in the territory of Bangladesh*, whether before or after the commencement of

[63] Writ Petition No 5916 of 2008.
[64] 17 BLD (A.D.) 1997 (App. Div.1996).
[65] 26 BLD (HCD) (2006) 549.

this Act, any of the [listed] crimes'. Hence, the Act only provides for jurisdiction for crimes committed within the territory of Bangladesh and not outside Bangladesh.

The International Crimes Tribunal Act lay dormant until 29 January 2009, when the Bangladesh Parliament adopted a resolution to try war criminals. On 25 March 2009, the current government decided, in conformity with its election promises, to try war criminals of the 1971 Liberation War against Pakistan under the International Crimes (Tribunals) Act 1973. It has been reported that during the war as many as three million people were killed and many thousands of women were raped. While many of those involved in the war on both sides have died, the intention of the government is to prosecute those Bengalis who collaborated with the Pakistani armed forces.

As the International Crimes Tribunal Act previously did not allow for the prosecution of individuals or groups of individuals who were not part of the armed forces, it was subsequently amended in 2009.[66] In addition, the International Crimes Tribunal Rules of Procedure and Evidence were adopted in 2010. Further, a constitutional amendment made in 1973 added clause 3[67] to section 47 and two clauses[68] to section 47A of the Constitution. Still various critics maintain that further amendments are necessary to make the Act and rules compatible with international law.[69]

There are international concerns that the Act does not provide due process guarantees for a fair, impartial and transparent trial.[70] The Act also lacks a clear definition of what it means by 'International Crimes', 'Genocide' and 'Crimes Against Humanity'. Other concerns pertain to the source of collecting the evidence to proving the crimes from an international point of view, as only evidence from the government, the United Nations and other international organizations is accepted in this regard. Finally, there are concerns over the lack of rights to challenge and inability to request the tribunal to be accountable for its conduct.[71]

On 23 March 2010, the Government of Bangladesh ratified the Rome Statute of the International Criminal Court (ICC), becoming the first country within South

[66] Referred to as the International Crimes (Tribunal) Amend Act 2008.

[67] Clause 3 provides: 'Notwithstanding anything contained in this constitution, no law nor any provision thereof providing for detention, prosecution or punishment of any person, who is a member of any armed or defence or auxiliary forces or who is a prisoner of war, for genocide, crimes against humanity or war crimes and other crimes under international law shall be deemed void or unlawful, or ever to have become void or unlawful, on the ground that such law or provision of any such law is inconsistent with, or repugnant to any of the provisions of this constitution.'

[68] Clause 1 of the Article 47(A) stipulates that the Article 31 (right to protection of law), Article 35 (protection from trial and punishment) and Article 44 (enforcement of fundamental rights) shall not apply to any person to whom a law specified in clause 3 of Article 47 applies. In addition, clause 2 says notwithstanding anything contained in the constitution, no person to whom a law specified in clause 3 of Article 47 applies shall have the right to move the Supreme Court for any of the remedies under the constitution.

[69] Human Rights Watch, 'Bangladesh: Upgrade War Crimes Law' (Report) (8 July 2009) <http://www.hrw.org/en/news/2009/07/08/bangladesh-upgrade-war-crimes-law> accessed 30 December 2010.

[70] Ibid. [71] Ibid.

Asia to become party to the Statute.[72] The ratification will not directly affect Bangladesh's pending war crimes trials for the 1971 Liberation War because the ICC can only hear cases arising after its formation in 2002. However, Bangladesh will be required to update its laws to reflect provisions of the Statute.

### 7.2 Jurisdiction over Civil Actions Abroad

The courts in Bangladesh have so far refrained from exercising jurisdiction over civil actions for international law violations that have occurred abroad. One of the most likely reasons for this is that it is unattractive for civil litigants to file a case in the Bangladeshi courts due to a tremendous backlog of national cases, the lengthy trial procedure, and the limited financial remedies. Furthermore, some argue that companies have generally preferred to resort to international arbitration to settle disputes.

It may be noted here that Bangladeshi nationals are pursuing civil tort claims abroad. Thus, in the case of *Chowdhury v Worldtel Bangladesh Holding* Ltd,[73] the plaintiff sued in the United States under the Torture Victims Protection Act and the Alien Tort Claims Act for torture he suffered at the hands of the Rapid Action Battalion in Bangladesh. The case resulted from 'a business dispute that got out of control' with defendants Amjad Khan and the company WorldTel Bangladesh Holding. A jury in Brooklyn, New York, awarded the plaintiff $1.5 million in actual damages and $250,000 in punitive damages.

## 8. Conclusion

As this chapter has shown, the status of international law within the domestic legal order, in the absence of clear national incorporating legislation, remains weak in Bangladesh. Until now, very few treaties that have been ratified have been placed at the Parliament for codification into domestic law. Despite recommendations of various international treaty bodies as well as decisions of the Supreme Court flagging this issue, the government so far has not taken any action to implement these recommendations and decisions. Until such action is taken, courts in Bangladesh in effect remain barred from relying on international law and only may invoke it as an aid to interpretation when there is no domestic law on the issue or when the domestic law is unclear. Nevertheless, the increasing number of cases of the Supreme Court using international law is an encouraging development in itself. To ensure implementation of the doctrine of precedent, it is crucial that lower courts are made aware of these cases through dissemination of law reports down to the lowest tier of the court system and training on national and international human rights law.

[72] International Criminal Court, 'Bangladesh ratifies the Rome Statute of the International Criminal Court' (Press Release) (24 March, 2010) <http://www.icccpi.int/Menus/ASP/Press+Releases/Press+Releases+2010/Bangladesh+ratifies+the+Rome+Statute+of+the+International+Criminal+Court.htm> accessed 30 December 2010.

[73] 588 F Supp.2d 375 (EDNY 2008).

# 5

# Canada

*Stéphane Beaulac* and John H. Currie***

## 1. Introduction

As a result of Canada's legal and constitutional heritage, its Constitution is 'similar in principle to that of the United Kingdom'.[1] As such, the Canadian Constitution comprises both 'written' and 'unwritten' elements. Its written sources are found primarily in enactments of the British Imperial Parliament (the most important of which are the Constitution Act, 1867[2] and the Constitution Act, 1982),[3] Royal Proclamations and Letters Patent; and a number of enactments of the Canadian Parliament and the provincial legislatures.[4] The unwritten elements are found in common law constitutional principles propounded by the courts, which explain the written Constitution's necessarily implied elements;[5] the vestigial remains of the royal prerogative;[6] and justiciable yet legally unenforceable constitutional usages and conventions.[7] These unwritten or 'common law' aspects of Canada's Constitution are equally applicable throughout Canada, including Québec. This is so

* Professor Beaulac is the author of sections 2, 5 and 6 of this chapter.

** Professor Currie is the author of sections 1, 3 and 4 of this chapter.

[1] Constitution Act 1867 (UK) (30 & 31 Vict) c 3, reprinted in RSC 1985 App II No 5, preamble.

[2] Ibid.

[3] Constitution Act 1982, being Sch B to the Canada Act 1982 (UK) 1982 c 11.

[4] See the non-exhaustive enumeration of written sources of the Canadian Constitution set out in the Constitution Act 1982, ibid, s 52(2) and the Schedule thereto. See also the constitutional and 'quasi-constitutional' documents referred to in P.W. Hogg, *Constitutional Law of Canada* (5th edn, Supp (looseleaf), Scarborough, Ont: Thomson Carswell, 2007) s 1.5 n 32, s 1.6.

[5] See *Fraser v Public Service Staff Relations Board* [1985] 2 SCR 455, 462–3; *Reference re Manitoba Language Rights* [1985] 1 SCR 721, 752; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3, [92]–[93] and [104] (*Judges Reference*); *Reference re Secession of Québec* [1998] 2 SCR 217, 276 (*Québec Secession Reference*); *Ocean Port Hotel v British Columbia* [2001] 2 SCR 781; *Babcock v Canada* [2002] 3 SCR 3, [55]; *British Columbia v Imperial Tobacco* [2005] 2 SCR 473, [65].

[6] The royal prerogative is a residual source of executive power, once exercised by the King or Queen, but now much limited in its scope and conventionally exercised, in Canada, by either the federal or provincial cabinets. See, eg, A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, London: Macmillan, 1964) 424; Hogg (n 4) s 1.9.

[7] See *Reference Re Amendment of the Constitution of Canada* [1981] 1 SCR 753, 876–84; Hogg (n 4) s 1.10.

notwithstanding Québec's predominant civil law heritage and system of private law, as 'common law rules that are public in nature apply in the province'.[8]

## 1.1 Relevant Provisions of the National Constitution

With two exceptions, Canada's written Constitution is silent on international agreements and treaties. This is because Canada was a British Dominion rather than a sovereign state at the time of Canadian Confederation in 1867, and its foreign affairs were conducted on its behalf by the Imperial British government in the years immediately following Confederation.[9]

The first exception to this silence is section 132 of the Constitution Act 1867, which provides that:

> The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

This provision is of limited modern significance, since Canada acquired the right to negotiate international treaties on its own behalf in 1926[10] and attained sovereign statehood in or about 1931.[11] Canada does nevertheless remain bound by some treaty obligations previously entered into on its behalf by the Imperial Government, so this provision may continue to be relevant in the unlikely event that performance of such treaty obligations still requires domestic legislative or executive action.[12]

The second notable reference to international agreements or treaties in Canada's written Constitution is somewhat indirect. In accordance with the principle *nullem crimen sine lege*, section 11(g) of the Canadian Charter of Rights and Freedoms[13] provides:

> Any person charged with an offence has the right . . . not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or *international law* or was criminal according to the general principles of law recognized by the community of nations.[14]

[8] *Prud'homme v Prud'homme* [2002] 4 SCR 663, [46].

[9] See Hogg (n 4) s 11.2.

[10] See ibid, s 11.5(a). See also IC Rand, 'Some Aspects of Canadian Constitutionalism' (1960) 38 Can Bar Rev 135, 138.

[11] Statute of Westminster 1931 (UK) 22 Geo V c 4, reprinted in RSC 1985 App II No 27. See *Reference re Ownership of Offshore Mineral Rights (British Columbia)* [1967] SCR 792, 816 (*Offshore Mineral Rights (BC)*).

[12] For example, Canada is bound by Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague (adopted 18 October 1907, entered into force for Canada 26 January 1910) UKTS 9 (1910), Cd 5030, as a result of Great Britain's ratification of the Convention on 27 November 1909.

[13] Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act 1982 (n 3).

[14] Ibid s 11(g) (emphasis added).

While the reference to 'international law' in this provision is generic, it clearly encompasses international treaty law.[15]

The void created by the absence of references to international agreements or treaties in Canada's written Constitution has largely been filled by judicial development of the unwritten Constitution,[16] as will be seen below.

There are no explicit references to customary international law or the law of nations in Canada's written Constitution. However, section 11(g) of the Canadian Charter of Rights and Freedoms implicitly references customary international law when it refers to offences at 'international law'.[17] Further, the preamble to the Constitution Act 1867 provides that Canada shall have 'a Constitution similar in principle to that of the United Kingdom'. As will be explored below, this has generally been interpreted to mean that customary international law has a status in Canadian law similar to that which it enjoys in British law.

The only reference to general principles of law in Canada's written Constitution is found in section 11(g) of the Canadian Charter of Rights and Freedoms, which prohibits criminal convictions for acts that were not, inter alia, 'criminal according to the general principles of law recognized by the community of nations' at the time of their commission. This formulation was intended to reflect the wording used in the parallel protection found in the International Covenant on Civil and Political Rights.[18] Canada's unwritten Constitution also contains no rules specifically addressing the domestic legal status of general principles of international law. It has been suggested that there is no need for such rules, as general principles by definition originate in domestic legal systems.[19]

There are no express references in Canada's written Constitution to 'soft-law' sources of international law, such as the decisions of international tribunals or declarative resolutions of the United Nations General Assembly. The Canadian courts have, however, on occasion made reference to the significance and role of such sources in domestic law in a manner that may be considered to form part of Canada's unwritten Constitution. For example, with respect to the decisions of international tribunals, the Supreme Court of Canada has made the following observation regarding the weight to be attributed in domestic courts to decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR):

Though the decisions of the ICTY and the ICTR are not binding upon this Court, the expertise of these tribunals and the authority in respect of customary international law with

[15] See *R v Finta* [1994] 1 SCR 701 (La Forest J dissenting on another point).

[16] See generally Gib van Ert, *Using International Law in Canadian Courts* (2nd edn, Toronto: Irwin Law, 2008) 74–5.

[17] See generally *Finta* (n 15) (La Forest J dissenting on another point).

[18] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 28 March 1979) 999 UNTS 171 (ICCPR) Article 15(2). See Mark Freeman and Gib van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004) 182.

[19] See van Ert (n 16) 280; Freeman and van Ert (n 18) 182. See also Jutta Brunnée and Stephen J. Toope, 'A Hesitant Embrace: The Application of International Law by Canadian Courts' (2002) 40 Can YB Int'l L 3, 12.

which they are vested suggest that their findings should not be disregarded lightly by Canadian courts applying domestic legislative provisions, such as ss. 7(3.76) and 7(3.77) of the *Criminal Code*, which expressly incorporate customary international law.[20]

While the Court thus held that the decisions of these international tribunals were not binding, it did find that differences between those decisions and the Court's own prior jurisprudence 'warrant[ed] reconsideration' of the latter.[21]

Some members of the Supreme Court of Canada have expressed similar views with respect to the domestic legal relevance of the 'teachings of . . . publicists'.[22] In *R v Finta*,[23] La Forest J, writing for himself and two other members of the Court, observed as follows:

> [Learned writers] render valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged. But . . . in many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to be . . . than the enunciation of a rule or practice as universally approved or assented to.[24]

This 'persuasive but non-binding' approach is applied by Canadian courts not only to the material sources of international law enumerated in section 38(1)(d) of the ICJ Statute, but also to soft-law more generally. A recent illustration of this may be found in *Dell Computer Corp. v Union des consommateurs,*[25] where the majority stated that the UNCITRAL Model Law on International Commercial Arbitration[26] was 'a non-binding document that the United Nations General Assembly has recommended that states take into consideration' and that 'Canada has made no commitment to the international community to implement'.[27] Nevertheless, as the Québec legislation provided that its interpretation should take into consideration, where applicable, the Model Law, the majority concluded that 'international thinking' reflected in the Model Law was also a 'formal source' for interpreting the Québec legislation.[28]

Finally, rules of construction applicable to the Canadian Charter of Rights and Freedoms also call for consideration of the judgments of international tribunals and soft-law sources of international human rights law, a development that will be considered further in sections 4.3 and 4.4 below.

## 1.2 References to International Law in Legislation or Regulations

There are virtually no Canadian legislative or regulatory provisions that explicitly call for the application of international law generally within the Canadian legal

[20] *Mugesera v Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100, [126] (*Mugesera*).
[21] Ibid.
[22] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) Can TS 1945 No 7 Article 38(1)(d) (ICJ Statute).
[23] *Finta* (n 15).
[24] Ibid 761–2 (La Forest J dissenting on another point).
[25] *Dell Computer Corp v Union des consommateurs* [2007] 2 SCR 801 (*Dell Computer*).
[26] UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985) UN Doc A/40/17 (1985) Ann I (Model Law).
[27] *Dell Computer* (n 25) [46].
[28] Ibid [46]–[47].

system. One narrow exception to this is the federal Interpretation Act, which provides that in every federal Act or regulation, the definition of the maritime zones of another state is 'determined in accordance with international law and the domestic laws of that other state'.[29] Another, similarly narrow exception is found in the Extradition Act,[30] which provides that extradition agreements or provisions thereof published in either the Canada Treaty Series or the Canada Gazette are to be judicially noticed by Canadian courts.[31]

Aside from this, however, there are many pieces of legislation that implement specific treaties or other international legal obligations within the Canadian legal system. Still other legislation merely refers to Canada's international legal obligations without necessarily engendering domestic legal effects in respect of those obligations.[32]

An example of simple transformation or implementation by reference in domestic legislation is the Foreign Missions and International Organizations Act,[33] which implements in Canada key provisions of the Vienna Convention on Diplomatic Relations 1961[34] and the Vienna Convention on Consular Relations 1963.[35] Other than a few provisions relating to interpretation and the establishment of certain administrative procedures necessary to give effect to the provisions of both conventions, the Act simply gives relevant provisions of those conventions (included as schedules to the Act) legal force in Canadian law.[36]

A different approach is taken in the Oceans Act,[37] which implements Canada's obligations as a party to the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[38] Rather than including UNCLOS as a schedule to the Oceans Act and conferring domestic legal effect upon its provisions, the Oceans Act in fact reproduces, in many instances verbatim, those provisions within the Act's own operative provisions. Thus, for example, the Act's definitions of Canada's territorial sea,[39] its contiguous zone,[40] its exclusive economic zone[41] and its continental shelf[42] borrow language directly from provisions of UNCLOS. This approach minimizes variations between UNCLOS and the Oceans Act. Where there are variations in the text, of course, precisely the opposite effect results, with attendant

[29] Interpretation Act RSC 1985 c I-21 ss 2(1), 35(1).
[30] Extradition Act SC 1999 c 18.
[31] Ibid, s 8(3).
[32] See generally van Ert (n 16) 238–9.
[33] Foreign Missions and International Organizations Act SC 1991 c 41.
[34] Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95.
[35] Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261.
[36] Foreign Missions and International Organizations Act (n 33), s 3.
[37] Oceans Act SC 1996 c 31.
[38] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).
[39] Compare Oceans Act (n 37), s 4 with UNCLOS (n 38), Articles 3–4.
[40] Compare Oceans Act (n 37), ss 10–11 with UNCLOS (n 38), Article 33.
[41] Compare Oceans Act (n 37), ss 13–14 with UNCLOS (n 38), Articles 55–7.
[42] Compare Oceans Act (n 37), ss 17–18 with UNCLOS (n 38), Articles 76–7.

potential for a degree of divergence between the meaning of the treaty and that of the legislation.[43]

Other laws implement treaties by paraphrasing or drawing inspiration from their text without relying upon their express terms. For example, the War Crimes and Crimes Against Humanity Act implements Canada's obligations under the Rome Statute of the International Criminal Court.[44] Pursuant to the Rome Statute's complementarity provisions,[45] the Act establishes Canadian criminal jurisdiction over the 'core' international crimes of genocide, crimes against humanity and war crimes. Moreover, it defines these crimes for purposes of domestic criminal prosecutions. However, in doing so it does not limit itself to the provisions of the Rome Statute. Instead, the Act extends Canadian criminal jurisdiction over core international crimes not only on the basis of the territorial and nationality principles, as does the Rome Statute;[46] but also on the basis of the passive personality and quasi-universal principles.[47] Similarly, the definitions of genocide, crimes against humanity and war crimes adopted in the Act take the Rome Statute definitions as their starting point but go further in defining these crimes in terms of evolving customary or conventional international law.

In some cases, domestic treaty implementing legislation explicitly provides that interpretation of the implementing (and sometimes other) legislation is to be consistent with the international agreement thus implemented. For example, section 3 of the North American Free Trade Implementation Act provides:

> For greater certainty, this Act, any provision of an Act of Parliament enacted by Part II and any other federal law that implements a provision of the Agreement or fulfils an obligation of the Government of Canada under the Agreement shall be interpreted in a manner consistent with the Agreement.[48]

Indeed some domestic implementing legislation goes further by providing that the terms of an implemented treaty shall prevail over any conflicting domestic legislation, including the implementing legislation itself. For example, some Canadian provincial legislation implementing the 1980 Hague Convention on the Civil Aspects of Inter-

[43] For example, Canada chooses, in the Oceans Act, to rely upon a system of geographical coordinates of points joined by geodesics in order to give effect to UNCLOS's provisions relating to the use of straight baselines for purposes of establishing the boundaries of a coastal state's maritime zones: see Oceans Act (n 37), ss 5, 13, 17, 25, and UNCLOS (n 38), Article 7.

[44] Crimes and Crimes Against Humanity Act SC 2000 c 24 (CAHWCA); Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute).

[45] The Rome Statute provides that the Court may only exercise jurisdiction over the core crimes where national legal systems fail or are unable genuinely to do so, clearly making the Court's jurisdiction secondary or 'complementary' to that of national criminal systems. Ibid, Article 17.

[46] Ibid, Article 12(2).

[47] CAHWCA (n 44), s 8. 'Quasi-universal' jurisdiction refers to the exercise of jurisdiction over crimes having no territorial or national links to Canada other than the presence of the accused in Canadian territory at the time such jurisdiction is exercised. This 'presence requirement' belies classification of such jurisdiction as genuinely 'universal' jurisdiction: see *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 5, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, [41], [45].

[48] North American Free Trade Implementation Act, SC 1993 c 44, s 3.

national Child Abduction[49] 'contain[s] the provision that, in the event of a conflict between the Convention and any other legislative scheme, the Convention prevails'.[50]

As final examples, a number of provincial or territorial human rights codes make preambular reference to certain sources of international human rights law. For example, the Ontario Human Rights Code provides in its preamble:

> Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations.[51]

The Yukon Human Rights Act[52] goes somewhat further by spelling out, in its preamble, the consequences of Canada's international human rights obligations, and referring to such obligations in its first operative section.

## 1.3 Federalism and International Law

The constitutions of Canada's provinces are embedded in the written and unwritten Constitution of Canada itself.[53] There are no specific references to international law in the provincial constitutional aspects of Canada's written constitution. However, the provinces are affected by those aspects of Canada's unwritten Constitution that address matters relating to international law.

Canada's written Constitution is virtually silent with respect to federal authority over matters concerning international law. One arguable exception to this is found in the Letters Patent of 1947, by which all of the King's prerogative powers in respect of Canada were delegated to the Governor-General.[54] It is widely considered that this delegation comprised the foreign affairs power,[55] including the treaty-making power, in respect of Canada as a whole.[56] This position is contested by the province of Québec, which claims power to conclude international agreements in

[49] Hague Conference on Private International Law, Hague Convention on the Civil Aspects of International Child Abduction (adopted 25 October 1980), Hague XXVIII, [1983] Can TS no 35.

[50] *Thomson v Thomson* [1994] 3 SCR 551 (La Forest J for the majority).

[51] Human Rights Code RSO 1990 c H-19 preamble.

[52] Human Rights Act RSY 2002 c 116.

[53] For a description of the complex web of sources of Canada's provincial constitutions, see Hogg (n 4), ss 4.5, 4.7.

[54] Letters Patent Constituting the Office of Governor General of Canada RSC 1985 App II No 31. While not listed among the instruments comprising Canada's written Constitution in the s 52(2) schedule to the Constitution Act, 1982 (n 3), the fundamental importance of the Letters Patent to the exercise of federal executive authority in Canada surely elevates them to constitutional status. The powers delegated in the Letters Patent are today exercised, as a matter of constitutional convention, on the advice of the federal cabinet: see Hogg (n 4), s 11.2.

[55] Hogg (n 4), s 11.2.

[56] See *References re The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act, and The Limitation of Hours of Work Act* [1936] SCR 461, 488–9 (Duff CJ writing for himself and Kerwin and Davis JJ) (*Labour Conventions Reference (SCC)*); *Thomson* (n 50) [112]–[113] (L'Heureux-Dubé J, McLachlin J concurring); Hon P. Martin, Secretary of State for External Affairs, *Federalism and International Relations* (Ottawa: Queen's Printer, 1968) 11–33; G.L. Morris, 'The Treaty-Making Power: A Canadian Dilemma" (1967) 45 Can Bar Rev 478, 484.

areas assigned to exclusive provincial legislative jurisdiction under section 92 of the Constitution Act 1867.[57] In practice, however, the federal executive alone concludes international treaties.[58]

Mention should be made of the federal Department of Foreign Affairs and International Trade Act.[59] Section 10 of that Act gives the Minister of Foreign Affairs the power to conduct Canada's foreign affairs, including the power to conduct and manage international negotiations as they relate to Canada, coordinate Canada's international economic relations, and 'foster the development of international law and its application in Canada's external relations'.[60] Similarly, section 10(1) of the federal Extradition Act empowers the Minister of Foreign Affairs, with the agreement of the Minister of Justice, to 'enter into a specific agreement with a State or entity for the purpose of giving effect to a request for extradition in a particular case'.[61]

With respect to treaty performance (where this requires the enactment of implementing legislation), such legislation must be enacted by either Parliament, or the provincial legislatures, or both, depending on whether the subject-matter of the treaty falls within the legislative competence of Parliament or the provincial legislatures, respectively, as established in the Constitution Act 1867. This requirement is explored in greater detail in section 2.2 below.

## 2. Treaties and Other International Agreements

In Canada, the debate regarding the legally binding effect of treaties has been considered in the context of international human rights, particularly in the context of the Canadian Charter of Rights and Freedoms,[62] which is the legislative implementation of Canada's international human rights treaty commitments.[63]

[57] See eg Ministère des Relations internationales, *Quebec's International Policy: Working in Concert* (Québec: Gouvernement du Québec, 2006); An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State SQ 2000 c 46, s 7; An Act Respecting the Ministère des Relations Internationales RSQ c M-25.1, ss 19–22.4. See also C Emanuelli, *Droit international public: contribution à l'étude du droit international selon une perspective canadienne* (2nd edn, Montréal : Wilson and Lafleur, 2004) 92; J.-Y. Morin, 'La personnalité internationale du Québec'(1984) 1 RQDI 163; J.-Y. Morin, 'Le Québec et le pouvoir de conclure des accords internationaux'(1966) 1 Études Jur Can 136; A.-M. Jacomy-Millette, *Treaty Law in Canada* (Ottawa: University of Ottawa Press, 1975) 78–94.

[58] Hogg (n 4), ss 11.2, 11.6; A.E. Gotlieb, *Canadian Treaty Making* (Toronto: Butterworths, 1968) 4–6. The provinces of course retain the ability to enter into various reciprocal arrangements with foreign jurisdictions: see eg *Ontario (Attorney General) v Scott* [1956] SCR 137 (inter-jurisdictional agreement on the reciprocal enforcement of judgments). However, these agreements do not amount to treaties at international law unless they have been negotiated and ratified at the provinces' behest by the federal government.

[59] Department of Foreign Affairs and International Trade Act RSC 1985 c E-22.

[60] Ibid, s 10.

[61] Extradition Act (n 30), s 10(1).

[62] Canadian Charter of Rights and Freedoms (n 13).

[63] M. Cohen and A.F. Bayefsky, 'The Canadian Charter of Rights and Freedoms and International Law' (1983) 61 Can Bar Rev 265.

In a dissent in *Re Public Service Employee Relations Act*, Dickson CJ expressed a point of view that set the tone for resorting to international law in Canada:

> The *Charter* conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions . . . The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the 'full benefit of the *Charter*'s protection.' I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified . . . In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the *Charter*, these norms provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, especially when they arise out of Canada's international obligations under human rights conventions.[64]

In this statement, Dickson CJ draws a distinction between two categories of international legal instruments: (1) those that, while not necessarily binding upon Canada as a question of law, fit generally into the category of contemporary international human rights law, (2) and those that actually bind Canada as a matter of international law.[65] The first category includes treaties such as the European Convention on Human Rights and the American Convention on Human Rights; declarations and other inherently non-binding norms,[66] such as the Universal Declaration of Human Rights,[67] the Helsinki Final Act, and other documents of the Organization for Security and Co-operation in Europe, the Standard Minimum Rules for the Treatment of Prisoners, the Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities, and the UN Declaration on the Rights of Indigenous Peoples. Such non-binding or 'soft-law' norms are said to be relevant and persuasive to the interpretation of the Charter because they are sources of comparative law, not international law proper.[68] Canadian courts have a long tradition of referring to comparative law sources. Where fundamental rights are concerned, there has been a particular affinity for the

[64] *Re Public Service Employee Relations Act* [1987] 1 SCR 313, 348–50.

[65] This part draws from W.A. Schabas and S. Beaulac, *International Human Rights and Canadian Law—Legal Commitment, Implementation and the Charter* (3rd edn, Toronto: Thomson Carswell, 2007) 84–90.

[66] On non-binding norms, in general, see: C. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 Int'l & Comp LQ 850.

[67] It has been argued that at least some of the norms contained in the Universal Declaration represent codified provisions of customary human rights law: R.B. Bilder, 'The Status of International Human Rights Law: An Overview' (1978) Int'l L & Pr 1, 8; J. Humphrey, 'The Canadian Charter of Rights and Freedoms and International Law'(1985–1986) 50 Sask L Rev 13; J. Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact and Judicial Character' in B.G. Ramcharan (ed.), *Human Rights: Thirty Years After the Universal Declaration* (The Hague: Martinus Nijhoff, 1984).

[68] See K. Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 NYUJ Int'l L & Pol 501.

case-law of the US courts with respect to that country's Bill of Rights, which predates the Canadian Charter.

The second category identified by the Chief Justice—instruments that are legally binding upon Canada—includes instruments such as the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the Rome Statute of the International Criminal Court. The provisions of these instruments are often similar to those of the Charter, and they have been ratified or acceded to by Canada. According to Dickson CJ, Canada is bound by international law to protect such rights within its borders. Interestingly, he did not specifically base his conclusion on the classic rule of interpretation by which domestic legislation is presumed to be consistent with international obligations. Rather, he wrote that 'general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in *Charter* interpretation'.

Dickson CJ's interpretation of these two categories has been very influential. In a 1988 speech, former Justice of the Supreme Court of Canada Gérard La Forest stated of the Chief Justice's position in *Re Public Service Employee Relations Act*: 'Though speaking in dissent, his comments on the use of international law generally reflect what we all do.'[69] More recently, in 2000 another former Justice of Canada's highest court, Michel Bastarache, opined similarly: 'While Chief Justice Dickson rejected the implicit incorporation of international law doctrine in a dissenting judgment, his opinion reflects the present state of the law.'[70] While the famous 'relevant and persuasive' passage has been cited on numerous occasions in subsequent Canadian cases, the distinction suggested by the Chief Justice between binding and non-binding instruments has generally been ignored. Canadian judges rarely, if ever, consider international law sources by taking into account whether they have a legally binding effect on Canada. Instead, they tend to consider *all sources* of international human rights law as 'relevant and persuasive'.

To be entirely accurate, there continues to be some authority for distinguishing between binding and non-binding instruments, but it is of little real significance. In the 2005 decision in *Mugesera*, for example, the Supreme Court of Canada spoke of 'the importance of interpreting domestic law in a manner that accords with the principles of customary international law and with Canada's treaty obligations'.[71]

[69] G.V. La Forest, 'The Use of International and Foreign Material in the Supreme Court of Canada' in *Proceedings, XVIIth Annual Conference* (Ottawa: Canadian Council on International Law, 1988) 230, 232.

[70] M. Bastarache, 'The Honourable G.V. La Forest's Use of Foreign Materials in the Supreme Court of Canada and His Influence on Foreign Courts' in R. Johnson and J.P. McEvoy (eds), *Gérard v La Forest at the Supreme Court of Canada, 1985–1997* (Winnipeg: Canadian Legal History Project, 2000) 433, 434.

[71] *Mugesera* (n 20) [82].

The Court referred to the 1999 case of *Baker*,[72] which is seminal in many regards for the reception of international law in Canada. Justice L'Heureux-Dubé for the majority relied heavily on the Convention on the Rights of the Child, noting that it had been ratified by Canada and was thus binding upon it. But after acknowledging the fact of ratification, she conceded that: 'International treaties and conventions are not part of Canadian law unless they have been implemented by statute.' She proceeded with the observation that 'the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review'.[73] Justice L'Heureux-Dubé then discussed two important instruments that are non-binding by their very nature, the Universal Declaration of Human Rights and the Declaration on the Rights of the Child. She concluded as follows: 'The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights.'[74] Accordingly, the majority in *Baker* did not operate on any actual distinction between binding and non-binding sources of international human rights law.

## 2.2 Domestic Incorporation of Treaties

Unlike many countries in the world, Canada is not described as 'monist' because its legal system does not consider domestic law and international law as forming a coherent and holistic body of law. At least in respect to treaties,[75] Canada follows the 'dualist' logic of reception, which means that treaty obligations cannot be enforced by a domestic court unless and until they have been transformed by the legislative branch of government. In an official opinion dated April 2002, the Legal Bureau of the Department of Foreign Affairs of Canada wrote:

> It is the legislative implementation of treaties that affords Parliament its main role in the treaty process: if new legislation must be passed, or existing legislation amended, it is Parliament that must pass or amend the legislation according to usual parliamentary practices.[76]

On numerous occasions, Canadian courts have endorsed and used the dualist approach, stating unambiguously that the mere ratification or accession to a treaty does not in any way, shape, form, or alter the law enforceable within the country.[77] As

[72] *Baker v Canada (Minister of Citizenship & Immigration)* [1999] 2 SCR 817 (*Baker*).
[73] Ibid [69].
[74] Ibid [71].
[75] This is said to contrast, in Canada, with the reception of customary international law. However, see S. Beaulac, 'Customary International Law in Domestic Courts: Imbroglio, Lord Denning, *Stare Decisis*' in C.P.M. Waters (ed.), *British and Canadian Perspectives on International Law* (Leiden and Boston: Martinus Nijhoff, 2006) 379.
[76] C. Swords (ed.), 'Canadian Ratification Practice' (2002) 40 Can YB Int'l L 491.
[77] *Arrow River & Tributaries Slide & Boom Co v Pigeon Timber Co* [1932] SCR 495; *Francis v R* [1956] SCR 618; *Capital Cities Communications Inc v Canada (Radio-Television & Telecommunications Commission)* [1978] 2 SCR 141; *Baker* (n 72).

the Judicial Committee of the Privy Council stated in the famous *Labour Conventions* case:

> Within the British Empire, there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes.[78]

Given Canada's dualist approach and federalist system, provinces must participate in the transformation of treaties in order to give effect to norms falling within their legislative authorities. Under the Constitution Act 1867, particularly sections 91 and 92, sovereign powers are divided up in Canada between the federal government and provincial governments.[79] To give a few examples, under section 91 the federal authority has jurisdiction over trade and commerce, unemployment insurance, the postal service, military and naval defence, navigation and shipping, fisheries, currency and coinage, banking, weights and measures, bankruptcy and insolvency, copyrights, marriage and divorce, immigration, and criminal law. On the other hand, under section 92 of the Constitution Act 1867, the provincial authorities are competent over public lands, the management of hospitals, municipal institutions, local works and undertakings, the celebration of marriage, property and civil rights, as well as the administration of justice, penal offences, and under paragraph 16: 'Generally all matters of a merely local or private nature in the province.'

Since the Constitution did not explicitly define whether the national or provincial authority was competent to implement treaties, this issue was decided in 1937 by the Judicial Committee of the Privy Council in the *Labour Conventions* case.[80] This case held that the legislative authority to implement international treaties is not the exclusive competence of the central government of Canada. It is the subject-matters of these agreements that determine what legislative authority has competence to implement them in the domestic legal order, pursuant to sections 91 and 92 of the Constitution Act 1867. The legislative authority to implement international treaty norms in domestic law is thus shared between the two levels of government in Canada, federal and provincial. This better respects the federal character of the Canadian constitutional structure.

There are countless examples of legislative implementation of international treaties by provincial authorities in Canada. For example, the 1980 Hague Convention on the Civil Aspects of International Child was incorporated by means of provincial implementing statutes, as described in *Thomson v Thomson*:

[78] *Canada (A-G) v Ontario (A-G)* [1937] AC 326, 347–8 (*Labour Conventions*).

[79] This part borrows from S. Beaulac, 'The Canadian Federal Constitutional Framework and the Implementation of the Kyoto Protocol' (2005) 5 Revue juridique polynésienne (hors série) 125.

[80] *Labour Conventions* (n 78).

The Uniform Law Conference agreed upon the text of a 'Uniform Act' to implement the *Hague Convention*. Four provinces (New Brunswick, Nova Scotia, Saskatchewan and Alberta) enacted legislation that paralleled the Uniform Act, including its provision that, in the event of a conflict between the *Convention* and any other enactment, the *Convention* prevailed: *International Child Abduction Act*, S.N.B. 1982, c. I-12.1; *Child Abduction Act*, S. N.S. 1982, c. 4; *The International Child Abduction Act*, S.S. 1986, c. I-10.1; and *International Child Abduction Act*, S.A. 1986, c. I-6.5.

Quebec chose not to enact the *Convention* at all, but to legislate equivalent provisions: *An Act respecting the civil aspects of international and interprovincial child abduction*, S.Q. 1984, c. 12. The five remaining provinces (Manitoba, Ontario, British Columbia, Prince Edward Island and Newfoundland) adopted the *Convention* in a more general statute dealing with the civil aspects of child abduction: *The Child Custody Enforcement Act*, S.M. 1982, c. 27 (now R.S.M. 1987, c. C360); *Children's Law Reform Amendment Act, 1982*, S.O. 1982, c. 20; *Family Relations Amendment Act, 1982*, S.B.C. 1982, c. 8, as am. by S.B.C. 1985, c. 72, s. 20; *Custody Jurisdiction and Enforcement Act*, S.P.E.I. 1984, c. 17; and *The Children's Law Act*, S.N. 1988, c. 61. Of these five, Ontario, Prince Edward Island and Newfoundland's enactments all contain the provision that, in the event of a conflict between the *Convention* and any other legislative scheme, the *Convention* prevails. Only the British Columbia and Manitoba Acts do not contain such supremacy provisions.[81]

As seen in these passages, the same international convention, which needs the involvement of provinces for domestic incorporation, will not necessarily be implemented the same way throughout the country.[82]

One of Canada's most respected specialists in legislative drafting, Ruth Sullivan, has identified two techniques used by the competent authorities to incorporate treaties into domestic law: (1) incorporation by reference and (2) harmonization.[83] The first technique directly implements the treaty, either by reproducing its provisions in the statute itself or by including the text as a schedule and somehow indicating that it is thus part of the statute.[84] However, in *Re Act Respecting the Vancouver Island Railway,* the mere scheduling of an international treaty was deemed insufficient by itself to give domestic effect to the norms therein.[85] The second technique, harmonization, is '[w]hen a legislature . . . redrafts the law to be implemented in its own terms so as to adapt it to domestic law'.[86] This is no doubt the mode of treaty incorporation that is most commonly used and in many areas of the law, including criminal law.

[81] *Thomson* (n 50) 601–2.

[82] This situation, of course, would run contrary to the spirit of article 29 of the Vienna Convention on the Law of Treaties, on the territorial scope of treaties, which reads: 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.' For more on this aspect, see S. Beaulac, 'National Application of International Law: The Statutory Interpretation Perspective' (2003) 41 Can YB Int'l L 225, 243.

[83] R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th edn, Markham and Vancouver: Butterworths, 2002) 430.

[84] For example, the International Organizations Act (n 33) directly incorporates the applicable provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.

[85] *Re Act Respecting the Vancouver Island Railway* [1994] 2 SCR 41.

[86] Sullivan (n 83) 434.

However, one must realize that the two techniques are not mutually exclusive. International norms in a treaty can be implemented not only by using one or the other technique but also by using a combination of both, where part of the treaty would be directly incorporated in the statute while another part would be incorporated through harmonization. The Immigration and Refugee Protection Act[87] is such an example of hybrid legislation that both directly implements and harmonizes Canadian law in view of the Convention Relating to the Status of Refugees.

The deciding factor in knowing whether or not a treaty has been incorporated into domestic law is the 'intention of Parliament'.[88] As Justice Lemieux of the Federal Court of Canada in explained the *Pfizer* case, 'whether an agreement is legislated so as to become endowed with statutory force is a matter of discovering Parliament's intention'.[89] Thus, when the statute explicitly declares that a certain international convention has 'force of law in Canada',[90] the implementing requirement is likely fulfilled.[91] Although the language that is used in the act is important, 'all of the tools of statutory interpretation can be called in aid to determine whether incorporation is intended'.[92] A similar view was expressed by the Quebec Court of Appeal in *UL Canada Inc.*,[93] which stated: 'One must, using all the rules of statutory interpretation, determine the intention of the legislature. Did it intend to incorporate the Agreement into internal law?'[94] Accordingly, the old view that 'courts should be able to say, on the basis of the expression of the legislation, that it is implementing legislation'[95] appears obsolete nowadays.

Such an assessment of legislative intention led the Federal Court in *Pfizer* to hold that the whole treaty known as the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement)[96] was not incorporated in Canada through the domestic legislation entitled 'World Trade Organization Agreement Implementation Act',[97] which even scheduled the relevant international documents. In *Pfizer,* Justice Lemieux held:

> When Parliament said, in section of the WTO Agreement Implementation Act, that the purpose of that Act was to implement the Agreement, Parliament was merely saying the obvious; it was providing for the implementation of the WTO Agreement as contained

[87] Immigration and Refugee Protection Act SC 2001 c 27.

[88] Generally, on the concept of 'legislative intent,' see S. Beaulac, *Handbook on Statutory Interpretation—General Methodology, Canadian Charter and International Law* (Markham: LexisNexis, 2008).

[89] *Pfizer Inc v Canada* [1999] 4 FC 441 (FCTD) 458.

[90] For instance, see s 3 of the United Nations Foreign Arbitral Awards Convention Act RSC 1985 c 16 2nd Supp; and s 3(1) of the Foreign Missions and International Organizations Act (n 33).

[91] Such clear intention to implement, however, is not necessarily conclusive as to the actual transformation of treaty norms domestically—see *Antonsen v Canada (A-G)* [1995] 2 FC 272 (FCTD) 305–6.

[92] See *Re Act Respecting the Vancouver Island Railway* (n 85) 110. See also *Cree Regional Authority v Canada (Federal Administrator)* [1991] 3 FC (FCA) 546–7, 551–2.

[93] *UL Canada Inc v Quebec (A-G)* [2003] RJQ 2729, 234 DLR (4th) 398, aff'd [2005] 1 SCR 10.

[94] Ibid [78].

[95] *MacDonald v Vapor Canada Ltd* [1977] 2 SCR 134, 171 (Laskin CJ).

[96] Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994) 1867 UNTS 3.

[97] World Trade Organization Agreement Implementation Act SC 1994 c 47.

in the statute as a whole including Part II dealing with specific statutory changes. When Parliament said in section 8 of the WTO Agreement Implementation Act that it was approving the WTO Agreement, Parliament did not incorporate the WTO Agreement into federal law. Indeed, it could not, because some aspects of the WTO Agreement could be only implemented by the provinces under their constitutional legislative authority pursuant to section 92 of the *Constitution Act, 1867*... What Parliament did in approving the Agreement is to anchor the Agreement as the basis for its participation in the World Trade Organization, Canada's adherence to WTO mechanisms such as dispute settlement and the basis for implementation where adaptation through regulation or adjudication was required.[98]

In short, as in any case of determination of the intention of Parliament, the statute should be read as a whole, in light of the language used, the objective pursued, and the context of the enactment under examination.[99]

There is a lagging issue when it comes to the implementation of treaty norms in Canada—whether or not relying on existing legislation is enough to determine actual incorporation of international law. This contention is often expressed in terms of 'passive incorporation' or 'incorporation by complacence'. Here is how defenders of such argument put it: 'Existing law often provides a sufficient basis to allow the legal advisers of the federal government to proceed with ratification of a treaty without the necessity of any new enactment.'[100] This view does not correspond to Canadian practice, and is not supported by any government statement or judicial authority. The argument can be attractive, given claims by Canadian authorities in reports to international treaty bodies that Canada's human rights commitments have been met on the basis of prior conformity.[101] However, this position contradicts the ideals of separation of powers, federalism, and democracy, and is not currently the law.

Since Canada uses a dualist model, it does not address treaties in terms of self-executing or non-self-executing. Under a dualist approach, international and national legal systems are separate. This results in two fundamental legal principles, one from international law and one from constitutional law. The first then is that a sovereign state is not entitled to invoke its internal law (including its constitutional structure)[102] in order to justify a breach of its international obligations.[103] The

[98] *Pfizer Inc v Canada* (n 89) 460.

[99] See also *R v Crown Zellerbach Canada Ltd* [1988] 1 SCR 401; and *R v Hydro-Quebec* [1997] 3 SCR 213.

[100] A. de Mestral and E. Fox-Decent, 'Rethinking the Relationship Between International and Domestic Law' (2008) 53 McGill LJ 573, 621. See, also of the McGill school on these issues: van Ert (n 16); and Brunnée and Toope (n 19).

[101] See, for instance, Canada's report to the United Nations Human Rights Committee, sitting under the first Optional Protocol to the International Covenant on Civil and Political Rights: Human Rights Committee, *Consideration of Reports Submitted by States under Article 40 of the Covenant: Fourth Periodic Report of States Parties Due in 1995: Canada*, UN CCPROR, 1995, UN Doc CCPR/C/103/Add.5.

[102] See R. Jennings and A. Watts (eds), *Oppenheim's International Law*, vol 1 (9th edn, London: Longman, 1992) 254.

[103] The basic authority for this proposition is the arbitration decision in the *Alabama Claims* case (United States/United Kingdom) (1872), Moore, *Arbitrations*, i. 653. This rule was codified in s 27 of the Vienna Convention on the Law of Treaties. See also P. Daillier and A. Pellet (eds), *Nguyen Quoc Dinh—Droit international public* (5th edn, Paris: LGDJ, 1994) 272.

essential reason why domestic law cannot justify a failure to honour obligations vis-à-vis the international community is that these norms and duties belong to two distinct and separate legal systems.

The second core legal principle springing from the international/internal divide is in fact a set of rules concerning the administration of the relationship between the two systems. These rules determine how the two legal systems interact, including the way in which the norms from one may be used in the other. As Francis Jacobs explained, 'the effect of international law generally, and of treaties in particular, within the legal order of a State will always depend on a rule of domestic law. The fundamental principle is that the application of treaties is governed by domestic constitutional law.'[104] This is fundamentally an application of the dualist logic.

In terms of judicial activities, the international/domestic dichotomy means that domestic courts apply their domestic law, while the International Court of Justice and other international tribunals apply international law. Put another way, the constitutional mandate of domestic courts is to interpret and apply domestic law, not international law. This normative division, however, does not mean that international judicial bodies cannot take into account domestic law. Conversely, domestic judges may resort to international law when it has become part of the laws of the land through reception rules.[105] While recent cases provide for more flexibility in using international law domestically,[106] the orthodoxy remains: 'International treaties and conventions are not part of Canadian law unless they have been implemented by statute.'[107]

## 2.3 Standing and Private Rights of Action

Canadian courts are entrusted with the interpretation and application of Canadian law, including treaty implementing statutes. The general rule is that private parties do not have direct contact with international norms, as a treaty cannot be invoked

[104] F.G. Jacobs, 'Introduction' in F.G. Jacobs and S. Roberts (eds), *The Effect of Treaties in Domestic Law* (London: Sweet & Maxwell, 1987) xxiii, xxiv. This represents the traditional position, which is challenged by the 'internationalist conception' of the relation between international law and domestic law, advocated by some authors in the United States, according to which, 'the incorporation and status of international law in the US legal system should be determined, at least to some extent, by international law itself'. C.A. Bradley, 'Breard, Our Dualist Constitution and the Internationalist Conception' (1999) 51 Stanford L Rev 529, 531.

[105] If an authority was needed, the clearest judicial pronouncement in Canadian case-law may be found in the *Reference re Secession of Quebec* (n 5) 235, where, in rejecting the argument that it had no jurisdiction to look at international law, the Supreme Court of Canada wrote this: 'In a number of previous cases, it has been necessary for this Court to look to international law to determine the rights or obligations of some actor within the Canadian legal system.' The Court cited the following case-law in support: *Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences* [1943] SCR 208; *Reference re Ownership of Offshore Mineral Rights of British Columbia* (n 11); and *Reference re Newfoundland Continental Shelf* [1984] 1 SCR 86. See also S. Beaulac, 'On the Saying that International Law Binds Canadian Courts' (2003) 29(3) CCIL Bulletin 1.

[106] See S. Beaulac, 'Recent Developments on the Role of International Law in Canadian Statutory Interpretation' (2004) 25 Statute L Rev 19; and A.W. La Forest, 'Domestic Application of International Law in Charter Cases: Are We There Yet?' (2004) 37 UBCL Rev 157.

[107] *Baker* (n 72) 861.

and enforced in litigation between private parties. Canada's domestic law governs any domestic litigation involving domestic actors, be they private or public. The norms applied may be statutory or judge-made law, and can include the means by which international law is incorporated into domestic law, such as treaty implementing legislation. Be it as it may, the legal rules that private parties invoke are domestic law. The same remarks apply for issues of standing and private rights of action.

The 2002 Supreme Court of Canada decision in *Suresh*[108] provides a relatively recent illustration of the situation. At issue in this case was a ministerial decision under immigration legislation that allows deportation to a country where a refugee faces serious risks of torture in exceptional cases of national security. Central to the issue was whether such deportation was contrary to the principles of fundamental justice protected by section 7 of the Canadian Charter of Rights and Freedoms. To determine the scope of protection against torture in Canada, the Court first referred to domestic law, and then continued its analysis under international law, stating: 'A complete understanding of the Act and the Charter requires consideration of the international perspective.'[109] Such an 'international perspective' involved considering (without deciding the issue, however) whether the international prohibition on torture was a peremptory norm of customary international law (*jus cogens*), as well as examining the provisions of three international conventions: the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention Relating to the Status of Refugees. It was clear for the Supreme Court of Canada that such treaty-based international norms were merely acting as persuasive authority in its interpretation and application of section 7 of the Charter. Even though the court found that international law prohibited any deportation to face torture, even in exceptional cases of national security, the court held that, under Canadian domestic law, 'in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1'.[110]

Accordingly, the legal norm against torture in Canada was held to be different from the one that exists in the international legal order. This indicates without a doubt that the international law argument was given some weight by the Court, but not a determinative weight, let alone a controlling one.

## 2.4 Treaty Interpretation

In Canada, there is no established practice for government authorities to provide an official interpretation for treaties. The judiciary does not defer to the political branches of government regarding the interpretation and application of Canadian law. However, several cases from the Supreme Court of Canada in the 1980s and 1990s seem to suggest that the international interpretation influences the domestic

[108] *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 (*Suresh*).
[109] Ibid. [110] Ibid [78].

interpretation. Since the 1990s the highest court has not referred to the interpretive provisions of the Vienna Convention on the Law of Treaties (Vienna Convention). There has been no need for the court to resort to international law in such contexts because of a recent convergence of methodological approaches in respect to international treaties and domestic legislation.

It was at the Ontario Court of Appeal that, in the 1980s, the first explicit reference was made to the international interpretive methodology in the interpretation of legal norms incorporated by domestic legislation. At issue in *R v Palacios*[111] was Canada's Diplomatic and Consular Privileges and Immunities Act,[112] which implemented the Vienna Convention on Diplomatic Relations, giving it 'the force of law'[113] in Canada, including the grounds on which diplomatic immunity may be lost, such as when a diplomat leaves the country. When interpreting the expression 'leave the country' found in section 39(2) of the Convention, Blair JA of the Ontario Court of Appeal stated: 'The principles of public international law and not domestic law govern the interpretation of treaties. . . . These rules of interpretation apply even where, as in this case, a treaty has been incorporated in a statute.'[114]

At the Supreme Court of Canada, the first time international rules of interpretation were referred to was in *R v Parisien*,[115] which involved the construction of Canada's Extradition Act.[116] In his reasoning, La Forest J did not explicitly distinguish international interpretation methodology from that applicable in Canadian domestic law, but he did refer to the interpretive provisions of the Vienna Convention by name, stating that an extradition treaty 'must, as in the case of other terms in international agreements, be read in context and in light of its object and purpose as well as in light of the general principles of international law; see Art. 31 of the *Vienna Convention on the Law of Treaties*'.[117]

At the Supreme Court of Canada, there have been several other instances in the 1980s and 1990s where the Vienna Convention was invoked in the interpretation of implementing legislation.[118] The last one was the 1998 case of *Pushpanathan*, where Bastarache J for the majority, applied and quoted at length the Vienna Convention.[119]

It has been more than ten years since Canada's highest court referenced the interpretive rules of the Vienna Convention. There was no shortage of occasions to do so, with several cases involving implementing legislation that directly incorporated treaty obligations in Canada's domestic law, either by reproducing

[111] *R v Palacios* (1984) 7 DLR (4th) 112.
[112] Diplomatic and Consular Privileges and Immunities Act SC 1976–1977 c 31.
[113] *Palacios* (n 111) 116.
[114] Ibid 120–1.
[115] *R v Parisien* [1988] 1 SCR 950.
[116] Extradition Act RSC 1970 c E-21.
[117] *Parisien* (n 115) 958.
[118] These cases include: *Canada (A-G) v Ward* [1993] 2 SCR 689, 713; *Thomson* (n 50); and *Crown Forest Industries Ltd v Canada* [1995] 2 SCR 802, 827. Note that in the case of *Ward*, rules of treaty interpretation were used without explicit reference to the Vienna Convention.
[119] *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982.

the treaty or by scheduling it in a statute. Yet, despite numerous opportunities, there has been no reference whatsoever to the methodology of interpretation applicable on the international plane.[120] The author's hypothesis for this is that the Canadian legal system has evolved considerably in the last few decades, such that the domestic approach and international approach are largely similar. The traditional strict and literal interpretation of statutes has left the way to a much more liberal, purposive, and dynamic construction of the Canadian Charter, other constitutional texts, ordinary statutes, and even implementing legislation.[121]

## 2.5 Reservations

Pursuant to the British-style parliamentary tradition, matters of international relations like the conclusion and ratification of treaties fall within the prerogatives of the Crown. In Canada, it is the executive branch of the federal government that exercises such prerogatives with respect to foreign affairs,[122] including the power to negotiate, sign and ratify international treaties. Neither the legislative branch of government nor the judiciary has any formal role to play at the stage of treaty formation,[123] which includes issues of reservations and their validity. Therefore, *ex ante*, a court cannot be involved in determining the scope or the legality of treaty reservations. It is unclear whether Canadian courts would decide the legality or effect of a reservation or declaration, as there is no judicial authority on this issue. This is not surprising given Canada's strict dualist approach to international law.

## 2.6 Non-binding Instruments as Persuasive Authority

The Supreme Court of Canada has required that the treaties they invoke, whether implemented or not into domestic law, be at least formally approved. In addition, the Supreme Court of Canada does not consider international law, whether a formally approved treaty or an instrument of 'soft-law', to be binding upon the Canadian courts, either in Charter interpretation or regular construction of ordinary law.[124]

[120] See eg *Mugesera* (n 20); *GreCon Dimter inc v JR Normand inc* [2005] 2 SCR 401 (*GreCon Dimter*); *Dell Computer* (n 25). See also Sullivan (n 83) 430–1: 'In interpreting an incorporated provision, the court appropriately looks to international law materials and to interpretations of the incorporated provision by international courts or by courts in other jurisdictions.'

[121] For more details, see S. Beaulac and P.-A. Côté, 'Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization' (2006) 40 Revue juridique Thémis 131.

[122] See A.-M. Jacomy-Millette, *L'introduction et l'application des traités internationaux au Canada* (Paris: LGDJ, 1971) 102.

[123] However, in January 2008, the federal government announced that all treaties will be tabled in the House of Commons of the Parliament of Canada prior to ratification for a period of 21 days. It must be noted that this new policy is very much a courtesy on the part of the executive branch of government, which continues to have sole authority to decide whether, after the involvement of Parliament, to bind Canada to an international convention by means of ratification or otherwise.

[124] S. Beaulac, 'Arrêtons de dire que les tribunaux au Canada sont 'liés' par le droit international' (2004) 5 Revue juridique Thémis 359.

Two decisions by the Supreme Court of Canada, in the area of labour law, show how the line between treaties and other international instruments or documents is blurred in Canadian case-law.[125] In the 1999 case of *Delisle*,[126] the issue was whether the exclusion of members of the Royal Canadian Mounted Police from the definition of 'employee' in section 2(e) of the Public Service Staff Relations Act,[127] constituted an infringement of constitutionally protected freedom of association. The majority held that there was no violation because the statute did not affect their right to form an independent union and carry on labour activities outside the statutory regime. Dissenting Justices Cory and Iacobucci stated that the very purpose of the exclusion at hand was to ensure that these employees remain unassociated and thus vulnerable to management, which was sufficient in itself to constitute an infringement of their freedom of association.[128] In support of the basic right to form and join a labour union, the dissenting justices referred to many international instruments: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Labour Organization's Convention (No 87) Concerning Freedom of Association and Protection of the Right to Organize, as well as the Concluding Document of the Madrid Meeting of the Conference on Security and Co-operation in Europe.[129] The latter instrument is not an international convention, but the dissenting justices noted that 'All of these instruments protect the fundamental freedom of employees to associate together in pursuit of their common interests as employees.'[130] As such, they were all referred to in order to help interpret section 2(d) of the Canadian Charter.

A similar argument was presented later in the *Dunmore* case.[131] The case bore many similarities with *Delisle*: it concerned agricultural workers who were excluded from the Ontario Labour Relations Act 1996,[132] but without an express provision prohibiting them from associating. The court not only cited international conventions to which Canada was a party, but also gave considerable weight to ILO Convention No 11, even though it has not been ratified by Canada This demonstrates the Canadian practice to treat all sources of international law, as 'relevant and persuasive sources' in the interpretation and application of domestic law.

Using this 'relevant and persuasive' doctrine, Canadian courts do not draw a hard distinction between international instruments that are binding upon Canada at international law, and those that are not. They may all play a persuasive role in the judicial process of interpreting and applying domestic law. For example, Canada often references the European human rights regime, especially when interpreting the

[125] This part draws from Schabas and Beaulac (n 65) 320–3.
[126] *Delisle v Canada (Deputy A-G)* [1999] 2 SCR 989 (*Delisle*).
[127] RSC 1985 c P-35.
[128] *Delisle* (n 126) [107].
[129] Ibid [71].
[130] Ibid.
[131] *Dunmore v Ontario (A-G)* [2001] 3 SCR 1016.
[132] Labour Relations Act 1995 SO 1995 c 1 Sch A s 3(b).

Canadian Charter.[133] The courts have cited not only the European Convention on Human Rights, but also the case-law of the European Court of Human Rights.[134]

A recent example is the 2004 decision in *Canadian Foundation for Children, Youth and the Law*, the so-called 'spanking case'.[135] In this case, the Supreme Court of Canada examined a section of the Criminal Code that exempted parents and teachers from criminal sanctions for the use of corrective force on children or pupils that is 'reasonable under the circumstances'. In deciding whether this legislative norm was unconstitutional based on the 'void for vagueness' doctrine,[136] McLachlin CJ resorted to the interpretive guidance provided by the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights, as well as by the European Convention on Human Rights and its case-law.[137]

Canadian courts find the comments and observations of European jurists, whose training and outlook is not unlike their own, to be quite persuasive. According to La Forest J, writing extra-judicially:

> The Convention decisions are obviously not directly applicable to the Canadian context, reflecting as they do the compromises necessary for a multinational agreement in Post-war Europe. However, given that the Commission has had the opportunity to consider many of

[133] Especially in the early years of *Charter* interpretation. See, for example: *R v Oakes* (1983) 145 DLR (3d) 123, aff'd [1986] 1 SCR 103l; *R v King* [1984] 4 WWR 531; *Rowland v R* (1984) 10 DLR (4th) 724; *Lazarenko v Law Society (Alberta)* [1984] 4 DLR (4th) 389; *Borowski v Canada (A-G)* [1984] 4 DLR (4th) 112; *Reference re Education Act (Ontario)* [1984] 10 DLR (4th) 491; *R v Morgentaler* [1984] 12 DLR (4th) 502, aff'd (1984) 14 CRR 107; *R v Punch* [1985] 22 CCC (3d) 289; *Association des détaillants en alimentation du Québec v Ferme Carnaval Inc* [1986] RJQ 2513; *Black v Law Society of Alberta* [1986] 27 DLR (4th) 527, aff'd [1989] 1 SCR 591; *Ford v Quebec (A-G)* [1988] 2 SCR 712; *Borowski v Canada (A-G)* [1987] 39 DLR (4th) 731, aff'd [1989] 1 SCR 342; *R v Schmidt* [1987] 1 SCR 500;*R v Morgentaler* [1986] 22 DLR (4th) 641, rev'd [1988] 1 SCR 30; *Cotroni v Centre de Prévention de Montréal* [1989] 1 SCR 1469; *Tremblay v Daigle* [1989] 2 SCR 530; *R c Pearson* [1990] RJQ 2438, rev'd [1992] 3 SCR 665; *Lippé v Charest* [1990] RJQ 2200, rev'd [1991] 2 SCR 114; *R v Keegstra* [1990] 3 SCR 697; *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892; *Lavigne v OPSEU* [1991] 2 SCR 211; *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779; *Québec (Commission des droits de la personne) v Immeubles Ni/Dia Inc* [1992] RJQ 2977; *Commission des droits de la personne du Québec v Commission scolaire Deux-Montagnes* [1993] RJQ 1297.

[134] Just at the Supreme Court of Canada, see: *R v Mills* [1986] 1 SCR 863; *R v Rahey* [1987] 1 SCR 588; *BCGEU v British Columbia (A-G)* [1988] 2 SCR 214; *Ford v Quebec (A-G)*, ibid; *Andrews v Law Society (British Columbia)* [1989] 1 SCR 143; *Irwin Toy Ltd v Quebec (A-G)* [1989] 1 SCR 927; *R v Conway* [1989] 1 SCR 1659; *Edmonton Journal v Alberta (A-G)* [1989] 2 SCR 1326; *R v Keegstra*, ibid; *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139; *R v Lippé*, ibid; *Lavigne v OPSEU*, ibid; *Kindler v Canada*, ibid; *Reference re Ng Extradition (Canada)* [1991] 2 SCR 858; *R v Butler* [1992] 1 SCR 452; *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606; *R v Potvin*, [1993] 2 SCR 880; *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835; *Thomson Newspapers Co v Canada (A-G)* [1998] 1 SCR 877; *R v Lucas* [1998] 1 SCR 439; *United States v Burns* [2001] 1 SCR 283 (*Burns*); *R v Advance Cutting & Coring Ltd* [2001] 3 SCR 209; *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.

[135] *Canadian Foundation for Children, Youth and the Law v Canada (A-G)* [2004] 1 SCR 76 (*Foundation for Children*).

[136] On the void for vagueness doctrine in Canada, see S. Beaulac, 'Les bases constitutionnelles de la théorie de l'imprécision: partie d'une précaire dynamique globale de la Charte' (1995) 55 Revue du Barreau 257.

[137] *Foundation for Children* (n 135) [33]–[34]. The European Court of Human Rights decision referred to was *A v United Kingdom* (App No 25599/94) 23 September 1998, Reports 1998-VI.

the issues that are coming before our courts, the more frequent citation of these materials would assist us as we develop a Canadian approach to these common issues.[138]

Canada is surely not alone. The case-law of the European Court of Human Rights has had an impact on many domestic courts outside of Europe. For example, its landmark decision on the so-called 'death row phenomenon'[139] has been cited not only by the Supreme Court of Canada,[140] but also by the US Supreme Court,[141] the Supreme Court of Zimbabwe,[142] the South African Constitutional Court,[143] the High Court of Tanzania,[144] and the Judicial Committee of the Privy Council, sitting in review of the Jamaican Court of Appeal.[145]

It is not only in the area of human right law that one finds references to European legal experience. In the 2004 decision by the Supreme Court of Canada in *Society of Composers, Authors and Music Publishers of Canada*,[146] resort was made to the WIPE Copyrights Treaty when addressing interpretive issues dealing with Canada's Copyright Act.[147] In this case, Justice Binnie noted that 'Canada is a signatory but not yet a party to the *WIPE Copyrights Treaty*'.[148] He then proceeded to consider the situation in Europe, which is bound by the said treaty and where the European Commission has adopted, in 2000, a piece of legislation entitled 'Directive on Electronic Commerce'.[149]

## 3. Customary International Law

As observed above, Canada has a Constitution 'similar in principle to that of the United Kingdom'.[150] In the United Kingdom, it is well-settled that customary international law that does not conflict with legislation automatically forms part of the common law and, as such, has direct legal effect in British courts without the need for intervention or transformation by domestic law-making

[138] GV La Forest (n 69) 241.
[139] *Soering v United Kingdom and Germany*, 7 July 1989, series A, vol 161, 11 EHRR 439.
[140] *Kindler v Canada* (n 133).
[141] *Lackey v Texas* 115 SCt 1421, 63 LW 3705, 131 LEd2d 304 (1995).
[142] *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General* et al (1993) 1 ZLR 242 (S), 4 SA 239), 14 Human Rights Law Journal 323 (ZSC).
[143] *S v Makwanyane* 1995 (3) SA 391, (1995) 16 Human Rights Law Journal 154.
[144] *Republic v Mbushuu* [1994] 2 LRC 335.
[145] *Pratt v Jamaica (A-G)*, [1994] 2 AC 1, 14 Human Rights Law Journal 338, 33 ILM 364 (Jamaica; PC).
[146] *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers* [2004] 2 SCR 427.
[147] Copyright Act RSC 1985, c C-42.
[148] *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers* (n 146) [65].
[149] *Directive 2000/31/EC of the Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market* [2000] OJL 178/1.
[150] Constitution Act 1867 (UK) (n 1) preamble.

processes.[151] Notwithstanding Canada's British constitutional heritage, the situation has been less clear in Canadian law until recently, largely because the courts have tended not to address the issue expressly.[152] Rather, Canadian courts have for many years appeared implicitly to espouse an adoptionist stance,[153] giving rise to the cautious conclusion that 'there is room for the view that the law on the relationship of customary international law to domestic law in Canada is the same as it is in England'.[154] More recently, some commentators have taken a more robust view of Canadian law's embrace of the doctrine of adoption.[155] Recent case-law tends to support the latter view, although the matter is still not clear of all doubt.

The leading early case, usually cited as probable authority for the adoptionist approach to customary international law in Canada, is the *Foreign Legations Reference*.[156] In that case, the Supreme Court of Canada was asked to give an advisory opinion on whether the Ontario Assessment Act[157] applied to property owned by foreign states in the national capital region. Section 4 of the Act did not expressly address this issue but simply provided that 'All real property in Ontario . . . shall be liable to taxation.' Implicit in the question before the Court was the status of customary international law granting immunities to foreign states from local taxation. While Duff CJ appeared in his judgment to adopt the proposition that customary international law was presumptively part of the common law of Canada, and Justice Taschereau concurred in a separate opinion with the Chief Justice, the three remaining judges deciding the case were not explicit in their support for such an adoptionist position. As such, the adoptionist position did not unambiguously command a clear majority of the opinions in the case. Nevertheless, the overall tendency in the cases following the *Foreign Legations Case* has been to implicitly endorse the position articulated by Duff CJ.

[151] See, for example, *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 (Eng CA). In this judgment, Lord Denning traces the origins of this rule to the early eighteenth century and provides a succinct overview of the relevant precedents: ibid 553. See also *Buvot v Barbuit* (1737) 25 ER 777 (Ch); *Heathfield v Chilton* (1767) 4 Burrow 2015 (Lord Mansfield); S. Fatima, *Using International Law in Domestic Courts* (Oxford: Hart Publishing, 2005) 403–6; and I. Brownlie, *Principles of Public International Law* (7th edn, Oxford: Oxford University Press, 2008) 41–4.

[152] See generally J.H. Currie, *Public International Law* (2nd edn, Toronto: Irwin Law, 2008) 226–331.

[153] The term 'incorporationist' is more common in British practice whereas 'adoptionist' tends to be used in Canadian practice. On the vagaries of the terminology used in this area of the law, see van Ert (n 16) 3–5.

[154] R. St J. Macdonald, 'The Relationship between International Law and Domestic Law in Canada' in R. St J. Macdonald, G.L. Morris and D.M. Johnston (eds), *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) 88, 111. See also Brunnée and Toope (n 19) 42–51, reviewing the ambiguous and sometimes conflicting Canadian case-law and tentatively concluding that 'the best view appears to be that customary law can operate directly within the Canadian legal system'.

[155] See in particular the excellent analyses of the law in this area by van Ert (n 16) 182–27; and F Larocque and M Kreuser, 'L'incorporation de la coutume internationale en common law canadienne' [2007] 45 Can YB Int'l L 173.

[156] *Reference Re Powers of Ottawa (City) and Rockcliffe Park* [1943] SCR 208 (*Foreign Legations Case*).

[157] Assessment Act RSO 1937 c 272 (now RSO 1990 c A-31).

This is illustrated in the advisory opinion given by the Supreme Court of Canada in *Re Newfoundland Continental Shelf*.[158] In that case one of the principal issues was whether customary international law relating to the status of the continental shelf had progressed sufficiently by 1949, the date of Newfoundland's entry into Confederation, to have vested Newfoundland with sovereign rights over the continental shelf off its coasts. While the Court did not expressly address the nature of the relationship between customary international law on this issue and the domestic legal and constitutional questions before it, the careful review of customary international law carried out by the Court would appear to be an implicit acknowledgment of its direct legal relevance in Canadian law.

Similarly, in the *Québec Secession Reference*,[159] the Supreme Court considered at length the customary international law of self-determination of peoples in determining the legality of a potential unilateral declaration of independence by the National Assembly of Québec. It addressed objections to its jurisdiction to consider international law in this context by stating:

> In addressing this issue, the Court does not purport to act as an arbiter between sovereign states or more generally within the international community. The Court is engaged in rendering an advisory opinion on certain legal aspects of the continued existence of the Canadian federation. *International law has been invoked as a consideration and it must therefore be addressed*.[160]

While a somewhat cryptic and cursory statement on a complex and critical issue, this could be read as an endorsement of the direct legal effect or relevance of customary international law in construing the common law constitution of Canada.[161] There are many similar examples of such implicit adoption of customary international law in Canadian common law.[162]

[158] *Reference re Newfoundland Continental Shelf* [1984] 1 SCR 86 (*Newfoundland Continental Shelf* ).

[159] *Québec Secession Reference* (n 5).

[160] Ibid 276 (emphasis added).

[161] But see S.J. Toope, 'Case Comment on the *Québec Secession Reference*' (1999) 93 AJIL 519, 523–5, referring to the Court's 'complete disregard for customary law'; and Brunnée and Toope (n 19) 45, arguing that the Court 'failed completely to engage with the customary law on self-determination', suggesting that 'a dualist position may implicitly have been adopted'. With respect, this seems an overly pessimistic reading. While the Court did fail to advert to customary international law as such, it did indicate that 'the principle [of self-determination] has acquired a status beyond 'convention' and is considered a general principle of international law' (see [114]). Moreover, the Court did in fact refer to several elements of non-conventional state practice and *opinio juris* (admittedly, without labelling them as such), suggesting that, at least in substance, it was applying customary international law. Certainly, the Court failed to take account of some recent, mainly European, state practice in this area, but that speaks to the quality of the Court's analysis of customary international law rather than to rejection of its applicability in principle.

[162] See for example *Saint John v Fraser-Brace Overseas Corp* [1958] SCR 263, 268–9 (Rand J) (*Saint John*) (again dealing with the effect of the customary international law of state immunities from municipal taxation); *Pushpanathan* (n 119) 1029–35 (referring to the customary international legal meaning attributed to the words 'contrary to the principles of the United Nations' in interpreting legislation implementing treaty obligations relating to refugee status). See also *The Ship* '*North*' v *The King* (1906) 37 SCR 385, 394 (Davies J) (*The Ship* '*North*'); *Reference as to Whether Members of the Military or Naval Forces of the United States of America Are Exempt from Criminal Proceedings in Canadian Criminal Courts* [1943] SCR 483, 502 (Kerwin J) (*Re US Armed Forces*); *Finta* (n 15); *Baker*

More recently, a number of lower Canadian courts have been more explicit in their support for the adoptionist approach to customary international law. For example, in litigation arising from the 1995 boarding and arrest by Canadian officials of the Spanish fishing trawler *Estai* in international waters (during the so-called 'turbot war'), the Federal Court of Canada considered 'well settled' the proposition that 'accepted principles of customary international law are recognized and are applied in Canadian courts, as part of the domestic law unless, of course, they are in conflict with domestic law'.[163] Similarly, in addressing a lawsuit brought by an Iranian expatriate against Iran for alleged torture, the Ontario Court of Appeal accepted that 'customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation'.[164]

A majority in the Supreme Court of Canada has also recently revisited the issue in *R v Hape*.[165] Interestingly, this case turned solely on interpretation of the Canadian Charter of Rights and Freedoms,[166] such that its discussion of the doctrine of adoption must likely be considered obiter dicta.[167] After reviewing the somewhat ambivalent adoptionist stance taken by the Canadian courts to date, LeBel J, writing for five members of the Court, concluded:

> Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. *The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary*. Parliamentary sovereignty

(n 72); *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Ville)* [2001] 2 SCR 241, [30]–[32] (*Spraytech*); *Suresh* (n 108) [61]–[65]; *Schreiber v Canada (Attorney General* [2002] 3 SCR 269 [48]–[50] (LeBel J) (*Schreiber*). But see *Gouvernement de la République démocratique du Congo v Venne* [1971] SCR 997 (*Congo v Venne*). It should be noted that while the Court relied extensively on customary international law in *Mugesera* (n 20), it did so in the context of statutory interpretation, and (at least in considering the definition of 'crimes against humanity') in light of the express incorporation of customary international law in s 7(3.76) of the Canadian Criminal Code RSC 1985 c C-46. Accordingly, the question of the relationship between customary international law and Canadian common law did not arise in that case.

[163] *Jose Pereira E Hijos SA v Canada (Attorney General)* [1997] 2 FC 84 [20] (TD) (*Jose Pereira*).

[164] *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675 [65] (CA), leave to appeal ref'd [2005] 1 SCR vi (*Bouzari*). See also *Mack v Canada (Attorney General)* (2002) 60 OR (3d) 737 [32] (CA), leave to appeal ref'd [2003] 1 SCR xiii.

[165] *R v Hape* [2007] 2 SCR 292 (*Hape*). The accused had been convicted of money laundering based in part on evidence gathered abroad by Canadian police officers working co-operatively with local police. The principal issue in the case was whether the *Charter*'s s 8 protection against unreasonable search and seizure extended to the offshore activities of Canadian law enforcement officials. Relying in part on customary international legal principles of territorial sovereignty, non-intervention and extraterritorial jurisdiction, the majority concluded it did not: *Hape*, ibid [55]–[56], [85] (LeBel J).

[166] *Canadian Charter of Rights and Freedoms* (n 13).

[167] See discussion of this point in JH Currie, 'Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law' [2007] 45 Can YB Int'l L 55, 85–6, n 136.

dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.[168]

While this appears to have been an attempt to clarify the direct domestic effect of customary international law through the doctrine of adoption,[169] this paragraph, and the majority's subsequent application of the 'doctrine of adoption' in *Hape*, gives rise to considerable uncertainties as to the true interpretation of that doctrine.[170] In particular, this and other passages from *Hape* could be read to endorse as many as five different understandings of the relationship between customary international law and Canadian common law, as follows:

- customary international law *is automatically part of* the common law of Canada in the absence of conflicting legislation;[171]
- customary international law *should be incorporated into* the common law of Canada in the absence of conflicting legislation;
- customary international law *may be incorporated into* the common law of Canada in the absence of conflicting legislation;[172]
- customary international law *may aid in the development of* the common law of Canada; or
- customary international law *may aid in the interpretation of* the common law of Canada.[173]

*Hape* therefore arguably formulates several mutually inconsistent versions of the doctrine of adoption, both monist and dualist in nature,[174] without stipulating which one prevails. Some clarification as to whether the majority's intention was indeed to endorse the first of these alternative formulations—the only one clearly consistent with the doctrine of adoption applied in English law[175]—is therefore necessary.

[168] *Hape* (n 165) [39] (emphasis added).

[169] See R Sullivan, *Sullivan on the Construction of Statutes* (5th edn, Markham Ont: Butterworths, 2008) 558 n 82; Larocque and Kreuser (n 155).

[170] See discussion in Currie (n 167) 63–6.

[171] See also *Hape* (n 165) [56], where the majority refers to the principle of 'the direct application of international custom'.

[172] See also ibid [46], holding that principles of customary international law 'may be adopted into the common law of Canada in the absence of conflicting legislation;' and [36], where the English position is paraphrased thus: 'Prohibitive rules of international law may be incorporated directly into domestic law through the common law.... According to the doctrine of adoption, the courts may adopt rules of customary international law as common law rules.'

[173] See also ibid [70], where the majority refers to the 'context and interpretive assistance set out in the foregoing discussion'.

[174] On the distinction between monist and dualist models for the reception of international law in domestic law, see van Ert (n 16) 3–5; Currie (n 167) 220–4. See also G Fitzmaurice, 'The General Principles of International Law: Considered from the Standpoint of the Rule of Law' (1957-II) 92 Rec des Cours 5, 68–85; and J.G. Starke, 'Monism and Dualism in the Theory of International Law' (1936) 17 Brit YB Int'l L 66.

[175] See authorities collected (n 151).

To summarize, it can cautiously be concluded that, unless a statute is expressly and irreconcilably to the contrary effect, a rule of customary international law will be deemed to form part of the common law of Canada and to have direct domestic legal effect as such.[176] As a logical corollary, existing statutory law that does not expressly override inconsistent rules of customary international law will generally be interpreted by the courts in such a way as to conform to the latter.[177] In this way, it is probable that customary international law is readily received in Canadian domestic law via the common law while preserving the domestic legal system's ultimate ability, through its legislative branch, to control the content of domestic law through express override of a customary/common law rule.

## 3.1 Deference to the Executive or Legislature

There are a number of legislative provisions that provide for executive certification of matters of fact, such as the identity of a state or a head of government,[178] the existence of an extradition agreement,[179] or the status of a treaty.[180] Such certificates will generally be deemed by the courts to be conclusive proof of their contents.[181] There is, however, no general doctrine of judicial deference to the executive or legislative branches with respect to the existence or content of customary international law. Indeed any such doctrine would be inconsistent with the presumed common law status of customary international law[182] and the rule that judicial notice is to be taken of customary international law.[183]

However, courts generally defer to the legislative branch with respect to the content of domestic law, pursuant to the principle of legislative or parliamentary supremacy.[184] This is the basis of the limitation on the direct domestic effect of customary international law due to irreconcilable conflict with constitutionally valid legislation.[185] It also means that in the case of statutes addressing matters governed by customary international law, such as Canada's State Immunity Act,[186] courts will give effect to clear statutory language even if it contradicts the current state of customary international law.[187]

[176] See van Ert (n 16) 194–208; Currie (n 167) 226–35; Larocque and Kreuser (n 155) 220–1.

[177] See van Ert (n 16) 131–2; Sullivan (n 169) 538–9, 548–9; P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd edn, Scarborough: Carswell, 2000) 367–8; *Hape* (n 165) [53]–[54]; *Jose Pereira E Hijos S.A.* (n 163) [20].

[178] State Immunity Act RSC 1985 c S-18, s 14(1).

[179] Extradition Act (n 30), s 10(3).

[180] See eg *Institut National des Appellations d'Origine des Vins et Eaux-de-Vie v Château-Gai Wines Ltd* [1975] SCR 190, 199; *Ganis v Canada (Minister of Justice)* (2006) 216 CCC (3d) 337 [23]–[26] (BCCA); *Château-Gai Wines Ltd v Attorney General of Canada* [1970] Ex CR 366, 382–4.

[181] *Ganis* (n 180) [23].

[182] See further section 3 above.

[183] See further section 3.2 below.

[184] See *Hape* (n 165) [39], [53], [68]; Macdonald (n 154) 119; Hogg (n 4) [12.2]; Sullivan (n 169) 431; and R Sullivan, *Statutory Interpretation* (Concord Ont: Irwin Law, 1997) 34.

[185] See further above, section 3.

[186] State Immunity Act (n 178).

[187] See *Schreiber* (n 162) [50]–[51]; *Bouzari* (n 164) [66]–[67].

Legislatures on occasion explicitly defer to the courts with respect to the existence or content of customary international law. For example, Canada's Crimes Against Humanity and War Crimes Act[188] defines the offences of genocide, crimes against humanity, and war crimes according to customary international law.[189] This is clearly a legislative invitation to the courts to determine and apply the relevant customary international law when applying the statutory definitions of genocide, crimes against humanity, and war crimes.

## 3.2 Judicial Notice of Customary International Law

While there are few clear and authoritative Canadian decisions on point, it is generally assumed by Canadian commentators and courts alike that judicial notice is taken of customary international law, in keeping with the position in English law.[190] The same position is generally considered to apply in Québec on the basis of legislation providing that 'judicial notice shall be taken of the law in force in Québec'.[191] The effect of this provision is generally taken to encompass customary international law.[192]

One of the few Canadian cases explicitly addressing judicial notice of customary international law is *The Ship* '*North*'.[193] The issue in that case was whether Canadian law enforcement authorities had exceeded their jurisdiction in arresting an American fishing vessel, beyond the (then-prevailing) three nautical mile limit of Canada's territorial sea, for illegal fishing in Canadian waters. At first instance, the Admiralty Court took judicial notice of customary international law's doctrine of hot pursuit onto the high seas in order to find jurisdiction. On appeal to the Supreme Court of Canada, two members of the Court explicitly held that 'the Admiralty Court . . . is bound to take notice of the law of nations' and that the right of hot pursuit under the law of nations 'was properly judicially taken notice of and acted upon by the learned judge'.[194] One other member of the Court relied upon the doctrine of hot pursuit in concurring reasons, albeit without explicitly addressing the judicial notice question; another simply concurred in the result without

[188] CAHWCA (n 44).

[189] Ibid, ss 4(3), 6(3)-(4). See also *Mugesera* (n 20) [133ff], interpreting the offence of crimes against humanity formerly defined with reference to customary international law in Canada's Criminal Code (n 162) s 7(3.76).

[190] See eg Macdonald (n 154) 112–13; van Ert (n 16) 42–56, 62–6; A Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) 138–9. For critical commentary on the appropriateness of such an approach, and suggestions for reform, see Knop (n 68) 525; A Warner La Forest, 'Evidence and International and Comparative Law' in O.E. Fitzgerald (ed.), *The Globalized Rule of Law: Relationships Between International and Domestic Law* (Toronto: Irwin Law, 2006) 367, 384; G van Ert, 'The Admissibility of International Legal Evidence'(2005) 84 Can B Rev 31, 44–6. The leading English decisions supporting judicial notice of customary international law include *Triquet v Bath* (1764) 97 ER 936, 938 (KB); *Buvot v Barbuit* (n 151); *Re Piracy Jure Gentium* [1934] AC 586, 588 (JCPC); *The Christina* [1938] AC 485, 497 (HL); *Chung Chi Cheung v The King* [1939] AC 160, 168 (JCPC); *Trendtex* (n 151) 569 (Stephenson LJ).

[191] Civil Code of Québec SQ 1991 c 64, s 2807.

[192] See Emanuelli (n 57) 73.

[193] *The Ship* '*North*' (n 162).

[194] Ibid 394 (Davies J, MacLennan J concurring).

giving reasons; while yet another dissented, finding that the doctrine of hot pursuit was not available due to a conflict with domestic legislation. From this mix of opinions, one can discern a predominating preference for taking judicial notice of customary international law.[195]

In many other cases, Canadian courts have simply taken judicial notice of customary international law without explicitly addressing the existence of a rule of law permitting them to do so.[196] While in some cases expert evidence has been led, and occasionally admitted, on the existence or content of customary international law, this has generally been treated as legal argument rather than evidence in the strict sense.[197]

### 3.3 Subject Areas of Customary International Law

As illustrated in the discussion preceding section 3.1 above, the primary subject areas or contexts in which customary international law has been invoked or applied by Canadian courts include the existence or scope of sovereign or diplomatic immunities,[198] the extent of offshore maritime zones,[199] self-determination and state succession,[200] international criminal law,[201] human rights,[202] environmental law,[203] and state jurisdiction.[204]

## 4. Hierarchy

Treaties do not formally have the force of law in Canada's domestic legal system unless legislatively implemented.[205] If legislatively implemented, treaty obligations

[195] See also *Re US Armed Forces* (n 162) 524 (Rand J); *Finta* (n 15) 773–4 (La Forest J dissenting on another point).

[196] See eg *Foreign Legations Case* (n 156); *Saint John* (n 162); *Offshore Mineral Rights (BC)* (n 11); *Newfoundland Continental Shelf* (n 158); *R v Crown Zellerbach Canada Ltd* [1988] 1 SCR 401 (*Crown Zellerbach*); *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 (*Slaight Communications*); *Ordon Estate v Grail* [1998] 3 SCR 437; *Québec Secession Reference* (n 5); *Baker* (n 72); *United States v Burns* [2001] 1 SCR 283 (*Burns*); *Spraytech* (n 162); *Suresh* (n 108); *R v Malmo-Levine; R v Caine* [2003] 3 SCR 571; *Mugesera* (n 20); *GreCon Dimter* (n 120); *Hape* (n 165); *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia* [2007] 2 SCR 391, 2007 SCC 27 (*Health Services*).

[197] See for example *Québec Secession Reference* (n 5); *Re Bill C-7 Respecting the Criminal Justice System* (2003) 228 DLR (4th) 63 (Qué CA); *Bouzari* (n 164). But see *Romania v Cheng* (1997) 158 NSR (2d) 13 (SC) aff'd (1997) 162 NSR (2d) 395 (CA). See also generally van Ert (n 16) 50–4, 69; A Bayefsky, *Self-Determination in International Law: Quebec and Lessons Learned* (The Hague: Kluwer Academic, 2000).

[198] See eg *Foreign Legations Case* (n 156); *Re US Armed Forces* (n 162); *Saint John* (n 162); *Congo v Venne* (n 162); *Schreiber* (n 162); *Bouzari* (n 164).

[199] See eg *The Ship North* (n 162); *Re Newfoundland Continental Shelf* (n 158); *Jose Pereira* (n 163).

[200] See eg *Québec Secession Reference* (n 5).

[201] See eg *Finta* (n 15); *Mugesera* (n 20).

[202] See eg *Pushpanathan* (n 119); *Baker* (n 72); *Suresh* (n 108); *Mack* (n 164); *Bouzari* (n 164).

[203] See eg *Spraytech* (n 162).

[204] See eg *The Ship North* (n 162); *Re US Armed Forces* (n 162); *Jose Pereira* (n 163); *Hape* (n 165).

[205] See further sections 2.6, 2.6 above.

rank equally with other domestic legislation. However, the presumption of statutory conformity with Canada's international legal obligations may give slightly more weight to treaties because domestic legislation will, in so far as possible, be interpreted to conform to Canada's treaty obligations, rather than the other way around.[206] This indirect effect is limited, however, by the principle that clear legislative language will override irreconcilably inconsistent treaty provisions.[207]

As seen above, it is likely that customary international law has direct domestic effect in Canada as common law.[208] It is much less clear in Canadian law, however, whether customary international law overrides established common law precedent (as is the case in English law),[209] or vice versa. On the one hand, there is somewhat dated Supreme Court of Canada authority for the proposition that customary international law does not displace existing common law precedent.[210] On the other hand, there is more recent, if somewhat inconclusive, lower court and Supreme Court of Canada authority implying that binding common law precedent may yield to contrary rules of customary international law.[211] This is a matter that will require further clarification by the Canadian courts. In any case it is clear that customary international law, as common law, will yield to clearly inconsistent statutory language,[212] including any such language implementing treaty obligations. However, the courts will strain to avoid this result by seeking to interpret legislation in a manner consistent with the relevant rule of customary international law.[213]

## 4.1 Presumption of Conformity

The Canadian courts' approach to the effect of customary international law on Canadian common law has already been noted above in section 3. Other than this, perhaps the most significant development in the Canadian courts' stance vis-à-vis international law in recent years has been their development and entrenchment of an interpretive 'presumption of conformity' of Canadian legislation with Canada's

[206] See further section 4.1 below.

[207] *Hape* (n 165) [53]. See also van Ert (n 16) 131–2; Sullivan (n 169) 548–9; Côté (n 177) 367–8; H.M. Kindred, 'The Use and Abuse of International Legal Sources by Canadians Courts' in Fitzgerald (n 190) 5, 8–9.

[208] See section 3 above.

[209] See *Trendtex* (n 151) 553; Fatima (n 151) 403–36; and Brownlie (n 151) 41–4.

[210] See *Re US Armed Forces* (n 162) 490 (Duff CJ for the majority). This decision may be considered dated as it was based upon the precedent of the Judicial Committee of the Privy Council in *Chung Chi Cheung v The King* (n 190) 168 (Lord Atkin), which has since been superseded in English law by *Trendtex* (n 151). See generally discussion in van Ert (n 16) 184–94, 208–13. See also Macdonald (n 154) 102–5.

[211] See eg *Gouvernement de la République démocratique du Congo v Venne* [1969] BR 818(Qué CA), reversed on other grounds by the Supreme Court of Canada (n 162); *Re Canada Labour Code* [1992] 2 SCR 50, 73–4 (La Forest J for the majority); *Hape* (n 165) [36], [39]. See discussion in van Ert (n 16) 211–12, 216–18.

[212] See *Hape* (n 165) [39], [53], [68]; Macdonald (n 154) 119; Hogg (n 4) [12.2]; Sullivan (n 169) 431; Sullivan (n 184) 34.

[213] See van Ert (n 16)131–2; Sullivan (n 169) 538–9, 548–9; Côté (n 177) 367–8; *Hape* (n 165) [53]–[54]; *Jose Pereira E Hijos S.A.* (n 163) [20].

binding international legal obligations, whether found in treaty or customary international law.[214]

In one of its earliest clear articulations by a majority of the Supreme Court of Canada, in the 1990 decision in *National Corn Growers*,[215] this presumption was originally conceived as a means of reconciling Canada's treaty commitments and domestic legislation implementing them. The presumption was therefore originally premised on respect for legislative intent:

> In interpreting legislation *which has been enacted with a view towards implementing international obligations*, as is the case here, it is reasonable for a tribunal to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations.[216]

This original conception was repeated and applied in such cases as *Ward* (1993),[217] *Thomson v Thomson* (1994),[218] *Pushpanathan* (1998)[219] and *Ordon Estate v Grail* (1998).[220]

However, the presumption of conformity is not confined to the implementing legislation context. In particular, in the 1999 majority Supreme Court of Canada decision in *Baker*,[221] the seeds were sown for a radical extension of the scope of the presumption. In *Baker*, the majority found that the 'values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review', and described the Convention on the Rights of the Child as an 'aid in interpreting domestic law'—even though it remained formally unimplemented in Canadian legislation.[222]

A majority of the Supreme Court revisited and arguably extended the *Baker* approach in 2001 in *Spraytech*.[223] *Spraytech* required interpretation of provincial and municipal legislation to ensure that the latter came within the grant of delegated legislative authority provided in the former. Recalling the majority ruling in *Baker,* the *Spraytech* majority suggested that international environmental law's 'precautionary principle' may be customary international law.[224] It also noted that its interpretation of the by-law in issue 'respected,' and its interpretation of the enabling provincial legislation was 'consistent' with, that principle.[225] Again, the majority used very cautious language: the precautionary principle was described merely as 'context'; and no presumption of conformity of domestic legislation with that arguable principle of international law was asserted. Rather, conformity was merely noted to exist, almost as a fortuitous coincidence. But the *Spraytech* majority's invocation of *Baker* seemed at

[214] See generally van Ert (n 16) 130–81; Currie (n 167) 248–59; J.H. Currie, 'International Law in the Jurisprudence of the McLachlin Court' in D. Wright and A. Dodek (eds), *The McLachlin Court's First Decade: Reflections on the Past and Projections for the Future* (Toronto: Irwin Law, 2011) 391.

[215] *National Corn Growers Assn v Canada (Import Tribunal)* [1990] 2 SCR 1324 (*National Corn Growers*) (Gonthier J for the majority).

[216] Ibid 1371 (emphasis added). [217] *Ward* (n 118). [218] *Thomson* (n 50).

[219] *Pushpanathan* (n 119) 1029–35.

[220] *Ordon Estate* (n 196) [137] (Iacobucci and Major JJ).

[221] *Baker* (n 72). [222] Ibid [70]. [223] *Spraytech* (n 162).

[224] Ibid [32]. [225] Ibid [30]–[31].

least to suggest that the permissible use of international law to interpret domestic legislation was not limited to treaty law, but could also extend to customary international law—perhaps even if not clearly established as such.

The Court's subsequent decisions decisively went much further, clearly overtaking *Baker* and *Spraytech,* and dramatically extending the role of the presumption of conformity well beyond its *National Corn Grower* roots. *Schreiber* (2002)[226] offered a first inkling of such an extension.[227] In *Schreiber*, the Court was invited by one of the interveners to apply international law when construing the State Immunity Act.[228] The Court demurred, on the ground that the domestic legislation was clearer and more detailed than international law and that nothing was therefore to be gained from considering the latter.[229] However, in doing so the Court also endorsed a much earlier dictum of Justice Pigeon, writing for himself in the 1968 case of *Daniels v White*:[230] 'Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law . . . [although] if a statute is unambiguous, its provisions must be followed even if they are contrary to international law.'[231] The majority in *Schreiber* characterized this dictum as the rule governing 'when international law is appropriately used to interpret domestic legislation'.[232] Remarkably, it did so without tying such a presumption to the interpretation of domestic *implementing* legislation. However, it also did not address how such an extension of the presumption of conformity could be reconciled with the requirement of legislative implementation of treaty obligations before they can have domestic legal effect.[233] Nevertheless, following *Schreiber* the Supreme Court of Canada has relied upon this much broader presumption of conformity in numerous cases and contexts.

For example, in *Canadian Foundation for Children* (2004),[234] the majority referred without qualification to the presumption that '[s]tatutes should be interpreted to comply with Canada's international obligations'.[235] It accordingly applied a number of Canada's international treaty obligations, most unimplemented, in order to construe section 43 of the Criminal Code[236] in a way that avoided

[226] *Schreiber* (n 162).

[227] It is arguable that the judgment of Dickson J, writing for the Court in *Zingre v The Queen* [1981] 2 SCR 392, 406–7, 409–10, had already implicitly applied a presumption of conformity to the interpretation of non-implementing legislation. However, the language used in the judgment could also support the view that its use of the relevant treaty as an interpretive aid was confined to the particular facts of the case and that no general principle was being adumbrated by the Court; and it has not been cited by the Court as support for the presumption of conformity in the non-implementation context until very recently. See eg *Hape* (n 165) [54].

[228] State Immunity Act (n 178).

[229] *Schreiber* (n 162) [51].

[230] *Daniels v White and The Queen* [1968] SCR 517.

[231] Ibid 541 (Pigeon J concurring).

[232] *Schreiber* (n 162) [50].

[233] See further section 2.3 above.

[234] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 SCR 76 (*Canadian Foundation for Children*).

[235] Ibid [31] (McLachlin CJ for the majority).

[236] Criminal Code (n 162).

unconstitutionality on the basis of vagueness. In *Mugesera* (2005),[237] the Court was called upon to interpret the elements of the Criminal Code offence of genocide.[238] In doing so, the Court underlined '[t]he importance of interpreting domestic law in a manner that accords with the principles of customary international law and with Canada's treaty obligations'.[239]

In *GreCon Dimter* (2005),[240] the Court had to determine which of two apparently inconsistent provisions of the Civil Code of Québec[241] should prevail in determining whether the Québec courts had jurisdiction over an action brought by a Québec importer against a German manufacturer. Noting that Canada (and thus Québec) is bound by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[242] and that the 'legislature has incorporated the principles of the *New York Convention* . . . into Quebec law by enacting the substance of the Convention',[243] the Court found that the '*New York Convention* is therefore a formal source for interpreting the domestic law provisions'.[244] However, the Court went further still in describing the way in which this formal source was to be applied. The Court wrote: 'The interpretation of the provisions in issue . . . *must necessarily be harmonized* with the international commitments of Canada and Quebec.'[245]

*National Corn Growers* articulated a rebuttable presumption of conformity of implementing legislation with international treaty obligations, one that courts 'should . . . strive' to apply 'where the text of the domestic law lends itself to it'.[246] Subsequent articulations of the presumption of conformity, which asserted that courts 'should' strive to interpret domestic legislation in conformity with Canada's international legal obligations, also implied its rebuttable nature.[247] The language quoted from *GreCon Dimter* above, by contrast, appears on its face to make such conformity mandatory and arguably gives the treaty controlling effect. The Court tied this rule to the 'presumption that the legislature is deemed not to intend to legislate in a manner that cannot be reconciled with the state's international obligations',[248] but did not explain why such a 'presumption' entails a restatement of the *National Corn Growers* rule in such unqualified, compulsory terms.

[237] *Mugesera* (n 20).
[238] Criminal Code (n 162), s 318(1).
[239] Ibid.
[240] *GreCon Dimter* (n 120).
[241] Civil Code of Québec (n 191) Articles 3139, 3148(2).
[242] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958) 330 UNTS 3, [1986] Can TS No 43 (*New York Convention*); see *GreCon Dimter* (n 120) [40].
[243] *GreCon Dimter* (n 120) [41].
[244] Ibid. See also *Dell Computer* (n 25) [38]–[41], [44]–[47] and [73]–[75] (DesChamps J); and [175] (Bastarache and LeBel JJ dissenting).
[245] *GreCon Dimter* (n 120) [39] (emphasis added).
[246] *National Corn Growers* (n 215) 1371.
[247] See eg *Canadian Foundation for Children* (n 234) [31] (McLachlin CJ): 'Statutes *should* be construed to comply with Canada's international obligations' [emphasis added].
[248] *GreCon Dimter* (n 120) [39], citing Côté (n 177) 367.

While both the majority and dissenting judgments in the subsequent *Dell Computer* (2007) case[249] relied on *GreCon Dimter*'s conclusion that the New York Convention was a formal source for the interpretation of domestic law, neither addressed the seemingly mandatory conformity rule enunciated by the Court in *GreCon Dimter* or its apparent departure from prior articulations of the presumption.

Clarification on this point may however be gleaned from *Hape* (2007),[250] where a majority of the Court affirmed, albeit in obiter, the nature and scope of the presumption of conformity:

> It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. . . . The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation. . . . The presumption applies equally to customary international law and treaty obligations.[251]

Again, here the presumption is stated without limiting its application to implementing legislation or to treaty obligations that have been implemented domestically. However, the rebuttable nature of the presumption is once again underscored, as is its application to both Canada's obligations under customary international law and treaties.

Thus, the Supreme Court of Canada has expanded the scope of the presumption of statutory conformity well beyond its origins as a device for reconciling Canada's treaty obligations and legislation implementing those obligations domestically. Rather, the presumption now clearly requires Canadian courts to interpret all domestic legislation, whether or not it purports to implement treaty obligations, in a manner consistent with all of Canada's international legal obligations, whether or not they take the form of treaty obligations. However, the presumption is rebuttable where the terms of the domestic legislation cannot, through interpretive ingenuity, be reconciled with the international legal obligation.[252]

One particularly notable application of the presumption of statutory conformity with international law arises in the context of interpreting Québec's Charter of Human Rights and Freedoms.[253] This statute, the counterpart to other Canadian provinces' human rights codes, has repeatedly been interpreted by Québec's *Tribunal des droits de la personne* in light of the presumption of conformity with Canada's international human rights obligations.[254]

[249] See *Dell Computer* (n 25) [38]–[41], [44]–[47] and [73]–[75] (DesChamps J); and [175] (Bastarache and LeBel JJ dissenting).

[250] *Hape* (n 165).

[251] Ibid [53]–[54].

[252] Ibid [53]. See also van Ert (n 16) 131–2; Sullivan (n 169) 548–9; Côté (n 177) 367–8.

[253] Charter of Human Rights and Freedoms RSQ c C-12.

[254] See eg *Dufour v Centre hospitalier St-Joseph de la Malbaie* [1992] RJQ 825 (TDPQ); *Québec (Commission des droits de la personne) v Immeubles Ni-Dia Inc* [1992] RJQ 2977 (TDPQ); *Kafé et Commission des droits de la personne du Québec v Commission scolaire Deux-Montagnes* [1993] RJQ 1297 (TDPQ); *Roy et Commission des droits de la personne et des droits de la jeunesse du Québec v Maksteel Québec Inc* [1997] RJQ 2891 (TDPQ); *ML et Commission des droits de la personne du Québec v Maison des jeunes* [1998] JTDPQ No 31 (TDPQ).

The Canadian courts have also articulated a number of interpretive presumptions designed to reconcile, to various degrees, interpretation of the Canadian Charter of Rights and Freedoms[255] (part of Canada's written Constitution) with Canada's international legal obligations. These presumptions are described in greater detail in section 4.4 below.

## 4.2 *Jus Cogens*

There has been limited recognition of the doctrine of *jus cogens* norms in Canadian case-law. Moreover, even where a rule of international law has been judicially recognized as having a *jus cogens* character, little if any domestic legal or practical significance has flowed from that characterization in itself.[256]

For example, in *Suresh,*[257] the Supreme Court of Canada addressed the issue of whether deportation to a risk of torture, on national security grounds, was consistent with the Canadian Charter of Rights and Freedoms. In considering the role that international law should play in answering this question,[258] the Court considered the nature of *jus cogens* norms in general[259] and whether the prohibition of torture in particular had acquired the status of such a peremptory norm in international law.[260] The Court's somewhat non-committal conclusion on this issue was that 'the prohibition of torture at international law . . . is considered by many academics to be an emerging, if not established peremptory norm, [which] suggests that it cannot be easily derogated from'.[261] However, the Court disclaimed any need to definitively resolve the issue, as 'this Court is not being asked to pronounce on the status of the prohibition on torture in international law'.[262] Given that the central task before the Court was interpretation of the Canadian Charter of Rights and Freedoms, this dictum appears to suggest that the peremptory character of a rule of international law is irrelevant to that exercise. This seems to be confirmed elsewhere in the judgment, where the Court appeared to accord the same interpretive weight to international law generally and *jus cogens* norms in particular.[263]

Another example of the apparently inconsequential recognition of the *jus cogens* concept by the Supreme Court of Canada is found in *Schreiber.*[264] One of the interveners in the case had argued that the Court's interpretation of Canada's State Immunity Act should take account of the fact that 'the right to the protection of mental integrity and to compensation for its violation has risen to the level of a peremptory norm of international law which prevails over the doctrine of sovereign

[255] Canadian Charter of Rights and Freedoms (n 13).
[256] See generally van Ert (n 16) 223–7.
[257] *Suresh* (n 108).
[258] See further, on the use of international law in interpreting the Canadian Charter of Rights and Freedoms, section 4.3 below.
[259] *Suresh* (n 108) [61].
[260] Ibid [62]–[65].
[261] Ibid [65].
[262] Ibid.
[263] Ibid [46]: *Charter* interpretation 'is informed . . . by international law, including *jus cogens*'. See also ibid [60].
[264] *Schreiber* (n 162).

immunity'.[265] The Court dismissed this submission on the basis that no such peremptory norm had been established.[266] However, the Court went further and rejected the relevance of 'international legal principles' generally in interpreting the State Immunity Act, given the clear terms of the latter and Parliament's authority to enact legislation contrary to international law.[267] This may suggest that, even if the peremptory norm asserted by the intervener had been established, it would have had no greater relevance than an ordinary rule of international law.

## 4.3 Constitutional Interpretation

When Canada's Constitution was 'patriated' from the United Kingdom in 1982,[268] it was also fundamentally amended by, inter alia, the inclusion of a constitutionally entrenched 'bill of rights' known as the Canadian Charter of Rights and Freedoms.[269] While it is widely accepted that the Charter does not, at least formally, implement any of Canada's international legal obligations,[270] the Canadian courts have liberally taken account of international human rights obligations when construing the fundamental guarantees set out in the *Charter*.[271] This is a relatively long-standing practice stretching back to the 1989 majority judgment of the Supreme Court of Canada in *Slaight Communications Inc. v Davidson,*[272] where it was held that 'the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified'. This rule is sometimes described as the 'minimum content presumption', meaning that the Charter should generally be interpreted to provide protections no less generous than those found in Canada's international human rights treaty obligations.[273]

However, subsequent case-law has displayed a surprising degree of variability in the role international human rights law plays in the interpretation of the Charter (as well as the range of international legal sources more generally that may be called upon for this purpose, as will be seen in section 4.4 below). *Suresh*[274] in particular signalled a retreat from *Slaight Communications*' minimum content presumption. In

[265] Ibid [48]. [266] Ibid [49]; see also [17]. [267] Ibid [50]–[51].

[268] 'Patriation' refers to the final surrender of the formal power to amend Canada's Constitution by the United Kingdom Parliament to the Canadian Parliament and legislatures, in accordance with amending formulae set out in the Constitution Act 1982 (n 3), ss 38–49.

[269] Canadian Charter of Rights and Freedoms (n 13).

[270] See eg *Ahani v Canada (Attorney General)* (2002) 58 OR (3d) 107 [31] (CA) (*Ahani*); Schabas and Beaulac (n 65) 59–67; Hogg (n 4) [36.9(c)]. But see van Ert (n 16) 333–5. For criticism of the *Ahani* decision, see J Harrington, 'Punting Terrorists, Assassins and Other Undesirables' (2003) 48 McGill LJ 55.

[271] See generally Schabas and Beaulac (n 65).

[272] *Slaight Communications* (n 196).

[273] See WS Tarnopolsky, 'A Comparison between the *Canadian Charter of Rights and Freedoms* and the *International Covenant on Civil and Political Rights*' (1982–83) 8 Queen's LJ 211; Hogg (n 4) [33.8 (c)], [36.9(c)]; Schabas and Beaulac (n 65) 61; Currie (n 167) 259; van Ert (n 16) 344. See also J. Claydon, 'International Human Rights Law and the Interpretation of the *Canadian Charter of Rights and Freedoms*' (1982) 4 SCLR 287. But see the cautionary note sounded with respect to such a 'minimum content' presumption by I. Weiser, 'Effect in Domestic Law of International Human Rights Treaties Ratified without Implementing Legislation' (1998) 27 Can Council Int'l L Proc 132, 138–9.

[274] *Suresh* (n 108).

*Suresh,* the Court accepted that deportation to torture is categorically prohibited by the International Covenant on Civil and Political Rights[275] and the Convention Against Torture,[276] to both of which Canada is a party.[277] Yet it also found that 'in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by section 7 of the Charter or under section 1.'[278] This either signals abandonment of the minimum content presumption, or underscores the significance of Dickson CJ's use of the qualification 'generally' in first setting it out.[279] More recently, however, in the collective bargaining/freedom of association context, the Court has reiterated the minimum content presumption *without* such a qualification.[280] Yet in another judgment released the day before, a majority of the Court relied upon Canada's customary international legal obligations—significantly, not of a human rights character—to *restrict* the potential scope of application of the Charter and, hence, of the protections it extends.[281] The reasons for this variability of approach are not clear; nor is there a clearly discernable trend in the Court's approach to the issue. On one hand, the *Hape* approach would apply a rigid presumption of conformity of the *Charter* with Canada's international legal obligations, whether of a human rights character or not. On the other hand, *Health Services* (which post-dates *Hape* by a day) appears to favour a robust, *Slaight*-type minimum content presumption with specific reference to Canada's international human rights obligations. And in still another reading, both *Hape* and *Health Services* appear also to endorse *Suresh*'s highly discretionary contextual approach, in which international law and other sources merely 'may inform' Charter interpretation.[282] Clarification of which of these various approaches should prevail must therefore await future cases.

[275] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976; Article 41 entered into force 28 March 1979) 999 UNTS 171 (ICCPR).

[276] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

[277] *Suresh* (n 108) [66]–[75].

[278] Ibid [78].

[279] *Public Service Employee Relations Act Reference* (n 64).

[280] *Health Services* (n 196) [70]: '. . . [T]he *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.' See also ibid [79]: '. . . s. 2(d) of the *Charter* should be interpreted as recognizing at least the same level of protection [as international conventions to which Canada is a party].' Note, however, the somewhat non-committal language used by the Court in describing Canada's international legal obligations as an 'interpretive tool' that 'can assist' courts in interpreting the *Charter*: ibid [69].

[281] *Hape* (n 165) [56] (LeBel J for the majority): 'In interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction.' The majority relied in part on the customary international legal principles of territorial sovereignty and non-intervention in reaching its conclusion that 'extraterritorial application of the *Charter* is impossible': ibid [55]–[56], [85]. See also *Canada (Attorney General) v JTI-Macdonald Corp* 2007 SCC 30 [10], [66]–[67], *semble* relying on Canada's treaty obligations to bolster the government's s 1 justification of a prima facie infringement of s 2(b) *Charter* rights. These cases of course illustrate that allowing interpretation of the *Charter* to be influenced by Canada's international legal obligations can be a double-edged sword. On the dangers of allowing international law to act as a limit on the protections afforded by the *Charter*, see *R v Cook* [1998] 2 SCR 597 [148] (Bastarache J).

[282] See *Hape* (n 165) [55]; *Health Services* (n 196) [20], [69]; *Canada (Justice) v Khadr* 2008 SCC 28 [29].

## 4.4 Hierarchy within International Law

As described in section 4.3 above, the Supreme Court of Canada has on occasion appeared to prescribe a somewhat elevated relevance, in interpreting the Canadian Charter of Rights and Freedoms, for Canada's international human rights obligations, as distinct from Canada's other international legal obligations. Unfortunately, however, it has not done so in a clear or consistent manner, with the result that it remains unclear whether international human rights law has any higher status in Canadian law than other areas of international law.

In particular, the majority of the Supreme Court of Canada in *Slaight Communications* (1989) asserted a minimum content presumption only in respect of Canada's international human rights obligations.[283] While the Court subsequently, in *Burns* (2001), broadened the range of international law that may be used in interpreting the Charter beyond Canada's international human rights obligations, it nevertheless appeared to attribute differential weight to different categories of international law: whereas Canada's international human rights obligations 'must' be 'relevant and persuasive', international law generally was merely 'of use'.[284] *Suresh* (2002), however, appeared to eschew this differential approach, holding in effect that interpretation of the *Charter* is 'informed' no less by international law in general than it is by international human rights law in particular.[285] This non-differential approach appears subsequently to have been endorsed in the articulation, in *Hape* (2007), of a uniform presumption of *Charter* conformity with all of Canada's international legal obligations, whether of a human rights character or not.[286] However, in an apparent return to the approach in *Burns*, the majority in *Health Services* (2007) appeared to apply the *Suresh* 'may inform' approach to international law generally, whereas the *Slaight Communications*' minimum content presumption was applied to international human rights law in particular.[287] Yet the subsequent, apparent approval of *Hape*'s presumption of conformity in *Khadr* (2008),[288] coupled with the latter's application of the *Suresh* 'may inform' approach to Canada's international human rights obligations,[289] fails to confirm, and indeed would appear to undermine, the differential value apparently attributed by *Health Services* to Canada's international legal obligations generally and those of a human rights character particularly.

[283] *Slaight Communications* (n 196) 1056–7.

[284] *Burns* (n 196) [79]–[80].

[285] See *Suresh* (n 108) [46], where the Court accords the same interpretive weight to international law generally, 'sources' of international human rights law in particular, and even *jus cogens* norms. See also [60]. For comment, see Brunnée and Toope (n 19) 49–50.

[286] *Hape* (n 165) [56].

[287] *Health Services* (n 196): contrast [70] ('the *Charter should be presumed* to provide at least as great a level of protection as is found in the *international human rights documents* that Canada has ratified') with [20] ('*international law . . . may inform* the interpretation of *Charter* guarantees') [emphasis added].

[288] *Khadr* (n 282) [18].

[289] Ibid [29].

## 5. Jurisdiction

### 5.1 International Crimes and Criminal Jurisdiction

As a common law based country, Canada generally follows the territorial principle for criminal jurisdiction.[290] Section 6(2) of the Canadian Criminal Code confirms this approach to state jurisdiction when it says that: 'Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged . . . of an offence committed outside Canada.' The nationality (or personality) principle applies to provide criminal jurisdiction to Canadian courts in but a few instances, when particularly serious crimes are committed abroad by Canadian citizens.[291] The so-called passive personality jurisdictional basis also finds some rare applications in the Criminal Code.[292]

In terms of the universal jurisdiction principle, it is through the participation in the International Criminal Court regime that Canada has provided for this basis of state jurisdiction. Let us first recall that the Rome Statute of the International Criminal Court, which entered into force on 1 July 2002, calls upon member states to prosecute in their domestic criminal justice system perpetrators of genocide, crimes against humanity and war crimes.[293] Like many countries in the world, Canada has responded by enacting provisions giving domestic courts universal jurisdiction, as part of the implementing legislation giving effect to the Rome Statute, namely the Crimes Against Humanity and War Crimes Act.[294] Section 8 of this federal statute reads:

> 8. A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if
>
> (a) at the time the offence is alleged to have been committed,
>
> (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,
>
> (ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state,
>
> (iii) the victim of the alleged offence was a Canadian citizen, or
>
> (iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or
>
> (b) after the time the offence is alleged to have been committed, the person is present in Canada.

[290] On issues of state jurisdiction, see *Hape* (n 165).

[291] Criminal Code (n 162) s 7(3)(c), for certain crimes against internationally protected persons, and s 46(3), for acts of treason.

[292] Criminal Code (n 162) s 7(3)(d), for crimes against Canadian diplomats abroad, s 7(3.1)(e), for hostage-taking of Canadian citizens abroad, s 7(3.7)(d), for acts of torture against Canadian citizens abroad, and ss 7(3.72)(e), 7(3.73)(g), and 7(3.75)(a) for terrorist acts against Canadian citizens abroad.

[293] Rome Statute of the International Criminal Court (n 44) Article 86.

[294] CAHWCA (n 44).

In addition to the nationality basis and the passive personality basis of jurisdiction, this statutory provision provides for the universal principle to justify the exercise of Canada's domestic jurisdiction over genocide, war crimes and crimes against humanity, providing of course that the accused is physically present in the country.

Finally, note also that Canada has extended its national jurisdiction on the basis of the universal principle in regard to a number of other offences under the Criminal Code, including hijacking,[295] hostage-taking,[296] terrorist acts[297] and piracy.[298]

## 5.2 Civil Jurisdiction

The modern trend in Canada is not to draw a distinction between the rules pertaining to criminal jurisdiction and those relating the civil actions brought in a domestic court.[299] The general basis for jurisdiction is territorial, with other bases such as the nationality or the passive personality of the party seldom being invoked.[300] It follows that territoriality plays a heavy role on issues of state jurisdiction and, in Canada, the applicable test is that of the *real and substantial link*. This is how Justice La Forest of the Supreme Court of Canada explained the doctrine in the *Libman* case:

> As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a 'real and substantial link' between an offence and this country, a test well-known in public and private international law.[301]

The 2004 decision of the Ontario Court of Appeal in *Bouzari*[302] addressed the question of whether the 'real and substantial link' standard would justify extending jurisdiction over someone not in Canadian territory. According to *Bouzari,* the principal elements worthy of consideration in assessing this issue are: (1) the reprehensible character of the alleged injurious acts; (2) the fact that the alleged acts were perpetrated or condoned by the *locus delicti* state, hence dismissing itself as a possible forum for the case; (3) the fundamental idea of access to justice,[303] which is linked to the rule of law[304] and justifies a broad interpretation of the real and substantial link test for state jurisdiction.

[295] Criminal Code (n 162), s 7(2). [296] Ibid, s 7(3.1)(f).
[297] Ibid, ss 7(3.72)(d), 7(3.73)(d). [298] Ibid, s 74(2).
[299] Currie (n 167) 333–4. [300] See generally Swords (n 76) 494–5.
[301] *R v Libman* [1985] 2 SCR 178, [74]. The modern academics referred to are S.A. Williams and J.-G. Castel, *Canadian Criminal Law, International and Transnational Aspects* (Toronto: Butterworths, 1981); and L. Hall, "Territorial' Jurisdiction and the Criminal Law'[1972] Crim L Rev 276.
[302] *Bouzari v Iran* [2004] 243 DLR (4th) 406, confirming [2002] OJ No 1624, 114 ACWS (3d) 57; leave to appeal to the SCC denied [2005] 1 SCR vi.
[303] On a possible human right of access to justice, see F. Francioni et al (eds), *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione europea* (Milan: Giuffrè, 2008); and F. Francioni (ed.), *Access to Justice as a Human Right* (Oxford: OUP 2007).
[304] On the rule of law and its international law ramifications, see S. Beaulac, 'The Rule of Law in International Law Today' in G. Palombella and N. Walker (eds), *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009) 197.

## 6. Non-binding International Norms

### 6.1 Declarations and Other Non-binding Instruments

Let us first recall here what was discussed above about the 'relevant and persuasive' role of international law in the interpretation and application of domestic law. Particularly important is the absence of a meaningful distinction between binding and non-binding international law (sections 2.1 and 2.2) or between instruments to which Canada is party and those inapplicable to it (section 2.8). There is no doubt that declarative texts emanating from the United Nations or other international organizations are not seen by Canadian courts as compelling or controlling for domestic legal issues. On a sliding scale of persuasive authority, such instruments of soft-law should be considered at the lower end; much less than implemented treaty norms, less than unimplemented treaty norms, somewhat less also than treaties to which Canada is not a party and a little less (or pretty much the same) than other soft-law. But, pursuant to the 'relevant and persuasive' approach to the use of international law, the Cartesian reasoning just employed is unlikely to be verifiable.

### 6.2 International Jurisprudence

The closest case on this issue is the Ontario Court of Appeal decision is *Ahani*.[305] Both *Ahani* and *Suresh*[306] were considered at the same time by the Supreme Court of Canada, and the decisions were handed down in tandem in January 2002, shortly after the terrorist attacks of September 2001 in the United States. Unlike the latter case, the petitioner Ahani was not granted a new deportation hearing and, having exhausted all domestic remedies, went to the United Nations Human Rights Committee under the Optional Protocol to the International Covenant of Civil and Political Rights, which had not been implemented in Canadian law. The Human Rights Committee called upon Canada to stay the deportation until the full consideration of Ahani's case, a request that was refused by Canada. The second Canadian judicial proceeding, which went as far as the Ontario Court of Appeal (the Supreme Court of Canada denied leave to appeal), asked for an injunction to suspend the deportation order on the basis of the Human Rights Committee interim measure of protection, and thus 'preserve an effective remedy in international law.'[307] The injunction was not granted.[308]

The majority rejected Anahi's position because it 'would convert a non-binding request in a Protocol [ie interim measure], which has never been part of Canadian law, into a binding obligation enforceable in Canada by a Canadian court, and more, into a constitutional principle of fundamental justice'.[309] Concerning the nature of the international interim measure of protection from the Human Rights Committee, the court stated that 'the Committee's final views and its interim

[305] *Ahani* (n 270). [306] *Suresh* (n 108). [307] *Ahani* (n 270) [29].
[308] See generally Harrington (n 270). [309] *Ahani* (n 270) [33].

measures requests are not binding or enforceable in international law'. Therefore, Canada 'reserved the right to enforce its own laws before the Committee gave its views',[310] and thus there was no violation of the Optional Protocol because the petitioner 'has no right to remain in Canada until the Committee gives its views'.[311]

What is blatantly absent in the reasoning is a reference to the landmark decision of the International Court of Justice on these issues of interim or provisional measures, namely the *LaGrand* case[312] which, unlike the *Avena* case, was rendered prior to *Ahani*. Based on Article 41 of the Statute of the International Court of Justice, it was held in *LaGrand* that the ICJ has 'the basic function of judicial settlement of international disputes by binding decisions', which creates a need 'to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved'.[313] Hence,

> the power to indicate provisional measures entails that such measures should be binding, inasmuch, as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court.[314]

To our knowledge there is no case where a domestic court in Canada has been called upon to apply or enforce something that emanates from a non-judicial treaty body.

[310] Ibid [42]. [311] Ibid.
[312] *LaGrand* case *(Germany v United States of America)* (2001) 40 ILM 1069.
[313] Ibid [102]. [314] Ibid.

# 6

# China[1]

*Jerry Z. Li and Sanzhuan Guo*

## 1. Introduction

The People's Republic of China was founded in 1949 and has been led since then by the Chinese Communist Party, the highest power enshrined in the Chinese Constitution. The primary state organs include the unicameral National People's Congress (NPC or the national legislature), the President (the head of state), the State Council (the executive branch), the Supreme People's Court and the Supreme People's Procuratorate. The NPC is the highest organ of state power, while its Standing Committee is the permanent organ thereof. Both the NPC and its Standing Committee have the term of office of five years and are empowered to legislate, decide, supervise and remove key state leaders in accordance with the Constitution.

The Chinese legal system, which has followed the civil law tradition, has experienced significant reforms since the late 1970s, resulting in greater individual freedoms and protections under the rule of law. The fundamental force for the development of the rule of law in China comes from its drive to build a market economy, which demands better recognition and protection of private rights, especially property rights, a more sound and comprehensive legal infrastructure and fewer government/party interventions. The current Constitution has been revised several times and the most recent revision in 2004 includes the protection of individual human rights and legally-obtained private property. However, the Communist Party organs still exercise substantial authority over all areas in the Chinese society.

The People's Republic of China is an active member of the international community. As one of the permanent members of the UN Security Council, China is now playing an increasingly important role in world affairs. However, except the WTO dispute resolution mechanism, the People's Republic of China has not accepted compulsory jurisdiction of international courts or tribunals, including that of the ICJ.

[1] This chapter deals with the practice of international law in the legal system of the People's Republic of China ('PRC' or 'China'), excluding its territories in Hong Kong, Macau and Taiwan.

## 1.1 Constitutional and Legislative Texts

China is a unitary country with its Constitution as the supreme law of the land, and no laws or administrative or local regulations may contravene the Constitution. The Chinese Constitution is silent on the domestic status of treaties, customary international law and other international rules. Generally, the Constitution refers to international law or foreign policy as described herein.

The Preamble of the Constitution declares the general principles on which China bases its foreign policy:

> China consistently carries out an independent foreign policy and adheres to the five principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries. China consistently opposes imperialism, hegemonism and colonialism, works to strengthen unity with the people of other countries, supports the oppressed nations and the developing countries in their just struggle to win and preserve national independence and develop their national economies, and strives to safeguard world peace and promote the cause of human progress.[2]

The concept of fundamental principles of international law is widely used and accepted in China.[3] Instead of treating general principles of international law as a separate source of international law, fundamental principles of international law are regarded as higher law and constitute parts of *jus cogens* in most cases.[4] Although the international community has not fully agreed on the scope of fundamental principles of international law, China generally accepts that the five principles of mutual respect for each other's sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence, adopted at the Bandung Conference of the Non-Alignment Movement in 1955, are key parts of these fundamental principles.[5] The seven principles contained in the UN Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations and the principles in the Charter of Economic Rights and Duties of States are also accepted by China as fundamental principles of international law.[6] The principles highlighted in the Preamble of the Constitution quoted above reflect the understanding of such fundamental principles of international law in China, although the Preamble does not so state.

[2] Chinese Constitution, amended on 14 March 2004, Preamble.

[3] See several widely used textbooks in China: Wang Tieya (ed.), *Guo Ji Fa* [*International Law*] (Beijing: Law Press, 1995) 57; Bai Guimei, *Guo Ji Fa* [*International Law*] (Beijing: Peking University Press, 2006) 103–29.

[4] Bai (n 3) 109.

[5] Wang (n 3) 57; Bai (n 2) 103–29.

[6] Wang Tieya, *Guo Ji Fa Dao Lun* [*Introduction to International Law*] (Beijing: Peking University Press, 1998) 241; Bai (n 3) 105.

Undoubtedly the Constitution is 'the fundamental law of the state and has supreme legal authority'.[7] However, there is controversy over whether the Preamble has the same binding legal force as the substantive parts of the Constitution.[8] Even if the Preamble does constitute the 'supreme law' of China, its role remains quite limited because of the lack of judicial review on whether a law or statute violates the Constitution and the inability to invoke the Constitution as a legal basis applicable in specific cases.[9] It may be argued that the Preamble serves mainly as a policy pronouncement and has no legally binding force.[10] So far, no court decisions have referred to or relied on the Preamble.

Within the body of the Constitution, Article 32 stipulates: 'the PRC protects the lawful rights and interests of foreigners within Chinese territory' and 'foreigners on Chinese territory must abide by the laws of the People's Republic of China'. Article 32 also provides that 'the PRC may grant asylum to foreigners who request it for political reasons'. On 24 September 1982, China ratified both the 1951 Convention relating to the Status of Refugees[11] and the 1967 Protocol relating to the Status of Refugees.[12] Although Article 32 of the Constitution only refers to the power of China to grant asylum to those who seek protection due to political reasons, China has the inherent power, as a sovereign state, to grant protection to other asylum seekers.

China has no special law on refugees and, as a result, the lack of legal definition of refugees and lack of procedures to identify refugees in China have led to conflicts on several occasions between China and the Beijing Office of UN High Commissioner for Refugees (UNHCR). The recent controversial issue concerns persons arriving from North Korea.[13] The Beijing Office of UNHCR classified some of the newly arrived North Koreans as refugees, but China considered them economic migrants instead.[14] At present, the legal status of the documents issued by the UNHCR to identify refugees remains unclear in China.

[7] Chinese Constitution, Preamble.

[8] See eg Ma Ling, 'Dui Xian Fa Qian Yan he Zong Gang de Xiu Gai Yi Jian' ['The Revising Suggestions of The Preamble and General Principle of Constitution of People's Republic of China'] [2003] 4 Fa Lv Ke Xue [Law Science] 3, 5; Huang Weiqian, 'Lun Wo Guo Xian Fa Xu Yan de Fa Lv Xiao Li' ['On Its Preface's Legal Effectiveness of China's Constitution'] [2010] 2 Fa Xue Za Zhi [Law Journal] 104.

[9] See eg, Zhang Qianfan, 'Wo Guo Fa Yuan Shi Fou Ke Yi Shi Xian' ['Can Chinese Courts Interpret Constitution'] [2009] 4 Fa Xue [Legal Science] 39; Wang Lei, *Xian Fa de Si Fa Hua* [*Judicial Application of Constitution*] (Beijing: Press of China University of Politics and Law, 2000); HU Jinguang, 'Zhong Guo Xian Fa de Si Fa Shi Yong Xing Tan Tao' ['On Judicial Application of China's Constitution'] [1997] 5 Zhong Guo Ren Min Da Xue Xue Bao [China Renmin University Journal] 58.

[10] See Ma (n 8) 5.

[11] 1951 Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

[12] 1967 Protocol Relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

[13] China accepted about 224,000 refugees from Indochina in the 1970s and those refugees have integrated into the Chinese society over years. Chen Mengzu, 'Nan Min de Fa Lv Bao Hu' ['Legal Protection of Refugees'], [2009] 9 Jin Ri Nan Guo [The South of China Today] 154.

[14] CRS Report for Congress, *North Korean Refugees in China and Human Rights Issues: International Response and U.S. Policy Options*, 26 September 2007, 10–12.

Chapter II of the Constitution includes most human rights recognized in international human rights law, but the Constitution did not use the term 'human rights' until the addition of paragraph 3 into Article 33 in 2004, which provides that '[t]he State respects and preserves human rights.' Article 33(3) is significant, in particular, because it provides the supreme legal basis for the protection of those rights which are not expressly or implicitly guaranteed in the Constitution.[15] Yet, despite criticism of the Constitution for not including duties of citizens, the major shortcoming of Constitutional rights lies in the non-enforceability of constitutional provisions in Chinese courts. Rights provisions in the Chapter II of the Constitution cannot be invoked or applied directly in Chinese courts.

In 1955 China's highest court, the Supreme People's Court (SPC), issued a reply to the Xinjiang High Court, stating that 'it is improper for the Constitution to be used as the legal basis for convictions and punishments in criminal judgments.'[16] Although this reply only referred to the inappropriateness of using the Constitution as a legal basis in criminal judgments, it has strangely become the main reason that Chinese courts hesitate or even refuse to apply the Constitution in all cases, including civil and administrative litigation. In addition, another SPC reply to the Jiangsu Provincial High Court in 1986 listed a number of standardized documents that Chinese courts could cite as legal bases for judgments and did not include the Constitution.[17]

Whether these two replies from the SPC can be considered sufficient to exclude the application of the Constitution is problematic and arguable, but the Constitution has not been used in Chinese court judgments. Moreover, the Constitution itself does not mention judicial review of laws and regulations, although the National People's Congress (NPC) or NPC's Standing Committee (NPCSC) theoretically could be requested to review constitutional matters in accordance with the both the Constitution and Law on Legislation.[18] As a result, if fundamental rights in the Constitution have not yet been specified in separate laws and regulations, or if a legislative act itself violates any human right guaranteed by the Constitution, then it is extremely difficult, if not totally impossible, to seek judicial remedies for violations of human rights.

The case of *Qi Yuling* in 2001 was regarded as the first constitutional case in China. In its reply to the judicial request by the Shandong Provincial High Court, the SPC held that Qi Yuling's right to education was violated as a result of the defendant's violation of Qi's right to her name.[19] But, since it was generally agreed

[15] Han Dayuan, 'Xian Fa Wen Ben Zhong 'Ren Quan Tiao Kuan' de Gui Fan Fen Xi' ['Normative Analysis on Human Rights Clause in Constitution'] [2004] 4 Fa Xue Jia [Jurists Review] 8, 10–11.

[16] The Supreme People's Court, *Guan Yu zai Xing Shi Pan Juan Zhong Bu Yi Yuan Yin Xian Fa zuo Lun Zui Ke Xing de Yi Ju de Fu Han* [*Reply on People's Courts Inappropriateness of Using the Constitution as Legal Basis in Criminal Judgment*], 30 July 1955.

[17] The Supreme People's Court, *Guan Yu Ren Min Fa Yuan Zhi Zuo de Fa Lv Wen Shu Ying Ru He Ying Yong Fa Lv Gui Fan Xing Wen Jian de Pi Fu* [*The Reply on People's Courts Using Standardized Legal Documents When Making Judgments*], 28 October 1986.

[18] *Law on Legislation*, Article 88.

[19] *Qi Yuling v Chen Xiaoqi and* et al., Shandong Provincial People's Court, <http://www.chinalawinfo.com>(23 June 2008).

that the Constitution does not have direct effect on the relations among individuals, the court did not decide whether Chen Xiaoqi, the defendant, violated Qi Yuling's constitutional rights. More importantly, the SPC reply was later repealed in the *Qi Yuling* case in its Decision on 8 December 2008.[20] However, according to SPC's 2008 decision, the judgment rendered by the Shandong Provincial High Court in Qi Yuling's case, where Qi was awarded monetary compensation, remains valid.

## 1.2 Legislative Power

The NPC and NPCSC constitute the legislative body of China. Unlike the limited legislative power of the Parliament/Congress under a federal system, the NPC and NPCSC have plenary legislative power. The legislative roles are divided between the NPC and NPCSC—the NPC makes basic laws and decides on questions of war and peace, while the NPCSC makes all laws other than basic laws.[21] To implement particular treaties in China, the NPC and NPCSC have the power to pass basic laws or laws in any areas. In addition to implementing international treaties by passing legislation, the NPCSC is also directly involved in the treaty-making process. The Constitution, Article 67(14), stipulates that the NPCSC is empowered 'to decide on the ratification or abrogation of treaties and important agreements concluded with foreign states'.[22]

Although it is within the NPC's power to decide matters of war and peace, it is the NPCSC who will 'decide, when the NPC is not in session, on the proclamation of a state of war in the event of an armed attack on the country or in fulfillment of international treaty obligations concerning common defense against aggression'.[23] The NPCSC also has the power to decide on the appointment or recall of plenipotentiary representatives abroad.[24]

## 1.3 Executive Power

The President is the head of state of China and the Premier of the State Council is the head of the Chinese government. The President has three main powers regarding international law: (1) to declare war and peace in accordance with the decisions of NPC or NPCSC;[25] (2) to represent China in conducting national activities and receiving foreign diplomatic representatives and, in pursuance of NPCSC decisions, appointing or recalling plenipotentiary representatives abroad;

[20] SPC Zhushi [2008] 15: Zui Gao Ren Min Fa Yuan Guan Yu Fei Zhi 2007 Nian Di Yi Qian Fa Bu de You Guan Si Fa Jie Shi (Di Qi Pi) de Jue Ding, [SPC Notes [2008] 15: SPC's Decision on Repealing Certain Judicial Interpretations Made Prior to the End of 2007 (No 7)].

[21] The basic laws refer to the laws prescribed under Chapter II of the Law on Legislation, which will be discussed under section 2 on treaties.

[22] Chinese Constitution, Article 67(14).

[23] Chinese Constitution, Article 62(14) and Article 67(18).

[24] Chinese Constitution, Article 67(13).

[25] Chinese Constitution, Article 80.

and (3) to ratify or abrogate, in pursuance of the decisions of the NPCSC, treaties and important agreements concluded with foreign states.[26] Strictly speaking, the power of the President is more symbolic because he or she will only act in accordance with the decisions of the NPC or NPCSC. In practice, however, the President has a powerful rather than symbolic position in Chinese politics because he or she may also serve as the Secretary General of the ruling Communist Party. The Constitution does not designate the President as the commander-in-chief of the People's Liberation Army, but in reality the two posts are normally held by the same person, except in rare and temporary occasions in recent history.

## 2. Treaties

Paragraph 9 of Article 89 of the Constitution grants the State Council the power 'to conduct foreign affairs and conclude treaties and agreements with foreign states'.[27] The State Council answers to the NPC, or the NPCSC when the NPC is not in session.[28] The Ministry of Foreign Affairs (MFA) represents the state and government in matters of foreign affairs.[29] The Minister of the MFA is a member of the State Council. Pursuant to the PRC's Law on the Procedure of the Conclusion of Treaties (Treaty Procedure Law), the State Council and its departments can conclude treaties and agreements with foreign states.[30] In accordance with the Constitution, the State Council may also pass administrative regulations (*Xing Zheng Fa Gui*), while the departments under the State Council can pass departmental rules (*Bu Men Gui Zhang*) within their mandates to implement international law.

### 2.1 Treaty Approval

The Treaty Procedure Law gives detail to the treaty-making procedure prescribed in the Constitution. Under the Constitution, the State Council has the power to conclude treaties and agreements with foreign states.[31] Pursuant to the Treaty Procedure Law, '[t]he Ministry of Foreign Affairs of the People's Republic of China shall, under the leadership of the State Council, administer specific affairs concerning the conclusion of treaties and agreements with foreign states'.[32] Under the Treaty Procedure Law, there are three types of treaties and agreements: treaties and agreements concluded in the name of the state of China, those in the name of Chinese Government, and those concluded in the name of the Chinese governmen-

[26] Chinese Constitution, Article 81.
[27] Chinese Constitution, Article 89 (9).
[28] Chinese Constitution, Article 92.
[29] Guo Ban Fa No [1994] 2: Wai Jiao Bu Zhi Neng Pei Zhi, Nei She Ji Gou he Ren Yuan Bian Zhi Fang An [State Council General Office No [1994] 2: Plan on Functions, Internal Structure and Personnel of the Ministry of Foreign Affairs], 4 January 1994, Article 1(2).
[30] The PRC's Law on the Procedure of the Conclusion of Treaties ('Treaty Procedure Law'), Article 4.
[31] Chinese Constitution, Article 89(9).
[32] Treaty Procedure Law, Article 3.

tal departments.[33] The different types of treaties and agreements follow different treaty-making procedures in accordance with the Treaty Procedure Law, as follows.

(1) With respect to the negotiation and signing of treaties and agreements in the name of the People's Republic of China, the Ministry of Foreign Affairs, or the departments concerned under the State Council in conjunction with the Ministry of Foreign Affairs, shall make a recommendation and work out the draft treaty or agreement of the Chinese side, and submit it to the State Council for examination and decision;

(2) With respect to the negotiation and signing of treaties and agreements in the name of the Government of the People's Republic of China, the Ministry of Foreign Affairs or the departments concerned under the State Council after consultation with the Ministry of Foreign Affairs, shall make a recommendation and work out the draft of the Chinese side and submit it to the State Council for examination and decision. With respect to agreements concerning specific business affairs, with the consent of the State Council, the draft agreement of the Chinese side shall be examined and decided upon by the departments concerned under the State Council or in consultation with the Ministry of Foreign Affairs when necessary;

(3) With respect to the negotiation and signing of agreements in the name of a governmental department of the People's Republic of China concerning matters within the functional competence of the department concerned, the decision shall be made by the department or in consultation with the Ministry of Foreign Affairs. In the case of an agreement involving matters of major importance or matters falling within the functional competence of other departments under the State Council, the department concerned or in consultation with the other departments concerned under the State Council, shall submit it to the State Council for decision. The draft agreement of the Chinese side shall be examined and decided upon by the department concerned or in consultation with the Ministry of Foreign Affairs when necessary.[34]

There is a further important distinction in both the Constitution and Treaty Procedure Law between 'treaties and important agreements' and other agreements. In international law, no matter what name a treaty carries—treaty, agreement, charter, convention or something else—the nature of the treaty as binding agreement between/among states is unchanging. In Chinese domestic law, however, treaties and important agreements carry a different legal force compared to other agreements (of lesser importance). Under the Constitution and Treaty Procedure Law, 'treaties and important agreements' require the ratification decisions to be made by the NPCSC with signature by the President.[35] Pursuant to the Treaty Procedure Law, 'treaties and important agreements' refer to:

[33] Treaty Procedure Law, Article 4.
[34] Treaty Procedure Law, Article 5.
[35] Treaty Procedure Law, Article 7.

(1) treaties of friendship and co-operation, treaties of peace and other treaties of a political nature;
(2) treaties and agreements concerning territory and delimitation of boundary lines;
(3) treaties and agreements relating to judicial assistance and extradition;
(4) treaties and agreements that contain stipulations inconsistent with the laws of the People's Republic of China;
(5) treaties and agreements that are subject to ratification as agreed by the contracting parties; and
(6) other treaties and agreements subject to ratification.[36]

In reality, most legally binding agreements or documents may not require ratification by the NPCSC and the President, but instead require the approval of the State Council.[37] The Treaty Procedure Law does not specify the types of agreements that would fall into this category, but apparently they would be those international agreements that are not characterized as 'treaties and important agreements' under the Constitution and the Treaty Procedure Law. Examples include the agreements approved in 2007 by the State Council, including the Agreement of Governments of Member States of Shanghai Co-operation Organization on Education Co-operation;[38] Statute of the Secretariat of the Conference on Interaction and Confidence Building Measures in Asia;[39] and Agreement between the Government of the People's Republic of China and the Government of the Republic of Kazakhstan on China-Kazakhstan National Boundary Management Regulations.[40]

Either the NPCSC or the State Council may decide to accede to multinational treaties that China did not sign when the treaties were made.[41] The Treaty Procedure Law provides:

(1) To accede to a multilateral treaty or an important multilateral agreement listed in Paragraph 2, Article 7 of this Law, the Ministry of Foreign Affairs or the department concerned under the State Council in conjunction with the Ministry of Foreign Affairs shall make a recommendation after examination and submit it to the State Council, Whereupon the State Council shall, after review, submit it to the Standing Committee of the National People's Congress for decision on accession. The

[36] Treaty Procedure Law, Article 7.
[37] Treaty Procedure Law, Article 8.
[38] *Shang Hai He Zuo Zu Zhi Cheng Yuan Guo Zheng Fu Jian Jiao Yu He Zuo Xie Ding* [*Agreement of Governments of Member States of Shanghai Cooperation Organization on Education Cooperation*], signed on 16 June 2006 and approved by the State Council on 29 September 2007.
[39] *Ya Zhou Xiang Hu Xie Zuo yu Xin Ren Cuo Shi Hui Yi Mi Shu Chu Xie Ding* [*Statute of the Secretariat of the Conference on Interaction and Confidence-Building Measures in Asia*], signed on 17 June 2006, approved by the State Council on 14 April 2007.
[40] *Zhong Hua Ren Min Gong He Guo he Ha Sa Ke Si Tan Gong He Guo Zheng Fu Guan Yu Zhong Ha Guo Jie Guan Li Zhi Du de Xie Ding* [*Agreement between the Government of the People's Republic of China and the Government of the Republic of Kazakhstan on China-Kazakhstan National Boundary Management Regulations*], signed on 20 December 2006 and approved by the State Council on 29 January 2007.
[41] Treaty Procedure Law, Article 11.

instrument of accession shall be signed by the Minister of Foreign Affairs, and the specific procedures executed by the Ministry of Foreign Affairs.

(2) To accede to a multilateral treaty or agreement other than those listed in Paragraph 2, Article 7 of this Law, the Ministry of Foreign Affairs or the department concerned under the State Council in conjunction with the Ministry of Foreign Affairs shall make a recommendation after examination and submit it to the State Council for decision on accession. The instrument of accession shall be signed by the Minister of Foreign Affairs, and the specific formalities executed by the Ministry of Foreign Affairs.[42]

According to our research, there have been about 20 decisions made by the NPCSC so far with respect to accession to multinational treaties or agreements. Intellectual property rights falls among the subject areas on which such NPCSC decisions have been made, including the Decision on Acceding to the Paris Convention for the Protection of Industrial Property on 14 November 1984,[43] the Decision on Acceding to the WIPO Copyright Treaty[44] and the Decision on Acceding to the WIPO Performances and Phonograms Treaty on 29 December 2006.[45] Another area concerns anti-terrorism, including the Decision on Acceding to the International Convention against the Taking of Hostages on 28 December 1992[46] and the Decision on Acceding to the International Convention for the Suppression of Terrorist Bombings on 27 October 2001.[47]

Most international agreements have been acceded to by decisions of the State Council. For example, on 24 November 2007, China's State Council decided to accede to the Framework Agreement for International Collaboration on Research and Development of Generation IV Nuclear Energy Systems, which was signed and entered into effect on 28 February 2005.[48] The decision to accept a multilateral treaty or agreement is also made by the State Council when a multilateral treaty or agreement containing clauses of acceptance is signed by the Chinese representative or does not require any signature.[49] According to the

[42] Treaty Procedure Law, Article 11.

[43] *Quan Guo Ren Min Dai Biao Da Hui Chang Wu Wei Yuan Hui Guan Yu Jia Ru 'Bao Hu Gong Ye Chan Quan Ba Li Gong Yue' de Jue Ding* [*The NPC's Standing Committee's Decision on Acceding to* Paris *Convention for the Protection of Industrial Property*], 14 November 1981.

[44] *Quan Guo Ren Min Dai Biao Da Hui Chang Wu Wei Yuan Hui Guan Yu Jia Ru 'Shi Jie Zhi Shi Chan Quan Zu Zhi Ban Quan Gong Yue' de Jue Ding* [*The NPC's Standing Committee's Decision on Acceding to the WIPO Copyright Treaty*], 29 December 2006.

[45] *Quan Guo Ren Min Dai Biao Da Hui Chang Wu Wei Yuan Hui Guan Yu Jia Ru 'Shi Jie Zhi Shi Chan Quan Zu Zhi Biao Yan he Lu Yin Zhi Pin Tiao Yue' de Jue Ding* [*The NPC's Standing Committee's Decision on Acceding to the WIPO Performances and Phonograms Treaty*], 29 December 2006.

[46] *Quan Guo Ren Min Dai Biao Da Hui Chang Wu Wei Yuan Hui Guan Yu Wo Guo Jia Ru 'Fan Dui Jie Chi Ren Zhi Guo Ji Gong Yue' de Jue Ding* [*Decision on Acceding to the International Convention on Against the Taking of Hostages*], 28 December 1992.

[47] *Quan Guo Ren Min Dai Biao Da Hui Chang Wu Wei Yuan Hui Guan Yu Jia Ru 'Zhi Zhi Kong Bu Zhu Yi Bao Zha de Guo Ji Gong Yue' de Jue Ding* [*Decision on Acceding to the International Convention for the Suppression of Terrorist Bombings*], 27 October 2001.

[48] *Guo Wu Yuan Guan Yu Jia Ru 'Di Si Dai He Neng Xi Tong Yan Jiu he Kai Fa Guo Ji He Zuo Kuang Jia Xie Yi' de Jue Ding* [*State Council's Decision on Acceding to the Framework Agreement for International Collaboration on Research and Development of Generation IV Nuclear Energy Systems*], 24 November 2007.

[49] Treaty Procedure Law, Article 12.

Notice of the General Office of the State Council on Matters of Ratification or Approval of International Treaties and Agreements regarding the treaties and agreement that require the ratification of the NPCSC or the approval of the State Council, the competent authority shall report to the State Council within three months after the execution date.[50]

For those agreements that require neither the ratification from the NPCSC and the President nor the approval of the State Council,

> the agreements shall be submitted by the departments concerned under the State Council to the State Council for the record, except those agreements concluded in the name of the governmental departments of the People's Republic of China which are to be submitted by these departments to the Ministry of Foreign Affairs for registration.[51]

The question of standards to determine which international agreements shall be characterized as 'treaties or important agreements' subject to ratification of the NPCSC in contrast to agreements subject to the State Council's approval is still yet to be fully answered. It has been argued that international agreements for the avoidance of double taxation could be seen as 'important agreements' in China, but in reality they belong to those agreements that require neither ratification of the NPCSC and the President nor the State Council's approval.[52]

Finally, the Treaty Procedure Law requires that 'treaties and agreements concluded by the People's Republic of China shall be registered with the Secretariat of the United Nations by the Ministry of Foreign Affairs in accordance with the relevant provisions of the United Nations Charter', or 'registered by the Ministry of Foreign Affairs or the departments concerned under the State Council in accordance with the provisions of the respective constitutions of the international organizations'.[53] In practice, not all treaties or agreements concluded by China are registered, and the failure of such registration has no impact on the binding force of the treaties concerned.[54]

## 2.2 The Status of Treaties in Domestic Law

Due to the lack of any provision in the Constitution, the status of treaties in the Chinese legal system remains unclear. Some scholars argue that such constitutional silence indicates that the Chinese legal system deliberately excludes treaties as a part

[50] *Guo Wu Yuan Ban Gong Ting Guan Yu Ban Li Guo Ji Tiao Yue Xie Ding Pi Zhun Shou Xu huo He Zhun Shou Xu Wen Ti de Tong Zhi* [*Notice of the General Office of the State Council on Matters of Ratification or Approval of International Treaties and Agreements*], 12 August 1992.

[51] Treaty Procedure Law, Article 9.

[52] Liu Yongwei, 'Zhong Yao Xie Ding yu Fei Zhong Yao Xie Ding—Jian Tan Zhong Wai Shui Shou Xie Ding de Zhong Yao Xing [Important Agreements and Non-Important Agreements: The Importance of China-Foreign Taxation Agreement]' (2008) 26(5) Zheng Fa Lun Tan [Tribune of Political Science and Law] 171, 175.

[53] Treaty Procedure Law, Article 17.

[54] See eg, Sino-US Joint Communiqués; Jerry Z. Li, 'The Legal Status of Three Sino-US Joint Communiqués,' (2006) 5 Chinese Journal of International Law 617, 634.

of Chinese law,[55] but most Chinese international lawyers agree that while the Constitution should have expressly clarified this issue, its mere silence does not exclude the direct effect of treaties in Chinese domestic law.[56] The authors share the latter view and further think that treaties bear apparent legal effects in one way or another in the Chinese legal system in both theory and practice.

There are quite a few specific laws and regulations concerning the status of treaties in China,[57] but unfortunately they do not provide clear answers. Article 142 of the General Principles of Civil Law (GPCL) is often referred to in this regard. It provides:

> [I]f any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations.

Article 236 of China's Civil Procedure Law, another important piece of civil legislation, has exactly the same wording as Article 142 of the GPCL.

Because of the silence of China's Constitution, scholars use different approaches to interpret such legislative provisions. Some take the conflict-based approach by regarding conflicts between a treaty and a domestic law as implying that the treaty has direct effect in the domestic legal system,[58] while some others think that the conflict is the precondition for a treaty to come into effect in domestic law.[59] Some scholars have pointed out the difference between the application of treaties in Chinese courts and the treaties' effects in the Chinese legal system, arguing that the monist view on the relationship between treaties and domestic law cannot be inferred from such provisions as Article 142 of GPCL.[60] On the other hand, the

[55] Liu Yongwei, 'Guo Ji Tiao Yue zai Zhong Guo Shi Yong Xin Lun [Some New Thoughts on Application of International Treaties in China]' [2007] 2 *Fa Xue Jia* [*Jurists Review*], 144; Wan E'xiang et al (eds), *Guoji Tiaoyue Fa* [*International Treaty Law*] (Wuhan: Wuhan University Press, 1998) 192.

[56] Bai (n 3) 74–8; Li Haopei, *Tiao Yue Fa Gai Lun* [*Introduction to Law of Treaties*] (Beijing: Law Press, 2003) 316–26; Tao Zhenghua, 'Guan Yu Tiao Yue Xiao Li de Ji Ge Wen Ti' ['Several Issues on the Effects of Treaties'], in Zhu Xiaoqing and Huang Lie (eds), *Guo Ji Tiao Yue yu Guo Nei Fa de Guan Xi* [*The Relationship between International Treaties and Domestic Law*] (Beijing: World Affairs Press, 2000) 36–7.

[57] According to the statistic, there are about 70 domestic laws with provisions dealing with treaty obligations. See, Gong Rengren, 'Implementing international Human Rights Treaties in China,' in Errol P. Mendes and Anik Lalonde-Roussy (eds), *Bridging the Global Divide on Human Right: A Canada-China Dialogues* (Aldershot, Burlington, VT: Ashgate Publishing Co, 2003) 100–1; and see also Xue Hanqin and Jin Qian, 'International Treaties in the Chinese Domestic Legal System' (2009) 8 (2) Chinese Journal of International Law 299, 303.

[58] Li Zhaojie, 'The Effects of Treaties in the Municipal Law of the People's Republic of China' (1995) 4 Asian Yearbook of International Law 197, 339–40; Chen Hanfeng, Zhou Weiguo and Jiang Hao, 'Guo Ji Tiao Yue yu Guo Nei Fa de Guan Xi ji Zhong Guo de Shi Jian' ['Relationship between International Treaties and Domestic Law and China Practice'] [2000] 2 Zheng Fa Lun Tan [Politics and Law Review, Journal of China University of Politics and Law], 120–1; Ann Kent, *Beyond Compliance: China, International Organizations and Global Security* (Stanford, Stanford University Press, 2007) 61.

[59] Kong Qingjiang, 'Enforcement of WTO Agreements in China' in Debora Cass, Brett Williams and George Barker (eds), *China and the World Trading Systems: Entering the New Millennium* (Cambridge: Cambridge University Press, 2003) 149–50; Kent (n 58) 61–2.

[60] Liu (n 55) 145–6.

fact that the Regulations of the PRC Concerning Diplomatic Privileges and Immunities and the Regulations of the PRC Concerning Consular Privileges and Immunities were enacted pursuant to the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations respectively provides no proof that China has adopted the transformation method.[61]

In our view, treaties to which China is a party have become a part of Chinese domestic legal order. The foregoing two regulations are good examples to demonstrate the status of treaties in China. On the one hand, provisions of the two said international conventions and other agreements on diplomatic and consular privileges and immunities shall prevail in cases where these international agreements have different provisions from the regulations, according to Article 27 of these regulations. This indicates the direct effect of treaties in the Chinese legal system, and the fact that these treaties have become a form of law binding Chinese domestic institutions and private parties. It is the common practice in China that most treaties, if not all, need to go through the process of transformation in order to have them implemented domestically. This is due to the fact that domestic legislation can hardly fully embody the treaty provisions concerned. The conflict-based approach applies in situations where treaties carry different provisions from domestic legislation or Chinese laws do not have the same provisions as those of the treaties. The following statements by Chinese representatives on treaty status in general and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[62] in particular may be seen as good evidence in support of our view of incorporation.

In April 1990, Chinese representatives stated in a report that,

> . . . according to the legal system of China, as soon as the Chinese government approves or participates in any related international treaty it becomes effective in China and the Chinese Government will be responsible for the respective obligations. In other words, the Convention against Torture has become directly effective in China. Acts of torture, as defined by the Conventions, are strictly prohibited according to the laws of China.[63]

It seems that this statement represents to some extent the official stance of the Chinese government in the application of human rights treaties in China, though final clarification in the Constitution is still pending.[64] On another occasion, Chinese representatives presented a statement regarding the same Convention by declaring:

> Pursuant to its legal system, once China has ratified or acceded to an international treaty and the treaty had entered into force, there was no need for additional domestic legislation to give effect to the treaty. In other words, the Convention against Torture had automatically

[61] Gong (n 57) 101.

[62] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

[63] *The People's Daily*, 16 November 1991, s 4. See also UN Committee against Torture, 4th Session, *Summary Record of the 51 meeting*, Geneva, 27 April 1990, UN Doc CAT/C/SR.51 (4 May 1990) 2.

[64] Kent (n 58); Gong (n 57) 104.

entered into force in the country. Furthermore, many provisions of the Convention had been embodied in national laws . . . [65]

## 2.3 Implementation by Domestic Laws

As reported above on the legal status of treaties, China has adopted neither a pure monist nor dualist approach. Instead, China has developed different ways to implement treaties depending on the type of treaty. First, if the subject-matter of a 'treaty' or 'important agreement' is not covered by current domestic law, China will usually adopt new legislation to implement such treaty or agreement. A commonly cited example is that of the 1961 Vienna Convention on Diplomatic Relations[66] and the 1963 Vienna Convention on Consular Relations,[67] which came into force in 1975 and 1979 respectively. The NPCSC passed the Regulations Concerning Diplomatic Privileges and Immunities in 1986 and the Regulations Concerning Consular Privileges and Immunities in 1990.[68] However, unlike the transformation doctrine applied by most commonwealth countries such as the UK and Australia, the legislation to implement a treaty in China is usually not passed solely for the purpose of implementing the treaty but combined with other objectives. For example, after China ratified the International Labour Organization's (ILO) No 111 Discrimination (Employment and Occupation) Convention in 1 December 2006, the NPCSC passed the Law of the People's Republic of China on Promotion of Employment (Promotion of Employment Law) on 30 August 2007 thereby transforming the convention obligations into domestic law. However, the Promotion of Employment Law deals not only with anti-discrimination,[69] but also concerns the broader objective to promote employment generally.[70]

Second, if the subject-matter of a 'treaty' or 'important agreement' is addressed by current legislation, the pre-existing laws will be amended or revised to implement the treaty or important agreement. This practice is regarded as 'the most common way for China to implement its treaty obligations'.[71] One outstanding example is China's accession to the World Trade Organization (WTO). China joined in the WTO in 2001, and the Report of the Working Party on the Accession of China, which constitutes part of China's agreement with the WTO, provides:

The representative of China stated that China had been consistently performing its international treaty obligations in good faith. According to the Constitution and the Law on the

[65] The Third Committee of General Assembly, *Summary Record of 41st Meeting*, New York, 14 November 1991, UN Doc A/C.3/46/SR/41 (3 December 1991) [12].

[66] *Vienna Convention on Diplomatic Relations* (opened for signature 18 April 1961) 500 UNTS 95 (entered into force 24 April 1964).

[67] *Vienna Convention on Consular Relations* (opened for signature 24 April 1963) 596 UNTS 261 (entered into force 19 March 1967).

[68] Xue and Jin (n 57) 306.

[69] Promotion of Employment Law, Article 3 and Chapter III—Fair Employment.

[70] Promotion of Employment Law, Article 1.

[71] Xue and Jin (n 57) 308.

Procedures of Conclusion of Treaties, the WTO Agreement fell within the category of 'important international agreements' subject to the ratification by the Standing Committee of the National People's Congress. China would ensure that its laws and regulations pertaining to or affecting trade were in conformity with the WTO Agreement and with its commitments so as to fully perform its international obligations. For this purpose, China had commenced a plan to systematically revise its relevant domestic laws. Therefore, the WTO Agreement would be implemented by China in an effective and uniform manner through revising its existing domestic laws and enacting new ones fully in compliance with the WTO Agreement.[72]

To observe its wide-ranging obligations under the WTO agreements, 'China has repealed, abrogated, revised, enacted and promulgated more than 30,000 domestic laws, administrative regulations and administrative orders'.[73] The most prominent laws amended in this respect include, among others, the Contract Law, Wholly Foreign-Owned Enterprise Law, Law on Equity Joint Ventures, Law on Co-operative Joint Ventures, Customs Law, Copyrights Law, Trademarks Law, Patents Law and Insurance Law.

Third, bilateral co-operation agreements and memoranda of understanding concluded by the State Council or the governmental departments are neither 'treaties' nor 'important agreements' under the Treaty Procedure Law but belong to the category of agreements that do not require the ratification procedures of the NPCSC and the President. The same is true with respect to many multilateral agreements. Generally, these agreements are directly implemented by the administrative departments concerned through departmental regulations/decrees/announcements without passage of any specific domestic laws. For instance, the International Maritime Organization's Maritime Safety Committee (MSC) adopted at its 86th Session on 5 June 2009, Amendments to the International Convention for the Safety of Life at Sea 1974 and Amendments to the Protocol of 1988 relating to the International Convention for the Safety of Life at Sea 1974.[74] In accordance with Article VIII(b)(vii)(2) of the Convention and Article VI of the Protocol, the Amendments entered into force on 1 January 2011 upon their acceptance. On 8 December 2010, Ministry of Transport of China issued an announcement declaring that China, as a contracting party to the Convention and the Protocol, raised no objection to the contents of the Amendments, and therefore the Amendments will be legally binding on China.[75]

Fourth, some treaties embody provisions that allow them to be directly applied in Chinese courts in some circumstances. Such direct application of treaties usually does not require passage of or amendment to any domestic legislation. According to the statistics, there are about 70 domestic laws with provisions dealing with treaty obligations.[76]

[72] Working Party on the Accession of China, *Report of the Working Party on the Accession of China*, WTO Doc WT/ACC/CHN/49 (1 October 2001) [67].

[73] Xue and Jin (n 57) 308.

[74] Resolution MSC.282(86) and Resolution MSC.283(86), respectively.

[75] For the announcement in Chinese, see: <http://www.moc.gov.cn/zhuzhan/zhengwugonggao/jiaotongbu/haishijiulao/201012/t20101209_884774.html>.

[76] Chen (n 57) 122; Lui (51) 145.

## 2.4 Human Rights Treaties in Domestic Law

It is agreed that international human rights treaties cannot be directly applied in China but instead need to be transformed.[77] In China, the primary human rights provisions are stipulated in the Constitution, but to invoke international human rights standards in China, people must refer to specific laws and regulations rather than relying on the Constitution itself. Due to the broad scope of human rights, human rights legislation in China is scattered in many areas and laws. This section of the chapter tries to put human rights legislation into five categories based on the International Bill of Human Rights.

The first category is related to criminal justice, to which much attention has been paid when human rights in China are discussed[78] and refers mainly to China's Criminal Law (as amended), Criminal Procedure Law (as amended, 'CrPL'), and Prison Law (1994), among others. In this category, based on the International Covenant on Civil and Political Rights (ICCPR)[79] the key rights are the right to life (capital punishment, Article 6 of the ICCPR), the right not be to tortured (Article 7), the right of liberty and detainee's rights (Articles 9 and 10), and due process (Articles 14 and 15). Another law in this category is the Trial Implementation Methods for Labor Reeducation, a document issued by the Ministry of Public Security with the approval by the State Council in 1982 (Article 8). This law has been criticized widely at home and abroad,[80] since the re-education through labour system that the law enacts empowers the police, in reality, potentially to deprive individuals of personal liberty in the form of forced or compulsory labour for up to four years in the absence of trials by competent courts.[81]

The second area is other civil and political rights, including freedom of movement, freedom of religion, minority rights, freedom of association, freedom of expression, freedom of peaceful assembly, among others. With respect to minority rights, China revised its Law on Regional National Autonomy in 2001.[82] Freedom of religion is mainly dealt with by the State Council's Regulations on Religious Affairs (2004)[83] and freedom of association can be found partially in the Law on Trade Union and Regulations on the Registration of Social Organizations.[84] Due

[77] Gong (n 57) 103.

[78] Kent (n 58) 201–15.

[79] International Covenant on Civil and Political Rights, opened for signature 1967, 999 UNTS 171 (entered into force 23 March 1976).

[80] Ibid.

[81] Jerry Z. Li, 'Ratification of the ICCPR and Its Implications for Redistribution of Legal Powers in China,' in Jerry Z. Li (ed.), *Rambling along Public Law* (Beijing: China Procuratorate Press, 2006) 135.

[82] Bai Guimei, 'The ICCPR and Chinese Legislation: Protection of Minority Nationalities' (2004) 2 Chinese Yearbook of Human Rights 105.

[83] See Eric R. Carlson, 'China's New Regulations on Religion: A Small Step, Not a Great Leap, Forward' [2005] 3 BYU Law Review 747; Joel A. Nichols, 'Dual Lenses: Using Theology and International Human Rights to Assess China's 2005 Regulations on Religion' 34 Pepperdine LR (2006) 105.

[84] See Liu Hainian, 'Civil Society and Freedom of Association' (2004) 2 Chinese Yearbook of Human Rights 18; Zhao Zhengquan, 'The Judicial Protection and Limitation on Freedom of

to the passive nature of civil and political rights, fewer regulations may in fact provide broader freedom. For instance, it is arguable that the Regulations on Household Registration are not needed to protect freedom of movement.[85] However, in some cases, such as the right to vote or to be voted for, the active provisions in the Law on Elections enhance human rights.

Third, due to the existence of ILO conventions and their significance in human rights law, labour rights can be categorized as a special group. China's Labour Law (1994), Labour Contract Law (2008), Employment Promotion Law (2008) and Regulations on Prohibition of Use of Child Labour (as amended in 2002) are key laws in this regard. Since most discrimination cases in China concern employment, the Employment Promotion Law provides the legal basis to fight against discrimination in court. It can also be seen as the implementation of ILO Convention Number 111, for which China registered its ratification on 12 January 2006.

Fourth, for other economic, social and cultural rights, China enacted the Law on Compulsory Education (as amended in 2006) to promote the right to education and the Marriage Law (as amended in 2001) for the rights of marriage.

The fifth human rights legislative category concerns the rights of people who belong to vulnerable groups, such as women, children, and disabled persons. China has promulgated related laws in each area, including the Law on the Protection of Rights and Interests of Women (as amended in 2005), Law on the Protection of Minors (as amended in 2006), Law on the Protection of Rights and Interests of Disabled Persons (as amended in 2008), and Law on the Protection of Rights and Interests of Elders (1996).

Although human rights legislation in China has been improved greatly, problems remain. First, there are still many gaps and inconsistencies between Chinese human rights legislation and international human rights standards. Minority rights provide an excellent example. China's Law on Regional National Autonomy does include some ethnic minorities' rights, but there lacks legal recognition of linguistic or religious minorities under China's current legal system. Put simply, not all human rights areas are covered by Chinese human rights legislation.

More importantly, even for a right recognized in both treaties and Chinese domestic law, the interpretation and scope of that right can be very different. Article 12 of the CrPL prescribes that no person shall be found guilty without being judged as such by a court according to the law. However, there are differences between 'not guilty without being judged' and 'presumption of innocence', because the former does not include such elements as non-self-incrimination and exclusion of illegally-gathered evidence, while the presumption of innocence does.[86]

Association: Perceived from the New Provisions on Judicial Protection Added to the Trade Union Law' (2004) 2 Chinese Yearbook of Human Rights 61; Li Yuwen (ed.), *Freedom of Association in China and Europe: Comparative Perspectives in Law and Practice* (Leiden: Martinus Nijhoff Publishers, 2005).

[85] See Zhu Lijiang, 'The Hukou System in the Peoples's Republic of China: A Critical Appraisal under International Standards of Internal Movement and Residence' (2003) 2 Chinese Journal of International Law 519.

[86] Jonathan Hecht, *Opening to Reform? An Analysis of China's Revised Criminal Procedure Law* (New York: Lawyers Committee for Human Rights, 1996) 61–2; Kent (n 58) 208–9.

Second, most legislation with human rights components does not focus on human rights protection, but has a much broader purpose, which puts human rights legislation in an awkward position. For example, China's Law on Compulsory Education not only deals with the right to education, but also contains an obligation to accept compulsory education. Even fundamental rights in China's Constitution are treated this way, because citizens bear obligations when they enjoy their rights, while the obligator under human rights treaties generally refers to the state rather than individuals.

Third, it is common to incur administrative or criminal responsibility in the violation of human rights legislation, but not all laws include civil responsibility. For example, the Employment Promotion Law prescribes civil, administrative, and criminal responsibilities, while the Regulations on the Prohibition of Use of Child Labour provide mainly administrative and criminal responsibilities.

Finally, Chinese human rights legislation exists at many different levels, from the Constitution to administrative regulations and local regulations. Because judicial review of laws and regulations in China is lacking, these laws and regulations sometimes remain in conflict with each other, making it hard to apply them uniformly and impartially across the country. In the aftermath of the *Sun Zhigang* case, the Measures for the Sheltering and Send-off of Urban Vagrants and Beggars was abolished and replaced by another set of administrative regulations under social pressure, but its legality was not officially reviewed by a court or any other state organs as the reason for its repeal at the time.

## 2.5 Treaties and Courts

Even though China may adopt a largely monist view in the relationship between treaties and domestic law, there are still gaps between the incorporation of treaties in domestic law and the direct application of treaties in domestic courts, similar to the difference between self-executing and non-self-executing treaties in the United States.

Where Chinese laws include provisions dealing with treaty obligations, those treaties may be invoked and applied directly in Chinese courts. In contrast, if Chinese specific laws or regulations make no reference to a treaty, then that treaty may not be invoked and applied directly in Chinese courts.[87] Chinese laws concerning individuals' fundamental rights fall into this situation, and as a result, the human rights treaties that China has ratified or acceded to cannot be applied directly in Chinese courts.[88] Therefore, as a general proposition, the first test for direct application of treaties in China is to determine whether treaties have been referred to in the Chinese legislation.

Furthermore, whether and how treaties will be applied directly in Chinese courts also depends on the way treaties are referred to in the legislation. The reference to

[87] Bai Guimei and Gong Renren, *Summary of the Report on the Status of the Selected UN Conventions in China*, UN Theme Group on the Rule of Law, July 2005, 4.

[88] Ibid.

treaties could be very general or specific. Generally speaking, there are three different ways of referring to treaties in Chinese laws:[89]

(1) Article 142 of the GPCL type clause: if a treaty's provisions differ from provisions of the relevant law, then the treaty's provisions will take priority, except in cases where China has made reservations.
(2) In laws with an unconditional clause, treaties take precedence over Chinese laws and can be applied directly, irrespective of conflicting clauses between the two.
(3) Some laws make reference to treaties, but do not specify the priority between treaties and laws.

About 70 domestic laws with provisions dealing with treaty obligations fall under category (1).[90] As discussed above, the existence of some conflicts between treaties and Chinese laws is generally regarded as a precondition for applying those treaties. This group of laws covers mainly commercial, economic, managerial and administrative laws. For example, pursuant to Article 142 of the GPCL and Article 236 of the Civil Procedure Law, Chinese courts directly apply many international treaties in the civil cases with foreign elements. Xue and Jin listed following treaties that have been directly applied:[91]

- United Nations Convention on Contracts for International Sale of Goods;[92]
- Warsaw Convention on the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention);[93]
- Hague Protocol to the Warsaw Convention (Hague Protocol);[94]
- The Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier (Guadalajara Convention);[95]
- Agreement on International Carriage of Goods by Rail;[96]
- United Nations Convention on a Code of Conduct for Liner Conferences.[97]

It can be seen from the above list that international carriage is a common area where international treaties are directly applied in China. On 27 June 2009, Beijing East

[89] Ibid.
[90] Chen (n 57) 122; Liu (n 54) 145.
[91] Xue and Jin (n 57) 310.
[92] United Nations Convention on Contracts for International Sale of Goods, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988).
[93] Warsaw Convention on the Unification of Certain Rules Relating to International Carriage by Air, Opened for signature 12 October 1929, 137 LNTS 11 (entered into force 13 February 1933).
[94] Hague Protocol to the Warsaw Convention, opened for signature 28 September 1955, 478 UNTS 371 (entered into force 1 August 1963).
[95] The Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier, Opened for signature 18 September 1961, 500 UNTS 31 (entered into force 1 May 1964).
[96] Agreement on International Carriage of Goods by Rail, entered into force 1 November 1951.
[97] United Nations Convention on a Code of Conduct for Liner Conferences, opened for signature 6 April 1974, 1334 UNTS 15 (entered into force 6 October 1983).

District People's Court accepted the case of MA *Meilan v Thai Airway International Company Limited* and this became the first case in China to possibly apply the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention).[98]

Besides the GPCL and Civil Procedure Law, the Maritime Code is another category A subject area where international treaties are often applied by Chinese courts. Based on Article 268 of the Maritime Code,[99] the 1972 Convention on the International Regulations for Preventing Collisions at Sea[100] was directly applied in *Trade Quicker Inc Monrovia, Liberia v the Golden Light Overseas Management S.A. Panama*[101] and the 1974 International Convention for the Safety of Life at Sea[102] was applied in *Yu Xiaohong v Goodhill Navigation, S.A., Panama.*[103]

Intellectual property laws fall within category (2). According to Article 12 of the Rules for Implementation of the Trademark Law of the PRC (2002), '[i]nternational trademark registrations shall be dealt with according to the international treaties to which China has acceded'. China acceded to the Madrid Agreement Concerning the International Registration of Marks (Madrid Agreement) on 25 May 1989.[104] Based on the database in Chinalawinfo.com, a leading Chinese laws and cases database, 105 cases in Chinese courts had referred to the Madrid Agreement by the end of 2010.

In the Copyrights Law (2010), Article 2, paragraph 2 prescribes that:

> [w]here a foreigner or stateless person enjoys copyright in his or her work under an agreement concluded between China and the author's country of origin or country of habitual residence, or an international treaty to which both that country and China have acceded, such copyright shall be protected under this Law.

Paragraph 4 of Article 2 states:

> Where an author whose country has not concluded an agreement with China or is not a party to an international treaty to which China has acceded or a stateless person first publishes his or her work in a member country to an international treaty to which China

[98] The case was still in litigation as of January 2011. See also the Montreal Convention, opened for signature 28 May 1999, 2242 UNTS 309 (entered into force 4 November 2003).

[99] This code states: '[i]f any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those contained in this Code, the provisions of the relevant international treaty shall apply, unless the provisions are those on which the People's Republic of China has announced reservations. International practice may be applied to matters for which neither the relevant laws of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China contain any relevant provisions.'

[100] Convention on the International Regulations for Preventing Collisions at Sea, opened for signature 20 October 1972, 1050 UNTS 16 (entered into force 15 July 1977).

[101] [1992] Jin Hai Fa Shi Pan Zi No 4: *Trade Quicker Inc Monrovia, Liberia v the Golden Light Overseas Management S.A. Panama*, Tianjin Maritime Court, 29 June 1992.

[102] International Convention for the Safety of Life at Sea, opened for signature 1 November 1974, 1184 UNTS 2 (entered into force 25 May 1980).

[103] [2001] Zhe Jing Er Zhong Zi No 96: *Goodhill Navigation, S.A., Panama v Yu Xiaohong, Zhejiang Provincial High Court,* 20 November 2001.

[104] *Guo Wu Yuan Guan Yu Wo Guo Jia Ru 'Shang Biao Guo Ji Zhu Ce Ma De Li Xie Ding' de Pi Fu* [*State Council's Approval on Acceding to the Madrid Agreement Concerning the International Registration of Marks*], 25 May 1989.

has acceded, or simultaneously in a member and non-member country, such work shall be protected under this Law.

China joined in Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) on 1 July 1992.[105]

The PRC's Patent Law includes similar provisions to the Copyrights Law to protect foreigners filing a patent application in China. Under Article 18 of Patent Law:

> Where any foreigner, foreign enterprise or other foreign organization that has no habitual residence or business office in China files an application for a patent in China, the application shall be treated under this Law in accordance with the agreement, if any, concluded between the country to which the applicant belongs and China, or in accordance with any international treaty to which both countries are a party, or on the basis of the principle of reciprocity.

In relation to patents, China has ratified and acceded to the Paris Convention for the Protection of Industrial Property (Paris Convention),[106] Patent Co-operation Treaty (PCT),[107] Locarno Agreement on Establishing an International Classification for Industrial Designs,[108] Strasbourg Agreement Concerning the International Patent Classification (IPC)[109] and Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure.[110]

Another example falling into the category (2) approach is Article 22 of Law of the People's Republic of China on the Protection of the Rights and Interests of Returned Overseas Chinese and the Family Members of Overseas Chinese, which provides that:

> [t]he State shall protect the legitimate rights and interests, outside the country, of returned overseas Chinese and the family members of overseas Chinese in accordance with the international treaties to which the People's Republic of China is a party or has acceded or with international practice.

Criminal Procedure Law is a representative of category (3). Pursuant to Article 17 of the CrPL, 'in accordance with the international treaties which the People's Republic of China has concluded or acceded to or on the principle of reciprocity, the judicial organs of China and that of other countries may request judicial assistance from each other in criminal affairs'. Another example is Article 45 of

[105] *Quan Guo Ren Min Dai Biao Da Hui Chang Wu Wei Yuan Hui Guan Yu Jia Ru 'Bao Hu Wen Xue Yi Shu Zuo Pin Bo Er Ni Gong Yue' de Jue Ding* [*The NPC's Standing Committee's Decision on Acceding to Berne Convention for the Protection of Literary and Artistic Works*], 1 July 1992.

[106] Paris Convention for the Protection of Industrial Property, opened for signature 20 March 1883, 161 CTS 409 (entered into force 6 July 1884).

[107] Patent Co-operation Treaty, opened for signature on 19 June 1970, entered into force 1 April 2002.

[108] Agreement on Establishing an International Classification for Industrial Designs, opened for signature 8 October 1968.

[109] Agreement Concerning the International Patent Classification, opened for signature 24 March 1971, 1160 UNTS 484 (entered into force 7 October 1975).

[110] Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, opened for signature 28 April 1977 (entered into force 19 August 1980).

the Notarization Law of the PRC which provides: 'The embassies (consular offices) of the People's Republic of China stationed abroad may perform notarial acts pursuant to this Law or the international treaties, which the People's Republic of China has concluded or has acceded to.' Under category (3), whether treaties will be invoked or applied is subject to the discretion of state organs.

In summary, the general approach of direct application of treaties seems to be that of category (1). When the treaties relate to particular groups' rights, the category (2) approach may apply, but when direct application of treaties would require actions of public authorities, category (3) approach appears to govern. Categories (1) and (2) may overlap and apply in the same law; for instance, treaties in relation to copyrights law can be directly applied without the requirement of conflict when the subject-matter in question relates to rights of a foreigner or stateless person. However, since copyrights laws are also a part of civil law, Article 142 of the GPCL will also apply in situations where there are no special provisions from the Copyrights Law or there exist conflicts between provisions of the law and relevant treaties. Although the category (2) approach gives more weight than category (3) to international treaties in rights protection, human rights treaties are generally not referred to in Chinese laws and regulations and, as a result, they cannot be applied directly in Chinese courts.

It should be noted that the category (1) approach is normally applied in situations where there are conflicts between Chinese laws and relevant treaties, and typically in 'civil cases with foreign elements.' According to the SPC, the term of 'civil cases with foreign elements' means those cases in which: (1) one party or both parties to the dispute are foreign nationals, stateless persons, foreign enterprises or institutions; (2) the legal facts that establish, modify or terminate the civil legal relations between the parties to the dispute occur in a foreign country; or (3) the disputed objects are located in a foreign country.[111]

With respect to category (1) cases, two issues remain unresolved in both theory and practice. First, pursuant to Article 142 of GPCL and similar provisions of other laws, treaties can be applied only when differences exist between relevant treaties and domestic law provisions, but it is unclear who may determine the existence of such differences. Given the lack of judicial review in China, in theory, courts are not supposed to play such a role. Although the legislature should have the power to declare an inconsistency, laws are silent in this respect and the legislature has remained inactive. The second unresolved issue concerns whether, in a situation where a Chinese court decides that it should apply a particular treaty in a certain case, the court should apply the whole treaty (relevant provisions in the context of the whole treaty) or only the portion of it that differs from the existing provisions of relevant Chinese laws. Certain treaty provisions could be interpreted differently depending on whether or not they are applied in isolation or in the context of the treaty in its entirety.

[111] Opinions of the Supreme People's Court on Several Issues in the Application of the PRC Civil Procedure Law, Article 304, 14 July, 1992. The text in Chinese can be found at <http://www.chinacourt.org/flwk/show1.php?file_id=15390>.

It is also observed that Chinese courts are not always willing to apply treaties.[112] For example, in the case of *WU Guanzhong v Shanghai Duoyunxuan Firm and Hong Kong Yongcheng Antiques Auction Co., Ltd*, the court failed to apply relevant treaties in a situation where China's Copyright Law was found to be in conflict with treaties to which China was a party.[113] The two unresolved issues mentioned above could be among the reasons for non-application.

Finally, from legislative acts in China, we have found no special tests to determine the standing and private rights of actions when issues at stake involve treaties.

## 2.6 Treaty Interpretation

The term treaty is used narrowly to differentiate it from an 'agreement' under the Treaty Procedure Law, but in a broader sense it includes all agreements with binding force under international law. In most cases, 'treaty' is a straightforward legal term in China.[114] International treaties referred to in specific legislation such as the GPCL and Copyrights Law generally mean treaties in the broader sense; to the authors' knowledge no Chinese courts have interpreted 'international treaties' so narrowly as to refer only to treaties that require the ratification of the NPCSC and the President under the Treaty Procedure Law.

Pursuant to Article 16 of the Treaties Procedure Law, treaties and agreements concluded by China shall be compiled by the MFA into a Collection of Treaties of the People's Republic of China (Collection of Treaties).[115] Since 1987, the multinational treaties have also been complied into the Collection of Multinational Treaties of the People's Republic of China (Collection of Multinational Treaties).[116] Thus, if a treaty or agreement can be found in either the Collection of Treaties or Collection of Multinational Treaties, presumably such document is officially regarded as a treaty in China. However, not all treaties have been included in the Collection of Treaties or Collection of Multinational Treaties. As a matter of fact, the MFA usually exercises its discretion in compiling treaties to which China is a party.

As a result, confusion may exist regarding whether a certain document is a treaty or not, particularly when the document in question bears the name of declaration, joint communiqué, joint statement, memorandum of understanding (MOU) or exchange of notes. For example, three Sino-US joint communiqués (1972, 1978 and 1982) are regarded as treaties in China while they are deemed only as political and non-legally binding agreements from the perspective of the US government.[117]

[112] Chen (n 57) 121.

[113] Ibid. See also *WU Guanzhong v Shanghai Duoyunxuan Firm and Hong Kong Yongcheng Antiques Auction Co.,* Ltd, Shanghai High Court, 11 March 1996.

[114] See Bai (n 3) 156–7.

[115] Department of Treaty and Law of the Ministry of Foreign Affairs (ed.), *Collection of Treaties of the People's Republic of China*, Vol. 1–54 (Beijing: Law Press).

[116] Ibid.

[117] See Jerry Z. Li, 'The Legal Status of Three Sino-US Joint Communiqués' (2006) 5 Chinese Journal of International Law 617.

The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong carries the name of neither 'treaty' nor 'agreement', but due to the significance of the matter, it is considered to be a treaty or important agreement in China. In practice, the Collection of Treaties or Collection of Multinational Treaties is good evidence for the existence of a treaty, and Chinese courts usually defer to decisions of the MFA to put certain international instruments into the official treaty collections.

Although Chinese international lawyers including those working at the MFA have a very broad understanding of the scope of treaties, not all international instruments with the name of MOU, joint communiqué, or declaration would necessarily create rights and obligations for China under international law. In practice, the MFA relies on both international law and domestic law (particularly Treaty Procedure Law), to determine whether a particular international instrument is a treaty or a statement of political commitments. The key to distinguishing between a treaty and a non-legally-binding international instrument is not the name of the instrument itself, but the intent of the parties. For example, under the official website of the MFA, the 2009 List of Key Bilateral Treaties Concluded by China and Foreign Countries includes the Memorandum of Understanding to Enhance Co-operation on Climate Change, Energy and Environment between the Government of the US and the Government of the PRC,[118] but in the MOU itself there appears an express statement that the '[c]ooperation under this MOU . . . is not intended to give rise to rights or obligations under international law'.[119] This is another example of the discretion exercised by the MFA in this respect and the confusions caused as a result.

Finally, ratification or approval procedure is not a precondition for an international instrument to have the legally binding force of a treaty in China. As reported above, the Treaty Procedural Law does not require all treaties or agreement to be ratified by the NPCSC and the President or to be approved by the State Council and there is one category that is legally binding although the agreements have not been formally approved. For example, the Memorandum of Understanding between the Government of the United States of America and The Government of the People's Republic of China on the Protection of Intellectual Property (1992 Sino-US IP MOU), which was neither ratified nor approved under the Treaty Procedure Law, is widely recognized as a treaty in China and is registered with the UN Secretariat.[120] In *Walt Disney of the United States v Beijing Publishing House et al.* in 1995, Beijing High Court held that 1992 Sino-US IP MOU protected the

[118] 2009 List of Key Bilateral Treaties Concluded by China and Foreign Countries, available at: <http://www.fmprc.gov.cn/chn/pds/ziliao/tytj/tyfg/t705517.htm>(27 November 2010).

[119] *Memorandum of Understanding to Enhance Cooperation on Climate Change, Energy and Environment between the Government of the US and the Government of the PRC*, <http://www.state.gov/documents/organization/126802.pdf>(27 November 2010), last sentence of the MOU.

[120] *Memorandum of Understanding between the Government of the United States of America and The Government of the People's Republic of China on the Protection of Intellectual Property*, signed 17 January 1992, 2249 UNTS 314.

intellectual property rights of the American nationals in accordance with Chinese law.[121]

As discussed under the treaty-making process, the legislature mainly gets involved with 'treaties' and 'important agreements' through rendering ratification decisions. These decisions constitute a part of Chinese laws with the same status as laws passed by the legislature. Similarly, where the State Council exercises its treaty approval power under the Treaty Procedure Law on international agreements, the approval decision will constitute a part of Chinese law with the same status as administrative regulations. Therefore, if there are any reservations, declarations or statements in the decisions of the NPCSC or the State Council, they will bind the courts' application of treaties in question, just like other Chinese laws and regulations.

More importantly, because a ministry or commission of the State Council has the power to issue departmental regulations including Provisions, Circulars and Notices, which are part of Chinese domestic laws, the court must apply these departmental regulations if they are concerned with the interpretation of treaties. For example, in 1987 the Ministry of Foreign Trade and Economic Co-operation (currently the Ministry of Commerce), which was responsible for the negotiation and conclusion of the 1980 United Nations Convention on Contracts for the International Sale of Goods, released *Some Issues in the Implementation of the UN Convention on Contracts for the International Sale of Goods*.[122] The SPC transmitted this official document in the form of notice to the lower courts across the country thereafter.[123]

In addition, because treaties or international agreements are negotiated and signed by the executive branch, the working documents of the competent departments might have impact on the treaties' interpretation like all other *travaux préparatoires*. Xue and Jin, both working in the Ministry of Foreign Affairs, gave a good description of how the lower courts might seek legal opinions from the Treaty and Law Department of the Ministry of Foreign Affairs through a request to the SPC:

> If the lower courts think the treaty terms are ambiguous, or they need further information regarding the treaty, they may submit a request, through the Supreme People's Court, to obtain a legal opinion concerning treaty issues from the Treaty and Law Department of the Ministry of Foreign Affairs. The Department's opinions might address, for example, the meaning of certain treaty terms, the scope of treaty provisions or the status of States Parties

[121] *Walt Disney of the United States v Beijing Publishing House,* Beijing High Court, 19 December 1995.

[122] Wai Jing Mao Fa Zi No 22: *Dui Wai Jing Ji Mao Yi Bu Guan Yu Zhi Xing Lian He Guo Guo Ji Huo Wu Xiao Shou He Tong Gong Yue Ying Zhu YI de Ji Ge Wen Ti* [*Some Issues in the Implementation of the UN Convention on Contracts for the International Sale of Goods*], 4 December 1987 [87]; see also XUE and JIN (n 57) 316.

[123] Fa (Jing) Fa <1987>No 34: Zui Gao Ren Min Fa Yuan Zhuan Fa Dui Wai Jing Ji Mao Yi Bu 'Guan Yu Zhi Xing Lian He Guo Guo Ji Huo Wu Xiao Shou He Tong Gong Yue Ying Zhu Yi de Ji Ge Wen Ti' de Tong Zhi [Notice of the Supreme People's Court on MOFTEC's *Some Issues in the Implementation of the UN Convention on Contracts for the International Sale of Goods*, 10 December 1987; See also XUE and JIN (n 57) 316.

to a treaty. In response to a request from a lower court, the Supreme People's Court would either give its opinion on the legal issues or refer the request to the Foreign Ministry. The Treaty and Law Department of the Ministry, upon receiving a request, would give its legal opinion on the interpretation and application of the treaty terms in accordance with the relevant provisions of the Vienna Convention on the Law of Treaties. In its statement, the Department may also include information regarding the Chinese practice and the reciprocal basis of application with the country concerned. In practice, this mechanism is utilized primarily to address issues related to diplomatic privileges and immunities and sovereign immunities. Opinions of the Department are normally sent back to the Supreme People's Court for consideration. In principle, these opinions are taken by the courts as dispositive, since they often involve foreign policy and the treaty-making power, matters that are entrusted to the administrative department and to the State Council under the law.[124]

Although China's Constitution does not follow the principle of separation of powers, in theory the legislature has supremacy over the executive branch and the courts, which shall exercise their power to try a case independently, particularly from the intervention of executive organs.[125] Thus, from the formal and legal point of view, the courts shall not defer to the opinions of other state branches to interpret treaties except as required by law, including the rules of interpretation. Based on the database in Chinalawinfo, no case in China has cited the Vienna Convention on the Law of Treaties.

## 2.7 Use of Treaties to Interpret Domestic Laws

The power of Chinese courts to apply treaties to which China is a party is limited, so it is even more rare for Chinese courts to reference treaties to which China is not a party when interpreting or applying domestic law. The power to interpret the Constitution is vested in the NPC and NPCSC. Therefore, Chinese courts do not even apply the Constitution directly in cases, and do not refer to treaties to interpret the Constitution, no matter whether China is a party of those treaties or not.

However, if a treaty to which China is not a party constitutes international customary law, Chinese courts might apply it as international custom. For example, in 1992, in *Trade Quicker Inc Monrovia, Liberia v the Golden Light Overseas Management S.A. Panama*, the Tianjin Maritime Court applied the jurisdiction principle contained in the 1952 International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision[126] and stated:[127]

Article 1(1) of 1952 International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision provides that '[a]n action for collision occurring between seagoing vessels, or between seagoing vessels and inland navigation craft, can only be introduced: (b) . . . before the Court of the place where arrest has been effected of the

[124] Xue and Jin (n 57) 317.

[125] Chinese Constitution, Article 126.

[126] International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, opened for signature 10 May 1952, 439 UNTS 217 (entered into force 20 November 1955).

[127] [1992] Jin Hai Fa Shi Pan Zi No 4: *Trade Quicker Inc Monrovia, Liberia v the Golden Light Overseas Management S.A. Panama*, Tianjin Maritime Court, 29 June 1992.

defendant ship or of any other ship belonging to the defendant which can be lawfully arrested, or where arrest could have been effected and bail or other security has been furnished'. To exercise the jurisdiction by arresting a ship is a customary practice adopted by all other states in the world. Although China has not joined and accepted this Convention, this principle has been adopted by Chinese courts. Article 6(1) of the Regulations of the Supreme People's Court on the Impoundage of Sea Vessels by Maritime Courts Prior to Litigation stipulates that 'the Maritime Court involved in the impoundage proceeding has jurisdiction over litigation relating to the maritime claim . . . ' Therefore, Tianjin Maritime Court exercising the jurisdiction by arresting a ship has sufficient legal basis.

Note that under international law, states that have signed a treaty are 'obliged to refrain from acts which would defeat the object and purpose of a treaty'.[128] Therefore, there is a possibility that Chinese courts might consider applying treaties that China has signed, but not ratified (but in practice, no case has been found that referred to such treaties).

## 3. Customary International Law

In the Chinese domestic legal system, the phrase 'international custom' (*Guoji Xiguan*) is rarely seen, while 'international usage' (translated as *Guoji Guanli*, sometimes also translated as 'international practice')[129] is more commonly used. The three branches of international law as classified in China—public international law, private international law and international economic law—have different understandings of 'international customs' and 'international usages'.

For public international lawyers, an international custom is a legal term used in Article 38(1) of the Statute of the International Court of Justice[130] and refers to an independent source of international law that bears the elements of state practice and *opinio juris*. In Professor Wang Tieya's opinion, an 'international usage or practice' as used in the Chinese context differs from an 'international custom, as evidence of a general practice accepted as law' under the foregoing Article 38(1)(b). Professor Wang is of the view that the legal effect of an international usage or practice is lower than that of a treaty as well as domestic laws in China. Therefore, Article 142 of the GPCL provides that an international usage or practice 'may be' rather than 'must be' applied to matters where provisions of treaties and laws are both silent. This means that an international usage or practice can only be legally binding when it is actually applied by Chinese courts.[131] For private international lawyers, an international custom and international usage are more or less the same.

In the international economic law field, an international usage means a binding international custom. An international custom can become an international usage

[128] Vienna Convention on the Law of Treaties, Article 18.
[129] Eg, Xue and Jin (n 57) 319.
[130] Statute of International Court of Justice, Article 38(1).
[131] Wang Tieya, (n 6), 211; However, Professor Bai Guimei regarded international usage the same as international custom. See Bai (n 3) 78.

only after it bears the elements of state practice and *opinio juris*, which is totally opposite to the understanding of public international lawyers. International usages for international economic lawyers include both the usages to regulate the economic transactions between private persons and those usages regulating state economic relationships. International economic law is actually a part of public international law, so the confusion arising from different understandings of terminologies must be recognized. Given that the term of 'international custom' is widely used in the international law field outside of China, when it is used in this report, we refer to the public international lawyer's understanding of the terminology unless specified otherwise.

As a civil law country, China generally does not give international customs binding force in its domestic legal system. Not surprisingly, the Constitution does not discuss customary international law at all. However, in some specific laws, international usages are mentioned. There are three main areas of law that refer to international usages, as discussed below.

The first area is civil and commercial law. In the GPCL, Article 142 provides:

> If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those contained in this Law, the provisions of the relevant international treaty shall apply, unless the provisions are those on which the People's Republic of China has announced reservations. International usage may be applied to matters for which neither the relevant laws of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China contain any relevant provisions.

Article 268(2) of the Maritime Law, Article 95 of the Law on Negotiable Instruments and Article 184(2) of the Civil Aviation Law provide the same wording as Article 142 of the GPCL. Further, Article 150 of the GPCL states: 'The application of foreign laws or international usages in accordance with the provisions of this Chapter shall not violate the public interest of the People's Republic of China.' Article 276 of the Maritime Law and Article 190 of the Civil Aviation Law include the same wording as Article 150 of the GPCL. However, there is no similar wording in the Negotiable Instruments Law.

Second, Article 22 of the Law of the People's Republic of China on the Protection of the Rights and Interests of Returned Overseas Chinese and the Family Members of Overseas Chinese (Overseas Chinese Law) provides:

> The State shall protect the legitimate rights and interests, outside the country, of returned overseas Chinese and the family members of overseas Chinese in accordance with the international treaties to which the People's Republic of China is a party or has acceded or with international usages.

Third, Article 15 of Law of the People's Republic of China on the National Flag provides: 'When the National Flags of two or more nations are displayed in foreign affairs activities, relevant provisions of the Ministry of Foreign Affairs or the international practice shall be followed.'

The term 'international usage' is also widely used in administrative regulations and judicial interpretations, which is one source of law in China. For example, *Provisions of the Ministry of Foreign Affairs, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice on Several Issues Concerning Cases Involving Foreign Elements,* paragraph 3 stipulates that the notice to the embassy or consulate office of a state which has not concluded a bilateral consulate relationship treaty with China nor has it become a party to the Vienna Convention on Consular Relations,[132] should be dealt with 'under the mutual benefit and reciprocal principle and in accordance with relevant regulations and international usages'. Several observations can be made here. First, the meaning of international usages in different laws and regulations may not have the same meaning. In the GPCL and other relevant civil and commercial laws, it is more likely that an 'international usage' refers to a non-legally binding international general practice in certain areas. In the Overseas Chinese Law, an international usage is closer in meaning to an international custom than a non-legally binding international practice. Second, an international usage 'may' rather than 'must' be applied by courts in most circumstances. Third, an international usage usually applies only when there are neither Chinese laws nor treaties to govern in certain areas. Fourth, the application of an international usage should not violate the public interest of China. However, what constitutes the public interest is not very clear, but is generally very broad in the Chinese legal system.

Therefore, if an 'international usage' in Chinese legislation can be interpreted broadly to mean an international custom, the application of international customary law is not obligatory, but discretionary. If international usage is interpreted narrowly instead, to refer to a non-legally binding usage only, international customary law would not find support from these laws for its application in China. In any event, the application of international customary law in China is much more limited than the use of treaties.

Similar to the direct application of treaties in Chinese courts, an international custom may be applied directly by Chinese courts if Chinese legislation has referred to it as discussed above. As shown in *Trade Quicker Inc Monrovia, Liberia v Golden Light Overseas Management S.A. Panama*, the court applied an international custom by referring to an international convention even though China was not a party to the convention at the time.[133]

In practice, international usages are mainly applied in civil and commercial areas. It is very common for Chinese courts to apply International Rules for the Interpretation of Trade Terms (INCOTERMS), which have been widely used in international business transactions.[134] The Uniform Customs and Practices for

[132] Vienna Convention on Consular Relations, opened for signature 24 April 1963, 596 UNTS 261 (entered into force on 19 March 1967).

[133] [1992] Jin Hai Fa Shi Pan Zi No 4: *Trade Quicker Inc Monrovia, Liberia v the Golden Light Overseas Management S.A. Panama*, Tianjin Maritime Court, 29 June 1992.

[134] For example, see (2010) Shi Min Chu Zi No 2409: *Wacker Polymer Systems (Zhangjiagang) Co., Ltd v Beijing COSCO Huili Fine Chemical Co., Ltd*, Beijing Shijingshan District People's Court, 2010.

Documentary Credits 1993 are also frequently invoked in Chinese courts.[135] In maritime cases, the Hague-Visby Rules, though China is not a party to them, are often applied as international trade customs.[136]

In the field of criminal justice, the custom of 'non-extradition of nationals' was argued in several cases by the defendants. For example, in *R v Han Yongwan*,[137] Han Yongwan claimed that he was a national of Myanmar, and therefore Myanmar should not extradite him to China. Yunnan Province People's High Court did not challenge the application of the principle of 'non-extradition of nationals' but found that Han Yongwan was in fact a Chinese citizen so his arrest and delivery to China was not extradition per se but a kind of co-operation between the Chinese and Myanmar governments.[138]

In administrative cases, intellectual property and customs are two main areas in which international customs might be applied by Chinese courts. However, in most administrative cases Chinese courts generally do not explain what international customs they refer to, but only refer to them in general terms, such as 'pursuant to international treaties and international customs', without elaborating.[139]

Operating in a civil law country, China's judges may undertake an active role in applying customary international law and do not require the approval of the concerned parties. For example, in *Zhuhai Huiduo Canning Co. Ltd v Zhuhai Labor and Social Security Bureau*, the court referred to an international practice when defining work injury.[140] The parties did not invoke any international customs in arguing the case, but the court applied custom directly and *sua sponte* without giving any further explanation on the content of the international practice that it referred to.[141]

## 4. Hierarchy

The hierarchy of treaties in the Chinese legal system remains difficult and uncertain due to the lack of clear provisions on treaty status in the Constitution. As noted above, treaties to which China is a party become a part of the Chinese domestic legal order. However, due to the conspicuous silence of the Constitution and laws

[135] For example, *Liaoning Textiles Import and Export Corp v San Paolo IMI Bank of Italy*, the Second Intermediate People's Court of Beijing Municipality, 1999 (Er Zhong Jing Chu Zi No 1636, 1999); See also XUE and JIN (n 57) 319–21.

[136] For example, *Shanghai E&T International Transportation Co. Ltd v Sea-Land Oriental (China) Ltd*, Shanghai Maritime Court, 1996 (Hu Hai Fa Shang Zi No 6, 1996); See also Xue and Jin (n 57) 321–2.

[137] (2008) Yun Gao Xing Zhong Zi No 106: *R v Han Yongwan et al.*, Yunnan Provincial High Court, 2008.

[138] Ibid.

[139] For example, see (2001) Yue Gao Fa Xing Zhong Zi No 267: *Shantou Customs v Fortis Bank Asia,* Guangdong Provincial High Court, 7 March 2002.

[140] (2004) Xiang Xing Chu Zi No 7: *Zhuhai Huiduo Canning Co., Ltd v Zhuhai Labor and Social Security Bureau*, Guangdong Province Zhuhai City Xiangzhou District People's Court, 2 April 2004.

[141] Ibid.

on this matter, the standards to evaluate such hierarchy can only be derived from a comparison of treaty-making procedures and Chinese legislative procedures.

First, in comparison with the Constitution and laws promulgated by the NPC and NPCSC respectively, we could conclude that treaties enjoy a similar rank to laws made by the NPCSC. Pursuant to Article 62 of the Constitution, the power to amend the Constitution is vested solely with the NPC. In addition, Article 62 also stipulates that the NPC is empowered to 'enact and amend basic laws governing criminal offences, civil affairs, the State organs and other matters'. On the other hand, the NPCSC, in accordance with Article 67 of the Constitution, is in the position 'to enact and amend laws, with the exception of those which should be enacted by the NPC', while at the same time, 'to decide on the ratification or abrogation of treaties and important agreements concluded with foreign states'. Therefore, the treaties and important agreements under both the Constitution and the Treaty Procedure Law have the similar procedure to laws made by the NPCSC. It can thus be concluded that treaties and important agreements ratified by the NPCSC have a legal status in the legislative hierarchy similar to the laws passed by the NPCSC, but they are lower in position than the Constitution and basic laws that fall under the mandates of the NPC itself.

Nonetheless, there are rare exceptions under special circumstances where treaties might be ratified by the NPC rather than NPCSC, such as the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong.[142] In this particular case, what the Chinese legislature relied on are special clauses bearing on the establishment of special administrative regions other than those relating to ratification of treaties and important agreements under the Constitution, ie Article 31and Article 62(13), which provide respectively, 'The State may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions' (Article 31) and the NPC is 'to decide on the establishment of special administrative regions and the systems to be instituted there'.[143] Although there exist such exceptions, we may hardly draw the conclusion that there are some international instruments ratified by the NPC that shall have a legal status similar to the basic laws passed by the NPC. Having said that, as a general proposition, the NPC does have the mandate to touch on treaties and important agreements since it is empowered 'to alter or annul inappropriate decisions of the NPCSC',[144] which may include the latter's decisions on the ratification or abrogation of treaties and important agreements concluded with foreign states.

[142] *Decision of the NPC's on Ratifying Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong*, 10 April 1985.

[143] Article 62(13).

[144] Chinese Constitution, Article 62(11).

The second comparison is between agreements that do not require ratifications of the NPCSC but instead need the approval of the State Council and administrative regulations. According to Article 89 of the Constitution,

> [t]he State Council exercises the following functions and powers, including:
> (1) to adopt administrative measures, enact administrative rules and regulations and issue decisions and orders in accordance with the Constitution and the law;
> (9) to conduct foreign affairs and conclude treaties and agreements with foreign states.

Under the Law on Legislation, the drafting of administrative regulations should be dealt with by the State Council and the decision-making procedures for administrative regulations shall comply with the relevant provisions in the Organic Law of the State Council of the People's Republic of China.[145] Administrative regulations shall be promulgated by the Order the State Council signed by the Premier.[146] The Treaty Procedure Law did not express what procedures the State Council would follow to approve international instruments, but we can generally conclude that the international agreements approved, decided, acceded, or accepted by the State Council, except important treaties and agreements, should have the similar legal effect as the administrative regulations made by the State Council.

Similarly, international agreements which require neither the NPCSC's ratification nor the approval of the State Council may have legal effects similar to the State Council's ministerial regulations or rules, a conclusion reached by comparing the Treaty Procedure Law and the Law on Legislation.[147] Furthermore, although the doctrine of *jus cogens* is widely accepted by Chinese international lawyers, it has not been invoked by Chinese courts. As such, Chinese courts have not yet indicated any higher status for any specific part of international law.

Generally speaking, therefore, international treaties should have a lower legal status than the Constitution, but may have the same legal force as either laws passed by the NPCSC, administrative regulations, or ministerial rules, depending on their concerned making procedures.

## 5. Jurisdiction

### 5.1 Universal Criminal Jurisdiction

China has not yet ratified the Rome Statute of the International Criminal Court (Rome Statute).[148] However, China has been actively taking part in international criminal justice, including as a permanent member with veto power in the UN Security Council, voting for the establishment of International Criminal Tribunal

[145] Law on Legislation, Article 57 and 60.
[146] Law on Legislation, Article 61.
[147] See Law on Legislation, Article 71 and 75; Treaty Procedure Law, Article 9.
[148] Rome Statute of International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

for the Former Yugoslavia (ICTY)[149] and abstaining from the establishment of International Criminal Tribunal for Rwanda (ICTR).[150]

Domestically, China's first criminal code—the 1979 Criminal Code—did not include universal jurisdiction, although its Article 3(3) could possibly cover some international crimes.[151] Under Article 9 of the PRC's Criminal Code 1997 (Criminal Code), the Criminal Code 'is applicable to the crimes specified in international treaties to which the PRC is a signatory state or with which it is a member and the PRC exercises criminal jurisdiction over such crimes within its treaty obligations'.[152] This provision is identical to that under the *Decision on Exercising Criminal Jurisdiction over the Crimes Prescribed in International Treaties to Which the People's Republic of China Is a Party or Has Acceded* adopted by the NPCSC in June 1987 (1987 Universal Jurisdiction Notice). Article 9 of the Criminal Code is regarded as the key clause establishing universal criminal jurisdiction in China.[153] The international treaties referred to in Article 9 of the Criminal Code mainly include treaties concerning the four following areas:

(1) *International peace and security*. The crime of aggression, crimes against humanity and war crimes fall into this category. Although China has not yet ratified the Rome Statute, China is a party to most international humanitarian treaties including the Hague and Geneva Conventions.

(2) *Human rights*. The crimes of torture, genocide, apartheid, and slavery are in this category. China has ratified most key human rights treaties including: (a) the Convention on the Prevention and Punishment of the Crime of Genocide;[154] (b) the International Convention on the Suppression and Punishment of the Crime of Apartheid;[155] (c) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[156] and (iv) the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.[157]

[149] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN SCOR, 48th sess, 3217rd mtg, UN Doc S/RES/827 (25 May 1993).

[150] Statute of the International Tribunal for Rwanda, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994).

[151] Section 3(3) of 1979 Criminal Code provides that, '[i]f the criminal act or its consequence takes place within the territory of the People's Republic of China, the crime shall be deemed to have been committed within the territory of the People's Republic of China'.

[152] PRC's Criminal Code 1997, Article 9.

[153] See, eg, Zhu Lijiang, 'The Chinese Universal Jurisdiction Clause: How Far Can It Go?' (2005) Netherland International Law Review 85.

[154] Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 78 UNTS 277(entered into force 12 January 1951).

[155] International Convention on the Suppression and Punishment of the Crime of Apartheid, opened for signature 30 November 1973, 1015 UNTS 243 (entered into force 18 July 1976).

[156] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

[157] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, opened for signature 7 September 1956, 266 UNTS 3 (entered into force 30 April 1957).

(3) *International public safety*. Such treaties include: (a) the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents[158]; (b) the Convention for the Suppression of Unlawful Seizure of Aircraft[159]; (c) the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation[160]; (d) the Convention on the Physical Protection of Nuclear Materials[161]; (e) the International Convention against the Taking of Hostages[162]; (f) the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation[163]; (g) the Law of the Sea (about piracy).[164] The first five conventions in this category were listed in the 1987 Universal Jurisdiction Notice.

(4) *Narcotic drugs*. The key treaties under this category are the Convention on Psychotropic Substances[165] and the Single Convention on Narcotic Drugs.[166]

In addition, the NPCSC adopted the *Decision on the Prohibition against Narcotic Drugs on 28 December 1990* (1990 Drug Decision).[167] Under the 1990 Drug Decision:

> With respect to foreigners who, after committing the crimes mentioned in the preceding paragraph outside the territory of the People's Republic of China, have entered the territory of China, the Chinese judicial organ shall have jurisdiction and this Decision shall apply, with the exception of those who shall be extradited pursuant to the international conventions or bilateral treaties which China has acceded to or concluded.[168]

This Decision established universal jurisdiction in China for the crime of smuggling, trafficking, transporting and manufacturing drugs. However, this Decision was repealed after the Law of Prohibition of Narcotic Drugs was adopted on 29 December 2007. The Law of Prohibition of Narcotic Drugs does not include a similar provision like Article 13(2) of the 1990 Drug Decision.

[158] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977).

[159] Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971).

[160] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973) ('1970 Hague Convention').

[161] Convention on the Physical Protection of Nuclear Materials, opened for signature 3 March 1980, 1456 UNTS 101 (entered into force 8 February 1987).

[162] International Convention against the Taking of Hostages ('1979 Hostages Convention'), opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983).

[163] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, opened for signature 10 March 1988, 1678 UNTS 201 (entered into force 1 March 1992).

[164] UN Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

[165] Convention on Psychotropic Substances, opened for signature 21 February 1971, 1019 UNTS 175 (entered into force 16 August 1976).

[166] The Single Convention on Narcotic Drugs, opened for signature 30 March 1961, 520 UNTS 204 (entered into force 13 December 1964.

[167] Decision of the NPC on the Prohibition against Narcotic Drugs on 28 December 1990 (repealed on 1 June 2008).

[168] 1990 Drug Decision, Article 13(2).

China's universal jurisdiction provisions have the following features. First, the universal jurisdiction must be based on the international treaties to which China is a party. Whether international customary law can provide legal basis for universal jurisdiction in China is not decided.[169]

Second, universal jurisdiction in China applies not only to crimes of an international character that have been regulated by international treaties of which China is a party, but also to 'real' international crimes. Among the four types of international treaties listed above, the crimes under categories (1) and (2) treaties can be regarded as real international crimes, while crimes under categories (3) and (4) are crimes with a transnational character. However, some scholars argue that the 1997 Criminal Code does not 'criminalize all the offences listed in the international criminal conventions concluded by the PRC' because the Criminal Code does not include those substantive crimes like genocide, apartheid, torture and piracy.[170] If treaties can be applied directly in the Chinese domestic law under Article 9 of the 1997 Criminal Code, there would be no need to list those international crimes in the Code in an exhaustive manner.

The reluctance of Chinese courts to directly apply international treaties does not mean that they do not have the capacity to do so. For example, the 1979 Criminal Code did not include the crime of aircraft hijacking, but in *The People's Procuratorate of Harbin City, Heilongjiang Province v Alimuradov Shamid Gadji-ogly* in 1986, the Intermediate People's Court of Harbin City applied the analogy provision based on China's accession to the Tokyo, Hague and Montreal Conventions in relation to aircraft and sentenced Gadji-ogly to eight-year imprisonment for the crime of aircraft hijacking.[171] In 2003, the Shantou Intermediate People's Court held that ten Indonesian defendants' conduct (plundering and controlling ships by illegally boarding a Thai oil tanker in Malaysian maritime space) met the requirements of Article 3(1)(a) of the Convention for the Suppression on Unlawful Acts Against the Safety of Maritime Navigation and therefore constitutes a crime.[172] Due to the lack of a crime against the safety of maritime navigation in the 1997 Criminal Code, the court sentenced the defendants by referring to both Article 9 and Article 263 of the Code, although it is questionable whether the Court was in a position to exercise universal jurisdiction over the crime of robbery (Article 263) by referring to Article 9 and the UN Convention on the Law of the Sea and the Convention for the Suppression on Unlawful Acts against the Safety of Maritime Navigation. The analogy provision in the 1979 Criminal Code has been repealed based on the general principle of *nullum crimen sine lege, nulla poena sine lege*, and it is preferable for the legislature to transform those treaties with criminal clauses into domestic law rather than to allow them to be directly applied. However, it is still possible for the courts, although they rarely do, to apply international treaties

[169] Zhu (n 153) 94. [170] Ibid 94–5.

[171] *The People's Procuratorate of Harbin City, Heilongjiang Province v Alimuradov Shamid Gadji-ogly*, available at <http://www.chinalawinfo.com>.

[172] *Shantou Municipal People's Procuratorate v Atan Naim* et al, available at <http://www.chinalawinfo.com>. See also ZHU (n 152) 100–1.

directly and/or arguably by the analogy interpretation on the 1997 Criminal Code (not the analogy provision) to exercise the universal jurisdiction.

Third, China will not exercise universal criminal jurisdiction if China has extradition obligations and receives an extradition request. Where the treaty stipulates the obligation of *aut dedere aut judicare*, China must exercise universal jurisdiction if no extradition is applicable. Fourth, pursuant to the *Judicial Interpretation concerning Several Issues in Implementation of the Criminal Procedure Law of the PRC*, China will exercise the universal jurisdiction under Article 9 of the 1997 Criminal Code only when the accused has been apprehended in China,[173] which is different from countries that may exercise universal jurisdiction in absentia, such as New Zealand, Germany, and Spain. The requirement of 'presence' does not mean that the defendant needs to show up in all stages of the criminal proceedings. Finally, China does not exercise the universal jurisdiction over those who enjoy diplomatic privileges and immunities, but instead deal with such requests through diplomatic channels.[174]

## 5.2 Universal Civil Jurisdiction

China does not have a legislative act like the Alien Tort Statute[175] of the United States. On 26 December 2009, the NPC passed the Tort Law of the PRC (Tort Law).[176] The Tort Law does not provide any provisions dealing with foreign-related matters such as those under Chapter 8 of the GPCL (including Articles 142–150). However, there is no provision prohibiting the court from exercising jurisdiction over torts committed by aliens. Pursuant to Article 29 of the PRC's Law on Civil Litigation Procedures (Civil Procedure Law), courts may exercise jurisdiction over torts based on the place of the defendant's residence or the place of the tort.[177] Under the Law of the Application of Law for Foreign-Related Civil Relations of the People's Republic of China, adopted by the NPCSC on 28 October 2010, the applicable law in torts with foreign-related matters would be the law of the place of the tort.[178] Therefore, it is possible for Chinese courts to exercise jurisdiction over international law violations, such as torture, that are committed in other countries. So far, it has not yet been reported that Chinese courts exercised such universal civil jurisdiction.

In addition, Chinese laws apply when the application of foreign laws will undermine social and public interests of China.[179] Before the Tort Law was passed,

[173] *Judicial Interpretation concerning Several Issues in Implementation of the Criminal Procedure Law of the PRC*, Article 7.

[174] 1997 Criminal Code, Article 11; Criminal Procedural Law 1996, Article 16; Judicial Interpretation concerning Several Issues in Implementation of the Criminal Procedure Law of the PRC, Article 315.

[175] Alien Tort Statute, 28 USC § 1350 (2008).

[176] Tort Law of the PRC.

[177] PRC's Law on Civil Litigation Procedures, Article 29.

[178] Law of the Application of Law for Foreign-Related Civil Relations of the People's Republic of China, Article 44; see also General Principles of Civil Law, Article 146.

[179] Law of the Application of Law for Foreign-Related Civil Relations of the People's Republic of China, Article 5.

the GPCL was the main applicable law in torts. The GPCL is still applicable in the circumstances where the Tort Law is silent. It remains unsettled whether both civil laws (particularly including the GPCL and the Tort Law) and the PRC Law on State Compensation (State Compensation Law) may apply to the violations of individual rights by public authorities in China. There were rare cases under Article 121 of the GPCL, which is the main provision for state liability under China's civil law.[180] The Tort Law is silent on the torts committed by public authorities, which means that Article 121 of the GPCL applies to such tort cases even after the passage of the Tort Law.

The civil rights protected under the Tort Law are very broad, including the right to life, the right of privacy, and the right to reputation. Since the Tort Law came into effect only on 1 July 2010, some people think that it is within reasonable expectation that new torts cases including aliens' overseas violations of human rights may come up in the future. However, the present authors think that the chance of such extraterritorial application of Chinese laws is very slim due to China's own bitter experience with extraterritoriality and the trend of narrower application by foreign courts over tort claims for acts committed by foreigners in foreign territories, such as the US Alien Tort Statute.

## 6. Other International Sources

Chinese courts usually pay very limited attention to international non-binding declarative instruments and other primary international instruments such as general comments and concluding observations of human rights treaty bodies. China does not accept the compulsory jurisdiction of the International Court of Justice or the jurisdiction of any international human rights bodies. Although China accepts the jurisdiction of WTO dispute settlement mechanism and the dispute resolution mechanism under the UN Convention on the Law of the Sea, Chinese courts have not been asked to apply or enforce a decision rendered by an international court or tribunal.

## 7. Conclusion

In summary, the Chinese Constitution is silent on the domestic status of treaties, customary international law and other international rules. Treaties to which China is a party are generally regarded as a part of Chinese law. Chinese domestic legislation may be passed to implement treaties, and Chinese courts may directly apply treaties in some areas such as civil and commercial areas. However, not all treaties are directly applied by Chinese courts without transformation. International human rights treaties are good examples of this. International treaties should have

[180] General Principles of Civil Law, s 121.

a lower legal status than the Constitution and the basic laws, but may have the same legal force as the laws passed by the NPCSC, administrative regulations, or ministerial rules, depending on their concerned making procedures.

Legislative and administrative state organs may interpret treaties through their involvement in the treaty-making process, and courts interpret treaties in order to apply them, as allowed by provisions of the legislative acts. Ministerial departments, particularly the MFA, who are in charge of concluding treaties, may issue departmental regulations or opinions to interpret treaties. China generally does not give international customary law binding force in its domestic legal system. No matter which definition of 'international usage' is adopted, it usually applies only when there are neither Chinese laws nor treaties to govern in certain areas. In addition, Chinese courts have discretion to decide whether to apply international usage or not. Interestingly, general principles of international law receive wide acceptance in the Chinese international law community. However, other international instruments, such as non-binding declarations, the resolutions of international organizations, and general comments of treaty bodies, have not attracted much attention in Chinese courts.

In addition, Article 9 of 1997 Criminal Code provides the main legal basis of universal jurisdiction in China. However, universal civil jurisdiction seems much less likely to be exercised by Chinese courts.

# 7

# The Czech Republic

*Alexander J. Bělohlávek*

## 1. Introduction

With the collapse of Soviet authority in 1989, Czechoslovakia regained its freedom through a peaceful 'Velvet Revolution' and in 1993 split into the Czech Republic and Slovakia. The Constitution of the Czech Republic[1] was adopted on 16 December 1992, became effective on 1 January 1993, and has been amended many times, most recently in 2002. The Czech Republic is now a parliamentary democracy in which the President, who is elected by the Parliament, is the chief of state; and the Prime Minister, who is appointed by the President, is the head of government. As formal head of state, the President is granted specific powers such as the right to nominate Constitutional Court justices, and enact a veto on legislation. The members of the bicameral Parliament, consisting of the Senate and Chamber of Deputies, are all elected by popular vote. The Supreme Court (the highest court within the judiciary system), and Supreme Administrative Court preside over a civil law system based on Czech legislation and modified currently to comply with European Union obligations. The Constitutional Court supervises the conformance of the law, enacted by the Parliament, with the Constitution and Constitutional Acts and adjudicates complaints regarding violations of constitutional (basic) rights and freedoms and some other issues.

The Czech Republic joined NATO in 1999, the European Union in 2004, and completed its first-ever EU presidency during the first half of 2009. The Czech Republic is a member of the United Nations, the World Trade Organization, and has not accepted compulsory ICJ jurisdiction.

It must be noted that the Czech Constitutional Order is based not only on the Constitution itself, but also on the Declaration of Basic Rights and Fundamental Freedoms[2] and other Constitutional Laws enacted in accordance with the Constitution. These also have to be taken into account when examining the issue of the

[1] Constitutional Law [Act] No 1/1993 Coll, the Constitution of the Czech Republic, as amended (hereinafter the Constitution).

[2] Decree of the Czech National Council No 2/1993 Coll, on the proclamation of the Declaration of Basic Rights and Fundamental Freedoms as a part of the Czech Constitutional Order (hereinafter the 'Declaration of Basic Rights').

interaction between public international law and national law from the Czech perspective.

## 1.1 Constitutional and Legislative Texts

The Constitution does not include any specific article dealing exclusively with customary law or the law of nations. The only article that could be deemed to deal with this issue is Article 1, section 2 thereof, which states: 'The Czech Republic respects the obligations arising to it from international law.' The other provisions concern treaty law, as follows:

Article 10:
Promulgated Treaties, the ratification of which has been approved by the Parliament and which are binding for the Czech Republic, constitute a part of the legal order; if the Treaty provides for something different than national law, the Treaty shall prevail.

Article 10a:

(1) Some competences of the Czech organs can be transferred by the Treaty to an International Organisation or Institution.
(2) The consent of the Parliament is necessary for the ratification of the Treaty mentioned in Section (1), if the Constitutional law does not provide that a referendum is necessary for ratification.

Article 33, Section 2:
[In case of the dissolution of the Chamber of Deputies] The Senate is not allowed to enact legal measures concerning the Constitution, the state budget, the state final Account, the Voting Act and International Treaties under Article 10.

Article 39, Section 4:
For the adoption of constitutional law and for approval of the ratification of the Treaty as described in Article 10a, Section 1 hereof, a three-fifths majority of all Members of Parliament and a three-fifths majority of the present Members of the Senate are required.

Article 43, Sections 1, 4 and 6:

(1) The Parliament decides on declaring a state of war, if the Czech Republic has been attacked, or if it is necessary to fulfil the contractual obligations of common defence against aggression.
(4) The Government decides on dispatching the Armed Forces of the Czech Republic to foreign countries and on the stay of foreign armed forces on the territory of the Czech Republic for a maximum of 60 days, if it concerns: fulfilling the obligations stemming from the International Treaties of common defence against aggression, participating in peace missions on the basis of a decision of an international organisation of which the Czech Republic is a member, while the agreement of the host state is necessary . . .
(6) The government immediately informs both Chambers of Parliament of a decision under Sections 4 and 5. The Parliament can cancel the decision of the Government, for which it is sufficient for one of the Chambers of Parliament to issue a negative decision accepted by the majority of all members of that Chamber.

Article 49:

The Ratification of Treaties concerning: the rights and obligation of individuals, alliances, peace or other political issues, membership of the Czech Republic in international organisations, general economic issues, and other issues the regulation of which falls under the law, have to be approved by both Chambers of Parliament.

Article 52/2:
The means of promulgating the Act and Treaty shall be set by law.

Article 63, Section 1, Letter b):
The President of the republic further: . . .
b) Negotiates and ratifies the Treaties; he can delegate the negotiation of the Treaties to the Government or, with its consent, to individual members thereof . . .

Article 87, Section 2:
The Constitutional Court further decides whether the Treaty under Article 10a and Article 49 is in compliance with the Constitutional order before the ratification thereof.

Article 89, Section 3:
A decision of the Constitutional Court by which it declares that the Treaty is not in compliance with the Constitutional order under Article 87, Section 2 hereof suspends the ratification of the Treaty until such discrepancy has been remedied.

Article 95, Section 1:
The Judge is obliged to follow the Law and the Treaty while rendering judgment, which constitutes part of the legal order; he is entitled to analyze whether another legal enactment runs counter to the Law or such Treaty.

The Constitution also includes articles dealing with decisions of international organizations. Article 10b requires the government to inform Parliament in advance about issues concerning the membership obligations of the Czech Republic in international organizations or institutions mentioned in Article 10A, quoted above. The Chambers of the Parliament then prepare a stance on the decisions of such organizations or institutions in accordance with their own rules of procedure. In respect to the judgment of an international tribunal that is binding on the Czech Republic, Article 87, section 1(i), provides that the Constitutional Court decides on the measures necessary for executing such a decision, if it cannot be executed in any other way.

## 2. Treaty Law

### 2.1 The Treaty-Making Process

The process of ratification by the President is preceded by formal approval from the Parliament. Under Article 49 of the Constitution, approval by both Chambers of Parliament is required. The process is limited only to approving or rejecting ratification; no reservations or similar comments may be added.

A treaty becomes binding in the Czech Republic when it is ratified by the President under Article 63, section 1 (b) of the Constitution. The international legal effect of the ratification process is finalized by the exchange of the ratification

documents with the other high contracting party or by any other means under international law necessary for the binding effect of the treaty to be achieved.

## 2.2 Domestic Application of Treaties

Treaties that have undergone the ratification process in the Parliament, and that have been duly promulgated in the Collection of International Treaties, are automatically accepted as binding in the Czech legal order. However, such treaties can only be directly applicable and binding if they include rights and obligations that are self-executing and do not need any further legislative implementation to be applicable.

There is no general reception norm in the Constitution to incorporate every binding treaty or agreement into the legal order of the Czech Republic. The legislature implements some international treaties through 'statutory reception'. In this process, the legislature incorporates a treaty by referring to it in a different law. Such statutory reception via legal acts does not have an express basis in the Constitution itself, but it is not inconsistent with the Constitution.

The statutory reception of international treaties means that the relevant international treaty becomes part of the national legal order. However, the Act that is used for statutory reception does not necessarily specify the treaty to be incorporated by name or type. The only prerequisite for reception is that the treaty and the receptive legal Act that refers to it regulate the same subject matter. The treaties incorporated in this way are still part of public international law and the treaty will only be used in national law in place of the specific Act that has referred to it, and not in place of any Act that could be applicable if there is a question. Treaties concerning human rights and fundamental freedoms, which are incorporated on the basis of the Constitution, have a broader application.

The legislative practice in the Czech Republic is that only when a treaty's provisions differ from domestic law will a special provision will be incorporated into the domestic Act of incorporation emphasizing the priority of the international agreement. This legislative practice applies despite the general priority of international treaties established by the Czech Constitution. In relation to such Act, the treaty is *lex specialis.* If both the treaty and the Act provide the same thing, then the Act shall prevail. In sum, statutory incorporated treaties have the same legal force in the Czech legal order as the Act that has referred to it.

The main problem with this legal regulation is its spontaneity. Some legal Acts include clauses referring to preferential application of the treaties,[3] while other Acts do not include any clauses of this kind. Where such clause is missing, the treaty is not applied. There is no legal title to the application of the treaty without its

[3] For example, the following important laws of the Czech Republic: *Celní zákon* [The Customs Act] (Act [Law] No 13/1993 Coll of Laws), *Živnostenský zákon* [The Trade Licensing Act] (Act No 455/1991 Coll of Laws), *Obchodní zákoník* [The Commercial Code] (Act [Law] No 513/1991 Coll of Laws), *Zákon o trestním řízení* soudním [The Code of Criminal Procedure] (Act [Law] No 141/1961 Coll of Laws), and many others.

reception via an Act, nor does Czech law regulate the manner in which conflicts between the treaty and the Act should be resolved.

## 2.3 Judicial Interpretation and Application of Treaties

The Constitutional Court plays the most important role in relation to acts and documents of an international nature. This court acts as a bridge between national and international law. When any Czech court needs to analyze a domestic law's compatibility with international law, the court must request the Constitutional Court's analysis of the compatibility.

A request for the Constitutional Court's analysis of compatibility is only required in relation to ratified international treaties.[4] The Constitutional Court has no discretion to decide which agreements are treaties (as opposed to other legally binding texts and other commitments of a political nature) because Parliament makes this decision when ratifying an agreement.[5] Interestingly, the Constitution does not provide the definition of a 'treaty', but in the Commentary on the Constitution legal scholars refer to the Vienna Convention on the Law of Treaties.[6] This method illustrates the strong dualistic attitude of the Czech legal order. As a result, courts do not take account of non-binding international texts.

As the separation of state powers between the legislative, executive and judicial branches in the Czech Republic is firm, the courts are not obliged to defer to any political, legislative or executive authorities when deciding issues concerning international treaties. This position is most significantly highlighted in the judicial activities of the Constitutional Court, which normally exercises pre-emptive control over treaties that are incorporated into the legal order of the Czech Republic. The most significant case of such an independent decision in recent times is the Court's decision about the so-called 'Lisbon Treaty'. This treaty has been intensively criticized by some of the Euro-sceptic faction in the Parliament, as well as by the President of the Czech Republic. The Constitutional Court, when exercising its pre-emptive control, has clearly stated that it is only bound by the Czech constitutional and legal order, with certain international obligations of the Czech Republic, and has decided the issue clearly and in accordance with these principles, without any political prejudice.[7] This decision is fully in accordance with the general Article 95 of the Constitution,[8] which states that the judge is only bound by the law and international treaties that are a part of the national legal order. This principle is applicable a fortiori at all levels of the Czech judicial system.

[4] See, for example, Naděžda Rozehnalová, *Právo mezinárodního obchodu* [*Law of International Trade*] (Brno: Masarykova universita, 2004) 192 et seq.

[5] See Article 10 of the Constitution.

[6] V. Sládeček, V. Mikule, and J. Syllová, *Ústava České republiky: komentář* [*Constitution of the Czech Republic: Commentary*] (Praha: C.H. Beck, 2007) 76 et seq.

[7] Decision of the Constitutional Court of the Czech Republic No Pl. ÚS 19/08, issued on 26 November 2008.

[8] See section 1 above.

From the aforementioned, it is clear that when interpreting a treaty, the courts are obliged to apply the Vienna Convention of the Law of Treaties, which constitutes part of the national legal order.[9] However, in these cases, it is also important to distinguish between self-executing and non-self-executing treaties. For non-self-executing treaties, the implementing legislation is the primary source of national law, and the treaty is only a secondary means of interpretation.

Only self-executing treaties can have a direct effect and confer rights and duties to individuals in the Czech Republic. The treaty is regarded as self executing if the rights and obligations stipulated therein are sufficiently specific that the treaty can be applied in the legal order without any further legislative specification in a separate Act.

According to Article 10 of the Constitution, the international treaty shall be applied in its entirety. The treaty is given precedence when there is a domestic Act that provides for obligations that run counter to the treaty. Thus, generally, the courts are obliged to apply international treaties over domestic law if the two differ. When domestic law is in accordance with the treaty, and the treaty does not provide a higher standard of treatment or confer additional rights on the subject, there is no need to apply the international legal standard. However, in practice, the parties commonly support their legal arguments with arguments based on treaty obligations.

International treaties are most commonly invoked in disputes concerning a breach of human rights. Often the arguments in these situations are primarily based on the Declaration of Basic Rights, as well as rights stemming from a human rights treaty. The practical effect of arguing a treaty violation in these cases is that the case could go to an international court after appeals are exhausted in the Czech Republic.[10]

In theory, it is possible to directly invoke a right conferred by a treaty if the areas regulated by the treaty are not regulated by domestic law at all. However, to the best of the author's knowledge, this has not yet happened. In such a case, there would be no difference from the procedure used to invoke domestic laws before the local court.

Further, the ability to invoke rights anchored in a treaty depends on the nature of the rights provided. If the rights provided by the treaty are self-executing, then the party can directly invoke such rights. However, if the treaty is not self-executing and the rights conferred are not entirely clear, the rights must be incorporated into domestic law before they can be invoked by an individual. Once such a treaty is incorporated into a domestic law, individuals can invoke the domestic law to enforce their rights in the treaty.

Under the Constitution, the courts are bound by national law and international treaties that form a part of the national legal order. From this wording, it is clear

[9] Incorporated by Public Notice of the Ministry of Foreign Affairs (No 15/1988 Coll of Laws), on the Vienna Convention on the Law of Treaties.

[10] Most significant in this regard is the European Court of Human Rights in Strasbourg, founded under the auspices of the Council of Europe, where the Grand Chamber adjudicated 4 cases against the Czech Republic in 2008, while as of 31 December 2007, the applications pending in the Fifth Section of the Court against the Czech Republic represented 20 per cent of all applications presented to this section of the Court; for details, see <http://www.echr.coe.int/NR/rdonlyres/96443711-4133-4043-8FB6-331AEC510FCA/0/2007_section_activity_reports.pdf> (visited on 4 February 2009).

that the legal matrix applicable to the dispute presented to the national court does not include treaties to which the state is not a party. The author does not know of any case in which the Czech court has used arguments including an international treaty that has not been binding for the Czech Republic. However, as a matter of principle, the breadth of the field of arguments of the Constitutional Court, especially when using comparative arguments, is broad enough that the Constitutional Court could use non-binding instruments of international law when interpreting matters of the Constitutional law.

## 3. Customary International Law

The limited use and applicability of customary international law in the Czech Republic is largely due to the territorial limitations (lack of access to the sea and world oceans) that exclude an important part of customary law from applicability. Additionally, the great focus on law and historical connotations limit the use of customary international law. The pre-1989 constitutions even omitted clauses concerning rules for incorporating international treaties. Instead, treaties were accepted and incorporated in a highly selective and politically-motivated manner. However, the application of customary international law has not been limited by any law. This enabled the courts and the legislature to act in cases where there is a need to apply customary law. However, the courts seem to remain sceptical of international law and the legislature expressly rejected the incorporation of the receptive norm for customary law, so customary law is not often used.

All these factors have greatly limited the use of customary international law. The situation persisted even after the enactment of the democratic Constitution. The reception of customary law is being resolved with the extended reception norm, which authorizes all subjects applying the norm to use not only the treaty, but also any other sources of international law (ie customary law). However, the reception of customary law is carried out on a selective basis, not automatically.

The most important cases where customary law has been incorporated into domestic law concern conflicts of law[11] and civil procedures involving foreigners.[12] Customary international law is also included in the penal code of procedure,[13] which stipulates the conditions of mutual co-operation in criminal matters that are not regulated by a treaty. In the view of the author, these articles are sources for the direct application of local or bilateral customary law.

Article 1, section 2 of the Constitution states that the Czech Republic respects the obligations arising to it from international law. Additionally, the modification

[11] *Zákon o mezinárodním právu soukromém a procesním* [Act [Law] on private international law] (Act [Law] No 97/1963 Coll of Laws, as amended), whose Article 53 also concerns reciprocity and which authorizes the judicial organs in doubt to request its opinion on the issue of reciprocity.

[12] See, for example, Naděžda Rozehnalová and Vladimír Týč, *Evropský justiční prostor v civilních otázkách* [*European Area of Justice in Civil Law Matters*] (Brno: Masaryk University, 2003) 43 et seq.

[13] *Trestní řád* [Act [Law] on Criminal Procedure] (Act [Law] No 114/1961 Coll, as amended), where such stipulation is embedded in Article 376.

to the Constitution,[14] carried out in connection with the Czech accession to the European Union,[15] incorporated older customary law that had not been expressly incorporated via a special intra-state legal Act.[16] As a result, Czech courts are able to apply customary law. The most notable areas where customary law is used concerns treaty law, reciprocity in international penal issues and issues of international civil law.[17] Even in these areas, the application of customary law through the judicial system in the Czech Republic is rather scarce. The ministries play an important role in assuring and investigating the application of the principle of reciprocity regarding states with whom the Czech Republic has not concluded treaties regulating the relevant issues.

In terms of taking judicial notice of customary law, one of the founding principles of the Czech judicial system is the principle *iura novit curia*. However, it is highly speculative whether a Czech court, in following the constitutional rule expressed in Article 95, section 1, which only obliges it to apply the international treaty and national law, would also be bound to apply existing customary law. Additionally, Article 1, section 2 of the Constitution (the duty to respect international obligations of the Czech Republic) does not require the courts to apply customary law.[18] From this perspective, it is highly probable that the court would not take into account customary law, unless its existence was proven by the relevant ministry or by a party asserting such norm. However, no such case has yet been resolved before the Czech courts.

## 4. Hierarchy

Generally speaking, the rank of treaties and customary international law is expressed in Article 10 of the Constitution. This Article gives treaties the power of a normal domestic Act, but in case of a conflict between the ordinary Act and the

[14] See, for example, Karel Klíma and others, *Komentář K Ústavě a listině* [*Commentary – Constitution and the Charter (. . . of fundamental rights)*] (Plzeň, Czech Republic: Aleš Čeněk, 2005) 103 seq.

[15] See, for example, Monika Pauknerová, 'International Conventions and Community Law: Harmony and Conflicts' in G. Venturini and S. Bariatti (eds), *Liber Fausto Pocar: Nuovi strumenti del diritto internazionale privato* (Milano: Giuffrè, 2009), 793–808, Jiří Malenovský, 'K nové doktríně Ústavního soudu ČR v otázce vztahů českého, komunitárního a mezinárodního práva' ['On the New Doctrine of the Constitutional Court of the CR regarding the Relationship among Czech, Community and International Law'] [2006] 16 Právní rozhledy, No 21, 774–5.

[16] See, for example, M. Bonell, 'Die Bedeutung der Handelsbräuche im Wiener Kaufrechtsübereinkommen von 1980' [1985] Österreichische juristische Blätter 387–88.

[17] See Jiří Valdhans in Naděžda Rozehnalová, Karel Střelec, David Sehnálek, and Jiří Valdhans, *Mezinárodní obchodní transakce* [*International Commercial Transactions*] (Brno:Masary University: 2004), 1–12.

[18] See, for example, J Salač, 'Lex mercatoria – nástin vývoje a význam' (1998) 137(5) Právník 409–24, Naděžda Rozehnalová, 'Lex mercatoria – fikce či realita?' (1998) 137(10–1) Právník 932–52; Karel Střelec, *Nestátní prostředky v mezinárodní obchodní arbitráži – systémový pohled* [*Non-governmental Means in International Commercial Arbitration – Systematic View*] (Brno: Faculty of Law Masaryk University, 2005); Tereza Kyselová, *Právní závaznost nestátních prostředků regulace v mezinárodních soukromoprávních vztazích* [*Legal Effects of Non-governmental Means of Regulation in International Private Law Relations*] (Brno: Faculty of Law Masaryk University, 2008) and others.

treaty, the treaty shall prevail. This principle is described as the principle of 'application precedence'. The rank of a customary international norm is not expressly discussed in the Czech legal order. However, it is likely that the court applying customary law would analogize to Article 10 and grant custom the legal power of an ordinary Act, but without application precedence.

Where the automatic annulment of domestic law is not in conformity with constitutional principles (ie the principle of legal certainty and, in relation to customary law, the obligatory written form of the law), application precedence postpones the application of the contravening state laws. If the treaty is terminated in the future, the norms postponed during the period when the treaty has been in force again become effective and applicable.

The doctrine of the *jus cogens* has been recognized by the national courts in the Czech Republic, but merely on a theoretical basis. This doctrine has been included in the national law system via the practice of the European Court of Human Rights, which has been applying *jus cogens*, and whose decisions are binding for the Czech Republic. So this doctrine is respected in relation to human rights, as this is the area of law in which the European Court of Human Rights functions. However, such doctrine is merely being used to fortify the position of the basic human rights and freedoms that are anchored in the Declaration of Basic Rights. *Jus cogens* is most often referred to when the courts discuss human rights, but its practical importance is mostly exercised in supplementary lines of argument. The practical impact is, therefore, minimal.

The most important in the hierarchy of the state courts is the Constitutional Court, which regularly deals with questions concerning human rights. This court uses doctrines and arguments based on the practice of the European Court of Human Rights (ECtHR), as well as citing those cases. The Constitutional Court thus acts as an 'overarching bridge' between national and international law. Most often, it refers to Articles 5 and 6 of the European Convention on Human Rights. Assuming the legal opinion of the ECtHR and referencing the practice of the ECHR strengthens the persuasiveness of its own decisions and the reasoning. At the same time, using case law of the ECtHR naturally lowers the risk that the ECtHR itself might challenge the decision as not being in accordance with the European Convention on Human Rights. The effect of such extensive application of the decisions of the ECtHR has a self-defensive and pedagogical character. Notably, the reception of the reasoning of other international tribunals or organs is scarce.

The Constitutional Court interprets the issue of individual rights in accordance with the international obligations of the Czech Republic, although it cannot be said that it applies and interprets international law in its complexity, because most of the cases primarily invoke the regional European Convention on Human Rights.

From a historical perspective, before the enactment of the euro-modification, the Czech Constitution granted a higher status to human rights in general. This is because incorporation and direct effect was only guaranteed to international treaties on human rights and to the decisions of the human rights courts. This discrimination was removed by the euro-modification.

## 5. Jurisdiction

Universal criminal jurisdiction is directly regulated by Article 19 of the Czech Code of Criminal Procedure,[19] which declares jurisdiction when there is:

> culpability for a [...] terrorist attack, [...] genocide, the use of forbidden weapons and forbidden means of waging war, war cruelty, the persecution of civil populations, pillaging in a battle zone, the misuse of internationally respected symbols and crimes against the peace, even if the crime has been committed by a foreigner or an apatride individual in a foreign country, which does not have a domicile in the Czech Republic.

However, the Czech justice system has not yet been challenged with such a case.

The general jurisdiction for civil actions arising under international law is given by Act [Law] No 97/1963 Coll,[20] which regulates the cognizance of the Czech courts in matters with an international element. Article 37 states:

> the cognizance of the Czech courts in proprietary disputes is given if they have competence under Czech law. The cognizance of the Czech courts in proprietary disputes can also be based on the written agreement of the parties.[21] The material competence of the Czech courts shall not, however, be changed with such agreement.

This general clause concerning proprietary matters is also generally applicable to breaches of international law by analogy, as the purpose of this Act is to determine which legal order is applicable to civil, family, employment and similar legal relations with an international element.[22]

## 6. Other International Sources

The courts are only bound by domestic law and ratified international treaties that form a part of national law. From this perspective, the courts are not obliged to apply any other non-law sources in their decision-making process. However, in

[19] *Zákon o trestním řízení* soudním [The Code of Criminal Procedure] (Act [Law] No 141/1961 Coll of Laws).

[20] *Zákon o mezinárodním právu soukromém a procesním* [Act [Law] on private international law] (Act [Law] No 97/1963 Coll of Laws).

[21] *Prorogatio fori*. See for example Zdeněk Kapitán, 'Volba sudiště v soukromoprávních vztazích s mezinárodním prvkem' ['Choice of jurisdiction in private law relations with an international element'] (2004) 1 Časopis pro právní vědu a praxi 18–26; Zdeněk Kučera, *Mezinárodní právo soukromé* [*Private international law*] (6th edn, Brno: Doplněk, 2006); Naděžda Rozehnalová, 'Prorogační smlouva z pohledu Luganské úmluvy (několik poznámek k článku 17)' ['Choice of jurisdiction agreement as from the prospective of the Lugano Convention: some remarks regarding Articel 17'] (1999) 5 Evropské a mezinárodní právo (EMP) 21–6; Naděžda Rozehnalová, 'Doložky o právním režimu a o řešení sporů v případě smluv v mezinárodním obchodním styku' ['Choice of law and choice of jurisdiction clauses in international commercial contracts'] (1998) 1 Právní praxe v podnikání 2 et seq.; Naděžda Rozehnalová, 'Určení fóra a jeho význam pro spory s mezinárodním prvkem' ['Forum identification and its significancy for international disputes'] (2005) Bulletin advokacie No 4, pp 16–23 and No 5, pp 12–20.

[22] Article 1.

practice Czech courts are free to use non-binding texts to assist in decision making. For example, the court could use such a non-binding recommendation from an international organization, of which the Czech Republic is a member, in its reasoning, but the court would not likely use it as the main argument or in its final reasoning of the judgment.

The Czech Republic has not yet resolved a case of the enforcement of a judgment of the International Court of Justice concerning a breach of international law by the Czech Republic. However, the application and/or enforcement of such cases is quite common with decisions issued in the course of international arbitration and decisions of international judicial organs concerning human rights. This is a consequence of the incorporation of the international treaties under Article 10 of the Constitution. When treaties are incorporated they become domestic law but also maintain their status as a source of international law. As a consequence of this dual nature of treaties, the domestic court is obliged to take into account the interpretation presented by the international bodies that oversee the observance of the treaty. The Constitution implicitly assumes the reception of the decisions of international judicial bodies.

As described above, the overarching bridge between international and domestic law, the Constitutional Court, regularly assumes the decisions of ECtHR in its own decisions.

The mechanism for enforcing decisions of international judicial and para-judicial bodies is entrusted to the government, not to domestic judicial bodies. This enforcement encompasses not only paying equitable compensation for the breach of human rights under the European Convention of Human Rights, but also to proposing legislative changes under Article 41, section 2 of the Constitution. This article enables the legislature to make changes to an Act that runs contrary to an international treaty, and that causes damage to domestic subjects. The legislature also has the power to initiate proceedings for the termination of the Act or a part thereof before the Constitutional Court, if such Act is at variance with the treaty and it is not possible to change the Act by any other means.

The Constitutional Court also plays an important role in enforcing decisions of international organs. The Constitutional Court decides 'the measures necessary for the enforcement of the decision of the International Court, which is binding for the Czech Republic, if there are no other means of enforcement available'.[23] This power of the Constitutional Court shall not be exercised when enforcement can be achieved merely through an Act of the legislature or executive. Most probably, this measure is applicable in cases where the remedy for a breach of international law requires intervention in the decision of a domestic court.

Further, in 2004 a new instrument was introduced into the Czech legal system for participating in proceedings before an international judicial body. This instrument allows the Constitutional Court to reopen trial proceedings,[24] cancel its

[23] Article 87, section 1 of the Constitution (Czech Republic).

[24] According to the Act [Act] on the Constitutional Court, Act No 182/1993 Coll, until 2004 there was no possibility to reopen the case once the court had decided over the case of the parties, even if

original decision and appeal to an international court for a recommendation. The Constitutional Court can then decide the matter in accordance with the decision of the international body. However, this does not mean that the Court has an obligation to obey the decision of the international organ; it merely has an obligation to appeal to it. However, in practice, there has been no case in which the constitutional case has failed to follow the decision of the international judicial body. But, it cannot be said that a decision of the international body takes precedence in the hierarchy of decisions from the intra-state perspective.

The Constitutional Court has itself addressed some of the critical opinions of the Human Rights Committee, existing as the control organ of the International Covenant on Civil and Political Rights. This Committee has concluded that the Czech Republic breached Article 26 of the Covenant because of decisions in certain cases concerning restitution in early 1990s. The Constitutional Court has not applied its conclusions. In two of its decisions, the Constitutional Court only took cognizance of the opinion of the Committee and did not argue with them. However, in its reasoning on these decisions, it has repeated its constant view of the constitutional principle of equivalence, thereby indirectly expressing its disagreement with the Committee.

It is evident that the Constitutional Court has challenged the reasoning of the Committee with its own arguments, and did not ignore the Committee's opinion. However, under the Constitution, the Constitutional Court is not entitled to apply and enforce decisions of the bodies that do not fall under the legislative definition of an international court under Article 87, section 1 of the Constitution.

## 7. Conclusion

The Czech Republic has quite limited experience with international law. This is for political reasons, as the Czech Republic was part of the 'eastern bloc' under the Soviet influence. This ideologically limited the application of some international treaties (on human rights, for example). After the fall of the Iron Curtain, the political leaders drafted the Constitution with minimal experience in international law, which led them to include some serious systemic flaws, such as limiting the automatic incorporation of international treaties into domestic law only to treaties on human rights. Similarly, the decisions of international judicial bodies, except for the human rights judicial bodies, were ignored before the modification of the Constitution and the Act on the Constitutional Court in 2004.

there had been a significant procedural mistake on the side of the Court. By the modification (Act [Law] No 83/2004 Coll), such reopening is possible on the basis of a decision of the international judicial body that decides that the proceedings before the Constitutional Court were flawed.

# 8

# France

*Emmanuel Decaux*

The French system has long been characterized by what might be called 'legal nationalism.' As of 1789, beyond the revolutionary shocks and regime changes, the social Constitution was founded on the notion of national sovereignty with law being 'the expression of the general will'.[1] Thus, the Constitution of the Third Republic was actually the constitutional laws voted by the National Assembly in 1875, at the beginning of the Third Republic. The guarantee of rights proclaimed in the Declaration of the Rights of Man and of the Citizen of 1789 was ensured by the framework of the law, in what would become the regime of 'civil rights' (*libertés publiques*).[2] The idea of constitutional control was impossible to imagine, because in addition to the absence of a constitutional norm of a supra-legislative nature, the French revolution had been aimed at the privileges of the magistrates of the *Ancien Régime*. The idea of separation of powers inherited from Montesquieu was translated into a weakening of the power of the judiciary compared to the executive and legislative powers, and was coupled with an internal divide between judicial and administrative courts. A 'government of judges' that would assert itself alongside the National Assembly was inconceivable; Parliament in the end appropriated national sovereignty.

This 'law-based system' went hand in hand with a mistrust of international obligations. Such obligations were regarded as prejudicial to national sovereignty; treaties were no more than laws adopted through the parliamentary process of authorization and ratification.[3] In the Third Republic, the only relevant provision was Article 8 of the constitutional law of 16 July 1875, which was characterized by the tradition of a strong executive:

[1] For the distinction between the social Constitution and the political Constitution, cf especially M. Hauriou, *Précis de droit constitutionnel* (Sirey, 1928) (CNRS, 1965). Compare the modern situation as described by J. Chevallier, *L'État de droit*, Montchrestien (9th edn, 2010).

[2] It must be recalled that the Declaration of 1789 did not have any 'legal value' as such before its inclusion in the preamble of the Constitution of 1946, even if it constituted the historic inspiration for all liberal systems.

[3] For an illustration of this distrust throughout the nineteenth century in respect to human trafficking at sea, cf our course at the Hague Academy 'Les formes contemporaines de l'esclavage, RCADI' 2008, vol 338 (Nijhoff, 2009).

[T]he President of the Republic shall negotiate and ratify treaties. He will inform the Chambers in this matter as soon as the interest and security of the State allows it.—Peace treaties, trade agreements, treaties committing the finances of the State, those relating to the status of persons and to the right to property of the French abroad, will not be definite until the two Chambers have voted on them. No ceding, exchanging, or acquiring of territory may take place except by an Act of Parliament.'

The lack of a formal Constitution, and the absence of any hierarchy of norms and any constitutionality control, meant that the law, that is to say Parliament, had the last word.

This historical backdrop has dominated French law for nearly 150 years and provides the context by which to judge the fundamental evolution, if not legal revolution (in the first sense of the term) that has transpired since 1945, through a series of successive changes that have profoundly altered the landscape of classic French law. A first step, not without difficulties, was the adoption through popular referendum of the Constitution of the Fourth Republic. The Constitution of the Fifth Republic was also adopted by referendum in 1958, making the sovereign people the true constituent power.

The reform of 1962 that introduced the election of the President of the Republic through universal suffrage reinforced the institutional democracy that was the legacy of General de Gaulle, even if the most populist aspects of this legacy, such as the plebiscitary use of the referendum or the implementation of the head of state's political responsibility, seem now to be forgotten. In this context, parliamentary law was relegated to the second tier, eclipsed by the Constitution.

This post-war French system, contained in the framework of the 1946 Constitution, as well as in that of the 1958 Constitution, has been frequently analyzed in jurisprudence as well as in doctrine. Starting from the simple idea of the primacy of the will of the people, this system has progressively become more complicated through the proliferation of competent courts and the diversification of sources since 1974. It is no coincidence that a liberal president, and stranger to the Gaullist heritage, put his mark on this 'modernization' of institutions, which is characterized by the rise to power of the constitutional judge, the appearance of European supranationality, and the supremacy of international human rights law.[4]

Nonetheless, the democratic foundation of the French system remains the same. By virtue of the principle of national sovereignty expressed through the will of the people that constitute it and in the last resort through a referendum ('the national sovereignty belongs to the people . . . ', according to the abrupt formula of Article 3 of the 1958 Constitution) the Constitution is the source of all positive law. International law is received in the internal legal system through the legal framework defined by the Constitution, according to the Constitution's fundamental principles and following its procedural modalities. French 'monism' is thus a false monism, or rather a hierarchical 'monism', where the first source of any legal norm

[4] On this turning point, cf H. Thierry and E. Decaux (eds), *Droit international et droits de l'homme, la pratique juridique extérieure de la France dans le domaine des droits de l'homme* (Cahiers du CEDIN, Montchrestien, 1990).

is the Constitution, considered to be a 'social compact' between all citizens. Treaties that have been duly ratified have an infra-constitutional and supra-legislative value.

This system was for a long time purely theoretical, but today is anchored in abundant practice. Its coherence in general is guaranteed by the Conseil Constitutionnel, whose relevant jurisprudence has developed since the reform of 1974 first permitted referrals to it by 60 members of Parliament, and not, as previously, by only the four highest state officials. A landmark decision of 16 July 1971, enhanced this control through reference to a 'corpus of constitutionality' that includes the constitutional preambles, without international treaties being taken into account as such, following the decision of 15 January 1975.[5] On these bases, constitutional jurisprudence has become increasingly rich[6] and has been combined with the development of the case-law of the administrative, civil, commercial, and criminal courts.

Domestic jurisprudence long hesitated to give a treaty priority over a subsequent law, because a law authorizing treaty ratification is an ordinary law, which may always be changed. It was felt that the judge should not put himself in the position of the legislator. Nonetheless the sovereign will was clear, by virtue of Article 55 of the 1958 Constitution: 'Treaties or agreements duly ratified or approved shall upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.'[7] This domestic hierarchy was recognized by the Cour de Cassation in the 1975 judgment *Jacques Vabre* and by the Conseil d'État in the 1989 *Nicolo* judgment. These two cases, it must be noted, concerned European Community law, but the holdings are applicable to all international agreements, in the framework of title VI of the Constitution, which is titled *Des traités et accords internationaux* ('On Treaties and International Agreements').

This classic French conception, which could be said to work in a binary fashion by opposing domestic and international law in a dualistic manner (like two watertight worlds) is today called into question by the reception of Community law, which constitutes a new legal order established by recent constitutional amendments. A special title headed *Des Communautés européennes et de l'Union européenne* ('Of the European Communities and the European Union') was introduced 25 June 1992 for the purpose of Maastricht Treaty. More radically, two amendments have simplified the heading of title XV, now entitled *De l'Union européenn*e ('On the European Union'): the amendment of 1 March 2005 concerning the Madrid Treaty (application of which was challenged by referendum 29 May 2005), and the 4 February 2009 amendment concerning the Treaty of

[5] The various sources of the 'corpus of constitutionality' are discussed in section 2.1. For these developments cf B. Mathieu et al, *Les grandes délibérations du Conseil constitutionnel, 1958-1983* (Dalloz, 2009), and L. Favoreu and L. Philip, *Les grandes décisions du Conseil constitutionnel* (10th edn, 1999). Concerning the original perspective of political analysis, see D. Schnapper, *Une sociologue au Conseil constitutionnel* (Gallimard, 2010).

[6] Cf the cumulative tables 1959–2009, which are particularly useful, on the new site of the Conseil Constitutionnel: <http://www.conseil-constitutionnel.fr>. The site provides an official translation of the Constitution.

[7] Official translation on the website of the Constitutional Council.

Lisbon. Since then, the French system increasingly resembles a monist state with three tiers: old legal nationalism combined with creeping Europeanization and growing internationalization.

Ratification of the European Convention on Human Rights in 1974, and even more the acceptance in 1981 of individual access to the European Court of Human Rights (with first effects as of the judgment in *Bozano v France* in 1986), have also contributed gradually to opening French justice to the exterior world, even if there remain some reluctance, distrust and lack of understanding. As with Community law, systematically taking into account the European Convention on Human Rights has brought a new dimension to the interaction between French law and international law.[8] There is no longer a 'sovereign jurisdiction' that has the last word, because other judges are able to judge the judges, whether in Luxembourg or Strasbourg. This remarkable development, which creates a permanent interaction between national and European tribunals, has been systematized in doctrine, both in the area of judicial practice with the notion of a 'dialogue of judges'—coined as a median term between a government of judges and a war of judges (to adopt the formula of president Bruno Genvois,[9] a proponent of the European expansion at the Conseil d'État)—and in theory, with the concept of 'pluralisme juridique ordonné' ('multifaced legal order') that was launched by Professor Mireille Delmas-Marty in her courses at the Collège de France.[10]

Furthermore, interactions between domestic and international remedies can only be enriched by implementing a policy favouring a 'question prioritaire de constitutionnalité' ('priority ruling on the issue of constitutionality'), according to the constitutional amendment of 23 July 2008 aiming at modernizing the institutions of the Fifth Republic. An underlying idea of this reform was to permit some review of the constitutionality of laws through popular initiative before the Conseil Constitutionnel, in order to avoid having only one system that controls the 'conventionality' of laws, both before national judges and at the European courts. During the *travaux* of the 'Balladur committee' that prepared the 2008 constitutional reform, the then president of the Conseil Constitutionnel, Pierre Mazeaud, very clearly expressed this point of view.[11] The reform opened up a new and better means to determine the dialectic between the Constitution on one hand—and more generally the 'corpus of constitutionality'—and treaties and ordinary laws on the other hand. This new development, which emphasizes the principle of subsidiarity, echoes the debates at the European ministerial conference at Interlaken that was organized in February 2010 on the future of the European Court of Human

[8] For an overview, cf the workshop of the CNCDH on 'La Convention européenne des droits de l'homme et la justice française', *Gaz. Pal.*, 10-12 juin 2007, n° 161 à 163. Cf also the series of annual colloquiums (colloques annuels) organized by P. Tavernier, especially, *La France et la Cour européenne des droits de l'homme, 1998-2008 : une décennie d'application du protocole XI, La jurisprudence en 2007* (Bruylant, 2009).

[9] *Mélanges en l'honneur du président Bruno Genevoise, Le Dialogue des juges* (Dalloz, 2008).

[10] M. Delmas-Marty, *Les forces imaginantes du droit (II), Le pluralisme ordonné* (Le Seuil, 2006).

[11] Cf the *Rapport du Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la V^e^ République*, that is the Comité Balladur, on the site of the Élysée <http://www.elysee.fr>.

Rights. The question is whether this development represents a new stage in the construction of a 'European constitutionalism' with several levels and characterized by the decentralization of jurisdictions, or rather a renationalization of the constitutional case-law after increasingly contested delocalizations. That these two debates are concomitant in 2010 is no more due to coincidence than the parallelism of the reforms of 1974 with their chain of consequences.

To follow the overall scheme of the other chapters, the present study should distinguish conventional sources and non-conventional sources of international law, although in the French legal tradition such a presentation becomes particularly unbalanced. French tradition combines the privileged position given to written law, and especially to codification over two centuries, with the desire to control 'judicial authority' by limiting the importance of jurisprudence and by avoiding general judgments (however, the development of administrative law as a praetorian creation illustrates the precept that all rules have an exception). France reinforces this well established domestic law tradition on the international level by the primacy that is granted to the expression of the will of the state, which goes hand in hand with a distrust of spontaneous or vague obligations, ranging from soft law to *jus cogens*.[12] We will spare a few words before the conclusion of this chapter to discuss the place of European Community law. The primacy of national sovereignty, both on the internal and international level, has at least the advantage of intellectual coherence. The introduction of other systems, parallel or concurrent, only serves to multiply unresolved questions. But the development of the law also undoubtedly obeys a principle of complexity.

## 1. The Constitutional Framework

### 1.1 The Distribution of Competences between the Executive and the Legislature in Concluding Treaties and International Agreements

The Constitution of 1958 marked the return to a certain legal nationalism, rather in the spirit of Gaullist policy, while the Constitution of 1946, in post-war enthusiasm, recognized the primacy of international law in its Title IV on 'diplomatic treaties':

> diplomatic treaties that are ratified in the regular manner and are published have the force of law, even in the case where they would be contrary to French laws, without there being any need to ensure the application of legislative provisions other than those that would have been necessary to ensure their ratification. (Article 26)[13]

[12] Since the Vienna Conference on the Law of Treaties, France has opposed a recognition of the concept of *jus cogens*, and did not hesitate to vote alone against the adoption of the Convention of 1969. Cf P. Reuter, *Introduction au droit des traités* (Armand Colin, 1972). This refusal on principle is a constant in the French 'legal foreign policy', as 50 years of opinions and studies of the Conseil d'État on the subject have interpreted it.

[13] Unless otherwise noted, this and all other translations from the French in this chapter are by the editor.

This Article granted an automatic direct effect to treaties, outside any promulgation or incorporation, even if the formulation of the provision may seem clumsy in limiting itself to recognizing the 'force of law' for treaties that were in reality given a supra-legislative status.[14] Article 27 further stated the categories of treaties for which prior parliamentary authorization was necessary for ratification, including 'those that modify internal laws'. But Article 28 removed all ambiguity: 'provisions of diplomatic treaties duly ratified and published, and that have an authority superior to that of internal laws, may only be abrogated, modified or suspended after a regular denunciation that is notified by diplomatic channels'.[15]

The Constitution of 1958 is much more prudent, as the *travaux préparatoires* confirm, with a title VI that is headed 'Of treaties and international agreements.' Title VI aims to distribute the executive competences between the President of the Republic and the government by introducing a formal distinction between 'treaties' and 'agreements', as implicitly appears beginning with Article 52: 'the President of the Republic shall negotiate and ratify treaties. He shall be informed of any negotiations for the conclusion of an international agreement not subjected to ratification.' This distinction between 'negotiated' treaties in the name of the President of the Republic that are submitted for ratification, and agreements negotiated by the foreign secretary, which are not subjected to ratification, does not tally with the material *distinguo* between commitments that necessitate parliamentary authorization by virtue of Article 53, and other commitments:

> Peace treaties, trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament. They shall not take effect until such ratification or approval has been secured. No ceding, exchanging, or acquiring of territory shall be valid without the consent of the population concerned.[16]

Apart from 'peace treaties' and in a fairly archaic manner 'trade agreements', all the other instruments mentioned can either be 'treaties' or 'agreements', being the subject of an act of authorization for ratification , or an act of authorization for approbation, in conformity with the vocabulary of Article 53 that can also be found in Article 55.

[14] The expression 'force de loi' ('legal value') has long been used in jurisprudence. The Cour de Cassation stated in a judgment of 8 May 1963 that the law authorizing the ratification of a treaty gives it the scope and the effects of a law but the strict hierarchy that has been confirmed since the judgment in *Jacques Vabre* marks the abandoning of such confusion.

[15] For a complete bibliography, cf P. Daillier, M. Forteau and A. Pellet, *Droit international public* (8th edn, LGDJ, 2009), p 166. Two theses must be mentioned here: P. Gaia, *Le Conseil constitutionnel et l'insertion des engagements internationaux dans l'ordre juridique interne* (Economica, 1991), and V. Goesel Le Bihan, *La répartition des compétences en matière de conclusion des accords internationaux sous la V^e^ République* (Pedone, 1995).

[16] Official translation on the website of the Conseil d'Etat.

These purely domestic distinctions do not correspond to any category of the law of treaties as found in the Vienna Convention of 1969. The Convention, of course, is later in time than the 1958 Constitution, and France did not vote for the Vienna Convention in any case, even if in practice she refers to some of its non-controversial provisions, such as those on interpretation or reservations. The domestic distinctions are thus 'inoperative in international law', to use the phrase coined by Alain Pellet, and the various types of instruments it differentiates have 'exactly the same legal value'.[17]

If we add that the Constitution does not take into account the development of administrative agreements and other forms of obligations in simplified form, despite the concern of the minister for foreign affairs to maintain his diplomatic monopoly for international negotiation, his 'treaty-making power' (which in old French used to be called *pouvoir de tractation*) pledge of expertise, coherence and continuity of the 'legal foreign policy of France',[18] it is clear that the new constitutional system does not clarify practice at all.[19] According to Alain Pellet, this would nevertheless have been the first intention of the authors of the Constitution:

> [T]reaties—that are ratified—and agreements—which are approved—envisaged by the Constitution flow both from the international category of 'treaties in solemn form', which also will not prevent France from concluding further agreements in simplified form; rather this is a para-constitutional practice and it is highly regrettable that the opportunity has not been taken at one of the numerous constitutional revisions that have been undertaken recently to put the statement of the law in agreement with the intentions of the Constituent.[20]

### *1.1.1 Executive powers*

Fairly late, the Conseil Constitutionnel has begun to police the distribution of competences between the legislature and the executive, under Articles 52 and 53 of the Constitution. In a decision of 9 April 2009, it confirmed the discretionary role of the executive in the matter of reservations and interpretive declarations. It should be noted that since the beginning of the 1980s the practice of the executive branch has been to inform Parliament on these matters, as a matter of courtesy. An organic law was at issue that provided

> that the introduction of bills authorising the ratification or approbation of treaties or international agreements must be accompanied by documents stating the objectives that are pursued by the treaties or agreements, setting out their economic, financial, social and environmental consequences, analysing their effects on the French legal order and present-

[17] Notice on the site of the Conseil Constitutionnel, Dossiers thématiques, 'La Constitution en 20 questions', *Le droit international et la Constitution de 1958*, § 2; translation of the editor.

[18] G. de Lacharrière, *La politique juridique extérieure* (Economica, 1983).

[19] Cf the circular by the Prime Minister of 30 May 1997. For the practice at the beginning of the Fifth Republic, cf P. Reuter and A. Gros, *Traités et documents diplomatiques* (coll. Thémis PUF, 5th edn, 1982).

[20] Op cit, § 2.

ing the negotiation history, the state of signatures and ratifications, as well as, as the case may be, reservations or interpretive declarations made by France.

The Conseil was quick to recall that in the words of Article 52 of the Constitution:

> The President of the Republic shall negotiate and ratify treaties . . . ; that the competence to negotiate, conclude and approve international agreements not submitted to ratification belongs to the executive power; that the only power recognised for Parliament in the matter of treaties and international agreements by the Constitution is to authorise or refuse ratification or approbation in the cases mentioned in Article 53.

In stating this, Conseil has considerably reduced the scope of the provision in question, by considering that the organic law has provided, for the appropriate information of Parliament, that the bills authorizing the ratification or approbation of a treaty or international agreement must be accompanied, as the case may be, by 'reservations or interpretive declarations made by France'; that it has thus aimed to have the reservations expressed before the introduction of the bill; that consequently, it does not threaten the freedom of the executive power at the ratification of a treaty or an agreement, of lodging a reservation, renouncing reservations that it had planned on lodging and of which it had informed Parliament or, after ratification, of removing reservations that it had formulated beforehand.

For all that, the Conseil minimized the scope of interpretive declarations when it pronounced itself on the conformity with the Constitution of the European Charter for Regional or Minority Languages in a decision on 15 June 1999:

> The French government has paired its signature with an interpretive declaration in which it sets out the sense and scope that it intends to give the Charter or some of its provisions with regard to the Constitution. Such an interpretive declaration only has the normative force of constituting an instrument in relation with the treaty and is concurrent, in case of litigation, with its interpretation. It is thus for the Conseil Constitutionnel, which is competent on the basis of Article 54 of the Constitution, to proceed to control the constitutionality of obligations that France has agreed to, independently from this declaration.

It must nevertheless be noted that the Conseil Constitutionnel specifically refers to Article 54, and it may be questioned whether the reasoning could be transposed to other cases. Furthermore, it is not clear that the regime of interpretive declarations would be valid for reservations that, while limiting expressly the 'obligations agreed to', can constitute 'essential conditions for the exercise of sovereignty'.

### *1.1.2 Legislative powers*

By definition, the Conseil is not able to enforce compliance with Article 53. No question has arisen concerning a treaty submitted for Parliamentary authorization by reason of its political importance, such as the Franco-German treaty of 1963, and one may assume that this superfluous authorization has nothing in it 'contrary to the Constitution'. Conversely, when the executive avoids Parliamentary authorization in the areas mentioned by the Constitution, there is no useful remedy, for want of *a priori* control by the Conseil Constitutionnel. Further, it must be noted

that the Conseil Constitutionnel has always avoided *a posteriori* control of the validity of treaties in indirect ways, by insisting on the principle of *pacta sunt servanda*. Thus, according to a decision of 29 December 1989:

> applying the provisions of Article 55 of the Constitution, it is for the various organs of the State, within the framework of their respective competences to monitor the application of international conventions; if it falls to the Conseil Constitutionnel, when it is seised on the basis of Article 61 of the Constitution to ensure that the law respects the field of application of Article 55, it is however not for it to examine the conformity with the provisions of a treaty or an international agreement.

In a similar sense, according to a decision of 20 December 2007: 'those stipulations of a treaty that take up obligations agreed to previously by France are exempted from the control of conformity with the Constitution'. One could transpose this principle, which has the virtue of reinforcing the international obligations of France, constituting what internationalists call 'imperfect ratifications'.

The Conseil d'État did finally examine the question of the regularity of the procedure, in its judgment *Parc d'activités de Blotzheim* of 18 December 1998. The case concerned the requirement of parliamentary authorization for certain categories of treaties, specifically as named in Article 53, notably treaties that modify legislative provisions. It annulled the decree of publication of an agreement that was approved in disregard of Article 53, in the *Bamba Dieng* judgment of 23 February 2000. The Conseil d'État admitted that such an irregularity may be invoked as a matter of exception in its *Aggoun* judgment of 5 March 2003.[21] The Cour de Cassation has followed in the same path, with a judgment in *ASECNA v N'Doye* of 29 May 2001.[22]

This development has some disadvantages, because it may lead judges to unearth old conventions that were 'properly' applied, without having been the subject of an authorization of ratification in proper and due form. This retroactive control has the consequence of 'rendering the position of the French authorities legally uncomfortable' as Alain Pellet has pointed out. Thus the Conseil d'État annulled on 16 June 2003 the decree of execution of 26 April 1947 of the Convention on the Privileges and Immunities of the United Nations for lack of parliamentary ratification, rendering it inapplicable on French territory, while France remained bound on the international level.[23] The French authorities thus had to introduce a bill of ratification to adjust the situation with regard to this convention. The same procedure was recently followed with regard to the constituent act of the FAO, to which France has been a party on the international level since 11 October 1945, but which had never been submitted to the French Parliament.[24]

[21] M. Long, P. Weil, G. Braibant, P. Delvolve and B. Genevois, Les grands arrêts de la jurisprudence administrative (17th edn, Dalloz, 2009), p 662. Beforehand these questions were categorized under the doctrine of 'acts of government', thus escaping any kind of judicial control.

[22] *RGDIP* 2001, p 1031.

[23] Req. n°246794 M. Cavaciuti, *RGDIP* 2004, p 249.

[24] Daillier, Forteau and Pellet, op cit, p 262.

## 2. The Incorporation of Treaties in Domestic Law under the Constitution

It is in the context of the hierarchy of norms that the contribution of the Constitution is decisive. Under Article 55, the primacy of international law is recognized, whichever terminology is adopted: 'treaties and agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject with respect to each agreement or treaty, to their application by the other party'. For all that, this clearly affirmed superiority in principle is not unconditional. A treaty ends up on a supra-legislative level, but it remains infra-constitutional in nature. In other words, it is by virtue of the Constitution and only in the framework of the Constitution that it fits into the domestic legal order.

This fundamental concept has been at the centre of the legal philosophy of the Fifth Republic since it began, but the Conseil Constitutionnel had to clarify this when facing the challenge of a 'European Constitution'. The Conseil affirmed in its decision of 19 November 2004 that the Constitution was at the 'top of the public legal order', only to conclude, not without sophism, that by virtue of this constitutional superiority the primacy of Community law is recognized.

### 2.1 Prior Control Exercised by the Conseil Constitutionnel

A mechanism has been put in place to ensure that any new 'international obligation' conforms with the Constitution. It should be clarified that the 'corpus of constitutionality', in other words the constitutional norms, come from several sources: The 1958 Constitution proper, the preamble of the 1946 Constitution and the French Declaration of the Rights of Man and of the Citizen of 1789, by reference to the preamble of 1958—and in a superabundant way by reference to the preamble of 1946—and finally, the 'fundamental principles recognized by the laws of the Republic'. In a decision of 29 December 2009, the Conseil Constitutionnel took into account the revision made by the constitutional law of 1 March 2005, which established the Charter of the Environment, by stating that the whole of its provisions had 'constitutional value'.[25]

The Conseil Constitutionnel has always refused to introduce treaties into the corpus of constitutionality.[26] As a consequence, the Conseil does not have to assess the conformity of a new treaty with the 'stipulations of a treaty or international agreement' that is already in force.[27]

At present Article 54 states that:

[25] Official translation on the website of the Constitutional Council.

[26] Cf below at section 2.2.

[27] It is only where a new treaty aims directly at a treaty that has already been ratified that the Conseil has a duty to 'determine the scope of the treaty submitted for examination according to international obligations that this treaty intends to modify or complete'. Decision of 9 April 1992.

if the Conseil Constitutionnel on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given after amending the Constitution.

In practice, the President of the Republic or the Prime Minister will certainly refer an issue to the Conseil Constitutionnel if in doubt, but the possibility of the matter being referred by a parliamentary minority under Article 54 or even under Article 61 paragraph 2, which aims at all laws before their promulgation, constitutes a supplementary guarantee. The Treaty of Maastricht, for example, has been the subject of three referrals: one presidential referral giving rise to the decision of 9 April 1992, which led to a constitutional revision; a senatorial referral regarding the conformity of the treaty with the revised Constitution that was the subject of a decision on 2 September 1992; and finally a referral by members of National Assembly on the referendum law authorizing ratification, in its decision of 23 September 1992. Notably, the question did not arise in the context of various agreements concluded in the Fourth Republic, including the most important ones, such as the Charter of the United Nations, the NATO the European Coal and Steel Community treaty or the treaty for the EDC,[28] the Geneva agreements on Indochina, etc.

Following the logic of the 1958 Constitution, if an obligation is held to be 'contrary to the Constitution', the solution is simple: either the draft treaty is abandoned, or a revision of the Constitution is necessary prior to ratification. This revision may be made by Congress or can give rise to a referendum. Then, in a second stage, the ratification of the treaty must also be authorized, either through Parliament, or by referendum, under Article 11.[29] Recent practice shows abundant examples of these different scenarios, on the basis of increasingly precise jurisprudence of the Conseil Constitutionnel. In any case, following good democratic logic, it is a matter of giving 'national sovereignty' the last word, today incarnated in popular sovereignty, that is to say the 'constituent power' that is exercised by the entire citizenry, under the control of the constitutional judge.

The first mission of the Conseil Constitutionnel was to state exactly the scope of Article 54, which limits itself to mentioning 'an international obligation [that] includes a clause contrary to the Constitution'. In its first decision of 9 April 1992 on the Treaty of Maastricht the Conseil dealt with an inventory of 'norms of reference of the control that is instituted under Article 54 of the Constitution', placing the emphasis on the position granted 'to principles of national sovereignty' in the preambles:

considering that it follows from these texts of constitutional value that the respect for national sovereignty places no obstacle as to how, on the basis of the provisions cited from the preamble of the 1946 Constitution, France may agree, subject to reciprocity, to

[28] It was a parliamentary vote that put an end to the process of ratification.
[29] Cf below at n 50.

international obligations with a view to participating in the creation and development of a permanent international organization, that has legal personality and vested with powers of decision by consensual transfers of competences by the member states; considering nevertheless that where the international obligations agreed to for this end contain a clause contrary to the Constitution or threaten the conditions that are essential to the exercise of national sovereignty, the authorisation to ratify them requires a revision of the constitution.[30]

In other words, the potential obstacle is split in two, on the one side there is a 'clause contrary' to a specific provision of the Constitution, on the other, an 'attack' on national sovereignty. In the decision of 13 October 2005, the analytical table revealed a supplementary section by expressly dealing with 'rights and freedoms that are constitutionally guaranteed'. From then on, the Conseil considers

that where an international obligation contains a clause contrary to the Constitution, puts into question the rights and freedoms that are constitutionally guaranteed or threatens conditions that are essential to the exercise of national sovereignty, the authorisation to ratify it requires a constitutional revision.

It was in the decision of 9 April 1992 that the Conseil Constitutionnel considered for the first time that certain clauses 'threatened the conditions that are essential to the exercise of sovereignty'—thus adopting a more subtle vocabulary than the initial terminology, opposing 'limitations and transfers of sovereignty'[31]—which led to the introduction by constitutional law of 25 June 1992 of a new title XV 'On the European Communities and the European Union', which at first was a ragbag of specific or derogating measures, before permitting the recognition of a proper legal regime. In 1992, Articles 88-1 to 88-4 were introduced, which took up terms of constitutional jurisprudence: 'subject to reciprocity and according to the modalities set out in the Treaty on European union signed on 7 February 1992, France consents to transferring the competences necessary to the establishment of the economic and monetary European union' (Article 88-2). Following the decision of 31 December 1997 on the Treaty of Amsterdam, a new paragraph containing the same formula on the free movement of persons was added to Article 88-2 through the constitutional law of 25 January 1999. For the record we will mention here the constitutional law of 1 March 2005 following the decision of 19 November 2004, the fate of which was tied to the Treaty of Madrid that established a constitution for Europe. Finally, following the decision of 20 December 2007, the constitutional law of 4 February 2008, concerning the Treaty of Lisbon, as well as the constitutional law of 23 July 2008 on the modernization of the institutions of the Fifth Republic, have recast all of these provisions, with Articles 88-1 to 88-7. This new, more coherent mechanism should avoid piecemeal revisions in European matters, with four consecutive revisions.

[30] *Grandes décisions du Conseil constitutionnel*, n° 45.

[31] Although this was about the election of the European Parliament through universal suffrage, with the decision of 30 December 1976, the abrupt formula completely diverged from the requirement that: 'no constitutional provision can authorise the transfer of all or part of national sovereignty to any international organisation whatsoever'.

Before the qualitative leap of 1992, the Conseil Constitutionnel had considered that the intended measures did not depart from the ordinary, notably, with regard to the election of the parliamentary assembly through universal and direct suffrage in its decision of 30 December 1976, or even with ratification of the convention of application of Schengen, in its decision of 25 July 1991. Sometimes, even in accepting an international obligation, the Conseil Constitutionnel pronouncements forclose future developments, as happened in the reasoning of its decision of 22 May 1985 on Protocol No 6 of the European Convention on Human Rights. The decision dissuaded successive governments from considering becoming a party to Protocol No 2 of the International Covenant on Civil and Political Rights (ICCPR), because it prohibits denunciation. Of course, this protocol is not likely to be denounced, even if Article 16 of the Constitution is brought into play, but with the decision of 22 May 1985, initiatives to sign Protocol No 2 were paralysed for more than 20 years, until a campaign for the universal abolition of the death penalty highlighted the contradiction of the French position.

The Conseil Constitutionnel was able to show flexibility in its decision of 25 July 1991, when examining the claim made that 'the absence of express possibility of denunciation would entail an abandonment of sovereignty', with regard to the provisions of the convention of application of the Schengen agreement on the accession of new members:

> in every case the requirement of ratification, approbation or acceptance is reserved. With regard to modification procedures so envisaged, on a basis of reciprocity, respecting the rules of national law on the introduction of treaties into the internal order, the absence of reference to a withdrawal clause should not in itself constitute a neglect of sovereignty.
>
> This would of course be quite different if the non-denunciation were expressly mentioned in the treaty, either in the text itself in the final clauses, or in light of the *travaux préparatoires*.

The decision of 13 October 2005 clarifies the elliptical reasoning of the 1985 decision, by clearly distinguishing the texts that are being submitted for examination:

> Considering that the conditions that are essential to the exercise of national sovereignty are threatened by the irrevocable adhesion to an international obligation that touches on a domain that is inherent in it; Considering that protocol No. 13 to the Convention on human rights and fundamental freedoms, while it excludes all derogations or reservations, can be denounced under the conditions set out in Article 58 of this Convention, that, from then on, it does not threaten the conditions that are essential to the exercise of national sovereignty; Considering on the other hand that the second optional protocol cannot be denounced with reference to the International Covenant on Civil and Political Rights; that this obligation binds France irrevocably even where exceptional danger threatens the existence of the Nation, that from then on it threatens the conditions that are essential to the exercise of national sovereignty.

Amendments to the Constitution have been imposed in other areas of international law, especially in the area of judicial cooperation or criminal competence. This was at first the case with the constitutional law of 25 November 1993, which

introduced Article 53-1 on the right to asylum,[32] and then with the constitutional law of 8 July 1999 on the Rome Statute of the International Criminal Court, with the introduction of the new Article 53-2 ('the Republic may recognise the jurisdiction of the International Criminal Court under the conditions envisaged by the treaty that was signed on 18 July 1998'), which is grafted on to Article 53 even though it has no substantial link to it. More elegantly, taking into account the decision of 13 October 2005 on international obligations concerning the death penalty—in particular, protocol No 2 to the ICCPR and Protocol No 13 to the European Convention on Human Rights—has been transposed not by a specific provision of Title VI on treaties, but by principled affirmation, through the constitutional law of 23 February 2007, which introduces Article 66-1 'no one may be sentenced to death', after Article 66 on habeas corpus.

The Conseil Constitutionnel has only once had a matter referred by the President of the Republic, during a period of political *cohabitation.* The government was prepared to ratify the European Charter for Regional or Minority Languages of 5 November 1992 and Mr. Chirac referred the question of its constitutionality to the court. The Conseil Constitutionnel gave a decision on 15 June 1999 and held certain provisions to be contrary to the Constitution, which forclosed debate, due to the absence of a constitutional revision. Professor Pellet is of the opinion that the introduction of the short Article 75-1 in the constitutional revision of 23 July 2003, which recognizes that 'regional languages are part of the heritage of France', could reignite the debate on a new basis.[33] A fortiori, the possibility of signing the Framework Convention on National Minorities is not on the agenda, bearing in mind constitutional principles, especially the principle of the indivisibility of the unity of the Republic, which has already been referred to in the landmark decisions of the Conseil Constitutionnel.

Further, it must be noted that by virtue of Article 11 of the Constitution, the President can submit to referendum any 'bill that intends to authorise the ratification of a treaty, that, without being contrary to the Constitution, would affect the functioning of institutions'. on proposal by the government. Thus in this case, outside any constitutional revision, the referendum procedure aims to authorize the ratification, as happened in 1972 with the Treaty of Brussels on the accession of the United Kingdom, Denmark and Ireland to the European Community.

The situation is similar if Congress has already undertaken a constitutional revision; nothing will prevent the executive from submitting the draft law of authorization to a referendum, introducing a type of a double check, as happened with the referendum of 20 September 1992 on the Treaty of Maastricht and the

[32] 'The Republic may conclude with European States that are bound by obligations identical to its own in the area of asylum and the protection of human rights and fundamental freedoms, agreements that determine their respective competences for the examination of asylum claims that are made to them. Nevertheless, even if the claim does not enter within their competence under these agreements, the authorities of the Republic will always have the right to grant asylum to any foreigner that is persecuted due to his acts in pursuance of freedom or who requests the protection by France for another reason.'

[33] Op cit, § 5.

defeat of the referendum of 29 May 2005 on the Treaty of Madrid establishing a constitution for Europe. In this very special case, the constitutional revision that had been adopted previously remained a dead letter. On the contrary, the Treaty of Nice of 2001, and the Treaty of Lisbon in 2007, were ratified following parliamentary authorization, under the classic procedure of Article 53.

The controversies over the enlargement of the European Union—and especially the prospect of the accession of Turkey, even though it is not explicitly in the texts—have resulted in cumbersome procedures. Under Article 88-5 that was introduced by the constitutional law of 1 March 2005, 'any bill authorising the ratification of a treaty on the accession of a State to the European Union and European Community is submitted to a referendum by the President of the Republic'. Paragraph 2 nevertheless provides that the assemblies can, through a motion that is adopted in 'identical terms', with a double majority of 3/5, authorize the adoption of a draft ordinary law, in conformity with Article 89 paragraph 3.

## 2.2 The Constitutional Scope of a Treaty Ratified in the Regular Manner

The inscription into domestic law should not make a treaty prevail over 'provisions of a constitutional nature'. The Conseil Constitutionnel did not feel bound by international law at the time of independence for the Comoro Islands, when ruling on the fate of Mayotte Island. It applied the last paragraph of Article 53 of the Constitution to a case of decolonization, highlighting in its decision of 30 December 1975 that the right to independence was exercised within the framework of the Constitution and that 'as a consequence, no rule of public international law is at issue'. Of course, this topic concerned Resolution 1514, which had been voted on by the General Assembly of the United Nations, and not a treaty that was in force in France, but the scope of the decision reaches very far.[34]

For its part, in the *Koné* judgment of 3 July 1996, the Conseil d'État held that a 'fundamental principle recognised by the laws of the Republic' prevails over an extradition. This obvious conclusion was confirmed by the Conseil d'État in the *Sarran* judgment of 30 October 1998, which concerned the composition of the electoral body of New Caledonia. A constitutional law of 20 July 1998 had introduced a new Article 76 into the French Constitution under the title of 'transitory provisions concerning New Caledonia', which limited the electoral body, in conformity with the agreements of Nouméa, in order to safeguard the demographic equilibrium of the territory. After determining that Article 76 infringed 'other norms of constitutional value on the right of suffrage', the Conseil d'État, ruled out application of the international human rights instruments invoked, the ICCPR and the European Convention on Human Rights, for the purpose of challenging a decree of application. Citing Article 55 of the Constitution, it considered that:

[34] Cf below.

the supremacy so conferred on international obligations does not apply in the internal order to constitutional provisions; thus the means taken to challenge the decree must be ruled out, in that it misunderstood the application of international obligations that were introduced into domestic law in the regular manner, and was thus contrary to Article 55 of the Constitution.

According to authorized commentators, by limiting the scope of its decision 'in the internal order', the Conseil d'État 'has not intended to challenge the "fundamental principle in international law of the pre-eminence of this law over internal law"'.[35] But this principle only develops its full effect in the international legal order. 'The national judge can only impose respect for it to the extent that his own legal order, in which the Constitution holds an essential position, gives him a title that authorizes him to make the international norm prevail over the internal norm, whichever it may be.'[36]

The Cour de Cassation had to deal with an identical case on the basis of another provision that was introduced following the Nouméa agreements, Article 77 of the Constitution adopted a similar solution to that of the Conseil d'État in the *Mlle Pauline Fraisse* judgment of 2 June 2000.[37] This undoubtedly constitutes the beginning of a potentially permanent contradiction between the 'internal' reading of the national judge and the 'international' reading of supra-national organs, even if in this instance the European Court of Human Rights validated the derogating system that was put in place in its *Py v France* judgment of 11 January 2005.

Nonetheless, the Conseil d'État does not envisage the inverse case, through the question of whether a treaty conforms to the Constitution. In the same way, in a judgment of 27 February 1990, on the occasion of the *Touvier* affair, the criminal chamber of the Cour de Cassation had recalled that it was not for the courts of the judicial order to pronounce on the constitutionality of treaties. As the commentators in *Grands arrêts* state further:

In the *Sarran* judgement the Conseil d'État considered that it could not rule out the application of the constitutional law by relying on international obligations that France had agreed to. But this in no way means that in the future it will only ensure the primacy of a treaty over the law after prior verification of whether this treaty conforms with the Constitution [...] Even if the *Nicolo* judgment has opened the door to conventionality control of the law, this must not be confused with the constitutionality control which only the Conseil Constitutionnel has the power to carry out.[38]

This half-way position has not escaped Alain Pellet's criticism:

From a dualist perspective this reservation of constitutionality is not incongruous (but France claims that it follows legal monism). Nevertheless, this jurisprudence poses great problems with regard to international law, since the international responsibility of France

[35] Cf opinion of the International Court of Justice of 26 April 1988, United Nations Headquarters Agreement.
[36] Cf *Grands arrêts de la jurisprudence administrative*, n° 102, p 741.
[37] *RGDIP* 2000, p 815.
[38] Op cit, p 743.

may be engaged; what is more, the high administrative jurisdiction could have used the preamble of the 1946 constitution to appear more daring. One can certainly see in the *Koné, Sarran* and *Commune de Porta* judgments an effect, which is maybe perverted, but is predictable, of lacunae in the control mechanism of the constitutionality of treaties and of the combination of the *IVG* jurisprudence of the Conseil Constitutionnel and the *Nicolo* judgment of the Conseil d'État: as soon as the Conseil Constitutionnel does not fulfil its role as guardian of the Constitution, the administrative and legal jurisdictions feel they need to replace it, even though they do not have the means to do so.[39]

The delicate distribution of roles risks becoming even more confused by the reform of 2008 that establishes in Article 61-1 a new question of constitutionality, turning both the Conseil d'État and the Cour de Cassation into a jurisdictional filter for the Conseil Constitutionnel.

## 3. Application in the Jurisprudence

### 3.1 The Recognition in Principle of the Superiority of Treaties over the Law

This complex procedure of a priori control, of possible constitutional revisions and subsequent ratification, which is completed by the publication of the treaty or agreement in the *Journal Officiel*, is not enough to remove all difficulties.[40]

The primacy of the treaty over the law, which seems clearly confirmed in Article 55 of the 1958 Constitution, contrary to a certain hesitation of the 1946 Constitution, has not imposed itself directly on the judge. Thus, the constitutional judge refused in a controversial decision of 15 January 1975 to assess the conformity of a law to a treaty, considering that a priori constitutional control was not possible, to the extent that this control was of absolute and definitive character, while the superiority of the treaty that flows from Article 55

> presents a character both relative and share holding on the one side, to what it is limited to in the field of application of the treaty, and on the other side, to what it is subordinated to at condition of reciprocity, the realisation of which can vary according to the behaviour of the signatory State or States of the treaty, and the moment where the respect for this condition must be assessed.[41]

At least it would have been possible for the Conseil Constitutionnel to find a place for certain fundamental conventions in the 'constitutional corpus', as François Luchaire, an eminent member of the Conseil Constitutionnel, has suggested. The solution adopted in the decision of 15 January 1975 is even more questionable since the claimants invoked the European Convention on Human Rights which has an objective character and is by nature not subject to reciprocity.[42] The

[39] Daillier, Forteau and Pellet, p 314.
[40] For a systematic bibliography, cf Daillier, Forteau and Pellet, op cit, p 258.
[41] Grandes décisions du Conseil constitutionnel, n° 91.
[42] J. Rivero, Ajda 1975, p 134.

question will arise again with the question of unconstitutionality, which will introduce, this time a posteriori, permanent schizophrenia between conventionality control and constitutionality control and eventually a risk of contradiction between the Conseil Constitutionnel and the European Court of Human Rights.[43]

This case-law about principle has been confirmed by a dozen subsequent decisions.[44] Yet, returning ten years later in a decision of 3 September 1986 to its case-law of 1975, the Conseil Constitutionnel stated that 'the respect for the rule enunciated in Article 55 of the Constitution [...] applies even where the law is silent', thus emphasizing 'that it is for the different organs of the State to ensure the application' of international conventions 'within the framework of their respective competences'. In this instance, the Conseil Constitutionnel was also ensuring that the law does not underestimate directly the reach of Article 55 by applying it only to treaties, when the text expressly aims at 'treaties and other agreements that are ratified or approved in the regular manner'.

The Conseil Constitutionnel has recalled on several occasions with regard to reservations of interpretation that the legislator had a duty to respect the international obligations of France. In a decision of 26 June 1986, it noted that the provisions of a law that authorized the government to adopt ordonnances 'do not authorise either disregard for the right to work, or for the international obligations of France'. In the same way, in a decision of 22 January 1990, it stated :

the legislator may make specific provisions with regard to foreigners under the condition that the international obligations to which France has agreed are respected and that the freedoms and fundamental rights of constitutional value are recognised for all those that reside in the territory of the Republic.

Nevertheless, in a decision of 13 August 1993, the Conseil Constitutionnel recalls straight away

that the assessment of constitutionality of provisions that the legislator regards to be necessary should not be drawn from the comparison between provisions of successive laws or from the conformity of the law with the stipulations of international conventions, but result from the comparison of it to the requirements that have constitutional character.

Only in passing is reference made to the 1951 convention on refugees, and this is mostly to underline the constitutional principles that are even more protective:

Considering that the preamble to the Constitution of 27 October 1946 to which the preamble of the Constitution of 1958 refers provides in the fourth paragraph: 'Any one who is persecuted due to his action in pursuance of liberty has the right of asylum in the territories of the Republic'; that if certain guarantees that attach to this right are envisaged in international conventions that are introduced to internal law, it is for the legislator to ensure in all circumstances all legal guarantees that this constitutional requirement comprises.

[43] F. Sudre, 'Question préjudicielle de constitutionnalité et Convention européenne des droits de l'homme', *Revue du droit public,* n° 3-2009, p 671.

[44] Especially the decisions of 20 July 1977, 18 January 1978, 17 July 1980, 29 December 1989, 23 July 1991, 24 July 1991, 21 January 1994, 9 April 1996, 5 May 1998, 29 December 1998, 23 July 1999 and 30 March 2006.

With regard to a new law on foreigners, the decision of 5 May 1998 by the Conseil Constitutionnel recalls one more time that even though it is for it 'to ensure that the law respects the field of application of Article 55, it is on the other hand not for it to examine the conformity of the law with the stipulations of a treaty or international agreement'.[45] Nevertheless, more recently, on the topic of the controversial resort to DNA testing—now abandoned by the government—to establish the filiation of foreigners, the Conseil has recalled in its decision of 15 November 2007, after invoking the first Article of the 1789 Declaration:

> firstly, that the criticised provisions will only be applied subject to international conventions that determine the law applicable to the link of filiation; that it follows from the parliamentary *travaux* that the legislator did not intend to infringe the rules of the conflict of laws defined by Articles 311-14 and the following ones of the *Code Civil*, which in principle submit the filiation of a child to the personal law of the mother; that the referred provisions do not aim to and should not, without violating the first Article of the 1789 Declaration, have the effect of instituting, with regard to children requesting a visa, particular rules of filiation that could lead to the non-recognition of a link of filiation that is legally established in the sense of the law that is applicable to them; that, from then on, the proof of filiation by means of 'possessing a state as defined in Article 311-1 of the civil code' could only be accommodated if, under the applicable law, a comparable mode of proof is admitted; that further, these provisions could not deprive the foreigner of the possibility of justifying the link of filiation according to other modes of proof that are admitted under the applicable law.

The combination of constitutional principles, international treaties and rules of private international law has the result of depriving the law of its 'venom', without revealing the respective weight given each of these references.

For the rest, since 1975, the Conseil Constitutionnel has limited itself to confirming the green light given to domestic judges in the matter. As well-informed commentators note:

> as the jurisprudence of the Conseil Constitutionnel has stated more precisely, the idea in the doctrine that Article 55 of the Constitution, as interpreted by the Conseil Constitutionnel, implicitly authorises both the administrative and legal judge to ensure respect for the hierarchy of norms that it decrees, has progressively developed.[46]

### *3.1.1 The evolution of the French jurisdictions*

Since the judgment in *Société des Cafés Jacques Vabre* of 24 May 1975 the Cour de Cassation has endured the consequences of the legal void thus created by the jurisprudence of the Conseil Constitutionnel. The case made the treaty prevail over the law, whether it was prior or subsequent to the treaty and was not limited to Community law, as in the *Société Jacques Vabre* case; the Cour de Cassation

[45] *RGDIP* 1998, p 577.

[46] *Les Grands arrêts de la jurisprudence administrative* (17th edn, Dalloz, 2009), commentary to the *Nicolo* judgment, n° 93, p 661.

applied it for example in criminal law in the *Glaeser* judgment of 30 June 1976, the *Barbie* judgment of 3 June 1988, and the *Richemont* judgment of 22 January 1997.

The Conseil d'État ended up adopting this jurisprudence in the *Nicolo* judgment of 20 October 1989, but limited itself to citing Article 55 of the Constitution among its list of relevant documents, while considering that a law of 1977 on the elections of the European Parliament 'is not incompatible with the clear stipulations [...] of the Treaty of Rome'. This jurisprudence went beyond Community law in the judgment in *Confédération nationale des associations familiales catholiques* of 21 December 1990. In the judgment in *Mlle Deprez* of 5 January 2005, its reasoning was clarified: 'to implement the principle of superiority of treaties over laws as stated in Article 55 of the Constitution, it falls to the judge, for the determination of the text that he must apply, to conform to the conflict of norms rule that is decreed in this Article'. Nevertheless, this is not a question that need be automatically raised, according to the judgment of *Maciolak* of December 2002.

Recently, the Conseil d'État has ventured even further, in its *Gardedieu* judgment of 8 February 2007, by highlighting that the responsibility of the state due to laws is

> susceptible to being engaged [...] because of obligations that belong to it to ensure the respect for international conventions by public authorities, to make amends for all prejudices that result from the intervention of a law that is adopted in disregard of the international obligations of France.

To do this, the judge was led to verify that the conditions of the entry into force of the treaty were regular, especially with regard to the requirement of publication—that thus replaces the old requirement of promulgation to incorporate an international treaty into domestic law. A contrario, a treaty that has not been published officially cannot usefully be invoked before a judge. With the same logic, the Conseil d'État applies a treaty from the date of its publication, even if this is later than the international entry into force. As was said in the judgment in *Fédération nationale des associations tutélaires* of 7 July 2000:

> considering that if, by application of the stipulations of Article K, the revised social charter entered into force on 1 July 1999, this date only governs the effects of this treaty in the international order, and should not be confused with the entry into force of said treaty in the internal order, which is subordinate, in conformity with the provisions of Article 55 of the Constitution, to its publication.[47]

In the same way, the suspension of the application of a treaty must also be the subject of a publication, as the judgment in *Préfet de Gironde v Mhamedi* of 18 December 1992 illustrates.

[47] *RGDIP* 2001, p 240.

## 3.2 The Competence of Ordinary Judges in the Matter of Prejudicial Questions

### *3.2.1 The assessment of the condition of reciprocity*

The issue of the primacy of treaties in domestic law has been complicated by the condition of reciprocity that was clumsily introduced in the 1958 Constitution.[48] For its part, the Conseil Constitutionnel often refers to the principle of reciprocity, even if in reference to formalities, such as the exchange of ratifications, but has considered that its mandate does not include controlling fulfilment of the condition of reciprocity envisaged by Article 55. In a decision of 30 December 1980 it judged that 'the rule of reciprocity in Article 55 of the Constitution, if it affects the superiority of treaties or agreements over laws, does not determine the conformity of the laws to the Constitution'. The Conseil Constitutionnel has also come to recognize that the condition of reciprocity does not concern all treaties. It had already noted, in a decision of 30 October 1981, that:

> Article 55 of the Constitution, which defines the conditions under which treaties and international agreements have a superior authority to laws, is no obstacle to a French law granting rights to foreigners even where the State of which they are nationals would not give the same rights to the French.

The formulation does not make clear whether this is a subjective and voluntary renunciation on the part of the legislator, or a general principle that has an objective character founded on the nature of the rights concerned, but when examining the statute of the ICC, the Conseil Constitutionnel stated in a decision of 22 January 1999 that the obligations that follow from the Rome Statute 'apply to each of the State parties independently from conditions for their execution by other parties; that thus the reservation of reciprocity mentioned in Article 55 of the Constitution is not to be applied'.

The issue of non-respect of reciprocity is not raised as a matter of course, but the Conseil d'État, when seised of the issue by a party, has a duty to demand the view of the Ministry of Foreign Affairs, which alone knows the practice of the state in question and can assess the diplomatic implications of the case. This happened in the *GISTI* case of 29 June 1990 and more recently in the *Mme Chevrol* judgment of 9 April 1999. In general, the Conseil d'État seems to limit the condition of reciprocity to bilateral agreements, such as the Franco-Algerian agreements, leaving aside treaty laws of objective character, such as the international labour conventions or human rights and humanitarian law treaties. In the *Chevrol* judgment of 13 February 2003, the European Court was of the opinion that to adhere to the assessment of the Ministry of Foreign Affairs, instead of exercising judicial control over the condition of reciprocity, was a violation of the right to a fair trial.

[48] E. Decaux, *La réciprocité en droit international* (LGDJ, 1980).

In the *Kryla* judgment of 6 March 1984, the Cour de Cassation considered that:

> in absence of an initiative taken by the Government to denounce a convention or suspend its application, it does not fall to the judges to assess the respect for the condition of reciprocity that is envisaged in the relations between States by Article 55 of the Constitution.[49]

### *3.2.2 The interpretation of treaties*

The application of a treaty is closely linked to the interpretation of the norm, either in isolation or in combination with other sources. The traditional practice of referral for interpretation to the Ministry of Foreign Affairs, fully justified by its knowledge of the *travaux préparatoires* and relevant international implications of the treaty, as compared to information available to judges, has been challenged following the jurisprudence of the European Court of Human Rights.

The Conseil d'État was the direct subject of a judgment by the European Court challenging its lack of independence and impartiality in the *Beaumartin* judgment of 24 November 1994. As a consequence, it completely changed its jurisprudence in relation to the deference that had been applied as a principle from the beginning of the nineteenth century. The Conseil considered, in its *GISTI* judgment of 29 June 1990, that from now on it was competent to interpret treaties itself, without being bound by a referral to the Ministry of Foreign Affairs,. Thus, it could reject the interpretation given by the Ministry of Foreign Affairs, as in the *Serra Garriga* judgment of 21 December 1994, and a fortiori, not take into account the official interpretation of the ICJ statute, in the *Aquarone* judgment of 6 June 1997.

In a classic manner, the Cour de Cassation applied from the mid nineteenth century the theory of the *acte clair* concerning issues relating to 'private interests' and only used the referral for interpretation where 'the public international order' or 'public international law' was at issue.[50] Since the judgment of the first civil chamber of 10 December 1995, *Banque africaine de développement*, the Cour de Cassation has considered 'that it is a matter of course for the judge to interpret international treaties that have been invoked, without it being necessary to request the advice of a non-legal authority'.[51] Nevertheless, in practice, the referral for interpretation remains because of its obvious utility, but the official interpretation that is given does not formally bind the judge.

## 3.3 Effectiveness of International Obligations: Direct Applicability of Treaties before the Ordinary Jurisdictions

Even in a monist system that resembles an obstacle course, like the French system, the direct application of a treaty that is introduced into domestic law is not as such

[49] *RGDIP* 1985, p 358.
[50] Cf the numerous references cited in Daillier, Forteau and Pellet, p 260.
[51] D. Alland 'Jamais, parfois, toujours. Réflexions sur la compétence de la Cour de cassation en matière d'interprétation des conventions internationales', *RGDIP* 1996, p 599.

automatic.[52] Of course, as Ronny Abraham indicates, 'in principle conventions are directly executed into domestic law; they can thus be invoked by individuals'. The author explains in a footnote that this is not a principle of international law: 'it is from French constitutional law, in its current state (that is to say, under Article 55 of the Constitution of 4 October 1958) that the normally self-executing character of international conventions follows.' He quickly added that this principle is subject to two exceptions 'that in reality cover rather numerous cases: either the convention contains only recommendations or obligations that address States and only States; or the rules that it contains are not applicable in absence of measures that serve to define the modalities of application'.[53]

It is for each tribunal to analyze the relevant provisions of an agreement, prudently. This was the case with the European Convention on Human Rights after the ratification in 1974, with a few judgments that today seem aberrant with regard to the European jurisprudence.[54] One example is the judgment of 29 February 1980 of the Cour d'Appel of Paris where the provisions of Articles 6, 13 and 14 of the European Convention on Human Rights were considered 'very general in their formulation, only constituting guidelines for the legislation of the various signatory States'. Soon thereafter, the direct applicability of the European Convention on Human Rights was imposed both on legal and administrative judges.

The only reason to return to this early case-law is to keep a memory of this period of apprenticeship, which was full of hesitation and contradictions. An anecdote that illustrates these aberrations is found in a judgment by the Commercial Chamber of the Cour de Cassation of 25 January 2005, which dealt with the judgment of the Cour D'Appel of Caen of 12 November 2002. The claimants who had challenged the excessive solidarity tax (*impôt de solidarité sur la fortune* (ISF)) had invoked Article 11 of the International Covenant on Economic, Social and Cultural Rights, but the judges of the Tribunal de Grande Instance (TGI) of Cherbourg had referred to Article 11 of the International Covenant on Civil and Political Rights, which prohibits prison sentences for debtors. The claimants reproached the Cour d'Appel for having noted this confusion, without concluding that the TGI had not answered the claim put forward. The Cour de Cassation at first limited itself to considering that this 'alleged irregularity of judgment is inadmissible for lack of interest', the Cour D'Appel being seised of the whole case through the 'devolutive effect' of the appeal. Finally, when examining the substantive argument, the Court set aside the claim, recalling 'that with regard to their content, the provisions of Article 11 of the International Covenant on Economic, Social and Cultural Rights of 16 December 1966, which do not produce a direct effect in the internal legal

[52] D. Alland, 'L'applicabilité directe du droit international considérée du point de vue de l'office du juge', *RGDIP* 1998, p 203.

[53] Op cit, p 77.

[54] For a first report, M.-A. Eissen, *in* G. Cohen-Jonathan (ed), *Droits de l'homme en France, Dix ans d'application de la CEDH devant les juridictions judiciaires françaises* (Engel, 1985).

order, cannot be usefully invoked'. Even though the judicial error of the TGI was without consequence, it was a considerable blunder.

Even apart from the issues raised with regard to the simple knowledge of international norms by judges, we encounter similar uncertainties on the direct applicability of recent treaties in the area of social rights and with the convention on the rights of the child, to give two examples.

### *3.3.1 The scope of the European Social Charter*

The Conseil d'État has long held, for example in the *Ministre du budget v Mlle Valton et Mlle Crépeaux* judgment of 20 April 1984, that claimants cannot successfully invoke the European Social Charter since this Charter does not produce any direct effect with regard to the nationals of the contracting states.[55] This general conclusion is reached by an authorized commentator, but it is only an extrapolation to the extent that the judgment limits itself to consideration of Article 4-4 of the Social Charter, noting 'that this clause does not produce a direct effect with regard to the nationals of the contracting States; that thus in any case, the claimant cannot usefully invoke the violation of the clause of Article 4-4 . . . ' From the start the position of the Conseil d'État was empirical, following its case-by-case method and avoiding pointless generalizations. Scholars, however, have too quickly accepted that the Conseil d'État thus established a clear split between two sets of rights, civil and political rights of direct application, through the European Convention on Human Rights and the International Covenant on Civil and Political Rights on the one hand, and economic and social rights through the European Social Charter and the International Covenant on Economic, Social and Cultural Rights on the other hand.

Recent developments show that the jurisprudence is not quite so dualistic. The prudence of the Conseil d'État has in effect allowed certain flexibility, even if the economic and social instruments are too rarely invoked, purely because of the force of their ideas. Examining the dozen or so cases where the European Social Charter has been invoked at the Conseil d'État demonstrates that the outcome is nuanced. In the *CGT* judgment of 19 October 2005, on new recruitment contracts, the labor union invoked Article 24 of the European Social Charter and the International Labour Convention No 158. The Conseil d'État rejected the assertions on the merits 'in any case', without first assessing the direct applicability of the invoked provisions. In the same way, returning to the issue in its judgment of 26 February 2007 in *Union des organismes conventionnés assureurs*, the Conseil d'État recalled:

> that in the words of Article 4 of the International Labour Convention No. 158 on the termination of the employment at the initiative of the employer: a worker must not be dismissed without a valid reason for dismissal that is linked to the aptitude or the conduct of the worker or based on the necessities of the functioning of the company, establishment or service; that, under Article 24 of the European Social Charter, the parties undertake to

[55] *Étude du Conseil d'État*, NED n° 4803, p 28.

recognise this right to workers; that, contrary to what is maintained, the decision by which the general director of the *caisse nationale du régime social des indépendants* ended, in application of the provisions of Article L.611-14 of the social security code, the employment of a director or an accountant of a savings bank is not a dismissal, which may only occur, following such a withdrawal of employment, after the refusal by the person interested of the offer of re-classification, that is made to him in application of the same provisions; that in consequence, the claimants cannot usefully maintain that the attacked ordonnance, that provides in fact that the withdrawal of functions can only occur for a reason that is based on the interest of service, disregards the stipulations of the International Labour Convention no. 158 nor, in any case, those of Article 24 of the revised European Social Charter.

In other situations, the Conseil d'État seems to adopt a systematic attitude to refuse the direct application of the Charter as such. In the *association AIDES* judgment of 21 October 2005, this time concerning 'an alleged violation of Articles 13 and 17 of the revised European Social Charter', the Conseil made unnecessary arguments to show that the claim had no basis, contrary to its usual concern for judicial economy:

firstly, because this Charter does not have direct effect in domestic law, secondly, because the Charter does not concern persons who reside in France in irregular situations that enter the field of application of medical aid given by the State; and thirdly, contrary to the assertions by the claimant, France is not the subject of any adverse judgment by the Committee of Ministers of the Council of Europe. [. . .]'

By affirming outright that the Charter does not have direct effect, the Conseil d'État, for once, has moved carelessly into uncharted territory.

The Conseil reasserts a casuistic approach in another *association AIDES* judgment on 7 June 2006:

Considering on the one hand, that under Articles 9 and 10 of the International Covenant on Economic, Social and Cultural Rights, the State parties recognise the right of every person to social security, including social insurance, as well as protection and assistance to the largest extent possible for the family, that in the same way, under Articles 11, 12, 13 and 17 of the revised European Social Charter, the parties agree to take appropriate measures to ensure the effective exercise, respectively, of the right to the protection of health, the right to social security, the right to social and medical assistance and the right of children and adolescents to grow up in an environment that is favourable to the prospering of their personality and the development of their physical and mental abilities; that these stipulations, that do not produce direct effects with regard to individuals, cannot usefully be invoked in support of conclusions that aim to annul challenged decrees; that it follows from this that the claim made from the fact that the rights that are set out by the revised European Social Charter are not guaranteed with respect to the principle of non-discrimination provided in Article E of part V of the Charter is equally non-operative.

In the same way in a judgment of 2 October 2009, *Union syndicale solidaires Isère*, it rejected the direct applicability of Article 4 of the revised Social Charter.

Nonetheless, in the *GISTI* judgment of 23 October 2009 the Conseil d'État seemed to take a symbolic step by not raising the issue of direct applicability even

though it took refuge in the habitual stylistic clause 'in any case', which saves it from having to tackle the issue. It validated the impugned acts since

> in any case, they do not ignore any further, for the same reasons, the provisions relating to non-discrimination contained in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the convention No. 111 of the International Labour Organisation, the revised European Social Charter and Article 14 of the European Convention on Human Rights and Fundamental Freedoms.

The fact that the same non-discrimination clause is contained in these various instruments has undoubtedly favoured a combined reasoning. If we look closely, in the judgment of 7 June 2006 mentioned above, the Conseil did indeed distinguish certain specific provisions without direct effects and the transversal principle of non-discrimination that is directly applicable but indirectly lacking in basis. The Conseil d'État has not ruled out further developments.

### *3.3.2 The scope of the International Covenant on Economic, Social and Cultural Rights*

If we take a look at the references to the International Covenant on Economic, Social and Cultural Rights, the same extreme prudence can be found. The basic reasoning remains the one that was made in the *M.X.* judgment of 26 January 2000:

> Considering that in the words of paragraph 1 of Article 6 of the International Covenant on Economic, Social and Cultural Rights, published by the decree of 29 January 1981: 'The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right'; that having regard to their content, these stipulations do not produce a direct effect in the internal legal order; that thus the claimant cannot usefully invoke disregard for them.

In the *GISTI* judgment of 6 November 2000, the Conseil d'État dismissed Article 9 on the right to 'social security' by stating 'that these stipulations that do not produce direct effects with regard to individuals, cannot be usefully invoked to support conclusions that aim at the annulment of the challenged decree'. In the same way, in the *GISTI* judgment of 18 July 2006, the Conseil d'État recalled:

> in the words of Article 2 of the International Covenant on Economic, Social and Cultural Rights: The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to [ . . . ]national [ . . . ] origin; that in the words of Article 9: The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance; that these stipulations, that do not have direct effect with regard to individuals, cannot be usefully invoked in support of conclusions that aim to annul implicit decisions that are attacked.

The same is true for the *Association AIDES* judgment of 7 June 2006 that has already been mentioned. But it may be noted that the Conseil d'État takes care not only to mention treaties expressly in its list of relevant texts (*visas*), but also to cite the invoked provisions at length ('supposing that it could be usefully invoked elsewhere . . . '), rather than limiting itself to a simple non-admissibility decision.

This intention not to mortgage the future is very reasonable considering that two parallel developments have occurred. First, the adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights will further develop the 'justiciability' of these rights on the international level. It would be paradoxical for the French judge to remain in retreat and refuse direct applicability on the internal level of provisions applied and interpreted by a quasi-judicial supranational organ.

At the same time, through a decision of 16 December 2008, the social chamber of the Cour de Cassation itself accepted direct applicability of Article 6 on the right to work, thus opening up a possibility that undoubtedly will be expanded through subsequent jurisprudence.[56]

### *3.3.3 The Convention on the Rights of the Child*

The advanced position of the Cour de Cassation noted above is disingenuous in the face of judicial vacillation with regard to the Convention on the Rights of the Child 1990 (CRC). While the applicability of a treaty must be approached on the basis of its provisions and the intention of the parties, it must be noted that the interpretation of the letter and the spirit of a treaty is not the same issue.

The Cour de Cassation, undoubtedly in order to avoid judges being inundated by claims made on the basis of the CRC, clearly stated that it had no direct application in a judgment of 10 March 1993. The defects of the judgment were highlighted thereafter by high magistrates such as André Braunschweig and Régis de Gouttes. A slightly apologetic reversal occurred with the judgments of 8 May 2005 and 14 June 2005, coming round to the casuistic approach of the Conseil d'État, abandoning a wholesale refusal of application.[57]

The Conseil d'État in effect reacted prudently, adopting a case-by-case strategy, distinguishing the different provisions of the Convention, as occurred in the *GISTI* judgment of 23 April 1997, given on the conclusions of Ronny Abraham. Thus it recognized the self-executing character of certain clauses in the *Demirpence* judgment of 10 March 1995. In a judgment of 22 September 1997, *Dlle Cinar*, it considered that Article 3.1, which gives 'primary consideration' to the 'best interests of the child', can be applied directly. In the *AIDES* judgment of 7 June 2006, it let this provision prevail over a law that envisaged a residence obligation of three months to permit access for foreign minors to state medical aid.

[56] C. Pettiti, 'La clause de non concurrence en droit du travail et l'applicabilité directe du Pacte international relatif aux droits économiques, sociaux et culturels', *in Droits fondamentaux*, *n° 7,* in <http://www.droits-fondamentaux.fr>.

[57] *RGDIP* 2006, p 232.

The Conseil dismissed direct application of other CRC provisions in the *Rouquette* judgment of 5 March 1999 and the *Hadj Kacem* judgment of 29 December 2004. The reasoning of the Conseil d'État in this last judgment illustrates its method well:

On the claim based on the Convention of the Rights of the Child of 26 January 1990: Considering on the one hand, that in the words of Article 2-1 of said convention: 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'; that in the words of Article 26 of the same convention: '1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law'; that in the words of Article 27 of the same convention '1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development'; that the cited stipulations of the Articles 26 and 27 do not have direct effect with regard to individuals and cannot be usefully invoked to support conclusions that challenge the decree; that it follows from this that the claim that is based on the rights stated in these Articles not being guaranteed with respect to the principle of non-discrimination contained in the cited Article 2 of the convention is, in any case, inoperative;

Considering on the other hand, that in the words of Article 3 of the same Convention 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration' that having regard to the whole protection regime for minors that is applicable in France, the contested provisions do not disregard the cited stipulations.

The issue of direct applicability of France's international obligations is crucial because the priority question of constitutionality risks shifting the debate on human rights in a completely different direction. At the margin of the interpretation by ordinary judges, strictly flanked by the letter and spirit of treaties, 'the intention of the negotiators' risks taking the place of an interpretation by constitutional judges, based either on general principles of constitutional texts drafted in 1789 and in 1946, or based on fundamental, non-written principles. In his account *Sociologue au Conseil constitutionnel,* Dominique Schnapper has shown this tension in the past with regard to the creating power or 'declarative' power of the judge. This will be even stronger with implementation of the 2008 revision and means that debate on the position of non-conventional sources can also be examined under a new light.

## 4. The Diversification of Sources

In conformity with French tradition, the Constitution of the Fifth Republic is considerably vaguer on this point. The preamble to the 1946 Constitution—that belongs to the 'corpus of constitutionality' via the renvoi that is made to it in the

preamble of the 1958 Constitution—limits itself to confirming in paragraph 14 that 'the French republic, true to its traditions, conforms to the rules of international public law'. This unusual formula, which was used for the first time by Léon Duguit, aims to place an 'accent on solidarity' by 'postulating the existence of a public international order over States', as Élisabeth Zoller explains.[58] But in practice, nothing determines the content or scope of this affirmation. It is however stated in paragraph 15 that 'subject to reciprocity, France consents to the limitations of sovereignty that are necessary to the organisation and defence of peace'.

The modern phenomenon of the international organisation is not taken into account; at the very most 'treaties or agreements on international organisations' feature next to 'peace treaties' and 'commercial treaties' among the categories of treaties enumerated in Article 53 that require parliamentary authorization. In passing it may be noted that military alliances and disarmament agreements are not even mentioned. A fortiori, if public international law refers to a type of supranationality, other sources are not excluded, such as the law derived from international organizations or even spontaneous sources of international law, such as custom, not to mention *jus cogens*, which remains the *bête noire* of French legal advisors.

In this respect, the two French post-war constitutions lag behind international law, just as the military is always being prepared for the war previously fought: they barely acknowledge the internationalization that has occurred since the nineteenth century, even though France had a primary role in creating former international unions, then large international organizations, and finally in founding the European organizations. The term 'reciprocity' itself, which appears in the 1946 Preamble, is transposed into Article 55 *in fine* of the 1958 Constitution, reflecting a contractual conception, above all in bilateral relations and treaty-contracts, rather than envisaging multilateral agreements that are in effect treaty-laws, without dreaming of a constitutional vision of international law, in the image of contemporary German doctrine. Trapped by the letter of 'limitations of sovereignty', the Conseil Constitutionnel will have great difficulty in extricating itself from a conception and a vocabulary that is full of abandonment and concessions, as if sovereignty could be anything other than a form of interdependence in today's world.

The question has posed itself in two ways: first through the formal matter of non-written sources, but also, with a material difference, through Community law.

## 4.1 The Formal Distinction

In absence of a constitutional framework, it is for the French judge to determine the place of other sources of international law, especially the 'non-written sources'; but by force of circumstance he will do this with more prudence than imagination.[59]

[58] *Introduction au droit public* (Dalloz, 2006), p 16.

[59] On the position of 'unwritten international law in French law cf especially D. Carreau, *Droit international* (9th edn, 2007), p 446.

Paradoxically, the Conseil Constitutionnel 'which refuses to assess the conformity of laws with treaties, does not hesitate to ensure their compatibility with the non-written principles of international law, that is to say, international custom' highlights Alain Pellet, referring to a series of examples, since the historic decision of 30 December 1975 on the Comoro Islands which was concurrent with the decision on the IVG.[60] Of particular relevance are the decisions of 16 January and 11 February 1982 on nationalizations, the decisions of 8 and 23 August 1985 on New Caledonia and the decision of 9 April 1992 on the Treaty of Maastricht.

By referring in its decision of 9 April 1992 to the 'rules of international public law' evoked by paragraph 14 of the 1946 Preamble, the Conseil Constitutionnel has accepted 'the rule *pacta sunt servanda* which implies that all treaties that are in force bind the parties and must be executed by them in good faith'.

Dominique Carreau spoke of the 'positive approach of the Cour de Cassation in the face of the negativism of the Conseil d'État'.[61] The legal judge decides on a case-by-case basis. In a judgment of 13 March 2001 on the Gaddafi affair, the Cour de Cassation referred to the 'general principles of international law' to consider that 'international custom does not allow that heads of State can [...] be subject to prosecutions in the criminal courts of a foreign State'.[62] Only specific provisions, such as resolutions by the Security Council that create ad hoc jurisdictions or the Rome Statute can in principle challenge international comity. On the other hand, with regard to the universal competence of the French courts, the Cour de Cassation stands by the provisions of treaties, such as the United Nations Convention against Torture of 1984 or the international conventions against terrorism. Further, the government does not seem disposed, after inter-ministerial arbitration, to extend this competence to international crimes as provided in the Statute of Rome, and even less so for grave violations of the Geneva Conventions, in spite of the obligation to 'respect and to ensure respect' for these conventions.

The Conseil d'État has also been brought to invoke non-written international norms. With regard to the law of the sea, the Conseil d'État has recognized the existence of an unwritten 'principle of international law' applicable to French authorities in relation to the destruction of a wreck on the high seas in the *Société Nachfolger Navigation* judgment of 23 August 1987. In the *Aquarone* judgment of 6 June 1997, the Conseil d'État showed greater prudence by considering that neither Article 55 of the Constitution nor any constitutional provision 'prescribe or imply that the administrative judge must let international custom prevail over the law where there is a conflict between these two norms'.

So, while recognizing the existence and normative value of 'international custom', the Conseil d'État seems to reduce it to an infra-legislative character, depriving itself in this way of a useful source. It extended this diminishing of general principles of international law in the *Paulin* judgment of 28 July 2000, repeating that neither Article 55 'nor any provision of constitutional value prescribes or implies that the administrative judge must let international custom or even a general principle of international law prevail over the law where there is a

[60] Ibid, § 9. [61] Op cit, p 447. [62] *RGDIP* 2001, p 474.

conflict between these international norms on the one hand and an internal legislative norm on the other'.[63]

Finally, in the *Zaidi* judgment of 21 April 2000, the Conseil d'État considered that 'where several international obligations compete, there is cause to define the respective modalities of application in conformity with their stipulations and according to the principles of customary law relating to the combination of them and international conventions'. According to well-advised commentators, this reference implicitly refers to the Vienna Convention 1969.[64] The issue may be important where there is potential contradiction between a bilateral treaty and the European Convention on Human Rights, as in the *Mme Larachi* judgment of 22 May 1992, or even with regard to the Schengen agreements in the *GISTI* judgment of 29 June 1990, in relation to a Franco-Algerian agreement of 1968.

## 4.2 The Material Distinction

For a long time French judges had a global approach to international law, without any distinction of categories, either on a material basis (humanitarian law), on a geographic basis (European law), or on a legal basis (self-contained regimes). This approach is problematic in reference to Community law, which, from these three points of view is not a law like others, but by maintaining the approach Community law has become a spearhead of progress for international law. Only through the constitutional revision of 1992, 40 years after the entry into force of the first ECSC treaty, were there specific provisions added to deal with the construction of Europe. As Joël Rideau says 'the revision of 1992 marks the entry of Europe into the Constitution'.[65] While the constitutional law of 25 July 1992 above all aimed to take into account the technical obstacles raised by the decision of the Conseil Constitutionnel of 9 April 1992, a more general provision was introduced by parliamentary amendment, through Article 88-1: 'the Republic participates in the European Communities and in the European Union, that is constituted of States that have chosen freely, under the treaties that have instituted their ability to exercise some of their competences in common'.

The Conseil Constitutionnel has commented several times on the place of Community law in the legal order. In its decision of 10 June 2004 on the digital economy, the Conseil Constitutionnel relied on Article 88-1 of the Constitution, seeing in it a constitutional requirement of

> internal transposition of a community directive . . . which can only be stopped by an express contrary provision in the Constitution; that in absence of such a provision, it only falls to the Community judge, who as the case may be is seised prejudicially, to control the respect both for competences that are defined in the treaties as well as for fundamental rights that are guaranteed by the Article of the treaty on European Union through a Community directive.

[63] *RGDIP* 2001, p 239.
[64] *GA*, ibid, p 664.
[65] Notice, *La construction européenne et la Constitution de 1958.*

After the victory of the *non* at the referendum, the Conseil Constitutionnel seemed to reconsider its jurisprudence, stating in a decision of 27 July 2006 in relation to a law on the rights of authorship, that the transposition of a directive should not go against a principle that is 'inherent in the constitutional identity of France, unless the Constituent has consented'. According to official commentary 'the reservation of constitutionality must be understood as aiming a specific provision in the French legal order, not being equivalent to the fundamental rights that are guaranteed by original Community law (treaties instituting European Union and the European Communities) and opposable to derived Community law (regulations, directives)'.[66] In this instance, the Conseil Constitutionnel condemned a legislative provision that was 'manifestly incompatible with the directive that it was supposed to transpose', and seemed to limit its competence to a manifest error in the absence of any possibility of preliminary reference to the ECJ.

For all that, as the commentators on the *Grands arrêts* highlight, 'contrary to what has sometimes been argued this jurisprudence does not indicate the supremacy of the Community legal order over the Constitution. It limits itself to deducing from an Article of the Constitution, Article 88-1, a constitutional obligation to transpose Community directives with certain reservations.' In a more general manner, the judgment in *Syndicat national de l'industrie pharmaceutique* of 3 December 2001 recalls that the principle of the primacy of Community law 'should not in the domestic order lead to a renewed challenge of the supremacy of the Constitution'.

The decision of 19 November 2004 on the European Constitution expands on this analysis, recalling that through Article 88-1 'the Constituent has accepted the existence of a Communitarian legal order that is integrated into the domestic legal order and that is distinct from the international legal order', thus carrying out a sort of shift in a bipolar world—of a transfer of Community law, much like a football player that is changing teams—instead of recognizing a tripartite structure of the legal orders. This is a way of confirming once more that the Constitution is at the top in domestic law.

This recognition is also valid for secondary law. The Conseil d'État has not hesitated to ensure the primacy of Community regulations over national laws, in its *Boisdet* judgment of 24 September 1990. The same is true for Community directives under Article 89-9 of the Constitution. What is more, in the *Sté Klockner* judgment of 23 March 1992, the Conseil d'État considered that an ECJ judgment holding France liable for a breach had the consequence of rendering inapplicable a regulation that had been judged to be contrary to a directive.[67] 'The Conseil d'État was won over by the reading of Article 88-1 by the constitutional judge, but maintained a control over the constitutionality of a regulatory act that transposes a directive, in its judgment of 8 February 2007, *Société Arcelor Atlantique et Lorraine*.'[68] This jurisprudence has been extended to the conventionality control of the law, in the judgment of 10 April 2008 in *Conseil national des barreaux*,

[66] *GA*, n° 116, p 900. [67] *GA*, p 665. [68] *GA*, p 744.

which dealt with the transposition of a directive that was held to be contrary to the European Convention on Human Rights.

The problem is to know how this osmosis between European Community law and internal law will develop without contradiction. Between the reference for interpretation to the Luxembourg Court and the priority question of constitutionality, French law will be subject to two parallel evaluations. But paradoxically, this proximity risks dismissing international law as a whole, including the law of the European Convention on Human Rights. In other words, while Community law has served as an *avant garde* to the integration of international law in domestic law, through the *Jacques Vabre* judgment and the *Nicolo* judgment, we may be running a risk of aiding a switch-over, that is marked by the introduction of a separate title in the Constitution and by the recognition of an 'integrated legal order' through the 2004 decision? A new hierarchy appears to be forming, with Communitarian monism and international dualism.

# 9

# Germany

*Hans-Peter Folz*

## 1. Introduction

Germany is a federal republic with a democratic constitution emphasizing the protection of individual liberty and separation of powers. The German Constitution, known as the Basic Law, was established in 1949 and became the constitution of united Germany on 3 October 1990. Governmental powers in Germany are divided between the bicameral legislature, the executive, and the judiciary. The executive consists of the Chancellor, who exercises most of the executive powers, and the President, who holds a primarily ceremonial position. The civil law judicial system is presided over by the Federal Constitutional Court or '*Bundesverfassungsgericht*', which has the power of judicial review over legislative acts and whose justices are elected by Parliament.

Germany is a contributing member in NATO operations and has been a large net contributor to the EU budget. Germany also is a strong supporter of the United Nations and of the Organization for Security and Co-operation in Europe (OSCE) and accepts compulsory ICJ jurisdiction with reservations.

### 1.1 Constitutional texts

The Basic Law (*Grundgesetz*—GG), as the German constitution is known, refers to international agreements in more than one provision. Article 32, paragraph 3 GG concerns the competences of the states (*Bundesländer* or *Länder*) to conclude international agreements with third states: 'Insofar as the Länder have power to legislate, they may, with the consent of the Federal Government, conclude treaties with foreign states.'

Article 59, paragraph 2 G, in its first sentence, defines the prerogative of the legislature to authorize the executive to conclude an international treaty:

> Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation require the consent or participation, in the form of a federal statute, of the bodies competent in any specific case for such federal legislation.

Article 25 GG refers to a specific part of customary international law: 'The general rules of public international law are an integral part of federal law. They

take precedence over statutes and directly create rights and duties for the inhabitants of the federal territory.' Notably, Article 84 of the Bavarian Constitution also provides that the generally recognized principles of international law are part of domestic law.

The Basic Law does not explicitly refer to specific sources of international law. However, it refers in a variety of provisions to legal concepts deriving from international law:

- The Preamble to the Basic Law stresses the resolve of the Federal Republic of Germany to serve peace as an equal partner in a united Europe.
- According to Article 1, paragraph 2 GG the German people acknowledge inviolable and inalienable human rights as the basis of peace and justice in the world.
- Article 23 GG provides for participation of the German state in the European Union.
- Article 24, paragraph 1 GG allows for a transfer of sovereign powers to intergovernmental institutions.
- Article 24, paragraph 2 GG allows the federation (Bund) to enter a system of mutual collective security. The provision expressly foresees a limitation upon the rights of sovereignty of Germany.
- Article 24, paragraph 3 GG provides that the federation shall accede to agreements concerning international arbitration of a general, comprehensive and obligatory nature.
- Article 26, paragraph 1 GG declares unconstitutional any acts tending to and undertaken with the intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression. Such acts shall be made criminal offences.
- Article 26, paragraph 2 GG provides for a special regime of supervision for weapons designed for warfare.

The Federal Constitutional Court (*Bundesverfassungsgericht*) has deduced an unwritten constitutional principle from a comprehensive interpretation of the abovementioned provisions. According to the constant jurisprudence of the Federal Constitutional Court the Basic Law is based on the assumption that the entire German legal order has the objective to fulfil the requirements imposed on the German state by international law. Every national German norm including the constitution itself has to be interpreted in accordance with international law. This unwritten constitutional principle is called the international law friendliness of the Basic Law (*Völkerrechtsfreundlichkeit des Grundgesetzes*).

## 1.2 Issues of Federalism

Article 32 GG provides for the distribution of foreign relations powers between the federation (*Bund*) and the states (*Bundesländer* or *Länder*). Article 32, paragraph 1

gives the federation the general prerogative over foreign policy matters, saying, 'Relations with foreign states shall be conducted by the Federation.' Article 32, paragraph 3 GG addresses the competences of the *Bundesländer* to conclude international agreements with third states: 'Insofar as the Länder have power to legislate, they may, with the consent of the Federal Government, conclude treaties with foreign states.' This provision is generally understood to mean that the Federation has a general treaty-making power over all matters of policy. The treaty-making power of the states is much more restricted. States can conclude treaties with third states only on matters over which they have the power to legislate. In practice, the power of the states to legislate is narrowly defined, as the Basic Law attributes most legislative powers to the Federation. In addition, the states can only conclude an agreement after having obtained the consent of the Federal Government. The Federal Government can therefore prevent any agreement that it regards as inconsistent with its own foreign policy.

However, while the Federation has a general treaty-making power, it does not have a general power of implementation. The Federation can conclude an agreement on a policy area that in internal law concerns matters which fall under the power to legislate of the states. In such a case, the Federation has no general power to legislate in order to implement the international agreement. It is up to the states to pass the necessary laws in order to fulfil the requirements of the international agreement.

The constitutional duty of states to implement treaties concluded by the Federation depends on the entry into force of the treaty on the international level. Therefore, there is no reason why states should adopt the substantive provisions of unratified treaties into state law. Equally there is nothing to prevent the states from doing so. However, during the absence of ratification there is no international or constitutional obligation incumbent on the states to adopt or repeal such legislation at will.

## 2. Treaties and Other International Agreements

After formal approval of the legislature according to Article 59, paragraph 2, first sentence, the deposit of the ratification instrument, and entry into force, a treaty will be part of the German legal system. As such, it will be applied by the administration and the courts. Courts in particular will interpret any norm of domestic law so as not to contravene the provisions of the treaty. However, most international treaties, in particular those creating rights and obligations for individuals, will require implementation by legislation.

From a practical point of view, German courts are apt to apply international treaties as law as long as they have been formally submitted to the legislature before ratification. Legally, Article 59, paragraph 2, 1st sentence GG defines the prerogative of the legislative branch to authorize the executive to conclude an international treaty: 'Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation require the consent or participation, in the form of a federal

statute, of the bodies competent in any specific case for such federal legislation.' The statute authorizing the government to ratify the treaty is published in a particular section of the Federal Law Gazette (*Bundesgesetzblatt*, Teil II). After the entry into force of the international treaty the courts will apply it as a part of national law.

Apart from that, German courts are aware of the fact that treaty law matters are to be decided according to international public law, particularly according to the Vienna Convention on the Law of Treaties (Vienna Convention). They are therefore likely to distinguish treaties from political commitments (soft law, gentleman agreements) according to the criterion of legal obligation. If the treaty intends to create rights and obligations between subjects of international law and if these are governed by international public law, it is an international treaty. This approach is a reflection of Article 2, paragraph 1 of the Vienna Convention.

In day-to-day practice however, the interpretation of multilingual treaties will raise difficulties. It will be the task of interested parties, such as plaintiffs or defendants, to raise these points.

Article 59, paragraph 2, 2nd sentence GG expressly provides for executive agreements concluded between governments: 'In the case of administrative agreements the provisions concerning the federal administration shall apply.' German courts will apply such executive agreements if these have been implemented by the Federal Government, by, for example, passing a regulation. The situation would be similar if the existing statutes would allow the executive to fulfil the international obligation without the need for the creation of new national law. Since such acts of the executive have a rank lower than parliamentary statutes in the domestic legal order, courts will apply such agreements only if they do not contravene parliamentary statutes.

Hypothetically, should a Federal Government conclude an international treaty assuming obligations under international public law without seeking any national implementation, such an agreement would not have any effect under domestic law. Courts would be prevented from applying the agreement. The Federal Republic of Germany would be liable according to the rules of state responsibility under international law, but this would not affect the duty of the domestic courts to refrain from applying such an agreement.

German courts recognize the distinction between self-executing and non-self-executing treaties and tend to consider most treaty provisions as non-self-executing. In deciding, they apply generally accepted criteria. Treaty provisions will be considered as non-self-executing if: (1) the treaty itself expressly excludes its direct applicability; (2) the treaty itself refers to the necessity of further implementation either by the contracting parties themselves on the international plane or by the legislature of the contracting parties on the national level; (3) the treaty provision cannot be applied directly since it either does not designate the responsible administration, does not define a necessary administrative procedure, or does not designate the jurisdiction of a specific court.

A treaty can only be invoked and enforced in litigation by private parties if the specific treaty provision invoked has direct effect. If the norm is shown to be self-

executing, German courts will basically apply the same standards to questions of standing and rights of action. The entire concept of standing in German law presupposes a so-called subjective right, roughly equivalent to a private right of action. A distinction is drawn between norms that benefit individuals only indirectly and subjective rights that bestow on individuals the right to claim acts or omissions from other individuals or the state itself and give the holder of such rights the power to have these claims enforced by the courts. The distinction can be much disputed, particularly regarding treaties protecting the environment.

In German constitutional law there is no tradition of judicial deference to the executive in foreign policy matters. In particular, there is no political question doctrine. So, once the executive has ratified a treaty, its application and implementation is a matter of law. Any intervention by the executive in favour of a quasi-authoritative interpretation of a treaty provision might be construed as incompatible with the principle of separation of powers. As a matter of fact, the executive may find it hard to make its views on the interpretation of a specific treaty provision known to the courts, since there is no formal amicus curiae procedure.

Apart from that, German courts are mostly aware of the fact that treaties follow rules of interpretation that are different from domestic rules of interpretation. They tend to apply the rules of interpretation under international law as embodied in the Vienna Convention. However, especially in lower courts, the interpretation of multilingual treaties will raise difficulties. The questions of interpretation will therefore often be framed by plaintiffs or defendants in a particular case.

## 3. Customary International Law

According to Article 25, 1st sentence GG, the general rules of public international law are an integral part of federal law. The jurisprudence of the Federal Constitutional Court defines the general rules of public international law as those rules of customary international law that are recognized by an overwhelming majority of states in the world. This excludes regional customary law. In sum, universal customary law is incorporated into German domestic law.

German courts tend to apply customary international law in practice, at least if the parties to the case rely on it. Such application is facilitated by a special procedure provided by Article 100, paragraph 2 GG:

> If, in the course of litigation, doubt exists whether a rule of public international law is an integral part of federal law and whether such rule directly creates rights and duties for the individual (Article 25), the Court shall obtain a decision from the Federal Constitutional Court.

This so-called norm-verification procedure[1] allows any German Court, when confronted with a claimed norm of universal customary law, to refer questions of

[1] For a practical example see Press Release No 97/2003 of 13 November 2003—Extradition to the United States of America, <http://bundesverfassungsgericht.de/en/press/bvg97-03en.html>.

interpretation to the Federal Constitutional Court. After having obtained a decision from the Federal Constitutional Court, the original court can apply the identified norm of customary law in order to decide the outcome of the original case.

Ordinary courts defer to the Federal Constitutional Court within the framework of the norm-verification procedure according to Article 100, paragraph 2 GG. The Federal Constitutional Court itself will hear the expert opinion of the Federal Government on the existence of customary international law, but the Court will not be bound by such opinion.

In general, judges take judicial notice of customary international law. Since the expertise of lower courts in customary international law is limited, it will be helpful if the interested parties raise the issue before the courts. The most important part of customary international law that has been verified by the Federal Constitutional Court concerns the rules of state immunity.

## 4. Hierarchy

The rank of international treaties in the German legal order is determined by Article 59, paragraph 2 GG. Since the legislature gives its assent to treaties in the form of a statute, treaties have the rank of an ordinary statute. This has the consequence that a treaty held to be unconstitutional cannot be implemented domestically. Germany will be liable as a state under the rules of state responsibility in relation to the other parties to the treaty but in the domestic legal order the treaty will have no effect. Another consequence of the rank of a treaty as an ordinary statute is the fact that the legislature is able to invalidate a treaty domestically simply by passing a statute abrogating the provisions of the treaty. An intention of the legislature to infringe a treaty will not be lightly assumed by the courts. If a compatible interpretation of the statute with the treaty is possible, it will be preferred by German courts. However, if the will of legislature is clear and the wording of the statute unambiguous, the courts will apply the latter statute even if it is in contravention of the treaty.

The rank of customary international law within the German legal order is determined by Article 25, 2nd sentence: 'They take precedence over statutes and directly create rights and duties for the inhabitants of the federal territory.' Norms of customary international law therefore enjoy a higher rank than statutes. If a statute should conflict with a norm of universal customary law, the statute would be void. However, norms of domestic constitutional law still outrank customary law.

As mentioned in the first section, the Federal Constitutional Court has deduced an unwritten constitutional principle from a comprehensive interpretation of all the constitutional provisions dealing with international law. According to the constant jurisprudence of the Federal Constitutional Court, the Basic Law is founded on the assumption that the entire German legal order has the objective of fulfilling the requirements imposed on the German state by international law. Every national German norm, including the constitution itself, has to be interpreted in accordance with international law. This unwritten constitutional principle is called the

commitment of the Basic Law to International Law (*Völkerrechtsfreundlichkeit des Grundgesetzes*).

### 4.1 *Jus Cogens*

German courts have recognized the existence of *jus cogens* under international law. However, they are very much aware of the stringent requirements for the verification of *jus cogens*. Very few norms of *jus cogens* have therefore been recognized and even fewer have been deemed to have an effect on the outcome of specific cases. German courts have recognized that the concept of *jus cogens* implies a higher status of norms over ordinary international law. Such a higher status can only depend on the verification of a specific norm of international law as *jus cogens*. This most certainly cannot be assumed for all human rights. Only those non-derogable human rights such as the prohibition of torture, even in times of war or other existential crises, can be assumed to be *jus cogens*. However, there are no cases directly addressing conflicts of norms.

As for UN Security Council decisions, these cannot be considered as *jus cogens*. They nonetheless have a claim for precedence under Article 103 UN Charter, but this precedence applies only to ordinary public international law, not to domestic constitutional law. Again, there is no jurisprudence of German courts so far. However, if there should ever be a manifest conflict between a UN Security Council decision and a provision of German constitutional law, a basic right in particular, it is highly unlikely that the Federal Constitutional Court would accept the precedence of UN law.

### 4.2 Construing Domestic Law to Conform to International Obligations

In 2004 the Federal Constitutional Court decided the impact of the European Convention on Human Rights (ECHR) and the jurisprudence of European Court of Human Rights in Strasbourg on the German legal order.[2] It stressed that all provisions of the German legal order have to be construed in accordance with the ECHR so as to avoid any conflict. All German authorities—legislative, executive and judicial—are under an obligation to implement judgments of the European Court of Human Rights if Germany has been a party to the proceedings. Even the fundamental rights in the Bill of Rights within the Basic Law (GG) have to be construed in the light of the ECHR as far as that is possible. However, there is an ultimate limit to any kind of interpretation. If the provisions of the Basic Law clearly and unambiguously deviate from the ECHR as interpreted by the European Court of Human Rights, and a conflict cannot be avoided, the constitution outranks the ECHR.

[2] Federal German Constitutional Court, Press Office, Press Release No 92/2004 of 19. October 2004—On the consideration of the decisions of the European Court of Human Rights by domestic institutions, in particular German courts, <http://www.bundesverfassungsgericht.de/en/index.html>.

## 5. Jurisdiction

German courts exercise universal jurisdiction over international crimes in so far as the legislature has provided a domestic legal basis. In 2002 the German Parliament has codified material provisions for the prosecution of the international crimes of genocide, war crimes, and crimes against humanity in the International Penal Code (*Völkerstrafgesetzbuch*). This statute states explicitly that the crimes defined by the Code will be prosecuted in Germany wherever they may have been committed. The International Penal Code therefore provides explicitly for universal jurisdiction. In the absence of such explicit determination of jurisdiction by a domestic statute, German courts will refrain from assuming jurisdiction solely based on international law.

Even under international law there is no general basis for jurisdiction based on claims regarding a violation of international law. If the question should pertain to the universality principle and if it were assumed that the universality principle could constitute a valid basis for extraterritorial jurisdiction in civil matters, then the courts do not exercise jurisdiction in such cases. Thus far, the legislature has not determined such an extraterritorial jurisdiction for German courts by statute. In the absence of legislative authorization, German courts will not assume jurisdiction in civil actions.

## 6. Other International Sources

German courts will consider non-binding declarative texts as soft law. These texts may play a certain role in the interpretation of legally binding acts such as treaties, if they refer to them. Apart from that, such declarative texts may be used in order to illustrate societal developments that have indirect effects on the evolution of legal concepts. However, there is no systematic use of such sources in the jurisprudence of German courts.

As set out above, the Federal Constitutional Court decided in 2004 on the impact of the jurisprudence of European Court of Human Rights in Strasbourg on the German legal order in a case to which Germany was a party.[3] In its judgment the Federal Constitutional Court confirmed its constant jurisprudence that all provisions of the German legal order have to be construed in accordance with the ECHR so as to avoid any conflict. The Convention has the status of a federal German statute and the courts must observe and apply the Convention in interpreting national law. Even the fundamental rights in the Bill of Rights within the Basic Law (GG) have to be construed in the light of the ECHR as far as possible. In

[3] Federal German Constitutional Court, Press Office, Press Release No 92/2004 of 19. October 2004—On the consideration of the decisions of the European Court of Human Rights by domestic institutions, in particular German courts, <http://www.bundesverfassunsgericht.de/en/press/bvg04-092en.html>.

that respect, the ECHR and the case law of the European Court of Human Rights serve as tools of interpretation in determining the content of the basic rights of the German Basic Law. However, there is a limit to the admissibility of such an interpretation of national law. If the provisions of the Basic Law clearly and unambiguously deviate from the ECHR as interpreted by the European Court of Human Rights, if a conflict with fundamental principles of the constitution therefore cannot be avoided, the constitution outranks the ECHR.

According to Article 46 ECHR, the judgments of the European Court of Human Rights have a binding effect on the Convention states if they have been a party to the proceedings. According to the Federal German Constitutional Court all German authorities—legislature, executive and judicative—are under an obligation to implement judgments of the European Court of Human Rights, if Germany has been a party to the proceedings. The binding effect of the judgments means that administrative authorities and courts must take into account the decisions as part of the interpretation of the relevant German law. If they fail in doing so it is the ultimate responsibility of the Federal Constitutional Court to remove violations of the Convention by voiding the judgments of lower courts. It is safe to assume that a non-binding recommendation would be used as a tool of interpretation for the provisions of the treaty, as foreseen by Article 31, paragraph 3(b) of the Vienna Convention.

# 10

# Greece

*Angelos Yokaris*

## 1. Introduction

Greece is a parliamentary republic with a Constitution enacted in 1975 and most recently amended in May 2008. Under this Constitution, governmental power is divided between a unicameral Parliament (*Vouli ton Ellinon*) elected by popular vote; an executive office, which includes a President (the chief of state) and a Prime Minister (the head of government); and a judiciary, which is divided into civil, criminal, and administrative courts. The legal system in Greece is based on codified Roman law and presided over by the Supreme Judicial Court and the Special Supreme Tribunal, both of whose justices are appointed by the President for life.

Greece is a founding member of the United Nations, became a member of NATO in 1952, and served in the chairmanship of the Organization for Security and Co-operation in Europe (OSCE) in 2009. As a member of the EU, Greece regards itself as a leader of the region's Euro-Atlantic integration process and is a major beneficiary of the EU budget. Greece also accepts compulsory ICJ jurisdiction with reservations.

### 1.1 Constitutional and legislative texts

International law has entrusted the final procedure of undertaking conventional obligations to the discretion of states with the understanding that they will not act contrary to the rules adopted in the international field and sealed by their signature.

Accordingly, the 1975 Constitution (as amended in 1986, 2001 and 2008) provides in Article 28, paragraph 1 that, from their promulgation by law and their entry into force, international conventions constitute an integral part of the internal Hellenic law and prevail over any contrary internal provision. However, their application by the courts with regard to foreigners is always under the condition of reciprocity (Article 28, paragraph 1$\beta$). The official translation approved by resolution of the Parliament states:

> [I]nternational conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and

of international conventions shall be applicable to aliens only under the condition of reciprocity.

For the promulgation by parliamentary law to be valid the majority of those present during the voting is required. The following cases explained below require a qualified majority. The first case is when competencies provided in the Constitution are to be recognized and ceded by treaty to an international organizations' constituent organs. In that case a three-fifths majority of 300 MPs is required (Article 28, paragraph 2). The official translation approved by resolution of the Parliament states:

> Authorities provided by the Constitution may by treaty or agreement be vested in agencies or international organisations, when this serves an important national interest and promotes co-operation with other States. A majority of three-fifths of the total number of Members of Parliament shall be necessary to vote the law ratifying the treaty or agreement.

The second case is when, because of important national interest, the treaty restricts the exercise of national sovereignty and under the condition that the principles of equality and reciprocity are to be respected. In that case the absolute majority of the total number of MPs is required (151–300: Article 28, paragraph 3). Regarding these treaties, the official translation approved by resolution of the Parliament states:

> Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity.

In addition, the Constitution stipulates in Article 36, paragraph 2, that certain categories of treaties cannot enter into force without their promulgation by a formal law of Parliament. These categories are: treaties of commerce, taxation, economic co-operation, participation in international organizations or unions, and those containing concessions that cause burdens to citizens. Their voting proceeds with the majority required in Articles 28, paragraphs 1, 2, and 3, according to each particular case. The official translation approved by resolution of the Parliament states:

> Conventions on trade, taxation, economic cooperation and participation in international organisations or unions and all others containing concessions for which, according to other provisions of this Constitution, no provision can be made without a statute, or which may burden the Greeks individually, shall not be operative without ratification by a statute voted by the Parliament.

Furthermore, Article 36, paragraph 3 provides that the non-published articles of a treaty cannot prevail over those publicly known. The official translation approved by resolution of the Parliament states that 'Secret articles of a treaty may in no case reverse the open ones.'

Several clauses of the 1975 Constitution directly refer to international custom as 'generally recognised rules of international law' or as 'generally accepted rules of international law'.

Article 2, paragraph 2 prescribes the general framework for the application of international law in Greece. This article states that Greece, by following the generally recognized rules of international law, pursues the establishment of peace and justice, as well as the development of friendly relations between peoples and states. The official translation approved by resolution of the Parliament states that 'Greece, adhering to the generally recognised rules of international law, pursues the strengthening of peace and of justice, and the fostering of friendly relations between peoples and states.'

The position of the customary rules in the internal legal order is defined precisely in Article 28, paragraph 1. This article states that the generally accepted rules of international customary law constitute an integral part of the internal Hellenic law and prevail over any other contrary provision of law. The official translation approved by resolution of the Parliament states that 'The generally recognized rules of international law . . . shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law.' This provision is inspired by the principles of monism, which considers international law as an integral part of domestic law with prevailing force.

It must be noted, however, that the second part of paragraph 1 of Article 28 includes a constitutional requirement according to which international law (and international custom) applies to foreigners under the condition of reciprocity. The official translation approved by resolution of the Parliament states that 'The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity.'

In the period before the 1975 Constitution, many judicial decisions referenced non-written sources of international law, but with a widespread lack of clarity and vagueness. For example, the Supreme Court has referred to 'fundamental principles of international law'[1] and to 'international dicta' (in reference to international custom).[2]

The 1975 Constitution does not refer to non-written sources of international law apart from custom,[3] but there are detailed references to jurisprudence. For example, the courts have referred to 'generally accepted and customarily prevalent rules of public international law';[4] 'fundamental principles prevailing in international law';[5] and to 'teachings in public international law'.[6] This last reference was based on the Statute of the International Court of Justice, Article 38(d), which references 'the teachings of the most highly qualified publicists' as a supplementary source of law.

[1] 85/1929. [2] 342/1950. [3] Article 2[2]; Article 28[1].
[4] Supreme Court, 4054/1979. [5] Appeal Court of Creta, 491/1991.
[6] Appeal Court of Athens, 2724/1985.

## 2. Treaties and Other International Agreements

### 2.1 Treaty-making

In Greece, treaties enter into force immediately after their signature, without the interference of the constitutionally competent authority and without the intervention of ratification procedures, acceptance or approval and without their submission to the Parliament. The only condition for their application by the courts is their publication in the Official Journal through a Presidential Decree or a Ministerial Decision. This practice is similar to that of Article 12 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention), whereby a signature to a treaty has international effects. In Greece, signed treaties prevail over a pre-existent law but not over a posterior one, unless their provisions are specific.

### 2.2 Interpretation and Application of Treaties

Some confusion has been caused by the 1975 Constitution's use of alternate terms for a treaty in Articles 28 and 36. However, in Greek judicial practice the terms 'treaties-conventions-agreements-covenants-protocols-statutes, etc.' are identical in as much as they express the will of states to be bound internationally.

In cases before international tribunals where Greece was a party in the dispute, the following points regarding treaties have been established:

- Terminology does not signify any qualitative difference in the degree of the commitment.[7]
- A common statement attached to a treaty must be considered as an integral part of the conventional text, even if this is not expressly stated.[8]
- A binding agreement can be concluded even on the basis of informal procedures.[9]
- When the text of the agreement does not adequately specify the legal situation that is established when one of the contracting parties does not have an evident statehood, the nature of the conventional character of the text must be defined taking into account the object and the purpose of the agreement and the circumstances that led to its conclusion.[10]

Regarding the entry into force of a treaty in the international field, Article 28 of the Constitution refers to the agreed terms between the parties according to international law that are stated in the text.

According to Article 28, paragraph 1 of the 1975 Constitution, after their promulgation by law (if this is required by Article 36, paragraph 2), international

[7] *Aegean Sea Continental Shelf* case, *Greece v Turkey* [1978] ICJ Rep 96.
[8] *Ambatielos* case, *Greece v U.K., Prelim. Objections* [1952] ICJ Rep 44.
[9] *Aegean Sea Continental Shelf* case 96.
[10] Diverted Cargoes Arbitration, *Greece v U.K.* (1955) 12 UNRIAA 65.

conventions constitute an integral part of the internal Hellenic legal order. Together, Article 28, paragraph 1 and Article 36, paragraph 2 define the functions of the promulgated law, including the incorporation of the convention in the internal law and its entry into force in the international field.

Indeed, the 1975 Constitution defines the entry into force of international conventions that are to be incorporated in the internal legal order. The terms set out by the conventional text enjoy autonomy with regard to their application in the internal legal order as well as with regard to their entry into force in the international field.

The procedures of integrating a treaty into domestic law according to Articles 28, paragraph 1 and 36, paragraph 2 reflect the monist 'execution' theory, giving effect to the treaty through the parliamentary law that promulgates the international convention. The adoption of the 'execution' theory in full compliance with the constitutional principle of the separation of powers, respects the right of the legislature to control the acts of the executive and integrates the conventional text into the domestic legal order while safeguarding its international character.

In Greece, international conventions have always constituted a direct source of law, whether by judicial practice or by constitutional requirement. According to Article 28, paragraph 1 of the 1975 Constitution, the international customary rules and the international conventions constitute an integral part of the Hellenic internal legal order. The international conventions are 'self-executing' if their provisions have sufficiency and fullness and either attribute or recognize rights to private persons. Self-executing treaties must also be able to support legal actions before tribunals, or prescribe obligations to the executive power that private persons can invoke before tribunals.[11]

In contrast, 'non-self-executing' treaties do not have direct legal effect in the domestic legal order, either because their application requires the promulgation of supplementary measures in the internal field, or because their purpose is not the recognition or the attribution of rights capable of being pursued by judicial procedures.[12]

The international treaty text not only can create or recognize rights and obligations for states, but can also lead to direct legal effects on matters related to the internal competences of states, even with regard to physical or moral persons within their jurisdiction.

Apart from international conventions with a political content, which regulate relations between states (such as treaties establishing international organizations, peace treaties, etc.) many other international conventions contain provisions that affect the legislative competences of states. These conventions can lead to direct

[11] See, for example, the international convention signed under the auspices of the United Nations in Ramsar, Iran (1973) for the protection of wetlands of international interest: The disregard of the obligations imposed on the contracting parties legitimize the legal interest of injured physical persons to have recourse before tribunals. Supreme Court, 2343/1987.

[12] Supreme Court, 665/1975.

legal effects and can be applied directly and 'ex officio' by courts if they can serve as a basis for legal actions in order to protect claims of physical or moral persons.

The jurisprudence of Greek courts recognizes that international conventions with a legislative content, which lead to direct legal effects in the internal legal order, can be invoked by applicants. The courts are obliged to apply these treaty provisions, subject to the control of the Supreme Court.[13]

This obligation concerns vast categories of conventions with a legislative content, such as the conventions of judicial co-operation, protection of human rights, recognition and execution of foreign judgments, conventions related to the international criminal jurisdictions of national courts, etc.[14] It also concerns conventions of international uniform law for the protection of private legal interests, such as the 2000 New York Convention related to the international sale of mobile objects. Furthermore, it also concerns conventions with a political content applicable by the courts for the settlement of disputes on matters of personal or particular status (such as nationality or respect of *droits acquis*).[15]

In every case the application toward foreigners is always subject to the condition of reciprocity.[16] It has been accepted in judicial practice that the above constitutional requirement applies *ex officio* to the courts, which are obliged to verify the existence of a real reciprocity in each case. They are committed accordingly to examine if the courts of the foreign applicant's state of nationality offer and guarantee the same level of protection to applicants of Greek nationality.[17] However, there is a contrary jurisprudence defending the opposite position, which places the burden of proof on the applicant.[18]

The competence of courts to interpret international conventions was never questioned in reference to the civil courts,[19] the administrative courts,[20] or the criminal courts.[21] However, both the executive and legislative powers are able to hold an interpretative intervention when the treaty is being promulgated into domestic law. In fact, the law that promulgates the official text of the international convention in the language agreed to by the parties (according to Article 33 of the Vienna Convention) contains a translation that is also published in the official journal. In the text of the translation some language may be introduced that alters the official text with the intent of adapting the provisions to the official legislative or judicial policy. The judges may have recourse to the translated text of the convention for reasons of convenience, since they are obliged to apply the authentic text.

When interpreting international conventions, the courts follow the international methods of interpretation established by international practice and adopted by the

[13] Supreme Court, 123/1926.
[14] Supreme Court, 8/1997(in plenary).
[15] Supreme Court, 418/1971, 701/1978, 340/1985.
[16] 1975 Constitution Article 28 [1b].
[17] Supreme Court, 580/1982.
[18] Supreme Administrative Court, 2280/1990.
[19] Supreme Court (in plenary), 1142/1974.
[20] Supreme Court, 4590/1976.
[21] Supreme Court, 961/1982 (related to the 1931 convention of extradition between Greece and the United States).

Vienna Convention, Article 31. This is actually a constitutional requirement in the 1975 Constitution. In fact, according to Article 87, paragraph 2 of the 1975 Constitution, judges are subject, during the exercise of their duties, to the constitution and the laws. Therefore, they are obliged to apply the rules of interpretation contained in the Vienna Convention that constitutes, according to Article 28, an integral part of the Hellenic internal legal order. These interpretation standards include: literal interpretation;[22] object and purpose;[23] recourse to the *travaux préparatoires*;[24] the subsequent state practice;[25] and the clear act doctrine.[26]

The courts have two other functions in respect to treaties. The first is in respect to reservations. By invoking its sovereignty every state has the right to define, in matters concerning it, the meaning it attributes in the provisions of the treaty to which it is signatory. In this case Greece has a unilateral interpretative approach, non-binding for the other contracting parties, whose courts have the power to appreciate it at their discretion. A specific case of unilateral governmental interpretation is the interpretative declarations deposited by a contracting party at the moment of signature or ratification. However, their functionality and legal effects are dependent on the reaction of the other contracting parties and the courts.

According to the Vienna Convention, a state depositing a reservation pursues an exception in the application to itself, of certain provisions of the treaty. The validity of the reservation depends on its acceptance by the other contracting parties. If the reservation is of an interpretative character, its qualification as a reservation or interpretative declaration is subject to the jurisdiction of the court that has to apply the conventional text.[27]

The second function has to do with treaties that are not in force for the state. In principle, the courts apply the international conventions promulgated by law[28] or published in the Official Journal by Presidential Decree or Ministerial Decision. However, there are some exceptions. The application of a treaty that has not been promulgated is acceptable if a reference to it is made by an internal Act, legislative or administrative.[29] The application of a non-promulgated convention is possible if this is provided in a private agreement as the applicable law agreed by the parties.[30]

[22] Supreme Administrative Court, 3870/1990 ('. . . it occurs from the phrasing of definitions given in the 102 international convention of the International Labour Organization . . . ').

[23] Supreme Administrative Court, 1343/1980 ('. . . the privileges recognized by the 1961 Vienna Convention for the diplomatic agents intends to the secure and unhindered accomplishment of their duties . . . ').

[24] Supreme Court, 281/1994 ('. . . the history of the genesis of the convention must be taken into account, in a supplementary manner . . . ').

[25] Supreme Court, 4054/1979 ('. . . the term jurisdiction in the 1973 London Convention for oil pollution must be interpreted in compliance with the spirit of international law in force at the time of the application of the convention by the court . . . ').

[26] Supreme Court, 141/1993 ('. . . the literal interpretation must be followed on the basis of the clear act doctrine'); Supreme Court, 281/1994 ('. . . recourse to interpretation must be done only if it is not possible to ascertain the exact meaning of the provision to be applied . . . ').

[27] Supreme Administrative Court, 545/2001.

[28] 1975 Constitution Articles 28[1] and 36[2].

[29] Supreme Court, 450/1996.

[30] Civil Code Article 25; First Instance Court of Athens, 9934/1983.

Additionally, the application of a provision of a non-promulgated convention is acceptable if this provision is considered to reflect customary international law.[31]

## 3. Customary International Law

According to Article 28, paragraph 1 of the 1975 Constitution, the rules of international customary law form an integral part of the internal Hellenic law. The *ex officio* application by the courts of the indisputable rules of international law, general principles of law, and customary rules, has been accepted since 1896 in the jurisprudence.[32] Their disregard is subject to the control of the Supreme Court. The courts have looked with characteristic willingness to the 'generally accepted principles or rules of international customary law' for clarification of legal facts that might affect the settlement of disputes between parties.

The courts have jurisdiction to investigate the existence of a rule of customary law. On this subject, the Appeal Court of Athens, 6384/1989, stated:

> [T]he 135/1971 international convention of the International Labour Organization has not been promulgated by law and, therefore, it cannot be applied for the reason that it does not establish generally accepted rules since it has received ratifications only by nine states among the 150 member states of the International Labour Organization.

The courts have the power to investigate for themselves the existence and the content of a rule of international customary law. According to the Supreme Court, 11/2000:

> [T]he state immunity on civil matters does not cover actions of state organs, illegal according to international law (war crimes), but relevant to this matter is the Convention of the Council of Europe on state immunity (1972), which despite the fact that it has not been put into force, codifies rules of international customary law.' Furthermore, the Special Highest Court established by Art.100 of the 1975 Constitution is competent to qualify a rule of international law as generally accepted, in cases where this rule has been questioned by the courts. According to the Special Highest Court, 48/1991: '[I]n the case of a convention between the United States and Greece establishing taxation waivers, the longstanding abstention of the Greek Treasury from tax claims does not constitute a legal commitment based on the generally accepted rules of general international law.

The primary subjects where customary international law has been applied include the immunity of diplomatic agents, as the Supreme Court, 14/1896, stated: '[T]he immunity derived from the general custom between states and its recognition is generally accepted.' Also included are questions of state immunity[33] and state succession. Regarding the latter, the Military Court of Athens, 1463/1993, stated: '[T]he not yet in force 1978 Vienna Convention on state succession has codified the customarily valid rule on the continuity of conventional obligations.'

[31] Supreme Court (in plenary), 11/2000.
[32] Supreme Court, 14/1896.
[33] Supreme Court 11/2000.

## 4. Hierarchy

According to Article 28 of the 1975 Constitution, the rules of international customary law and international conventions form an integral part of the Hellenic internal law and prevail over any contrary internal rule. However, it should be noted that only international conventions that have been promulgated by law acquire prevailing force, particularly those belonging to the categories numbered in Article 36, paragraph 2 of the 1975 Constitution. The functionality of the prevailing force of international conventions is most evident in international conventions of a legislative character, those that produce direct legal effects, have a self-executing character, and constitute the basis for the legal protection of private rights before the courts or affect the functions and the competences of internal organs or services.

There are many consequences deriving from the prevailing force of international law. For example, one such consequence is the non-application in the specific judicial instance of the contrary internal provision, but not its abolition.[34] In such a case, the contrary national provision becomes inactive (*caduc*) in the specific judicial instance.[35]

There are frequent references by the courts to the provisions of the 1950 European Convention on Human Rights and Fundamental Freedoms, as well as to the 1966 UN Covenant on Civil and Political Rights, for the clarification of the content of several provisions of the 1975 Constitution referring to: the protection of individual rights (Article 4); the protection of the physical integrity of persons (Article 5); the protection of the religious freedom and political beliefs (Articles 5 and 13); the safeguard of the free flow of information (Articles 5A and 14); the safeguard of the right to assemble peacefully and to unionize (Articles 11 and 23); the protection of individual property (Article 17); the freedom of forming a family situation (Article 21); and, most generally, to human rights (Article 25)

Regulations of international organizations with a legislative content, which affect the internal competences of states or rights of physical or moral persons, like the Regulations of the World Health Organization, have prevailing force by virtue of Article 28 of the 1975 Constitution.[36]

More specifically, decisions of the Security Council have prevailing force by virtue of Article 28, and those that are taken on the basis of chapter VII of the Charter are directly enforceable, based on Article 48, paragraph 2 of the Charter. The only condition for decisions to be taken into account by the courts is their publication in the Official Journal by Presidential Decree (eg decisions imposing an economic embargo, freezing of transactions, seizing of accounts, etc.).[37]

[34] Administrative Court of Athens, 7907/1982.

[35] Legal Council of State (in plenary), 339/1981; Supreme Administrative Court (in plenary), 867/1988.

[36] Supreme Administrative Court, 154/1990.

[37] Supreme Administrative Court (in plenary), 412/1953.

## 5. Jurisdiction

Article 8 of The Hellenic Penal Code of 1950 established the extraterritorial jurisdiction of Greek criminal courts for illegal acts occurring abroad and perpetrated by foreigners who are subject to criminal proceedings on the basis of the universal jurisdiction adopted in Article 8 or in international conventions ratified by Greece.

It follows that Greek penal laws and the international conventions ratified by Greece apply to Greek subjects and foreigners even for illegal acts that occurred abroad if this is stipulated by a specific internal or conventional provision that also establishes the principle of the universal jurisdiction. This is the case with the 1949 Geneva Conventions for war crimes and the international anti-terrorist conventions for crimes related to international terrorist activities. It should be noted that Greece has ratified all the international conventions establishing universal jurisdiction and is also a party to the Statute of the International Criminal Court.

The general view is that the principle of universal jurisdiction does not provide a basis for jurisdiction in a civil case. The doctrine on universality only provides for criminal jurisdiction.

## 6. Other International Sources

Non-binding declarative texts are regarded by the national courts as guidance material for interpreting relevant domestic law. The judicial pursuit of the recognition and execution of decisions of international judicial organs in the internal legal order, on the basis of the obligation imposed by Article 94 of the UN Charter, has been recorded in international practice. The judgment of the international judicial body can be used as legal basis for the judicial pursuit of legal effects in the internal legal order. For example, it has been judged by the Legal Council of State (in plenary), 507/1980, that the decisions of the International Mixed Arbitration Commissions prevail over any judicial decisions issued in the meantime.

# 11

# Hungary

*Nóra Chronowski, Tímea Drinóczi, and Ildikó Ernszt**

## 1. Introduction

The Hungarian Constitution was adopted in 1949, but was substantially rewritten in 1989 and amended in 1990 when this parliamentary democracy held its first multiparty elections and initiated a free market economy. Under the present Constitution, the President of Hungary holds a largely ceremonial position, while the Prime Minister has more executive responsibility. Legislative authority is in the hands of the unicameral National Assembly, which elects the Prime Minister on the recommendation of the President, and also elects the President. In addition, the National Assembly appoints judges to the Constitutional Court for nine-year terms. The Constitutional Court has the power to challenge legislation on grounds of unconstitutionality, provided that the Act is not regarded as having a financial character. The Supreme Court is the court of last resort for adversarial proceedings, and the members of this court, like other judges, are appointed by the President. These courts preside over a legal system based on the German-Austrian legal system.

As a result of the two-thirds parliamentary majority of the governing parties (FIDESZ-KDNP), there was a fast constitution-making process in Hungary. In the summer 2010, a parliamentary committee (with only MPs) was established to draft a concept of the new constitution for submission to the Parliament in December 2010. The new constitution was adopted on 18 April 2011. The Fundamental Law of Hungary (15 April 2011)[1] – which however is not based on this concept – leads to a lower standard of human rights protection, malfunction of the system of checks and balances, and vanishing of politically neutral institutions and democratic control.

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[1] Magyar Közlöny 2011. évi 43. szám 10656. o. [Official Journal Nr 43 2011 p 10656]. The Fundamental Law enters into force on 1 January 2012.

Hungary makes for an interesting case-study for a variety of reasons. First of all, it displays several uncertainties in this area. A number of its constitutional provisions (in particular Articles 2/A and 7)[2] give rise to uncertainty, as will be shown below. In addition, Hungarian courts and other authorities appear unwilling to apply international law in cases before them. Secondly, since 1 May 2004, Hungary has been a member state of the European Union. Thus, its legal system has been undergoing important changes in recent years, expanding because of the application and implementation of the legal norms issued by EU institutions and also the international commitments undertaken by the Community. These commitments are binding on Hungary by virtue of Article 300 TEC and Article 26 TEU.

The main focus of this chapter is on how the Hungarian Constitution regulates the relationship between international and national law, with the addition of Community law. This question is important because it is the Constitution that establishes the positions of national authorities (legislature, judiciary, etc.) towards these legal orders. Second, this chapter examines how this triangular relationship affects the Hungarian legal system at the legislative level. Finally, after discussing the legislature's approach towards the Europeanization of international law, we will examine the practice of ordinary courts.

## 1.1 Historical Overview

In Hungary the relationship between international law and national law was a quite neglected area for a long time. Our unwritten historical constitution, our first written constitution (Act I of 1946), and our present constitution in its original form are all silent on this question.

For centuries established judicial practice determined the relationship between the two law systems. In practice this meant that international treaties had priority over national law only in exceptional cases.

Between the two world wars international treaties were promulgated through Hungarian Acts or other national laws. This same practice was followed in the Socialist era from 1949 until 1989. This suited the Socialist view that international law can not be applied without being implemented in national laws. Such a dualist approach was dominant among Hungarian legal scholars as well.[3] Also, even though

[2] Article Q (2)-(3) of the Fundamental Law: Hungary shall ensure harmony between international law and Hungarian law in order to fulfil its obligations under international law. Hungary shall accept the generally recognized rules of international law. Other sources of international law shall become part of the Hungarian legal system by publication in the form of legislation. Article E (2) With a view to participating in the European Union as a member state, Hungary may exercise some of its competences arising from the Fundamental Law jointly with other member states through the institutions of the European Union under an international agreement, to the extent required for the exercise of the rights and the fulfilment of the obligations arising from the Founding Treaties. (3) The law of the European Union may stipulate a generally binding rule of conduct subject to the conditions set out in paragraph (2). (4) The authorization to recognize the binding nature of an international agreement referred to in paragraph (2) shall require a two-thirds majority of votes of the Members of Parliament.

[3] Eg, György Haraszti, Géza Herczegh, Károly Nagy.

Hungary promulgated a large number of international agreements,[4] these mostly had a declarative character, making it nearly impossible to base a claim on them before judicial organs. Even if treaties were referred to, the judicial 'practice' at the time was to refer to the promulgating Act/law, not to the international instrument itself. Then in the 1970s–1980's legal scholars (eg Károly Nagy, László Valki, László Bodnár, Géza Herczegh) turned to a monist approach. However, the dualist approach continued to be represented in Hungarian jurisprudence through men such as János Bruhács, András Bragyova, József Petrétei, Gábor Sulyok, and András Jakab. Finally, in 1989 the amendment of the constitution made the first step in determining the relationship between international law and national law with Article 7.[5]

### 1.2 The Hungarian Constitutional Framework

Article 7(1) of the Constitution provides that '[t]he legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law'. This provision, at first sight, adopts a dualist approach toward international law, which seems to be strengthened by Article 2/A(2) of the Constitution.[6] However, the Constitution does not clearly declare a dualist approach. It is also silent about the possible solution of conflicts between international law and national law and about self-executing norms. So it is no wonder that this article has been debated by legal scholars and practising lawyers. Therefore, Article 7(1) can only be understood and interpreted in conjunction with the decisions of the Constitutional Court.

## 2. General Principles of International Law

When analyzing the 'harmonization' of domestic law with international law, one must first ask which sources to take into account. The main sources of international law are international treaties and general principles of international law, which involve customary international law, *jus cogens* and general principles of law.[7] When

[4] The 'enthusiasm' of Hungary to join significant international treaties—which were in fact nearly never applied—could be due to the fact that Hungary was condemned more times before. Szegő Hanna Bokorné in Tamás Molnár, 'A nemzetközi jog és a magyar jogrendszer viszonya' ['Relationship of international law and Hungarian legal system'], in Jakab András és Takács Péter (szerk.), *A magyar jogrendszer átalakulása 1985/1990–2005. II. Kötet* [*Transformation of the Hungarian legal system 1985/1990-2005, Vol. II.*], —(Budapest, Gondolat and Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kar 2007).

[5] Tamás Molnár, 'A nemzetközi jog és a magyar jogrendszer viszonya' 4.

[6] The Constitution Amendment in 2002 created Article 2/A according to which for the strengthening and proclamation of the accession treaty the two-third majority of the members of the Parliament is needed.

[7] See in more detail, János Bruhács, *Nemzetközi jog I. Általános rész* [*International law, I. General Part*] (Budapest-Pécs: Dialóg Campus Kiadó, 1998) 79–82, Hanna Bokorné Szegő, *Nemzetközi jog* [*International law*] (Budapest: Aula Kiadó 2003) 33–43; Ngnyen Quoc Dinh, Patrick Daillier, Allain

states describe their alignment to international law on a constitutional level, they often use the term 'general principles of international law' and regard international treaties and agreements separately.[8] However, in light of the case-law of the Constitutional Court,[9] the notion of 'general principles of international law', as it appears in the Constitution, should be taken to refer to customary international law and international *jus cogens*.[10]

'Assurance of harmony' indicates that the state should develop a domestic legal order in which international principles are recognized and international treaties that have been entered into by the state prevail. According to the Constitutional Court, it is a constitutional obligation to enforce international legal obligations of the state.[11] This means that the Constitution and domestic law should be interpreted so as to make principles of international law prevail. Thus, in accordance with Article 7, the Constitution, international legal obligations and domestic law are interpreted together and in view of their correlation with one another.[12] More precisely, the Constitution and domestic law should be construed so that they will be consistent with general principles of international law.[13] Despite this obligation to harmonize domestic and international law, in its decision 53/1993 (X.13), the Constitutional Court held that international law is not to be adjusted to the conditions of domestic law, but rather domestic law should be adjusted to comply with international law.[14] The Constitutional Court made the obligation of interpretation one-sided because international law cannot be construed in terms of national law. To support its reasoning, the Constitutional Court stated that national law might be applied if it is explicitly ordered by international law, but national law should not prevail over the explicit and cogent principles of international law. Additionally, the Court held that ignoring international law would conflict with Article 7(1) of the Constitution.[15]

Since generally recognized principles of international law qualify as part of domestic law, their application in domestic law requires an automatic or general

Pellet, and Péter Kovács, *Nemzetközi közjog* [*International Public Law*] (Budapest: Osiris Kiadó 2003) 71, 162.

[8] Bokorné (n 4) 50.

[9] Since the Constitutional Court (CC) fails to use international legal terminology, it is difficult to construe what is denoted under the general principles of international law. See 53/1993 (X. 13.) AB határozat, (CC decision), ABH 1993. 323, 329.

[10] For a contrasting opinion see Bokorné (n 4) 50. In her opinion the constitutions, since they refer to general principles of international law, leave the question open if they denote customary international law, *jus cogens* or both.

[11] For a similar view in Italian legal literature see Gustavo Zagrebelsky, *Manuale di diritto Constituzionale I. Sistema delle fonti del diritto* [*Handbook of constitutional law I. Legal source system*] (Torino: UTET 1987) 120.

[12] 53/1993. (X. 13.) AB határozat, (CC decision), ABH 1993. 323, 327.

[13] In the case examined in the resolution according to Constitutional Court (CC) Article 57(4) and Article 7(1) of the Constitution should be interpreted in consideration with each other. 53/1993. (X. 13.) AB határozat, (CC decision), ABH 1993. 323, 327.

[14] In the case of the CC resolution referred to eg in consideration with penalty. 53/1993. (X. 13.) AB határozat, (CC decision), ABH 1993. 323, 333.

[15] 53/1993. (X. 13.) AB határozat, (CC decision), ABH 1993. 323, 327.

adoption.[16] This is justified by the view that generally recognized principles of international law cannot be transformed but only adopted.[17] Molnár states that customary international law cannot be adopted with transformation, because there is not a concrete text that could be built into the national legal system. Further its content is not certain; it demands even in international judiciary case-by-case interpretation. Furthermore, a comparative analysis of more detailed provisions of a few European constitutions with Article 7(1) leads to a similar conclusion.[18]

However, there was a heated debate on this topic in legal literature, showing very different views on the subject. Sulyok admits the special nature of international customary law—obscure, constantly changing content—but points to the fact that it behaves very similarly to international treaties relating to national law. So according to Sulyok's view, there is no essential difference between international treaties and international customary law, so the special features of customary law mean only a technical 'challenge' for implementation.[19]

Article 7(1) operates as a 'permanent transformer' of every present and future norm belonging to general principles of international law.[20] In this way, the Hungarian legal system accepts these norms according to their actual status and

[16] Cf András Bragyova, 'A magyar jogrendszer és a nemzetközi jog kapcsolatának alkotmányos rendezése' ['The constitutional organization of the connection between the Hungarian legal system and International law'] in András Bragyova (ed.), *Nemzetközi jog az új Alkotmányban* [*International law in the new Constitution*] (Budapest: Közgazdasági és Jogi Könyvkiadó MTA Állam- és Jogtudományi Intézete 1997) 16. Zagrebelsky (n 11) 120.

[17] László Bodnár, 'A nemzetközi jog magyar jogrendszerbeli helyének alkotmányos szabályozásáról' ['On the constitutional regulation of the place of international law in the Hungarian legal system'] in *Alkotmány és jogtudomány. Tanulmányok* [*Constitution and Jurisprudence, Studies*] (Szeged, 1996) 23.

[18] The expression 'generally recognized principles' of international law is applied for instance by the German basic law (Article 25) when it provides that the general principles of international public law are part of the federal law and as such have primacy over the acts and will directly entail rights and obligations for the inhabitants of the federal territory. Under Article 9 of the Austrian federal constitution, the generally recognized principles of international law form part of the federal law in effect. Pursuant to the Greek constitution, the generally recognized principles of international law take priority over contradictory legal provisions. Article 8(1) of the Portuguese constitution states that the general and common law principles of international law constitute part of Portuguese law. By virtue of Article 10 of the Italian constitution, 'the Italian law and order aligns with the generally recognized principles of international law'. The conclusion we can draw from these formulations is the absolute priority of the general principles of international law over domestic law. Although Article 29(3) of the Irish basic law also recognizes the generally recognized principles of international law, but adopts them just as principles of conduct against other countries. From this draft, it follows that the enforcement of generally recognized principles of international law is possible only within the restrictions imposed.

[19] Gábor Sulyok, 'A nemzetközi jog és a magyar jog viszonya, Korreferátum Molnár Tamás A nemzetközi jog és a magyar jogrendszer viszonya 1985–2005 című előadásához' in Jakab András és Takács Péter (szerk.), *A magyar jogrendszer átalakulása 1985/1990–2005. II. Kötet* [*Transformation of the Hungarian legal system 1985/1990-2005, Vol. II.*] (Budapest, Gondolat and Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kar 2007) 947.

[20] The expression was used by J. Petrétei in his work *Lezioni di diritto internazionale* [*Lectures on international law*] (Padova: CEDAM, 1957) 29. Being turned into general domestic law does not exclude certain 'generally recognized rules' from being determined by distinct treaties (too), and in that respect distinct transformation should be made. Eg, the United Nations Charter and the Geneva Convention contain such principles. 53/1993. (X. 13.) AB határozat, (CC decision), ABH 1993. 323, 327.

content. In Berke's words: it is a 'constant and opened transformation'.[21] This also means that, by virtue of the explicit 'acceptance' clause in Article 7(1), certain rules of international law prevail simultaneously in a compulsory manner.[22]

The already mentioned decision of the Constitutional Court 53/1993 (X. 13) states that 'transformation' in general—without listing and determining the rules—was carried out by the Constitution itself. So the general principles of international law are not part of the Constitution, but undertaken obligations.[23] Jakab's standpoint is contrary to that of the Constitutional Court. According to him these norms can be regarded as part of the Constitution. He emphasizes that the distinction made by the Court does not have any practical consequence and that these norms are the 'interpretation result, unwrapping' Article 7(1).[24]

The question of who will interpret the international norms in question may arise.[25] However, this question does not cause any problems, because the principles of international law introduced into national law should be enforced by the national courts within the Hungarian legal system. Thus, the courts should arguably apply the general rules of international law in light of the facts of the case, as specified by international law. However, in practice customary international law does not have a role in the case-law of Hungarian courts and only rarely are international treaties applied.[26]

## 3. Treaties

Hungary takes a dualist point of view to ensure the harmony of international treaties with domestic law, in accordance with Article 7(1) of the Constitution.[27] Thus, to implement a self-executing treaty[28] Hungary generally uses the special adoption or transfer method. Additionally, another method of implementation available is the 'special regular transfer'—special because it is done through execu-

[21] Barna Berke, 'A nemzetközi jog, a belső jog és az alkotmány: a nemzetközi szerződések alkotmányossági revíziója' ['International law, internal law and constitution: constitutional review of international treaties'] (1997) 1 Jogállam 38.

[22] 53/1993. (X. 13.) AB határozat, (CC decision), ABH 1993, 323, 327.

[23] AB határozat (CC decision), ABH 53/1993 (X. 13.) III/a.

[24] András Jakab, *A magyar jogrendszer szerkezete* [*Structure of the Hungarian legal system*] (Budapest-Pécs: Dialóg Campus Kiadó, 2007) 160.

[25] Bragyova (n 16) 19.

[26] Blutman, László's remarks. Barnabás Kiss, 'Az európai jog, a nemzetközi jog és a nemzeti jogrendszerek egymáshoz való viszonya' ['The relationship between European law, International law and national legal systems'] (1998) 3 Jogtudományi Közlöny 105.

[27] According to Németh Article 7(1) is essentially dualist in character. Cf János Németh, 'Az európai integráció és a magyar Alkotmány' ['European integration and the Hungarian Constitution'] in András Bragyova (ed.), *Nemzetközi jog az új alkotmányban* [*International law in the new constitution*] (Budapest: Közgazdasági és Jogi Könyvkiadó, MTA Állam- és Jogtudományi Intézete, 1997) 107. A legal system that does not take a stand on the legal status of international legal norms explicitly is necessarily dualist. Bragyova (n 16) 15.

[28] A treaty is self-executing if it complies with specified conditions: domestic law does not exclude direct jurisdiction, the addressee is concretely specified or may be specified, the treaty includes rights and duties drafted exactly.

tion and regular because the generally used legislative procedure must be applied. In the case of a non-self-executing norm, legislators thus are required to create the executive rules needed (rules creating new organs and verifying authority of duty or procedure).[29]

In his parallel opinion—attached to decision 7/2005 (III. 31.) of the Constitutional Court—Harmathy calls attention to certain facts in connection with the interpretation of Article 7(1) of the Constitution. He points out that in some cases international agreements do not demand the creation of legal rules, but actions still must be taken to help the execution of the treaty. He adds that international agreements are not always proclaimed in the form of a legal norm. So the harmony between international law and domestic law is realized indirectly, not with the creation of one single legal norm. It is approved by the fact that the Constitutional Court has not stated unconstitutionality in cases when the obligation of law making could have risen from the international treaty, but the principle—ordered by the treaty—could also prevail on the grounds of the Constitution and penal regulations—without the creation of a distinct domestic norm. The Constitutional Court also examines to what extent a deliberation possibility is assured by the international treaty to contracting states—if it is compulsory to enact the agreement into the domestic system. He also emphasizes that it cannot be concluded that in all cases an international norm should be built into the Hungarian legal system without any modification. It must be examined if the obligation hurts the regulations of the Constitution or not. The constitutionality of a norm that is in contradiction with rule of law principle enacted in Article 2(1) cannot be accepted.[30]

## 4. Hierarchy

The stronger the automatic application of international law in the domestic legal system, the more important it is that the Constitution includes guarantees that ensure that international law does not infringe the fundamental values of the Constitution.[31] In this respect, the Hungarian Constitution has a serious handicap, as it includes no material restriction at all. Based on the case-law of the Constitutional Court, the rule of law[32] and other basic values of the republic, such as democracy and respect for fundamental rights, could be regarded as such constitutional limitations.[33] The Constitutional Court has set some limits to the automaticity of the process. Thus, it required that customary international law and

[29] Zagrebelsky (n 11) 124, Bodnár (n 17) 24, Bruhács (n 4) 87.

[30] 7/2005 (III. 31) AB határozat (Constitutional Court decision), parallel opinion of Attila Harmathy.

[31] Bragyova (n 16) 13.

[32] The Constitution contains the expression 'jogállam', which is equivalent to 'Rechtsstaat' or 'rule of law'.

[33] Cf eg, 11/1992 (III. 5.) AB határozat, (CC decision), ABH 1992. 77, 80.

*jus cogens* prevail exclusively in respect to the facts of the case and conditions specified under international law.[34]

According to provisions of the Constitution and the interpretation of the Constitutional Court, certain *jus cogens* norms have priority over the Constitution. Molnár states that *jus cogens* can be considered as a 'priority of application'.[35] This is different from general principles of international law and customary international law, which are not above the Constitution in the hierarchy of norms. According to Sólyom, when the Constitutional Court mentions the hierarchy of the Constitution—international law and domestic law—it is also a hierarchical order. Other legal scholars supported this point of view,[36] but others, such as Vörös, disagree.

In light of the constitutional obligation to ensure harmony, any norms implemented in domestic law will take the introducing provision's place in the hierarchy of norms. In this respect, international law is regarded as a special source of law, as it takes effect in domestic law not through the given organ exercising its legislative authority but in connection with the state's international relations.[37] Hence, if a strictly formalistic approach is followed under the relevant Hungarian regulations, international treaties are placed below the Constitution and above all 'secondary legal sources' (laws as well as other forms of state administration). How the relationship between international treaty obligations and domestic law is designed falls within the state's (legislative) competence. However, the problem with the Hungarian hierarchy of legal norms is that related rules are scattered. Rather than being included in a single specified Act, other provisions—eg the Act on the Constitutional Court—are also relevant. It would be preferable if the rank of international treaty obligations published in a Hungarian legal source (Act or Government decree),[38] and their relationship with domestic legal sources, especially with purely domestic[39] Acts and Government decrees, were regulated in a single Act.

In the hierarchy of norms, an international treaty does not affect the provisions of the Constitution. This is because the Constitutional Court has competence to carry out an *ex ante* review of the constitutionality of provisions of international treaties.[40] If the Constitutional Court finds that a treaty is unconstitutional, it cannot be ratified until the unconstitutionality is repaired.[41] The treaty enacted cannot have an effect on the Constitution because the Constitution requires two-

[34] Cf 53/1993 (13. 10.) CC resolution, ABH 1993. 323, 335. In the case, the CC stated that 'it is a constitutional requirement that the exclusion of the lapse of culpability can be established exclusively to the crimes for which the culpability, according to Hungarian law in effect at the time of the commission of crime, had no statutory limitation. There is one exception, that is if the crime (facts of the cases) is (are) declared a war crime or crime against humanity by international law, or the statute of limitations (or its possibility) for those crimes is established by international law and Hungary is obliged to exclude the statute of limitations by an international obligation.' 53/1993 (13.10.) CC resolution, ABH 1993, 323.

[35] Molnár, 926.

[36] Eg Pál Sonnevend, Mihály Ficsor in Molnár, 927.

[37] Petrétei (n 20) 170–1.

[38] Article 9 of Act L of 2005 on the procedure in connection with the international treaties.

[39] Ie, a legal source not referring to an international treaty.

[40] Article 1(1) of the Act on the Constitutional Court.

[41] See Article 36 of the Act on the Constitutional Court.

thirds of the votes of members of Parliament for its amendment.[42] Thus the Constitution cannot be subject to an implied constitutional amendment. However, ending the unconstitutionality will in some cases take a long time, since an international treaty may be bilateral or multilateral and its amendment will require the approval of all the contracting parties.[43] Because of this, an appropriate constitutional amendment may be needed.[44]

The primacy of international treaties in the hierarchy of legal sources is specified under Act XXXII of 1989 on the Constitutional Court (CC Act). By virtue of the CC Act it is the duty of the Constitutional Court to examine a conflict between national law and international treaties.[45] Article 45(1) of the CC Act expresses the legislature's will that domestic law be examined for conformity with an international treaty and that the domestic law be revoked if it does not comply with the treaty's implementing legislation. This means that the international treaty enacted in an Act or government decree is superior to other Acts and legal instruments. The principle of *lex posteriori* will therefore not prevail here.

From this follows the absolute primacy of international treaties, which is simultaneously strengthened and weakened by the following provisions on the competence of the Constitutional Court. If an Act enacting an international treaty conflicts with a legal norm of a higher level,[46] the Constitutional Court, pursuant to the CC Act, is not entitled to annul the former or the latter provision. But, the Court will call upon the domestic organ that concluded the treaty or the domestic legislative organ to resolve the contradiction.[47] This is a carefully crafted solution that shows the intention to preserve the hierarchy of legal norms in the domestic legal system.

Thus, the preservation of harmony between international treaties and domestic law is accomplished by the principle of the primacy of treaties in the hierarchy of legal norms. However, this system does not fully ensure the enforcement of constitutional obligations.[48] The organ requested to resolve any contradiction between domestic law and a treaty is obliged to fulfil its duty within an appointed time. If it fails to do so, the Constitutional Court will verify the non-compliance.[49] However, this obligation to resolve contradictions is not legally enforceable. Consequently, sometimes there is no harmony between the international obligation and domestic law; and yet the constitutional order specified under Article 7(1) of the Constitution will not

[42] Article 24(3) of 46/1994 (IX. 30.) Parliamentary resolution on the Standing Orders of the Parliament (46/1994 (IX. 30.) *Ogy határozat az Országgyűlés Házszabályáról*).

[43] See the Reasoning of the Act on the Constitutional Court.

[44] See 4/1997 (22. 01.) AB határozat, (CC decision), ABH 1997.41. This solution is applied by the Spanish Constitution, since its Article 95 states that drawing up a treaty containing a provision contradictory to the constitution requires a preliminary amendment of the constitution. It appears in the Reasoning connected to Act 2 of Bill No T/4486.

[45] Article 1(c) of the Act on the Constitutional Court.

[46] Eg, a treaty was published in a decree of the government and it conflicts with an Act of Parliament.

[47] Cf Article 46(1) and (2) of the Act on the Constitutional Court.

[48] International obligations become constitutional obligations by virtue of Article 7(1).

[49] See Article 47(1) and (2).

prevail.[50] A solution to this problem requires the total assurance of the primacy of international treaties. This could be achieved by placing international treaties between the Constitution and the Acts—a solution that is similar to that adopted by other states.[51] At present, the place of legal instruments promulgating international treaties in the hierarchy of legal norms is rather complicated.

In summary, it must be noted that international treaties containing a general obligatory rule of conduct should be enacted in a provision corresponding to their content. In this way they will be placed below the Constitution, and neither a provision of a lower level nor a subsequent provision of the same level may contradict them. Further, a provision of a higher level, except the Constitution itself, may not be contradictory to a promulgating provision.[52] Any contradiction that may arise should be resolved not by the repeal of the higher-level provision, but through the amendment of the international treaty or amendment of the higher-level provision itself. The latter solution is more frequently used.

## 5. International, Community and National Law

According to the CC Act, once an international norm has been enacted, the Constitutional Court can examine the constitutionality of laws and other legal instruments for compliance with the norm. Additionally, the Constitutional Court, by means of an *ex post* review, can examine if laws or other legal instruments of state administration are contrary to the Constitution. When the Constitutional Court declares a legal norm unconstitutional, it annuls it. As the Constitutional Court is entitled to interpret laws, it has interpreted the CC Act, including its own competence. In some cases it found that a competence should be interpreted restrictively, while in other instances a more active approach was taken and the competence in question was interpreted broadly. The practice of the Constitutional Court with regard to Community law is not yet wide-ranging. To date there have been only two decisions concerning this issue, which have provoked extensive debates in legal scholarship.[53]

[50] Nevertheless, it does not mean the obligation effective under international law would not bind the Republic of Hungary on the international level. See Petrétei (n 20) 175.

[51] Other constitutions have similar provisions in connection with the decisions of international organizations and international treaties promulgated. The Dutch constitution (Article 94), Portugal basic law (Article 8), the Greek constitution (Article 28(1)), the Finnish basic law (Article 55), the Spanish constitution (Article 96) and Article 55 of the French constitution provide that treaties and/or decisions of international organizations and acts promulgating these treaties or decisions have primacy over domestic law. Compared to these, by virtue of Article 9 of the Polish constitution, the Republic of Poland recognizes international law as binding the state. Under Article 87, however international treaties and provisions ratified are enumerated within legal sources generally binding the state. For the review of certain constitutional provisions see also Németh (n 33) and Bodnár (n 17) 25.

[52] Eg, the promulgating provision is a governmental decree. If it contradicts an Act of Parliament, the procedure is followed according to the Act on the Constitutional Court mentioned above.

[53] See László Kecskés, 'Magyarország EU-csatlakozásának alkotmányossági problémái és a szükségessé vált alkotmánymódosítás folyamata' ['Constitutional problems of the Hungarian EU accession and the necessary process of constitutional amendments'] (2003) 1 Európai Jog; Imre

## 5.1 The First Decision: International Law, Community Law and National Law

In 1997 the Constitutional Court examined its competence to conduct an *ex post* review of constitutionality under Article 1(b) of the CC Act.[54] Although this is not spelled out explicitly in the CC Act, the Court held that laws enacting international treaties can be subject to a subsequent examination for constitutionality.[55] These types of laws are basically 'normal' Acts that can be referred to the Constitutional Court for *ex post* review.

In its decision, the Constitutional Court found that *ex post* review can be extended to review the constitutionality of the international treaty becoming part of any law implementing it. If the Court finds the international treaty or any of its provisions unconstitutional, it declares the implementing legislation unconstitutional.[56] Interestingly, the Court specifically made the following consideration with regard to Community law:

[R]egarding the relation between international law and national law the dualist transformational system is gradually replaced by a monist system, the direct application of international treaties (international law). According to the so-called monist-adoptive conception, the concluded international treaties, which became part of the national legal system, have primacy over national law, without any enactment of the State. This system is forcibly required by European integration, and this is why those Member States of the EU that use the transformational system apply the EU legislation without transformation and guarantee priority to it, except in the case of the Constitution. [...] Consequently, constitutional courts exercise their power related to constitutional control of norms also in case of Community decisions, which automatically become part of the national legal system.

The Court also referred to the practice of the *Bundesverfassungsgericht*, declaring:

[T]he constitutional control over international treaties is done by the constitutional courts of those countries that follow the dualist transformational system regarding also interna-

Vörös, 'Az EU-csatlakozás alkotmányjogi, jogdogmatikai és jogpolitikai aspektusai' ['Aspects of the EU accession from the perspectives of constitutional law, legal dogmatics and legal politics'] (2002) 9 Jogtudományi Közlöny.

[54] Petitioner stated that it is unconstitutional that the CC Act permits only the *ex ante* constitutional review of international treaties. He suggested that the CC should examine the possibility of *ex post* review of promulgating acts of international treaties.

[55] Decision 4/1997 (22 January) of Constitutional Court. (CC decision) 41–54. It was not obvious according to the former decisions. Cf Decisions 30/1990 (XII. 15.) AB határozat, (CC decision), and 61/B/1992 AB határozat (CC decision).

[56] According to Dec 4/1997 (I. 22.) AB of the Constitutional Court, if any provision of an international treaty were found unconstitutional by the Constitutional Court, it would establish the unconstitutionality of the domestic statute which promulgated the treaty. The decision declaring unconstitutionality has no effect on the obligations assumed by the Republic of Hungary under international law. The legislator must harmonize the obligations assumed under international law and domestic law, and pending this process, the Constitutional Court suspends its proceedings concerning the determination of the date of nullification of the promulgating statute for a reasonable time (ABH 1997, 41).

tional treaties that become part of the national legal system by this method. The German Constitutional Court, besides its 'natural' exercise of competence of constitutional court related to the subsequent control of norms especially regarding the EU treaties, can not give up a part of its role to protect the constitution, and this role extends over the execution of any kind of sovereignty that is based on the constitution.[57]

According to the decision of the Constitutional Court, 'the legislative power has to create harmony between the international commitments assumed in the treaties and national law, even in case of the need for amending the Constitution'.[58] This decision is a landmark because the Constitutional Court expressly refers to the nature of Community law. The reference to the practice of the German Constitutional Court suggests that the Court considered the 'Constitution-protecting' practice of other European constitutional courts against Community law a good example for Hungary.

## 5.2 The Second Decision: Community Law

The second decision is a result of a norm-control procedure[59] based on the 1997 decision.[60] In this case, Article 62 of the Europe Agreement promulgated by Act I of 1994[61] was at stake. This agreement established an association between the Republic of Hungary and the European Communities and their member states. Article 62 of the Agreement provides Community criteria for the authorities supervising the respect of competition law. The Constitutional Court had to make a decision about how these criteria can affect national competition law. The Court held that the Parliament cannot implicitly amend the Constitution by concluding or promulgating an international treaty. The treaty examined was unconstitutional because the article in question caused the direct effect of Community law criteria, even though at that time Hungary was not yet an EU member state. As the source for these Community criteria had not been based on the decision of the Parliament, their application violated the principles of popular sovereignty and the rule of law.

[57] 4/1997 (I. 22.) AB határozat, (CC decision), ABH 1997 51–2.

[58] 4/1997 (I. 22.) AB határozat, (CC decision), ABH 1997 41.

[59] 'The Constitutional Court established earlier that examining the procedure of adopting a statute that promulgates an international treaty—including a review of the powers, authorizations and procedures linked to undertaking the international obligation—is a question of constitutionality falling within the scope of powers of the Constitutional Court. The results of the review may, therefore, form a basis for establishing the unconstitutionality of the promulgating Act of Parliament.' Dec 4/1997 (I. 22.) AB, ABH 1997, 42; see also ECJ, Case C-327/91 *France v Commission* [1994] ECR I-3641, 3678

[60] 30/1998 (VI. 25.) ABH 1998 220–39, also available in English: <http://www.mkab.hu/admin/data/file/687_30_1998.pdf>.

[61] 1994. évi I. törvény a Magyar Köztársaság és az Európai Közösségek és azok tagállamai között társulás létesítéséről szóló, Brüsszelben 1991. december 16-án aláírt Európai Megállapodás kihirdetéséről [Act I of 1994 on the publication of the European Aggreement on the association among the Republic of Hungary and the European Communitites and their member states, signed on 16 December 1991 in Brussels].

The Constitutional Court reasoned as follows:

> In the present decision, the Constitutional Court had to form an opinion on how the legal criteria and principles of Community law may prevail in the Hungarian legal system, on the basis of Article 62 of the Europe Agreement and the Implementing Rules, in the legal field of prohibiting the restrictions of competition. Thus, the construction of enforcing the criteria referred to in Article 62(2) of the Europe Agreement as provided for by the Implementing Rules is in the focus of constitutional review. Accordingly, it is a question of constitutionality whether it is possible for the Hungarian Competition Authority to directly apply the norms of domestic law of another subject of international law, of another independent public authority system, and of an autonomous legal system that serves the purpose of regulating legal relations of public law, without having these foreign public law norms made a part of Hungarian law.

Here the Constitutional Court points out that the criteria of the Community's internal law are foreign law, as the Republic of Hungary is not a member state of the European Union. The underlying legal issue was directly linked to the sovereignty of the state, as the right to prohibit the restriction of competition is within the scope of exclusive jurisdiction of the state authority. Extending beyond the principle of objective territoriality of regulations in this field of law is not acknowledged by international law. Neither may such regulations be qualified as generally recognized rules of international law; thus they are not covered by the first sentence of Article 7(1) of the Constitution. The Constitutional Court points out that—as a general rule—an international treaty must be promulgated in an internal source of law in order to make the legal norm contained in the treaty applicable to Hungarian subjects of law. However, the constitutional concern raised by the petition actually lies in the fact that Article 62(2) of the Europe Agreement merely refers to the Community law criteria without having them presented in an international treaty or in the promulgating domestic legal norm.[62]

It is clear that the Constitutional Court put up constitutional restrictions against Community law and did not let the Hungarian legal system open up to such criteria. These reasons were consistent with the domestic legal system prevailing at that time, as the Hungarian Republic was not an EU member state.

One has to take into consideration that until accession, the practice of the Constitutional Court in relation to Community law was reduced to the examination of an ordinary treaty. As an EU member state, it is obvious that the Constitutional Court has to deal with the supranational norms of Community law in another way. This means that, in accordance with the principle of 'Community loyalty', the Constitutional Court may not jeopardize the effect of rules (including rules of secondary community law) that were introduced or implemented constitutionally. In Hungary, the problem is that the constitution-making and legislative powers have modified neither the Constitution nor the CC Act to change the competence of the Constitutional Court regarding this issue. Therefore, the Constitutional Court itself has to reinterpret its competences.[63] The two possible directions of interpretation

[62] 30/1998 (VI. 25.) ABH 1998 220–39.

[63] Since the Constitution and the CC Act have not been properly modified (the latter was not modified at all), the CC could examine the harmony of Community and domestic law according to

are activism and self-restriction. If the Constitutional Court chooses activism, it can interpret its competences so that it is the guardian of Community law. This, however, could cause continuous frictions with Luxembourg. In case of restraint based on co-operation, the Constitutional Court would give up its competence under the CC Act in relation to the EU/EC treaties. It could also take the opportunity to ask for a preliminary decision when the constitutionality of a Community provision appears doubtful.

## 5.3 The New Constitutional Status of Community Law

In light of the case-law of the Constitutional Court and other constitutional requirements of accession to the EU, an amendment to the Hungarian Constitution was passed by the Parliament December 2002 (Act LXI of 2002). The bill amending the Constitution, however, did not deal with all questions relating to Hungary's accession to the EU, and referred some of them to 'ordinary' legislation. In fact, the bill did not meet modern constitutional standards. Moreover, it damaged the requirement of stability. Because of its deficiencies the bill was revised before being put to Parliament, where it was adopted as Act LXI of 2002 on the amendment of Constitution (the 'Amendment'). This Act introduced a new Article 2/A into the text of the Constitution that took effect on the day of its promulgation. This Article reads as follows:

> By virtue of treaty, the Republic of Hungary, in its capacity as a member state of the European Union, may exercise certain constitutional powers jointly with other member states to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (the 'European Union'); these powers may be exercised independently and by way of the institutions of the European Union. The ratification and promulgation of the treaty referred to in subsection (1) shall be subject to a two-thirds majority vote of the Parliament.

From its place in the Constitution under the 'General Regulations', the authorization article, as a general rule, influences other norms in the Constitution. This is in harmony with maintaining the consistency and coherency of the Constitution.

The European Article in the Amendment set aside the phrase 'transfer/confer of competence'. It emphasized the 'common' exercise of competence with member states instead of the exercise of competence 'by the institutions'. However, in light of the dynamic evolution of EU law this distinction can be regarded as superfluous and misleading.

Article 15(c) CC Act. It is, however, evident from the decision of the Constitutional Court that it refrains from doing so (because this falls within the competence of the European Court of Justice). By virtue of Article 1(c) CC Act, the Constitutional Court has competence to examine conflicts between domestic law and the EC Treaty as a traditional international treaty. This would not be a problem in itself, since there are constitutional courts for which this may be a constitutional issue, for instance the practice of the Austrian, Belgian and Italian constitutional courts. The Constitutional Court definitely wanted to have such conflicts resolved by courts of law and, finally, by the European courts, which is well demonstrated by point 1.1 of 1053/E/2005, CC Decision.

The new text of the Constitution sets out the aim of the transfer of competence (to take part as a member state in the EU) and its limitations (to the extent of fulfilment of duties and exercising rights coming from the treaties). However, the Amendment lacks elements that are contained in the constitutions of many member states to protect sovereignty and fundamental constitutional norms. To that effect, the Amendment could have included a statement such as: 'If there is a need for amending the Constitution implied by the transformation of competences described in the Constitution, the amendment shall not amend the provisions of §1, 2, 8, 56 of the Constitution.' This would protect the following constitutional values: republic form of state, democracy, rule of law, popular sovereignty, principle of public representation, fundamental rights, especially the recognition and the respect of the right to life and human dignity.[64]

In the meantime the Constitutional Court has held that it 'will not treat the founding and amending treaties of the European Union as international treaties even though they arise from treaties'. In the absence of material unconstitutionality, the Constitutional Court does not regard the conflict of domestic law and Community law in itself as a constitutional issue. Apparently, this conflict is to be resolved by courts of law. The omission to legislate when such an obligation arises from a founding treaty does not result in the violation of Article 2/A in itself. In order for this to become a domestic constitutional norm conflict, an extra condition is needed—namely that the said omission establishes a substantial unconstitutional situation at the same time. In other words, the omission must violate a constitutional norm containing a fundamental right, a fundamental obligation, a prohibition, a guarantee or a competence.[65]

The authentic interpretation of the authorizing provision was further enriched in 2008. The Constitutional Court highlighted the function of Article 2/A in Decision No 61/B/2005. AB:

> The purpose of including this provision into the Constitution was to establish the conditions and the framework of the participation of the Republic of Hungary in the European Union. The cited provision of the Constitution authorises the Republic of Hungary to conclude an international treaty under which certain of its competences deriving from the Constitution may be exercised jointly with the other Member States of the European Union and the joint exercise of competences be implemented through the institutions of the European Union.

The body—according to the relevant special literature and as a new element concerning its practice—highlighted the limitations of the union-type exercise of competences:

[64] Following the solution of the German constitution, an '*Ewigkeits-klausel*'-like phenomenon would have entered the Constitution, which, however, would only limit amendments in connection with the transfer of competence.

[65] László Blutman and Nóra Chronowski, 'Alkotmánybíróság és közösségi jog: alkotmányjogi paradoxon csapdájában' ['Constitutional Court and Community Law: falling into the trap of a constitutional paradox'] (2007) 4 Európai Jog 17–25.

(1) competences may be exercised jointly to the extent required for the exercise of rights and fulfilment of obligations stemming from the founding treaties of the European Union; (2) only the joint exercise of certain concrete competences deriving from the Constitution is authorized, in other words, the scope of competences exercised jointly is limited.

In respect of the exercise of the jurisdiction of the Constitutional Court, this decision rejects expressly for the first time the examination of a conflict with community law:[66]

The jurisdiction of the Constitutional Court is laid down by Article 1 of the Act on the Constitutional Court. The cited provision contains no competence authorising the Constitutional Court to examine conflict with community law. Pursuant to the rules of community law, this questions falls within the competence of the organs of the European Community, finally the European Court of Justice.

It also follows from this that conflict with community law does not in itself serve as a ground for alleging unconstitutionality.

Finally, regarding the position of community law in the system of the Hungarian sources of law, the Constitutional Court widened the meaning of the authorizing provision with one statement, by naming it as the ground for the constitutional law validity of community law: 'Under Article 2/A of the Constitution community law applicable in Hungarian law is just as valid as is law adopted by Hungarian legislation.' This interpretation is progressive in that—taking into consideration the stipulation of the limits of authorization—it may serve as a ground for the possible examination of the conflict of community law with Article 2/A.[67]

## 5.4 The Triangular Relationship at the Legislative Level

Legal harmonization has been a central element of Hungarian legislation for more than a decade. Since EU accession in 2004, Hungarian national law has had to take a different position in its approach to EC law. Since then, legal harmonization has been carried out in connection with each newly adopted and published Community Act. The whole process is regulated by government decrees, but the emphasis lies on the compliance with the provisions of the Constitution and Act XI of 1987

[66] This makes it clear that as the body has withdrawn community law from the scope of Article 7(1) of the Constitution, in accordance with it, the exercise of its competence under Article 1(c) of the Act on the Constitutional Court is out of the question. The unequivocal nature of this statement is later slightly deteriorated by point III.6 of the reasoning, in which the harmony between internal law and community law is established: 'The court proceeding in the case shall decide—under the cited acts—on the factual and legal information required for answering the question. This conforms to the Rules of Procedure of the European Court of Justice . . . and the Statute of the European Court of Justice . . . ' Does it mean that the body does not examine conflicts with community law, but it examines compliance with it? This may cause a problem if an internal legal regulation deemed to be in compliance with community law by the Constitutional Court will later be deemed to conflict with community law by the European Court of Justice.

[67] Decision No 61/B/2005. AB, 29 September 2008.

on Legislation.[68] As the Minister of Justice and Law Enforcement is responsible for guaranteeing the lawfulness of legislation, he issued Guideline No 7001/2005 (IK 8) concerning law-harmonization legislation (Guideline).[69] In what follows, we examine whether the Hungarian legislature fulfils its obligations stemming from membership in the EU.

According to the Guideline,[70] treaties establishing the European Communities do not formally require any incorporation, since they are sources of Community law. But as they are international treaties as well, they have to be published in the proper domestic legal instrument. This instrument is Act XXX of 2004 on the publication of the 2003 EU Accession Treaty.[71] Thus, primary Community (treaty) law was transferred into the Hungarian domestic legal system in 2004. Since then, from the viewpoint of Hungarian law, it is no longer international law or Community law, but purely national law.

The Guideline repeats the findings of the European Court of Justice (ECJ) on the nature and characteristics of international agreements concluded by the Community and establishes that there is no need for transformation by a domestic legal norm.[72] The Guideline does not preclude the possibility that domestic legislation may be necessary to implement international agreements concluded by the Community. It distinguishes between agreements that have direct effect and those that do not. The Guideline establishes that if the conditions are not present for direct effect, legislation will be enacted at Community level. However, if there is an obligation to legislate, the member state (Hungary) has to approve the necessary legal norms according to its constitutional and other rules.[73]

As to mixed agreements, the Guideline concludes that, since member states' competences are involved, an internal legislation process must take place. Thus, the transformation is to be done via a domestic legal norm, as provided for by Act L of 2005. According to the Guideline, in most cases the powers of the Community or member states are not strictly delineated. Thus, the internal transposition process must cover the entire international agreement, ie the complete agreement has to be enacted in Hungary. This technique may cause some uncertainty in terms of law

[68] 1987. évi XI. törvény a jogalkotásról. It was declared as unconstitutional by the 121/2009 (XII. 17) decision of the Constitutional Court (published in: Magyar Közlöny 2009. évi 184. sz., AB közlöny: XVIII. évf. 12. sz.) and annuled with an effect of 31 December 2010. The new Act is being debated by the Parliament.

[69] 7001/2005 (IK. 8.) IM irányelv a jogharmonizációs célú jogalkotásról.

[70] Guideline, point 162

[71] 2004. évi XXX. törvény a Belga Királyság, a Dán Királyság, a Németországi Szövetségi Köztársaság, a Görög Köztársaság, a Spanyol Királyság, a Francia Köztársaság, Írország, az Olasz Köztársaság, a Luxemburgi Nagyhercegség, a Holland Királyság, az Osztrák Köztársaság, a Portugál Köztársaság, a Finn Köztársaság, a Svéd Királyság, Nagy-Britannia és Észak-Írország Egyesült Királysága (az Európai Unió tagállamai) és a Cseh Köztársaság, az Észt Köztársaság, a Ciprusi Köztársaság, a Lett Köztársaság, a Litván Köztársaság, a Magyar Köztársaság, a Máltai Köztársaság, a Lengyel Köztársaság, a Szlovén Köztársaság és a Szlovák Köztársaság között, a Cseh Köztársaságnak, az Észt Köztársaságnak, a Ciprusi Köztársaságnak, a Lett Köztársaságnak, a Litván Köztársaságnak, a Magyar Köztársaságnak, a Máltai Köztársaságnak, a Lengyel Köztársaságnak, a Szlovén Köztársaságnak és a Szlovák Köztársaságnak az Európai Unióhoz történő csatlakozásáról szóló szerződés kihirdetéséről.

[72] Guideline, point 165.

[73] Guideline, point 166.

enforcement, as the scope of Community competences may not be clear, but member states cannot decide on this matter, as it is within the jurisdiction of the ECJ.[74]

Some provisions of the Accession Treaty provide an obligation of accession to mixed agreements concluded by the 'old' member states and the Community (eg Article 6). As the Guideline states, the legal means of joining these mixed agreements are protocols, the conclusion of which is within the competence of the Council acting on behalf of the 'old' and the 'new' member states. Therefore, Hungary does not need to sign and confirm the protocols, but must nonetheless enact them via a domestic legal norm. Thus, these mixed agreements must also be enacted,[75] even though some parts of the agreement have already become a part of the Community legal order.

Points 173–176 of the Guideline contain provisions on the international agreements concluded under the EU's second and third pillar. They take Article 34(2)(d) of the TEU[76] as a starting point, and determine that this provision enables a member state to uphold and apply its own constitutional provisions. The Guideline also states that, as a consequence, the parties to these international agreements are the member states. Thus, Hungary has to apply Act L of 2005 with an additional proviso allowing for the final determination of the international agreement to be made according to the decision-making procedure of the Council of Ministers. Nonetheless, Act L of 2005 applies to the acknowledgment of binding effect as well as the enactment and publication of the agreement. The same rule applies to the international agreements concluded under Article 34(2)(d) of the TEU before Hungary's accession, as Hungary has undertaken to sign these treaties under Article 3(4) of the Accession Treaty.[77]

The Guideline cites Article 24 TEU and concludes that the determination of the contracting party is controversial. As stipulated in the Guideline at point 175, neither the Union nor the Council has legal capacity under international law. Thus, the most convincing viewpoint is that the contracting parties are the member states, which is strengthened by Article 24(6), which states *expressis verbis* that agreements concluded on this legal basis are binding on the institutions of the EU. According to the Guideline, Article 24 TEU simplifies the treaty-making procedure. It does not give legal capacity under international law to the EU, but only gives procedural competence in relation to the negotiation of the treaty in question. The Guideline requires that the treaty-making procedure regulated by domestic rules be followed. Thus, Hungary has to apply Act L of 2005 with an additional proviso allowing for the final determination of the international agreement to be made according to the decision-making procedure of the Council of Ministers.

[74] Guideline, points 167, 168.

[75] Guideline, point 172.

[76] '[ . . . ] the Council may [ . . . ] (d) establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the procedures applicable within a time limit to be set by the Council.'

[77] Guideline, point 174.

The same rule applies to the international agreements concluded under Articles 24 and 38 of the TEU before Hungary's accession, as Hungary undertook to sign these treaties under Article 6(1) of the Accession Treaty. Provisions of the TEU, however, have to be taken into account.[78] Joining these agreements is done by applying Act L of 2005. This means that a dualist method is applied, so each such agreement is enacted into a Hungarian legal norm, and therefore has no special features of treatment. By its enactment it becomes part of the Hungarian legal system.

In sum, it can be said that Hungary regards international agreements concluded by the Community as Community law, and does not seem to have the intention of upholding a dualist approach towards such international treaties. It is questionable whether national enactment is required in case of mixed agreements, since when the Council adopts this Act, the agreement becomes binding for Hungary as Community law and can entail a direct effect within the Hungarian legal order. The Hungarian legislature seems somewhat over-insured so as to avoid any risk of non-compliance with international and Community law. The Hungarian legislature follows the procedure for incorporating international treaties into the national legal system and also states in the Act that it contains rules that are in harmony with the relevant Community law provisions. Clearly, accession to the EU has resulted in many domestic law-making processes in accordance with the commitment undertaken in the Accession Treaty. It is imperative here to underline the fact that even though these Acts contain international, Community or EU legal obligations, they are treated as normal domestic legal norms because they are applied through a domestic legal instrument. There is one exception, though, namely Acts that have international treaty elements. The Constitutional Court has special competence in respect to these Acts, as well as Acts containing entirely or partly Community or EU law. It is also vital to note that the principle of *lex posteriori derogat lege priori* cannot prevail regarding these kinds of legal sources.

## 6. International and Community Law in the Hungarian Courts

It may be hard to assess the case-law of Hungarian courts, with the exception of the Constitutional Court,[79] because there have not been many cases involving international or Community elements before the courts. When a court deals with cases that have international relevance, it basically applies national law. This is because, as has been outlined above, international treaties (and sometimes also Community legal norms) have legal effect in Hungary only once they have been enacted within a Hungarian law.

The appraisal of case-law on the triangular relationship of international, Community and national law is also difficult because it is not quite certain that judges

[78] Guideline, point 176.

[79] Moreover, its decisions (some translated into English) are available at <http://www.mkab.hu>, with proper search facilities.

have modified their way of thinking in adjudicating cases before them. One should not forget that judges reluctantly referred to international agreements even before EU accession. This practice could be justified by reasoning that, due to the dualist system, it is not necessary for the courts to apply international law as they are bound to apply national law, in which the international agreement was enacted. Thus, in judgments one can usually find that the judge has to apply a certain Act relating to an international agreement, but one will rarely find any reference in the judgment to doctrines developed by international bodies.

It can be said that Hungarian national courts are unwilling to, or even 'escape'[80] from applying international law. There can be many reasons for this attitude. First, international law changes extremely quickly, which makes it difficult for the courts to follow. The general principles of international law are also uncertain and foreign to continental legal thinking. Furthermore, the enormous amount of case-law puts a nearly 'unbearable' burden on courts.[81] This could also be the reason that cases rarely invoke international agreements, as parties are not prepared to invoke international legal norms. It is also natural for courts not to invoke international law by themselves, as it would make their task harder.

Additionally, courts are reluctant to refer to transformed international agreements in judgments if there is a national Act that can be applied in the case in any way.[82] Referring to international customary law raises several problems: these norms are not certain; their precise content is difficult to determine; and it is sometimes even harder to find out if they exist or not on a certain subject. Additionally, the methods in international law are not used in national laws or not well-known. Thus, we can summarize that international customary law does not have much of a practical role in Hungarian judicial practice.[83]

For example, in the 1990s Hungary joined several international agreements that may have an impact on the everyday life of its citizens (eg the 1997 New York Convention on the Rights of the Child). In spite of this, courts have still not shown a willingness to apply international agreements. However, there are some areas where international norms are applied more as a result of these international agreements (eg in family law, law of bills).

## 6.1 Human Rights

In human rights cases it is more common to invoke and refer to international agreements. Though there is not a precedent system in the European Court of Human Rights, its case-law is coherent. So if the case-law is followed and courts

[80] János Bruhács, *Nemzetközi Jog, I. Általános rész* [*International law I. General Part*] (Budapest-Pécs: Dialóg-Campus Kiadó, 2008) 173.

[81] Ibid, 174.

[82] László Blutman, 'A nemzetközi jog a magyar bírósági joggyakorlatban' ['International law in the jurisprudence of ordinary courts in Hungary'] in *Acta Universitatis Szegediensis de Attila József Nominatae Acta Iuridica et politica, In Memoriam Nagy Károly egyetemi tanár* (Szeged: SZTE ÁJK, 2002) 46.

[83] Ibid 42–3.

were called upon to take it into consideration when deciding a human rights case, future condemnation of Hungary could be avoided. In Hungary there are not institutional guarantees for this, so there is not a Supreme Court decision that would call upon courts to consider relevant cases of the Strasbourg Court.[84]

The judicial approach to fundamental rights is largely determined by the fact that such rights are regulated in the Constitution itself.[85] Therefore, international agreements governing human rights issues are part of the Hungarian legal system not only by their enactment in a domestic law, but also by the relevant provisions of the Constitution.[86] The provisions of the Constitution on fundamental rights are quite often present in judicial decisions.[87] References in court decisions can be classified as follows: (1) parties intend to strengthen their reasoning by referring to the Constitution, but the final judgment does not deal with the constitutional provision; (2) courts refer to the Constitution without clarifying the relevance of the cited provision of the Constitution for the case in question; (3) the Supreme Court[88] deals with the relevant rule of the Constitution as a substantive part of the judgment, but it bases the reasoning itself on the particular rules of the given branch of law; (4) the basis of a judgment is the joint interpretation of the Constitution and the particular rules of a branch of law. The number of these types of decisions is, however, limited.[89]

In some judgments judges make reference to international human rights agreements, such as the International Covenant for Civil and Political Rights (ICCPR) and the European Convention of Human Rights (ECHR). The ICCPR was brought into the Hungarian legal system by Law Decree No 8 of 1976 on the enactment of the ICCPR,[90] whereas the ECHR was transposed by Act XXXI of 1993 on the enactment of the ECHR.[91] The following examples illustrate the practice of Hungarian judges in matters involving international elements.

In one case the applicant filed an application to the Capital Court[92] for registration of a civil organization he intended to establish.[93] He attached all the necessary documentation, including the statute of the organization, in which the founders declared that the aim of the organization was to assist in the acknowledgement of

[84] Ibid 48–9.

[85] We consider rights as fundamental rights when they are recognized and guaranteed by the Constitution; we refer to rights as human rights when they are regulated and guaranteed at international level.

[86] Attila Harmathy, 'Bírói gyakorlat—Alkotmány' ['Case law—Constitution'] (2004) 11 Magyar Jog 645.

[87] Ibid 642.

[88] The Supreme Court is situated at the top of the ordinary judicial system, while the Constitutional Court does not belong to the judicial system; the latter is the 'defender of constitutionality.'

[89] Harmathy (n 86) 643.

[90] 1976. évi 8. törvényerejű rendelet a Polgári és Politikai Jogok Nemzetközi Egyezségokmánya kihirdetéséről.

[91] 1993. évi XXXI. törvény a az 1950. november 4-én Rómában elfogadott emberi jogok és alapvető szabadságok védelméről szóló Egyezmény kihirdetéséről.

[92] This is a court at second, in some cases at first instance, which has jurisdiction in the capital, Budapest. In certain cases its jurisdiction is exclusive.

[93] BH 1995. 246, Legf Bír Kpkf III 25. 796/1994. sz.

the right of self-determination of homosexual people as a fundamental right. The Court denied the registration and demanded a completion of documents, stating that the name of the organization (which contained the word 'gay') did not comply with the requirement of accuracy. According to the Court the documentation should contain the name and the age of the members because the Criminal Code does not allow minors to be a member of this kind of organization. The founders submitted the documents again but without the requested modification of the name or the list of the names and ages of the members. The founders argued that these requirements were contrary to Articles 7(1) and 63(1) of the Constitution declaring the right to association,[94] the anti-discrimination clause of the Constitution,[95] Act II of 1989 on the right to association,[96] and the ICCPR. After the court again denied the registration, the founders referred the case to the Supreme Court. The Supreme Court confirmed the decision of the Capital Court, holding that the right of association, under both the Constitution and the Act on association, can be limited, and that the limitation in the Act is in accordance with the ICCPR. Subsequently, the Court simply interpreted Article 67(1) of the Constitution[97] and relevant provision of the Criminal Code without referencing useful decisions of the European Court of Human Rights. Thus, the court applies that national rule even if it is originally an international rule.

In another case the Supreme Court referred to ICCPR Article 12.2 on free movement.[98] Pursuant to this provision, everyone is free to leave any country, including his own. In this case, a defendant had failed to complete his military service[99] and had not reported to a relevant military unit. Instead he went absent without leave and illegally trespassed the Bulgarian-Turkish border, where he was caught. The defendant was then delivered to the Hungarian authorities. In the meantime, Act XI of 1992 on the nullification of convictions for certain crimes against the state and public order committed between 1963 and 1989[100] was

[94] Article 63: '(1) On the basis of the right of assembly, everyone in the Republic of Hungary has the right to establish organizations whose goals are not prohibited by law and to join such organizations. (2) The establishment of armed organizations with political objectives shall not be permitted on the basis of the right of assembly. (3) A majority of two thirds of the votes of the Members of Parliament present is required to pass the law on the right of assembly and the financial management and operation of political parties.'

[95] Article 70/A: '(1) The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever. (2) The law shall provide for strict punishment of discrimination on the basis of Paragraph (1). (3) The Republic of Hungary shall endeavour to implement equal rights for everyone through measures that create fair opportunities for all.'

[96] 1989. évi II. törvény az egyesülési jogról.

[97] In the Republic of Hungary all children have the right to receive the protection and care of their family, and of the state and society, which is necessary for their satisfactory physical, mental and moral development.

[98] BH 1994. 579, Legf. Bír. Stf V. 665/1994. sz.

[99] At that time there was compulsory military service in Hungary involving the obligation to report to have personal data checked and then to join the army.

[100] 1992. évi XI. törvény az 1963 és 1989 között elkövetett egyes állam és közrend elleni bűncselekmények miatt történt elítélések semmissé nyilvánításáról.

approved. The defendant submitted a petition for the nullification of his conviction, which was granted by the Capital Court. The Court argued that the illegal trespassing of the border had to be considered as an exercise of the right to free movement as declared in Article 12.2 of the ICCPR; thus the nullification under Act XI of 1992 was justified. The military prosecutor appealed, however, arguing that the trespass could not be regarded as an exercise of the right to free movement. This argument was accepted by the Supreme Court, which referred to Article 12.3 of the ICCPR: 'The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, law and order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.' The Court also drew attention to the amended Criminal Code, which criminalized the failure to fulfil military obligations, pointing out that this provision was in accordance with the ICCPR.

In a third case a defendant who could not speak or understand Hungarian, was convicted.[101] Under the judgment, the defendant was obliged to pay the cost of interpretation and translation from Hungarian to German and vice versa. The County Court of Győr declared that this obligation was contrary to Article 14.3(f) of the ICCPR, which sets out minimum guarantees in the determination of any criminal charge, including the 'right to have the free assistance of an interpreter if he cannot understand or speak the language used in court'.

A fourth case dealt with the reregulation of contact between children living in the United States and their father.[102] The County Court made a brief reference to Act LXIV of 1991 on the publication of the New York Convention on the Rights of the Child.[103] However, this was not done by the County Court because of the full awareness of the fundamental rights and best interests of the child. Rather, the problem was that the guardianship court[104] had not revealed all the facts of the case and had not acquired the declaration of the child on the contact. The Supreme Court, however, announced that it is not obligatory to acquire the declaration of the child, either under the New York Convention, or Act IV of 1952 on marriage, family, and guardianship.[105] Again, the Court did not utilize the relevant international case-law or doctrines available for these matters.

Thus, is difficult to find any triangular relationship between international, Community and national law. Rather, one can see that Hungary uses the dualist system and applies national law even if the ECHR could be seen as regional customary law[106] or as part of general principles of Community law.

[101] BH 1979. 1. Győr Megyei Bíróság Bf. 590/1977. sz.
[102] BH 1998. 154, Legf. Bír. Kfv. III. 27.669/1996. sz.
[103] 1991. évi LXIV. törvény a Gyermek jogairól szóló, New Yorkban, 1989. november 20-án kelt Egyezmény kihirdetéséről.
[104] In Hungary it is not a court but a special organ.
[105] 1952. évi IV. törvény a házasságról, a családról és a gyámságról.
[106] Wouters and Eeckhoutte (n 1) 27–8.

## 6.2 The Europe Agreement

There is some case-law dealing with Act I of the Europe Agreement, Community law (regulations) and the case-law of the ECJ. These cases can be broadly classified into two groups: cases in which the problem of applying Community law has occurred before and after the accession.

In a significant decision the Supreme Court held that a case had to be decided according to laws in effect at the time of occurrence. Thus, the applicant's reference to an EC Regulation was in vain; Hungary was not an EU member state at the time of the events. Consequently, only the provisions of the Europe Agreement, and not the EC Regulation, were applicable.[107] In another case, the Supreme Court also found that Community law cannot be applied to cases where the right to initiate a legal procedure occurred before the accession to the EU.[108]

Additionally, in a 4 December 2003 decision[109] the Supreme Court, ruling only on the given case, referred to a decision of the ECJ.[110] It held that the ECJ's decisions did not bind the Hungarian courts, but legal principles in its judgments were applicable, provided that they could be founded on Hungarian law.[111] In this way, the Supreme Court, making use of the quoted case-law of the ECJ, indirectly applied the Sixth VAT Directive to Hungarian VAT rules. This case demonstrates how Community legal sources may be applicable even before the accession.

At least one Hungarian county court has acknowledged the primacy of EC law, applying a Community regulation[112] and Act CXXVI on the implementation of the customs law of the Community.[113] By giving primacy to EC law, the court acquitted persons accused of smuggling, as under the relevant Community law their action could no longer be considered as a crime.[114]

## 6.3 Other Matters

International conventions in international transportation by road, air or railway have been part of the Hungarian legal system since the 1960s and 1970s. The International Convention on International Railway Transportation was enacted by Law Decree No 9 of 1975,[115] and the International Convention on the Contract on International Transportation by Road was enacted by Law Decree No 3 of 1971.[116] Additionally, the International Convention on International Transportation by Air, known as the Warsaw Convention, was enacted by Act XXVII of 1936, and

[107] EBH 2005. 1375. [108] Kfv.II.39.203/2004. [109] Kfv.I.35.057/2002/6.
[110] C-258/95. The reference and the interpretation may have been due to the reference made by the defendant in his claim.
[111] In the case it was the Act on VAT.
[112] 2913/92/EEC Regulation.
[113] 2003. évi CXXVI. törvény a közösségi vámjog végrehajtásáról.
[114] County Court of Hajdú-Bihar 1.BF.982/2003.
[115] 1975. évi 9. tvr. a Vasúti Árufuvarozásról szóló Nemzetközi Egyezmény kihirdetéséről.
[116] 1971. évi 3. tvr. a Nemzetközi Közúti Árufuvarozási Szerződésről szóló Egyezmény.

later modified by Law Decree No 19 of 1964.[117] In this field, courts have not been as reluctant to refer to the above-mentioned conventions and have solved cases applying the convention almost solely.[118]

A number of problems arose in criminal law cases because of the application of criminal law provisions in international agreements, such as war crimes, protection of victims of wars, etc.[119] In these cases, the Supreme Court applied international provisions through the enacting Hungarian laws, in effect paying attention to its nexus to international law.[120] One such decision applied and interpreted an Act that enacted the Geneva Convention relative to the Protection of Civilian Persons in Time of War, as well as the Act on criminal procedure for crimes committed during the revolution and war of freedom of 1956.[121]

It is apparent that there has been almost no interrelation between international and Community law in Hungarian case-law. This is probably due to the small number of cases dealing with international and Community law. As far as the relationship of national and Community law is concerned, the case-law before accession may indicate an awareness of the necessity of the future application of Community law on the one hand, and the proper law-harmonizing activity of the legislature, on the other. After accession, one can recognize a tendency of parties to request that courts apply Community law, with varying success. Further, courts seem to make reference to domestic Acts, thus referring to Community law indirectly, since the Hungarian Acts refer to the relevant primary law source. Obviously, this practice will develop in the future with regard to Community legal norms having direct effect or being directly applicable.

### *6.3.1 Act L of 2005 on the procedures relating to international agreements*

In the 7/2005 (III. 31) decision the Constitutional Court declared that it is the Constitutional Court that has the authority to decide if an international norm has been built into domestic law or not. The obligation to execute international norms is based on Article 2(1) and Article 7(1) of the Constitution. This obligation exists since the international agreement obliges Hungary according to international law. The decision addresses self-executing norms as well, finding that the self-executing nature of a treaty can be decided through treaty interpretation. The treaty can also make reference directly or indirectly to whether it is self-executing, and in other cases the law-maker gives a point of reference. According to Article 16 of Act XI of 1987, even self-executing norms must be transformed and proclaimed in domestic

[117] A nemzetközi légifuvarozásra vonatkozó, Varsóban 1929. október 12-én aláírt, az 1936. évi XXVII. törvénnyel kihirdetett egyezmény.

[118] See, BH 1983. 39, Legf. Bír. Gf. III. 30 424/1981. sz. on the application of CIM; BH 1995. 653, BAZ Megyei Bíróság 3. G. 22. 072/1993.—Legf. Bír. Gf. III. 34. 100/1994. sz. on the application of CMR and the Civil Code; BH 1997. 137, Legf. Bír. Gf. III. 30.01/1995. sz. on the application of the Warsaw Covenant and the Civil Procedure Act.

[119] EBH 1992/2. sz. 82, 83 cited by Harmathy (n 86) 645, n 5.

[120] Harmathy (n 86) 645.

[121] EBH 1999, 83.

law. Therefore, if an international obligation becomes part of domestic law after transformation without containing a reference about its self-executing nature—the courts decide if the international regulation can be applied directly in the given case. To be self-executing, the addressees of an international treaty must be precisely determined civil law subjects and the rights and obligations of the treaty must be concrete enough to be applied without any other Acts.

The Hungarian Act L of 2005 on Procedures relating to International Agreements uses the notion of treaty preparation which has a broader meaning than treaty initiation. The notion 'preparation of the treaty' includes several elements: adopting the Hungarian policy; elaborating on the conception and the draft of the treaty; communicating the intention to conclude a treaty with the other parties, handing over the draft or the conception; proposing to carry on negotiations; and accepting the similar initiatives of other parties.[122]

The minister with authority (according to the subject of the treaty), together with the Foreign Minister, decide on the preparation of the treaty, taking into consideration the foreign principles determined by the Parliament and the government.[123] Government authorization is needed only in the case of disagreement between the two ministers. The Prime Minister gives authorization and determines the assignment and tasks of representatives and the Hungarian delegate.[124] The Foreign Minister makes out a document about the authorization that has to be shown at the beginning of the negotiations. Government authorization is needed to determine the final text of the treaty.[125] The ratification of the treaty is done by the head of state, but he needs the previous consent of the Parliament.

The Parliament gives authorization to the President of the Republic for treaties that have outstanding importance relating to the foreign affairs of the Hungarian Republic.[126] These are treaties that: (1) touch a subject about which an Act was accepted with qualified majority rules according to the Constitution; (2) concern the content of fundamental rights and obligations; (3) contain provisions contrary to a current Act; (4) regulate directly the rights and obligations of persons under the jurisdiction of Hungarian Republic; or (5) touch other matters falling within the competence of the Parliament.[127]

The Parliament's authorization is included in the Act that promulgates the international treaty. The promulgating Act also contains the official Hungarian translation—and if possible the English text—of the treaty,[128] the date of coming into effect, modification, and ceasing of the treaty relating to Hungarian Republic if it is known at the time of acceptance.[129] If the above-mentioned data are not known, the Foreign Minister publishes them in Magyar Közlöny immediately after the information is known.[130] The promulgating Act also contains reservations, exceptions, declarations, statements, the approval of the temporary application of

[122] Act L of 2005 Article 2.
[123] Act L of 2005 Article 4(1).
[124] Act L of 2005 Article 5.
[125] Act L of 2005 Article 5 (2).
[126] Act L of 2005 Article 7 (1/a).
[127] Act L of 2005 Article 7 s 3.
[128] Act L of 2005 Article 11 s 2.
[129] Act L of 2005 Article 10 s 1/c.
[130] Act L of 2005 Article 10 s 4.

the treaty (if needed), the organ that is responsible for the execution, and, if necessary, changes in acts, legal rules and other steps that need to be taken to harmonize international and national law.[131]

Furthermore, the rules for Parliamentary authorization should also be used *mutatis mutandis* for the modification and termination of the treaty.[132] In cases where treaties do not fall within the authorization competence of the Parliament, the government will give the authorization.[133]

After accepting the promulgating treaty, the Foreign Minister immediately makes a proposal for the President of the state,[134] who completes a document about the consent to be bound by the treaty. The President of the state also arranges for the exchange or deposition through the Foreign Minister,[135] or in case of unconstitutionality, applies to the Constitutional Court.[136] The government approves the treaty with the provision that it contributes to the execution of the international legal acts of the President of the state or the Foreign Minister. The head of the government must ensure that the treaty is concluded by the Prime Minister and the text of the treaty is promulgated by a government decree.[137]

A novelty of the Act L of 2005 is that, according to Article 13(4) of the Act, the compulsory decisions of international courts and other organizations relating to the interpretation of agreements must be enacted and promulgated in Magyar Közlöny. This means that the obligation does not touch the decisions of European Court of Justice against Hungary. The hierarchical place of the promulgating legal norm is determined by the norm on which the debate was based, which can be an Act or government decree.

## 7. Open Questions

In the Hungarian system there are still several unregulated matters in this area. It has not been determined how and in what form the so-called 'sanction' of the Security Council should be enacted in the Hungarian legal system.[138] The practice on this is quite spontaneous and ad hoc. Security Council resolutions are promulgated mostly in government decrees, but in one case were promulgated by a government resolution, which is not even a legal norm. Sometimes resolutions that suspend or terminate former resolutions are referred to only in a Foreign Minister guide, the text of which is not even published.[139] This same uncertainty also applies to NATO documents.[140]

[131] Act L of 2005 Article 10. 1.
[132] Act L of 2005 Article 12.
[133] Act L of 2005 Article 7. 1/b.
[134] Act L of 2005 Article 8. 1.
[135] Act L of 2005 Article 8 s 2.
[136] Act L of 2005 Article 8. 3.
[137] Bruhács János: Nemzetközi jog I., Dialóg-Campus Kiadó, Budapest-Pécs, 2008.
[138] Originally Act L of 2005 would have ruled on this matter: it would have amended Act I of 1956 on the Promulgation of the Charter of the United Nations, and these resolutions would have to be promulgated in Magyar Közlöny. (The Parliament has not accepted the proposal.)
[139] Csuhány Péter: Gondolatok a nemzetközi jog és a belső jog viszonyáról, Állam- és Jogtudomány, 2005, 267.
[140] Molnár, 943.

## 8. Conclusion

This chapter has examined the triangular relationship between international, Community and national law in Hungary. To do so, it was necessary to start with an interpretation of the relationship between international, Community law and national law from the perspective of constitutional law. The Hungarian Constitution attempts to regulate, although not very successfully, this relationship in Articles 2/A and 7. However, the Constitution neither determines the status of Community law in the Hungarian legal system, nor explicitly regulates the status of international law. On the one hand, primary Community law (ie only treaty law) is to be handled according to the aforementioned articles, while on the other hand, the Hungarian legal system adopts a dualist approach towards international law. Thus, the Hungarian legal system is not particularly friendly to international agreements.[141]

Many experts have drawn attention to the deficiencies of the Constitution regarding international law as a source of law.[142] Despite this, Article 7(1) of the Constitution has remained unchanged. It may be regarded as a serious omission that this section was not specified in 2002 together with the Amendment, and that a differentiated regulation of the features of Community law and international law, as sources of law, has not occurred. One has to consider the fact that the founding treaties of the European Communities and the European Union, as well as the Accession Treaties, are essentially supranational law.

In conclusion, the international agreements concluded by the Community are Community law, while customary international law remains international law for member states and thus for Hungary as well.[143] Hungary for its part is ready to comply with Community law obligations, including the implementing of international agreements concluded by the Community. It is difficult to evaluate case-law due to the modest amount of Community-relevant case-law. Hungarian judges apply Community law through relevant domestic Acts and sometimes refer to the ECJ case-law, but rarely apply enacted international agreements and almost never apply doctrines developed at the international level. It may also be said that the

[141] See the criticism of these articles in more detail Nóra Chronowski and József Petrétei, 'EU-csatlakozás és alkotmánymódosítás: minimális konszenzus helyett politikai kompromisszum' ['EU accession and modification to the Constitution: political compromise instead of minimal consensus'] (2003) 8 Magyar Jog 449–66, Nóra Chronowski, *Integrálódó alkotmányjog. Az Európai Unió és a Magyar Köztársaság alkotmányos rendszerének kapcsolata* [*Constitutional law under integration. The relation between the European Union and the constitutional system of the Republic of Hungary*] PhD thesis, Manuscript (2004) 85.

[142] See for example László Bodnár, 'Alkotmányfejlődés és EU-csatlakozásunk' ['Development of Constitution and EU Accession'], in László Bodnár (ed.), *EU csatlakozás és alkotmányozás* [*EU accession and constitution making*] (Szeged: SZTE ÁJTK Nemzetközi Jogi Tanszék, 2001) 5–11.

[143] This is an obvious generalization; an examination of the constitutional provisions of all member states would provide an accurate picture.

relationship between international, Community and national law can be characterized by the expression 'triangular' only from the perspective of Community law. From the perspective of Hungarian law, there exists only a dual relationship between international and Community law as 'foreign law' on the one hand and national law on the other.

# 12

# Israel

*Talia Einhorn*

## 1. Introduction

On 14 May 1948, upon the expiration of the British Mandate, the members of the People's Council, representatives of the Jewish Community of the Land of Israel and of the Zionist movement, declared the establishment of Israel as a Jewish state in the Land of Israel.

Israel does not have a formal, written constitution. The Knesset (Israel's Parliament) was originally elected in 1949 as a constituent assembly but decided in 1950 not to proceed with the adoption of a constitution, but to focus on passing a number of basic laws which, in time, would become Israel's formal constitution. Accordingly, the Knesset enacted Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, as well as Basic Laws that define the respective roles of the Knesset, the government, the judiciary and the President. Additionally, the Declaration of Independence has been termed by the Israel Supreme Court the Israeli 'credo'.[1] The Declaration expresses Israel's commitment to be open for Jewish immigration; to foster the development of the country for the benefit of all its inhabitants; to be based on freedom, justice and peace as envisaged by the prophets of Israel; to ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; to guarantee freedom of religion, conscience, language, education and culture; to safeguard the holy places of all religions; and to be faithful to the principles of the Charter of the United Nations.

Israel is a parliamentary democracy. The head of the state is the President, who fills a primarily ceremonial role. The Knesset, Israel's legislature, is a 120-member unicameral Parliament, whose members are elected by popular vote for four-year terms. The government is charged with administering internal and foreign affairs. It is headed by the Prime Minister and is collectively responsible to the Knesset. Israel's independent judges are appointed by a committee composed of three justices of the Israel Supreme Court, as well as members of the Knesset (MKs), the government, and the Bar Association. Judicial appointment is permanent and expires only with mandatory retirement at age 70. The Supreme Court, sitting as a

[1] HCJ 262/62 *Peretz v Kefar Shmaryahu* 16 PD 2101 (1962).

High Court of Justice and, in that capacity, acting as first and last instance, exercises judicial review over the other branches of government, ie administrative acts, secondary legislation, as well as the compatibility of statutes enacted by the Knesset with the Basic Laws. Matters of marriage and divorce are adjudicated by the religious courts—Rabbinical, Muslim and Christian. The High Court of Justice hears petitions against decisions of the pertinent Supreme Religious Court.

The Israeli legal system is often referred to as hybrid, or mixed, having been built one layer over another. Important parts of family law (marriage, divorce and maintenance) represent the oldest layer, a remnant of the rule of the Ottoman Empire (1517–1917). They are, by and large, subject to the personal, religious laws of Israeli nationals or persons domiciled in Israel. Other parts of private law were imported from English law during the British Mandate (1917–48). Following Israel's establishment, the Knesset enacted statutes following the model of Continental law, especially German and Swiss (the Companies Law 5759–1999, is an exception as it draws, to an extent, on American legal sources). The origins of the various statutes notwithstanding, the style and method of legal development have, at all times since the British Mandate, remained in the tradition of the common law—from one precedent to another.

Israel joined the United Nations in 1949 but, until 2000, had been excluded from the regional group system, limiting the country's involvement in the UN. Israel's relationship with the UN plummeted with the adoption in 1975 of the General Assembly Resolution 3379 (XXX) which determined that Zionism was 'a form of racism and racial discrimination', eventually repealed by Resolution 46/86 of 1991. Moreover, following the disintegration of the Soviet Union, as well as the signing of the Israel–PLO Declaration of Principles (1993) and Interim Agreement (1995), Israeli candidates have again been elected, for the first time in decades, to various UN bodies, enabling Israel to contribute once again to the overall work of the Organization. In May 2000, Israel became a full member, on a temporary basis (subject to renewal) of the Western European and Others Group (WEOG), thereby enabling it to put forward candidates for election to various UN General Assembly bodies. In 2004, Israel obtained a permanent renewal to its membership in WEOG's headquarters in US. Israel has not accepted compulsory ICJ jurisdiction.

## 2. Treaties

### 2.1 Treaty-Making Power

The legal position with respect to the treaty-making power is essentially that included in an 11 March 1951 memorandum submitted by the government of Israel at the request of the Secretary-General of the United Nations.[2] In the memorandum it is stated:

[2] The memorandum is included in Laws and Practices concerning the Conclusion of Treaties, document ST/LEG/SER.B/3, 67ff. The volume contains authoritative information from 86 countries on their laws and practices concerning the conclusion of treaties.

1. The situation in Israel is at present characterized by the absence of clear and specific provisions of a legislative character . . .
7. The authority which in this way is vested exclusively in the Government of Israel extends not only to negotiating and signing international treaties, whether or not they are subject to ratification. It also includes ratifying international treaties requiring ratification . . .
8. As far as concerns the manner in which the Government uses its powers, reference should be made to Section 2(d) of the Law and Administration Ordinance, 5708–1948, as read together with Section 12 of the Transition Law, 5709–1949. Decisions concerning the use of the treaty-making power are taken by the Cabinet as a whole, and the execution of these decisions is the responsibility of the Minister for Foreign Affairs. If the document to give effect to the Government's decision requires the signature of the President, such document has to bear the attesting signature of the Minister for Foreign Affairs.
9. The President's functions in connection with the exercise of the treaty-making power are governed by Section 6 of the Transition Law, 5709–1949, under which the President 'shall sign treaties with foreign States which have been ratified by the Knesset.'[3] This means that when in fact the Knesset has expressed its approval to the ratification of the treaty, the act of ratification may be signed by the President. In other cases, the act of ratification may be signed by the President, or by the Foreign Minister . . . It is to be observed that this provision is one relating to the powers of the President. It does not import any modification in the general law about treaty-making or about the authority of the Knesset to ratify treaties. This aspect is not regulated by any law passed by the Israel Legislature and therefore remains as described above . . .
11. The position can therefore be summarized in the following way:
    (a) The legal power to negotiate, sign and ratify international treaties on behalf of Israel is vested exclusively in the Government of Israel and is in charge of the Minister for Foreign Affairs;
    (b) Where the Knesset has given its approval to the ratification of the treaty, the act of ratification is signed by the President of the State . . .

The memorandum bases these conclusions, regarding the government's exclusive power to conclude treaties on behalf of Israel, on two legislative instruments: the Law and Administrative Ordinance 5708–1948, enacted upon the establishment of the State of Israel, and the Transition Law 5709–1949.

Section 11 of the Law and Administration Ordinance establishes the principle that:

> [t]he Law which existed in Palestine on . . . 14 May 1948 shall remain in force, so far as there is nothing therein repugnant to this Ordinance or to other laws which may be enacted by, or on behalf of, the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities.

According to section 14(a) of the Law and Administration Ordinance,

> any power vested under the law in the King of England or in any of his Secretaries of State, and any power vested under the law in the High Commissioner, the High Commissioner in Council, or the Government of Palestine, shall henceforth vest in the Provisional Govern-

[3] Section 6 of the Transition Law was replaced in 1964 by the identical section 11(a)(5) of the Basic Law: The President of the State). See section 1.1.3 below.

ment, unless such power has been vested in the Provisional Council of State by any of its Ordinances.[4]

Since no modifying enactment has been passed by the Knesset, the memorandum asserts that the treaty-making power in Israel is still that which existed during the League of Nations' British Mandate, subject to appropriate modifications because of the establishment of the sovereign State of Israel.

Under Article 12 of the British Mandate, the Mandatory (ie His Britannic Majesty, according to the fourth recital of the Preamble to the Mandate) was entrusted with the control of the foreign relations of Palestine. Articles 10, 12, 18, 19 and 20 conferred some degree of treaty-making power upon the Mandatory acting for Palestine. Only in Article 18 was a very limited treaty-making power regarding customs agreements conferred upon the Administration of Palestine itself acting on the advice of the Mandatory.

During the British Mandate, the basic constitutional document was the Order-in-Council, 1922–47, enacted by the British Mandatory to implement its international obligations imposed by the League of Nations' Mandate. The Order-in-Council did not contain rules regarding the treaty-making powers since the power was conferred upon the Mandatory itself rather than the High Commissioner, who was appointed by the British sovereign to administer the government of Palestine.

The memorandum concludes that the treaty-making power at the time of the Mandate vested exclusively in the British sovereign or in the High Commissioner of Palestine subject only to limitations imposed by the Mandate. Section 11 of the Law and Administration Ordinance maintained this legal situation, and section 14 only provided for the devolution of powers from the various British authorities to the provisional government.

Following the first general elections, the first Knesset adopted the Transition Law, section 12 of which provides that 'the Government shall have all the powers vested by the law in the Provisional Government'.[5] This language yields the conclusion that the legislature wanted to confer the powers of the British Crown, including its prerogative powers, upon the Israeli government. These include the Crown's capacity, as a matter of prerogative, to conclude treaties.

By a government decision taken in 1951, in accordance with section 2(d) of the Law and Administration Ordinance, the government delegated its powers to negotiate and sign treaties and international agreements to the Minister of Foreign Affairs, or to whoever he may appoint to that end.[6]

[4] Official Gazette No 2 of 21.5 [1948] (LSI [Laws of the State of Israel, authorized English translation by the Ministry of Justice] 1, 7). Section 15(a) of the same Ordinance provides that '"Palestine", wherever appearing in the law, shall henceforth be used as "Israel".'

[5] LSI (Laws of the State of Israel) 3, 3.

[6] Yalkut Ha-Pirsumim (the Official Gazette: Government notices) 162, 5711–1951, 989.

### 2.1.1 The role of the President and the Knesset

This state of affairs renders quite meaningless the function of the President, mentioned in paragraph 9 of the memorandum. The memorandum based this rule on section 6 of the Transition Law (replaced in 1964 by the identical section 11(a)(5) of the Basic Law: The President of the State), which provided that 'the President of the State shall sign treaties with foreign states which have been ratified by the Knesset'.[7] It is difficult to understand why the President would sign treaties that have been 'ratified'[8] by the Knesset, but not those 'ratified' by the government. However, several debates have taken place in the Knesset regarding this provision, and none of them brought a change in the legal position.[9]

When the MKs first sought to enhance the role of the Knesset and have it approve treaties prior to their ratification, the Minister of Justice opposed these proposals, pointing out that the Knesset could in fact exercise sufficient control over the government's use of its treaty-making powers under section 11 of the Transition Law (later replaced by section 24 of the Basic Law: the Government) by bringing the government down through a vote of non-confidence. He further argued:

> [Israeli procedure] is just the same as in many countries which systems we regard as most proper, where the structure of the highest authorities and the separation of powers between them is similar to the structure and separation of powers in Israel, that is England and the Commonwealth countries . . . Any encroachment by the Legislature on the Executive's responsibilities would gravely affect the separation of powers essential in any democratic state.[10]

The government proposed to inform the Knesset of the contemplated conclusion of treaties of great significance by laying their texts before the Knesset after they had been signed and prior to their ratification.[11] Subsequently, the Knesset defeated the attempt to enhance its role.[12]

Another attempt was made when the Knesset debated the adoption of section 11 of the Basic Law: the President of the State. IH Klinghoffer, MK and Professor of Constitutional Law, criticized the practice of the government, denounced it as

[7] Sefer Ha-Chukkim (the Official Gazette: Principal legislation) 428, 25.6.1964, 118 (LSI 18, 111).

[8] It should be noted that the term 'ratification' referred to in this section is not the 'ratification' within the meaning of the Vienna Convention on the Law of the Treaties (Articles 2(1)(b), 11 and 14), but rather the *domestic* procedure of establishing the state's consent to be bound by a treaty.

[9] See eg Divrei Ha-Knesset, vol 3 [1949] 313; vol 11 [1952] 1419; vol 35 [1962] 771; vol 36 [1963] 966; vol 40, [1964] 2018, 2033ff, 2048ff.

[10] Divrei Ha-Knesset, vol 35 [1963] 772.

[11] Such a procedure would have paralleled the British 'Ponsonby Rule', in effect since 1924, whereby, even though the treaty-making power is a prerogative of the Crown (in fact, the government), the text of a treaty, which has either been signed or to which it is intended that the United Kingdom will accede, is laid before both Houses of Parliament at least 21 sitting days prior to its ratification, acceptance, approval or accession. This procedure does not amount to formal approval by Parliament of treaties prior to their ratifications.

[12] Divrei Ha-Knesset, vol 40 [1964] 2033–4.

'illegal' and suggested that a change be introduced into the law, to give the Knesset a role in the treaty-making power. Treaties would be submitted to the Knesset, followed by a 'tacit approval' procedure, according to which the treaty would be deemed approved by the Knesset unless at least 15 MKs requested to discuss it within three months.[13] MK Meridor opined that if the Knesset treaty-making power was going to remain meaningless as before, it would be better to omit altogether section 11(a)(5) from the Basic Law, rather than re-enact empty words.[14] The Minister of Justice maintained that the Knesset was confusing the issue of the treaty-making power with the separate issue of the President's functions.[15] The Knesset defeated the proposed amendments and adopted section 11(a)(5), which reiterated section 6 of the Transition Law.

On the following day, a further attempt of MK Riftin to have the Knesset approve his private member's bill from the previous year failed.[16] Again, the Minister of Justice promised that the government would communicate to the Knesset, whenever possible, the text of 'important' treaties prior to their ratification by the government.

Against this background, it is not surprising that in the leading case on this matter, *The Attorney-General of Israel v Kamiar*,[17] the Supreme Court, when called upon to construe section 11(a)(5), maintained:

> [I]n the year 5724 (1964), the Knesset re-enacted the unclear provision from the Transition Law as Section 11(a)(5) of the Basic Law: the President of the State. It did that knowing very well the constitutional custom which had developed in the interval, according to which the Government itself ratified all the international treaties—and there were many of them which were subject to ratification—without any of them having been ratified by the Knesset. When the Knesset did this and dropped from its agenda private members' bills aimed at changing the situation, we must see in that action a clear statement that this situation is properly maintained as far as concerns treaties which had been ratified in the past . . . and that it will continue to be maintained until it should be changed in the future by some clear enactment of the Knesset.[18]

Justice H. Cohn offered an alternative ground:

> I do not share the view that as far as concerns the general and fundamental powers of the organs of the State it is either appropriate or necessary to fall back on interpretations of the corresponding powers vested in British or mandatory authorities in the pre-State epoch and to construct some theory of inheritance from them. Indeed, in that approach there is something distasteful.[19]

[13] Divrei Ha-Knesset, vol 40 [1964] 2033–4.
[14] Ibid.
[15] Ibid 2035.
[16] Divrei Ha-Knesset, vol 40 [1964] 2048–51.
[17] Criminal Appeal 131/67 *The Attorney-General of Israel v Kamiar* 22(2) PD 89 (1968); (1972) 44 ILR 197. Kamiar argued that the Extradition Treaty between Israel and Switzerland was devoid of legal effect, since the procedure required by Israeli law, that a treaty subject to ratification should be ratified by the Knesset, rather than the government, was not followed.
[18] Ibid 113, per Justice M. Landau.
[19] Ibid 97.

The alternative ground is phrased as a rule:

> When in the light of the constitutional position in a given State the Head of the State is not the organ authorized to conclude international treaties and in fact the treaties of that State are concluded by its Government, then the Government is the organ qualified to ratify them. That accurately reflects the constitutional position in Israel. The fact that this is the constitutional practice of Israel is established by certain figures which the Attorney-General indicated to us at the beginning of his pleading. Up to now the Government has concluded on behalf of the State of Israel 780 international treaties, of which 356 were subject to ratification. All of those were ratified by the Government . . . [20]

Justice B. Halevi, too, relied on 'the continuous custom in Israel whereby all international agreements since the establishment of the State which were subject to ratification had been ratified by the Government'.

### *2.1.2 Approval of treaties by the Knesset*

The above legal situation notwithstanding, important instruments affecting Israel's foreign relations have been submitted for parliamentary approval, although not always prior to their being signed or ratified on the international level. These include the following:[21] Israel's accession to the UN Charter in 1948 was first approved by the Provisional State Council (the Knesset's predecessor); the armistice agreements, 1949, were notified to the Knesset after having been signed;[22] The Convention on the Prevention and Punishment of the Crime of Genocide was approved by the Knesset and implemented by a domestic statute in 1950, prior to its ratification;[23] the disengagement of forces with Egypt in 1974 was approved by the Knesset prior to the conclusion of the Convention;[24] the disengagement of forces with Syria in 1974 was approved by the Knesset prior to concluding the Convention;[25] the Interim Agreement with Egypt in 1975 was approved by the Knesset prior to its conclusion;[26] the Camp David accords, 1978, were approved by the Knesset prior to their final conclusion and coming into effect;[27] the 1979 peace treaty with Egypt was approved prior to its conclusion;[28] the agreement concerning the deployment of the multinational force in Sinai, 1981, was approved by the

[20] Ibid 103–4.

[21] Shimon Shetreet, 'The Role of the Knesset in the Conclusion of Treaties' (1985) 36 Ha-Praklit 349; Ruth Lapidoth, 'The Authority to Conclude Treaties on behalf of the State of Israel' in Nathan Feinberg (ed.), *Studies in Public International Law in Memory of Sir Hersch Lauterpacht* (Jerusalem: Magnes, 1961) (in Hebrew) 210, 237ff.

[22] Divrei Ha-Knesset, vol 1 [1949] 287; vol 2, 1095. However, the principles of the armistice agreement with Syria had first been approved by the Knesset Foreign Affairs and Security Committee, and the agreements with Egypt, Lebanon and Jordan were approved in principle by the Provisional State Council.

[23] Divrei Ha-Knesset, vol 3 [1949] 315ff.

[24] Divrei Ha-Knesset, vol 69 [1974] 10–60.

[25] Divrei Ha-Knesset, vol 70 [1974] 1459ff.

[26] Divrei Ha-Knesset, vol 74 [1975] 4080ff.

[27] Divrei Ha-Knesset, vol 83 [1978] 4058ff.

[28] Divrei Ha-Knesset, vol 85 [1979] 1898ff.

Knesset prior to its conclusion; the Israel–Lebanon agreement regarding Israel's retreat from Lebanon and the subsequent security arrangements, 1983, was likewise approved by the Knesset;[29] and the peace treaty with Jordan, 1994, was approved by the Knesset in 1994, prior to its conclusion.[30]

A different approach was adopted for Israel's economic agreements. The free trade agreement between Israel and the European Communities, 1975, was notified to the Knesset after its conclusion.[31] So was the free trade agreement between Israel and the United States.[32] In both cases, MKs complained about the procedure used by the government, which they considered inadequate.

It is noteworthy that even treaties approved by the Knesset were not subsequently signed by the President, as provided in section 11(a)(5) of the Basic Law: the President of the State.[33] However, in view of the government's declaration regarding its exclusive authority to conclude treaties and the procedure adopted in Israel de facto, this disregard of the procedure stipulated by domestic law does not amount to a manifest disregard of an Israeli internal law of fundamental importance.[34]

In 1984, the Attorney-General issued guidelines concerning the ratification of treaties.[35] According to the guidelines, every treaty that requires implementing legislation must be ratified by the government. Ten copies of a treaty that is subject to ratification must be laid before the Knesset, together with a Hebrew translation of the text, at least 14 days prior to its ratification. The minister in charge of the specific treaty has to report to the government any action taken by the Knesset regarding that treaty. However, the Minister of Foreign Affairs and the Minister of Defence may jointly decide to deviate from this procedure on the grounds of urgency or secrecy. In that case, the government alone will ratify the treaty. The government may also decide that a certain treaty, because of its importance, should be approved by the Knesset prior to its ratification by the government, as was done in the case of the Camp David Accords and the peace agreement with Egypt.

In 1999, a further legal development took place with respect to treaties that may determine or affect Israel's international borders. The Knesset enacted the Law and Administration (Cease of Application of the Law, Jurisdiction and Administration) Law, 5759–1999.[36] Section 2 of this law provides that a government decision (by way of ratification of a treaty or an agreement or in any other way, including a future commitment and a conditional commitment), according to which the law, jurisdiction and administration of the State of Israel, shall no longer apply to a

[29] Divrei Ha-Knesset, vol 96 [1983] 2188ff.
[30] Divrei Ha-Knesset, vol 140 [1994] 752ff.
[31] Divrei Ha-Knesset, vol 73 [1975] 2732ff.
[32] Divrei Ha-Knesset, vol 101 [1985] 2350ff.
[33] The Peace Treaty with Egypt, which was signed by the President, with the signature attested by the Minister of Foreign Affairs was an exception, *Kitvei Amana* (Israel Treaty Series) 868, vol 25, 695, 758.
[34] Cf Art 46, Vienna Convention on the Law of the Treaties, 1969.
[35] Attorney-General Guidelines 64.000A—International Conventions: Ratification Process (1.1.1984).
[36] Sefer Hachukkim 1703, 5759–1999, 86.

territory in which they apply at the time the government decision is made, requires the approval of the Knesset, taken by a majority of its members. This law applies to any government decision, even one taken unilaterally. Furthermore, section 3 provides that the government decision, approved by the Knesset, also requires approval in a referendum. Section 3 will only come into effect however once a law concerning a referendum is passed by the Knesset (section 4). The Knesset has not yet enacted such a law.

The procedure that had been adopted de facto by the government with respect to the majority of important treaties has led some jurists to opine that a binding custom has developed whereby the government must lay important treaties before the Knesset prior to their ratification.[37] However, the texts of Israel's agreements with the Palestine Liberation Organization (PLO) were not brought before the Knesset prior to their entering into effect. They remained secret and no debate took place regarding their content prior to signing the Oslo Agreements in Camp David and the Gaza–Jericho Agreement. Prior to the signing of the Oslo B Interim Agreements with the PLO, MK Shilansky, the Deputy Speaker of the Knesset petitioned the High Court of Justice to make an injunction forbidding the government to sign the agreements without obtaining the prior approval of the Knesset.[38] MK Shilansky argued that a binding custom had developed according to which agreements of this kind require prior approval of the Knesset. The Supreme Court dismissed the petition, holding that no such custom had developed. Indeed, the Court pointed to the previous agreements with the PLO that had not been brought before the Knesset prior to their conclusion. A letter written by the Attorney-General, dated 30 July 1995 (shortly before the submission of the petition), promising to lay the agreement before the Knesset for its approval, was held by the Supreme Court to be no more than a political commitment devoid of legal effect.

### *2.1.3 The International Treaties (Approval by the Knesset) Bill 1998*

In 1998, the government submitted the International Treaties (Approval by the Knesset) Bill to the Knesset.[39] According to the Bill, all treaties that are subject to ratification must be laid on the table of the Knesset for 14 days prior to their ratification. Four categories of treaties will require, in addition, approval by the

[37] Shimon Shetreet (n 20) 360–66.

[38] HCJ 5934/95 *MK Shilansky, Deputy Speaker of the Knesset v Prime Minister Y. Rabin* Nevo database; the Supreme Court reiterated its position that no constitutional convention had developed according to which the Knesset's approval must be sought in advance in HCJ 5167/00 *Weiss v The Prime Minister* 55(2) PD 455 (2001). The dismissed petition concerned the government's continuation of the negotiations with the Palestinians even after its resignation, at a period in which it was considered a transitional government, in office only until the next government takes office since it had resigned already. Consequently, the Knesset had lost its power to compel the resignation of a government that reaches an unacceptable agreement by a no-confidence vote.

[39] Hatza'ot Chok (Bills) 2691 (24.2 1998). For an analysis in detail of the Bill, including an English translation, cf Rotem M. Giladi, 'The Practice and Case Law of Israel in Matters Related to International Law' (1998) 32 Israel Law Review 475.

Knesset prior to ratification: a treaty whose subject-matter is human rights; a treaty that determines or changes the boundaries of the state; a treaty that, according to a decision of the government, the Knesset or any of its committees, is of a special political or economic interest; and a treaty whose implementation requires legislation by the Knesset. Exceptions are provided for in cases of urgent ratification and secrecy. The Bill has not been adopted by the Knesset.

## 2.2 How Domestic Courts Define and Interpret Treaties

A 'treaty', as used by the Israeli courts, is an international agreement, bilateral or multilateral, in written form, concluded between states and governed by international law. Ratification is not required to be regarded by the courts as a 'treaty'. Also, treaties that do not require ratification, such as memoranda of understanding, are 'treaties'. Their effect in the domestic domain, and the ability of private parties to rely on their provisions, may differ however, according to the courts' evaluation of whether these treaties were intended to have a legally-binding effect or were only intended as political commitments.[40]

In one case, the District Court of Jerusalem dealt with the question whether the agreements[41] signed with the Palestine Liberation Organization were 'treaties'.[42] The Court concluded that the Palestinian Authority was not a state since, according to the Interim Agreement:

> [The Palestinian Council] will not have the powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions.[43]

Consequently, these agreements were not 'treaties' in the sense of the Vienna Convention on the Law of the Treaties. Nonetheless, the Court concluded that they have created binding commitments under international law, since the Palestinian Authority was a legal entity that was established and had assumed rights and obligations under the said agreements. Furthermore, the Gaza–Jericho Agreement and the Interim Agreement were implemented in Israeli law by parliamentary statutes.

The Supreme Court has also dealt with political commitments undertaken unilaterally by the State of Israel, as was the case with Israel's disengagement from the Gaza Strip.[44] In that case, the Court emphasized that when assessing

[40] See below.

[41] The Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993; the Agreement on the Gaza Strip and the Jericho Area, 4 May 1994; Agreement on the Preparatory Transfer of Powers and Responsibilities, 29 August 1994; the Interim Agreement, 28 September 1995.

[42] Civil Case (Jerusalem) 2538/00 *Irena Litvak Norich v The Palestinian Authority* tak-District 2003 (1), 4968.

[43] See Article IX(5)(a).

[44] HCJ 6996/05 *Dr Joseph Dalin v the Prime Minister* 59(2) PD 896 (2005).

the legality and proportionality of the administrative orders implementing the Disengagement Plan (Implementation) Law 5765–2005, passed by the Knesset, it had taken into account the international commitments. These international commitments were expressed in unilateral statements made by the government of Israel regarding its intention to withdraw from the Gaza Strip the Israeli army and all Israeli citizens who resided there at the time. In another case, Israeli citizens petitioned the Supreme Court to revoke a building and construction programme, alleging that it was contrary to Israel's commitments under the Roadmap Programme of 30 April 2003.[45] The Supreme Court pointed out that the Court will not entertain an allegation that relates to political matters that are reserved to other organs of the democratic governance and raise issues the political features of which are dominant and clearly outweigh any legal aspects. Likewise, the Supreme Court has refused to review Israeli commitments to release Arab terrorists from prison, made as a political 'gesture' to the Palestinian Authority, Arab states, and the *hizbullah*, respectively.[46] Documents exchanged between Israel and the Palestinian Authority regarding the guidelines for opening fire on armed PLO gunmen were held by the District Court of Jerusalem to be political commitments and were consequently not made available to an applicant who petitioned the Court to require their disclosure.[47]

In deciding issues of treaty law, the courts turn to international sources in order to ascertain the proper interpretation of the treaty. A pertinent example is the Vienna Convention on the International Sale of Goods 1980 (CISG), which provides a set of unified substantive law rules on this subject. To implement this treaty, the Knesset enacted the Sales (International Sale of Goods) Law 5760–1999, which provides that the treaty provisions, in Annex 'A' have the force of law. In interpreting the CISG, the Supreme Court turned to authoritative commentaries, as well as decisions of the Belgian, Austrian and German courts.[48]

Another example is the Hague Convention on Civil Aspects of International Child Abduction 1980, which came into effect in Israel on 1 July 1991.The Convention was implemented in Israeli law with the enactment of the Hague Convention (Return of Abducted Children) Law 5751–1991. The Convention has been applied rigorously by the courts and the defences to returning abducted

[45] HCJ 10042/04 *Nirit—Rural Community Settlement v Minister of Defense* tak-Supreme 2005(1), 2122.

[46] HCJ 2455/94 *Be-Tzedek (Justice) Organization v Government of Israel* tak-Supreme 94(2), 292; HCJ 6023/95 *Carmaela Hanoch, Adv v Minister of Justice* tak-Supreme 95(3), 1123; HCJ 8012/98 *Amin Atar v the Prime Minister* tak-Supreme 99(1), 494; HCJ 4395/00 *MMT—Headquarters of Terror Victims v Government of Israel* tak-Supreme 2000(2), 2243; HCJ 10154/03 *Tami Arad v the Attorney-General* tak-Supreme 2003(4), 353; HCJ 5272/05 *M.Sh.L.T.—Legal Institute for the Research of Terror and Assistance to its Victims v the Prime Minister* tak-Supreme 2005(2) 2789; HCJ 6316/07 *Almagor—Organization of Terror Victims v Government of Israel* tak-Supreme 2007(3), 1095; HCJ 5754/07 *Sara Levi v the Prime Minister* tak-Supreme 2007(3), 143.

[47] Civil Case (Jerusalem) 3139/01 *Estate of Anwar Makusi v State of Israel* tak-District, 2003(1), 36580.

[48] Civil Appeal 7388/06 *Pamesa Ceramica v Israel Mendelson* tak-Supreme 2009(1) 4087.

children have been construed narrowly, in line with its object and purpose.[49] In one rather complicated case,[50] in an effort properly to apply this Convention, the District Court checked a whole variety of international and comparative sources, among them: the text of the various pertinent provisions of the Child Abduction Convention; its preamble; the Pérez Vera Explanatory Report to the Convention; a lecture given by Mr Hans van Loon, Secretary-General of the Hague Conference on Private International Law (which was appended by the Court to its decision); foreign court decisions in similar matters, including American, Austrian, Australian, Canadian, English, French, German, Swedish, and Swiss cases; other international conventions *in pari materia*, ie the UN Convention on the Rights of the Child (CRC) 1989, as well as the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993 (including the Parra-Aranguren Explanatory Report) and the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children 1996 (including the Lagarde Explanatory Report); and James D. Garbolino, *International Child Abduction: Guide to Handling Hague Convention Cases in US Courts.*[51]

Yet, despite the very clear general trend, there are also a couple of cases in which the District Court held that courts should interpret the Hague Abduction Convention on the basis of Israeli law principles, *in casu* the good faith principle, even if, as the Court acknowledged, that principle did not fit into any of the defences of the Convention.[52] In reaching this decision, the Court did not rely on commentaries or on foreign cases. It relied on a case that the same Court had given a few days earlier,[53] in which the Court held that treaties should be interpreted in line with the language employed in Article 46 of the Palestine Order-in-Council, 'so far only as the circumstances of Palestine [ie Israel] and its inhabitants . . . permit'. In reaching this rather innovative conclusion, the District Court did not cite any authority, expressing the hope that this case will set the next line of precedents in such matters. It is submitted that these cases are extraordinary and do not reflect the general rules of interpretation of treaties in Israel.

Since it is the government alone that ratifies treaties, there have not been many cases in which the validity of a treaty was challenged on the basis that it was not binding. However, in an early case that came before the Supreme Court regarding the Israeli–Swiss Extradition Convention, the wanted person claimed that the Convention had not been signed at all by Israel.[54] Israeli law required the treaty to be signed by the Foreign Minister himself, who was not authorized to delegate this power to

[49] See eg, Request Family Appeal 2338/09 *plonit v ploni* tak-Supreme 2009(2), 2730, in which the Supreme Court referred to Elisa Pérez-Vera, 'Explanatory Report on the 1980 Hague Child Abduction Convention' Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session (Vol III, 1980) 435.

[50] Appeal Family Matters (Tel-Aviv) 70/97 *Sh.D. v T.D.* tak-District 98(4), 16182.

[51] James D. Garbolino, *International Child Custody Cases: Handling Hague Convention Cases in US Courts* (3rd edn, Reno, NV: The National Judicial College, 2000).

[52] Family Appeal (Jerusalem) 621/04 *D.I. v D.R.* (18.11.2004), Nevo database.

[53] Family Appeal (Jerusalem) 575/04 *I.M. v A.M.* (11.11.04), Nevo database.

[54] Criminal Appeal 131/67 *The Attorney-General of Israel v Kamiar* 22(2) PD 89 (1968) (n 16).

others, but the Convention was signed by the Israeli Ambassador in Berne, who had acted under full powers to do so, issued by the Israeli Foreign Minister. The Supreme Court dismissed this objection, holding that, since the Convention was subsequently ratified by the government, the ratification validated the act that was performed without authority. In so deciding, the Court cited international law authorities,[55] but did not consider whether it was permissible from a domestic law perspective.[56]

Most memoranda of understanding would be regarded by the courts as establishing only political, rather than legally-binding, commitments, and the courts will usually exercise very limited judicial review of those. Nonetheless, they are not distinguished from ratified treaties, in the sense that if there has been a gross violation of Israeli public policy, the court may exercise judicial review and declare the administrative act invalid.

In interpreting a treaty, Israeli courts do not defer to the views of the government or legislature. This is seen clearly in the cases concerning the Fourth Geneva Convention. The Courts have checked commentaries, legal literature, how courts in other countries interpreted the same provisions, etc. At the same time, Israel has adopted the English established practice whereby courts may apply to the executive branch of government for a conclusive ascertainment of certain facts.[57] In Israel, this practice was only used to apply for a Minister of Foreign Affairs certificate.[58] The kinds of questions that may be determined in such a certificate relate to the boundaries of the state, recognition of foreign states, whether Israel is a contracting state to an international convention, the existence of a state of war with a foreign state, the existence of diplomatic relations with a foreign state, or whether a certain person is a foreign diplomat. Such certificates are limited to the facts pertaining to Israel's foreign relations.[59] Thus, for example, the certificate may determine that a person is registered as a diplomat, or that Israel recognizes a certain state. The question of immunity and the scope of such immunity have to be determined by

[55] In international law, this conclusion is indeed supported by Article 7, Draft Convention on the Law of the Treaties: 'An act relating to the conclusion of a treaty performed by a person who cannot be considered . . . as representing his State for that purpose is without legal effect unless afterwards confirmed by the competent authority of the State,' Report of the International Law Commission on the second part of its 17th session and on its 19th session, UN Doc A/6309/Rev.1, Yearbook of the International Law Commission (1966), vol II, 193.<http://untreaty.un.org/ilc/documentation/english/a_cn4_191.pdf> (accessed 30 November 2010).

[56] See the criticism on this point by Yehuda Z Blum, 'The Ratification of Treaties in Israel' (1967) 2 Israel Law Review 120, 127–28.

[57] See Malcolm N. Shaw, *International Law* (5th edn, Cambridge: Cambridge University Press, 2003) 172–3.

[58] See Shabtai Rosenne, 'Minister of Foreign Affairs Certificate' (1955) 11 Ha-Praklit 33 (in Hebrew); Robbie Sabel, *International Law* (2nd edn, Jerusalem: Sacher Institute, Hebrew University of Jerusalem, 2010) (in Hebrew) 75.

[59] For a general discussion of the scope of the courts' acceptance of matters stated in a certificate of the Minister of Foreign Affairs, see Criminal Appeal 131/67 *The Attorney-General of Israel v Kamiar* 22 (2) PD 89 (1968) (n 16) 93–4. In that case, the Court accepted as conclusive evidence the statement in the certificate that Israel is a party to a bilateral extradition treaty with Switzerland. However, the Court stated that the certificate cannot be conclusive with respect to the question of the legal effect of the treaty, or lack of it, or any other legal matter which the Court has to decide, a point with which, as noted by the Court (ibid 93), the Attorney-General concurred.

the Court.[60] The practice in Israel is that the court is the one to apply for the certificate. However, the initiative may come from the parties.

By analogy, the Supreme Court held that the question whether, following the Interim Agreement with the PLO, a certain territory is controlled by the Israel Defense Forces or by the Palestinian Authority, will be determined according to a certificate issued by the IDF commander of Judea and Samaria.[61]

Recourse to the Vienna Convention on the Law of the Treaties (Vienna Convention) has been scanty (six reported cases altogether out of hundreds of cases in which international treaties were discussed by the courts).[62] The Vienna Convention rules on the interpretation of treaties (Articles 31–32) were only consulted directly in one case,[63] and indirectly referred to in another which simply cited the first.[64] In these cases, the Supreme Court concluded erroneously that these provisions provide courts with wide discretion to go beyond the text adopted in the treaty, in search for the true object and purpose of its original authors, giving priority to an interpretation that imposes the least onerous obligations on the parties.[65] That said, however, the court went on to examine commentaries and legal literature to ascertain the original object and purpose of these provisions.

## 2.3 Domestic Application

With the treaty-making power in the hands of the government, it has been accepted that treaties are not automatically accepted into domestic law. If that were the case, the government would have had legislative powers without parliamentary participation. Rather, for treaty provisions to have full effect in Israeli law, they need to be implemented in Israeli law by primary or secondary legislation, if such implemen-

[60] See Civil Case (Jerusalem) 2538/00 *Irena Litvak Noritch v The Palestinian Authority* (the Agreements with the PLO are not 'treaties' within the definition of the Vienna Convention) tak-District 2003(1) 4968; Civil Appeal (Tel-Aviv) 4289/98 *Shlomit Shalom v The Attorney-General, Shulman and Bassyounni* tak-District 99(3), 2; Einhorn, *Private International Law in Israel* (Alphen aan den Rijn: Kluwer Law International, 2009) 273; Sabel, *International Law* (n 56) 409.

[61] HCJ 2717/96 *Waffa v Minister of Defense* 50(2) 848 (1996), 855.

[62] HCJ 785/87 *'Afu v the Commander of IDF Forces in the West Bank*, 42(2) PD 4 (1988) (regarding the interpretation of the Fourth Geneva Convention 1949 and Articles 31–2 Vienna Convention); HCJ 852/86 *MK Shulamit Aloni v Minister of Justice* 41(2) PD 1 (1987); Various Applications (Jerusalem) 1545/97 *The Attorney-General v Ploni*, 1998(2) Ps.M. [District Court Judgments] 145; Various Civil Applications (Tel-Aviv) 5663/07 *Yanko-Weiss Maintenance (1996) Ltd v [Income Tax] Assessing Officer Holon* (30.12.2007) Nevo database; and Criminal Appeal 7569/00 *Gnadi Yegudayev v State of Israel* tak-Supreme 2002(2), 1453, regarding the retroactivity of an extradition treaty; Civil Case (Jerusalem) 2538/00 *Irena Litvak Noritch v The Palestinian Authority* (the Agreements with the PLO are not 'treaties' within the definition of the Vienna Convention) tak-District 2003(1), 4968; HCJ 1661/05 *Regional Council Gaza Beach v the Knesset* tak-Supreme 2005(1), 2461, regarding Article 70(1)(b) of the Vienna Convention.

[63] HCJ 785/87 *'afu*, ibid.

[64] Civil Case (Jerusalem) 2538/00 *Irena Litvak Norich v The Palestinian Authority* tak-District 2003 (1), 4968.

[65] See eg HCJ 785/87 *'Afu v the Commander of IDF Forces in the West Bank* 42(2) PD 4 (1988), regarding the interpretation of the Fourth Geneva Convention, 1949; Criminal Appeal 7569/00 *Gnadi Yegudayev v State of Israel* tak-Supreme 2002(2), 1453, regarding the retroactivity of an extradition treaty.

tation had been authorized in principle by primary legislation. Only to the extent that a treaty provision reflects rules of international customary law are these provisions considered 'part of the law of the land'. However, even with respect to constitutive treaties, a qualification is in order. The treaties are not devoid of any legal effect, since the courts have adopted a rule of interpretation and a rule of presumption that ensure, to the extent possible, the compatibility of Israeli domestic law with Israel's international commitments.

### *2.3.1 The doctrine of self-executing treaties in Israeli courts*

There is only very limited scope for this doctrine in Israeli law. The general rule is that in order to have direct effect in the domestic domain, a treaty must be implemented by primary or secondary legislation. This rule has been stated by the Supreme Court in the landmark case *Custodian of Absentee Property v Samara*.[66] In that case, the claimant sought to rely on Article 6(6) of the Israel–Jordan Armistice Agreement (the Rhodes Agreement). The pertinent provision read: 'Wherever villages may be affected by the establishment of the Armistice Demarcation Line provided for in paragraph 2 of this article, the inhabitants of such villages shall be entitled to maintain, and shall be protected in, their full rights of residence, property and freedom.' The Supreme Court held that the Rhodes Agreement is a treaty between the State of Israel and another state, and only they acquire rights and undertake obligations towards each other. Such a treaty will become binding law in Israeli domestic law after being implemented in Israeli law. But, in that case, the courts apply the implementing legislation rather than the treaty itself.

In another case, the National Labor Court stated that private parties cannot rely on the Treaty of Friendship, Commerce and Navigation between Israel and the United States of America,[67] which was not implemented in domestic legislation.[68]

Three exceptions should be noted: (1) the Fourth Geneva Convention 1949, to which Israel is a contracting state, but no implementing domestic legislation has been enacted;[69] (2) provisions of treaties which codify customary law and are clear,

[66] Civil Appeal 25/55 *Custodian of Absentee Property v Samara* 10 PD 1825 (1955).

[67] Kitvei Amana 34, vol 2, 15.

[68] Labor Appeal 57/39–0 *Yehudith Schoenberger v National Insurance Institute* tak-National 97(3) 413 (1997).

[69] In 1967, during the Six-Day War, Judea, Samaria and the Gaza Strip were occupied by Israel. Israel's official position has been that the Fourth Geneva Convention does not apply to this occupation. The reasoning is as follows: The Convention (Article 2) confines its scope of application to the partial or total occupation of the territory of *a High Contracting Party*. These territories were all part of the British Mandate for Palestine, which had been created to establish a homeland for the Jewish People, the only people granted political rights under that document, while guaranteeing the civil and religious rights of all other inhabitants of Palestine. The invasion of Egypt and Jordan in 1948 into Palestine and their seizure of the Gaza Strip and Judea and Samaria, respectively, were unlawful. Egypt never claimed title to the Gaza Strip. The purported annexation by Jordan of Judea and Samaria in 1950 (the 'West Bank') was recognized only by Britain (with a reservation regarding East Jerusalem) and Pakistan (and opposed even by the other Arab states). Consequently, that occupation did not invest in Egypt and Jordan lawful, indefinite control, whether as an occupying power or a sovereign: *ex injuria non oritur ius.* See Yehuda Zvi Blum, 'The Missing Reversioner: Reflections on the Status of

unconditional, no further implementing legislation is necessary to give them effect, and the treaty does not leave the implementing measures to the discretion of the contracting parties; (3) the bilateral treaty Israel–United Kingdom regarding judgments in civil law matters.

As for the Fourth Geneva Convention, the legal interpretation notwithstanding, the Israeli government considered that humanitarian law concerns itself essentially with human beings in distress, rather than with states or their special interests.[70] Therefore, the government decided to act in accordance with customary international law and with the humanitarian provisions of the Fourth Geneva Convention. In a letter of 13 July 1987, Israel communicated its position to the International Committee of the Red Cross as follows:

> Israel maintains that in view of the *sui generis* status of Judea, Samaria and the Gaza Strip, the *de jure* applicability of the Fourth Convention to these areas is doubtful. Israel prefers to leave aside the legal questions of the status of these areas and has decided, since 1967, to act de facto in accordance with the humanitarian provisions of the Convention.[71]

Israel further decided to subject the acts of its military government to judicial review by the Israel Supreme Court sitting as the High Court of Justice. Accordingly, the state never argued lack of locus standi in response to petitions filed by alien enemies who were inhabitants of a territory not under Israeli sovereignty.[72] Petitions were also accepted from NGOs, acting on behalf of the residents. The Supreme Court has treated all acts of state officials in Judea, Samaria and the Gaza Strip whether legislative or administrative, as subject to section 15 of the Basic Law: Judicature. This law subjects all state and local officials to the judicial review of the Supreme Court sitting as the High Court of Justice, including jurisdiction to issue orders in the nature of habeas corpus.[73] In this respect, all military commanders,

Judea and Samaria' (1968) 3 Israel Law Review 279; Stephen M Schwebel, 'What Weight to Conquest?' (1970) 64 American J Int Law 344, 346.

[70] Meir Shamgar, 'The Observance of International Law in the Administered Territories' (1971) 1 Israel Yearbook on Human Rights 262; Meir Shamgar, 'Legal Concepts and Problems of the Israeli Military Government—the Initial Stage' in Meir Shamgar (ed.), *Military Government in the Territories Administered by Israel 1967–1980—the Legal Aspects* (Sacher Institute, Hebrew University of Jerusalem Faculty of Law, Jerusalem 1982), vol 1, 13, at 31ff (the legal position), 42ff (the application de facto).

[71] For further details cf Nissim Bar-Yaacov, 'The Applicability of the Laws of War to Judean and Samaria (the West Bank) and to the Gaza Strip' 24 Israel Law Review (1990) 485, 489ff.

[72] The line of cases starts with *Stekol v Minister of Defense* (20 June 1967) (unreported), cited by Eli Nathan, 'The Power of Supervision of the High Court of Justice over Military Government' in Meir Shamgar (ed.), *Military Government in the Territories Administered by Israel 1967–1980—the Legal Aspects* (n 68) 109, 114; HCJ 337/71 *Aljamyah Almassakhia Lalarachi Almakadassa* (*the Christian Society for the Holy Places*) *v Minister of Defense*, 26(1) PD 574 (1972); HCJ 256/72 *Jerusalem District Electricity Corp Ltd v Minister of Defense*, 27(1) PD 124 (1972). For a list of more than a hundred representative cases of the Israel Supreme Court, see Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009) xvii-xxi.

[73] See HCJ 302/72 *Hilu v Government of Israel*, 27(2) PD 169 (1973), which cited the equivalent provision (section 7) of the Courts Law 5717–1957, then in effect, as the source of the powers of the High Court of Justice. Initially, the Supreme Court maintained the position that the provisions of the Fourth Geneva Convention were generally constitutive rather than declaratory and consequently cannot be invoked by petitioners. Dinstein, *The International Law of Belligerent Occupation* (n 70) 25ff. However, over the years, the respondents in the cases (ie the Israeli Government, the military

including the Chief of Staff, are regarded as state officials. The extraordinary and unprecedented role of the Israel Supreme Court in applying the Fourth Geneva Convention has been noted, as well as the Court's skilful familiarity with international law—customary international law, conventions, commentaries and literature. The Court has also kept verifying, in lengthy obiter dicta, that their acts were in compliance with the Geneva Convention, ensuring that if a Convention provision were applicable the act would be in conformity therewith.[74] In recent years the consent of the government to the applicability of the Geneva Convention has been taken for granted.

Private parties may rely directly on treaty provisions that codify customary international law (provided that they fulfil the other requirements for being self-executing, ie that they are clear, unconditional, no further implementing legislation is necessary to give them effect, and the treaty does not leave the implementing measures to the discretion of the contracting parties). For example, the Hague Regulations of 1899/1907 have acquired the status of customary international law. This was acknowledged already by the Nuremberg Military Tribunal. Applicants to the Israeli courts from Judea, Samaria and Gaza could thus rely on the pertinent Hague Regulations directly. Thus, for example, the *Beth El*[75] and the *Elon Moreh*[76] cases were decided on the basis of the Hague Regulations 46 (prohibiting confiscation of private property) and 52 (dealing with requisitions in kind and services).

One case that came before the Israel Supreme Court concerned the estate of a person who had passed away stateless.[77] At the time, the law applicable to the estate was that of his state of nationality. Israel had ratified the UN Convention relating to the Status of Stateless Persons 1954, which provided that the status of stateless persons is governed by the law of their domicile or, in the absence of domicile, the law of the country of their residence (Article 12(1)). Even though Israel did not implement the Convention in domestic legislation, the Supreme Court applied Article 12 directly, considering it to reflect a norm of customary international law.[78]

One of the conditions for direct recognition of foreign judgments in Israel is that an agreement with a foreign state applies to that judgment, and that Israel has undertaken by that agreement to recognize foreign judgments of the kind in question (Foreign Judgments Enforcement Law 5718–1958, s 11(a)(1)-(2)).

commanders, etc, against whom the petitions were brought) gave their express consent to the Court to review their acts in the light of the provisions of the Geneva Convention. Dinstein, ibid (n 70) 30.

[74] Ibid.

[75] HCJ 606/78 *Ayyub v Minister of Defense* 33(2) PD 113 (1979).

[76] HCJ 390/79 *Dwaikat v Government of Israel* 34(1) PD 1 (1979). For an English translation cf *Military Government in the Territories Administered by Israel 1967–1980—the Legal Aspects* (n 68) 404–41.

[77] Civil Appeal 65/67 *Kurtz & Letushinsky v Kirschen* 21(2) PD 20 (1967); 47 ILR 212.

[78] The determination that Article 12(1) reflected customary international law was criticized—See Yoram Dinstein, *International Law and the State* (Tel-Aviv: Tel-Aviv University and Schoken, 1971) (in Hebrew) 148; Nathan Feinberg, 'Declarative and Constitutive Treaties in International Law' (1968) 24 Ha-Praklit 433 (in Hebrew). Indeed, Sweden made a reservation regarding Article 12(1), which would also seem to imply that the rule is constitutive rather than declaratory.

Four such bilateral treaties have been signed by Israel with Austria, Germany, Spain and the United Kingdom. None of these treaties was implemented in domestic legislation. Consequently, direct recognition under Israeli law has been very limited.[79] Yet, in a recent case, the Tel-Aviv District Court recognized a foreign judgment, allowing the party seeking recognition to rely directly on Article 2 of the unimplemented treaty and dismissing any possible defence against recognition on the basis of Article 3.[80]

This case deviates from a judgment rendered by the Supreme Court in 1994. In that case, the Court did not allow a party to rely on a similar treaty, ie the bilateral agreement between Israel and Germany regarding Judgments in Civil and Commercial Matters 1981.[81] In the latter case, regulations were enacted to implement the Convention in domestic Israeli law. Yet the Supreme Court held that these regulations could not be held as sufficient to adopt the Convention, even though the text of the Convention is included in Hebrew in the annex to the regulations, and despite the fact that Regulation #1 provided that the Convention came into force on 1 January 1981. Consequently, the Supreme Court held that, since the bilateral agreement differed from the Israeli Foreign Judgments Enforcement Law 5718–1958, a judgment rendered in Germany could not be enforced on the basis of the Convention's conflicting rules.[82]

### *2.3.2 Issues of standing and private rights of action*

The Israeli courts apply in international cases the same tests that they apply in purely domestic law cases. In general, standing is granted rather generously to private parties regarding private rights of action, as well as to public petitioners applying to the Supreme Court sitting as the High Court of Justice. With respect to claims and petitions concerning the Palestinian population in Judea, Samaria and Gaza, public petitioners have included the Israeli 'Peace Now' Movement; *'Adallah*—The Legal Center for Arab Minority Rights in Israel; *B'Tselem*—the Israeli Information Center for Human Rights in the Occupied Territories; the Association for Civil Rights in Israel; HaMoked: Center for the Defense of the Individual founded by Dr Lote Salzberger (an Israeli human rights organization whose main objective is to assist Palestinians of the Occupied Territories whose rights are allegedly violated due to Israel's policies); Physicians for Human Rights—Israel; and *Yesh Din* ('there is law')—Volunteers for Human Rights; and *Kannun* (Law)—The Palestinian Organization for Protection of Human Rights and the Environment.

The only case in recent years in which the Court declined to exercise jurisdiction concerned justiciability rather than standing. In this case, the 'Peace Now' Movement petitioned the High Court of Justice to declare unlawful all civilian Israeli

[79] See Talia Einhorn, *Private International Law in Israel* (n 58) [945]–[955ff].

[80] See Originating Summons (Tel-Aviv) 189/03 *New Hampshire Insurance Co Ltd v Bazan (Batei Ha-Zikuk Le-Israel [Israel Refineries]) Ltd*, (31 March 2008) Nevo database.

[81] Civil Appeal 1137/93 *Yael Eshkar v Tymon Heimes*, 48(3) PD 641 (1994).

[82] See section 4 below.

settlements in Judea, Samaria and the Gaza Strip, which cannot be justified exclusively by security imperatives.[83] The Supreme Court dismissed the petition, holding that it did not address any concrete case of infringement of property rights, but rather the government policy as a whole. Such abstract questions of wide public significance should be dealt with by other governmental institutions (the government or the legislature), which are more competent to address the questions.[84] The ruling in this decision, too, does not differ from decisions which concern only domestic law.

### *2.3.3 Using treaties to which Israel is not party*

Israeli courts utilize treaties to which Israel is not a party. Examples include the Rome Convention on the Law Applicable to Contractual Obligations. Israel is not an EC member state. Nonetheless, the Israeli courts, including the Supreme Court, have referred to the Rome Convention as a source from which Israeli law can draw the necessary rules, especially with respect to individual employment contracts.[85] In one case the Labor Court went as far as to refer to the provisions of the Rome Convention, as a special kind of conflicts rules developed in international law, especially for labour relations.[86]

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the 'ECHR'), a Council of Europe treaty, has been referred to in numerous Israeli cases. Israel is not a contracting state to this Convention, yet this treaty has been used by the courts for the sake of assessing basic human rights in Israel and comparing their protection under Israeli constitutional law and the ECHR.[87]

[83] HCJ 4481/91 *Gavriel Bargil, Director-General of 'Peace Now' Movement and 'Peace Now' Movement v The Government of Israel* 47(4) PD 210 (1993).

[84] The High Court of Justice in this case made references to American case-law and legal literature addressing the political question doctrine that restrains courts from reviewing an exercise of foreign policy judgment by the competent political branch authorized under the Constitution to make this policy. See *Powell v McCormack* 395 US 486, 519–21 (1969); *Schlesinger v Reservists to Stop the War* 418 US 208 (1974).

[85] HCJ 5666/03 *'Amutat kav la-'oved (Workers Hotline) v The National Labor Court* (10.10.2007), tak-Supreme 2007(4), 109; Labor Appeal 300050/98 *Local Council Giveat Zeev v Mahmud Muhamad Ali*, tak-National 2003(1), 1489; Cf, also, Labor Case (Jerusalem) 1184/03 *Mustafa Bazar v Srigei Yerushalaim*, tak-Labor 2006(4) 2395; Labor Case (Tel-Aviv) 6344/00 *Hillel Cutler v Palestine Post Ltd. (Jerusalem Post)*, tak-Labor 2004(2), 3138; Labor Case (Tel-Aviv) 8456/01 *Malka v Crystal Ltd.*, tak-Labor 2005(1), 5950.

[86] Cf Labor Case (Tel-Aviv) 8456/01 *Malka v Crystal Ltd.*, tak-Labor 2005(1), 5950, para 35 of the judgment.

[87] Examples include: the right to education (HCJ 4363/00 *Va'ad Poriah Illit v Minister of Education*, tak-Supreme 2002(2), 1008); the right to have the family, in particular the family tie with a child, protected against arbitrary action by public authorities (Article 8) (Request Family Appeal 377/05 *plonit and ploni, parents designated as adoptive parents v The Biological Parents*, tak-Supreme 2005(2), 617); the protection of homosexual relations (Article 8 and Draft Protocol 12 to the Convention prohibiting discrimination on the basis of sexual orientation, at the time not yet adopted) (HCJ 721/94 *El Al Israel Airlines Ltd. v Yonatan Danilovitz*, 48(5) PD 749 (1994)); the right of property as affected by Article 1 of Protocol 1 to the Convention (Administrative Appeal (District Jerusalem) 509/08 *The Local Committee for Planning and Building Jerusalem v Naomi Dreisin Baranover*, tak-District 2008(3), 9962); the right of Palestinians who marry Israeli citizens to be granted Israeli citizenship upon marriage (HCJ 7052/03 *'Adallah – The Legal Center for Arab Minority Rights in Israel v The Minister*

## 3. Customary International Law

Customary international law is 'part of the law of the land'. Two constitutional bases have been advanced by the Israel Supreme Court to substantiate this position. First, Article 46 of the Order-in-Council 1922, provided:

> The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and Regulations, as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto, and so far as the same shall not extend or apply, shall be exercised *in conformity with the substance of the common law, and the doctrines of equity in force in England*... Provided always that the said common law and doctrines of equity shall be in force in Palestine in so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualifications as local circumstances render necessary (emphasis added).

According to Blackstone:

> The Law of Nations (whenever any question arises which is properly the object of it's jurisdiction) is here adopted in it's full extent by *the common law*, and is held to be a part of the law of the land; And those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of it's decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world.[88]

This position has been reiterated by Lord Atkin: 'The Court acknowledges the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law...'[89] During the British Mandate the courts regarded customary international law as part of the law of the land.[90] Since section 11 of the Law and Administration Ordinance maintained in force the Law that existed in Palestine on 14 May 1948, the Supreme Court held that customary law is an integral part of Israeli law.[91]

*of the Interior*, tak-Supreme 2006(2), 1754: the majority of the Court held, inter alia after consulting Article 8, ECHR and the case law of the European Court of Human Rights, that there is no such right of unification of families, which requires Israel to grant automatic citizenship to the Palestinian spouses).

[88] Sir William Blackstone, *Commentaries on the Laws of England* (12th edn, London: Cadell, 1793–5), Book 4, 67 (based upon Lord Mansfield's judgment in *Triquet v Bath* (1764) SC 3 Burr 1478, 96 ER 273, and SC 1 Black 471, 97 ER 936 (emphasis added).

[89] *Chung Chi Chang v The King* [1939] AC 160, 167.

[90] See *Perlin v Superintendent of Prisons, Jaffa* 9 Law Reports of Palestine 685 (1942); *Haim Molvan v the Attorney-General* 13 Law Reports of Palestine 523 (1946). For further discussion, see Shabtai Rosenne, 'The International Law and Domestic Law of the State of Israel' (1950) 7 Ha-Praklit 258.

[91] See *Stampfer v Attorney-General* 10 PD 4 (1956), 14–15. In this case, the Supreme Court held that the competence of Israeli courts to exercise criminal jurisdiction with respect to acts that had taken place on the high seas on board a ship flying an Israeli flag was based on customary international law.

Second, the fact that Israel is a sovereign, independent state itself is a basis for applying directly customary international law: 'The Declaration of Independence has opened for the new State a lattice to the international laws and customs, from which all States benefit by virtue of their sovereignty . . . Since Israel is a member of the family of Nations we may drink directly from these sources.'[92] The Declaration of Independence makes reference to international law, and in particular includes a statement promising that Israel 'will be faithful to the principles of the Charter of the United Nations'.[93] This second basis has been considered the preferable one.[94] Customary international law should be applied and its rules be assessed by Israeli courts directly rather than through the lens of English common law.

Israeli courts apply the customary rules. The Israeli courts do not defer to the government or legislature. It is their role to ascertain the rules of customary international law that they are going to apply.[95] It does not matter whether Israel has implemented in its domestic law a treaty that is declaratory of customary international law, as was the case with the UN Convention relating to the Status of Stateless Persons 1954. Nor does it matter if Israel is a contracting state at all. For example, the provisions of Protocol 1 to the Four Geneva Conventions that have been considered by the Israel Supreme Court as reflecting customary international law have been applied by the Court even though Israel is not a contracting state to the Protocol.

Two dicta of the Supreme Court may be instructive on the role of customary international law. In one of the earliest cases, the Supreme Court held:

> The municipal courts of a state will recognize the rules of international law and will decide in accordance with them only if the other civilized nations have recognized them, so that it must be assumed that these rules have been accepted by that state as well. A rule of international law, therefore, *has to be proven by adequate evidence from which it may be deduced* that the State has recognized the rule and acted upon it, or that the nature of the rule, or the fact that it is recognized by many sates and is widespread, necessarily give rise to the assumption, that no civilized state will ignore it.[96]

In a more recent case, the Supreme Court held that '[t]he burden to prove the existence of a custom with the characteristics and status ascribed in Article 38 of the Statute of the International Court of Justice, falls upon the party which pleads its existence'.[97]

[92] Ibid 15.

[93] The text of the Declaration of Independence (in English translation) can be viewed at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm> (accessed 30 November 2010).

[94] See Ruth Lapidoth, 'International Law within the Israel Legal System' (1990) 24 Israel Law Review 451, 453; Yoram Dinstein, *International Law and the State* (Tel-Aviv: Schoken, 1971) (in Hebrew) 144–5.

[95] See also above, concerning a certificate of the Minister of Foreign Affairs.

[96] *Shimshon v Attorney-General* (1951) 4 PD 143, 145–6 (emphasis added). This passage is translated in Ruth Lapidoth, 'International Law within the Israel Legal System' (n 90) 454.

[97] *Abu'Aita v Commander of the Judea and Samaria Region*, 37(2) PD 197 (1983), 241. See also Lapidoth, 454.

Whereas Israeli law recognizes the *stare decisis* doctrine and the Supreme Court's precedents are binding on all courts of lower instances, lower instances are free to declare changes and developments in customary international law, without waiting for the Supreme Court to declare that the rule has changed. Consequently, in a case that came before the Supreme Court in 1972, the Supreme Court held that absolute sovereign immunity from jurisdiction was a rule of customary international law,[98] but in a case that came before the magistrate court in Herzliya in 1990, the judge concluded that a substantial majority of states have come to favour the restrictive doctrine of sovereign immunity from jurisdiction.[99] This decision was later approved by the Israel Supreme Court.[100]

Customary international law has been applied primarily in international humanitarian law, ie the humanitarian legal rules concerning territories under belligerent occupation.[101] Another important area has been cases concerning sovereign immunity from jurisdiction and execution (prior to the enactment of the Foreign States Immunity Law 5769–2008), as well as diplomatic and consular relations. Finally, in almost every case concerning basic human rights (as well as animal rights), the courts check whether customary international law rules have developed.

## 4. Legislative Provisions or Regulations Calling For the Application of International Law

Some statutes have been enacted with the specific purpose of implementing treaties to which Israel has become party.[102] Other statutes reflect customary international law. The immunity of foreign states has developed as part of customary international law. However, over the years, state practice has differed with respect to the limits of the immunity. The Foreign States Immunity Law 5769–2008, reflects the

[98] CA 347/71 *Michael Sansur v The Greek Consulate General*, 26(2) PD 328 (1972).

[99] Cf *Reinhold v Her Majesty The Queen in Right of Canada* [1991] 3 PM 166.

[100] Application Permission to Appeal 7092/94 *Her Majesty The Queen in Right of Canada v Sheldon Adelson* tak-Supreme 97(2), 292; see also B. Cohen, 'The Practice of Israel in Matters related to International Law' (1992) 26 Israel Law Review 559.

[101] See above.

[102] Examples include: the Crime of Genocide (Prevention and Punishment) Law 5710–1950, which implemented the Convention on the Prevention and Punishment of the Crime of Genocide; Carriage by Air of Goods by Air Law 5740–1980, which implements the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929, in its original form and as amended at the Hague 1955. The Law states that effect will also be given to the supplementary Guadalajara Convention 1961 (relating to international carriage by air performed by a person other than the contracting carrier), the Guatemala Protocol 1971, and the further revision by the four Montreal Protocols; Sales (International Sale of Goods) Law 5760–1999, which implements the Vienna Convention on Contracts for the International Sale of Goods (CISG) 1980; The Arbitration Law 5728–1968, applies to all arbitration proceedings, whether domestic or international. In 1974, the Law was amended in order to implement Israel's international obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Following the amendment, the Law contains rules that apply only to an arbitration to which 'an international convention to which Israel is party applies' (s 6), or to a 'foreign arbitral award' (s 29A).

basic rules of customary international law, but also clarifies the limits of state immunity under Israeli law.

A third type of statute implements in advance international agreements. Sections 82 and 83 of the Post Law 5746–1986, for example, set the liability of the general postal services provider for postal items and parcels in accordance with the Universal Postal Convention currently in force, which has been notified in the *Reshumot* (the Official Gazette). Finally, sometimes treaty implementation is done via secondary legislation—regulations or administrative orders.[103]

If the Knesset passes a law that clearly contradicts an international norm, whether customary law or an obligation undertaken in a treaty, the Israeli statute will prevail.[104] However, the contradiction must be express. In a case that came before the District Court of Tel-Aviv, the claimant sought to recover damages in torts from the Egyptian Ambassador to Israel.[105] The claimant argued that the Civil Wrongs Ordinance [New Version] enumerated all defences to claims in torts, and those did not include diplomatic immunity. The Court considered that the Ambassador was entitled to immunity under Article 13 of the Vienna Convention on Diplomatic Relations 1961, for the duration of his office. The Convention was ratified by Israel but not implemented in Israeli domestic law. Yet, the Court held that the fact that the Civil Wrongs Ordinance did not mention the defence granted under international law could not be regarded as an implied contradiction to an

[103] Examples for such implementation are: (1) Significant aspects of Israel's international trade agreements (WTO/GATT; Free Trade Area Agreements) can be implemented in the domestic order through an administrative order made by the Government, or the Minister of Finance—cf s 31 of the Purchase Tax Law (Goods and Services) 5712–1952; s 232 of the Customs Ordinance (New Version) 5717–1957; and s 3 of the Customs Tariff and Exemption Ordinance. The Tariff Order—a combined Customs and Purchase Tax Tariff—reflects Israel's commitments under the various international trade agreements. It is updated regularly to incorporate any change that takes place in these matters; (2) the Performers and Broadcasting Organizations Law 5744–1984, provides that the law does not apply to performances made outside Israel (s 13(a)). This provision notwithstanding, the Minister of Justice may, with the authorization of the Knesset Constitution, Law and Justice Committee, issue an order instructing that the provisions of this Law apply to performances made outside Israel, if such an order is needed to comply with an international convention of which Israel is a contracting state. Two such orders have been issued; (3) Income Tax Ordinance s 196, provides that after the Minister of Finance has notified in an order that an agreement has been made with a certain state for double-taxation relief concerning income tax and any other tax imposed under the laws of that state, and that it is beneficial to give this agreement effect in Israel, that agreement shall be effective in Israel notwithstanding the provisions of any enactment; (4) Prevention of Marine Pollution (Sea Dumping) Law 5743–1983, s 15, and the Prevention of Marine Pollution from Land-Based Sources Law 5748–1988, s 14, provide that the Minister of the Environment will enact regulations implementing the provisions of this Law according to Conventions to which Israel is party; (5) Clean Air Law 5768–2008, s 35, provides that regulations under this Law will be enacted by the Minister of the Environment according to international conventions to which Israel is party, as well as recommendations and directives published by international organizations, including the European Union; (6) Tenders (Obligation) Law 5752–1992, s 5A, provides that regulations enacted under this Law, apply in so far as they do not contradict obligations of the state undertaken in an international convention.

[104] Cf two of the first cases in which the Supreme Court stated this rule—Criminal Appeal 5/51 *Steinberg v The Attorney-General* 5 PD 1061 (1951); Criminal Appeal 336/61 *Adolph Eichmann v The Attorney-General*, 16 PD 2033 (1962).

[105] Civil Appeal (Tel-Aviv) 4289/98 *Shlomit Shalom v The Attorney-General, Shulman and Bassyounni* tak-District 99(3), 2.

international norm that is binding on Israel. This case can be viewed as an example of the rule of interpretation adopted by the Israeli courts.

## 5. Hierarchy

### 5.1 Judicial Doctrines to Reconcile Domestic Law with International Law

As aforementioned, constitutive treaty provisions are not self-executing in Israel. Unless they are implemented in Israeli domestic law by primary or secondary legislation, they cannot be relied upon by private persons and cannot be applied by the Court. Furthermore, contradicting Israeli legislation overrides international norms. This result is mitigated by two rules, each of which creates a presumption of compliance—a rule of interpretation and a rule of presumption. Furthermore, in numerous cases, the yardstick for judicial review has been the rule of proportionality, which substantially constrains the discretion of the government.

According to the rule of interpretation, domestic law must be interpreted in compliance with international norms, provided that there is no Israeli legislation that expressly contradicts the international obligation. In applying this rule, the courts pay close attention to the international source and make an effort to interpret the convention autonomously, in order to attain a proper and unified application as much as possible. There are numerous cases in which this rule has been followed, some of them already mentioned above. The Supreme Court has held:

> Although our courts draw their judicial authorities from the laws of the State and not from the system of international law, . . . we have a well established rule, following English law, that a court in Israel 'will interpret a municipal statute, as long as its content does not dictate another interpretation, in accordance with the rules of public international law . . . .'[106]

The courts will not construe the silence of the legislature as an implied intention to disregard international law.[107]

According to the rule of presumption, which is a corollary of the rule of interpretation, the administrative and governmental authorities are presumed to be obliged to apply their discretion under the enabling legislation in a manner that conforms to international obligations, unless compelling public interests and considerations mandate disregard of those. Administrative regulations and orders, made in disregard of international obligations, may be set aside under this rule.

[106] HCJ 302/72 *Sheikh Abu Hilu v Government of Israel* 27(2) PD 169 (1973). See also Ruth Lapidoth, 'International Law within the Israel Legal System' (n 90) 455; Further Hearing 36/84 *Teichner v Air France* 41(1) PD 589 (1987), in which the Supreme Court emphasized the importance of uniform interpretation of multilateral treaties with multiple contracting states (*in casu*, the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929).

[107] See Civil Appeal (Tel-Aviv) 4289/98 *Shlomit Shalom v The Attorney-General, Shulman and Bassyounni* tak-District 99(3), 2.

The Israeli courts of law have demonstrated that, given the appropriate case, they will not hesitate to review administrative measures in view of Israel's international obligations. The state may even be estopped from relying on its faulty implementation of an international agreement.[108]

The standard used by the courts to review administrative and legislative acts plays a very important role in deciding the outcome of the case. In principle, the Supreme Court has applied one of two rules: the rule of reasonableness and the rule of proportionality.

The rule of reasonableness requires the administrative authority to use its discretion reasonably and fairly, even when dealing with interests that are unprotected.[109] Acting reasonably means taking account of all relevant considerations, properly balancing all interests involved, etc. The rule applies not only to administrative acts but also to secondary legislation—regulations and orders. 'Reasonableness' however was never construed to mean 'wisdom and efficiency'. Once the authority paid heed to all relevant considerations, acted fairly and discharged all other duties in a reasonable manner, the court would not replace its discretion with that of the authority. The test of 'reasonableness alone' (as opposed to other grounds for review) is rather restricted. Only where the authority has acted so unreasonably that no reasonable authority would have acted in such a manner will the court intervene and revoke the decision or regulation it has purported to enact.[110] The onus of proof that the authority acted unreasonably has to be discharged by the petitioner.

The rule of proportionality requires the Court to engage in a stringent process of judicial review. To be proportionate, a measure has to satisfy three cumulative conditions: (1) It has to be suitable for the purpose of achieving objectives legitimately pursued by the enabling legislation (this means, inter alia, that the objectives themselves must be constitutionally authorized). (2) The measure must be necessary for the achievement of the objective. Therefore, if there is a choice between several appropriate measures, recourse must be had to the least onerous. (3) The

[108] Cf eg Civil Appeal 544/88 *The State of Israel v Salon Tokyo* 46(4) PD 26 (1992), per President Meir Shamgar; Originating Summons 727/93 (Haifa) *Stessel v The Customs Director* tak-District 96(1) 423, per Judge Dan Bein; Various Applications (Jerusalem) 793/95 *Regent Ice-Cream v The Minister of Trade and Industry* tak-District 97(1), 1785, per Judge Yehudit Zur; Various Applications *MDK v The Minister of Trade and Industry* (April 1998 nyr), per Judge Amnon Huminer.

[109] The result of the case may, however, be different from that of a case where a vested right has been infringed, since the remedies may reflect the greater protection granted to an infringed vested right as compared with the protection of an 'unprotected' interest. See the analysis of the Supreme Court in HCJ 637/89 *Constitution for the State of Israel v The Minister of Finance* 46(1) PD 191 (1991).

[110] See eg, HCJ 389/80 *Dapei Zahav Ltd v The Broadcasting Authority* 35(1) PD 421 (1980); HCJ 197/83 *Sitar Fashion Ltd v The Minister of Trade and Industry*, 37(2) PD 388 (1983). In English administrative law, the principle of reasonableness has been nicknamed 'Wednesbury principle', after *Associated Provincial Pictures Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229, where Lord Hailsham LC, expressed it as 'something so absurd that no sensible person would ever dream that it lay within the powers of the authority'. Nevertheless, it has been noted that there are abundant instances where the courts did rule that decisions and actions at all levels were legally unreasonable. 'This is not because public authorities take leave of their senses, but because the courts in deciding cases tend to lower the threshold of unreasonableness to fit their more exacting ideas of administrative good behavior'. See William Wade and Christopher Forsyth, *Administrative Law* (10th edn, Oxford: OUP, 2009) 304.

measure has to be proportionate *in strictu sensu*, that is the benefits accruing should outweigh its disadvantages. Furthermore, the onus of proof that a rule is proportionate has to be discharged by the public authority that imposes it.

The Supreme Court has applied the rule of proportionality to all acts, administrative as well as legislative, of the government and its various organs in Judea, Samaria and the Gaza Strip.[111]

This has also been the case where the petitioner could point to a basic right that had been infringed by the administrative act. This is in accordance with the provisions of the Basic Law: Human Dignity and Liberty, which provides that human dignity and liberty may be infringed only 'by a statute that befits the values of the State of Israel, enacted for a purpose and to an extent no greater than required'. Likewise, the Basic Law: Freedom of Occupation provides that the freedom to engage in an occupation may only be restricted by law in so far as that law is enacted 'for a proper purpose and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such law'.

In other cases, the Court has generally preferred the standard of reasonableness. In a case raising compatibility of safeguards duties with WTO/GATT law and with Free Trade Agreements to which Israel is a contracting party,[112] the District Court held that the Minister did not provide the factual basis for his decision to impose the duty and that, according to his own submissions, he did not weigh properly all considerations as he should have. Accordingly, it voided the duty. The Supreme Court reversed, holding that, since the rule of reasonableness applies to such cases, the authority is presumed to have acted lawfully and it is up to the applicant contesting validity to prove that such is not the case. Consequently, the Supreme Court checked only in very general terms the compatibility of the safeguards duty with the GATT 1994 Agreement on Safeguards, relying essentially on the reasons given by the Minister. The Court demanded that the applicant prove that imposing the duty was unreasonable rather than placing the burden on the Minister of Trade and Industry to prove that the measure was lawful, compatible with Israel's international commitments, and necessary and proportionate *in strictu sensu*.

In a more recent case similarly concerning a safeguards duty and its compatibility with the rules of the WTO/GATT,[113] the Court ostensibly applied the rule of proportionality, but stated, it is submitted erroneously, that the administrative authorities have wide discretion to decide whether or not to impose the duty and that it is up to the applicant contesting the validity of the measure to prove that it is not proportionate. This is regrettable, especially in the field of international economic law.[114] Whereas reasonableness sets a very wide margin of discretion, proportionality

[111] See Dinstein, *The International Law of Belligerent Occupation* (n 70) 87, 105, 198, 247–59.

[112] Civil Appeal 2313/98 *Minister of Trade and Industry v Minkol Ltd* 44(1) PD 673 (2000).

[113] Civil Appeal 9647/05 *Poliva Ltd v The State of Israel—Customs and VAT Department* tak-Superme 2007(3), 80.

[114] Regarding the different results that would obtain under the rule of proportionality as compared with the rule of reason, see Talia Einhorn, *The Role of the Free Trade Agreement between Israel and the EEC—the Legal Framework for Trading with Israel between Theory and Practice* (Baden-Baden: Nomos, 1994) 195–205.

requires the courts to scrutinize the measures taken not only according to the criteria chosen by the administration, but also according to at least some of the criteria that were not chosen. By shedding light on the different motives and objectives, such a scrutiny would cause a more responsible use of discretion by the authorities. The rule of proportionality derives from the rule of law in democratic societies. In a democracy, citizens should be free to exercise their rights and benefit from their property, and the authorities may only restrict them from so doing in so far as the measures that they take are necessary to protect the public interest.[115]

## 5.2 Recognition of *Jus Cogens* Norms

The Israeli courts have recognized *jus cogens* norms. Adolph Eichmann, the Nazi criminal who was tried in Israel, claimed that Israel had no jurisdiction to try him, since he had committed his crimes in Germany and in other European states but not in Israel, which had not yet been established at the time. The Court held that the crimes that Eichmann had committed—genocide of the Jewish people, crimes against humanity and crimes against the peace—were universal crimes, prohibited by law of the nations, and, consequently, he could be tried in any country.[116]

In the 'bargaining chips' case,[117] Israel sought to keep in administrative detention Sheikh Obeid of the *hizbullah* and Mustafa Dirani of *amal*, in order to put pressure on the terrorist organizations to which they belonged to provide information about missing in action Air Force Navigator Ron Arad, with whom no contact had been established following his capture in Lebanon in 1986. Even though the government pointed out that negotiations with the *hizbullah* had started, prompting a minority of the Court to support the continued detention of Obeid and Dirani, the majority of the Court held that the holding of hostages was contrary to the International Convention against the Taking of Hostages 1979. As a result, holding these persons in administrative detention was prohibited and unjustifiable for any reason whatsoever. Justice Dorner held that it would seem that, even if Israel were not a contracting state, the holding of hostages had by now become a violation of customary international law. Although not quite couched in terms of *jus cogens*, it seems that this opinion (but not the opinion of the other justices) would support such an approach.

Third, the Supreme Court has held that, in line with Israel's obligations, in particular under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, as well as Israeli human rights law, the use of torture is an 'absolute' prohibition, without any derogation allowed. The use of degrading treatment or punishment is likewise prohibited. The background to the case[118] was as follows. In 1987, the government established a

[115] See Juergen Schwarze, *European Administrative Law* (1st rev edn, London: Sweet & Maxwell, 2006) 685 (regarding German law) and 712–14 (regarding EC law).

[116] Criminal Appeal 336/61 *Adolph Eichmann v The Attorney-General*, 16 PD 2033 (1962).

[117] Further Hearing Criminal 7048/97 *Plonim v The Minister of Defense* 54(1) PD 721 (2000).

[118] HCJ 5100/94 *Public Committee against Torture in Israel and others v Government of Israel* 53(4) PD 817 (1999). The judgment is excerpted in English in (2000) 30 Israel Yearbook on Human Rights 352.

Commission of Inquiry, headed by former Supreme Court President, Justice Moshe Landau, to set the basic guidelines on the methods of interrogation of terrorist suspects, used by the General Security Service (GSS). The Landau Commission examined international human rights law standards, existing Israeli legislation prohibiting torture and maltreatment, and guidelines of other democracies confronted with the threat of terrorism.[119]

The Commission determined that, in dealing with dangerous terrorists who represent a grave threat to the State of Israel and its citizens, the use of a moderate degree of pressure, including physical pressure, in order to obtain crucial information, is unavoidable under certain circumstances. Such circumstances include situations in which information sought from a detainee, who is believed to be personally involved in serious terrorist activities, can prevent imminent murder, or where the detainee possesses vital information on a terrorist organization that could not be uncovered by any other source (for example, location of arms or caches of explosives for planned acts of terrorism). In order to prevent abuse of power, the Commission recommended that psychological forms of pressure be used predominantly and that only 'moderate physical pressure' (not unknown in other democratic countries) be sanctioned in limited cases where the degree of anticipated danger is considerable.

The Commission noted that the use of such moderate pressure is in accordance with international law. It took heed from a decision of the European Court of Human Rights (ECHR) on certain methods of interrogation used by Northern Ireland police against IRA terrorists.[120] The ECHR had ruled that ill-treatment must reach a certain severe level in order to be included in the ban on torture contained in Article 3 of the European Convention on Human Rights. In its ruling, the ECHR disagreed with the view of the Commission that the methods used by the United Kingdom could be construed as torture, though it ruled that their application in combination amounted to inhuman and degrading treatment. The question whether each of these measures separately would amount to inhuman and degrading treatment was therefore left open by the ECHR.

The Landau Commission's Report provides for limited forms of pressure under very specific circumstances, to be determined on a case-by-case basis. It did not authorize indiscriminate use of force, but identified specific circumstances and interrogation practices strictly defined in a manner that, in the opinion of the Landau Commission, 'if these boundaries are maintained exactly in letter and in spirit, the effectiveness of the interrogation will be assured, while at the same time it will be far from the use of physical or mental torture, maltreatment of the person being interrogated, or the degradation of his human dignity'.[121] In a second section

[119] See *Report of the Commission of Inquiry on the Methods of Interrogation of Suspected Terrorists by the General Security Service* (Jerusalem October 1987) (in Hebrew).

[120] *Ireland v The United Kingdom* (App No 5310/71) (1978) Series A No 25.

[121] This citation, as well as the limitations and restrictions, are brought in Israel's Report to the UN CAT Committee (18.2.1997)—CAT/C/33/Add.2/Rev.1., available at <http://unispal.un.org/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/4d5bde175e6e76738025645e0033d453?OpenDocument> accessed 30 November 2010.

of its report, the Landau Commission precisely detailed the exact forms of pressure permissible to the GSS interrogators.

In line with the recommendations of the Landau Commission, responsibility for investigation of claims of maltreatment was transferred to the Division for the Investigation of Police Misconduct in the Ministry of Justice under the direct supervision of the State Attorney.

In addition, an agreement between the State of Israel and the International Committee of the Red Cross (ICRC) provides for the monitoring of conditions of detention. Delegates from the ICRC are permitted to meet with detainees in private within 14 days of the arrest. ICRC doctors may examine detainees who complain of improper treatment. All complaints made by the ICRC regarding treatment of prisoners are fully investigated by the relevant Israeli authorities and the findings are made known to the ICRC.

Finally, Israel has a procedure for the judicial review of complaints of alleged maltreatment or torture. Any person who alleges that he has been wronged can petition directly to the Supreme Court, sitting as a High Court of Justice. It does not matter whether the petitioner is an Israeli citizen or has just come under the jurisdiction of an Israeli authority. Such a petition will be brought before a judge within 48 hours its submission.[122]

The Public Committee against Torture in Israel petitioned the High Court of Justice, challenging the methods of interrogation that were, in principle, allowed by the Landau Commission's Report, as long as they remained within the boundaries of 'moderate physical pressure'.[123] The Supreme Court, in a special panel of nine justices, presided by President Barak, held unanimously that neither the government nor the heads of the General Security Service had the authority to enact guidelines permitting the use of force against interrogated suspects of terrorist activity. Likewise, the individual interrogator has no such authority. According to the Supreme Court:

> A reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever. There is a prohibition on the use of 'brutal or inhuman means' in the course of an investigation . . . This conclusion is in perfect accord with (various) International Law treaties—to which Israel is a signatory—which prohibit the use of torture, 'cruel, inhuman treatment' and 'degrading treatment' . . . These prohibitions are 'absolute.' There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice.

Nonetheless, in appropriate circumstances—such as those of a 'ticking bomb'—the GSS investigators may avail themselves of the necessity defence if criminal charges

[122] Two such petitions are brought in the Annex to Israel's Report to the UN CAT Committee, ibid.

[123] HCJ 5100/94 *Public Committee against Torture in Israel and others v Government of Israel*, 53(4) PD 817 (1999). The judgment is excerpted in English in (2000) 30 Israel Yearbook on Human Rights 352.

are brought against them for having used force against a suspect. This defence can operate only *ex post*, but never *ex ante*.

The impact of this decision has been substantial, since it placed the responsibility for every case of use of force directly upon the interrogator who had carried it out. Additionally, it placed an absolute prohibition not only on torture but also on any violence directed at the suspect's body or spirit.

Finally, in a case that came before the District Court of Jerusalem, the Court held unenforceable an arbitral award, according to which the plaintiff was awarded the money he had paid to bribe Mexican state officials. The Court held that the prohibition on corrupt practices and money laundering is now part of international *jus cogens*.[124]

## 5.3 The Extent to which Courts Use International Law to Interpret Constitutional Provision

The Israeli courts (and the parties who argue before them) turn quite often to international law to substantiate their constitutional rights. In a case that concerned the rights of people with disabilities,[125] the Magistrate Court cited the following international instruments as imposing a duty upon the state to maintain the human dignity and the rights of persons with disabilities to conduct a full and normative life, in so far as possible: Article 3 of the UN Declaration on the Rights of the Disabled Persons 1975; Articles 24–25 of the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities1993.

With respect to the right to education, the Supreme Court cited Article 26 of the Universal Declaration of Human Rights 1948; Article 13 of the International Covenant on Economic, Social and Cultural Rights 1966; Articles 28–29 of the International Convention on the Rights of the Child 1989; as well as Article 2, Protocol I of the European Convention on Human Rights and Fundamental Freedoms 1952 (even though Israel is not a contracting state to the latter).[126]

The National Labor Court held that the right to strike is a corollary of human dignity. The Court cited the following international instruments as obliging Israel, as a member of the ILO and the United Nations, to enforce this right against employers and prevent them from laying off workers who took part in a strike:[127] ILO Convention 87: Freedom of Association and Protection of the Right to Organize Convention 1948; ILO Convention 98: Right to Organize and Collec-

[124] Originating Summons (Jerusalem) 2212/03 *Nissan Albert Gad v David Siman-Tov* tak-District 2004(1), 623.

[125] Civil Case (Jerusalem) 9582/99 *Miriam Livni v Salim Shabo* tak-Magistrate 2005(2), 6844. The District Court dismissed the claim of Jerusalem residents who sought to prevent their handicapped neighbors from riding their cars and parking in a place very close to their homes in a manner which would not have been permissible to persons without disabilities.

[126] HCJ 4363/00 *vaad Poriya Elite v Minister of Education* tak-Supreme 2002(2), 1008. The case concerned the right of parents to choose the school in which their child will learn and the duty of the State and the municipal authority to cover the expenses involved in the selection of a private school.

[127] Appeal Collective Dispute (National) 1008/00 *Horn & Leibovitz Ltd v Histadruth Ha-'Ovdim Ha-chadasha (The New Workers' Union)* tak-National 2000(2), 324.

tive Bargaining 1949; Article 23, Universal Declaration of Human Rights 1948; Article 22, International Covenant on Civil and Political Rights 1966; Article 8, International Covenant on Economic, Social and Cultural Rights 1966. The National Labor Court further pointed out that, in Europe, the firing of a member of the workers' committee is deemed to be a violation of Article 11 of the European Convention on Human Rights and Fundamental Freedoms. The Court held that the fact itself that Israel is an ILO member and has ratified some of the conventions mentioned in the decision should guide the Court in its interpretation of any Israeli law or subsidiary legislation, even if the ILO conventions were not implemented in Israeli domestic law.

## 6. Jurisdiction

The first case of this kind that came before the Israeli courts was that brought against Adolph Eichmann, the Nazi criminal who was kidnapped in Argentina and tried in Israel. The Court held that the crimes which Eichmann had committed—genocide of the Jewish people, crimes against humanity and crimes against the peace—were universal crimes, prohibited by law of the nations, and, consequently, he could be tried in any country.[128]

The Israeli Penal Law 5737–1977 was amended in 1994 to include all principles upon which, according to international law precepts, courts may base international criminal jurisdiction. Sections 13–17 of the Penal Law 5737–1977 concern the applicability of Israeli penal laws to a 'foreign offence'; ie, an offence that is not a 'domestic offence'. The latter is defined as an offence, all or part of which was committed within Israeli territory, as well as an act in preparation for commission of an offence, an attempt to commit an offence, or a conspiracy to commit an offence, which were committed abroad, provided that all or part of the offence was intended to be committed within Israeli territory. Israeli territory includes the territorial sea, as well as vessels and aircraft registered in Israel. Section 9(b) provides that no person will be put on trial in Israel for a foreign offence, except by the Attorney-General or with his written consent, having concluded that doing so is in the public interest.

Section 13 applies Israeli penal laws to offences committed against the state or against the Jewish people (the 'protective principle'). The list of offences includes offences against the security of the state, its foreign relations or its secrets; the form of government; the ordinary functioning of state authorities; state property, its economy and its transportation or communications relations with other states; the life or bodily welfare, health, freedom or property of an Israeli citizen, an Israeli resident or an Israeli public servant; the life or bodily welfare, health, freedom or property of a Jew, or the property of a Jewish institution just because they are

[128] Criminal Appeal 336/61 *Adolph Eichmann v The Attorney-General*, 16 PD 2033 (1962).

Jewish. Israeli penal laws apply also to foreign offences against the Denial of Holocaust (Prohibition) Law 5746–1986.

Section 14 applies Israeli penal laws to foreign offences against Israeli citizens (the 'passive personality principle'), provided however that the act is also an offence under the law of the foreign state in which it was committed and the person had not already been acquitted in that state, or if found guilty had not yet served the penalty imposed on him. The penalty for the offence may not be more severe than that which would have been imposed under the laws of the state in which the act was committed.

Section 15 applies Israeli penal laws to foreign offences committed by Israeli citizens or Israeli residents (the 'nationality principle').

Section 16 applies Israeli penal laws to foreign offences against international law (the 'universality principle'), ie offences that the State of Israel had undertaken under multilateral treaties open to accession, to punish, even if committed by persons who are not Israeli citizens or residents regardless of where they were committed. Prior to the 1994 amendment of the Penal Law, universal jurisdiction was covered partially in section 4 of the Penal Law 5737–1977, entitled 'Offenses against humanity'. Under this provision, the courts in Israel were competent to try a person who, outside Israel, committed an offence under any of the following laws (still in effect):

(1) The Crime of Genocide (Prevention and Punishment) Law 5710–1950, which was enacted to implement the Convention on the Prevention and Punishment of the Crime of Genocide 1948;
(2) The Nazis and Nazi Collaborators (Punishment) Law 5710–1950 (which is now embodied in section 13—the 'protective principle');
(3) Section 169 of the Penal Law 5737–1977, which dealt with piracy;
(4) The Air Navigation (Offences and Jurisdiction) Law 5731–1971, which implemented the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963;
(5) The Dangerous Drugs Ordinance (Consolidated Version) 5733–1973, which implemented the New York Single Convention on Narcotic Drugs 1961.

According to the Explanatory Note to the 1994 amendment of the Penal Law,[129] these sub-sections covered only some of the offences that Israel had undertaken in international conventions to punish. Therefore, the legislature decided to make a general provision concerning universal crimes.

Section 17 provides that the State of Israel may assume obligations under international treaties to apply its penal laws to foreign offences, apart from those mentioned in sections 13–16, at the request of a foreign state and on a reciprocal basis. The following cumulative conditions must be met: the penal laws of the requesting state must apply to the offence; the offence must have been committed

[129] Hatza'ot Chok (Bills) 2098 (6 January 1992).

by a person who is present in Israel and who is an Israeli resident, regardless of whether he is an Israeli citizen; and the requesting state has waived the applicability of its laws to the pertinent case. The penalty imposed may not be more severe than that which would have been imposed under the laws of the requesting state. According to the Explanatory Note,[130] the purpose of this provision was to enhance, on the basis of reciprocity, international co-operation by making it possible to bring criminal proceedings and punish all criminals in the state in which it is most appropriate to do so. So far, Israel has not concluded any such treaty.

There is no specific Israeli legislation addressing the exercise of jurisdiction over civil actions for international law violations that are committed in other countries. Several tort claims have been brought before the Israeli courts against the Palestinian Authority and the Palestinian Liberation Organization for their responsibility for terror acts in Judea, Samaria and Gaza, which they had supported, encouraged and instigated, causing death, physical injury and damage to property.[131]

It is submitted that, in any case that involves a civil action for international law violations committed in other countries, the Israeli court will have to decide the question of its international jurisdiction and, if that matter is satisfied and the Court does not consider itself *forum non conveniens*, then the case will be adjudicated in Israel. In principle, Israeli courts may exercise jurisdiction if service of the claim was effected in Israel. Alternatively, if the case is one of 11 exceptional situations listed in Civil Procedure Rule 500, the court has discretion to grant leave to serve the defendant with the process outside Israel. The most pertinent ground for serving tort claims is rule 500(7), which requires that the claim be founded on an act or omission within the jurisdiction. Another pertinent ground is rule 500(10), which applies if the person outside the jurisdiction is a necessary, or proper, party to a claim duly brought against another person who was lawfully served within Israel.

If the acts or omissions were all outside of the jurisdiction, then it would arguably only be possible to institute civil proceedings in Israel if service can be effected in Israel. Thus, tort claims resulting from the killing, physical injuries and damage to property caused in Israel by the firing of rockets at Israeli civilian targets from the Gaza Strip may escape the international jurisdiction of Israeli courts.

Another possible venue is the enforcement of a civil law judgment rendered in another country for international law violations. In a case that came before the District Court of Jerusalem, the District Court held an American judgment to be enforceable in Israel under the Foreign Judgments Enforcement Law 5718–1958.[132] According to that judgment, the Palestinian Authority and the Palestine Liberation Organization were required to pay treble damages of about US$116

[130] Ibid.

[131] See eg, Application Permission Civil Appeal 11019/08 *Palestinian Authority v Yosef Azuz* tak-Supreme 2009(2) 286; Application Permission Civil Appeal 4050/03 *Palestinian Authority v Dayan* tak-Supreme 2007(3), 1194.

[132] Originating Summons (Jerusalem) 4318/05 *Ungar v Palestinian Authority and PLO* tak-District 2003(1), 4968.

million under the Anti-Terror Act to the estate of victims of a terror act that had taken place in the West Bank.

It is noteworthy that violations of international law may serve in civil cases not only as a sword but also as a shield. Thus, in a case for the enforcement of a foreign arbitral award, under which the plaintiff had been awarded money that he had paid to bribe government officials in Mexico, the District Court of Jerusalem held the award unenforceable in Israel, because of Israel's international undertaking to curb corrupt practices.[133]

## 7. Other International Sources

Standards for treatment of prisoners in Israel were considered in a petition brought by Physicians for Human Rights—Israel, requiring the Minister of Public Security and the Commissioner of the Prisons Service to provide each prisoner in Israel with a separate bed rather than a mattress.[134] When determining the appropriate Israeli standard, the Supreme Court considered the UN Economic and Social Council Standard Minimum Rules on the Treatment of Prisoners 1955 (sections 10 and 19), as well as the UN Center for Human Rights Basic Principles for the Treatment of Prisoners 1990 (Articles 1, 5) to be both authoritative and relevant. The Supreme Court further considered the European Prison Rules, 1987 (rules 15, 24), as well as legislation in European countries and the United States. On the basis of these standards, the Supreme Court held that the state must, within a period of several months, provide a separate bed to each prisoner.

In considering the claim brought by a woman who was the victim of forced labour and human trafficking, the National Labor Court considered the International Labor Office Human Trafficking and Forced Labor Exploitation: Guidance for Legislation and Law 2005, to be both authoritative and relevant.[135] The defendants argued that the labour courts had no jurisdiction to decide the questions of compensation and disgorgement of profits accumulated at the expense of the plaintiff. On the basis of the guidelines, the National Labor Court held that 'for the person who was wronged, the most satisfactory remedy will be one in civil, labor and administrative law rather than criminal law'. Furthermore, labor law could be even more effective in remedying the situation than civil law, since according to the guidelines:

> Labor law provides yet another mechanism and another set of sanctions that go beyond criminal and civil law . . . Administrative orders under labor law can also provide an entry point to tackle forced labor issues . . . Labor courts deal with the right of workers and employers as regards employment. In most jurisdictions, labor codes set standards of

[133] Originating Summons (Jerusalem) 2212/03 *Nissan Albert Gad v David Siman-Tov* tak-District 2004(1), 623 (n 120).

[134] HCJ 4634/04 *Physicians for Human Rights—Israel v Minister of Public Security and Commissioner of the Prisons Service* tak-Supreme 2007(1), 1999.

[135] Labor Appeal (National) 480/05 *Eli Ben-Ami v plonit* tak-National 2008(3) 6.

employment, which override the principles of free contract. Many victims will therefore opt for separate civil claims before industrial tribunals or labor courts concerning the non-payment of wages or other elements of forced labor.

The Court upheld the claim and granted the woman a salary on the basis of *quantum meruit*, the profits made by the defendants at her expense, as well as compensation for her humiliation at the defendants' hands.

The Israeli courts recognize and apply as authoritative the International Standards on Auditing (ISA), which are professional standards for the performance of a financial audit, issued by the International Federation of Accountants through the International Auditing and Assurance Standard Board.[136]

In dismissing an income tax appeal, the District Court of Tel-Aviv considered the OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials 1996, as well as a 1997 UN position paper on the role of the UN in fighting corruption and bribery (A/Res./51/59 Action against Corruption and International Code of Conduct for Public Officials).[137] The Court relied on these non-binding recommendations in order to substantiate the norms existing in international law prior to the adoption of the UN Convention against Corruption (UNCAC) 2005, since the case concerned the deductibility of bribery in 1999.

The Supreme Court has cited as authoritative and relevant the Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism: 'A person suspected of terrorist activities may only be arrested if there are suspicions.'[138]

## 7.1 Decisions of International Tribunals

Israeli courts have cited, on occasion, decisions of the ICJ, decisions of the International Criminal Tribunal for Yugoslavia, the European Court of Justice, and numerous decisions of the European Court of Human Rights. None of these decisions were held binding, however the Supreme Court has given much weight to their interpretation of international norms.

The most pertinent, recent example relates to the ICJ Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), at the request of the UN General Assembly.[139] This security barrier ('Wall') yielded also several decisions of the Israel Supreme Court, most notably the *Beit Sourik* case,[140] delivered by the Supreme Court about one week before the publication of the Advisory Opinion, and the *Alfei Menashe* case,[141] delivered in

[136] See eg, Civil Case (Haifa) 1009/00 *Israel Discount Bank Ltd v Broide and Co, CPA* tak-District 2008(2) 10679.

[137] Income tax appeal (Tel-Aviv) 1015/03 [*Plaintiff company name not given*] *v Income Tax Commissioner* tak-District 2008(1), 5817.

[138] HCJ 3239/02 *Mar'ab v Military Commander of Judea and Samaria* tak-Supreme 2003(1), 937.

[139] (2004) 43 ILM 1009; <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp &p3=4> (accessed 30 November 2010).

[140] HCJ 2056/04 *Beit Sourik Village Council v Government of Israel* 58(5) PD 807 (2004).

[141] HCJ 7957/04 *Mara'abe v Prime Minister*, (2006) 45 ILM 202.

2005. In the latter case, the petitioners relied on both the *Beit Sourik* precedent as well as the ICJ Advisory Opinion.

In the *Beit Sourik* case, the Israel Supreme Court held that the construction of the 'fence' (of which the actual concrete 'wall' component amounted to less than five per cent) was motivated by security rather than political considerations and was not permanent in nature; that the military government was authorized to seize land as required for military needs (subject to payment of compensation for private property, which had been offered); and that the principle of proportionality applied to the building of each segment of the barrier, minimizing the harm inflicted on local residents. On the latter basis, the Supreme Court held as disproportionate six out of the seven seizures of private lands contested in this case.

In contrast, the International Court of Justice held that the construction of the wall was contrary to international law. It has been pointed out that the facts and figures imparted to the ICJ by the UN Secretary General were grossly inflated and that the use of the term 'wall' by the UN was misleading.[142] It has also been pointed out that, whereas the Court noted the assurance given by Israel that the construction does not amount to annexation and that the wall is of a temporary nature, it nevertheless considered that the wall may create a fait acompli. In fact, in the aftermath of the *Beit Sourik* case, the fait accompli was overturned speedily.

The Court went even further to proclaim that the construction of the 'wall' constituted a breach of Israel's obligation to respect the Palestinian right to self-determination.[143] The 'wall' as a whole was held to be disproportionate. In his dissenting opinion, Judge Buergenthal stated that the opinion is one-sided in discussing only the harm caused by the wall and various provisions of international humanitarian law and human rights instruments, without conducting

> an examination of the facts that might show why the alleged defenses of military exigencies, national security or public order are not applicable to the wall as a whole or to the individual segments of its route. The Court says that 'it is not convinced' but it fails to demonstrate why it is not convinced, and that is why these conclusions are not convincing.

Judge Owada, too, noted that 'what seems to be wanted, however, is the material explaining the Israeli side of the picture, especially in the context of why and how the construction of the wall, as it is actually planned and implemented, is necessary and appropriate'. Thus, there was no mention in the Advisory Opinion of the suicide bombers and the terror attacks on the civilian population that made Israel plan the construction of the wall.

In the *Alfei Menashe* case, the Israel Supreme Court responded to the Advisory Opinion and analyzed it in detail.[144] It pointed out that even though the basic normative foundation upon which the ICJ and the Supreme Court based their judgments is a common one, the courts reached different conclusions. In the Supreme Court's opinion, the differences stem from the factual basis that was

[142] Dinstein, *The International Law of Belligerent Occupation* (n 70) 250ff.
[143] See the criticism by Judge Higgins on this point in her separate opinion.
[144] [56]–[72].

laid before the ICJ, which was different from that which was laid before the Supreme Court in the *Beit Sourik* case. It also noted the difference in the model of the proceedings. Whereas the ICJ held that the route of the wall contradicted international law, the Supreme Court held that a sweeping answer to the question of the legality of the fence should not be given, and that each segment should be examined separately. As a result, the Supreme Court concluded:

> The Supreme Court of Israel shall give the full appropriate weight to the norms of international law, as developed and interpreted by the ICJ in its Advisory Opinion. However, the ICJ's conclusions, based upon a factual basis different than the one before us, is not *res judicata*, and does not oblige the Supreme Court of Israel to rule that each and every segment of the fence violates international law. The Israeli Court shall continue to examine each of the segments of the fence, as they are brought for its decision and according to its customary model of proceedings; it shall ask itself, regarding each and every segment, whether it represents a proportional balance between the security-military need and the rights of the local population. If its answer regarding a particular segment is positive, it shall hold that that segment is legal. If its answer is negative, it shall hold that that segment is not legal. In doing so, the Court shall not ignore the entire picture; its decision will always regard each segment as a part of a whole. Against the background of this normative approach—which is the approach set out in the *Beit Sourik* Case, we shall now turn to examining the legality of the separation fence of the *Alfei Menashe* enclave.[145]

In one case concerning the detention of the appellants as 'unlawful detainees',[146] the Supreme Court referred to an ICJ case in which the Court emphasized the presence of military forces when deciding the existence of a state of occupation.[147]

Another case concerned the appeal of an Israeli–American dual citizen against an extradition order from Israel to the United States.[148] The Supreme Court dismissed the appeal, citing, inter alia, the ICJ decision in the *Nottebohm* case[149] that diplomatic protection may be exercised by the state of real and effective nationality.

In a case that concerned a claim in tort brought against the Ambassador of Egypt in Israel,[150] the District Court referred to the ICJ's interpretation of the Vienna Convention on Diplomatic Relations, 1961, in *United States Diplomatic and Consular Staff in Teheran* (*United States v Iran*).[151]

Another case raised the question of whether the introduction of excise tax and VAT by the IDF Commander with respect to sales in Judea, Samaria and Gaza

[145] [74]; For a comprehensive critical analysis of the Advisory Opinion of the ICJ and the Israel Supreme Court decisions, see Fania Domb, 'The Separation Fence in the International Court of Justice and the High Court of Justice: Commonalities, Differences and Specifics' in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines—Essays in Honour of Yoram Dinstein* (Leiden: Martinus Nijhoff, 2007) 509–41; Dinstein, *The International Law of Belligerent Occupation* (n 70) 247–59.

[146] Criminal Appeal 6659/06 *A v State of Israel* (2008) 47 ILM 768 [11].

[147] *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) Judgment [2005] ICJ Rep 168, [173].

[148] Criminal Appeal 6182/98 *Shoenbein v Attorney-General* 53(1) PD 625 (1999).

[149] *Nottebohm* case *(Liechtenstein v Guatemala)* [1955] ICJ Rep 4.

[150] Civil Appeal (Tel-Aviv) 4289/98 *Shlomit Shalom v The Attorney-General, Shulman and Bassyounni* tak-District 99(3), 2.

[151] [1980] ICJ Rep 3.

conformed to international law.[152] To answer this question, the Supreme Court referred to the ICJ *Asylum* case (*Columbia v Peru*),[153] regarding the proof of international custom.

In two cases concerning the detention of the appellants as 'unlawful detainees',[154] the Supreme Court referred to the definition of 'civilians' in an ICTY Case.[155] Also, in a case that concerned the pillage by an Israeli soldier of a mobile phone and some money,[156] the Military Court referred to an ICTY case regarding the prohibition of pillage under customary international law.[157] In addition, in a petition to the High Court of Justice,[158] the Supreme Court referred to an ICTY case regarding the prohibition on arrests of persons who are not suspected of posing a danger to public security.[159]

In a case concerning the prohibition of the force feeding of geese,[160] the Supreme Court referred to a case of the ECJ,[161] in which the European Court held that the provisions of the European Convention on the Protection of Animals kept for Farming Purposes were indicative rather than binding.

There are numerous references to the case-law of the European Court of Human Rights. In a petition brought by Israeli Arabs who had married spouses from Judea, Samaria and Gaza that the Supreme Court order the state to allow the families to be united within the green line,[162] the Supreme Court (that dismissed the petition) referred, among others, to two decisions of the European Court of Human Rights,[163] in which the European Court upheld the rejection by member states' authorities of applications for family reunion, not guaranteed by the protection of 'family ties' under the ECHR.

In a case that concerned the application of the biological parents to have an adoption order, given without the father's knowledge and consent,[164] the Supreme Court, while dismissing the pertinent appeal on grounds of the best interests of the child in the pertinent case, referred to a case in which the European Court held that placing a child for adoption without the unmarried biological father's knowledge or

[152] HCJ 69/81 *Abu'Aita v Commander of the Judea and Samaria Region* (1983) 37(2) PD 197.

[153] [1950] ICJ Rep 266.

[154] HCJ 769/02 *Public Committee against Torture in Israel v State of Israel* tak-Supreme 2006(4), 3958 (President Barak, para 26) and Criminal Appeal 6659/06 *A v State of Israel* (2008) 47 ILM 768, [12].

[155] *Prosecutor v Blaskic* (Judgment) ICTY-IT.95–14-T (3 March 2000).

[156] Appeal 62/03 *Chief Military Prosecutor v Sargeant Alexander Illin* tak-Military 2003(2), 48.

[157] *Prosecutor v Zejnil Delalic (Celebici prison-camp case)* ICTY-IT.96–21-T (16 November 1998).

[158] HCJ 3239/02 *Mar'ab v Military Commander of Judea and Samaria* tak-Supreme 2003(1), 937.

[159] *Prosecutor v Delalic*, ICTY case IT.96–21 (n 157).

[160] HCJ 9232/01 '*Noah*'—*the Israeli Association of the Organizations for the Protection of Animals v The Attorney-General* 57(6) PD 212 (2003).

[161] Case C-1/96 *R v Ministry of Agriculture, Fisheries and Food ex p Compassion in World Farming* [1988] ECR I-1251.

[162] HCJ 7052/03 *'Adallah v Minister of the Interior* tak-Supreme 2006(2), 1754.

[163] *Ahmut v The Netherlands* (App No 21702/93) ECHR 1996-VI No 24, and *Gül v Switzerland* (App No 23218/94) ECHR 1996-I No 3.

[164] Application Family Appeal 377/05 *plonit and ploni, prospective adoptive parents v Attorney-General* tak-Supreme 2005(2), 617.

consent amounted to an interference with his right to respect for family life under the Convention.[165]

In one case, the applicant petitioned the Supreme Court to declare unlawful the legal provision prohibiting spouses from adopting a child more than 48 years younger than themselves.[166] The Supreme Court dismissed the petition, referring, inter alia, to two decisions of the European Court of Human Rights. In the first,[167] the European Court held that the Convention does not guarantee the right to adopt as such, and that member states had the discretion to decide that single persons in general, but not homosexuals, may adopt children. In the second,[168] the Court considered the scope of protection of adoptive parents and their right to 'family life' under the Convention.

In a petition brought by an El-Al (Israeli airlines company) homosexual steward for benefits that the company granted the spouses of married employees, but not homosexual spouses,[169] the Supreme Court, which upheld the petition, referred, inter alia, to two decisions of the European Court of Human Rights regarding the protection of homosexual relations and the rights due to homosexual persons under the ECHR.[170]

In a case that concerned the illegal smuggling into Israel of aliens,[171] the District Court of Tel-Aviv referred to a judgment of the European Court of Human Rights in which the Court held that 'as a matter of well established international law and subject to its treaty obligations, a state has the right to control the entry of non-nationals into its territory'.[172]

As for non-judicial international bodies, the Israeli courts have used the non-binding Explanatory Notes and Classification Opinion issued by the Harmonized System Committee, composed of delegates of the 124 Contracting States of the World Customs Organization (WCO).

In order to make international trade statistics meaningful and facilitate international trade flows and tariff negotiations, the World Customs Organization (WCO) has developed a classification system—the Convention on the Harmonized Commodity Description and Coding System 1983, usually referred to as the HS. Products under the HS are classified on the basis of likeness. Six General Rules are included for the interpretation of the HS. The WCO maintains, amends, and updates the HS on a regular basis and takes measures to ensure its uniform interpretation. Contracting states must use all headings and sub-headings, together with their numerical codes, without addition or modification, and apply the HS

[165] *Keegan v Ireland* (App No 16969/90) (1994) Series A, No 290.
[166] HCJ 4293/01 *New Family v Minister of Labor and Welfare* tak-Supreme 2009(1), 3927.
[167] *Fretté v France* (App No 36515/97) ECHR 2002-I 347.
[168] *Pini v Romania* (App No 78028/01) ECHR 2004-V 299.
[169] HCJ 721/94 *El Al v Yonatan Danilovitz* 48(5) 749 (1994).
[170] *Norris v Ireland* (App No 10581/83) (1987) Series A No 142, and *Modinos v Cyprus* (1993) Series A No 259.
[171] Criminal Appeal (Tel-Aviv) 71494/06 *State of Israel v Bobo Bari Alusini* tak-District 2007(2), 12480.
[172] *Abdulaziz, Cabales and Balkandali v United Kingdom* (App No 9214/80) (1984) Series A No 94 [67].

General Rules of Interpretation. However, contracting states are allowed to establish, in their customs tariff, sub-divisions classifying goods beyond the level of the HS, provided that any such sub-division is added and coded at a level beyond that of the six-digit numerical code set out in the annex to the Convention.

The official interpretation of the HS is contained in five volumes of Explanatory Notes, authored by the WCO Harmonized Systems Committee (which is composed of delegates of WCO Members) and published by the WCO. The Explanatory Notes are not legally binding. In addition, the HS Committee publishes a Compendium of Classification Opinions with respect to the proper classification of specific goods. The HS Committee performs these functions according to Article 7, HS Convention, which authorizes it to 'prepare Explanatory Notes, Classification Opinions or other advice as guides to the interpretation of the Harmonized System'. The Israel Supreme Court gives much weight to both the Explanatory Notes and the Classification Opinion, even though they are not considered binding.[173]

[173] Regarding the Explanatory Notes, see Civil Appeal 2102/93 *State of Israel v Meron—Industrial Enterprises Galilee Ltd* 51(5) PD 160 (1997) and Civil Appeal 6296/95 *Diduktikt Ltd v Director of Customs and Excise, Purchase Tax and VAT* 53(2) PD 861 (1999); regarding the Classification Opinions see eg, Civil Appeal 2102/93 *State of Israel v Meron—Industrial Enterprises Galilee Ltd* 51 (5) PD 160 (1997); Civil Case (Tel-Aviv) 60609/92 *Agan Chemicals Producers Ltd v State of Israel* Dinim-Magistrate, vol 15, 241. For further discussion cf Avigdor Dorot, *Customs and International Trade Laws* (Chambers of Commerce, Ramat Gan 2006) (in Hebrew) 101–23.

# 13

# Italy

*Giuseppe Cataldi*

## 1. Introduction

A democratic republic replaced the Italian monarchy in 1946, followed quickly by a Constitution, which became effective in 1948. This Constitution established a bicameral Parliament consisting of the Senate and the Chamber of Deputies, which elects the President of the Republic. Based on the results of the political elections, the President nominates the Prime Minister, who chooses the other ministers. The Italian ordinary judicial system, based on Roman law modified by the Napoleonic code and subsequent statutes, is composed of a civil and a criminal branch, both of them presided over by the Supreme Court of *Cassazione*; it enumerates, among its statutory prerogatives, the uniform interpretation of law—including international treaty and customary norms that it considers relevant to the cases at hand—throughout the domestic court system. Questions of a law's constitutionality may arise as 'incidents' to ordinary judicial proceedings and they fall under the jurisdiction of the *Corte costituzionale*; in verifying the constitutional legitimacy of laws and acts having the force of law, this court may well interpret any relevant international norms affecting the supreme principles of the constitutional order.

Italy was a founding member of European Union (EU), was admitted to the United Nations in 1955, and is a member of the North Atlantic Treaty Organization (NATO), the Organization for Economic Co-operation and Development (OECD), the General Agreement on Tariffs and Trade/World Trade Organization (GATT/WTO), the Organization for Security and Co-operation in Europe (OSCE), and the Council of Europe. Italy has not accepted compulsory ICJ jurisdiction.

### 1.1 Relevant Constitutional Provisions

Article 87, paragraph 8, of the Italian Constitution (Constitution) provides that the President of the Republic 'ratifies international treaties which have, where required, been authorised by the Houses'. Article 80 Constitution specifies that '[t]he Houses authorise by law the ratification of international treaties which are of a political nature, or which call for arbitration or legal settlements, or which entail changes to the national territory or financial burdens or changes to legislation'. Finally, Article

89 provides for governmental control on the President's power of ratification by requiring the proposing minister—usually the President of the Council of Ministers—to countersign the act of ratification for it to be valid. In doing so, the President of the Council of Ministers assumes the political responsibility for the act.

This constitutional procedure of ratification of treaties is usually modified in practice. In fact, it is possible for the government to conclude a treaty in a 'simplified form' for the matters listed in Article 80 Constitution. Only afterward does the government ask for the Parliament's approval of the treaty.[1] No constitutional norm has been established to regulate this 'simplified form' procedure.[2]

In the Italian legal system, treaties are incorporated by means of the laws of ratification and must be consistent with the Constitution. Important indications on the relationship between treaties ratified by Italy and the constitutional order are found in the Constitution, even though the references are to distinguish the legal discipline in force before and after the 2001 constitutional reform. In fact, a clear supremacy of international treaties over national laws had been originally provided for by the Constitution only for some categories of treaties, namely the Lateran Pacts,[3] the treaties on the legal status of foreigners,[4] and the treaties establishing the European Communities.[5]

- *Lateran Pacts*: Article 7 Constitution reads as follows: 'The State and the Catholic Church are independent and sovereign, each within its own sphere. Their relations are governed by the Lateran Pacts. Changes to the Pacts that are accepted by both parties do not require the procedure for constitutional amendment.' However, the special status of the Lateran Pacts accorded by the Constitution is subject to a limit: the supremacy of fundamental principles of the constitutional order over principles established by the Pacts. Indeed, in its Decision No 18 of 2 February 1982, the Constitutional Court evaluated the constitutionality of the domestic law implementing the Concordat. At that time, the law provided for the automatic civil effect of the church's annulment of marriages originally celebrated by a Roman Catholic priest. The Court decided to repeal some provisions of the execution order[6] of the treaty because the church's procedure for the annulment was inconsistent with Article 24 Constitution, sanctioning the right to be heard before a court as a constitutional guarantee. In its Decision, the Constitutional Court underlined that both the declaration of sovereignty under Article 1 of the Concordat and the recognition of the separation of the Catholic Church and the Italian Republic under Article 7 of the Constitution imply that the supreme

[1] See, for example, the case of the Italian accession to the UN: the accession was accomplished by an act of the Italian Ministry of Foreign Affairs on 7 May 1947 and it was accepted by the General Assembly in 1955; the Italian Parliament approved this accession by Law No 847 of 17 August 1957.

[2] The international treaties concluded in this way are also named 'executive agreements' (see section 2.2 of this chapter).

[3] Constitution 1948, Article 7.

[4] Constitution 1948, Article 10, [2].

[5] Constitution 1948, Article 11.

[6] *Ordine di esecuzione*—see section 5 below.

principles of the constitutional order take priority over the law implementing the Concordat.

- *Treaties on legal status of foreigners*: Article 10, paragraph 2, Constitution affirms: 'The legal status of foreigners is regulated by law in conformity with international rules and treaties.' This provision establishes that treaties relating to aliens prevail over domestic laws. As a consequence, legislative provisions in conflict with such treaties may be subject to constitutional review and be repealed by the Constitutional Court for indirect violation of the Constitution.
- *European Community treaties*: The Italian Republic is a member state of the European Community/European Union. The Constitutional Court gives a special status to the European Community treaties through a particular interpretation of Article 11 Constitution.[7] This article, which was drafted in the Constitution to permit Italy to adhere to the United Nations, affirms that 'Italy rejects war as an instrument of aggression against the freedoms of others peoples and as a means for settling international controversies; it agrees, on condition of equality with other States, to those restraints on sovereignty which are necessary to a legal system grounded upon peace and justice between Nations; it promotes and encourages international organizations having such ends in view.'[8]

After the 2001 constitutional reform, the new Article 117, paragraph 1, Constitution reads as follows: 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU-legislation and international obligations.' The Italian Constitutional Court has clarified the real meaning of this provision in its Decisions Nos 348 and 349 of 24 October 2007.[9]

In reference to customary international law, Article 10, paragraph 1, Constitution reads as follows: 'The Italian legal system conforms to the generally recognised rules of international law.' This Article is considered to be a 'permanent converter' of international customary law into domestic law. By using the word 'conforms', Article 10 implies that the Italian legal order continuously and automatically incorporates international customary law, as it comes into force and evolves. The incorporation of international customary law is automatic in the sense that no legislative action is required to implement it. The prescription that Italian law conforms itself to international customary law implies that only a constitutional amendment can override the application of such a law. However, Article 10 does not specify what 'generally recognised rules of international law' are. Consequently, it is left to the interpreter to examine the practice in order to determine its existence.[10]

[7] See Constitutional Court, *Frontini*, 18 December 1973, Decision No 183.
[8] About the relationship between the European legal order and the Italian legal order, see section 1.4.
[9] See section 5.
[10] See section 4.

The Constitution does not mention other sources of international law, such as general principles of law, decisions of international tribunals or acts of international organizations, both binding and non-binding (as the Universal Declaration of Human Rights). However, 'generally recognised rules of international law' under Article 10, paragraph 1, Constitution, as interpreted by the Constitutional Court, also include 'the general principles of law recognized by civilized nations'.[11]

## 1.2 Legislative References to International Law

In the Italian legal order, ad hoc domestic pieces of legislation are adopted to implement the acts of international organizations, with the exception of the European Community. Domestic pieces of legislation reproduce and/or complete the provisions of the international organization acts. For example, UN Security Council sanctions against South Rhodesia in 1966 and against Iraq in 1991 were implemented by ordinary laws, while Annexes to the ICAO Convention are generally implemented by legislative decrees or administrative regulations. The acts of international organizations have the same rank as domestic laws adopted for their implementation.

An ordinary law, Law No 12 of 9 January 2006, establishes the legislative procedures to execute the decisions of the European Court of Human Rights in the Italian legal system. Article 1, paragraph 1 of this Law reads as follows: 'Anyone sustaining pecuniary or non-pecuniary damage as a result of a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, on account of a failure to comply with the "reasonable-time" requirement in Article 6, paragraph 1, of the Convention, shall be entitled to just satisfaction.' The aim of the law is to reduce the number of applications to the European Court of Human Rights by Italian citizens claiming that the excessive length of proceedings before domestic courts violates Article 6, paragraph 1, of the European Convention on Human Rights (ECHR).

## 1.3 Competences of the Italian Regions

The Italian Constitution gives wide legislative and administrative autonomy to the regions and to the autonomous provinces of Trento and Bolzano. In particular, it also establishes the attribution of competences in matter of international relations to the regions.

The relevant constitutional provisions are:

- Article 117, paragraph 1, Constitution: 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU law and international obligations.'

[11] See Constitutional Court, 18 April 1967, Decision No 48; 8 April 1976, Decision No 69; 28 April 1994, Decision No 168.

- Article 117, paragraph 5, Constitution: 'Regarding the matters that lie within their field of competence, the Regions and the Autonomous Provinces of Trento and Bolzano participate in any decision on the formation of community law. The Regions and autonomous provinces also are responsible for the implementation and execution of international obligations and of the acts of the EU in observance of procedures set by state law. State law establishes procedures for the State to act in substitution of the Regions whenever those fail to fulfil their responsibilities in this respect.'
- Article 117, paragraph 9, Constitution: 'Within its field of competence the Region may establish agreements with foreign states and understandings with territorial entities that belong to a foreign state, in the cases and forms provided for by state law.'
- Article 120, paragraph 2, Constitution: 'The Government may act as a substitute for regional, metropolitan city, provincial, or municipal authorities whenever those should violate international rules or treaties or community law, whenever there is a serious danger for the public safety and security, and whenever such substitution is required in order to safeguard the legal or economic unity of the nation, and particularly in order to safeguard the basic standards of welfare related to civil and social rights, irrespective of the boundaries of the local governments. The law defines appropriate procedures in order to guarantee that substitution powers are exercised within the limits set by the principles of subsidiary and fair cooperation.' The ordinary law that provides for the appropriate procedures in order to guarantee substitution power of the central government is Law No 131 of 5 June 2003, specifically Article 8. In particular, according to this Law, the government can act directly or by appointing somebody (a commissioner) to manage the situation.

Charters (*Statuti*) of the Italian regions and of the autonomous provinces of Trento and Bolzano make reference to international law and EC law only by reproducing or recalling the provisions of the Italian Constitution.

By the adoption of ordinary laws, the Italian Parliament stipulated the procedure and conditions that regions must respect to exercise their legislative powers in compliance with international obligations and EU/EC law to conclude international agreements and to implement international obligations and EU/EC acts (see Law No 131 of 5 June 2003, Article 6, paragraph 1, and Law No 11 4 February 2005). In particular, Article 6 of Law No 131 of 2003 establishes that the foreign power of the regions and the autonomous provinces consists exclusively in the power to transpose and implement international agreements ratified by the state, to reach understandings with foreign sub-state territorial entities, and to conclude executive agreements or agreements to implement international treaties already entered into force, as well as agreements of a technical/administrative or programmatic nature with foreign states. In its decision No 211 of 01 June 2006, the Constitutional Court underlined that Article 6 of Law No 131 of 2003 is a provision circumscribed to the limited domain of the shared competence over international relations, and it cannot be used by regions as a basis for the

subsequent ratification by the state of a regional activity, which infringes on the exclusive competence of the state over foreign policy.

As far as the competences and the modalities of the Italian regions and the autonomous provinces of Trento and Bolzano to conclude international agreements, the Parliament adopted Law No 131 of 5 June 2003, under Article 117, paragraph 9, Constitution.[12]

## 1.4 The Special Regime for EC/EU Law

As stated by the EC Court of Justice in 1963:

> [T]he EEC Treaty, albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions.[13]

Article 11 Constitution has been used as the legal basis for the participation of the Italian Republic in the European integration process. In the *Granital* case[14] the Court expresses its final position on the relation between the EC legal system and the Italian legal order. According to the Court, after the ratification of EC Treaties by the Italian Republic, Article 11 Constitution makes Community law applicable in the Italian legal system as the law of an autonomous legal order. As a consequence, if an ordinary court holds that a domestic piece of legislation, both ordinary law and administrative law, falls inside the scope of EC law, the latter prevails over the former whether or not the domestic law was adopted before or after the EC law became effective. This solution makes possible the effective and continuous application of EC law into domestic order without it being necessary for the court to wait for the outcome of the constitutional legitimacy cross-appeal in order to repeal the provision that is contrary to EC law.[15] Furthermore, this solution does not mean that the Constitutional Court loses its role as a guardian of the Constitution. Indeed, the Court has reserved the power to rule upon the conformity of EC rules with the fundamental principles of the Italian constitutional order and the inalienable rights of the human being. In the *Granital* case, the Constitutional Court also reserved the power to rule upon the validity of domestic laws that are challenged on the grounds that, if they were left in force, they would impede or prejudice the observance of the basic principles of the EC Treaty. In these two cases, courts cannot decide autonomously to dismiss domestic law, but they must instead trigger the procedure of constitutional control before the Constitutional Court.

[12] See, in particular, Law No 131/2003, Article 6, [2].
[13] Case 26/62 *Van Gend en Loos v Netherlands* [1963] ECR 3.
[14] Constitutional Court, *Granital*, 8 June 1984, decision No 170.
[15] See *Frontini* (n 7).

The Treaty establishing the European community requires the EC legislator to respect some international treaties when adopting EC acts (ie acts adopted jointly by the European Parliament and the Council, acts of the Council, the Commission and the ECB, other than recommendations and opinions, and acts of the European Parliament intended to produce legal effects vis-à-vis third parties):

- Article 63, paragraph 1, establishes that the Council adopts measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 on the status of refugees and other relevant treaties. However, the EC is not a part of these treaties; only member states have ratified them.
- Article 136 of the EC Treaty asserts that the EC and its member states adopt social measures, having in mind fundamental social rights such as those set out in the European Social Charter signed in Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers. The European Social Charter is an international treaty adopted in the framework of the Council of Europe, ratified by all member states but not by the EC. The Community Charter of the Fundamental Social Rights of Workers is a non-binding agreement, signed by member states.
- Article 6, paragraph 2, of the EU Treaty reads as follows: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, as general principles of Community law.' The EC Court of Justice considers the ECHR as an interpretative guide in litigation concerning human rights. Regarding the interpretation of the ECHR, the Court of Justice takes into account the European Court of Human Rights' interpretation of Convention provisions, following its case-law wherever possible.

Article 300 of the EC Treaty, which establishes the procedures that the European Community must follow in order to conclude an international agreement with one or more states or international organizations, at paragraph 7, reads: 'Agreements concluded under the conditions set out in this article shall be binding on the institutions of the community and on member States.' Thus, an agreement concluded by the EC under the EC Treaty is part of the EC law from the date it comes into force.[16]

According to Article 300, paragraph 7, of the EC Treaty, the member states are bound, like EC institutions, by the international agreements that the EC has the competence to conclude. In ensuring the respect for the obligations arising from an international agreement concluded by the EC, member states fulfil an obligation they have not only with third state(s) or international organization(s) that the EC has concluded the agreement with, but also with the European Community that has assumed the international responsibility with the third state(s) or the

[16] Case C-181/73 *Haegeman v Belgian State* [1974] ECR 449.

international organization(s) to comply with and implement the international agreement.[17]

Moreover, the EC Court of Justice holds that the provisions of an international treaty entail direct effects when, in the light of the wording and the purpose and nature of the international agreement concerned, they contain clear and precise obligations that are not subject, in implementation or effects, to the adoption of any subsequent EC or domestic measure.[18]

According to the case-law of the EC Court of Justice, the provisions of WTO agreements do not entail direct effects, as 'given their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions'. However, according to the EC Court of Justice case-law, two exceptions are allowed. The validity of EC measures can be reviewed in the light of WTO rules when (1) the EC measure at stake is 'intended to implement a particular obligation' assumed in the framework of the WTO or (2) the EC measure 'refers expressly to the precise provisions of the WTO agreements'.[19] However, in *The Netherlands v European Parliament and Council* case of 1998, the EC Court of Justice distinguished between international understandings of a lawmaking character, such as the Convention on Biological Diversity, and those of a reciprocal and mutual advantageous character, such as the WTO and TRIPS Agreements. The latter are not in principle among the rules by which the Court reviews the lawfulness of measures adopted by the EC institutions. However, the Court states clearly that the fact that an international agreement, such as the Convention on Biological Diversity, does not have direct effect in EC law 'does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement'.[20]

Finally, the EC Court of Justice holds:

> [T]he obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.[21]

In the EC and EU Treaties there is no provision expressly stating that the EC and/or the EU shall comply with general international law. In spite of this, the EC Court of Justice had the opportunity to deal with this issue on many occasions. The

[17] Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A* [1982] ECR I-3641.

[18] See, with reference to the provisions of an association agreement, Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR I-3719, and, with regard to the decisions adopted by mixed organs instituted by an association agreement, Case C-192/89 *Sevince v Staatssecretaris van Justitie* [1990] ECR I-3461.

[19] Case C-149/96 *Portugal v Council* [1999] ECR I- 8395, and Case C-377/02 *Van Parys v Belgische Interventie- en Restitutiebureau* [2005] ECR I-1465.

[20] Case C-377/98 *The Netherlands v European Parliament and Council* [2001] ECR I-7079.

[21] Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

Court was initially reticent about the legal effects of international customary law in the EC legal system. It mainly relied on international customary law only to define the limits of the state/EC jurisdiction and powers, to interpret international agreements ratified by the EC and the rules of EC law, and to fill the gaps in EC law. This can be explained by the efforts that the EC Court of Justice makes to safeguard the autonomy of EC law vis-à-vis international law.

Notwithstanding this, in the *Poulsen* case, the EC Court of Justice held that 'the European Community must respect international law in the exercise of its powers' and that it therefore interprets and applies EC law in conformity with international customary law.[22] Even though the Court of Justice did not explicitly state the possibility that international customary rules can be relied upon to review the legality of EC acts, the Court made clear that international customary law was part of the EC legal system and that it had the competence to ensure the compliance of EC law with international customary law.

However, in the *Racke* case, the Court of Justice was more explicit on this issue.[23] In the *Racke* case, the Court was asked to review the validity of an EC regulation in light of a rule of international customary law relating to the law of treaties: the principle *rebus sic stantibus.* The Court stated that customary international law is part of the EC legal order and the court has jurisdiction to review whether an EC Act violates of a rule of international customary law. Furthermore, the Court held that international customary law prevails over secondary EC law, even if the law seems to restrict the international customary law.

However, the jurisdiction of the Court to review the legality of an EC Act in relation to a rule of international customary law is limited to the following cases: (1) the application of the international customary rule must be invoked by an individual; and (2) the EC Act is, actually, implementing the invoked rule of international customary law. Indeed, the Court not only restricts the scope of the rules of customary international law, but it also mitigates the effects of the review of legality, admitting it only on grounds of manifest errors relating to the conditions of application of international customary law.

## 2. Treaties and Other International Agreements

### 2.1 The Definition of 'Treaty'

The Italian courts' case-law implicitly defines 'treaty' as an international agreement concluded among states, usually in a written form, and governed by international law whether embodied in a single instrument or in two or more related instruments and whatever its name (ie agreement, treaty, convention, charter, or covenant).

[22] Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.* [1992] ECR I-6019.

[23] Case C-162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz.* [1998] ECR I-3655.

The domestic courts distinguish legally-binding international texts from political commitments when they interpret or apply a provision in a case pending before them. In order to determine whether or not a particular treaty is meant to be a legally-binding document, domestic courts examine the explicit or implicit intent of the parties. An analysis of the wording can also clarify the exact nature of the treaty.[24]

However, in order for an international treaty to be considered as such, the parties must express the intention of creating legal rights or obligations or establishing relations governed by international law. This intention is not expressed by political commitments. In accordance with international practice, the Italian government signs joint commitments of policy orientation that do not establish legal obligations. These acts result from diplomatic exchanges of notes stating common positions or actions on policy issues or on matters of mutual concern.

Domestic courts rely on domestic or international law when deciding issues of treaty law. They interpret treaties on the basis of Articles 31 and 32 of the Vienna Convention on the Law of Treaties ('Vienna Convention'). A treaty shall be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Recourse may be had to supplementary means of interpretation such as 'the preparatory work of the treaty and the circumstances of its conclusion' to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure.[25] However, in its Judgment No 3610 of 24 May 1988, the *Corte di Cassazione* affirmed that when two interpretations of the same provision of an international treaty are possible, one in pursuance of and the other against the Italian Constitution, the first interpretation must be chosen by the court without bringing the case before the Constitutional Court in order to have an authoritative interpretation.[26] Finally, the *Corte di Cassazione* in Judgment No 6100 of 13 July 1987 underlined that treaties codifying 'general customary laws' must be interpreted in the light of international customary rules and, if necessary, the international customary rules shall be used to fill in any gap in the treaty provisions.

It is generally accepted that each ministry of the Italian government has a treaty-making power in all the matters under its administrative and technical competences. In this case, the consent of Italy to be bound by the treaty is expressed by the signature of the ministry and the treaty becomes effective without following any other constitutional ratification process. However in the *Baraldini* case, the

[24] See, for example, Council of State, 7 December 1993, Decision No 960, relating to the binding nature of recommendations adopted by the Conferences of Parties in Heiligenhafen and in Cagliari to implement the Convention on Wetlands of International Importance (Ramsar, 2 February 1971).

[25] See, for example, *Corte di Cassazione*, 16 December 1987, Judgment No 9321; *Corte di Cassazione*, 21 July 1995, Judgment No 7950.

[26] For a discussion of the contrast between a rule of an international treaty and the Italian Constitution, see section 5.

Constitutional Court held implicitly that a treaty concluded in 'a simplified form' cannot contravene domestic ordinary law.[27]

## 2.2 The direct application and the incorporation of ratified treaties

The Italian Constitution does not contain any express general rule providing for the incorporation of international treaties into the domestic legal order. According to Article 10, paragraph 1, Constitution, only international customary law is automatically incorporated into the legal system.[28]

Under the dualist approach followed in Italy, no treaty produces its effects in the domestic legal system if the implementing legislation has not been adopted. In Italy, such legislation might assume one of two possible forms: it could be a law that simply contains one or two provisions ordering the domestic execution of a certain treaty, the text of which is usually annexed and that will be applied untransformed ('special' method); or it could be a law that interprets and reformulates the provisions of the treaty amending the national legislation if this is necessary to implement them ('ordinary' method).[29]

The coexistence, for the purpose of implementing treaties, of an 'ordinary' method and a 'special' method confirms that, unlike other legal systems, such as those of common law, the Italian system does not exclude a priori the direct application of the rules of conventional international law. The legislator is expected to resort to the first in cases where the treaty contains rules that are only programmatic or whose content cannot be determined solely by interpretation, or rules that do not fully prescribe all the details and aspects of particular cases regulated and thus require supplementary legislation. A mere 'execution order' should, instead, be used in cases where international norms have an inherent aptitude—to be ascertained on a case-by-case basis—to be directly applied in the domestic order.[30]

Relating to the matters listed in Article 80 Constitution,[31] the Italian Parliament usually prefers the first method. In this case, the ordinary law ordering the domestic execution of a treaty is called *ordine di esecuzione* ('execution order'). According to legislature practice, the law authorizing the ratification of a treaty orders, at the same time, the domestic execution of that treaty.

The execution of a treaty can also be ordered by administrative acts, but only when the treaty does not deal with matters already regulated by law or the Constitution does not provide that they must be governed by ordinary law (*riserva di legge*).[32]

[27] Constitutional Court, *Baraldini*, 23 March 2001, Decision No 73. In this case, the treaty 'in simplified form' was the conditions for the transfer of Mrs Silvia Baraldini—a detainee—from the USA to Italy. The agreement was signed by the US Secretary of Justice and the Italian President of the Council of Ministries. Italian ordinary law in conflict with the treaty was Law No 334/1988 Ratification and execution of the Convention on the Transfer of Sentenced Persons.

[28] See section 4.

[29] See section 5.

[30] Concerning self-executing rules of international treaty law, see section 2.3.

[31] See section 1.

[32] For example, see the subject matters listed in Constitution 1948, Article 80.

A treaty ratified by the Italian government can produce legal effects in the national legal system only if an implementing law has previously been adopted.[33] On the contrary, until the implementing legislation is adopted by the legislator, an international treaty can be used by domestic courts only to interpret a domestic piece of legislation on the same matter already in force.

## 2.3 Domestic Courts and the Doctrine of Self-executing Treaties

In the Italian legal order, the courts and the doctrine have not established a univocal method to be used in order to determinate the self-executing nature of an international treaty.

In particular, two different points of view have been expressed about the doctrine of self-executing international rules. According to the first one—the monist approach—the self-executing nature of an international rule is determined according to the characteristics it has in the international legal order. According to the second one—the dualist approach—the self-executing nature of international rule is to be determined according to the characteristics of the domestic legal order. The latter is the approach generally adopted in Italy. Thus, in order to determine the nature of an individual right established by a treaty, courts should examine: (1) whether the implementing domestic provision confers a right directly on individuals, and (2) which remedies are provided by the domestic legal order to enforce that right. The better strategy for the claimants is to invoke the Italian execution order (*ordine di esecuzione*) of a treaty establishing a right. However, the interpreter's willingness is crucial to endow the conventional norm with direct effect. The assessment of the self-executing nature of an international rule—which is already incorporated in the domestic legal order—has to be carried out on a case-by-case basis.

It is frequently affirmed that the direct application of an international convention is not possible. This affirmation, as far as it refers to the convention in its entirety without taking into consideration its single norms on a case-by-case basis or the structure of the receiving domestic system, is totally unjustifiable. This affirmation is not compatible with the favour for international norms recognized by national constitutions and denotes a clear willingness to elude the application of such norms. It is not logical to exclude direct applicability of an entire treaty, instead of analyzing the individual provisions case by case. Such a system could result in norms that are incomplete being directly applicable, while detailed norms may be non-self-executing because of a 'rejection' of the domestic system.

This is even truer in the case of conventional norms on the protection of human rights. In the past, the doctrine of self-executing treaties was invoked in the case of conventional norms on the protection of human rights, specifically in relation to the ECHR. The *Corte di Cassazione*, in its Decision in the *Polo Castro* case of 8 May 1989, confirmed the possibility of direct application of a conventional rule containing 'the model of a national act complete in its essential elements' (in this case,

[33] See *Corte di Cassazione*, 22 March 1984, Judgment No 1920.

Article 5, paragraph 4, of the ECHR, which grants to anyone deprived of personal freedom the right to appeal to obtain a ruling on the legality of the arrest or detention). It might be objected that, in the *Polo Castro* case, it was a matter of filling a gap in the national system by direct application of the international norm (as there was no specific national law on the subject) and not of simultaneous non-application of a specific norm of domestic law, as in the case under review. More recently, however, and further to the reform of Article 117(1) Constitution, the *Corte di Cassazione* expressly affirmed in a dispute on land occupation for purposes of expropriation, that 'any direct application of Article 1, Protocol 1 of the Convention [...], is under the responsibility of the national judge who, if he perceives any conflict with the national law, must give precedence to the conventional norm provided with immediate binding effect in respect of the concrete case, even if this means the non-application of the national norm'.[34]

This conclusion, which also complies with the guidance of the Strasbourg Court, is confirmed by other decisions.[35] Moreover, the *Corte di Cassazione* stated the need, during the enforcement phase of a final criminal sentence, for full and direct application of the right to a new trial, as a consequence of an ascertained violation of Article 6 of the ECHR by the Strasbourg Court. Thus, the *Corte di Cassazione* declared unenforceable a final judgment and consequently did not apply the rules of the code of criminal procedure on the irrevocability of a final sentence.[36]

Nevertheless, in its Decisions Nos 348 and 349 of 2007, the Constitutional Court absolutely excluded the possibility of the judge directly applying the ECHR rules and setting aside the national norm. The reasons are numerous: first, because of the excluded 'communitarisation' of the ECHR;[37] second, because, according to the Court:

> [C]urrently, no elements relating to the structure and objectives of the ECHR, or to the characteristics of its specific norms, allow us to maintain that the legal position of the individuals may be directly and immediately tributary to it, independent of the traditional legal screen of their respective States, so as to allow the judge not to apply the conflicting national rule. The decisions of the Strasbourg Court [...] are addressed to the State legislator and expect a certain conduct from it. This is even more evident when, as in this case, there is a 'structural' conflict between the pertinent national norm and the ECHR as interpreted by the Strasbourg Court and the member State is requested to draw the necessary consequences.[38]

With regard to the impediment to direct application of conventional norms deriving from the 'structure' and 'objectives' of the ECHR, it is clear, in light of the long excursus dedicated to the status of EC law within the Italian legal system, that the Court refers to the fact that the ECHR has not created a supranational legal system that is comparable to the European Community and the European Union.

[34] *Corte di Cassazione*, 19 July 2002, Judgment No 10542.
[35] *Corte di Cassazione*, 23 December 2005, Judgment No 28507.
[36] *Corte di Cassazione*, *Dorigo*, 25 January 2007, Judgment No 2800.
[37] See section 5.
[38] Constitutional Court, 24 October 2007, Decision No 349.

Only the origin from a legal system that has the features of the latter would make ECHR norms directly effective within the Italian legal system through the constitutional 'umbrella' provided by Article 11. The Constitutional Court explicitly holds that the ECHR 'does not establish a supranational legal system and does not therefore create norms that are directly applicable in the contracting States'.[39]

It is hard to share the opinion that the 'structure' and 'objectives' of the ECHR can impede this result. It is also difficult to understand how 'the characteristics of specific norms' can prevent direct applicability since a dual verification is required for direct application: firstly, a verification on whether the abstractly suitable norm has been introduced into the domestic system by the legislator; secondly, a verification of the concrete possibility that the specific norm is relevant for the particular case on trial. It is the negative result of the second verification that has justly led judges (the *Corte di Cassazione* in particular) to defer the issues under review to the Constitutional Court. However, the review by ordinary judges of ECHR conformity does not represent a 'bypassing' of the constitutionality review, principally taking into account the sub-constitutional status attributed to the ECHR by the Constitutional Court.

## 2.4 The Role of Domestic Courts in Interpreting and Applying a Treaty

In Italy, domestic courts are formally and substantially free from any deference to the views of the government or legislature in interpreting a treaty provision.

In the Italian Constitution there is no rule on the power of the legislature or the government to formulate a reservation to a treaty. Thus, in practice, the competence to formulate reservations is exercised by the government and by the Parliament. The Parliament may formulate a reservation to a treaty when it authorizes the President of the Republic to ratify the agreement. The reservations formulated by the Parliament are usually included in the ordinary law adopted by the Parliament authorizing the President of the Italian Republic to ratify the treaty.

Concerning the power of the government to formulate a reservation to an international treaty, the government may formulate a reservation in two cases: (1) when it signs a treaty that is ratified in a 'simplified form' or (2) adding its reservations to the Decree adopted by the President of the Italian Republic to ratify the treaties on the subject-matters under Article 80 Constitution. In the second case, three hypotheses can be envisaged: (a) the Parliament acknowledges the government's reservation before adopting the ordinary law authorizing the presidential decree of ratification; (b) the government formulates its reservation when it exchanges or deposits the instrument of ratification, acceptance, approval or accession to the treaty, the Parliament is not aware of the government reservation, but the treaty is valid according to both international and domestic law, with or without the previous consent of the Parliament; (c) the government does not take into account the reservation formulated by the Parliament when it exchanges or

[39] Constitutional Court, 24 October 2007, Decision No 348 [3.3].

deposits the instrument of ratification, acceptance, approval or accession to the treaty, and makes applicable the provision of the treaty originally covered by the parliamentary reservation, thus widening the legal effects and the obligations arising from the treaty. In this third case, the consent to be bound by the provision of the treaty covered by the parliamentary reservation is expressed by the government in manifest violation of Article 80 Constitution.[40]

In their decisions, domestic courts are bound to take into account the reservations formulated to treaties by the Parliament and the government. No decision of domestic courts discussing the scope or the validity of a reservation to an international treaty appears in the record.

When interpreting domestic law, including constitutional matters, Italian courts do not make reference to or apply treaties to which Italy is not a party.

## 3. Customary International Law

International customary law is automatically incorporated into domestic law. Article 10, paragraph 1, Constitution expressly establishes that: 'The Italian legal system conforms to the generally recognised rules of international law.' Article 10, paragraph 1, Constitution, therefore, provides for a 'special' method of implementation of international customary law, as the 'ordinary' one is characterized by the adoption of a domestic piece of legislation by the Parliament or the government in order to implement international law. This method is usually used to incorporate treaties or binding acts adopted by international organizations that are not considered to be self-executing.[41]

Article 10, paragraph 1, Constitution has been defined as a 'permanent converter' of international customary law. In that sense, it makes the rules of international customary law, the general principles of international law[42] and peremptory rules of international law (*jus cogens*)[43] part of the Italian legal system by providing domestic courts with the opportunity to interpret and apply them to give judgment in a case pending before them. Therefore, Article 10, paragraph 1, Constitution not only provides the obligation to implement international customary law, but also directly and automatically provides its incorporation into domestic law. The 'special' method of implementation established by Article 10, paragraph 1, Constitution ensures prompt, immediate and constant compliance of the Italian legal system with international customary law because a rule of international customary law produces its effects in domestic law and can be applied as it comes into existence.

[40] See the Vienna Convention on the Law of Treaties (adopted 23 May 1969), Article 46.

[41] See section 2.4.

[42] See Constitutional Court, 12 April 1967, Judgments No 48; 25 March 1976, Judgment No 69; 27 April 1994, Judgment No 168.

[43] See *Corte di Cassazione* (Supreme Court), *Ferrini v Federal Republic of Germany*, 11 March 2004, Judgment No 5044; *Lozano,* 24 July 2008, Judgment No 31171; *Criminal Proceedings against Josef Max Milde,* 13 January 2009, Judgment No 1072.

Notwithstanding the fact that Article 10, paragraph 1, Constitution incorporates the principle *pacta sunt servanda* into Italian domestic law, this provision is considered to refer only to international customary rules and not to international treaties or to other international obligations undertaken by Italy.[44] The fact that treaties fall outside the scope of Article 10, paragraph 1, Constitution can be explained with the following arguments: (1) International customary law has general application, deriving from a widespread repetition by a significant number of states of similar international acts over time (*diuturnitas*), which occurs out of the conviction of their legal or social necessity (*opinio juris sive necessitatis*). Article 10, paragraph 1, Constitution expresses the will of the constituent to give immediate and complete implementation to international customary rules that correspond to a wide consensus that some obligations must be fulfilled by all states. (2) It is hard to identify accurately both when international customary rules come into force (as it depends on state practice and *opinio juris*) and what their content is, at it can change in accordance with the conduct of states. Accordingly, the Constitution considered it more appropriate to establish a method that automatically and constantly incorporates international customary rules into domestic law.

All domestic institutions and organs, especially national courts, charged with the application of law have the competence to verify the existence or the content of international customary rules and the changes that their automatic incorporation produces in the Italian legal system. They shall compare the content of international customary law with the content of domestic law in order to establish which domestic rules have been amended or have come into force in order to fulfil the international obligations.

When establishing the existence or the content of an international customary rule, the courts are independent. They shall not defer to the government or the legislature, nor shall they rely on the practice or the opinion expressed by them. Moreover, for the same reason, the court can recognize and accept the existence of a rule of international customary law without requiring proof from the party asserting that rule. Ordinarily, the party can present evidences or facts to the court in order to support the existence of a rule of international customary law and its application to the case. However, even if the party's argument can help the court establish the existence or content of a rule of international customary law, it is for the court to take judicial notice of it.

The Italian court is completely independent both in applying a rule of international customary law and in taking the decision to bring a question of constitutional legitimacy before the Constitutional Court, However, the interpretation and the effect of the application of international customary law is limited to the case

[44] See Constitutional Court, 18 May 1960, Judgment No 32; 22 December 1961, Judgment No 68; 26 June 1969, Judgment No 104; 25 March 1976, Judgment No 69; 22 December 1980, Judgment No 188; 6 June 1989, Judgment No 323; 26 February 1993, Judgment No 75; 28 July 1993, Judgment No 438; 27 April 1994, Judgment No 168 of 1994; 7 May 1996, Judgment No 146; 24 October 2007, Judgments Nos 348 and 349.

pending before the court, and the interpretation cannot be considered as binding for any other court or tribunal.

International customary law has been invoked on matters of: custom surveillance at sea;[45] diplomatic agent immunity from civil jurisdiction of the receiving state;[46] *ne bis in idem*;[47] the obligation of a state not to require foreign citizens to serve in the army;[48] state immunity from civil jurisdiction;[49] and immunity of state officials from foreign criminal jurisdiction.[50]

## 4. Hierarchy

As international customary law is automatically incorporated into the Italian legal system by a rule of the Italian Constitution; it assumes the same force of constitutional law. As a consequence, all the laws and the acts having the force of law issued by the state and the regions cannot contravene international customary rules, or else they can be declared unconstitutional by the Constitutional Court.

On different occasions, the Constitutional Court held, with reference to Article 10, paragraph 1, Constitution, that international customary rules must be considered as rules integrating the parameter of constitutionality under which to verify the legitimacy of a national piece of legislation. As a consequence, any domestic law in conflict with international customary law indirectly violates the Italian Constitution and can be repealed by the Court. For the Constitutional Court to give a ruling on such a question of constitutional legitimacy, it must be raised before any domestic court that can bring the matter before the Court, if it considers that a decision on the question is necessary.[51]

Another aspect relates to the relationship between international customary law and the Italian Constitution, in particular when an international customary law conflicts with a constitutional principle. As international customary law is considered to be as an external legal source continuously being incorporated into Italian legal order by Article 10, paragraph 1, Constitution, the protection of the fundamental principles of the Constitution prevails over the constitutional principle of observance of international customary law.

In the *Russel* case[52] the Constitutional Court dealt with a potential conflict between customary international law and the fundamental principles of the Constitution. The Court ruled on the issue of the constitutional legitimacy of the international customary law recognizing diplomatic agent immunity from civil

[45] See Constitutional Court, 5 December 1961, Judgment No 67.
[46] See Constitutional Court, 4 July 1963, Judgment No 135.
[47] See Constitutional Court, 12 April 1967, Judgment No 48; 25 March 1976, Judgment No 69.
[48] See Constitutional Court, 15 May 2001, Judgment No 131.
[49] See *Ferrini* (n 43) and *Milde* (n 43).
[50] See *Lozano* (n 43).
[51] See Constitutional Court, 22 December 1961, Judgments No 67; 13 July 1963, Judgment No 135; 12 April 1967, Judgment No 48; 25 March 1976, Judgment No 69; 15 May 2001, Judgment No 131.
[52] Constitutional Court, *Russel,* 18 June 1979, Decision No 48.

jurisdiction of the receiving state. This international customary law was in conflict with the Constitution Article 24, paragraph 1, which reads: 'All persons are entitled to take judicial action to protect their individual rights and legitimate interests.' The rights of judicial protection and equal access to justice were considered to be fundamental principles of the Italian constitutional system.[53] In the Judgment No 48 of 1979, the Court held:

> [T]he claimed contrast is only apparent and can be solved applying the *lex specialis* principle. Indeed the ouster of jurisdiction deriving from the diplomatic immunity is not in contrast with the mentioned constitutional rules, as it is necessary to guarantee the fulfilment of the diplomatic mission, which is an institution of international law that cannot be renounced. However, as far as the generally recognised rules of international law that have become effective after the Constitution came into force are concerned, it is necessary to assert, more generally, that the method of automatic incorporation provided by Article 10 Constitution shall not allow the violation of the fundamental principles of our constitutional system, as it produces effects in a constitutional system that has its basis in the people's sovereignty and in the rigidity of the Constitution.[54]

In the *Russel* case, the solution found by the Court was based on a distinction between existing international customary rules prior the Constitution's entry into force and international customary rules that became effective after the adoption of the Italian Constitution (1948). In the first hypothesis, international customary laws prevail over fundamental principles of the Constitution, while in the latter, international customary law is incorporated into the Italian legal order only if it is in compliance with fundamental constitutional principles. However, this chronological solution seems to have been abandoned by the Court since the Decision No 73 of 23 March 2001. In an obiter dictum in that case, the Constitutional Court stated that 'fundamental principles of constitutional order' and 'inalienable rights of the human being' are a limit to the automatic incorporation of international customary law into the Italian legal order.

According to the Constitutional Court, rules of international customary law assume the same force of constitutional laws. They both are at the same level in the hierarchy of law in the Italian legal system, or rather the former is not subordinate to the latter and prevails over it as *lex specialis*. International customary law does not prevail over the supreme principles of the Italian Constitution. If a rule of international customary law is in conflict with a fundamental principle of constitutional law concerning an inalienable human right, it cannot be implemented in the Italian legal system.[55] In this case, despite the fact that a judge takes judicial notice of a rule of international customary law, he must not apply it without bringing the matter before the Constitutional Court.

[53] See Constitutional Court, 2 February 1982, Judgment No 18.
[54] Constitution 1948, Article 1(2) and Title VI.
[55] See Constitutional Court, 29 January 1996, Judgments No 15; 22 March 2001, Judgment No 73.

The *Corte di Cassazione* seems to share the same point, as in *Milde* case it held:

> Article 10, paragraph 1, of the Constitution affirms that the Italian legal order must conform to the generally recognised rules of international law . . . However, even those scholars maintaining that customary rules incorporated by means of Article 10 enjoy a constitutional status . . . recognise that they must respect the basic principles of our legal order, which cannot be derogated from or modified. Fundamental human rights are among the constitutional principles which cannot be derogated from by generally recognised rules of international law.[56]

As mentioned above, Article 10, paragraph 1, Constitution incorporates *jus cogens* into domestic law as well. According to some scholars, peremptory rules of international law have the same rank as the supreme principles of the Constitution (ie the supreme values, on which the Italian Constitution is based).[57] Therefore, on the one hand, *jus cogens* prevails over constitutional rules, but, on the other hand, they can be modified only by a new peremptory rule of international law, and not by a constitutional review law.[58]

As far as international treaties are concerned, they are not automatically incorporated into the Italian legal system, but are implemented through legislation adopted by the legislature or the government, which reformulates the provisions of the international treaty converting them into domestic law ('ordinary' method). Treaties can also be implemented through the adoption of an 'execution order' (*ordine di esecuzione*) of the international treaty, where the treaty text remains unchanged and is attached to the execution order ('special' method). The execution order is usually integrated in the ordinary law adopted by the Parliament authorizing the President of the Italian Republic to ratify the treaty. In the first case, the international treaty has the same rank as the piece of legislation (ordinary law, regulation, or administrative law) adopted by the legislature or the government. In the second case, the treaty has the same rank as the ordinary law that incorporates it into domestic legal system. In the absence of any specific constitutional provision on the incorporation of international treaty law, it has the same rank as the domestic legal Act that implements it into the Italian legal system.[59]

Despite the rank that international treaties have in Italian legal system, doctrine and case-law have tried to recognize their supremacy over domestic law. Courts have used the principle of 'consistent interpretation', which imposes the obligation to interpret national law in conformity with international treaty law. This principle means that when a court applies domestic law, it is bound to interpret that law, so far as possible, in the light of the wording and purpose of the international treaty concerned in order to achieve the result sought by the treaty and to avoid conflict with the treaty. The obligation to interpret national law in conformity with international treaty law concerns all the provisions of national law. However, it is limited by the general principles of law, particularly those of legal certainty and

[56] See *Milde* (n 43).
[57] Constitutional Court, 29 December 1988, Judgment No 1146.
[58] See *Ferrini* (n 43).
[59] See section 2.3.

non-retroactivity, and it cannot serve as the basis for an interpretation of national law *contra legem*.

Another principle used by the courts is *lex specialis*, according to which a general rule of domestic law is interpreted consistently with a specific provision of a treaty on that subject-matter. If it cannot be applied in a way consistent with the international treaty, the general domestic provision is set aside and the matter is governed by the rule of the treaty.

Prior to the entry into force of Constitutional Law No 3 of 18 October 2001, the principles of consistent interpretation and of *lex specialis* were used to permit Italy to comply with its international obligations in the absence of a constitutional rule stating the primacy of international conventional law. After the constitutional amendment of 2001, the supremacy of international treaties has been established by the Italian Constitution. Article 117, paragraph 1, Constitution provides that 'in performing their legislative powers, the State and the Regions shall respect the Constitution and the obligations arising from international law'. Indeed, under Article 117, paragraph 1, Constitution, international treaty law occupies an intermediate position—midway between constitutional law and ordinary law—in the hierarchy of Italian legal sources. Consequently, international treaty law must be in compliance with the Constitution, and it prevails over domestic ordinary laws only if a pre-emptive condition is fully met, that is the international treaty rule must not contravene the Constitution. Domestic courts, therefore, cannot apply traditional criteria—ie the *lex posterior* and *lex specialis* principles that govern the conflict between rules of the same rank—to a conflict between domestic law and international treaty law. While in the past in such a conflict the court could act as if it was handling two equivalent provisions, now the court cannot resolve the conflict by its own decision. It is no longer a matter of application of the prevailing rule, but rather a question of constitutionality, which only the Constitutional Court can address.

The Constitutional Court recently had the opportunity to evaluate the relationship between Italian law and an international treaty, specifically the European Convention on Human Rights (ECHR), in light of Article 117, paragraph 1, Constitution.[60] The Constitutional Court held that 'the rules of the ECHR are not of a constitutional level as such, because one cannot grant them a status different from the act—an ordinary law—that authorised their ratification and execution within our legal system,' (ie Article 117, paragraph 1, of the Constitution does not attribute constitutional rank to international treaties). Consequently, as stated by the Court, the ECHR rules, like any other international conventional rule, are located midway between ordinary law and constitutional law within the hierarchy of legal rules in the Italian legal system. Thus, Article 117, paragraph 1, Constitution guarantees an 'infra-constitutional' rank to international treaty law in the Italian legal order. Furthermore, the Court holds that 'with Article 117, paragraph 1, a 'mobile reference' to the conventional rule applicable to each specific

[60] See Constitutional Court, 24 October 2007, Judgments Nos 348 and 349.

case has been created; such conventional rule gives content and life to the international obligations generically evoked by Article 117, paragraph 1'. In other words, the scope of Article 117, paragraph 1, Constitution is to give constitutional rank to the principle of observance of international obligations by recognizing a particular 'force of resistance' to laws implementing international treaties in case of a conflict with subsequent national law.

In the Court's view, Article 117, paragraph 1, Constitution, on the one hand, attributes a particular 'force of resistance' to domestic laws implementing international treaties, such as the ECHR, in case of conflict with ordinary legislation, and on the other hand, it brings the international treaties within the jurisdiction of the Constitutional Court, since 'eventual conflicts will not generate problems of the temporal succession of laws or assessments of the respective hierarchical arrangement of the provisions in contrast, but questions of constitutional legitimacy'.[61] The Court definitely includes among its prerogatives the task of verifying the constitutionality of international treaties adhered to by Italy. In particular, in relation to the ECHR, the Constitutional Court affirms that the standard of review for challenging the constitutionality of a national ordinary law is not the rule of the European Convention itself, but the rule as construed by the judicial body charged with its interpretation and adjudication (that is the European Court of Human Rights). Also, the interpretation of the ECHR rule by the European Court must be verified by the Constitutional Court as being compatible with the Constitution before its application in the national legal order. The reasoning the Constitutional Court uses with the ECHR should also work with provisions of other international treaties that have a body the Constitutional Court could address to verify the official and authentic interpretation of the rule at stake.

According to the Court, the European Convention does not produce effects on the domestic legal order that can establish the jurisdiction of the national courts to apply directly its provisions in disputes before them. As a consequence, domestic courts do not have the power to set aside domestic laws in conflict with the ECHR, since the alleged incompatibility between these two pieces of legislation amounts to a question of constitutional legitimacy falling under the Constitutional Court's exclusive jurisdiction.[62]

On the basis of the judgments Nos 348 and 349 of 2007, with reference to Article 117, paragraph 1, Constitution, the Court has more recently reaffirmed that the provisions of the ECHR must be considered as 'intermediate rules'—ie rules integrating the parameter of constitutionality under which to verify the legitimacy of a national piece of legislation—and that their specificity lies in the fact that they are subject to the interpretation of the European Court of Human Rights, to which contracting parties are obliged to conform.[63] As a consequence, any domestic law in conflict with the ECHR as interpreted by the European Court of Human Rights

[61] See Constitutional Court, 24 October 2007, Judgment No 348.
[62] See Constitutional Court, 24 October 2007, Judgments Nos 348 and 349.
[63] See Constitutional, 27 February 2008, Judgment No 39.

indirectly violates the Italian Constitution and can be repealed by the Constitutional Court.

In its judgment No 39 of 2008, moreover, the Court extended the effects of Article 117, paragraph 1, Constitution on the existing domestic law prior to the entry into force of the ECHR. The Court confirmed that it will be necessary to wait for the outcome of the constitutional legitimacy cross-appeal in order to repeal the provision in contrast with an international treaty such as the ECHR. The Court did not deal with the question of unconstitutionality in the light of the principle of the temporal succession of laws, according to which the rules of an international treaty, ratified and implemented by Italy, must be applied.

In other words, regardless of any other argument on the primacy of international obligations even on subsequent laws, if a domestic court finds a conflict between an international treaty and a national law that is impossible to be resolved by way of interpretation, it cannot apply the national law if it violates the treaty. On account of the Court's case-law, any antinomy between domestic and international law must be resolved by the Constitutional Court, even when the provisions of an international treaty can be immediately applied by the national court given their precise, unconditioned and complete character.

It is concerning that the ruling of the Court does not allow domestic courts to recognize any abrogative force to provisions of international law in reference to pre-existing national laws. It is hard to share the opinion of the Court, since the ratification and the implementation of an international treaty implies some restraints on state sovereignty. Moreover, the direct applicability and the direct effect of an international treaty rule cannot be limited to some treaties, such as the EU/EC Treaties, and ruled out for others, such as the ECHR. On the contrary, whether an international obligation imposed upon states by a treaty is directly enforceable by individuals before their domestic courts is a question that should be considered on a case-by-case basis, taking into account the clear, precise and unconditional character of the international rule, as well as the object and purpose of the treaty.[64]

## 4.1 The Doctrine of *Jus Cogens* and its Application

In the *Ferrini* case, the *Corte di Cassazione* held that Germany was not entitled to sovereign immunity for serious violations of human rights carried out by German occupying forces during World War II.[65] In order to exclude the applicability of the traditional regime of foreign state immunity with regard to international crimes, the Court referred to the principle of primacy of *jus cogens* rules.

The Court first affirmed:

> There could be no doubt about the persisting existence of a rule of customary international law obliging all States to refrain from exercising their jurisdiction over foreign States. This rule is applicable in Italy by virtue of Article 10, paragraph 1 of the Constitution. However,

[64] See section 2.4. [65] See *Ferrini* (n 43).

the immunity enjoyed by foreign States is not absolute any more. Its recognition depends on the nature and the object of the particular dispute in question.

According to the Court, in fact:

> [I]t is common knowledge that international crimes threaten humankind as a whole and undermine the very foundations of international coexistence. Given their intensity and systematic character, international crimes consist in particularly serious breaches of every person's fundamental rights. The protection of these rights is entrusted to peremptory rules which are at the top of the international legal order.

Consequently, the Court finds that the 'crimes' committed by Germany consisted 'in the particularly grave violation . . . of the fundamental rights of the human person, whose protection is upheld by peremptory rules of international law' and that the peremptory or *jus cogens* rules 'prevail over every other rule, whether customary or conventional. Thus, they also prevail over the rule on sovereign immunity.'

The Court seems to agree with the theory that the formal supremacy of *jus cogens* gives it prevalence over all other non-peremptory rules of international law, among which is the international customary rule concerning foreign state immunity. According to some scholars, in the *Ferrini* case the notion of *jus cogens* is not used by the *Corte di Cassazione* in strictly normative or formal terms, as the refusal to grant Germany immunity from jurisdiction was based on the need to emphasize substantial values of international law, such as those regarding respect for the human person.

The *Corte di Cassazione* again discussed the question of the immunity from civil jurisdiction in relation to gross violations of human rights committed by German military forces in Italy during World War II in its 13 orders of 2008[66] and, more recently, in the *Milde* case.[67] In all these cases, the Court dismissed jurisdictional immunity of foreign states in relation to claims by victims of gross violations of human rights. These cases impelled Germany to bring an action before the International Court of Justice complaining that Italy, by the conduct of its courts, violated the principle of sovereign immunity.[68]

In the *Mantelli* case, the *Corte di Cassazione* affirmed that it is aware of the fact that,

> at this stage, there does not exist a certain and explicit international customary rule providing that the principle of foreign State immunity from civil jurisdiction for its *iure imperii* acts . . . can be derogated in the case of those acts are so serious that can be considered as crimes against humanity.

The Court also maintains that 'it can be assumed that a principle restricting the immunity of the State that has committed crimes against humanity is in the making'.

[66] See *Corte di Cassazione*, 28 May 2008, Orders Nos 14200–14212. All the orders are formulated in substantially similar terms, so we will refer to the Order 14200 issued in the *Mantelli* case.

[67] See *Milde* (n 43).

[68] *Jurisdictional Immunities of the State (Germany v Italy) (Merits)* [2010] ICJ.

In the absence of an existing legal rule or widespread practice of the states to exclude sovereign immunity, the Court systematically analyzed the international legal system and ascertained the coexistence of two principles of general application: the 'principle of foreign State immunity from civil jurisdiction (directed to foster the international relations among States respecting their reciprocal sovereignties)' and 'the principle according to which international crimes threaten the whole mankind and undermine the foundations of the coexistence among peoples'. On account of the coexistence of these two principles, the Court held that 'the undeniable antinomy between [them] . . . can only be solved using a systematic approach giving supremacy to the rules possessing a higher rank, ie the rules that ensure the respect of inviolable rights of human being that, in the international legal system, is considered as a fundamental principle due to its axiological content as a meta-value'.

It is interesting to note that in the *Milde* case the Court reaffirmed that international rules protecting human beings from grave breaches of inviolable human rights, such as those prohibiting the international crimes, must prevail as rules possessing a higher rank:

> The customary rule on the jurisdictional immunity of foreign States is not absolute or without exception. It is bound to remain inoperative each time it competes with the customary international law principle legitimizing the exercise of remedies to recover compensation for damage caused by international crimes arising out of grave breaches of inviolable human rights . . . .The conflict between the customary rule on the jurisdictional immunity of foreign States and that on the necessary reparation of the gravest violations of fundamental human rights requires coordination in order to establish which of the two rules should prevail.

On the basis of the conclusions reached in the *Lozano* case,[69] the Court, referring to the notion of the international *jus cogens* set out in Article 53 of the 1969 Vienna Convention on the Law of Treaties (the Vienna Convention), held:

> The different value of customary rules is confirmed by the different strength they enjoy in the international legal order. According to a well-established judicial and doctrinal opinion, the customary rule on State immunity may actually be derogated from by an *ad hoc* treaty provision. However, customary rules aiming to protect inviolable human rights do not permit of any derogation because they belong to peremptory international law or *jus cogens*.

Finally, in the *Lozano* case[70] the *Corte di Cassazione* did not consider the functional immunity for a US soldier (whose conduct was performed in the scope of a multinational military operation under a clearly distinguishable national chain of command) as an absolute rule. Rather, it was interpreted as a flexible rule to be balanced with a peremptory rule (*jus cogens*) in the sense of Article 53 of the 1969 Vienna Convention. The latter, albeit in the process of formation, would impose a

[69] See *Lozano* (n 43).

[70] See *Lozano* (n 43) The Court confirmed the *Corte d'Assise*'s Judgment No 21 of 25 October 2007 dismissing, for lack of jurisdiction, a criminal case against the US soldier Mario Lozano, charged in absentia with the 'political murder' of Nicola Calipari, a high-ranking Italian intelligence agent.

limitation to the immunity principle whenever *iure imperii* conduct amounting to an international crime breaches fundamental human rights. Once stating that the functional restricted immunity can theoretically be derogated, the Court discussed whether the case under review constituted an international crime susceptible to overriding both the functional immunity of the accused and the plea for lack of jurisdiction of the Italian criminal judge. The answer was negative because the Court excluded the possibility of qualifying the case as a 'crime against humanity', given the lack of the typical elements of such an offence. The court maintained that the facts ascribed to the soldier did not amount to a 'war crime'.[71]

## 4.2 The Decisions of International Organizations and Tribunals

In reference to the self-executing nature of UN Security Council decisions, in the *Lozano* case[72] the *Corte di Cassazione* recently maintained that 'the Italian practice . . . requires a domestic implementing rule, especially when the case involves a criminal matter—which is reserved to statutory regulation by the Constitution'.[73]

Regarding international treaties on human rights, the Constitutional Court, in its judgment Nos 348 e 349 of 2007, considered the status of the ECHR within the system of sources of Italian law. The court addressed this issue by examining the relation of the Convention with the constitutional provisions referring to international law. In particular, the Court considered Article 11 Constitution, which states that Italy 'agrees to those restraints on sovereignty which are necessary to a legal system grounded upon peace and justice between nations'. Reference is made to this article in order to exclude the possibility that the ECHR may enjoy within the Italian system the same status reserved (in terms of primacy and direct application) to European Community law, whose 'specialty' is indeed rooted in Article 11. Contrary to EC law, 'there is no restraint on national sovereignty arising from the conventional rules'. Such a statement can hardly be agreed with, since the ratification of any international treaty and membership in any international organization invariably implies a restraint on state sovereignty. Such a restraint is particularly significant in respect to the ECHR, a treaty establishing a system of human rights guarantees under which individuals are entitled to summon any contracting state before an international court, whose decisions are binding on the respondent state.

Concerning the relationship between the ECHR and the Constitution, the Court stated that the former is subject to review according to the latter. This review falls within the responsibility of the Constitutional Court when requested to determine the constitutional legitimacy of national law in light of Article 117, paragraph 1, Constitution. This review consists of verifying 'whether the ECHR rules, according to their interpretation by the Strasbourg Court, provide for a degree of protection of fundamental rights that is at least equivalent to the level ensured by the Italian

[71] Note that the Court assimilated *war crimes* to the *grave breaches* of international humanitarian law.

[72] See *Lozano* (n 43).

[73] See section 1.1.

Constitution'.[74] Moreover, the Court more specifically stated that such 'review of constitutionality cannot be limited to the possible infringement of the principles and fundamental rights of the Constitution, but must be extended to any conflict between the 'intermediate laws' and the Constitution'.[75]

This conclusion of the Court is perplexing, especially regarding the absolute terms in which the principle is formulated. Surely, in some truly exceptional cases, the need for a balance between individual rights and the general interest may lead to the desirability of intervention by the Constitutional Court. Yet, as usual, the ECHR cannot impose a standard of individual rights that falls short of the guarantees provided by the national legal system. The ECHR limits itself to establishing the minimum standard of protection of individual rights. Additionally, the ECHR is based on the principle of subsidiarity, that is on the fact that protection of human rights is to be secured first at the national level, with international supervision having a subsequent nature. Thus, if the level of protection secured by the domestic constitutional rule is higher, there is no conflict, since the ECHR envisages the primacy of the protection offered by the national legal system. This is even truer in the case of an ordinary law. Hypothetically, should the latter grant a higher level of protection than a correspondent ECHR provision, compliance will not be at stake either with the ECHR itself or with Article 117, paragraph 1, Constitution. The necessity for the Constitutional Court to review the equivalence of protection offered by the ECHR system echoes domestic constitutional case-law on the limits to the exclusive competence of the European Court of Justice to review the observance of fundamental rights by EC legislation. But the two situations are certainly not comparable, given the diversity of the two systems (ECHR and European Union) and the respective functions of the Strasbourg Court and the Luxemburg Court.

The consequences of conflict resolution between national laws and the ECHR are also subject to criticism. However, there is no objection to the Court's statements regarding the need for the judge to interpret domestic rules 'consistently with international provisions, to the extent that this is permitted by the text of the relevant rules'. The Court thus adheres to the criterion of 'consistent interpretation', a criterion that, in the light of Article 117 Constitution, can be applied much more effectively than in the absence of such a specific constitutional provision.

Another important element is the value attributed to Strasbourg case-law. The Constitutional Court considered the text of the ECHR to be inseparable from the interpretation provided by its judge, because of the peculiar relevance that consists in the fact that the ECHR 'is more than a mere collection of mutual rights and obligations of the contracting States'. The permanent uniformity of application is on the other hand guaranteed by the centralized interpretation of the ECHR assigned to the European Court of Human Rights in Strasbourg, which has the final word.[76] The court further states:

[74] See Constitutional Court, 24 October 2007, Judgment No 349.
[75] See Constitutional Court, 24 October 2007, Judgment No 348.
[76] Constitutional Court, 24 October 2007, Judgment No 348.

> [A]s legal rules are brought to light thanks to the interpretation provided by legal interpreters, primarily the courts, the natural consequence of Article 32, paragraph 1, of the ECHR is that one of the international obligations assumed by Italy when signing and ratifying the ECHR is that of adapting its own legal system to the rules of this treaty, in accordance with the rulings of the Court specifically established to interpret and apply such rules. One cannot thus speak of a jurisdictional competence overlapping with the competence of Italian judicial bodies, but of an eminent interpretive function that the contracting States have granted to the European Court, therefore contributing to spell out their international obligations in the specific matter.[77]

The national judge must thus apply national rules consistently with the ECHR as interpreted by the Strasbourg Court.

When there is no possibility for a domestic rule to be read compatibly with the relevant international rule, the result is what the Court defines an 'irremediable conflict'. In this case, the ordinary judge must refer the matter of constitutional legitimacy to the Constitutional Court. As stated above, in its Decisions Nos 349 and 349 of 2007, the Constitutional Court absolutely excludes the possibility for the judge to directly apply the ECHR rule and set aside the national rule. It seems that the 2001 amendment of Article 117 does not impose a step backwards on the road to opening the domestic system to international rules (especially those on human rights) according to a rigid and formalistic reading of the ECHR provisions, as demonstrated by the stated obligation of the ordinary judge to refer compliance of national laws with the ECHR to the Constitutional Court. So the non-application by the judge of national laws that are incompatible with the ECHR can doubtless coexist with the Constitutional Court's review, which should be called upon in particular cases, when they refer to a very complex dispute between the parties before the court *a quo* or when there is the need to balance between individual rights and the general interest.[78]

Some last remarks are also relevant to demonstrate the unsustainability of the thesis according to which the decisions of the Strasbourg Court are exclusively addressed 'to the legislator of the State Party' and this 'even when it is the individual who initiates jurisdictional control in respect of his own State'.[79] This argument is consistent with the Court's description of the relations between the national legal system and the ECHR system, because the admission of a direct relationship between the ECHR judge and the national judges would also admit the possibility of national judges not applying the national law when inconsistent with the judgments of the Strasbourg Court. Such a limitation on the national judge proves how anachronistic and inadmissible the solution of the Constitutional Court is from the perspective of general international law and of the ECHR.

The attempt to restrict the scope of a binding international decision by affirming the competence and the responsibility of only one of the powers of the state in its execution is an outdated instrument, and we regret to have to emphasize it on this occasion. The decisions of the Strasbourg Court have a declaratory nature. In

[77] Ibid. [78] See section 4.3.
[79] Constitutional Court, 24 October 2007, Judgment No 349.

fulfilling their commitment to conform to such decisions pursuant to Article 46 ECHR, the concerned states may choose, within the national system, which means to use to execute this obligation. This may occur through measures relating to the particular case or, if the origin of the violation confirmed by the Strasbourg Court is a law or a practice, by measures of a general nature appropriate to prevent new violations. On specific occasions and in light of the type of violation ascertained, both the Court and the Council of Europe's Committee of Ministers have expressly indicated the national courts as bodies called upon to execute the judgments of the Court. The Committee specifically addressed Italian authorities with reference to the decisions that ascertained violations of the right of correspondence, pursuant to Article 8 of the ECHR, inviting them promptly to adopt 'the legislative and other measures necessary to ensure prompt and effective judicial review of decisions ordering derogations from the ordinary prison regime or ordering restrictions on prisoners' right to correspondence' and encouraging the courts in particular 'to grant direct effect to the European Court's judgments so as to prevent new violations of the Convention, thus contributing to fulfilling Italy's obligations under Article 46 of the Convention'.[80]

In the case of the ECHR, all the bodies of the state are called upon, each according to its own attributions and competences, to fulfil the commitments envisaged by Article 46 of the ECHR. Naturally, according to the type of competence, in the case of the Strasbourg Court, the legislative power will be primarily responsible for executing the decision, especially when a reform is required due to a structural deficiency in the national system. In the inertia of legislative power, however, the judge may find himself also assuming functions that may be defined as 'legislative substitution', in cases in which the national system does not allow for review of a final judgment in a proceeding recognized by the Strasbourg Court as inconsistent with the ECHR.[81] The 'praetorian' action of brave judges, however, does not exempt the legislator from the obligation of adapting the system to the ECHR.

In conclusion, the reading of these two decisions of the Constitutional Court highlights an approach of rigid closure to direct dialogue between the national judge and the judge of the Convention, as well as the possibility of non-application of national laws incompatible with the ECHR. This entails an interpretation of Article 117 Constitution which, if literally applied, would make the system even more rigid when it comes to resolving conflicts between national and international rules, an interpretation that is inconsistent with the spirit of the constitutional amendment. We hope that the Constitutional Court will review its position in further decisions on the matter, and that Judgments Nos 348 and 349 of 2007 may thus be remembered positively as the first step toward the definitive regularization of relations between the Italian legal system and the ECHR.

[80] Interim Resolution adopted by the Committee of Ministers on 5 July 2005, ResDH (2005)56, concerning the right to an effective remedy against monitoring of prisoners' correspondence and other restrictions imposed on prisoners' rights—general measures in the cases of *Messina (No 2)*, Judgment of 28 September 2000, final on 28 December 2000; *Ganci* Judgment of 30 October 2003, final on 30 January 2004; and *Bifulco* Judgment of 8 February 2005, final on 8 May 2005.

[81] See *Dorigo* (n 36).

## 5. Jurisdiction

### 5.1 Universal Criminal Jurisdiction

The following provisions of the Italian Criminal Code provide some elements of universal jurisdiction:

- Article 3, paragraph 2, of the Criminal Code provides that Italian criminal law is applicable to every citizen or foreigner who is abroad when it is so established by domestic law or international law.
- Article 7, paragraph 5, of the Criminal Code provides that Italian courts have jurisdiction over a foreign national for crimes committed abroad when there is a specific law or treaty that establishes the applicability of Italian criminal law (for instance, the Geneva Conventions, Protocol I to the Geneva Conventions, only as far as 'grave breaches' are concerned, and the Convention against Torture). In this case, the investigation can be initiated even if the accused is not present on the Italian territory and the accused may be tried in absentia. However, it is not clear to what extent Italian courts can exercise universal jurisdiction under Article 7, paragraph 5, of the Criminal Code since, according to some commentators, this provision is not directly applicable and courts may apply the provisions of a treaty only after their implementation in the Italian legal order. The reference to 'international treaties [which] establish that Italian criminal law shall apply' prevents domestic courts from exercising universal jurisdiction over: genocide, crimes against humanity and war crimes that are not considered 'grave breaches' of the Geneva Conventions and Protocol I to these Conventions; crimes under international law over which universal jurisdiction is established only under international customary law; and those international crimes that are not considered as such by an international treaty. Article 7, paragraph 5, of the Penal Code has not yet been applied by the Italian courts.
- Article 8 of the Criminal Code provides for protective jurisdiction over 'political crimes'. As used in Article 8, this term can be interpreted to include crimes under international law. Indeed, according to the Italian courts case-law, Article 8 must be read in the light of Article 10, paragraph 1, Constitution and of the international conventions protecting human rights, relying on a broader concept of state political interest that includes the protection of the rights of citizens.[82] In any case, the Minister of Justice must authorize a prosecution under Article 8 of the Criminal Code and, in some cases, prosecution must be requested by the victim.

[82] See *Corte d'Assise d'Appello* of Rome, Decision of 17 March 2003, regarding the appeal against the convictions of some Argentine military officers charged with crimes committed against Italian citizens during the military regime in Argentina. The sentence of the *Corte d'Assise d'Appello* was confirmed by the *Corte di Cassazione* (see Judgment of 17 May 2004, No 23181).

- Article 10, paragraph 2, of the Criminal Code expressly provides for custodial universal jurisdiction over non-political crimes committed abroad by foreigners against foreigners or against the EC or foreign states if the crime is punished with no less than three years of imprisonment. However, the Minister of Justice must request to initiate the prosecution and the accused must be present on the Italian territory (though it is not clear at what stage of the proceedings this presence is required) and extradition must not have been granted or accepted by the territorial state or the state of nationality of the accused.
- Article 17 of the Military Criminal Code of Peace provides for limited universal jurisdiction over crimes committed by armed forces in occupied, transit or sojourn territory as established by international conventions and customs. According to Article 18 of the Code, regarding other crimes committed abroad by armed forces, the request of the competent minister is necessary. 'Armed forces in occupied, transit or sojourn territory' under Article 17 of the Military Criminal Code of Peace are only organized troops stationed abroad with the consent of the host state. In contrast, other crimes committed abroad, to which Article 18 of the Military Penal Code of Peace applies, are those perpetrated by members of the armed forces who are in isolated service (such as military attachés to diplomatic or consular missions) or who are abroad in an unofficial capacity.
- Article 1080 of the Naval Code applies to Italian nationals or foreigners on duty on an Italian ship or aircraft when he or she commits abroad a crime established by the Code, ie piracy and suspected piracy.
- Article 3 of Law No 498 of 3 November 1988 on the ratification and domestic execution of the Convention against Torture provides that Italian courts have jurisdiction, even if the conduct amounting to torture under Article 1 of the Convention is committed abroad by a foreigner, provided that the accused is in Italy and his or her extradition has not been granted. The authorization of the Minister of Justice is, however, necessary. Article 3 of Law No 498 of 1998 cannot be applied in the absence of a domestic piece of legislation that incorporates the crime of torture in the domestic legal law. In the absence of such a provision, a court can only apply rules applicable to ordinary crimes, and, therefore, is unable to exercise universal jurisdiction over the crime of torture as provided by Law No 498 of 1998.

## 5.2 Transnational Civil Jurisdiction

The *Corte di Cassazione* in the *Ferrini* case[83] stated that Germany was not immune from civil jurisdiction for damages caused by deportation and forced labour during the World War II. In particular, the Court observed that the commission of international crimes constitutes a grave violation of fundamental human rights

[83] See *Ferrini* (n 43).

and encroaches upon universal values of the world community. These values are protected by *jus cogens* norms, which are located at the top of the hierarchy of norms in the international legal order.[84] The nature of these peremptory norms underlying the prohibition of international crimes involves, inter alia, that national courts possess universal jurisdiction over them in criminal proceedings and 'there can be no doubt that the principle of universality of jurisdiction also applies to civil suits relating to such crimes'.[85]

## 6. Other International Sources

According to the domestic courts, non-binding declarative texts have the nature of 'soft law'. In the courts' case-law, non-binding declarative texts are considered as recommendations addressed from international institutions to member states. As such, they have only political value. Sometimes, domestic courts make reference to these non-binding declarative texts in order to verify the *opinio juris* among states and consequently demonstrate the existence or establish the content of an international customary rule.

In the Italian Constitution, there is no provision on the incorporation and enforcement of the decisions of international courts or tribunals into the domestic legal order. The binding effect of such decisions is determined automatically by the treaty establishing the organization or the judicial body, but this binding effect is directed to the state party. Indeed, the Italian legal system does not set a direct relationship between domestic judicial order and international judicial control assessment. The decisions of international courts and tribunals are essentially declaratory and leave the state free to choose the administrative or legislative measures to comply with the judgment of the international court or tribunal.[86]

Domestic courts consider international case-law as a fundamental means of interpreting international rules, especially the rules of the international treaties on human rights. To this end, domestic courts often apply or interpret domestic rules in the light of the interpretation given by the international bodies, arguing that this is the best way to guarantee the respect for the fundamental rights in the domestic legal order.

As far as the judgments of the EC Court of Justice are concerned, the Constitutional Court, in its Decision No 113 of 1985, states that interpretative decisions of the Court of Justice are directly applicable in the domestic legal order.

[84] See section 4.2.

[85] See also *Corte di Cassazione*, 29 May 2008, Orders Nos 14200 and 14212, and *Strage di Civitella della Chiana*, 13 January 2009, Judgment No 1072.

[86] Regarding the application of the decisions of the European Court of Human Rights in Italy, see Law No 12/2006, which engages the government to give execution to ECHR decisions.

Italian courts do not apply or enforce any decision or recommendation of a non-judicial treaty body, as they consider such a decision not to be legally binding.[87] At most, these decisions or recommendations are recognized as 'soft law' by domestic courts and are taken into consideration to confirm, *ad abundantiam*, an interpretation of binding international rules or of national rules.[88]

[87] See, for example, *Corte di Cassazione*, 29 May 1993, Judgments Nos 6030 and 6031, relating to the applicability of the Universal Declaration of Human Rights in the national legal order.

[88] See, for example, Constitutional Court, 13 January 2005, Decision No 45.

# 14

# Japan

*Shin Hae Bong*

## 1. Introduction

Japan is a non-federal constitutional democracy with a parliamentary government. Even though the Emperor was traditionally the sovereign, he is now only the symbol of the state and his function is limited to ceremonial matters. Sovereignty rests in the Japanese people. Executive power is vested in a cabinet, led by the Prime Minister, and legislative authority is granted to a bicameral Diet (*Kokkai*). The judicial power is vested in the Supreme Court and the lower courts. The court system is three-tiered, and ordinary civil and criminal cases are first handled by district courts and then may be appealed to high courts and, upon conditions stipulated in law, to the Supreme Court. The Supreme Court is the highest court, composed of 15 justices. The Supreme Court presides over a judicial system established by the Constitution, and has the final authority to rule on the constitutionality of any law, order, regulation or official act. Japan does not have administrative courts. As part of the efforts of justice reform, a system of lay judge was introduced in 2009. The Japanese Constitution, enacted in 1947, includes a bill of rights that is similar to the US Bill of Rights but also includes social rights such as the rights of workers and the right to maintain a minimum standard of living. Japan has been an active member of the UN since 1956 and accepts compulsory ICJ jurisdiction with reservations.

### 1.1 Relevant Constitutional Provisions

Article 61 of the Constitution specifies the procedure for concluding treaties and provides that 'The second paragraph of the preceding article applies to Diet approval for the conclusion of treaties.'[1]

[1] Article 60, as referred to in Article 61, provides: The budget must first be submitted to the House of Representatives. Upon consideration of the budget, when the House of Councillors makes a different decision from that of the House of Representatives, and when no agreement can be reached even through a joint committee of both Houses, provided for by law, or in the case of failure by the House of Councillors to take final action within 30 days, the period of recess excluded, after the receipt of the budget passed by the House of Representatives, the decision of the House of Representatives shall be the decision of the Diet. The Diet is the Parliament of Japan, composed of the House of Councillors and the House of Representatives.

Two other constitutional provisions refer to treaties. Article 73 specifies that the Cabinet, in addition to other general administrative functions, performs the function of concluding treaties, but it must obtain prior or subsequent approval of the Diet (depending on circumstances). Article 98 refers to both treaties and the law of nations (customary international law): 'This Constitution shall be the supreme law of the nation and no law, ordinance, imperial prescript or other act of government, or part thereof, contrary to the provisions thereof, shall have legal force or validity. The treaties concluded by Japan and the established laws of nations shall be faithfully observed.'

## 1.2 Relevant Legislative Provisions or Regulations

There appear to be no legislative provisions or regulations that call, properly speaking, for the application of international law within the Japanese legal system. But, some Acts enacted in order better to implement relevant treaties mention, in the provisions stating the purpose of the Acts, that they are designed to ensure the observance of treaty norms, in direct or indirect terms.

For example, the Law on the Punishment of Activities Relating to Child Prostitution and Child Pornography, and the Protection of Children (Act No 52 of 26 May 1999), enacted after Japan ratified the Convention on the Rights of the Child in 1994, states, in Article 1, that:

> The purpose of this Law is to protect the rights of children by punishing activities relating to child prostitution and child pornography, and providing measures for the protection of children who have consequently suffered physically and/or mentally, in light of the fact that sexual exploitation and sexual abuse of children seriously infringe upon the rights of children and taking into account international trends concerning the rights of children.

This provision only mentions 'international trends', but it is clear from the legislative history of the Law that it was enacted in order to regulate child prostitution and child pornography as rendered necessary by the provisions of the Convention on the Rights of the Child.

As another recent important example, Japan acceded in 2004 to the two Additional Protocols of 1977 to the 1949 Geneva Conventions, and in the same year adopted several domestic laws to ensure the implementation of international humanitarian law, including the Law on the Treatment of Prisoners of War and Other Detainees in Armed Attack Situations,[2] the Law on the Measures for the Protection of the People in Armed Attack Situations, etc.,[3] and the Law on the Punishment of Grave Breaches of International Humanitarian Law.[4] The Civilians Protection Law, in Article 9, paragraph 2, explicitly provides that 'international humanitarian law applicable in international armed conflicts shall be appropriately

[2] POW Law, Act No 117 of 18 June 2004.
[3] Civilians Protection Law, Act No 112 of 18 June 2004.
[4] Grave Breaches Law, Act No 115 of 18 June 2004.

implemented in carrying out measures to protect people'. The Grave Breaches Law also states, in Article 1:

> The purpose of this Law is to serve to ensure the adequate implementation of international humanitarian law, by punishing, in addition to the punishment by such laws as the Penal Code (Act No.45 of 1907), the acts of grave breaches governed by international humanitarian law applied in international armed conflicts.

The Grave Breaches Law also explicitly refers to the 1949 Geneva Conventions and the 1977 Additional Protocol I in Articles 2 and 3. Article 2 of the Law concerns the definition of 'prisoners of war', 'wounded and sick prisoners of war', and 'civilians.' It provides that these terms refer to those who are treated as such under relevant provisions of the treaties (Third Geneva Convention and the Additional Protocol I for the 'prisoners of war', Third Geneva Convention for the 'wounded and sick prisoners of war', and the Fourth Geneva Convention for 'civilians'). Article 3 of the Law, which concerns the crime of destroying cultural monuments, works of art, or places of worship, provides that it shall be applied in situations or armed conflicts referred to in Article 1, paragraphs 3 or 4 of the Additional Protocol I. In the case of an Act, such as this one, that explicitly mentions treaty provisions, governmental authorities as well as judges are clearly expected to have recourse to international law straightforwardly when interpreting and applying such an Act.

## 2. Treaties and Other International Agreements

### 2.1 The Definition and Interpretation of Treaties

It is hard to find cases in which the courts actually define 'treaty', but we can extract an understanding from the courts' discussions of questions concerning treaties. For example, in the so-called *Tokyo Suikōsha* case concerning a claim of real estate ownership on the basis of Article 46 of the Regulations of the 1907 Hague Convention Concerning the Laws and Customs of War on Land (providing that private property cannot be confiscated) the Tokyo District Court, in its judgment of 28 February 1966,[5] examined the question of whether the principle embodied in Article 46 of the Hague Convention could be regarded as *jus cogens*.[6] In this context, the Court stated that 'in the international legal order, law is established, basically, on the basis of explicit (treaties in a broad sense) or implicit (international customs) agreement between its subjects of law, that is, States'. Here, it is apparent that the Court understood 'treaty' in a broad sense widely accepted in international law as a legally-binding agreement in the form of a written text.

Also, in the same case, the Court examined the legal nature of the instrument of surrender in World War II in which Japan accepted the provisions of the Potsdam Declaration. The Court held:

[5] *Shōmu Geppō* vol 12, No 4, 475, *Hanrei Jihō* vol 441, 3.
[6] The finding of the Court in this case on the issue of *jus cogens* will be dealt with in section 4.2.

[T]he instrument of surrender was, formally, signed by the Minister of Foreign Affairs representing Japan and the Chief of the General Staff, on the one hand, and by the representatives of each State including the Supreme Commander for the Allied Powers representing the Allied Nations, on the other, and substantially, it set forth the surrender of Japan to the Allied Nations as well as the conditions for the suspension of the fight between Japan and the Allied Nations. Consequently, it must be said that this instrument has the nature of an international agreement established on the basis of an agreement between Japan and the Allied Nations.

As shown above, Article 73 of the Constitution provides that the Cabinet, in concluding treaties, shall obtain approval of the Diet prior to or, depending on circumstances, subsequent to, their conclusion. However, in practice, in order to deal with the increasing number of various treaties, the government has limited the scope of treaties that have to be formally approved by the Diet in accordance with Article 73. According to the statement of the then Foreign Minister, Ōhira Masayoshi,[7] made public in the Foreign Affairs Committee of the House of Representative on 20 February 1964, the treaties that have to be formally approved by the Diet are the following: (1) agreements whose contents fall within the scope of legislative power of the Diet, such as a treaty of commerce and navigation or a taxation agreement; (2) agreements that necessitate state budgetary spending beyond the level already decided by law or budgetary measures, such as a treaty on the implementation of war reparation, a treaty on the provision of economic co-operation assistance for more than one year and a constitutive treaty of an international organization that involves annual payments; (3) agreements that do not belong to either category of (1) or (2) but that have political importance in that they govern the basic relationship between Japan and another state or other states, such as the Japan–Soviet Joint Declaration (1956) and the Treaty on the Basic Relationship between Japan and the Republic of Korea (1965). As a consequence, the great majority of bilateral treaties, including agreements of official development assistance concluded with many developing countries on a routine basis, have been concluded only by the government every year.

On the other hand, the practice of the courts is to understand 'treaty' in a broad sense, as a legally-binding agreement in the form of written texts, whether or not it went through the constitutional ratification process provided in Article 73. There are some cases in which an instrument that falls in categories (1)–(3) above was not subject to the constitutional ratification process for practical reasons. Even in such cases the courts have recognized the legally-binding nature of the instrument. The courts' recognition of the Japan–China Joint Declaration (1972) as a treaty is one of the cases on point.

The Joint Declaration, while it set out the basic relationship between Japan and the Peoples' Republic of China including the normalization of an interstate relationship and the recognition of the Peoples' Republic of China as the lawful government of China, was not treated as subject to Article 73 of the Constitution, because it provided the entry into force at the moment of signature. The courts, however, including the Supreme Court in a recent judgment

[7] Ōhira is the family name. In this chapter, Japanese names are written in their proper order in Japanese, ie the family name followed by the given name.

concerning compensation claims by Chinese forced laborers against the Nishimatsu Construction Company on 27 April 2007,[8] have taken the legally-binding nature of this Declaration for granted and examined the claim on the basis of such an understanding. In this case, we should say that the process of concluding the Japan–China Joint Declaration itself was irregular, as opposed to the political importance of its contents. Due to the particular circumstances at that time, the Japanese government preferred rapid normalization of the interstate relationship to the time-consuming process of demanding Diet approval.

The courts generally determine treaty matters without deference to the political branches, with the exception of the scope of treaties subject to the examination of unconstitutionality by the courts, discussed below.

The courts apply international rules of treaty interpretation, and have cited Article 31 and Article 32 of the Vienna Convention on the Law of Treaties ('Vienna Convention') in a considerable number of cases. For example, the Tokushima District Court, in its judgment on 15 March 1996 on a claim for state compensation from a prisoner who was obstructed from consulting his counsel regarding a civil suit,[9] reproduced the provisions of Article 31, paragraph 3(a), (b), (c) of the Vienna Convention in detail. The Court understood that Article 14, paragraph 1 of the ICCPR guaranteeing the right to a fair and public hearing corresponded to Article 6, paragraph 1 of the European Convention of Human Rights in its contents, given the fact that the latter Convention had been made in reference to the draft of the Covenant. The Court then gave certain weight to the interpretation of the European Court of Human Rights in relation to Article 6, paragraph 1 of the European Convention, recognizing that the jurisprudence of the European Court of Human Rights constitutes 'relevant principles of international law applied to the parties' referred to in Article 31, paragraph 3(c) of the Vienna Convention. In light of the jurisprudence of the European Court of Human Rights that the right to a fair trial includes the right of a prisoner to consult his counsel on filing a civil suit, the Court interpreted Article 14 paragraph 1 of the ICCPR to guarantee the right of a prisoner to meet his counsel in a civil suit. Consequently, the Court considered that the provisions of the Prison Law as well as the Implementing Regulations concerning the meeting with counsel must be interpreted in conformity with the object of Article 14, paragraph 1 of the ICCPR. If provisions of the Act and its regulations are contrary to the object of Article 14, paragraph 1 of the ICCPR, that part of the Law and Regulations must be judged null and void.

In relation to the interpretation of human rights treaties, the legal status and value of 'general comments', 'concluding observations', and/or 'views' of treaty organs have given rise to substantial dispute in Japan. This debate is especially strong between scholars of international human rights law, who stress that these sources have substantial weight as opinions pronounced by organs established under each treaty and therefore should be given sincere consideration, and the government and the majority of court opinions, which deny any authoritative value

[8] *Saikō Saibansho Minji Hanrei-Shū* vol 61, No 3, 1188; *Hanrei Jihō* vol 1969, 28.
[9] *Hanrei Jihō* vol 1597, 115.

to such comments or views. The courts have sometimes expressed their views on the matter in the context of the rules of treaty interpretation embodied in the Vienna Convention. Some judgments have taken the position that 'general comments' and 'views' of the Human Rights Committee under the ICCPR are understood to be a 'supplementary means of interpretation' in Article 32 of the Vienna Convention, to which the courts refer in order to confirm the meaning of a provision of the Covenant.[10] Also, the Ōsaka District Court, in its judgment of 9 March 2004[11] concerning a claim for state compensation for refusing to use videotaped evidence in a meeting of the accused and his counsel, took note that the Human Rights Committee had adopted a general comment on Article 14 of the ICCPR including the meaning of 'adequate time and facilities for the preparation of his defense'. This comment stated that general comments of the Committee 'should be respected to a considerable extent, as being analogous to any subsequent practice in the application of the treaty that establishes the agreement of the parties regarding its interpretation (see Article 31, paragraph 3(b) of the Vienna Convention on the Law of Treaties) or supplementary means of interpretation (see Article 32 of the Vienna Convention on the Law of Treaties).'

It is considered, generally, that the courts are not prevented from deciding whether a statement attached by the government or legislature during treaty approval is a reservation. But there is no such case to date. The courts usually follow the understanding of the government that a certain statement is a reservation or an interpretative declaration.

## 2.2 Domestic Incorporation of Treaties

Ratified treaties are automatically accepted into domestic law from the time of promulgation by the Official Gazette (*Kampō*), by virtue of Article 98, paragraph 2 of the Constitution. This is the position of the government and the courts as well as of the prevailing doctrine.

This being said, there are cases, based on the provisions of each treaty, in which the Diet enacted legislation in order to implement domestically the treaty provisions. One notable example is the enactment of the Law on Securing of Equal Opportunity and Treatment between Men and Women in Employment (the Equal Employment Opportunity Law) in 1985, following the ratification of the Convention on the Elimination of All Forms Discrimination against Women (CEDAW) in the same year. Article 11, paragraph (b) of this Convention requires state parties to take all appropriate measures to ensure, on the basis of the equality of men and women, the same rights, in particular 'the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment'. Until then, legal prohibition of sex discrimination in the

[10] Judgment of the Ōsaka High Court of 28 October 1994, *Hanrei Jihō* vol 1513, 71, *Hanrei Taimuzu* vol 868, 59; Judgment of the Hiroshima High Court of 28 April 1999, *Kōtō Saibansho Keiji Saiban Sokuhō-Shū* vol of 1999, 136.

[11] *Hanrei Jihō* vol 1858, 79.

labour market was practically non-existent in Japan. The exception to this was Article 14 of the Constitution on equality before the law, which concerns essentially the vertical relationship between public authority and individuals and therefore is applied between private parties only indirectly (that is, as a principle or an interpretational guide with regard to the civil and labour codes). Another exception was Article 4 of the Labor Standards Law, which prohibits discrimination on the basis of sex with regard to wages. Unlike these norms, whose reach of application is limited in employment relations, the Equal Employment Opportunity Law was designed to assure equality of opportunity at all stages of employment. Although the initial version of this law was notoriously inadequate to implement the CEDAW (in that it only provided the obligation of employers to 'make efforts' not to discriminate against women in many important aspects including recruitment and promotion) the law has been amended twice thereafter and its deficiencies remedied to a certain extent.

On the other hand, there are also cases in which the Diet has not taken any legislative measures to implement treaty provisions, despite the fact that such measures are critical if the relevant provisions are to be effectively implemented. One conspicuous example is the fact that no legislative measure was taken when Japan acceded to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1995. Article 2, paragraph 1(d) of this Convention provides that 'Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.' Whereas the need of legislation is to be judged in light of the circumstances in each state, numerous incidents of racial discrimination by private parties have constantly been reported in Japan to the present day, including the refusal of foreign applicants by owners of apartments or real estate dealers and the refusal of foreign guests by commercial facilities such as stores, restaurants and public baths.

In spite of the position of the government that no additional legislation is needed, existing norms in Japanese law in this area consist only of (1) Article 14 of the Constitution on equality before the law, which regulates the exercise of public authority toward individuals, and (2) Article 709 of the Civil Code on tort, which is a general provision applied to acts of an individual violating the rights or interests of another individual and is possibly applied to cover private racial discrimination by way of interpretation. Although there are cases, as shown below in section 4.1, in which the courts granted compensation to the victims of racial discrimination by applying Article 709 of the Civil Code interpreted in light of the ICERD, such a remedy is far from adequate in many respects. Firstly, Article 709 of the Civil Code is too general and it cannot be a normative reference for individuals or organizations as to what kind of acts actually constitute unlawful racial discrimination. Secondly, even if a victim of discrimination files a suit in a court, it is the victimized individual who has to prove the facts of the discriminatory act. That is difficult unless the speech or the act was videotaped or recorded on the spot. Scholars including this reporter have criticized Japan for not having effectively 'prohibited' private racial discrimination as required in Article 2, paragraph 1(d),

given that no concrete legislation regulating discriminatory acts of persons, groups or organizations exists in Japan in spite of the necessity for such law.[12]

Another flagrant example of the absence of domestic law or a mechanism to implement ratified treaties concerns ILO Convention No 100 on the equality of remuneration. There is a great disparity in salaries between men and women in Japan. On average, the salary of a woman in Japan is equivalent to approximately 65 per cent of that of a man, which is by far the lowest percentage among the industrialized countries. If we take the salary of part-time workers into account, the majority of whom are women who enter this precarious labour market because of family responsibilities, this percentage becomes even lower. The disparity persists despite the fact that Japan has been a state party to the ILO Convention No 100 on the equality of remuneration since 1967. The problem is that although this Convention demands equal remuneration for work of equal value, no legislation in Japan stipulates concrete methods to evaluate the value of different work. Article 4 of the Labor Standards Law, which prohibits discrimination with regard to wages because a worker is a woman, is not necessarily useful on the subject, because positions of men and women are often divided into two categories (the so-called 'two-track system')[13] from the outset. Japanese courts have not applied the ILO Convention No 100, denying its provisions' direct applicability.[14] Supreme Court

[12] M. Murakami, *Jinshu Sabetsu Teppai Jōyaku to Nihon* [*The Convention on the Elimination of Racial Discrimination and Japan*] (Tokyo: Nihon Hyōronsha, 2005) 229–31; H. Shin, *Jinken Jōyaku no Gendaiteki Tenkai* [*Contemporary Developments of Human Rights Conventions*], (Tokyo: Shinzansha, 2009) 405–10.

[13] This refers to a recruitment practice in which people are hired either for 'general' positions (*Ippan Shoku*) that involve general office work or for 'global' management-track positions (*Sōgō Shoku*). It is a practice that was introduced *after* the enactment of the Equal Employment Opportunity Law in order to avoid direct discrimination against women. Normally, companies do not openly refuse female candidates for global posts, at least in the first stage. However, in practice, many of them are eventually rejected, under the pretext that the position involves responsibility too heavy for a woman who is to get married some day and take care of the children. A considerable number of women are blocked from the stage of recruitment due to uncertainties related to the possibility of marriage and pregnancy; many others actually end up giving up their jobs after the birth of their first child. As a result, women represent the overwhelming majority of those hired for 'general' posts, while the great majority of the 'global' posts are occupied by men.

This segregation of work, closely related to the inadequacy of childcare facilities as well as abnormally long working hours in Japan, is quite serious because it is directly linked to basic issues such as remuneration and opportunities for promotion. Article 4 of the Labor Standards Law mentioned above is not a priori applicable, since this system was invented precisely to enable companies to say that different conditions of work or remuneration are not linked to the gender of workers but to the difference in professional categories. But it is evident that such a system constitutes a kind of indirect discrimination. In 2003, the CEDAW Committee examined Japan's report under the Convention, and in its concluding observations, recommended measures that Japan should take to address the indirect discrimination represented by this recruitment practice (UN Doc A/58/38, [358], [369]-[370]). Following these observations, the Equal Employment Opportunity Law was revised in 2006 (effective from 1 April 2007), and certain practices stipulated in a decree of the Ministry of Public Health and Labor (such as companies stipulating that workers must agree to possible transfers to other cities or countries as a condition for recruitment and employment in 'global' posts) were regulated as indirect discrimination under Article 7 of the revised law. But the law is still far from totally prohibiting such practices, since whether they constitute indirect discrimination is to be judged by the standard of reasonableness in each case.

[14] For instance, the judgment of the Kyoto District Court on 16 July 2008 (*Rōdō Hanrei* vol 973, 52) in a so-called *Kyoto Josei Kyokai* [*Kyoto Women's Association*] case.

justices have also admitted, in a meeting of consultation among judges involved in labour cases held in 1998, that there is currently no domestic norm ensuring the implementation of the principle of equal remuneration for work of equal value as provided for in the Convention.[15] This has remained one of the major discrepancies in Japan between the norms of ratified treaties and the actual state of implementation of such norms.

## 2.3 The Doctrine of Self-Executing Treaties

The Constitution of Japan in Article 98, paragraph 2 adopts the system of automatic incorporation of ratified treaties into the domestic legal order. Provisions of treaties can be directly applied by judges, if they consider it appropriate to do so in a given case. Whether a treaty is 'directly applicable'[16] may be evaluated by judges in each case, not regarding the justiciability of a treaty as a whole, but regarding each relevant provision in the context of a judicial decision required in that case.[17] In this sense, Japanese doctrine has often used the term 'self-executing' treaty, although the present reporter prefers the term 'direct applicability' of a treaty provision, because the expression 'self-executing treaties' or 'non-self-executing treaties' gives the impression that the treaty as a whole is directly applicable or not, regardless of the context of the required judicial decision in each case. A high degree of clarity of terms will be needed in order to use a treaty provision as the basis to claim an act such as the granting of social security. The same degree of clarity will not be necessary in order to use a treaty provision as the basis to judge unlawful an act that was already committed.[18]

The courts have recognized the doctrine of a 'self-executing' treaty, especially with regard to the International Covenant on Civil and Political Rights (ICCPR). While the Supreme Court has never approached the question of the

[15] Reported in an article 'Otokoto Onna: Chingin Kakusa Taikoku Nihon' ['Men and Women—A Superpower of Wage Gap: Japan'] *Asahi Shimbun*, 26 October 2007. The view of judges on the issue, confirmed in the meeting of 27 October 1998, can be found in a document disclosed by the Supreme Court (Saikōsai Hisho No 353, 10 July 2001) in response to a request for disclosure of information by lawyers.

[16] By the term 'directly applicable', I mean that a provision of a treaty can be used as the direct basis for a judicial decision in a given case without the assistance of other provisions of domestic law, including cases in which the action or omission of a public authority can be judged unlawful in light of an obligation under a treaty (O. De Schutter, *Fonction de juger et droits fondamentaux: transformation du contrôle juridictionnel dans les ordres juridiques américain et européens* (Bruxelles: Bruylant, 1999) 123–5, 160–4; C. Sciotti-Lam, *L'applicabilité des traités internationaux relatifs aux droits de l'homme en droit interne* (Bruxelles: Bruylant, 2004) 348–9). As such, it is a notion broader than that of treaty provisions being 'directly applicable as rights of the individual,' a formulation used by authors who equate the question of direct applicability with that of whether the individual can enforce his or her subjective rights in court (for example, P. Mayer, 'L'applicabilité directe des conventions internationales relatives aux droits de l'homme' in M. Delmas-Marty and C. Lucas De Leyssac (eds), *Liberté et droits fondamentaux* (2nd edn, Paris: Seuil, 2002) 303. However, many of the decisions of Japanese courts endorsing the direct applicability of human rights conventions have been based on the fact that the provision or treaty in question is formulated clearly as rights of the individual.

[17] De Schutter, n 17 above, 124.

[18] Y. Iwasawa, *Jouyakuno Kokunai Tekiyou Kanousei* [*Domestic Applicability of Treaties*] (Tokyo: Yūhikaku, 1985) 25 ff.

direct applicability of the ICCPR, there are a considerable number of cases in which the lower courts, and several high courts, have recognized that the ICCPR is directly applicable as a matter of principle. The courts recognize that the provisions of this Covenant are in principle directly applicable, for the reason that they are formulated in sufficiently precise terms as rights of the individual. However, in most cases, final judgments were made on the basis of domestic law and not on provisions of the ICCPR.

For example, in its judgment on 27 April 1999[19] concerning the claim asking for the removal of television cameras installed by Ōsaka City for the supervision of pedestrians the Ōsaka District Court recognized the direct applicability of Article 17, paragraph 1 of the ICCPR. This article provides that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation'. According to the Court:

> Given that this paragraph provides 'no one', it thus takes the form, similarly to other articles of the Covenant, that an individual is secured of his rights. It is to be understood that an individual is granted his rights directly by virtue of the Covenant, without the need for the enactment of domestic law realizing the contents of the Covenant. Indeed, there are no special circumstances that prevent such an understanding.

Also, the Hiroshima High Court, in its judgment on 28 April 1999 in a case concerning a defendant accused of a violation of the Public Election Law,[20] stated as follows:

> [T]he contents of the Covenant are, similar to the provisions of liberty rights in the Constitution, written in the form that is practicable for the realization by means of judicial application. It is understood that each State party is obliged to immediately implement the Covenant, in light of the object of the Covenant including Article 2 in which each State party undertakes to respect and ensure the rights recognized in the Covenant, to take necessary legislative and other measures to realize those rights, and to ensure that any person whose rights or freedoms as recognized are violated shall have an effective remedy. Therefore, it is understood that the Covenant has a self-executing force, and that it can be interpreted and applied in the courts.

An often-cited case in which the court actually struck down the application of domestic law for violating a provision of the ICCPR is the decision of the Tokyo High Court in a case concerning an appeal by a foreigner accused of violating various laws including the Hemp Control Law on 3 February 1993.[21] In this case, the accused had been found guilty by the Tokyo District Court and, in accordance with Article 181, paragraph 1 of the Code of Criminal Procedure, had been ordered to pay the fees of an interpreter needed for the trial. The accused issued an appeal, arguing that he had the right to free assistance of an interpreter by virtue of Article 14, paragraph 3 of the ICCPR. The Tokyo High Court, recognizing that Article

[19] *Hanrei Jihō* vol 1515, 116.
[20] *Kōtō Saibansho Keiji Hanrei Sokuhōshū* vol of 1999, 136.
[21] Tokyo Kōtō Saibansho, *Hanketsu Jihō (Keiji)* vol 44, No 1–12, 11.

14, paragraph 3(f) (stipulating the free assistance of an interpreter in cases where a foreigner charged with criminal offences cannot understand or speak the language used in court) was directly applicable, rejected the decision of the authorities imposing the payment as unlawful.

In contrast, the direct applicability of the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) has hardly been recognized by the courts. An important precedent in this regard is the judgment of the Supreme Court in the *Shiomi* case on 3 March 1989.[22] The plaintiff, Mrs Shiomi, a disabled woman of Korean nationality, had been disqualified from entitlement to the disabled pension under the National Pension Law, which, at the time of the institution of the suit, contained a Japanese nationality requirement. This requirement was later eliminated in 1982, after Japan acceded to the Convention on the Status of Refugees containing the clause of national treatment of refugees in the matters of social security. In this case, however, the Supreme Court did not take this change into consideration, nor did it apply the provision of Article 9 of the ICESCR, which provides that 'the States Parties to the present Covenant recognize the right of everyone to social security, including social insurance'. The Court rejected the complaint of the plaintiff, holding that this article simply declared and reaffirmed 'the political responsibility of the States Parties to actively pursue a policy on social security, in view of the realization of the right to social security', without granting any concrete and immediate right to individuals. Justifying its interpretation of Article 9 with the formula of 'progressive realization,' the Court concluded that the nationality requirement in the old pension law was not incompatible with the Covenant. Since this judgment, decisions of lower courts have followed the same line of reasoning.

In addition, another disturbing tendency in Japan's case-law is the fact that certain judgments go so far as to say that resorting to the courts in order to realize rights such as the right to social security is an unexpected course of action, or even an option excluded from the outset by the Covenant itself.[23] This position is equivalent to total and a priori negation of the justiciability of all provisions in the ICESCR.[24]

[22] *Shiomi v Minister of Public Health*, *Hanrei Jihō* vol 1363, 68.

[23] For example, the judgment of the Tokyo District Court on 29 May 1996 in a case concerning the refusal of a request for social welfare by a foreigner seriously injured in a car accident (*Hanrei Jihō* vol 1577, 76).

[24] Such observations, seriously contestable, of judges with regard to international social rights correspond, in fact, to the usual attitude of the courts toward social rights in the Constitution. The Constitution has an article on social rights, Article 25, which provides that 'all people have the right to maintain the minimum standards of wholesome and cultured living'. But this article is largely considered to be a programmatic right, which the individual cannot use to make demands of the government in the absence of legislation concretizing this right. Unlike certain social rights such as the right of workers to organize and to bargain and act collectively, provided for in Article 28 of the Constitution as well as in the labor code, which are considered to be subject to judicial intervention, the right to maintain the minimum standards of living is normally considered to be outside of the reach of justice. According to the Supreme Court, this right is not justiciable, except for cases in which concrete legislation or regulations fix the rate of social allowances in a manner manifestly incompatible with the right. Given that Japanese judges normally accord the legislature a wide margin of appreciation, it is practically unthinkable that they would ever deem a rule to be manifestly incompatible. The obstacle here seems to be the fear of violating the principle of the separation of powers, or rather, self-restraint by the judges in the exercise of their judicial power.

Recently, however, Japanese courts appear to have recognized, at least theoretically, the direct applicability of Article 2, paragraph 2 of the ICESCR concerning the principle of non-discrimination. The relevant judgments include that of the Ōsaka District Court on 25 May 2005[25] and that of the Ōsaka High Court on 15 November 2006 in the same case (unreported). The issue in question was the lawfulness of the exclusion of the plaintiffs, who are Korean residents in Japan, from the coverage of the National Pension Law.[26] Both courts considered that Article 2, paragraph 2, of the ICESCR prohibiting discrimination was directly applicable, as far as the lawfulness of the clause in the legislation designed to concretize the right to social security (Article 9) was being raised. Although such an observation did not, unfortunately, influence the negative conclusions of the courts toward the argument of the plaintiffs, they are the first cases in which the courts ever recognized the direct applicability of the ICESCR provisions on non-discrimination.

## 2.4 Standing and Private Rights of Action

Given that ratified treaties have domestic force of law in Japan upon the day of promulgation, treaties can be invoked by private parties in litigation in various ways. The most common form of litigation challenging the lawfulness of an act of the administrative authorities is a suit for the annulment of a decision (*Torikeshi Soshō*). Individuals are entitled to file a suit for annulment of a decision made by the administrative authorities (for example, a decision of responsible authorities of the Ministry of Public Health and Labor rejecting the demand of payment of pension allowances to a person). When such a suit is duly filed within a specified time limit, the plaintiff can argue the unlawfulness of the decision in question in terms of the relevant domestic law as well as provisions of the treaties.

Another pattern of litigation frequently used is a suit based on the State Compensation Law. This Law obliges the government to pay compensation for an act of a public official or organ that unlawfully caused damage to an individual. One can file a suit against the government on the basis of this Law. In such a case, the plaintiff can make arguments grounded on the unlawfulness of the act in question in view of applicable domestic law and treaties. On the other hand, while doctrine recognizes that the test of lawfulness under the State Compensation Law can be examined in a broad sense, the courts tend to be excessively rigorous in the application of treaties in this context and require that the provision of a treaty

[25] *Hanrei Jihō* vol 1898, 75.

[26] Although, as mentioned above in this report, the nationality clause was eliminated in the National Pension Law in 1982, this reform was not sufficiently comprehensive to cover all the foreign population concerned. When the law was revised, foreigners aged over 35 as of 1 January 1982 were excluded from entrance to the old-age pension plan, because premiums have to be paid for 25 years in order to qualify for the pension at age 60. Disabled foreigners aged over 20 as of the same date were also excluded, in a quite arbitrary manner, from qualifying for the pension for the disabled. As a consequence, there exists today several thousands of old and/or disabled foreign—mostly Korean—residents in Japan who are entirely deprived of the benefit of national pensions, frequently leading to judicial battles such as the one reported here.

invoked stipulate the 'right' of the individual. In a case concerning the claim for state compensation for the act of the Education Committee of Takatsuki City that abolished or considerably reduced educational programmes for Korean children, the Ōsaka District Court[27] rejected the arguments of the plaintiffs based on Article 27 of the ICCPR and other relevant provisions of human rights treaties, stating that the right to education for persons belonging to minorities could not be considered as a concrete right. Such a position is excessively strict, since the State Compensation Law only requires that an act 'unlawfully causes damage to an individual' and judges should be able to examine the unlawfulness of an act in light of the obligations of public authorities under human rights treaties.

In the context of litigation brought by private parties against other private parties, treaties are most commonly invoked in suits claiming compensation for damages by tort (Article 709 of the Civil Code), filed in accordance with the Civil Procedure Law. In cases concerning racial discrimination by private parties, such as real estate agents and shop owners, for example, plaintiffs unfailingly invoke the provisions of the ICERD to argue that the act in question is unlawful in light of the Convention. In some such cases, the courts actually invoked the treaty provisions for the purpose of interpreting Article 709 of the Civil Code.[28]

With regard to conditions on which treaties can be invoked in litigation by private parties, the present domestic law is problematic because the possibility to raise issues of treaties in the Supreme Court is severely limited by law. According to the Code of Penal Procedure, the grounds for an individual to appeal to the Supreme Court (Article 405) are limited to a violation of Constitution, an error of interpretation of the Constitution, and a conflict with the jurisprudence of the Supreme Court made by a high court. For other cases, the Supreme Court 'may admit' an appeal if the Court considers that a case involves an important issue concerning the interpretation of law (Article 406). Since treaties are considered to be part of the 'law' mentioned in Article 406, appeals based on treaties cannot be automatically admitted in accordance with Article 405 but are subject to specific admission by the Supreme Court. Similarly, the Code of Civil Procedure limits the grounds of appeal to a violation of Constitution and an error of interpretation of the Constitution (Article 312). As for other cases, the Supreme Court 'may admit' an appeal if there is a conflict with the jurisprudence of the Supreme Court or if the Court considers that a case involves an important issue concerning the interpretation of law (Article 318). As a consequence, the possibility of bringing arguments invoking treaties to the Supreme Court is substantially limited. It has to be added that this situation, in turn, would raise a problem in terms of the rule of exhaustion of domestic remedies in the system of individual communication under human rights treaties.[29]

[27] Judgment of 23 January 2008, *Hanrei Jihō* vol 2010, 93.
[28] These cases are referred to in this report below in section 4.2.
[29] At the present, Japan has not accepted any mechanism of individual communications.

## 3. Customary International Law

By virtue of Article 98 of the Constitution reproduced above, customary international law is deemed to be automatically incorporated into domestic law and courts will apply it. For example, in the *Tokyo Suikōsha* case cited above, the Tokyo District Court examined whether the 1907 Hague Convention Concerning the Laws and Customs of War on Land, specifically Article 46 of its Regulations, could be regarded as a customary international law, given that Article 2 of the Convention provided the applicability of the provisions contained in the Regulations only if all the belligerents were parties to the Convention. The Court held:

> In addition to the fact that the Hague Convention Concerning the Laws and Customs of War on Land was designed to further concretize or revise the existing general law and custom concerning war at a time when the Convention was adopted (paragraph 1 of its Preamble), the practice of the respect of private property in occupied territories, among others, had been gradually generalized in modern times as the concept of the respect of private property had come to be recognized, and had been established as a principle of customary international law by the beginning of the 19th century through its recognition by many civilized nations. Consequently, Article 46 has the meaning of affirming and declaring such international customary law and, therefore, the content of this Article has its own effect as customary law even separately from the Convention itself. If that is correct, even if the application of the Convention itself is excluded by Article 2, it is appropriate that the principles of the respect of private property and the prohibition of confiscation are applied in relation to the Second World War.

Courts examine the issue of customary law themselves without deference to the political branches and they take judicial notice of customary law, although in many cases they do so in response to arguments of a party invoking the customary nature of a norm. The primary subject areas in which customary law is cited are such matters as sovereign immunity, non-extradition of political offenders, the rights of the state regarding immigration control, and the basic principles of international law of armed conflicts.

The question of sovereign immunity was raised in Japanese courts for the first time in a case concerning a claim for execution of a promissory note issued by a *chargé d'affaires* of the Republic of China. In its judgment of 28 December 1928,[30] the *Taishin-in*, the Supreme Court in the pre-war period, held that it was a clearly established principle of international law that a foreign state was not subject to the civil jurisdiction of Japan except for special cases such as those involving real estate. This judgment has been treated as a leading case in Japan in which the Supreme Court took the position of absolute immunity as a matter of customary international law.

Recently, the Second Chamber of the Supreme Court, in its judgment of 21 July 2004,[31] changed its position in favour of restrictive immunity. The case was brought by Japanese plaintiffs against the government of Pakistan, claiming a payment based

[30] *Taishin-in Minji Hanrei-Shū* vol 7, No 12, 1128.
[31] *Saikō Saibansho Minji Hanrei-Shū* vol 60, No 6, 2542.

on a contract between their company and a company affiliated to the Ministry of Defense of Pakistan. The Supreme Court held that, in the present day, while a foreign state was still immune from civil jurisdiction of a forum state as far as the sovereign acts (acts *jure imperii*) were concerned, customary international law to the effect that it also enjoyed immunity from civil jurisdiction of a forum state for private law or commercial acts (acts *jure gestionis*) no longer existed. The Court stated that, in accordance with the rule of restrictive immunity, a foreign state was not immune to Japan's civil jurisdiction with regard to its private law or commercial acts, unless there were special circumstances—such as a risk that the exercise of the civil jurisdiction of the state might infringe the sovereignty of the foreign state.

In the *Yun Soo Gil* case, the existence of a rule of customary international law concerning the non-extradition of political offenders was invoked by the plaintiff, Yun Soo Gil, and was actively disputed in the courts. Mr Yun, a national of the Republic of Korea who had been smuggled into Japan and had been involved in political activities against his home country's military regime, was identified and received an order of forced expulsion from the immigration authorities of Japan. He filed a suit for annulment of the order, arguing that it was an established rule of customary international law that a political refugee like himself was not subject to expulsion to a country where he would face the risk of persecution. The Tokyo District Court[32] accepted his argument, holding that a rule of non-extradition of political offenders had become customary international law for the last century and therefore the order was unlawful as a violation of customary international law as well as Article 98, paragraph 2 of the Constitution stipulating the observance of customary international law. However, the Tokyo High Court overturned the judgment,[33] stating that even if a rule of non-extradition of political offenders was considered to exist, Mr Yun could not be regarded as a political offender in this sense and that, in any case, the procedure of forced expulsion of smugglers could not be equated with that of extradition. The Supreme Court also rejected the appeal.[34]

In the *McReen* case, known in Japan as a leading case concerning the rights and status of foreign nationals in Japan under the Constitution, the plaintiff, Mr McReen, filed a suit for an annulment of the non-permission of renewal of his one-year visa in Japan. The reason for the non-permission was apparently his political activities during his stay in Japan, including his participation in meetings and demonstrations against the Vietnam War by the United States. Consequently, the question was raised in the courts whether foreign nationals enjoyed fundamental rights and freedoms under the Constitution such as the freedom of expression and of assembly. The Grand Bench of the Supreme Court, in its judgment of 4 October 1978,[35] accepted that the guarantee of fundamental human rights in chapter 3 of the Constitution equally extended to foreign nationals staying in Japan, except for rights which, in terms of their nature, concerned only Japanese

[32] Judgment of 25 January 1969, *Gyōsei Jiken Saibanrei-Shū* vol 20, No 1, 25.
[33] Judgment of 19 April 1972, *Hanrei Jihō* vol 664, 3.
[34] Judgment of 26 January 1976, *Hanrei Taimuzu* vol 334, 105.
[35] *Saikō Saibansho Minji Hanrei-Shū* vol 32, No 7, 1223.

nationals. On the other hand, the Court stated that, under customary international law, a state was free to decide on the admission of foreign nationals into its territory as well as on the conditions in the case of admission. As a result, it held that foreign nationals did not have a guaranteed right of entry into Japan nor a right to demand extended stay in Japan under the Constitution. The Court thus arrived at the conclusion that the guarantee of fundamental rights to foreign nationals under the Constitution was given only in the framework of the system of immigration control, and that a foreigner could not enjoy the guarantee that his activities during a stay in Japan would be excluded from negative elements in the consideration of the renewal of his visa.

Principles of international law of armed conflicts (international humanitarian law) have also often been invoked and/or applied as a matter of customary international law. In the famous, so-called *Atomic Bomb* case, in which the victims of atomic bombs in Hiroshima and Nagasaki claimed compensation for their injuries against the Japanese government, the Tokyo District Court[36] recognized that the prohibition of indiscriminate attack against undefended towns as well as the principle of targeting military objects constituted customary international law. The Court also recognized that it was an established principle of international law that a belligerent state that caused damages to another belligerent state by unlawful acts of warfare must pay compensation, adding that, in the case of the use of atomic bombs, the wrongdoing state was directly responsible.

More recently, the rights and status of victims of international humanitarian law violations to claim compensation from the wrongdoing state have actively been invoked in Japanese courts by the former POWs of the allied nations and Asian victims of forced labour or 'comfort women' against the Japanese government. However, the courts are almost unanimous in rejecting such arguments.[37]

## 4. Hierarchy

According to the government as well as prevailing doctrine, treaties and customary international law are considered to have higher status than statutes. This means that treaties prevail over statutes and that a conflicting norm of a statute must be struck down by the courts. This rationale has been recognized, at least by the lower courts (the Supreme Court has never clearly addressed the issue), in a number of cases.

The decision of the Tokyo High Court in a case concerning an appeal by a foreigner accused of violating various laws including the Hemp Control Law on 3 February 1993,[38] mentioned above, is one of such cases. The Court, recognizing that Article 14, paragraph 3(f) (stipulating the free assistance of an interpreter in cases where a foreigner charged with criminal offences cannot understand or speak

[36] Judgment of 7 December 1963, *Kakyū Saibansho Minji Saibanrei-Shū* vol 14, No 12, 2435.

[37] See Shin Hae Bong, 'Compensation for Victims of Wartime Atrocities: Recent Developments in Japan's Case Law' (2005) 3(1) J Int Criminal Justice 187–206.

[38] Tokyo Kōtō Saibansho, *Hanketsu Jihō (Keiji)* vol 44, No 1–12, 11.

the language used in court) was directly applicable, rejected the decision of the authorities ordering the payment of the interpretation fee in accordance with the Code of Criminal Procedure.

Also, the Tokushima District Court, in its judgment on 15 March 1996[39] on a claim for state compensation because a prisoner was obstructed from seeing his counsel for a civil suit, rejected the application of the Prison Law and its Implementing Regulations that the government invoked as a legal basis of the act of the prison guards, stating that 'in a case where the provisions the Law and its Regulations are contrary to the object of Article 14, paragraph 1 of the ICCPR, that part of the Law and Regulations must be considered as null and void'.

## 4.1 Conforming Domestic Law to International Law

The courts have taken such a position in a number of cases, although it has not been clearly formulated as a doctrine of presumption. Among the judgments already cited in this chapter, the judgment of the Tokushima District Court on 15 March 1996 clearly took such a view. Based on the interpretation that Article 14, paragraph 1 of the ICCPR guaranteed the right of a prisoner to meet his counsel in a civil suit, the court went on to state the following: 'Consequently, the provisions concerning communication with counsel in the Prison Law and its Implementing Regulations must be interpreted in conformity with the object of Article 14, paragraph 1 of the ICCPR' (adding that, in a case where the provisions of the Law and its Regulations are contrary to the object of Article 14, paragraph 1 of the ICCPR, that part must be considered null and void).

Generally speaking, 'indirect application' of international law, ie the use of international law for the purpose of affirming and supporting the interpretation of domestic law, seems to be favoured and more easily accepted by the courts, rather than the direct application of international law. We can find an increasing number of such cases. For example, in its judgment on 27 March 1997 in the so-called *Nibudani Dam* case,[40] involving a claim for the annulment of a dam construction project on a site worshipped as a sacred place by the Ainu, the indigenous people in Japan, the Sapporo District Court held that the authorization of the project by the authorities was illegal. The court judged that the decision exceeded the authorities' scope of discretionary power given by the Land Expropriation Law. In this case, the Court first took note of the fact that the Japanese government had recognized that the Ainu people belonged to 'minorities' in the sense of Article 27 of the ICCPR during the examination of the state report by the Human Rights Committee in 1991. In addition, the Court also recognized that the Ainu was an indigenous people in Japan, which preserved its own unique culture and identity. The Court then interpreted that Article 27 of the ICCPR guaranteed, to persons belonging to minorities, the right to enjoy their own culture, and that it imposed on each state party the responsibility to give adequate consideration to such right in deciding and

[39] *Hanrei Jihō* vol 1597, 115, supra.
[40] *Hanrei Jihō* vol 1598, 33, *Hanrei Taimuzu* vol 938, 75.

executing a state policy that possibly affects the culture of minorities. The Court stated that 'in light of the object of the enactment of Article 27 of the Covenant, the restriction [of the right] must be limited to the minimum extent necessary', and concluded that the authorization of the project by the authorities was illegal. It is to be noted that this judgment of the Court was, in direct terms, concerned with a violation of the Land Expropriation Law by the authorities. But such an evaluation of the Court was clearly based on the interpretation of Article 27 of the ICCPR. In other words, this is a case in which the Court interpreted domestic law, the Land Expropriation Law, so that it would conform to the provision of the ICCPR. This case has also attracted much attention in Japan as the first case in which a Japanese court clearly recognized that the Ainu is a 'minority' in the sense of Article 27 of the ICCPR.[41] Furthermore, the Court in this case also recognized that the Ainu is an indigenous people in Japan. This is the first time that Japanese judicial authorities gave such recognition before the government did so.[42]

The courts have also developed important case-law concerning 'indirect application' of international law in relation to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). As already noted herein, the Diet has not taken any legislative measures to implement this Convention, in spite of the fact that Article 2, paragraph 1(d) provides that 'Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.' In a case concerning the rejection of a foreign client by a jewellery shop, in which a Brazilian woman window-shopping in a jewellery shop was ousted by a shop clerk, the Shizuoka District Court, in its judgment on 12 October 1999[43] ordered the owner of the shop to pay compensation to the plaintiff. The court reached its decision by applying Article 709 of the Civil Code on tort, interpreted in light of the Convention. The Court said:

> [T]he International Convention on the Elimination of All Forms of Racial Discrimination . . . requires State parties to take legislative or other measures against discriminatory acts by individuals and groups. . . . If we premise the view of the Ministry of Foreign Affairs that this Convention does not require any legislative measures, it is understood that substantive provisions of the Convention operate as an interpretative element of tort, in a case, such as the present one, concerning a claim for compensation based on an unlawful act against an individual.

The reasoning of the Shizuoka District Court regarding the use of the ICERD provisions in interpreting the Civil Code was used and developed further by the Sapporo District Court in a case concerning the refusal of foreign clients by a public thermal bath.[44] In this case, the owner of the bath, posting a notice of 'Japanese

[41] Unfortunately, the dam in question was eventually constructed, because the litigation did not have an effect of suspending the proceeding of the construction work.

[42] It is only in June 2008 that the government officially recognized the Ainu as an indigenous people in Japan (*Asahi Shimbun*, 6 June 2008).

[43] *Hanrei Jihō* vol 1718, 92, *Hanrei Taimuzu* vol 1045, 216.

[44] November 11, 2002, *Hanrei Jihō* vol 1806, 84; *Hanrei Taimuzu* vol 1150, 185.

Only', refused the entry of several foreign guests to the bath. One of them, an American who is married to a Japanese woman and was later naturalized in Japan, tried to enter after the acquisition of Japanese nationality but was refused again even with his Japanese passport. The Sapporo District Court, conceding that the ICERD, as well as Article 14 of the Constitution on the equality before law and the ICCPR, do not directly regulate the relationship between private parties, affirmed that they could be a standard of reference in interpreting provisions of private law. Given that the plaintiff holding the Japanese nationality was refused entry, the Court recognized that the refusal was not a distinction on the basis of nationality but,

> a distinction or restriction based on race, color, descent, or national or ethnic origin, that should be eliminated even between private individuals in light of the object of Article 14, paragraph 1 of the Constitution, Article 26 of the ICCPR and the Convention on the Elimination of All Forms of Racial Discrimination.

The Court then held that the refusal by the owner constituted unreasonable discrimination and thus a tort under the Civil Code, and ordered the owner to pay compensation to the victims. Whereas, in the passage just cited, Article 14 of the Constitution and the ICCPR are also enumerated, it is clear that the definition of 'racial discrimination' and the requirement of prohibition of private discrimination in the ICERD played an essential role in the Court's judgment. In the appeal case, the Sapporo High Court[45] followed the same position and ordered the owner of the bath to pay compensation.

Thus far, it has only been the lower courts that have developed a position to interpret domestic law in conformity with international law, but it is remarkable that the Supreme Court also took such an attitude recently on the issue of the rights of the child. The judgment of the Grand Bench of the Supreme Court on 4 June 2008,[46] concerning the confirmation of Japanese nationality for children born to unmarried couples of Japanese men and Philippine women, is an instance of the case in question. Under the Nationality Law valid at the time of filing suit, a child obtains Japanese nationality at birth if, at the moment of birth, the child's mother or father is Japanese. In the case of a child with a Japanese mother, the relationship between the mother and child was clear due to the facts of birth and the Japanese nationality was given to the child. However, the problem arose in the case of a child with a foreign mother and a Japanese father, because, in order for the child's 'father' to be Japanese at the moment of birth, the recognition of paternity had to be made during pregnancy, which does not happen very often. When a child is recognized by the father after birth, that child cannot obtain Japanese nationality unless his or her mother and the Japanese father legally become married. Japanese law still distinguishes children born out of wedlock from children born to married couples, notably in Public Registration Law and the Civil Code (the right of legal

[45] 16 September 2004 (unreported).
[46] *Hanrei Jihō* vol 2002, 3; *Hanrei Taimuzu* vol 1267, 92.

inheritance of children born out of wedlock is half of that of children born to married couples), and regarding nationality.

In this case, filed by children born to unmarried Japanese men and Philippine women and recognized by their father after birth, the Grand Bench of the Supreme Court held the provision of the Nationality Law requiring the marriage of parents as a condition of obtaining Japanese nationality to be unconstitutional, and confirmed the Japanese nationality of all ten plaintiffs. In its reasoning, the Court pointed out the change of social environment concerning family life and parental relationship in an era of globalization, to explain that the strength of the link of a child to Japan could not be measured instantly by whether or not his or her parents were married. In this context, the Court added: 'Also, in the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, which our State ratified, there exists a provision to the effect that a child shall not be subject to any discrimination.' Although not explicitly mentioned, it is clear that the Court referred to the contents of Article 23 of the ICCPR and to Article 2 of the Convention on the Rights of the Child. In this case, it is clear that the judgment of the Supreme Court on the unconstitutionality of the relevant provision of the Nationality Law was influenced by the concern for conformity of domestic law with international law.

## 4.2 The Doctrine of *Jus Cogens*

The courts have never recognized the doctrine of *jus cogens* norms in explicit terms, but there are cases in which the courts admitted the existence of some fundamental ideas or values in the international community. In the *Tokyo Suikōsha* case cited above, the Tokyo District Court examined whether the principles of respect for private property and prohibition of confiscation embodied in Article 46 of the 1907 Hague Convention Concerning the Laws and Customs of War on Land could be regarded as customary international law. The court then examined whether those principles could be regarded as *jus cogens* in international law. The Court, after stating that 'in the international legal order, law is established, basically, on the basis of explicit (treaties in a broad sense) or implicit (international customs) agreement between its subjects of law, that is, States, and governs only those States that made such an agreement', denied that there were *jus cogens* norms in international law, holding that 'international law, in principle, has a nature as supplementary norm, and we cannot but consider that it is *jus dispositum*'. On the other hand, the Court admitted: 'That being said, given that international law is also law, it cannot recognize the legal effect of an agreement between States conflicting with "public order and good morals" that are considered to be an idea or fundamental value ruling all bodies of law established in civilized nations.' The Court went on to say that, consequently, if some states agree, for example, to massacre a certain race of people or to close all the hospitals in a certain area, those agreements are considered null and void as conflicting with 'public order and good morals' in international law.

## 4.3 Using International Law to Interpret the Constitution

In general, the courts have shown a tendency to decline the use of international law for the purposes of interpreting constitutional provisions, assuming that the standards of international law, in particular treaty provisions guaranteeing individual rights, are essentially the same in content and they do not provide a guarantee exceeding that of the Constitution. In many cases, the courts have summarily rejected arguments of parties based on human rights treaties, without proceeding to the interpretation of the provisions invoked. For instance, in a case regarding the lawfulness of taking fingerprints from foreign residents in accordance with the Foreigners Registration Law, the Tokyo District Court held that the said treatment did not violate Article 14 of the Constitution (equality before the law). The court also rejected the argument invoking Article 26 of the ICCPR on non-discrimination in just a few lines, stating that: 'As far as the treatment does not violate Article 14 of the Constitution, it goes without saying that it does not violate Article 26 of the ICCPR.'[47] Similarly, the Ōsaka High Court, in the so-called *Note-taking in a Courtroom* case,[48] briefly disposed of an argument invoking Article 19, paragraph 2 of the ICCPR without interpreting it, stating: 'Given that this provision is the one on the freedom of expression, it cannot be understood that it has any significance beyond the freedom of expression guaranteed by Article 21 of the Constitution.' Such an attitude of the courts is to be seriously criticized, because it is clear that provisions of human rights treaties, even if there are corresponding articles in the Constitution, are often more specific and detailed than the constitutional provisions.

Under such circumstances, it is a welcome development that the Supreme Court, in its recent judgment, referred to above in section 4.1, took provisions of human rights treaties into account in interpreting the Constitution.

## 4.4 Hierarchy within International Law

The courts have not indicated that any specific part of international law has any higher status, but in the context of the scope of treaties subject to the examination of unconstitutionality by the courts, they have taken the view that treaties of high-level political importance are to be excluded from the subject of such examination.

In the famous, *Sunagawa* case, the defendants were accused of violating Special Criminal Code in Relation to the Executive Agreement based on Article 3 of the Security Treaty between Japan and the United States (of 1951, that expired in 1960) by trespassing on the US military base in Sunagawa town during a demonstration. The defendants submitted an argument that the Japan–US Security Treaty, which was the basis of the Executive Agreement and therefore the origin of the Special Criminal Code, was contrary to Article 9 of the Constitution of Japan enunciating the renunciation of war and the non-possession of land and other forces. The Supreme Court, in its judgment of the Grand Bench on 16 December

[47] Judgment on 29 August 1984, *Hanrei Jihō* vol 1125, 101; *Hanrei Taimuzu* vol 534, 98.
[48] Judgment on 25 December 1987, *Hanrei Jihō* vol 1262, 30; *Hanrei Taimuzu* vol 653, 233.

1959[49] declined to decide on the issue, stating that a treaty of high political importance such as this one, affecting the existence of the state, is beyond reach of the power of courts on the constitutionality of treaties, unless such a treaty is recognized, prima facie, as manifestly and evidently unconstitutional. This is the leading case on the issue, and has been followed by the lower courts since then.

## 5. Jurisdiction

### 5.1 Universal Criminal Jurisdiction

Although the courts have never had the opportunity to hear actual cases on this issue, the basis for the courts to exercise universal jurisdiction over international crimes violating international humanitarian law has existed since 2004.

In 2004, Japan ratified the 1977 Additional Protocols I and II to the 1949 Geneva Conventions and, in line with this, took a series of legislative measures effectively to implement the Protocols as well as the Geneva Conventions. The Geneva Conventions had already been acceded by Japan in 1953, but the implementing legislation had not been enacted. This is largely due to the ambivalent position of the government toward international humanitarian law in view of the principle of pacifism enshrined in the Constitution of Japan. However, given the possibility that Japan might be involved in armed conflicts, such as co-operating with the suppression of terrorism, and the fact that some members of the Japan's Self Defense Force are dispatched abroad, the need to come to terms with international humanitarian law came to be increasingly recognized.

The legislative measures concerning the universal jurisdiction are the provision of Article 7 of the Law Regarding the Punishment of Grave Breaches of International Humanitarian Law (Act No 115 of 18 June 2004) and the amendment of Article 4–2 of the Penal Code (Act No 45 of 24 April 1907). The Law Regarding the Punishment of Grave Breaches of International Humanitarian Law sets out the crimes of (1) destroying cultural monuments, works of art or places of worship (Article 3), (2) delaying the repatriation of prisoners of war (Article 4), (3) transferring by the occupying power of its own civilian population into the territory it occupies (Article 5), and (4) obstructing the exit of civilians from an occupied territory (Article 6). This law also provides that the crimes enumerated in Articles 3–6 shall be punished in accordance with Article 4–2 of the Penal Code. Article 4–2 of the Penal Code is a provision stipulating that the Code shall apply to anyone who commits outside the territory of Japan those crimes prescribed under Part II of the Code and they are to be punished. Articles 3–6 of the Law Regarding the Punishment of Grave Breaches of International Humanitarian Law are designed to ensure the punishment of crimes provided in Articles 85–4(d), 85–4 (b), 85–4(a) and 85–4(b) respectively.

[49] *Saikō Saibansho Keiji Hanrei-Shū* vol 13, No 13, 3225.

The 'grave breaches' under the Additional Protocol I, other than the four crimes regulated by the Law Regarding the Punishment of Grave Breaches of International Humanitarian Law, are governed by Article 4–2 of the Penal Code. As seen above, Article 4–2 of the Penal Code is a provision stipulating that the Code shall apply to anyone who commits outside the territory of Japan those crimes prescribed under Part II of the Code are to be punished under a treaty even if committed outside the territory of Japan. As a result of an amendment to the Law Amending the Part of Acts Including the Penal Code (Act No.52, 1987), Additional Provision 2 of the Act provides that Article 4–2 of the Penal Code shall be applied to those crimes that are to be punished under the four Geneva Conventions even if committed outside the territory of Japan.

## 6. Other International Sources

Although the courts never view non-binding declarative texts as being authoritative in interpreting and applying domestic law, there are cases in which the courts referred to them for the purpose of supporting their interpretation of relevant treaties.

In a case in which an accused placed under solitary confinement in detention facilities disputed the lawfulness of a window panel that blocked the view of the outside, the Tokyo High Court examined the interpretation of Article 7 of the ICCPR in reference to the Body of Principles for the Protection of All Person under Any Form of Detention or Imprisonment (A/RES/43/173, 1988) as well as the general comments of the Human Rights Committee. The Court held that, considering the general comment of the Committee with regard to Article 7 as well as Principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and its original footnote, the term 'torture or cruel, inhuman or degrading treatment or punishment' in Article 7 was understood to include treatment inflicting physical or mental suffering, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time or season.[50] The Court then admitted that, given that there was no denying that the panel in question imposed restrictions on the sight and awareness of the passing of time or season of a detained person, it would be more compatible, generally speaking, to international standards not to install such a panel on the windows of the cells of detention facilities.[51]

The Ōsaka District Court, in the above-mentioned judgment (2.6.) of 9 March 2004[52] concerning a claim for state compensation for refusing the use of videotaped evidence in a meeting of an accused and his counsel, referred to relevant non-binding texts in detail. The court also referred to a general comment of the Human Rights Committee, in interpreting Article 14, paragraph 3(b) of the ICCPR guaranteeing the

[50] Judgment of 22 May 1995, *Hanrei Taimuzu* vol 903, 112.

[51] However, in this case, the Court eventually did not recognize the unlawfulness in the sense of State Compensation Law.

[52] *Hanrei Jihō* vol 1858, 79.

accused the right 'to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing'. The Court said that in addition to the fact that the general comment of the Committee on Article 14 stated that 'facilities' in this paragraph must be understood to include access to documents and other evidence necessary for the accused to prepare for trial, a series of resolutions that clearly declare the right of communication between the accused and his counsel have been repeatedly adopted in the United Nations, including Article 93 of the Standard Minimum Rules for the Treatment of Prisoners, Principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and Articles 8 and 22 of the Basic Principles on the Role of Lawyers, Article 14, paragraph 3(b) of the ICCPR should be interpreted to mean that it require the guarantee of the right of communication between the accused and his counsel. On the basis of such an interpretation of Article 14, paragraph 3(b) of the ICCPR, the Court held that the act of the prison guards that rejected the demands of the accused for a meeting with counsel using videotaped evidence was unconstitutional and unlawful, violating the first sentence of Article 34 and Article 37, paragraph 3 of the Constitution concerning the right of the accused as well as the object of Article 14, paragraph 3(b) of the ICCPR.

Courts may make reference to treaties to which the state is not a party in interpreting or applying domestic law, including constitutional matters, but it is not so often that the courts do so. One notable case is the judgment of the Tokushima District Court of 15 March 1996, mentioned above. In this case, the Court examined the relevance of the jurisprudence of the European Court of Human Rights on Article 6, paragraph 1 of the European Convention of Human Rights for the purpose of interpreting Article 14, paragraph 1 of the ICCPR. The Court affirmed that the jurisprudence of the European Court of Human Rights had certain weight for the interpretation of the ICCPR, given that the European Convention of Human Rights had been made with reference to the draft of the ICCPR and that Article 6, paragraph 1 of the European Convention of Human Rights corresponded to Article 14, paragraph 1. The Court, considering that the jurisprudence of the European Court of Human Rights constituted 'relevant principles of international law applied to the parties' provided in Article 31, paragraph 3(c) of the Vienna Convention, took into account the jurisprudence of the European Court of Human Rights to the effect that the right to a fair trial included the right of a prisoner to meet his counsel to file a civil suit. The court also interpreted that Article 14, paragraph of the ICCPR guaranteed, as its corollary, the right of a prisoner to meet his counsel in a civil suit.

There are numerous cases in which parties have asked the courts to apply or give effect to general comments, concluding observations, views or general recommendations of non-judicial treaty bodies under human rights treaties. In some cases, the courts have accepted such arguments to a certain extent and referred to them when interpreting relevant treaty provisions, as in the cases already cited in this report. On the other hand, it remains true that such cases are still relatively few. The courts sometimes categorically deny to those materials any juridical value, particularly the 'views' of the Human Rights Committee. While Japan is not a state party to the

first Optional Protocol to the ICCPR, citizens and lawyers often cite the 'views' of the Committee to support their arguments, especially on matters such as excluding from the scheme of welfare allowances foreign nationals who were forced to serve in the Japanese army in World War II.

A set of legislation exists in Japan concerning pensions and other allowances for former soldiers as well as their surviving families, but it has a nationality requirement that systematically excludes all persons from former colonies. In the jurisprudence of the Human Rights Committee under the ICCPR, discrimination based on nationality, which is not explicitly mentioned in Article 2, paragraph 1, nor Article 26, is considered as discrimination with regard to 'other status'. It was on this basis that the Committee concluded, in the case of *Gueye v France* (1989),[53] that the difference of treatment between French citizens and former soldiers in the French army who later became Senegalese citizens, with regard to the value of the military pensions they were paid, constituted unreasonable discrimination with regard to nationality, unjustified under Article 26.[54] However, the courts have never accepted the argument, interpreting Article 26 of the ICCPR in reference to such views of the Committee. A typical case is the judgment of the Kyoto District Court on 27 March 1998,[55] in which the Court said that the views were legally non-binding for Japan and that the views of the Committee were to be treated as simple opinions.

Whereas Japan is not a state party to the first Optional Protocol at present, it cannot escape from the fact that the interpretation of substantive clauses of the Covenant by the Committee has been developed in the Committee's general comments and views. From such a perspective, the attitude of the court is problematic in that it does not understand the role of treaty organs properly. The Human Rights Committee, in its examination of Japan's fourth report in 1998, critically pointed out the attitude of the courts represented by that of the Kyoto District Court, stating:

> The Committee is concerned that there is no provision for training of judges, prosecutors and administrative officers in human rights under the Covenant. The Committee strongly recommends that such training be made available. Judicial colloquiums and seminars should be held to familiarize judges with the provisions of the Covenant. The Committee's general comments and the Views expressed by the Committee on communications under the Optional Protocol should be supplied to judges.[56]

[53] *Ibrahima Gueye et al v France*, Communication No 196/1985, Views adopted on 3 April 1989, UN Doc CCPR/C/35/D/196/1985 (1989).

[54] Communication No 196/1985, Views adopted on 6 April 1989, UN Doc CCPR/C/35/D/196/1985. In France, the Conseil d'Etat held that this distinction was contrary to the European Convention on Human Rights, by virtue of Article 1 of the first Optional Protocol (the right to the respect of property) and Article 14 of the Convention (the enjoyment of the recognized rights without any distinction) in 2001 (case No 214181, 214283 <http://legifrance.gouv.fr>). Afterwards, this question was finally settled in September 2006, when the government announced the re-evaluation of pensions of former African soldiers in the French army, on the occasion of the release of the film '*Indigènes*' depicting the history of these soldiers (*Le Monde*, 26 September 2006, *Le Figaro*, 28 September 2006).

[55] *Shōmu Geppō* vol 45, No 7, 1259.

[56] Concluding observations of the Human Rights Committee: Japan, CCPR/C/79/Add.102, 19 November 1998 [32].

# 15

# Luxembourg*

*Patrick Kinsch*

## 1. Introduction

The attitude of the public authorities of Luxembourg, and especially of the courts, towards international law may be explained by a basic fact of national history: modern Luxembourg—created in the nineteenth century through a series of international treaties,[1] evidently too weak militarily to ensure its own defence and dependent economically on its integration into the economy of one or more of its neighbouring states—has always been too dependent on the mechanisms of international co-operation and their organization by public international law to adopt anything other than a deferential attitude towards this law. In particular, the recognition since 1950 of the primacy of international law over internal law[2] is the manifest reflection of the needs peculiar to the special situation of the Grand-Duchy of Luxembourg. Benevolent explanations have been offered: the experience gained—through the integration in the *Zollverein* (the German Customs Union), and then through the Belgium–Luxembourg Economic Union and Benelux—of limitations and transfers of sovereignty;[3] the conviction, shared by all the public powers that integration into an international and supranational order is in conformity with, and even indispensable to, the national interests.[4]

Thus, it is the situation of Luxembourg as a very small European state that explains in great measure its attitude towards international law.

* Translated from the French by Federica Paddeu.

[1] The final act of the Congress of Vienna of 1815, the Treaty of London of 1839; cf G. Trausch (ed.), *Histoire du Luxembourg* (Toulouse: Privat, 2003) 200ff ('Comment faire d'un Etat de convention une nation?').

[2] Recognized, in Luxembourg, since 1950 (Cass 8 June 1950, *Pas lux* 15, 41), that is before its recognition in the legal orders of France and Belgium whose courts are usually followed, and not preceded, by the courts of Luxembourg.

[3] Cf P. Pescatore, 'L'effet du droit communautaire dans l'ordre juridique interne' (1966) 27–8 FSY 32, and especially 'La souveraineté nationale et les traités internationaux au fil de l'histoire luxembourgeoise (1815–1956)' (1967) 19 Hémecht 129, esp 163ff.

[4] P. Pescatore, ibid.

## 1.1 Constitutional Texts

International law and, more widely, international relations are treated in Article 37 of the Constitution of Luxembourg of 17 October 1868, which, after its revision of 25 October 1956, establishes:

> The Grand Duke concludes treaties. Treaties do not come into effect until they have been approved by law and published in the manner laid down for the publication of laws.
>
> The treaties referred to in Chapter III, § 4, art. 49*bis*, are approved by a law voted under the conditions of article 114, paragraph 2.
>
> Secret treaties are abolished.
>
> The Grand-Duke adopts the regulations and decrees necessary for the execution of treaties in accordance with the procedures regulating the execution of laws and with the effects attaching to such measures, without prejudice to the matters reserved to the law by the Constitution.
>
> No cession, exchange or addition of territory is effected except pursuant to a law.
>
> The Grand-Duke commands the armed force; he declares war and the cessation of war after having been authorised by a vote of the Chamber adopted under the conditions of article 114, paragraph 2 of the Constitution.

A brief gloss on paragraph 2 of Article 37: as it operates in relation to Articles 49*bis* and 114, this text relates to treaties concerning the devolution of 'powers reserved by the Constitution to the legislature, executive and judiciary . . . to institutions governed by international law' (Article 49*bis*). Such treaties, since they have a direct impact on the constitutional attribution of powers, must be approved under the quorum and majority conditions of a constitutional amendment (Article 114, paragraph 2). This supermajority is also required for a parliamentary authorization of a (very hypothetical) declaration of war by the Grand-Duke, referred to in the final paragraph of Article 37.

A modernization of the Constitution of Luxembourg is currently in progress:[5] but it is not foreseen that the process will modify the substance of Article 37, though its substantial content will be transferred to Articles 121–123.[6]

No provision of the Constitution concerns either the status of general public international law in the internal legal order of Luxembourg, or the hierarchy between norms (written and unwritten) of international law and norms of national law.

[5] Revision proposal for the modification and new organization of the Constitution, *Doc parl* No 6030.

[6] The modifications are essentially concerned with drafting; Article 121 will establish that 'The Grand-Duke makes, ratifies and, save for specific provisions on denunciation contained in the treaties themselves, denounces treaties', and the paragraph pursuant to which 'secret treaties are abolished, is intended to be eliminated: since the text of Article 37 establishes in a general way the publication of treaties, the 'abolition' of secret treaties is redundant.

The *travaux préparatoires* of the constitutional revision of 1956 show that the governmental project, based on previous research of comparative constitutional law,[7] intended to establish, through express constitutional provisions, the integration within the internal legal order of the 'rules of international law' and their primacy in respect of internal law[8] as well as the principle of the competence of courts for the application and interpretation of such rules.[9] This governmental initiative proved a failure: the report of the parliamentary Commission for the Revision of the Constitution criticized its perfectionism,[10] and the opinion of the Conseil d'État proposed to avoid all perilous 'anticipations' and to await the result of the evolution of the case-law.[11] This reticence in the reactions to the 1956 proposal better represents the attitude of the political institutions of Luxembourg than the enthusiasm of the government's proposal.

The logical consequence of this lacuna in the constitutional text is—as confirmed by the opinion of the Conseil d'État—that it is the courts of the state that are called to define the status of international law in relation to the internal legal order of Luxembourg. They are called on to define, at the same time, a part of their own institutional status. Confronted, for instance, with the question of the primacy of international law vis-à-vis internal law, the courts must necessarily take a position and either consider themselves to be subordinated to the political choices (or simply, to the inaction) of the legislative power or, to the contrary, to consider themselves as organs of a state that is subjected to international law and in charge of overseeing respect for the priority of the international obligations of the state.

## 1.2 Legislative Texts

At the infra-constitutional level, there are numerous legislative norms that refer to international treaties, whose direct application in the internal law is presupposed.[12] There also exists a framework law whose object is to enable the executive power to intervene through regulations and to derogate from existing laws, in the matter of the 'execution and sanction of decisions and directives as well as the sanction of regulations of the European Communities concerning economic, technical, agricultural, forestry, social and transport matters'.[13] But that is all: no more than the

[7] See the preliminary study, *Doc parl* No 516 (annexing, at pp 8–12, the text of the constitutional provisions of France, Italy, Germany, the Netherlands and Denmark), and the exposé de motifs accompanying the project of Constitutional Revision, *Doc parl* No 516[4].

[8] *Doc parl* No 516[4], draft for a new Article 42: 'The rules of international law are part of the national legal order. They prevail over the laws and all other national provisions.'

[9] Ibid, Article 43: 'Unless otherwise provided, the national jurisdictions are competent to apply and to interpret, in respect of the matters submitted to them, the rules of international law.'

[10] The report bears in epigraph the observation by Poincaré that 'the eternal chimera of men is to attempt to put in the Constitution the perfection that they themselves do not have' (*Doc parl* No 516[5], 1).

[11] *Doc parl* No 516[6], 7–8.

[12] On direct applicability see section 2.2 below; for an example see Article 1 of the Law of 20 June 2001 on extradition: '*In the absence of an international treaty* [. . . ], the conditions, procedure and the effects of extradition are determined by the present law'.

[13] That is the title of the Law of 9 August 1971.

Constitution, the legislative texts do not solve the questions of principle concerning the status of international law in internal law. These questions have been solved by the case-law.

## 2. Treaties and Other International Agreements

### 2.1 The Conditions for the Application of Treaties by Internal Authorities

These conditions are three: the agreement invoked must be binding in international law, it must have been introduced into the domestic order, and the provisions to be applied must be provisions of direct applicability.

#### *2.1.1 Binding international instrument*

The text invoked must be an actual binding international agreement, and not a declaration of intention or the product of purely political consultations. The courts judge this first condition for the applicability of international treaties by reference to the rules of international law.

On the one hand, since a given agreement is considered at international law to be an obligatory international agreement, it will be recognized as such in the internal order, independently of its denomination or its form.

An appeal judgment of 1960 considered, in respect of two 'protocols' between Belgium, the Netherlands, and Luxembourg, and in respect of 'Conclusions of a ministerial meeting', approved by a law of 14 June 1945, that having validly been concluded, they could have derogated from the provisions of the Convention of 25 July 1921 establishing the Belgian–Luxembourg Economic Union:

> that it mattered little what procedure had been used for the conclusion of these agreements, since the form of international agreements is freely determined by diplomatic practice and the terminology used to denominate international treaties is most varied; that in spite of their formal diversity, there is nevertheless a material equivalence between the different instruments used for the realisation of a determined juridical operation and they are all endowed with the same binding force,[14]

and a judgment of the Court of Cassation (*Cour de cassation*) of 1961, more laconically, pointed out 'that no special form is required for international conventions'.[15]

On the other hand, there exist texts in the international order that do not constitute binding agreements; these will be no more binding on the courts of Luxembourg. This is what was decided in relation to the 'CoCom List', during the 1980s, by the district court of Luxembourg, which was called on to decide a dispute

[14] Cour d'appel, 3 December 1960, *Pas lux* 18, 223, 228.
[15] Cass, 21 December 1961, *Pas lux* 18, 424, 429, note F.W.

concerning the non-authorized transit of strategic material towards the Soviet Union.[16] The court was faced with requests emanating from defence counsel who, according to the judgment, 'obsessively demanded that the court order the communication of this list'. But since the 'CoCom List' is neither an international treaty, nor an element of secondary law of an international organization established by treaty, but the simple product of an activity—legally informal—of technical and political 'co-ordination', the court did not consider it right to grant these requests, 'no proceedings being grounded on such a text, which moreover did not have the force of law'.[17]

Similarly, a text elaborated within an international organization cannot be considered, before internal authorities, as a binding norm unless it possesses binding force by virtue of the constitutive treaty of the organization. It is for this reason that the Universal Declaration of Human Rights of 10 December 1948, a resolution of the General Assembly of the United Nations, is a text that the courts of Luxembourg can certainly take into account,[18] but which could not be considered as constituting, properly speaking, a norm applicable by the courts. As was explained in a judgment, 'a written text of international origin cannot be recognized as having the value of a norm of internal law unless the double condition of having this value in international law and having been duly introduced in the internal order, in accordance with Article 37, paragraph 1 of the Constitution is fulfilled; this introduction into internal law will take the form, in the case of a text emanating from an organ of an international organization, of the approval and the publication in Luxembourg of the treaty constituting the international organization in question, a treaty by virtue of which the invoked text possesses normative value; now the first condition is not fulfilled in the case of the Declaration which 'does not possess . . . pursuant to the Charter of the United Nations, normative character'.[19]

As has been seen,[20] Article 37 of the Constitution establishes that treaties will not have effect before their approval by law and their publication in the manner laid down for the publication of laws.

[16] Trib arr Luxembourg, (corr.) 3 December 1987, No 2027/87, 22.

[17] Trib arr Luxembourg, 3 December 1987, quoted; see, already on the same case, the judgment of 21 March 1986, No 453/86, 5.

[18] Trib arr Luxembourg, 29 November 1984 and 13 July 1989, *Bull Laurent* 1995, I, 25, in respect of the divorce by repudiation under Iranian law: 'such a conception, which breaches the equality of man and women before the law, runs up against public policy since it is contrary to the Universal Declaration of Human Rights . . . '. The Universal Declaration serves, in this judgment, as a simple reference in the framework of the application of a norm of the internal law of Luxembourg, the reservation of public policy pursuant to private international law.

[19] Trib trav Luxembourg, 12 February 2003, (2004) 14 *Ann dr lux* 480, confirmed by the Appeal Court on 3 February 2005, (2006) 16 *Ann dr lux* 349. Another judgment denied the applicability of the Universal Declaration on the basis that it has 'not been incorporated in the domestic law by a law of approval and cannot thus be invoked in support of a legal action' (Superior Court of Justice, Ass., 5 December 2002, (2003) 13 *Ann dr lux* 676, 686), but this brief reasoning neglects the verification, logically preliminary, of the binding character in the international order of the concerned agreement.

[20] Section 1.1 above.

### *2.1.2 Approval by law and publication*

Parliamentary approval in the sense of Article 37 should not be confused with legislation incorporating into the internal system the substantive content of the treaty. The law that approves the text is a purely formal law,[21] through which the legislature limits itself to approving the concluded international agreement, and through which it formulates, if applicable, the reservations that will accompany the ratification of the agreement.[22]

It can be deduced from the constitutional provision that a treaty that has not been approved and published, even if it has already entered into force at the international level, cannot display any effects in the internal order. This rule seems to have always been considered as a general principle of law:[23] in 1889, a judgment by the Court of Appeal refused to apply an 'arrangement' between the Netherlands and Luxembourg of 7 January 1880, concerning the legalization of acts by Dutch diplomatic and consular agents, on the basis that this agreement had not 'been the object of publication in the *Mémorial*, or of any measure of general administration mandatory on the people of Luxembourg'.[24] A decision of 1951 similarly declared, in respect of an economic agreement between Belgium and Luxembourg confirmed in a protocol of 23 May 1935, that this agreement had not 'acquired legal force in the Grand-Duchy because it had not been legally published'.[25] The first instance judgment[26] had rejected the application of the protocol due to its not having been the object of a regular ratification, with the assent of the Chamber of deputies. More recently, the Superior Social Security Tribunal refused to apply an agreement between the social security authorities of Belgium and Luxembourg of 25 March 1991, which intended to settle the question of social security affiliation of seamen employed in vessels flying the flag of Luxembourg, and which had not been published in the official gazette.[27]

In view of this constitutional requirement, it is difficult to recognize the effects, before internal authorities, of simplified agreements, 'administrative' or 'executive' agreements, which have not been submitted to the procedure of parliamentary

[21] P. Pescatore, *Conclusion et effet des traités internationaux* (Luxembourg: Office des Publications de l'Etat, 1964 (reprinted, Brussels, 2009) 58: 'an act of legal and political control on the part of the [legislature]'.

[22] In the sense that 'due to the fact that they affect the legal effect of the convention, reservations formulated in respect of a treaty also need approval by law', see the commentary to the Constitution published by the Conseil d'Etat, *Le Conseil d'Etat, gardien de la Constitution et des Droits et Libertés fondamentaux* (Luxembourg: Conseil d'Etat , 2006) 160; see also P. Pescatore, n 21 above, 55. For a more recent example of 'declarations and reservations' prescribed by the law of approval, see Law of 27 July 2003 concerning the approval of the Hague Convention of 1 July 1985 concerning the law applicable to trusts and on their recognition, *Mém A* 2003, 2620, reported in (2004) 14 *Ann dr lux* 490.

[23] And this even at a time when the constitutional text was less exacting than it currently is: P. Pescatore, n 21 above, 77.

[24] Cour d'appel, 2 August 1889, *Pas lux* 3, 120, 123.

[25] Cour d'appel, 21 July 1951, *Pas lux* 15, 233, 235.

[26] Trib arr Luxembourg, 20 July 1950, ibid, pp 233–4.

[27] Cons sup ass soc, 26 January 1994, (1995) 5 *Ann dr lux* 385.

approval. Simplified agreements can be found in the practice of Luxembourg,[28] but they must be introduced in internal law respecting the procedures established in Article 37 of the Constitution.[29] It is true that, occasionally, the government maintains a different point of view,[30] but as has been seen, this point of view clashes with the case-law and with the advisory practice of the Conseil d'État. There is only one exception in the case-law, dating to the beginning of the 1950s: the double requirement of parliamentary approval and publication was considered inapplicable, by a judgment of 4 July 1951, in respect of a special category of agreements, entered into in 1944 between the government of Luxembourg and the supreme commander of the expeditionary allied forces and concerning the reparation of damages caused by members of the allied forces to inhabitants of Luxembourg: the district court of Luxembourg had refused to take those agreements into consideration on the basis that they were 'secret treaties',[31] but the Court of Appeal judged 'that the agreements in question do not constitute, in view of their provisional and temporal character, other than arrangements of a secondary interest for which parliamentary approval is not required'.[32] Formulated thus, the decision is hardly compatible with the terms of Article 37 of the Constitution, which does not make distinctions on the basis of the 'interest' accorded to an international agreement.

Setting aside the question of simplified agreements, Article 37 of the Constitution also entails that the *ratification* of treaties, through which the State of the Grand-Duchy of Luxembourg definitely binds itself by the treaty, cannot occur until after the parliamentary approval. However, nothing in the Constitution prevents the government to wait, after parliamentary approval, for the occurrence of a future event before depositing the act of ratification. Such a decision of the government is exceptional, but there exists an example in recent constitutional practice: although Luxembourg consented in 1997, under the friendly pressures of its international partners, to sign the protocol establishing the extension to fiscal infractions of the mechanism of mutual assistance in judicial matters established by the European Convention on Mutual Assistance in Criminal Matters, three years separated the law of approval of 17 August 1997 and the effective ratification of the Protocol. This was because the government intended to wait the entering into force

[28] Cf the opinion of the Conseil d'Etat of 17 December 2004, *Doc parl* No 5417-1; (2005) 15 *Ann dr lux* 601.

[29] P. Pescatore, n 21 above, 51ff, containing references to several opinions of the Conseil d'État; *adde* the opinion of the Conseil d'Etat of 29 October 1996: the form of the exchange of letters does not modify the conventional nature of the act in question, from where the necessity, for Luxembourg, to have recourse to the procedure of ratification established in the Constitution, *Doc parl* No 4247; (1997) 7 *Ann dr lux* 451.

[30] Response by the Ministry of Foreign Affairs of 9 October 2000, to the parliamentary question No 716, *CR, Questions au Gouvernement*, 2000–2001, p 78, (2001) 11 *Ann dr lux* 460: 'Dealing with a simple technical and administrative agreement [between France and Luxembourg] the French National Assembly did not ratify the Agreement of 1988 the Chamber of Deputies [of Luxembourg] was similarly not seized about it'. This is to neglect the difference between the French Constitutional texts (art 53 of the Constitution of the 5th Republic) and those of Luxembourg.

[31] Trib arr Luxembourg, 21 December 1949, *Pas lux* 15, 25.

[32] Cour d'appel, 4 July 1951, *Pas lux* 15, 149.

of an amendment law on international mutual assistance in criminal matters. This law, which was only promulgated on 8 August 2000, had the object to improve the functioning of international judicial mutual assistance, but also to reinforce the procedural guarantees at the disposal of the persons concerned by the mutual assistance.[33] One day after the entry into force of the law of 8 August 2000, the Government deposited the instrument of ratification of the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, approved since 1997 by the law of Luxembourg.[34]

### *2.1.3 Direct applicability of the conventional provision in question*

A recent judgment by the Court of Appeal observed, in lapidary terms, that 'international treaties . . . have in principle direct application in the different internal laws'.[35] As a statement of comparative law ('different internal laws'), this observation is evidently lacking in nuance, but as a description of the law of Luxembourg, it is not inaccurate: the law of Luxembourg admits that treaties may have direct application and has the tendency to presume their direct applicability. An author has even written, in 1984, that the case-law of Luxembourg did not contain a distinction between self-executing and non-self-executing treaties: all treaties would be capable of being applied by courts.[36] This affirmation, however, proved to have gone too far.

It is true that for a long time treaties were applied without any questions being asked as to their self-executing character. In 1879, a criminal was condemned to death in application of a treaty assimilating counterfeiting of German currency to counterfeiting of national currency (which was alone punishable, at the time, with this penalty by Article 132 of the Criminal Code), without any discussion as to the applicability of the treaty.[37] More generally, courts have not hesitated to give effect to all the treaties whose provisions could relate to the disputes referred to them; and during the *travaux préparatoires* of the 1956 constitutional revision, it was maintained that 'the courts of Luxembourg have applied the most diverse international conventions and they have never refused this application other than on the basis of failure of legislative approval or of publication'.[38]

[33] The law was described by the Minister of Justice as a 'good compromise for the financial market': cited by D. Spielmann, 'La loi luxembourgeoise du 8 août 2000 sur l'entraide judiciaire internationale en matière pénale' (2001) *Rev dr pén crim* 915, 915 (n 1).

[34] D. Spielmann, n 33 above, p 926.

[35] Cour d'appel, 11 March 2009, No 34284.

[36] P. Pescatore, 'L'application judiciaire des traités internationaux dans la communauté européenne et dans ses Etats membres' in *Mélanges Pierre-Henri Teitgen* (Paris: Pedone, 1984) 355, 383. The author does not hide, in his contribution, the fact that judgments have sometimes decided the opposite; but he writes that these decisions have had 'no tomorrow'.

[37] Cour d'assises, 3 February 1879, confirmed by Cass. 24 April 1879, *Pas lux* 1, 531.

[38] Exposé des motifs du projet gouvernemental, *Doc parl* No 516[4], 8. Cf Cour d'appel, 29 July 1904, *Pas lux* 6. 401, 405, which notes that a treaty binding Luxembourg to maintain its regulations on railways 'in accordance' with certain German regulations only gave rise to an obligation to exercise the regulatory power of Luxembourg, without rendering the German regulations automatically applicable before the judges of Luxembourg. The treaty was not, thus, self-executing.

Since then, things have changed. If the attitude of courts in respect of the direct applicability of treaties had for a long time been 'intuitive rather than reasoned',[39] courts have subsequently commenced—under the influence of the case-law and doctrine of France and Belgium—to pose themselves the question of the direct applicability of certain conventional provisions, and also often to answer that question in the negative. In fact, their case-law on the question of the direct applicability of treaties has gradually become less coherent, including and especially in connection with treaties for the protection of human rights. Admittedly, the most important regional treaty—the European Convention on Human Rights—is considered as directly applicable by constant case-law. But other treaties, more rarely invoked, are sometimes considered as directly applicable and sometimes as not directly applicable, depending on the judges who happen to decide individual cases.

The International Covenant on Civil and Political Rights has, in 1991, been considered by the Court of Cassation as devoid of direct applicability, on the—very questionable—basis that it appeared 'from article 2.2 of the Covenant that it did not contain any provision which could be directly invoked by an individual before a national court, adhesion to the Covenant having as its sole effect the creation of obligations for the contracting States'.[40] Since then, certain courts, referring to this judgment, continue to consider that the Covenant is not directly applicable in the internal order,[41] whereas others, on the contrary, have considered—and rightly so—that nothing opposes the direct application of the Covenant before the courts,[42] a position that has been upheld, very or too discreetly, by the Court of Cassation in judgments of 2002[43] and 2006.[44]

Similarly, some hesitation has existed in respect of the direct applicability of the UN Convention on the Rights of the Child of 20 November 1989.[45] With better

[39] P. Pescatore, 'Le problème des dispositions directement applicables (Self-Executing) des traités internationaux et son application aux traités instituant les communautés' (1965) 25–6 FSY 42, 48.

[40] Cass, 14 March 1991, No 04/91 pén.; see, for a similar solution, Cass, 28 June 1990, No 16/90 pén. Yet, the analysis of the *travaux préparatoires* of the Covenant show that, in reality, the question of the direct applicability was left open by the treaty and therefore is a matter for the internal practice of the state in question: M. Nowak, *CCPR Commentary* (2nd edn, Kehl/Strasbourg/Arlington: N.P. Engel Verlag, 2005) 57–8.

[41] Cour d'appel, 12 November 1993, (1995) 5 *Ann dr lux* 390; Cour d'appel, 3 February 2005, (2006) 16 *Ann dr lux* 349; Trib arr Luxembourg, 13 May 2005, (2007–2008) 17–18 *Ann dr lux* 574, 576.

[42] CE, 8 February 1994 and Trib arr Luxembourg, 31 March 1993, (1995) 5 *Ann dr lux* 389; Trib arr Luxembourg, 19 October 1999, (2000) 10 *Ann dr lux* 336.

[43] Cass, 11 July 2002, *Pas lux* 32, 351; (2003) 13 *Ann dr lux* 676, with the opinion of the *Parquet général*. The affirmation of the direct applicability of the Covenant is implicit: the Court of cassation rejected as inoperative a ground of cassation based on a violation of the European Convention on Human Rights and the International Covenant on Civil and Political Rights; the Court did not reject it because the Covenant could not be invoked before it, but because the provisions invoked were inapplicable ('But whereas the alleged violations of the European Convention of Human Rights and its corollary, the International Covenant on Civil and Political Rights, are not of a nature to attribute competences to the criminal court seized by the appellant') and thus placed the Convention and the Covenant on the same level.

[44] Cass, 14 December 2006, (2007–2008) 17–18 *Ann dr lux* 573 (dismissal, for the lack of basis—and not for lack of direct applicability—of a ground based on the Covenant).

[45] A judgment of the Court of Appeal (7 March 1994, (1995) 5 *Ann dr lux* 387) affirms the direct applicability of this Convention, whereas a judgment of other judges of the same Court (19 October

reasons (since it appears, this time, that the provisions in question are programmatic and hardly justiciable), the direct applicability of Article 11 of the Convention on the Elimination of all Forms of Discrimination against Women of 18 December 1979 was dismissed;[46] likewise, the direct applicability of Article 7 of the International Covenant on Economic, Social and Cultural Rights, according to which remuneration must provide, at a minimum, fair wages and equal remuneration for work of equal value without distinction of any kind.[47] In a similar manner, it was judged that the provisions concerning universal jurisdiction of the criminal courts referred to in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of 10 December 1984, could not be invoked by Chilean victims for crimes committed in Chile by General Pinochet (who was at the time detained in the United Kingdom with a view to his possible extradition to Spain) to attribute universal jurisdiction to the criminal courts of Luxembourg.[48]

Hesitations on the direct applicability of treaties can be explained on the basis of the uncertainty of the pertinent criterion. The courts of Luxembourg hesitate between two criteria utilized in French and Belgian doctrine: on the one hand, the criterion of the intention of the contracting states, relied on by legal writers who consider the question of the direct applicability of treaties as purely a matter of international law, and for whom the essential question is whether the states intended to confer on individuals the right to invoke the treaty before the courts; and, on the other hand, the more liberal criterion (and more adequate to a question that is ultimately one of internal law) of the precision of the treaty provisions: a conventional provision must, according to this criterion, be considered directly applicable if it is sufficiently precise and complete for a court to be able usefully to apply it to the dispute before it, without having to exceed the framework of its attributions and act as a legislator.

The two conceptions can be found in the case-law of Luxembourg. According to a judgment of the Court of Appeal of 7 March 1994,[49] there exists 'a principle according to which the international rule is 'self-sufficient' if its content announces a mandatory rule of conduct for the addressees of the rule in question; this is the

1994, *Pas lux* 29, 391; (1995) 5 *Ann dr lux* 398) denies direct applicability, by reference to the then existing case-law of the French Court of cassation.

[46] Trib ad, 26 January 1999, (2000) 10 *Ann dr lux* 335.

[47] Trib trav Luxembourg, 12 February 2003, (2004) 14 *Ann dr lux* 480, confirmed by the Court of Appeal, 3 February 2005, (2006) 16 *Ann dr lux* 349. According to the court, despite the 'apparent' precision of the terms of the Covenant, 'it appears from the general context of the Covenant that its provisions are not directly applicable in internal law. They state the principles or rules of conduct for the signatory states, lacking the precision and completeness of the rules applicable in internal law: the provisions of the Covenant thus appear as 'programmatic provisions' in which the implementation of the rights is conceived progressively and leaves a wide discretion to the States'.

[48] Cour d'appel (Ch cons), 11 February 1999, (2000) 10 *Ann dr lux* 363, with the contrary opinion of the *Parquet général*. According to the judgment 'article 5 of the invoked Convention says that every State shall take the necessary measures to establish its jurisdiction to adjudge on infractions to article 4, notably, in the case where the victim is a national of that State and the judge considers it appropriate.—Luxembourg has not to this day adopted legislative provisions to satisfy the obligation undertaken in article 5 of the Convention.'

[49] (1995) 5 *Ann dr lux* 307.

case if the rule is sufficiently clear and precise to authorize its internal application without the need for further intervention by the national authorities'. A judgment of the administrative court of 26 January 1999 adopts a hybrid position, stating,

> that it is a principle that treaties concluded between States are not binding and do not produce effects other than for the States, since States are the addressees of the norms of which they are the authors; but, it may happen that treaties between States directly grant rights or directly impose obligations on private persons. It is advisable, thus, to examine if the Convention [on the Elimination of all Forms of Discrimination Against Women] has granted subjective rights to individuals. In this case, the failure in article 11 of the Convention to express a clear, precise and unconditional right in favour of individuals, not requiring any means of execution on the part of the States, implies that individuals cannot invoke this article to directly derive subjective rights from it and the national judge cannot, therefore, apply it.[50]

The criterion of the intention of the contracting parties, supposedly discernible from the terminology chosen for the treaty, is relied on by the case-law that rejects the direct applicability of the International Covenant on Civil and Political Rights.[51]

The most restrictive position is that adopted by the Court of Appeal in the case of the criminal prosecution of Augusto Pinochet, where the criterion of the intention of the parties and the criterion based on the complete and precise character of the specific rule of the Convention, were considered as conditions that needed to be *cumulatively* satisfied for the treaty to be directly applicable:

> A norm of the international legal order, to be endowed with direct applicability in the internal order, must fulfil two conditions. First, it is necessary that this was the intention of the parties, an intention which can be deduced from the interpretation of the provisions of the treaty (or convention) and from the practical conditions in which it has been performed. Subsequently, it is necessary that the content of this norm be sufficiently precise and not entail the need to have recourse to means of internal application.[52]

While waiting for a clarification, at some point in the future, of this question by the Supreme Courts of Luxembourg (the Court of Cassation and the Administrative Court of Appeal (*Cour administrative*)), one must content oneself with this divergent case-law in respect of the criteria applied and in respect of the results obtained. This is the current status of the positive law of Luxembourg. It is clearly not satisfactory. It would be preferable if courts took notice of the fact that the question of direct applicability is, outside *exceptional* cases where it is really regulated by the treaty itself, a question that pertains to the institutional practice of each state. From that moment onwards, the criterion of the 'intention of the contracting states' will be discredited, and the criterion of the precision of the conventional provisions can—at least in the law of Luxembourg—prevail.

[50] (2000) 10 *Ann dr lux* 335.
[51] Cf text accompanying nn 40 and 41 above.
[52] Cour d'appel (Ch cons), 11 February 1999, see above n 48, quoting the *Précis de droit international public* by Pierre-Marie Dupuy.

In any case, in so far as the provisions of a treaty are considered as directly applicable in internal law, there is no distinction between rights derived from treaty and rights derived from internal law. The question is to know if the invoked provision is or not of direct applicability.

## 2.2 Judicial Interpretation of Treaties

If treaties have, before internal courts, the character of rules of objective law, it can appear evident that courts, whose mission is to state the law, are competent to interpret them.

And yet, the case-law has not always understood it in this way. In certain old decisions, courts have suggested that they were inclined to follow, on this point, a distinction then maintained by the case-law of the civil chamber of the French Court of Cassation:

> it is for the courts to interpret international treaties to the extent that they are applicable to a dispute concerning private interests, and . . . they must not leave the interpretation to the contracting Governments other than when it is required to establish its sense from the point of view of international law, that is, when the question relates to the interpretation of clauses which concern public policy and the law of nations.[53]

As for the Ministry of Foreign Affairs—which should be addressed, in accordance with the French model, by courts in order to obtain the governmental interpretation of the clauses of a treaty—it was for some time favourable to a limited restriction of the power of interpretation of courts. In 1954, the Court of Cassation received a note, emanating from the Ministry, in which the Ministry considered that, in principle, 'and save for the exceptions hereafter mentioned', the courts were competent to interpret the treaties that they were called on to apply:

c) The power to interpret is denied to the courts every time this competence is excluded by the terms of the treaty, either explicitly, or implicitly. This competence is also denied every time the treaty or the clause has as its fundamental object the regulation of reciprocal interests of the contracting States, and only through incidental effects it affects the situation of individuals.
d) Additionally, it is recommended to the courts to have resort to the Government every time the interpretation of a treaty appears affected by the execution it has received in the territory of the other contracting party, and every time the courts perceive circumstances which could affect the effects of the treaty which they are not in the position to judge or appreciate.

[53] Cass, 2 August 1895, *Pas lux* 3, 572, 575; see also, Cass, 28 April 1914, *Pas lux* 9, 111, 113; Cour d'appel, 3 June 1927, *Pas lux* 11, 350, 351; and before then, Cass, 14 August 1877, *Pas lux* 1, 370. This reservation has always been formulated as *obiter dictum*; in each of the disputes relating the existence of a distinction between 'disputes concerning private interests' and 'public policy and the law of nations', it was decided that since the dispute concerned 'private interests', nothing opposed the judicial interpretation of the treaty in question.

e) The opinion of the Government is conclusive, unless the contrary appears from its content. In every case, the Government is free to declare itself incompetent and to refer to the prudence of the courts, either in full, or in part, by giving only a partial opinion.

f) The opinion of the Government will be requested *ex officio*, through the Public Ministry and the opinion will be presented through the same way.[54]

The Court of Cassation did not take a position on this question—it considered that the issue of the interpretation of the treaty was not raised; nevertheless, during the examination of the case, the *Procureur général* underlined that the criterion proposed by this governmental note did not appear 'sufficiently precise and clear' and that undoubtedly the best solution simply consisted 'in saying that every time a court is competent to judge on the merits of the dispute, it must interpret without any reservation all the clauses and all the treaties whose interpretation is necessary for the solution of the dispute'.[55]

In reality, despite the reservations alluded to in the past by courts, they have never hesitated to interpret the treaties themselves whenever this interpretation was necessary. The reference to the government, sometimes envisaged in a theoretical manner, was never practised.[56] They have adopted this attitude irrespective of the treaty invoked, and of the nature of the question posed: the courts have pronounced on the scope of the 'treaty of limits' of 26 June 1816, adopted in Aix-la-Chapelle between Prussia and the Netherlands, and have affirmed the principle of the common sovereignty of the two riparian states on the Moselle;[57] on the scope of the most-favoured-nation clause, included in a treaty of commerce and navigation concluded between the states of the *Zollverein* and the Netherlands;[58] on the scope of the treaty of adhesion of Luxembourg to the *Zollverein*, judging that the king of Prussia had exceeded the powers of representation defined by this treaty by concluding an agreement on marques with France in the name of Luxembourg;[59] or still on the scope of the Convention between the states parties to the North Atlantic Treaty on the status of their forces, in so far as it concerns the entry of foreign troops on the territory of a contracting state.[60] The judicial interpretation of treaties is not restricted, and has never been restricted, to questions concerning 'private interests'.

[54] 'Avis du Gouvernement sur le pouvoir des juridictions nationales d'interpréter les traités internationaux' , reproduced in Cass, 14 July 1954, *JT* 1954, 694, 698, conclusion of L. de la Fontaine.

[55] Concl L. de la Fontaine, n 54 above, p. 695.—Cf in the same sense, in a further dispute, the conclusion of F. Welter on Cass, 19 November 1959, *JT* 1960, 100: an unrestricted judicial competence 'must be admitted as a corollary of the rule of the supremacy of treaties over national law'.

[56] P. Pescatore, *Conclusion et effet des traités internationaux,* n 21 above, 101; cf FW, in Cass, 21 December 1961, *Pas lux* 18, 424, 435–6.

[57] Trib arr Luxembourg, 17 June 1874, *Pas lux* 1, 95 (who deduced from it that the attachment undertaken by a bailiff of Luxembourg on vessels anchored in the Moselle is valid); J.P. Remich, 23 February 1901, *Pas lux* 6, 407 (criminal competence of the courts of Luxembourg to adjudge on a crime committed '*am preussischen Ufer der Mosel, unweit des Schlosses Thorn*').

[58] Cass, 11 April 1913, *Pas lux* 8, 550.

[59] Cour d'appel, 21 June 1912, *Pas lux* 9, 80.

[60] Trib arr Luxembourg, 22 November 1983, No 904/83; on appeal: Cour d'appel, 12 November 1987, Nos 8013, 8014 and 8432; note by Meyer, (1990) *Rev b dr int* 496.

Today, one can be certain that courts will continue to retain, without restriction, their competence in relation to the interpretation of treaties that they apply[61]—all the more so since the reference to the government, as it was practised in France, has been held in 1994 by the European Court of Human Rights to be incompatible with the requirements of a fair trial.[62]

It is understood that the *method* of judicial interpretation of treaties must take into account the nature of these instruments, which, while being applied by the internal judge, do not however lose their nature as international conventions. According to a judgment of 1985 of the district court of Luxembourg:

> the interpretation of an international text obeys its own rules of interpretation that are different to those applicable to the interpretation of a national text. It is necessary to determine the scope of the international convention following autonomous criteria of hermeneutics drawn from the said Convention and not from the national law of the contracting States. The interpretation and application of the rule of international law, in case of doubt or ambiguity, must take place with a view to discovering the international, material and uniform content of the articles of the international Convention by reference to its object, its purpose, thus to the intention of the authors of the Convention . . . For this teleological approach it is convenient to take into account, at the same time, the letter of the [provision of the international convention in question], its *travaux préparatoires*, the context of the Convention, and the comparative law of the contracting States in the application of the Convention . . . .[63]

## 3. Customary International Law

Unwritten public international law does not have the same role as international treaties within the legal order of Luxembourg. Its role is not, however, non-existent.

It is true that there exists a judgment of the Court of Appeal of 23 April 1947, which has an extraordinarily meagre view of the role, in the internal legal order, of international law in general and customary law in particular, which would have no value 'unless [it] had been incorporated . . . in the internal legislation'.[64] But this

[61] Which will not prevent them from obtaining, if need be, information from the Government, notably on the *travaux préparatoires* of the treaty, the transmission of which will take place through the *Procureur*: cf, the conclusions of the *Procureur général* Welter on Cass, 19 November 1959, *JT* 1960. 100, 101, 3rd col, which puts forward unpublished documents obtained from the Government by the Public Ministry; see also the reference to a 'practice followed in Luxembourg' by P. Pescatore, *Conclusion et effet des traités internationaux,* n 21 above, 103; N. Wagner, 'Les réactions de la doctrine à la création du droit par les juges en droit international privé et public', Luxembourg national report, *Travaux de l'Association Henri Capitant* (1980) vol XXXI, 437, 439. But this type of information cannot bind the judge in the same way as an opinion issued by the government on the basis of a request made by a court that considers itself incompetent to proceed to the interpretation of a treaty. In any event, this is a procedure very rarely followed at present, or even fallen into desuetude.

[62] Judgment of 24 November 1994, *Beaumartin v France*, Series A, No 296-B.

[63] Trib arr Luxembourg, 20 December 1985, (1986) *Rev fr dr aérien* 112, 115–16, in relation to the Convention of Warsaw of 12 October 1929. The grounds of the judgment are inspired by a judgment of the Cour de cassation of Belgium of 27 January 1977, *Pas* 1977, I, 574.

[64] Cour d'appel, 23 April 1947, *Pas lux* 14, 280, 282, in relation to a decree-law of 10 January 1947, establishing the impounding of property belonging to nationals of enemy States or stateless

judgment cannot be considered as representative of the attitude of the courts of Luxembourg in respect of customary international law. As established in an empirical study of the case-law existing on the subject, courts in reality do not hesitate to apply directly rules of customary international law where their application is appropriate.[65] The law of treaties (in the sense of the rules of public international law regulating the conclusion, entry into force, application, nullity, extinction or suspension of international treaties), which for a long time was customary in respect of Luxembourg,[66] territorial sovereignty, the law of military occupation and the immunity of states and (in the past) foreign diplomats have also been the object of a relatively important number of judicial decisions.

The latest judgment to consider the application of a customary rule of international law is the judgment of the Court of Appeal on the possibility (or rather impossibility) of prosecuting Augusto Pinochet before the courts of Luxembourg for a crime against humanity.[67] The judgment considers that there exists no customary rule of the law of nations recognizing universal criminal jurisdiction and authorizing national state authorities to prosecute and to bring before the courts, in any circumstance, persons suspected of having committed crimes against humanity; it explains, in general terms, that,

> for the formation of a customary international rule, it was necessary, on the one hand, to have evidence of a general, constant and uniform practice *and*, on the other, evidence of the *opinio iuris sive necessitates*, of the conscience of States to conform to a rule of law . . . — These two constitutive elements of custom as a formal source of international law are not established in this case.—In this respect it must be remarked that the existence of international tribunals created by the international community to judge the grave violations of humanitarian law contradicts the theory of universal jurisdiction invoked by the Public prosecutor.[68]

The status of international custom in the law of Luxembourg is, in summary, on the basis of the case-law (if it is permitted to set aside the curious decision of 23 April 1947), the following: (1) subject to the condition of its existence in international law, a customary rule will be recognized by the courts of Luxembourg;

persons who originally belonged to a nation which was currently an enemy: 'Whereas the rule of international law does not emanate from a superior authority which could impose its observation; Whereas, further, in the legal reality the prescriptions of international law and the clauses of international conventions have no value unless they have been incorporated in the national legislation (International law is a part of national law, Anglo-American principle, quoted by Pasquier, *Introduction à la Théorie générale et la philosophie du Droit*, No 316); Whereas in the case the question is decided by a provision of our positive law, article 10 of the decree-law, without any objection from the precise and clear text of an international law, having mandatory force in our country'. The judgment contains an evident misinterpretation of the maxim '*International law is a part of the law of the land*'.

[65] For the case-law, see the references given in the contribution 'L'application du droit international public par les tribunaux luxembourgeois' (1993) 3 *Ann dr lux* 184, 258–74.

[66] Luxembourg only ratified the Vienna Convention on the Law of Treaties rather late, in 2003 (law of approval of 4 avril 2003, *Mém A* 2003, 886).

[67] On this question, cf text at nn 48 and 52 above.

[68] Cour d'appel, 11 February 1999, *Ann dr lux* 10 (2000) 363, 369–70.

(2) customary international law is of direct applicability before the internal judge; (3) courts determine the existence of a customary rule through their own means, without referring to the Acts of the legislative power or the executing power; (4) the determination of the existence of a customary norm does not require, properly speaking, that the invoking party prove its existence: a customary rule is a rule of law, and not an element of fact of the dispute.

## 4. Questions of Hierarchy of Norms

The hierarchical position of customary public international law in the law of Luxembourg is unknown. True, the mentioned judgment of the Court of Appeal of 23 April 1947 maintained that 'the rule of international law does not emanate from a superior authority which could impose its observance', from where the court deduced that the alleged violation of the customary principles of international law by the internal regulation on the taking of enemy property should not worry the courts;[69] but this judgment cannot be considered as representative. Adopted in 1947, it is in reality the last judicial decision of Luxembourg that affirms the primacy, before the national judge, of internal law over international law. Since 1950 the approach of courts in respect of international treaties has profoundly changed, and they have not been asked, since then, to judge the question of the possible primacy of international custom vis-à-vis internal law.

In respect of international treaties, their primacy over the internal law is at present well established, and this includes not only their primacy over regulations and internal laws, but extends (more surprisingly in terms of comparative law) to their primacy over the national Constitution.

This primacy is afforded to all treaties, without the courts having had the occasion, up until now, to decide on a possible hierarchy between the treaties themselves, nor on the incidence of the notion of international *jus cogens*.

### 4.1 Primacy of Treaties over Administrative Acts

The question of the hierarchy between treaties and administrative Acts (regulatory or individual) has always been resolved in favour of the primacy of treaties, since administrative Acts can be the object of judicial control of their legality; a control of legality that includes control on the conformity of the Act with the treaties duly introduced in the internal law.[70]

[69] Notes 19 and 64 above.

[70] See, eg, the judgments of the Conseil d'Etat of 7 December 1978, *Pas lux* 24, 186, 194–6; 17 July 1992, *Pas lux* 28, 288; 13 January 1993, *GV*, (1993) 1 *Bull drr h* 99; (1995) 5 *Ann dr lux* 394; 28 December 1993, (1997) 7 *Ann dr lux* 461.

## 4.2 Primacy of Treaties over Legislation

A distinction can usefully be made on the basis of whether the legislative provision contrary to a treaty has been sanctioned before or after the entry into force of the treaty itself.

The 'primacy' of treaties over previous laws has never presented any difficulties. Even when the courts of Luxembourg refrained from controlling the conformity of laws adopted after the entry into force of the treaties with the treaties themselves, it had always been accepted that a new treaty could derogate from a previous law. A judgment of the Court of Cassation of 14 August 1877 deduced this much from the idea that treaties have 'force of law': 'treaties, like all new laws, can . . . derogate from a law or the provisions of our codes'.[71] *Lex posterior derogat priori.*

The principle of the application of the new treaties, even if they derogate from the existing laws, remains well understood in the current case-law,[72] but it is no longer grounded on the 'force of law' of the treaties, nor explicitly on the adage '*lex posterior* . . . '. Recourse to this adage could imply that in the conflict between a treaty and a posterior law, the judge should give preference to the latter.

Until 1959 the courts of Luxembourg adopted, on the question of the conflict between treaties and posterior laws, the same position held by the courts of France and Belgium: the conflict between a treaty and a posterior law cannot be resolved to the detriment of the internal law,[73] but it can (often) be avoided by a restrictive interpretation of the law. It is in this sense that the Court of Cassation judged, in 1890, that a law of 1860, which did not allow foreign limited companies to exercise their rights and bring suits before the courts of Luxembourg without an administrative authorization, could not—despite the generality of its terms—be applied to German limited companies:

> it is . . . certain that this law could not have and could not want to modify the situation of German limited companies, who are regulated by an international treaty; . . . [the law] could not have and could not want to undermine the international treaties, which would have previously conferred, on the basis of reciprocity, the exercise of the same rights to the limited companies of another country.[74]

*Could not have and could not want* (*N'a pas pu ni voulu*): in reality, the reason why the Court considered, by way of interpretation, that the legislator did not want to undermine the treaty, is that, in the international order, it could not legitimately want to undermine it; but in 1890 the courts refrained from openly applying this idea of the primacy of treaties over laws. But even today this means of conciliatory

[71] Cass, 14 August 1877, *Pas lux* 1, 370.

[72] As illustrations, see Cass, 21 November 1991, *Bull Laurent* 1992, II, 41 (conflict between a law of 1924 and a European Community regulation); Trib arr Luxembourg, 16 March 2005, (2006) 16 *Ann dr lux* 353 (conflict between a decree of 1806 and the European Convention on Human Rights).

[73] Cass, 21 November 1919, *Pas lux* 11, 72: '[the criticized text] has the character of a real law, which has the effect of derogating from the existing laws with which it could be in conflict, and which must be observed where it contained provisions contrary to the constitution or an international treaty'.

[74] Cass, 13 June 1890, *Pas lux* 2, 620.

interpretation, which allows reading internal laws in a manner compatible with the treaties concluded previously, is still occasionally adopted by courts.[75]

It was in 1950 that the principle of the hierarchical primacy proper was recognized for the first time. The old 'rule of interpretation' became, as expressed by Pierre Pescatore, the 'rule of hierarchy'.[76] The Court of Cassation was seised of a case against an appeal judgment, adopted by a criminal court. The appealed judgment had sentenced the defendant for contravening a decree-law concerning the regulation of the commerce of eggs; the case concerned eggs imported from Belgium, but the appeal judges did not consider themselves empowered to verify the conformity of the decree-law with the provisions of the Treaty on the Economic Union of Belgium and Luxembourg:

> Whereas the appealed judgment declared the mentioned decree as applicable to the appellant in cassation on the only basis that it has the character of a real law and that it does not pertain to the judge to assess whether it is in conformity with the obligations assumed by the Grand-Duchy in the execution of an international convention.

In so doing, the appeal judgment had limited itself to restate exactly the principles enounced by the Court of Cassation itself in a judgment of 1919.[77] The annulment of the lower court judgment consequently marks a turn in the case-law:

> But whereas in case of conflict between the provisions of an international treaty and those of a posterior internal law, the international law must prevail over the national law; . . . from where it follows that the appealed judgment is not legally justified and that the ground of cassation is founded on this basis.[78]

Shortly thereafter, in 1951, the Conseil d'État had the opportunity to render, on fiscal matters, a judgment deciding in the same sense. Its decision is as briefly reasoned as that of the Court of Cassation:

> Considering that in case of conflict between the provisions of an international convention having the force of law in our country and those of the internal law, the first prevail over and prevent the application of the incompatible legislative provisions even if they are posterior; that the existence of the fiscal domicile of Dieudonné in Brussels by virtue of the Belgium-Luxembourg Convention of 1931 bars the contemporaneous existence of a fictitious domicile [by virtue of the internal legislation of Luxembourg] in the Grand-Duchy and entails the illfoundedness of the deductions derived from this fiction.[79]

A third judgment was rendered on 14 July 1954 by the Court of Cassation; it repeats the principle of the primacy of treaties, but adds to the motivation of the two decisions mentioned some further elements of explanation: it dismisses the idea

[75] Trib arr Luxembourg, 25 June 1997, (1998) 8 *Ann dr lux* 8 486; Cass, 8 July 2004, (2005) 15 *Ann dr lux* 615 (primary EC law); Cour d'appel, 26 September 2006, *Pas lux* 33, 281; (2007–2008) 17–18 *Ann dr lux* 582.

[76] P. Pescatore, 'La prééminence des traités sur la loi interne selon la jurisprudence luxembourgeoise' (1953) *JT* 645; *Conclusion et effet des traités internationaux,* n 21 above, 104ff.

[77] Cass, 21 November 1919, cited above at note 73.

[78] Cass, 8 June 1950, *Pas lux* 15, 41, 42.

[79] CE, 28 July 1951, *Pas lux* 15, 263, 268.

according to which the adage '*lex posterior* . . . ' should lead the judge to prefer the new law to the previous treaty, and justifies its position by reference to what would be the proper nature of things:

> Whereas if it is true that in principle the effect of successive laws depends on the date of their entry into force, and that the provisions of more recent laws operate to repeal contrary provisions of previous laws, it could not however be so when the two laws have unequal value, that is, when one of the laws is an international treaty incorporated in the internal legislation by a law of approval; that in effect such treaty is a law of a superior essence having an higher origin than the will of an internal organ; that in consequence, in case of conflict between the provisions of an international treaty and those of a posterior national law, the international law must prevail over the national law.[80]

It can be noted from the conclusions of the *Procureur général* on this judgment that more technical considerations were not, in all likelihood, foreign to the thought of the magistrates that adopted it.[81] Be that as it may, this solution was adopted by the Court of Cassation—and this fact is exceptional for Luxembourg—without the Court having been able to refer to a constitutional text, or even to a well-established foreign solution; to the contrary, the judgment was rendered some 20 years before the recognition of the primacy of treaties over internal law by the Court of Cassation of Belgium first,[82] and then by the Court of Cassation of France,[83] and finally by the French Conseil d'État.[84]

Subsequent case-law has clarified the formula resulting from the judgments of 1950 and 1954, by integrating the notion of direct applicability of treaties, which represents a rather recent discovery in the case-law of Luxembourg.[85] A judgment of 1985 thus clarifies 'that in case of conflict between the provisions of an internal law and those of an international treaty *having direct effect in the internal legal order*, the norms of the international treaty prevail over the internal provisions which derogate from the treaty'.[86] And the courts continue regularly to render judgments recalling the principle of the primacy of treaties over internal laws.[87]

[80] Cass, 14 July 1954, *Pas lux* 16, 150, 152; *JT* 1954, 694, 696, conclusions of L. de la Fontaine, note Pescatore.

[81] Concl L. de la Fontaine, ibid, 695: only the primacy of treaties allows to really guarantee, in internal law, its mandatory force.—The opinion of the Advocate general also identifies some elements of reference which could have had an influence on the decision of the Court of cassation: a doctrinal opinion (Ch. Rousseau, *Principes généraux du droit international public* (Paris, 1944) 423) and the impression, which one could have had at the time, pursuant to which French case-law was about to state, under the influence of the 1946 constitution, the primacy of treaties over internal law.

[82] Cass, 27 May 1971, *Pas* 1971, I, 886.

[83] Cass, ch mixte, 24 May 1975, *D* 1975, 497.

[84] CE, 20 October 1989, *Nicolo*, *Rec*, 190.

[85] Text at nn 37–9 above.

[86] Cass, 17 January 1985, No 2/85. The new judicial formula is inspired by the case-law of the Court of cassation of Belgium (27 May 1971, *Pas* 1971, I, 886).

[87] J.P. Luxembourg, 4 October 1993, (1993) 1 *Bull dr h* 118; (1995) 5 *Ann dr lux* 391; Cass, 14 April 1994, *Pas lux* 29, 331; (1995) 5 *Ann dr lux* 394; Cour d'appel, 5 October 1995, (1996) 6 *Ann dr lux* 512; Trib arr Luxembourg, 14 June 1995, (1995) 24 *Droit et banque* 73; (1996) 6 *Ann dr lux* 513; Cour d'appel, 11 December 1997, (1998) 8 *Ann dr lux* 486, note; Trib ad, 3 February 1999, (2000) 10 *Ann dr lux* 342; Trib ad, 23 February 2000, (2001) 11 *Ann dr lux* 487; Trib ad, 24 January 2001, confirmed by Cour ad., 29 May 2001, (2002) 12 *Ann dr lux* 451; Cour d'appel, 23 October 2003,

## 4.3 Primacy of Treaties over the Constitution

Without a doubt, that is the most surprising element of the primacy, in Luxembourg, of treaties over internal laws. There are multiple manifestations in positive law of the subordination of the whole of the rules of the legal order of Luxembourg, including constitutional norms, to the treaties binding the state.

A first sign is the definition of the mission of the Constitutional court of Luxembourg. Created in 1996 by way of constitutional revision, the Court may be seised 'by preliminary reference . . . by all courts to decide on the conformity of laws, except of laws of approval of treaties, with the Constitution'.[88] The control of constitutionality is always done by way of judicial review of laws already in force. That the laws of approval of treaties are excepted from this control mechanism can be explained by a desire to prevent the Constitutional court from invalidating a law of approval of a treaty that has already been ratified and would consequently already be in force. The *travaux préparatoires* of the law of constitutional revision explain it thus:

> It is evident that the system of control established in the present project of revision cannot apply to international treaties and to the national laws which approve those treaties. In fact, once the treaty has been approved and ratified in conformity with the constitutional procedures and the rules of international law, the State is bound at the international level. From the moment of its ratification, the treaty has primacy over the whole of the internal law. In application of the Vienna Convention of the Law of Treaties of 23 May 1969, a State cannot invoke the provisions of its internal law to justify the non-performance of a treaty.[89]

Further, it should be noted that the reluctance to grant the Constitutional court the power to assess the unconstitutionality of a law of approval of a treaty can really be explained, better than by reference to the Vienna Convention,[90] by diplomatic considerations specific to the situation of a small state that has acquired the habit of prudence in its international relations.

But the same attitude has equally been adopted by the courts of Luxembourg when they have been occasionally confronted with conflicts between a constitutional provision and a treaty. In 1917, a judgment of the Court of Appeal had suggested that in case of conflict between the Constitution and a treaty, preference

(2004) 14 *Ann dr lux* 499; Trib arr Luxembourg, 13 May 2005, (2007–2008) 17–18 *Ann dr lux* 574; Trib arr Luxembourg, 15 May 2008, No 145/2008; Cour d'appel, 14 October 2009, *JTL* 2010, 71; Cour d'appel, 16 December 2009, *JTL* 2010, 73.—On the conflict between a treaty and a general principle of internal law, see Cass, 21 January 1999, *Pas lux* 31, 45; (2000) 10 *Ann dr lux* 340; between a treaty and customary rule of internal law: Trib arr Luxembourg, 7 May 2003, (2004) 14 *Ann dr lux* 501.

[88] Article 95*ter*, para 2, of the Constitution (constitutional revision of 12 July 1996).

[89] *Doc parl* No 4153, 4; (1997) 7 *Ann dr lux* 452.—The Vienna Convention only entered into force for Luxembourg in 2003 (cf n 66 above).

[90] This will be addressed *infra* text after note 96.

should be given to the treaty: while underlining that no provision of the Constitution was breached by a treaty providing for the recovery of customs duties without annual votes in the Chamber of Deputies, this judgment maintains that in case of a conflict, the international treaty has priority over the Constitution.[91]

More recently, the question was posed again in relation to criminal prosecutions for defamation, initiated (in a rather unusual fashion) by a journalist against a member of government. The latter, summoned to appear before the criminal court, claimed that in accordance with Articles 82 and 116 of the Constitution,[92] he was immune from direct summons before the court; his adversary replied that the constitutional texts invoked by the minister violated the right of the direct claimant to a fair trial pursuant to Article 6 of the European Convention on Human Rights. The district court of Luxembourg initially decided to give precedence to the Constitution over the European Convention.[93] But the Court of Appeal decided to give precedence to the treaty over the Constitution:

> The Court cannot follow this argument.
>
> In fact, in view of the fact that, once the treaty has been approved and ratified in accordance with the constitutional procedures and the rules of international law, the State is bound at the international level and cannot, in application of the Vienna Convention on the Law of Treaties, invoke provisions of its internal law to justify the non-execution of a treaty, the norm of conventional international law having direct effect must prevail over the norm of internal law, whatever its legislative or constitutional nature.[94]

[91] Cour d'appel, 7 March 1917, *Pas lux* 10, 285, 287: 'In Erwägung übrigens, dass, wie der Vorderrichter schon richtig hervorgehoben, die Zollgesetzgebung des Großherzogtums ohnehin, weil sie auf internationalen Verträgen beruht und mithin an dem Charakter derselben teilnimmt, im Falle eines Konfliktes mit der inländischen Gesetzgebung, sogar den Vorrang über letztere hat'.

[92] Article 82: 'The Chamber has the right to accuse members of the Government.—A law shall determine the cases of criminal liability, the penalties to be inflicted, and the procedure to be followed as regards either the accusation admitted by the Chamber or the action brought by the injured parties.'—Art 116: 'Until provided for by a law, the Chamber of Deputies has discretionary power to accuse a member of the Government, and the Superior Court shall try him in general assembly, specifying the offence and determining the penalty. The penalty may not, however, exceed that of confinement, without prejudice to cases expressly provided for by the penal laws.'

[93] Trib arr Luxembourg, 10 July 2000, (2001) 11 *Ann dr lux* 490: 'The court considers that no legal text may derogate from, even implicitly, the fundamental and supreme law that is the Constitution.—In fact, the court cannot maintain the idea according to which an international treaty—which produces its effects in the internal legal order of the State through a law, whose procedure of adoption is markedly more flexible than that of the Constitution—could prevail over the latter in case of contradiction between the two texts.'

[94] Cour d'appel, 13 November 2001, (2002) 12 *Ann dr lux* 454. On appeal in cassation, the Court of cassation decided that the procedure had been wrongly initiated, since neither the European Convention on Human Rights, nor the International Covenant on Civil and Political Rights imposed the special competence of the criminal court that had been seised by the claimant; by virtue of Article 116 of the Constitution, the competence belonged to the Superior court of justice in general assembly (Cass, 11 July 2002, *Pas lux* 32, 351; (2003) 13 *Ann dr lux* 682). And the general assembly of the Superior court of justice put an end to the procedure by holding that the European Convention on Human Rights did not establish a right to seize a criminal court by way of direct summon . . . such that the alleged conflict between the Convention and the Constitution of Luxembourg had never existed! (Judgment of 5 December 2002, (2003) 13 *Ann dr lux* 683).

The same point of view has been advanced in the conclusions of the *Procureur général* before the Court of Cassation[95] and in the advisory practice of the Conseil d'État.[96] Rightly or wrongly, there appears to be consensus on this point in Luxembourg. Its formal legal foundation (in opposition, possibly, to its political foundation) is in any event fragile: logically, the Vienna Convention—which cannot regulate the question of the relation between international law and internal law other than from the perspective of international law—cannot solve the question, with effects for the internal constitutional law, other than on the condition that the internal constitutional law accepts to subordinate itself to the rules of public international law. As demonstrated by comparative law, this self-subordination of the constitutional law is far from obvious and is excluded by the majority of national legal orders. It presupposes the voluntary adoption, by the internal legal order, of a radically monist attitude towards the question of the relation between public international law and national law. It is this type of monism—which, as we have seen, can ultimately be explained by the special situation of Luxembourg—that justifies the solution adopted in Luxembourg on the conflict between internal law and international law.

[95] Opinion of the *Parquet général*, 27 May 2002, (2003) 13 *Ann dr lux* 677, 678, on the appeal in cassation directed against the mentioned judgment of 13 November 2001; see, the opinion of the *Parquet général* in other cases: 22 October 1998, (1999) 9 *Ann dr lux*; and 8 May 2007, (2009) 19 *Ann dr lux* 379.

[96] Opinion of 25 February 2003, (2004) 14 *Ann dr lux* 505 (which referred to the 'supranational character and thus also supraconstitutional character of the legal instruments of international law'). See also, in the doctrine close to the Conseil d'Etat, P. Schmit (with the collaboration of E. Servais), *Précis de droit constitutionnel* (Luxembourg: St Paul, 2009) 87.

# 16

# Netherlands

*Evert A. Alkema*

## 1. Introduction

The Kingdom of the Netherlands is a parliamentary democracy under a constitutional monarch. The original constitution was adopted in 1815, while the present constitution dates from 1848 and has been amended several times, most recently in 2002. Under the Constitution, there are three main institutions in the national government: the monarch, the Council of Ministers, and the States General. The King fills a largely ceremonial role, but does have influence in advising. The King acting under ministerial responsibility appoints all members of the judiciary, including the 38 member of the Supreme Court. The majority of executive power is vested in the Council of Ministers, which plans and implements government policy. Legislative authority is vested in the government (ie the King and the Council of Ministers) and the States General, which consists of two chambers. The Constitution does not permit judicial review of acts of the States General.

The Netherlands is an active participant in the United Nations as well as other multilateral organizations such as NATO, the EU, the Organization for Security and Co-operation in Europe (OSCE), the Council of Europe (CoE), the Organization for Economic Co-operation and Development (OECD), the WTO, and the International Monetary Fund. The country is also the centre for international courts such as the ICJ (whose compulsory ICJ jurisdiction the country accepts with reservations), the International Criminal Court, and ad hoc tribunals.

The Netherlands emerged as an independent state from Habsburg rule after separation from Spain in 1581. Over time it developed into an independent republic, uniting seven provinces in a confederation structure. During a turbulent period from 1795–1813 it successively went through the phases of a unitary republic, a kingdom and an integral part of the French empire. In 1813 it revived as a kingdom and independent state and, from 1814–39, was united with present-day Belgium. Gradually, it became a constitutional monarchy. Over time the Netherlands also evolved from a colonial power into a post-colonial state.

The Kingdom of the Netherlands maintained special constitutional ties with its former colonial overseas territories that were laid down in the 1954 Charter for the Kingdom of the Netherlands (*Statuut*). Nowadays the Kingdom consists of three

autonomous entities or countries (*Landen*): the Netherlands (sometimes referred to as the 'Kingdom in Europe') and the Caribbean islands, Aruba and the Netherlands Antilles. As from 1 October 2010 the latter has been split into two autonomous territories, Curaçao and Sint Maarten (Saint-Martin), whereas three smaller islands, Bonaire, Sint Eustatius and Saba, will be politically integrated into the Netherlands.

The Kingdom's internal relations are governed not only by domestic law but by international law as well, particularly as far as the right to self-determination of the overseas territories is concerned. In international relations the Kingdom acts as the legal entity, exercising in particular the treaty-making power. Occasionally, the Kingdom's two-fold constitutional structure tends to complicate matters. In this chapter we use the term 'the Netherlands' as indicating the subject of international law. Where the relations between the countries (*Landen*) are concerned we will refer to the 'Kingdom'.

The attitude vis-à-vis international law in the Netherlands can be characterized by a relative openness of the written and unwritten constitution towards international law. In doctrine, the Netherlands system has been qualified as moderately monistic. In a recent summary of present-day state practice the government has endorsed this view. It explained that term by pointing to the fact that the Constitution sets some conditions for the internal effect of international law, such as parliamentary approval and official publication, and does not treat all sources of international law equally.[1] Further, a typical development in foreign relations has been 'democratization'. Parliamentary approval has increasingly become a precondition for the internal effect of international treaties. The last two centuries have seen an extension of the categories of treaties subject to such approval at the expense of the powers of the King and the executive.

## 1.1 Relevant Constitutional Provisions

International relations are dealt with in the Constitution under subsection 2 of chapter 5 'Legislation and Administration', entitled 'Miscellaneous Provisions'. The following articles are relevant here:

Art. 90: The Government shall promote the development of the international legal order.
Art. 91:

1. The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General. The cases in which approval is not required shall be specified by Act of Parliament.
2. The manner in which approval shall be granted shall be laid down by Act of Parliament, which may provide for the possibility of tacit approval.
3. Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favour.

[1] See *Doorwerking internationaal recht in de Nederlandse rechtsorde* (Governmental note on the effect of international law in the Netherlands legal order), *Parliamentary documents* 2007–2008, 29861 No 19, 3.

Art. 92: Legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Art. 91 para. 3.

Art. 93: Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.

Art. 94: Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.

Art. 95: Rules regarding the publication of treaties and decisions by international institutions shall be laid down by Act of Parliament.

These articles are followed by specific provisions (Articles 96–102) on declaring the Kingdom to be in a state of war, conscription[2] and, generally, on the military; they are less relevant here.

Finally, mention should be made of Article 120 restricting the judiciary's competence to review:

Art. 120: The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.

The quoted articles of the Constitution lend direct effect to some provisions of international law, ie of treaties and of decisions of international organizations on the condition that they are 'binding on all persons'. Such provisions of international law rank high in the hierarchy of legal norms; they enjoy priority over Acts of Parliament as well as over the Constitution itself. Besides, Article 120 precludes the courts from reviewing the constitutionality of treaties, a question that is of special relevance with regard to treaties that conflict with the Constitution and thus require, under Article 91, paragraph 3, a qualified majority for approval.

The Act referred to in Articles 91, paragraphs 1 and 2, and 95 is the Kingdom Act of 7 July 1994 containing Regulations on the Approval and Publication of Treaties and the Publication of Decisions of International Organizations (*Rijkswet goedkeuring en bekendmaking verdragen*).[3] It elaborates the conditions for and exceptions from parliamentary approval of treaties and also lays down some rules about the publication of treaties and decisions of international organizations in an official bulletin called *Tractatenblad.*

The Constitution refers explicitly only to treaties and decisions of international institutions (ie organizations). It is silent on customary international law, general principles of law, the decisions of international tribunals and international texts of a declarative nature.

In its judgment of 1959—to be discussed in section 3 on customary international law below—the Supreme Court has roughly sketched the contours of the courts' constitutional competences with respect to international law in general.

[2] This provision is nowadays merely hypothetical since conscription was terminated in 1996.
[3] *Staatsblad* (Official Gazette) (hereafter abbreviated as *Stb*) 1994, 542.

This judicial attempt to fill the gap in the written Constitution is neither perfect nor hard. Yet, it has been accepted as valid and legal practice conforms to it.

It boils down to the following. The application of self-executing provisions of treaties and decisions of international organizations generally excepted, the courts ought to avoid an open confrontation with the parliamentary legislature; they should not review Acts of Parliament and quash them for non-conformity with international law. Apparently the underlying idea stems from the implied constitutional supremacy of Parliament as the democratically elected legislator. Sometimes even self-executing international law may be denied that effect. Such is the case when the courts prefer to 'abstain', as will be explained in section 2.3 below.

That being said, international *non*-self-executing law from whatever source, of course to the extent that it is fit for judicial application, may produce all sorts of effects. These effects range from mere relevancy to great authority and from recommendatory to fully legally binding effect. In applying such international law, the judiciary has the power to review delegated statutory law but not Acts of Parliament. The situation is different for the administration and the legislature that are under the international and constitutional obligation to comply with international engagements even if they are not cast in self-executing form.[4] A complicating factor in this respect is that the latter obligations of the administration in some circumstances may subsequently as yet permeate into case-law and become subject to judicial review through tort actions against the authorities for non-compliance with international law.[5]

## 1.2 Legislative Provisions Concerning International Law

There are several statutory provisions about the application of international law. The most important ones are detailed herein. Article 13a of the *Wet algemene bepalingen* (General Provisions (Kingdom Legislation) Act of 1829) (*Stb* 28) states: 'The courts' jurisdiction and the enforceability of judgments is subject to the exceptions recognized in international law.' 'International law' in this provision is considered to extend to all sources of international law including customary international law, general principles of law and decisions of international tribunals. It excludes notably the courts' jurisdiction with regard to acts of state and has been elaborated in Article 3, paragraph 3 of the 2001 *Gerechtsdeurwaarderswet* (Bailiffs Act).[6] A bailiff is not to enforce a judgment if he has been informed that the Minister of Justice wishes to stay the enforcement of a court order because such enforcement would run contrary to obligations of the state under international law.

[4] See Governmental note (n 2) 5.

[5] J.W.A. Fleuren, *Een ieder verbindende bepalingen van verdragen* [Provisions of treaties which are binding on all persons] (The Hague: Boom juridische uitgevers, 2004) 304.

[6] *Stb* 2001, 70. A similar earlier provision, Article 13 of the Regulations for Bailiffs (*Deurwaardersreglement*), had been applied by Supreme Court 25 November 1977 ('t Hart/Helinski), NJ 1978, 186; see L. Erades, *Interaction between International and Municipal Law—comparative case law study* (The Hague: T.M.C. Asser Instituut, 1993) 633; see also President Judicial Section Council of State 24 November 1986 (1987) *Kort Geding,* 38; see also section 3.2–3.3.

Similar provisions are to be found in the Criminal Code and the Code of Criminal Procedure. Article 8 of the Criminal Code stipulates: 'The applicability of the previous Articles 2–7 is limited by those exceptions recognized in international law.' Articles 2–7 concern especially the territorial scope of the Criminal Code. Further, Article 539, section (a)(3) of the Code of Criminal Procedure reads: 'The powers conferred under the provision of this Title can be exercised only subject to the law of nations and the rules of inter-regional law.'

This section of the Code establishes to what extent the powers in Title VI(A) relating to criminal procedure outside a court's area of jurisdiction (including jurisdiction for seizure on the high seas) can be exercised when rules of international law and the rules in force between the constituent parts of the Kingdom are involved.[7] In both provisions, international law is to be understood as international law originating from any source, not just treaties or decisions of an international organization.

The *Algemene Wet inzake rijksbelastingen*[8] (State Taxes Act) in Articles 37–39 contains some provisions for the prevention of double taxation. Article 39 provides specifically: 'In cases where international law or in the opinion of the Minister of Finance international usage [in Dutch: *'gebruik'*] so requires exemption of taxation is granted. Our Minister is authorized to issue further regulations on the matter.' Again, the scope of the provision is comprehensive: international law from any source. Besides, the notion of usage is generally understood to be wider than customary international law; it also includes unilateral practices of the Netherlands State or of its administration.

The *Wet internationale misdrijven* (International Crimes Act) of 19 June 2003 (*Stb* 270) also frequently refers to international law, particularly to crimes against international humanitarian law. The 1922 *Wetboek militair strafrecht* (Military Penal Code) (*Stb* 1352), in Article 38, mentions the laws of war in connection with impunity, especially, of the military.

## 1.3 Federal Issues: the 1954 Charter for the Kingdom of the Netherlands

As mentioned in the introduction, the Kingdom (ie the Netherlands in Europe and the Caribbean overseas territories) has an uncommon structure; it is neither federative nor confederative in the strict sense. Recently it has been described as a 'co-operative structure' or 'constitutional association' since it is more of a procedural device 'for the Dutch organs to consult with the Netherlands Antilles and Aruba before acting on their behalf' than a body politic encompassing all elements and performing the traditional activities of an ordinary State.[9] In matters of

[7] See H. Meijers and R.C.R. Siekmann, The '"Magda Maria" and customary law at sea—a case note' [on the judgment of the District Court of The Hague of 27 November 1981] (1982) 13 NYIL 143–56, 145. See also the Supreme Court's judgment in this case of 25 May 1993, (1993) NJ 784 s 8.1.1.

[8] Of 2 July 1959 *Stb* 301 as amended.

[9] See, generally, S. Hillebrink, *Political Decolonization and Self-Determination* (The Hague: T.M.C. Asser Press, 2008) 183–206.

international law the Kingdom acts as an indivisible single legal entity according to Article 3, paragraph 1b of the Charter, the functions as a subject of international law being exercised mostly by the authorities of the European mother country.

With regard to formal acts such as treaty making and the membership of international organizations, however, the Charter contains specific rules (Article 24 et seq). The gist of it is that the Kingdom formally has the monopoly of conducting international relations. However, the separate entities (ie mother country as well as the overseas *Landen*) may exert considerable influence on the material contents of the international obligations to be engaged in, particularly so where autonomous matters (not belonging to the 'Kingdom affairs') are concerned. Agreements with other powers and with international organizations affecting an overseas *Land* shall be submitted to its representative assembly. The overseas *Landen* of the Kingdom have the opportunity to opt in or out of international agreements, especially those dealing with economic or financial matters. Article 28 even enables the Antilles and Aruba to accede to—separate—membership of international organizations. Moreover, these territories have been associated with the European Community under Part Four of the EC treaty as 'overseas countries and territories'.

Articles 90–95 of the Constitution quoted above also apply to the Kingdom by virtue of Article 5, paragraph 1[10] and Article 3 paragraph 1b of the Charter; the latter qualifying foreign affairs as an 'affair of the realm'. This implies inter alia that provisions of international law that 'may be binding on all persons' take priority even over the Charter for the Kingdom.

There is no special court charged with adjudicating any conflicts between international law and the law of Curaçao, Sint Maarten and Aruba. However, in civil, criminal and fiscal matters the Netherlands Supreme Court (*Hoge Raad*)—like the Council of State's Administrative Law Division (*Raad van State Afdeling bestuursrechtspraak*) in other administrative law matters—acts as a cassation court (French: *'cour de cassation')* and applies the law of the *Land* involved. Thus, although the statutory substrata are not the same, it is unlikely that the judicial methods and practice of applying international law will differ with respect to overseas *Landen* law. The more so, because the provisions of the Constitution just quoted apply equally to these *Landen*.

## 2. Treaties and Other International Agreements

### 2.1 Definition and Interpretation of Treaties

Articles 93 and 94 of the Constitution cited above treat the self-executing provisions of treaties and decisions of international organizations on an equal footing.

[10] Article 5 [1]: 'The Kingship and the succession to the throne, the organs of the realm referred to in the Charter, and the exercise of royal and legislative powers in affairs of the realm shall be governed, if not provided for by the Charter, by the Constitution of the realm.'

The Constitution refers to *'verdragen'* (ie treaties) in order to ascertain that—irrespective of their designation—formally and materially the same instruments are meant as in international law. This qualification is of importance in the first place for Parliament, since in principle a treaty needs to be approved as a condition for being binding on the Netherlands State. When approved by Parliament there is little or no reason for the courts still to question the qualification as a treaty. Besides, Article 120 of the Constitution precludes the courts from reviewing the qualification given by the government and Parliament.

A treaty that merely implements another treaty does not require parliamentary approval.[11] Nevertheless, on one occasion, the government gave in to political pressure and submitted a treaty, implementing a treaty approved by Parliament, to Parliament for approval. It concerned an agreement with the United States about the deployment of nuclear weapons on Dutch territory. The government did so in order to rally more democratic support.[12]

In order to be applicable, the treaty must have been duly published in the *Tractatenblad* (the official bulletin containing treaties and other international documents). It is for the courts to test the publication.[13] With that formal exception they will—as a rule—rely on international law for the interpretation and application of a treaty.

With the Constitution's revision in 1983 the distinction between legally binding and legally non-binding international texts was elaborated, both in doctrine and administrative practice (but not as much in case-law). With regard to the latter there is a further distinction, though not a very sharp one, between 'international policy agreements' and 'international administrative arrangements'. The former are usually referred to as 'memoranda of understanding'. They show a political commitment but cannot be held in law against the state. The term 'international administrative arrangements' is used for engagements entered into by eg the government or a cabinet minister with a foreign counterpart. Here the demonstrable intention of the authorities—either domestic or foreign—is required for their non-binding character. Otherwise such a document is deemed to be a treaty.[14] It is likely that the courts, in line with this approach of doctrine and administration, will accept the binding force of such an agreement.

The 'upgrading' of an administrative arrangement or any other originally non-binding text does not necessarily imply that parliamentary approval would be

[11] Article 7b of the 1994 Kingdom Act of 7 July 1994 containing Regulations on the Approval and Publication of Treaties and the Publication of Decisions of International Organizations.

[12] See E.A. Alkema, 'Foreign Relations in the Netherlands Constitution of 1983' (1984) 21 NILR 307–31, especially 321.

[13] See *Hoge Raad* (abbr HR) (Supreme Court) 24 June 1997 *Nederlandse Jurisprudentie* (NJ) (1998) NJ 70.

[14] Fleuren (n 6) 149. See also E.A. Alkema, 'The Commentaries on the OECD Model Tax Convention on Income and Capital—Effective in Domestic Law or in Need of Alternatives?' in S. Douma and F. Engelen (eds), *The Legal Status of OECD Commentaries* (Amsterdam: IBFD, 2008) 184–6.[1722] HR 7 November 1984, (1985) NJ 247.

needed, as yet. The 1994 Kingdom Act on Approval and Publication in Article 7 letter b provides that agreements for the implementation of approved treaties do not need to be approved themselves unless Parliament decides to the contrary (Article 8). This seems most practical since it is often difficult to distinguish between implementing treaties and administrative arrangements.

When interpreting treaty law the courts are not obliged to defer to the views of the government or the legislature. In principle, they have full power to interpret treaties. If deemed necessary, they may even review a treaty under international law itself, notably with respect to compatibility with other treaties or international law.[15] It goes without saying that they may also cite the Vienna Convention on the Law of Treaties (Vienna Convention'). Occasionally, the Advocates-General attached to the Supreme Court as well as the government have referred to that Convention.[16] The Vienna Convention as such is not being subjected to the test of self-executingness; the application of its rules on interpretation rather precedes the decision about the self-executingness of other international law and ought to be distinguished therefrom.

The courts do, however, take note of the information and opinions voiced on the occasion of a treaty's submittal for approval to Parliament and are used to accepting these as guidance. Such guidance is important since the power to review under Articles 93 and 94 is a 'diffuse' one: all courts have to apply international law but some of them, in particular courts of first instance, may lack the proper expertise or experience to do so. On the other hand, the political branches often explicitly leave the interpretation of international law to the judiciary on the assumption that the courts may meet the dynamic development of international law more flexibly and effectively than the legislature itself.

Courts have the power to decide whether a statement attached to an international instrument by the government or legislature during treaty approval is indeed a reservation.[17] However, they may review the question only under international law, *not* under constitutional law (the latter ban follows from Article 120 of the Constitution). No case-law to that effect has been reported; neither is there a reported instance of a court deciding on the scope or legality of a reservation.

Finally, since the Netherlands Constitution places in juxtaposition the provisions of both treaties and decisions of international organizations 'which may be binding on all persons by virtue of their contents' a few remarks will be made about the latter category, which is of increasing importance nowadays.

We will not dwell long on the decisions of the European Community, since that international organization has its own rules for and judicial supervision over interpretation and implementation of 'secondary' community law by the member states. Yet, one comment should be made. Since the Court of Justice of the EC ruled in *Van Gend & Loos/Netherlands*[18] that the Community constituted itself an

[15] HR 10 November 1989 (*Stichting verbiedt de kruisraketten/Staat*) (1991) NJ 248 s 3.4.

[16] Ibid; Advocate-General Mok's brief s 5.4 and 6.1; Governmental note (n 2) 7; HR 24 September 2010 (Llanos Oil Exploration Ltd/Staat et al. (2010) NJ 507.

[17] HR 5 January 1990 (X/Jugendamt Tempelhof) (1991) NJ 591 s 3.4.

[18] 5 February 1963, Case 26/62 Jur 1963, 8.

autonomous legal order, in the Netherlands the doctrine has been prevailing that Articles 93 and 94 were not instrumental in giving effect to European Community law within the domestic Netherlands legal order, European Community law being supposed to have such an effect in its own capacity.

Moreover, this understanding seems to have been confirmed by the Supreme Court and has firmly been adopted by the administration.[19] In spite of such evidently well-established constitutional practice, recently some authors have questioned that understanding.[20] They point to the fact that the present Articles 93 and 94 were introduced in the Constitution in 1953 precisely to enable European Community law to have effect within the domestic legal order and, therefore, these provisions still have to be considered as instrumental in that respect.

Decisions originating from other international organizations pose problems with regard to binding force, legality and legitimacy. Their binding force does not depend solely on the sovereign state's will as the decisions may have been taken by a majority of the membership within the international organization. Further, and in contrast to the treaties instituting the international organizations, these decisions are not subject to parliamentary approval and they have rarely been translated and published officially.[21] The constitutional notion of decisions of international institutions (ie organizations) is still unclear in some respects. The Supreme Court turned down the argument advanced by a taxpayer that the Universal Declaration of Human Rights qualified as 'a decision of an international institution', finding instead that the United Nations General Assembly from which the Declaration originates has no power to issue decisions that are binding on the Netherlands.[22]

With respect to judgments of the European Court of Human Rights (ECtHR) establishing a violation of the European Convention on Human Rights (ECHR) by the Netherlands, in theory, a similar reasoning could have been followed considering those judgments as 'decisions' in the sense of Articles 93 and 94 of the Constitution. Indeed, those judgments—though not explicitly so qualified in case-law nor in doctrine—have such effect. The same effect, however, has been given as well to judgments rendered against other state parties to the ECHR. Yet, Article 46 of that Convention only provides that judgments are binding *inter partes.*

Therefore, in literature the binding force or *erga omnes* effect of the latter has been explained in a different manner as some sort of '*incorporation*': the case-law of the ECtHR being construed as an authoritative interpretation of the ECHR and, therefore, entailing the same binding force as has been attributed to the Convention

[19] HR 2 November 2004 (2005) NJ 80 and Governmental note (n 2) 6; see also M.L. van Emmerik, *De Nederlandse Grondwet in een veellagige rechtsorde* [*The Netherlands Constitution within a multilevel legal order*] (R.M. Themis, 2008) 149.

[20] See for this discussion further: van Emmerik (n 20) 145–61, especially 149–50; see also Governmental note (n 2), 5–6; see also L.F.M. Besselink and R.A. Wessel, *De invloed van ontwikkelingen in de internationale rechtsorde op de doorwerking naar Nederlands constitutioneel recht* [The impact of developments in the international legal order on the implementation according to Netherlands constitutional law] (Deventer, Kluwer 2009) 84 et seq, 106–9.

[21] So-called 'rulings' made by the tax authority with respect to (foreign) taxpayers are an exception; their official publication takes place in the *Staatscourant.* See Alkema (n 13) 184 n 421.

[22] HR 7 November 1984 (1985) NJ 247.

itself. In this manner the doctrine evades qualifying the ECtHR's case-law as 'decisions' in the sense of the Constitution.

The doctrine as well as the courts has extended this reasoning to the views of the UN Human Rights Committee supervising the Covenant on Civil and Political Rights (ICCPR) and other international bodies supervising the interpretation and application of human rights, though formally non-binding.[23] Those judgments and views of international (quasi-)judicial bodies are often concrete, elicited by and addressed to individuals; therefore, they easily meet the constitutional requirements for self-executingness and so do the underlying treaty provisions. Although such international texts have not exactly the same constitutional status as decisions of international organizations they occasionally may take priority over contrary domestic statutory law.

The process of implementing international decisions, not only those concerning human rights but also more technical decisions originating from specialized organizations such as the World Health Organization, International Civil Aviation Organization, International Monetary Fund, etc, show a great variety and lack a proper statutory or constitutional structure. All branches of government: the executive, the legislative and the judiciary, are involved. Sometimes they act consecutively, eg the administration can take provisional measures or the courts may adapt—for the time being—their internal organization awaiting the amendment by the legislature.

Implementation within the Kingdom can be even more complicated. Yet, a proper procedure is lacking here too.

Exceptionally, special implementation procedures are provided for. With respect to the implementation of judgments of the ECtHR in criminal matters, the Code of Criminal Procedure in Article 957, paragraph 1, subsection 3 provides for reopening the contested proceedings.

As for the interpretation and implementation of international judgments and decisions, especially those made or taken by international supervisory bodies in matters of human rights, the political branches can often offer little or no guidance to the courts. Whenever the state itself has been participating in the proceedings before the international tribunals or supervisory bodies, it has acted in the completely different role of a defendant state, whose interpretations carry, of course, little or no special authority.

## 2.2 Domestic Effect of Ratified Treaties

Ratified treaties that have been explicitly or silently approved by Parliament and have entered into force do not, as far as self-executing provisions are concerned, need special acts of incorporation provided they have been duly published. However, implementing legislation is needed to make the non-self-executing provisions

[23] Occasionally, Netherlands courts also refer to General Comments of the Committee supervising the ICESCR; an example albeit negative is: *Centrale Raad van Beroep* (Central Appeals Tribunal: Supreme Court in matters of social security) 11 October 2007 (*LJN* BB 5687).

applicable by the courts. If and to the extent that implementation might encompass (elements of) self-executing provisions, such implementation does not, however, preclude the courts from testing the implementing domestic statutory law for conformity with the original treaty. Generally, implementation by legislation does not create an irrefutable presumption of non-self-executingness because the legislature often leaves it—explicitly or implicitly—to the courts to consult the *travaux préparatoires* and other relevant data in order properly to interpret and apply the domestic legal texts implementing a treaty.

## 2.3 The Doctrine of Self-executing and Non-self-executing Treaties

Since the Constitution in 1956 embraced a doctrine of self-executingness, the courts have been inclined to adhere to that doctrine.[24] The criteria taken into account are a mixture of international and domestic law. Self-executingness is not esteemed to be entirely dependent on the intention of the state parties. In the leading case the Supreme Court considered that it was not relevant whether the

> States parties intended to recognize the direct effect of Art. 6 para. 4 of the European Social Charter, since neither from the text nor from its travaux préparatoires could it be inferred that such effect had been excluded. In those circumstances, according to Netherlands law, only the contents of the provision are decisive: does it oblige the Netherlands legislator to make rules of a certain content or import or is that provision of such a nature that it can be applied as objective law right away.[25]

In case-law those criteria have been further elaborated.[26] *Fleuren* mentions in this respect inter alia the following criteria:

- the way in which the engagements of the states parties to a treaty have been couched;
- is a provision fit to be applied by the courts;
- is it sufficiently concrete;
- is gradual implementation provided for;
- is the provision binding on the state in its relations to other states only;
- does the provision contain a 'positive' obligation (particularly relevant with respect to social fundamental rights as opposed to classical fundamental rights).[27]

A most interesting development in case-law is that the courts have created some sort of an escape in order to avoid a direct conflict with the political branch, the so-called 'abstaining'. Occasionally the courts have ruled that even if the provision of international law is to be considered as self-executing, it would, under certain

[24] T. Buergenthal, 'Self-executing and Non-self-executing Treaties in National and International Law' (1992) 4 RCADI 235, 307–400, especially 352–3.

[25] Supreme Court *HR* 30 May 1986 (NS/FNV), (1986) NJ 688 s 3.2.

[26] See generally Fleuren (n 6); 'The Application of Public International Law by Dutch Courts' (2010/2) 57 NILR 245–66, especially 252.

[27] Fleuren (n 6) 271 et seq.

circumstances, lie outside their competence to apply the international law provision and let it prevail over the domestic statutory provision. This is particularly so when those circumstances call for a weighing of different alternatives that the courts deem is beyond their judicial task and rather a matter for the political branch to decide. Apparently for constitutional reasons, the courts in those circumstances shrink from setting aside domestic statutory provisions. In doing so, they clearly abstain from giving effect to an international law provision, in spite of recognizing it as being self-executing.

Sometimes the courts leave the question of self-executingness undecided. They can do so because they first preliminarily examine whether the contested domestic legal provision or decision is in conformity with international law.[28] If so, the question of self-executingness becomes moot.

Especially in connection with the International Covenant on Economic, Social and Cultural Rights (ICESCR) the matter of self-executingness has been discussed amply in the literature.[29] With respect to that Covenant the courts—with a few exceptions—have not considered its provisions as self-executing. The government, when submitting the treaty for parliamentary approval, observed that most of its provisions will not be directly applicable. In support of that view it pointed to Article 2 paragraph 1 where the state 'undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights concerned in the present Covenant'. Although this reasoning has been criticized by the UN Committee supervising this Covenant as early as 1998, still the courts are not inclined to lend direct effect to the Covenant's provisions. In the doctrine, to the contrary, it has been suggested that there could and should be exceptions. For one, it would be conceivable that some of these fundamental social rights would be applied by the courts, notably when newly introduced domestic legislation threatens to reverse a progressive development with respect to such a right into a retrograde development.

It is to be noted here that international law—whether self-executing or not—does not obligate just the state as a single entity but can address and obligate its component parts, notably the local authorities, as well. Disputes between central and local authorities including disputes about questions of international law used to be subject to administrative (non-judicial) review by the Crown and could result in annulment or non-approval of the local authorities' acts or regulations. Nowadays, since the appeal to the crown has been abolished following the European Court of Human Rights judgment in *Benthem*,[30] most such disputes are no longer decided by the administration but by the Administrative Law Division of the Council of State. There is no reason to believe that this judicial body would in future disputes between central and local authorities not apply *non*-self-executing international law

[28] F.M.C. Vlemminx and M.G. Vlemminx-Boekhorst, *Recente rechtspraak van de Raad van State over het begrip een ieder verbindend* [*Recent case law of the Council of State about the concept 'binding on all persons*] (Jurisprudentie Bestuursrecht plus, 2005) 32.

[29] See ibid 28–40; Fleuren (n 6) 299 et seq.

[30] ECtHR 23 October 1985 *Benthem v the Netherlands* Series A 97.

provisions either.[31] Though non-self-executing, those provisions indirectly may benefit the legal position of private parties in disputes with local authorities.

### 2.4 Treaties and Private Parties

The foregoing already sheds some light on the conditions or circumstances under which treaties can be invoked and enforced in litigation by private parties. Generally, there are no special conditions or special tests applied in such disputes with regard to the standing of private parties. Private parties may claim, as noted before, that the authorities have acted contrary to self-executing and non-self-executing treaty provisions and bring civil actions for tort and damages. However, private actions for an injunction with respect to the ratification or non-ratification of international treaties by the political branches are not permissible.[32] In this and other instances the courts have, for obvious constitutional reasons, refrained from interfering in matters of foreign relations.

## 3. Customary International Law

The Netherlands Constitution is silent on customary international law.[33] Articles 93 and 94 are not applicable. Therefore, in principle, customary international law does not prevail over Acts of Parliament, the Constitution or the Charter for the Kingdom.[34] There are, however, some specific statutory provisions recognizing it as a source of law. These few exceptions have been mentioned above in section 1.2; they concern the execution of court judgments as well as some matters of criminal and fiscal law. By virtue of these statutory provisions, customary international law—provided it is self-executing and in the circumstances therein indicated—prevails over all other domestic legal norms. In other instances, customary international law is being recognized as a source of international law that could and should be applied by the courts[35] but take priority over domestic *delegated* legislation only.[36]

The leading case with respect to customary international law still is the Supreme Court's judgment in *Nyugat* dating from 1959.[37] In that case, the Supreme Court,

[31] Royal Decree of 19 February 1993 (Eems-Dollard treaty Article 48), *Administratief rechtelijke beslissingen* (abbr *AB*) 1993, 385; see also Royal Decree of 19 July 1974 *Stb* 496 and Royal Decree of 10 September 1974 *Stb* 556 both quashing regulations of the City of Rotterdam for non-compatibility with the Convention on the Elimination of All Forms of Racial Discrimination.

[32] HR 6 February 2004 (about participation in military action in Afghanistan) (2004) NJ 329.

[33] See L. Erades, 'International Law and the Netherlands Legal Order' in H.F. van Panhuys et al. (eds), *International Law in the Netherlands*, vol. 3 (Alphen a.d. Rijn: Sijthoff & Noordhoff, 1980) 388.

[34] See Governmental note (n 2) 5; in the same sense Judicial Division of the Council of State 15 January 1996 (Ver Milieu Offensief/B & W Groesbeek) (1996) AB 333.

[35] District Court of Rotterdam 8 January 1979 (1979) NJ 113 (Stichting Reinwater et al. MDPA) where the court considered: 'this law [ie the law prevailing in the Netherlands] includes the unwritten rules of international law; Dutch courts are not only empowered, but even obliged to apply unwritten international law where appropriate' (1980) 11 NYIL 329.

[36] See Governmental note (n 2) 5.

[37] HR 6 March 1959 (Nyugat) (1961) NJ 2.

strongly relying on the article's drafting history, found that Article 66 (now Article 94) of the Constitution had as its purpose to define the courts' competence to review domestic law for compatibility with international law and that, for that matter, any such review was limited to self-executing provisions of treaties and of decisions of international institutions. In the instant case this precluded the application of customary international law on prize.

The judgment, though leading, in fact—it is submitted here—is atypical in several respects: in matters of prize the Supreme Court exercised exclusive jurisdiction in two instances; that jurisdiction had not been used for over a century; the case concerned emergency legislation with retroactive effect while the facts had occurred in wartime. Nevertheless, during the 1983 overall revision of the Constitution the government explicitly upheld the Supreme Court's narrow doctrine in *Nyugat:* matters of customary international law lay outside the courts' reviewing mandate. It did so notwithstanding the judicial tradition before 1953 and the opinions held in literature that were more favourable to applying customary law.

It is possible, though, that customary law is taken into account when the courts or the administration have to decide preliminarily about the validity under international law of (self-executing) treaties and decisions of international organizations. Nor is it to be excluded that the courts, in the future, might refer to customary international law in support of an interpretation of domestic law in conformity with customary law.

While customary international law is referred to rarely in case-law, incorporation or implementation is necessary in order to enable the courts to give effect to it, if any. Courts may apply customary international law—to the extent it is self-executing—in those instances where domestic law explicitly refers to it.[38] A case in point is a court ruling about the interference of the administration with the execution of a judgment providing for seizure of the bank account of the Turkish Republic's embassy in order to ensure the payment of salary to a Dutch citizen and former employee.[39] On that occasion the judge expressly rejected the state's assertion that the jurisdiction would be restricted with respect to interference with the execution of judgments. However, the court conceded that, generally, in matters of customary international law it has to be taken into account that the government represents the state in international relations and as such is a law-making *actor.* Therefore, it may be appropriate for the courts to hear the government's advisors in international law. However, the instant case did not require such a hearing since the customary international law about state immunity was sufficiently clear on the point at issue: it allows for immunity from execution in cases where assets to be seized—as in the present case—are meant for public purposes.[40]

[38] See section 1.2.

[39] President of the Administrative Law Division of the Council of State 24 November 1986 (1986) Kort Geding 38.

[40] The Court made a distinction with respect to a Supreme Court judgment of 26 October 1973 (1974) NJ 361. There the Supreme Court held that the Socialist Federal Republic of Yugoslavia, although not a party to the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, could not be received in its claim—based on customary international law—for immunity from an award to which it is a party.

As appears from this case-law, the courts take judicial note of customary international law and incidentally will apply it *ex officio*. This can be inferred from the just mentioned judgments of the District Court of Rotterdam and of the Supreme Court about the Universal Declaration of Human Rights.[41] In the latter case it would have been conceivable that the court had examined whether the Universal Declaration had in the meantime acquired binding force as customary international law[42] but it did not do so.

From the above it follows that customary law has played a role with respect to state immunity. It is likely that it will also permeate into case-law about (military) criminal and fiscal law. In those areas legislation explicitly gives leeway to do so.

## 4. Hierarchy

As explained above, the Netherlands Constitution focuses in particular on self-executing treaty law and on decisions of international organizations. Self-executing international law enjoys top rank in the hierarchy. Article 94 of the Constitution provides that all statutory regulations in force, ie also the Constitution itself and the Kingdom's Charter, are not applicable if they conflict with self-executing international law. This is affirmed also by Article 120 of the Constitution: the courts have no power to review such international law for constitutionality.

The Constitution does not refer to other sources of international law nor to *non*-self-executing international law. In principle, this does not imply a lower priority for such international law provisions. In doctrine it is held that, according to constitutional customary law, international law not provided for in the Constitution—if binding on the Netherlands—equally enjoys priority. However, so far that has not been borne out by practice (see with regard to customary international law the previous section).

With respect to the non-self-executing provisions of treaties and of decisions of international organizations there is no doubt about priority. This is especially relevant for the administration and the legislature. The political branches are firstly responsible for the regulations and measures implementing international law and, generally, for compliance with international law engaged in by the state. In addition, government and Parliament have to test, by virtue of Article 91 paragraph 3, whether international law is in conflict with the Constitution but not in order to let the latter prevail. A positive test requires—at least in theory—stronger legitimacy through an approval of the treaty by a qualified majority of votes in Parliament. Rarely, however, has the procedure of Article 91 paragraph 3 been followed; an omission that has recently been criticized in Parliament, notably in the Senate, with respect to treaties establishing the EC and EU (and later amendments of those

[41] HR 7 November 1984 (1985) NJ 247. See, generally, on the conflicts between treaties in Dutch case-law, J.B. Mus, *Verdragsconflicten voor de Nederlandse rechter* [Conflicting treaties in disputes before the Netherlands courts] (Zwolle: W.E.J. Tjeenk Willink, 1996.

[42] See J. P. Humphrey, 'The Universal Declaration of Human Rights, Impact and Juridical Character' in B.G. Ramcharan, *Human Rights: Thirty Years after the Universal Declaration* (The Hague: Martinus Nijhoff, 1979) 38 et seq.

treaties), and also with respect to the treaty on the International Criminal Court.[43] This criticism is understandable. If a treaty considered to be conflicting with the Constitution has not been approved with such a qualified majority but with a simple majority only, it will nevertheless have the effect of amending the Constitution materially. The conditions for a formal revision of the Constitution are much stricter. They are spelled out in Articles 137–142 providing for a two-fold reading by Parliament and a two-thirds majority in its Lower House.

Like customary international law the general principles of law are in limbo, so to speak. During the last few decades, however, several of these principles have been codified in (multilateral) treaties, eg the principles of equality and non-discrimination, abuse of rights and of other principles essential to the rule of law. Such codified principles have the same status as other treaty law.

## 4.1 Reconciling or Conforming Domestic Law to International Law?

In contrast to the judiciary in some Scandinavian countries, the Netherlands courts are not used to referring explicitly to a 'rule of presumption'. Rather they interpret domestic law in conformity with international law implicitly. Some 30 years ago they occasionally did so in a reverse manner. Several international legal rules were bent so as to conform to domestic notions and rules![44] Apparently, at the time the courts were not accustomed to applying the new power (dating from 1953) to review domestic statutory law and preferred avoiding an overt conflict with the political legislative branches.

## 4.2 *Jus Cogens*

The courts recognize the doctrine of *jus cogens* norms.[45] An old but somewhat shaky precedent dating back to the 1948 Constitution is the Supreme Court's judgment of 28 November 1950.[46] It concerned the winding up of a colonial heritage and the question of where to demobilize the former colonial military troops, mostly originating from the Moluccan Islands, in—at the time hostile—newly independent Indonesia or in the mother country in Europe. The Court, rejecting the government's argument derived from international law and from the Union treaty with Indonesia, referred to other 'rules and principles of law'. Although it did not use the term *jus cogens* as such, it ruled that not demobilizing the troops in the Netherlands would have been illegal and constitute a tortuous act endangering the fundamental right to life of the persons concerned. At that moment the Netherlands was not yet bound by a treaty spelling out the right to protection of life, the ECHR not yet having been ratified by the Netherlands. Since

[43] See van Emmerik (n 20) 148; Besselink and Wessel (n 21) 52 et seq.

[44] Erades (n 7) 429 n 132.

[45] See HR 10 November 1989 (*Stichting verbiedt de kruisraketten/Staat*) (1991) NJ 248 rejecting the applicability of *jus cogens* in the instant case and the Advocate General Mok's brief s 6, pointing to the codification of *jus cogens* in the Vienna Convention on the Law of Treaties.

[46] HR 2 March 1950 (demobilization of KNIL military troops) (1951) NJ 217.

the Constitution does not contain a guarantee for the right to life either, the norm referred to was in fact unwritten and probably part of international customary law.

At first glance the more recent record of case-law about *jus cogens* appears to be scanty. Again this may be a matter of codification. Over time many *jus cogens* norms have been laid down in treaties, particularly human rights treaties. Notably Article 3 of the ECHR and Article 3 of the European Convention for the Prevention of Torture have exercised and still exercise a considerable influence in the courtrooms and directly affect the policy of eg the immigration and penitentiary authorities. It goes without saying that the courts and the administration when applying these norms strongly subscribe and defer to the case-law of the ECtHR, of other international tribunals and to the reports of supervising quasi-judicial bodies like the European Committee for the Prevention of Torture. It is in this context that the 'technique of incorporation' often plays an important role.

## 4.3 The Impact of Human Rights Law

International law guarantees for human rights have had and still have an enormous impact on domestic case-law. This is particularly so for the civil and political rights laid down in the ECHR and the ICCPR. Most of them are considered to be self-executing. Through the aforementioned technique of 'incorporation' the judiciary takes due account of the interpretation by the ECtHR and the UN Committee on Human Rights.

The huge influence of the self-executing human rights law finds its cause in what we may call a contradiction within the Constitution.[47] Firstly, pursuant to Article 120 Acts of Parliament are not subject to review for unconstitutionality, whereas Acts of Parliament and any other domestic statutory regulation are subject to judicial review for compatibility with self-executing international law (Article 94), as was noted before. However, both the Constitution and international treaties contain similar provisions, notably fundamental rights. Consequently, any dispute about the alleged illegitimacy of Acts of Parliament concerning such fundamental rights necessarily tends to revolve around the application of international law and is not being considered under the comparable constitutional provisions.

Secondly, the 1983 revision of the Constitution has not mended that flaw. On the contrary, government and Parliament did not avail themselves of that occasion to adapt and consistently complete the existing catalogue of constitutional fundamental rights and thus missed the opportunity to make the Constitution more protective, or at least as protective as the international fundamental norms. Therefore, in practically each case about an alleged conflict between fundamental constitutional rights and *delegated* legislation or administrative decisions, both constitutional and international fundamental rights are invoked and to be applied side by side. The more so, since the courts have to let the most protective provision prevail (see inter alia Article 53 ECHR and Article 5, paragraph 2 ICCPR). As a

[47] See further E.A. Alkema, 'Constitutional Law' in J.M.J. Chorus et al. (eds), *Introduction to Dutch Law* (4th edn, Alphen a.d. Rijn: Kluwer Law International, 2006) 333–4.

consequence, the interpretation and application of international human rights have become a matter of daily routine in the courtrooms and also in legislators' quarters.

Other international fundamental rights that are not self-executing firstly require implementation in domestic legislation; an example is the Convention on the Elimination of All Forms of Racial Discrimination. Yet, the courts in interpreting certain notions from that treaty have referred to the treaty itself.[48] Some treaties, such as the European Social Charter (Turin, Italy, 1961) and the International Covenant on Economic, Social and Cultural Rights, are less influential. Here the non-self-executing character of most rights is a hurdle—if not a barrier—in domestic court proceedings. A similar divide in effects can be observed with regard to 'mixed' treaties protecting specific groups of persons, eg the Convention on the Rights of the Child containing civil and political rights as well as social rights.[49]

A special problem is posed by the internationally guaranteed principle of equality and non-discrimination that has been enshrined in numerous treaties, including the treaties, regulations, and directives of the EC. The principle is considered to be self-executing. As yet, claims combining this principle with social fundamental rights tend to make the latter apt for judicial review in that respect. It is precisely in this context that the technique of 'abstaining' has developed. Disputes about social fundamental issues linked with discrimination may be of such a political calibre, if not 'explosiveness', that the judiciary tends 'to pass the buck' to the legislature and, in so doing, declines to apply the self-executing non-discrimination principle.

It can be concluded that the effect of international fundamental rights on constitutional matters is considerable and so is the impact, generally, on the interpretation and application of the constitutional provisions concerning international law. Rarely have other elements of the Constitution, to my knowledge, undergone any such influence. An exception may be the specific provisions introduced in 1983 in the Constitution (Article 42 et seq) singling out the Prime Minister among the other cabinet ministers. Before, the Prime Minister was considered a *primus inter pares.* The amendments have been introduced to reflect the new co-ordinating role for the Prime Minister necessitated by his membership in the European Council of the European Union. On the other hand, it has been advocated—but so far in vain—to introduce a general provision about the status and effects of European Community law.

## 4.4 Hierarchy within International Law

The Constitution does not foresee any hierarchy, neither between treaties and decisions nor among decisions of international organizations. It is likely, though, that the courts will attribute a higher rank to the treaties establishing an

[48] HR 15 June 1976 (1976) NJ 551.

[49] See M.L. van Emmerik, 'Toepassing van het Kinderrechtenverdrag in de Nederlandse rechtspraak' ['Application of the Convention on the Rights of the Child in Netherlands case law'] (2005) NJCM-Bulletin 700–16.

international organization than to the decisions originating from such an organization. A comparable hierarchy is made by the Court of Justice of the EC with respect to the treaties establishing the EC and the EU and the EC's so-called secondary rules, like regulations and directives.

Conflicts between Community law and other international legal obligations may occur. This was the case in the *Barber* judgment of the Court of Justice (CoJ),[50] which was followed by a 'view' of the UN Committee on Human Rights in a case concerning the Netherlands.[51] The legal dispute revolved around the date from which a distinction based on sex with regard to pensions was to be illegitimate. The government endorsed the point of view of the EC CoJ and a similar judgment of the *Centrale Raad van Beroep* (Central Appeals Tribunal: Supreme Court in matters of social security)[52] and reacted by stating that it was unable to share the 'view' 'for compelling reasons of legal certainty'.

Sometimes these types of conflicts can be resolved outside the domestic legal system by the EC CoJ. A case in point is the CoJ's judgment in *Kadi and Al Barakaat/Council*.[53] In that case the Court of Justice tested the EC Regulation implementing a decision of the Security Council Committee against fundamental principles underlying Community law, notably those concerning a fair trial, and concluded that the Regulation did not meet this standard.

In another case about a conflict between treaties, the Netherlands Supreme Court exercised a comparable test.[54] The facts concerned a handing over under the NATO Status Treaty of an American soldier billeted in the Netherlands and suspected of the murder of his spouse. Handing over the man to the American authorities would have conflicted with Article 2 of the ECHR and Article 1 of the 6th Protocol to the ECHR, since it was likely that he would be sentenced to death. The Court weighed the conflicting international law: on the one hand the interests of the individual protected notably by Article 2 of the ECHR (prevention of the death penalty) and on the other hand the obligation derived from the international NATO Status Treaty obligation. It ruled that fundamental principles (ie the human rights provisions) had to prevail. No doubt this judgment was inspired by the judgment of the ECtHR in *Soering v UK*.[55]

In conclusion, there are no general unqualified answers to questions of status or rank of different types of international law in the Netherlands legal order.

## 5. Jurisdiction

### 5.1 Universal Jurisdiction over International Crimes

Generally, pursuant to Article 13A of the General Provisions (Kingdom Legislation) Act 1829, the courts' jurisdiction is subject to the exceptions recognized in

[50] Court of Justice EC, Case of 17 May 1990 C-262/88 (Barber).
[51] View of 26 July 1999 Communication No 768/1997 (*Vos v the Netherlands*).
[52] Decision of 26 November 1998 (1999) RSV 92.
[53] Of 3 September 2008 C-402/05 and C-415/05P.
[54] HR 30 March 1990 (Short) (1991) NJ 249.
[55] Of 7 July 1989 *Series A* 161.

international law. This article was inserted during World War I. The reason for the amendment was that a District Court had been neglecting state immunity and had ordered, contrary to international law, the seizure of a German state-owned vessel. The incident was very serious politically and could have been a '*casus belli*' for Germany since the Netherlands at the time was a neutral state.

Jurisdiction with respect to criminal law is laid down in Articles 2–7 of the Criminal Code (see also section 1.2). They provide for the applicability of criminal law jurisdiction in the following cases: crimes committed within the Netherlands territory and on board Dutch vessels and aircraft; certain crimes committed by whomsoever outside the Netherlands (ie universal jurisdiction *stricto sensu*); crimes for which the prosecution has been taken over from another state; and certain crimes committed by Dutch nationals abroad.[56] Further, it is provided that foreigners with a fixed abode in the Netherlands who have committed war crimes or certain other special crimes abroad come under Netherlands jurisdiction.

Following the institution of the International Criminal Court in The Hague the *Wet internationale misdrijven* (International Crimes Act) 2003 (*Stb* 270) has been adopted. It establishes universal jurisdiction for crimes like genocide, torture and war crimes as defined in the relevant specific international treaties and conventions. The District Court of The Hague is competent in these matters.

Criminal courts are equally competent in the adjudication of indemnifications connected with the aforementioned crimes on the condition that victims or their relatives have joined as civil parties in the criminal proceedings.

## 5.2 Transnational Civil Jurisdiction

The civil courts also have jurisdiction in matters of indemnification. Moreover, they exercise jurisdiction with respect to non-compliance with international law in actions for tort against the state. This is the case where the state or the state authorities allegedly have failed to comply with obligations under international law (eg if they do not take the proper administrative action or pass the required legislation). It is even conceivable that state acts in conformity with international law are nevertheless subject to civil actions where the measures taken affect civil parties unevenly and therefore violate the principle of *égalité devant les charges publiques*.[57] In this context it is to be noted again that the distinction between self-executing and non-self-executing tends to become blurred. Tort actions can be

[56] A recent example is HR 30 June 2009 (*v A./State*) (conviction for supplying the Saddam Hussein regime with raw material for chemical weapons) *LJN* BG 4822. Subsequent to this penal judgment, private lawsuits for damages have also been initiated. Jurisdiction—international or national—with respect to piracy (notably by Somalian nationals) is under discussion now (see *Parliamentary documents* II 2009/2010, 29521 No 124). Especially, the trial of pirates arrested by the Netherlands navy acting within the framework of the EU or UN poses a problem. So far, it has resulted in the pirates being released. See, however, with respect to the surrender of pirates to Germany, District Court Amsterdam, 4 June 2010 (2010) NJ 591.

[57] In connection with the International Court of Arbitration award in *Re Belgium/Netherlands (Iron Rhine)* (2005) <http://www.PCA-CPA.org>.

brought against the state for not complying with international law irrespective of whether it is self-executing or not.

## 6. Other Sources of International Law

Courts refer to treaties to which the Netherlands is not a party. Here a distinction can be made. Firstly, treaties can be binding although they have not yet been approved by Parliament. Article 10, paragraph 1 of the 1994 Kingdom Act on Approval and Publication allows for provisional application of treaties if such is considered to be particularly urgent; in those instances parliamentary approval has to follow as soon as possible. Secondly, treaties that have not yet entered into force for the Netherlands (eg because they have been signed but not yet ratified) are formally not binding.[58] Nevertheless the courts occasionally apply them in anticipation[59] or may pray in aid such treaties where they have to determine the contents of a rule of positive law.[60] It is noteworthy that this has happened also in cases with respect to constitutional principles, such as the ban on discrimination and the fundamental 'right of person' or the fundamental 'right to a personality'. Thirdly, it is conceivable but not very likely that a court would refer to a treaty to which the Netherlands is neither a party nor has taken steps to become a party. Such reference, however, could only support but not be a decisive element in the court's reasoning. Comparable rules apply with respect to the far more rare cases of termination or withdrawal from a treaty.

In the Netherlands Constitution there is no explicit reference to the general principles of (international) law. Yet, occasionally the courts have referred to these principles.[61] They are legally binding. In principle, they do not take priority over Acts of Parliament. In case-law, however, one exception has been recognized, although it does not concern a principle of *international* law as such. If during the legislative process a possible conflict with principles of (international) law has not been addressed explicitly, the courts may, incidentally, consider the contrary statutory provision as inoperative.[62] In doing so they exercise a sort of 'mitigated review', as the statutory provision is not applied in the instant case but nevertheless remains valid. It is likely that the courts will follow a similar reasoning with regard to disputes about domestic law allegedly conflicting with general principles of international law.

Another source of international law is rarely referred to in case-law: *comitas gentium.*[63] It is not clear, though, which legal force has been attributed to it.

[58] HR 29 May 1996 (*X/VZB*) (1996) NJ 556; see further Fleuren (n 6) 236 n 2.

[59] See for examples of such anticipatory interpretation or enforcement: Erades (n 7) 282, 559, 561–3. But see; HR 24 January 1984 (*Magda Maria*) (1984) NJ 538 s 5.6.

[60] HR 15 April 1994 (*Valkenhorst*) (1994) NJ 608.

[61] Erades (n 7) 115, 117, 131.

[62] HR 14 April 1989 (*Harmonisatiewet*) (about the principle of legal certainty) (1989) AB 207 and HR 9 June 1989 (*Kortverband vrijwilligers*) (1989) AB 412.

[63] Erades (n 7) 37.

## 6.1 Non-binding declarative texts

Non-binding declarative texts like the Universal Declaration of Human Rights[64] and the UN and European standards for the treatment of prisoners are relevant and often authoritative for the courts. Of course, they can become legally binding if enhanced by later developments, for example, if reference is made to these standards in subsequent binding or recommendatory resolutions of international organizations or conferences, in judgments of international tribunals or through state practice to that effect. The courts have considerable discretion in these matters and may also be influenced by the stance taken by the administration as to the quality of these norms.

## 6.2 Decisions of International Tribunals

As explained before, the Netherlands courts are used to applying the decisions of international tribunals to the extent that they can be considered self-executing. This is notably the case with respect to the judgments of the ECtHR and the Court of Justice and the Court of first instance of the EU.

There is little case-law reported in which decisions of non-judicial treaty bodies have been applied. The Commentaries on the OECD Model Tax Convention might be an example.[65] More frequent are references to the interpretations of the UNHCR of the Refugee Convention.[66] In this context the General Comments of the Committee supervising the ICESCR[67] are also relevant. It can be concluded that the courts, generally, will react favourably to those resolutions of international organizations and may refer to them or even 'incorporate' them and treat them as part of the interpreted treaty itself, lending it the same legally binding force and rank.

[64] HR 28 November 1950 (1951) NJ 137 (Tilburg).

[65] See HR 21 February 2003, *BNB*/177C where the Supreme Court observed—merely *ex abundantia*—that its interpretation would conform to such a commentary; see also Alkema (n 15) 180.

[66] District Court The Hague 27 August 1998 referring for its interpretation to a position paper of the UNHCR.

[67] See *Centrale Raad van Beroep* (Central Appeals Tribunal: Supreme Court in matters of social security) 11 October 2007 (LJN BB 5687).

# 17

# New Zealand*

*W. John Hopkins*

## 1. Introduction

Aotearoa/New Zealand is a Commonwealth country and former colony (later dominion) of the British Empire.[1] Uniquely amongst former British colonies, New Zealand did not adopt a formal constitutional charter upon independence, and is one of only three states that have no codified constitution of any kind.[2] This 'unwritten' approach mirrors the UK 'Westminster' model, although there are significant differences and over time the two models have diverged further. In reality the New Zealand constitution is anything but unwritten, with the main elements contained within a variety of constitutional texts and statutes. Key amongst them are the Treaty of Waitangi, the Constitution Act 1986 (which was introduced to codify some key elements of government, particularly in relation to the separation of powers), and the New Zealand Bill of Rights Act 1990. None of these are regarded as superior law and the highest form of law in New Zealand remains parliamentary statute. As discussed below, this extreme form of parliamentary sovereignty is under significant challenge, but if this approach is accepted, the New Zealand constitution can be summed up in a single sentence: 'Parliament can do anything.'[3]

The result of this emphasis on parliamentary power is, in fact, a tradition of executive dominance. As a parliamentary democracy, the head of government in New Zealand, the Prime Minister, is appointed by and from Parliament, as must be all ministers.[4] By convention and political necessity, this individual will be the leader of the largest party represented in the unicameral House of Representatives. This fusion of the legislative and executive branches of government allows the possibility of executive dominance.

* The author wishes to thank Camila Morsch for her extensive assistance in the preparation of this chapter. Thanks are also due to members of the International Law Group at University of Canterbury for their comments and input. Any errors and omissions are my own.

[1] The indigenous Maori people of New Zealand/Aotearoa make up around 15–20 per cent of the current population. They enjoy a formal treaty relationship with the New Zealand state (referred to as the Crown in New Zealand). A negotiated claims process and the independent (and advisory) Waitangi Tribunal address historic and contemporary Treaty grievances.

[2] Israel and the United Kingdom are the other two.

[3] F. Ridley, 'A Dangerous Case of the Emperor's New Clothes' [1988] 41 Parliamentary Affairs 340.

[4] Constitution Act 1986, s 6.

Prior to 1996, the ability of the executive branch to control Parliament through the Prime Minister's leadership of the majority party led many commentators to view the New Zealand constitution as dangerously unbalanced and an 'executive paradise'.[5] In 1996, however, the introduction of proportional voting (multi-member proportional–MMP) to replace the previous constituency based system of 'first past the post', led to a significant bridle being placed upon the power of the executive.[6]

However, the MMP environment is no silver bullet as recent examples of executive empowerment have confirmed.[7]

It is important to note, however, that the lack of a 'written constitution' in New Zealand leaves the current model open to significant interpretation. Academic commentators increasingly propose a variety of alternative views to this traditional approach of parliamentary sovereignty.[8] This criticism has increasingly been accompanied by a shift in judicial thinking towards extra-statutory limits on government power and parliamentary sovereignty. Much of this has been influenced by the growth of international norms, particularly in the field of human rights.[9]

New Zealand regards itself to be a good 'international citizen' with active membership of the World Trade Organization, the International Monetary Fund and the Organization of the Economic Co-Operation and Development, amongst many others. It also accepts the compulsory jurisdiction of the International Court of Justice, with a number of limited reservations.[10] It is a significant power in the south Pacific region and is a foundational member of both the South Pacific Forum and the Trans-Pacific Partnership. Its most important regional relationship is with Australia, with which it shares the Australia New Zealand Closer Economic Relations Trade Agreement (CER).[11] This framework agreement has established a free trade area as well as freedom of movement for citizens of both states. It aims in the longer term to deliver a single economic market across the trans-Tasman region.

## 1.1 International Law in the New Zealand Constitution

Although the uncodified nature of New Zealand's constitution allows international law the potential for significant constitutional influence, it also means that the

[5] Leslie Zines, *Constitutional Change in the Commonwealth* (Cambridge: CUP, 1991) 47.

[6] For a general discussion of this point see Geoffrey W.R. Palmer and Matthew Palmer, *Bridled Power: New Zealand's Constitution and Government* (4th edn, Oxford: OUP, 2004).

[7] Recent acts that have granted extensive powers to the executive branch include the Environment Canterbury Act 2010 and the Canterbury Earthquake Response and Recovery Act 2010. The powers conferred are ostensibly non-reviewable in the courts.

[8] See for example, Philip A. Joseph, 'Parliament, the courts, and the collaborative enterprise' (Summer 2004) 15.2 King's College Law Journal 321.

[9] See for example, *R v Pora* [2001] 2 NZLR (CA) and *Simpson v A-G* (*Baigent's* case) [1994] 3 NZLR 667 (CA)

[10] Disputes where peaceful settlement procedures have been agreed, disputes where the other part has accepted jurisdiction only for the purposes of the instant dispute and disputes concerning the New Zealand EEZ.

[11] Cheryl Saunders, 'To be or not to be: The constitutional relationship between New Zealand and Australia' in D. Dyzenhaus, M. Hunt and G. Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Oxford: Hart Publishing, 2006).

specific status of international law within the domestic context is open to debate. Its status within the domestic system cannot be traced to any constitutional document and instead can be discerned only from practice, statute and judicial decisions. If this were not complex enough, New Zealand is in the unusual position of having an 'international' treaty as its foundational document.[12]

If New Zealand does have a written constitution, then the Treaty of Waitangi/ Te Tiriti o Waitangi is the prime candidate. Indeed, the wish of colonial governments to avoid the limits that this document could place upon their actions may at least partially explain New Zealand's early enthusiasm for parliamentary sovereignty. The Treaty was signed between Maori Iwi (tribes) or Hapu (sub-tribes) and the British Crown on 6th February 1840.[13] The signing of the Treaty/te Tiriti is surrounded by controversy caused not least by the fact that the Teo Reo Maori version (signed by the Maori signatories) differs in significant parts from the English language version.[14] In particular, the English version ceded 'sovereignty' to the British Crown in return for the recognition of the Maori population as British subjects and the protection of their lands and Taonga (treasures). The Te Reo Maori version made no such reference to sovereignty, instead using the term *kawanatanga* (a transliteration of governership).[15] Such definitional confusion, whether intentional or not, continues to dog the use of the document today. The Treaty has had a chequered history and as the power of the settler government grew, it was honoured largely in the breach. This reached its nadir in 1877 when Prendergast J infamously referred to ti Tiriti as a 'simple nullity'.[16] In recent years, the Treaty has risen in prominence and it is now widely recognized as the founding document of the New Zealand state.[17] It has also acquired formal legal status through a number of statutory references and judgments, although the exact position of the Treaty in New Zealand law remains contentious.[18] Whatever the formal legal position of the Treaty, its status as the founding document of New Zealand/Aotearoa shows a particularly deep role for international law in New Zealand's constitutional structure.[19] More prosaically, the reference by the courts to the 'the principles of the treaty', rather than the specific text, has echoes in the judicial approach to international treaty law generally.[20]

[12] See Matthew Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington: Victoria University Press, 2005).

[13] Not all Iwi were signatories. This remains an issue of political significance amongst non-signatory tribes. The date is now celebrated in New Zealand as the national holiday (Waitangi Day).

[14] The Waitangi tribunal website carries accepted modern translations of the Maori text: <http://www.waitangi-tribunal.govt.nz/treaty/meaning.asp> accessed 17 November 2010.

[15] Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen and Unwin, 1987) 41.

[16] *Wi Parata v The Bishop of Wellington and the Attn-Gen* (1878) 3 NZJur (NS) 72.

[17] R. Cooke, 'Introduction' (1990) 14 NZLUR 1.

[18] Palmer (n 12).

[19] There is some debate as to whether the treaty is international, given the status of Maori society in 1840, but given that the United Kingdom encouraged and accepted the 1835 Declaration of Independence such arguments seem rooted in sophistry. See *Palmer* (n 12).

[20] See below in reference to treaties in New Zealand law. See also Michelle A. Poole, 'International Instruments in Administrative Decisions: Mainstreaming International Law' [1999] VUWLRev 29.

Despite the existence of the Treaty of Waitangi and its growing importance, the UK model of parliamentary sovereignty remains dominant in the New Zealand constitutional system. It therefore has a significant impact upon the role of international law in New Zealand.[21] There are no constitutional texts (nor can there be) which make reference to the wider role of international law in the law of New Zealand, so instead we must refer to the wider constitutional context, specific statutes and the judgments of the courts for guidance. Traditionally, this has led authors to describe New Zealand as having a 'dualist' approach to international treaties and a 'monist' approach to international custom.[22] In practice, the reality may be somewhere between the two.

Foreign affairs remain a prerogative power exercised by the New Zealand Crown.[23] There are no formal constitutional limits on its actions (and the courts have shown a marked reluctance to intervene, even when there are).[24] The legislature also has no formal role in the ratification or acceptance of international treaties. In practice, therefore, the only limits placed upon the executive's role in foreign affairs are political. A limited consultative role for Parliament has been developed in recent years in relation to multilateral treaties (bilateral treaties can also be referred at the discretion of the executive).[25] Multilateral treaties are referred to the Foreign Affairs, Defence and Trade Committee for comment prior to ratification. Such referrals must include a national interest analysis, but the Committee's response (or that of the House as a whole) remains advisory. Attempts to increase parliamentary involvement in international affairs have largely been unsuccessful.[26] In practice, the executive is relatively free to operate in the international sphere and will ratify treaties with minimal or no reference to Parliament unless political realities dictate otherwise.

Although the New Zealand Parliament's role in ratification and acceptance is minimal, it has a significant role to play in relation to the implementation of obligations. The concept of parliamentary sovereignty means that a treaty must pass through the domestic law-making process if it is to enter New Zealand law. Such a process will be disconnected from the ratification process and may require a primary statute.[27] If the power has already been delegated to the executive, then parliamentary involvement will be minimal, but perhaps surprisingly, given New Zealand's tradition of executive dominance, primary legislation is required in more instances than might be imagined.

[21] New Zealand was the only former British colony not to develop a limited form of government prior to or at independence. The reasons for this remain something of a mystery and are too complex to be discussed here. The tradition is now stronger in New Zealand that in the United Kingdom, lacking as it does the practical limits of devolution and the European Union.

[22] Eg *The Laws of New Zealand: International Law* (online LexisNexis) section 4–111.

[23] These are powers originally held by the monarch that have not been legislated for by Parliament. They have been inherited by the New Zealand executive.

[24] *Ashby v Minister of Immigration* [1981] 1 NZLR 22 (CA).

[25] New Zealand Parliamentary Standing Orders 387–90, as amended in 1998.

[26] An attempt by Green MP, Keith Locke to introduce a formal parliamentary ratification process for international treaties was predictably defeated (International Treaties Bill 2002).

[27] This classic dualist approach was most clearly stated in *Attn-Gen Ontario v Attn-Gen Canada* [1912] AC 571 (PC).

New Zealand as a state has been an enthusiastic user of primary legislation. As one nineteenth century politician put it: 'Every country has some staple manufacture, and there can be no doubt that laws are the staple manufacture of New Zealand.'[28] The reasons for this are not to be found in the democratic belief of the executive, but rather the power the New Zealand constitution places in the executive branch. As in most states, New Zealand public administration and policy making are usually delivered through the 'path of least resistance' principle. Ministers and their officials will attempt to implement their policies (including international treaties) by the simplest means possible. In most countries this has meant the extensive use of secondary legislation or executive decrees. In New Zealand, the 'winner takes all' approach to power and the ease with which legislation can be passed through the small unicameral Parliament has meant that the executive has had little concern about passing legislation (including legislation implementing treaties). For this reason, New Zealand has tended to utilize primary statutes in areas that many countries would reserve for executive legislation. The advent of a proportional system of voting in 1996, and with it the need for a coalition government, has meant that executive dominance of Parliament is less than it once was. Nevertheless, the historical legacy of this approach means that more international treaties will require implementation through parliamentary statute than might be expected.

It is difficult to assess the exact number of New Zealand statutes that make reference to international treaties. In 1996, the Law Commission identified 22 pieces of primary legislation that include the text of an international treaty in their schedules, but the actual number of statutes that implement international treaties is much higher.[29] The United Nations Act, for example, allows for the implementation of UN sanctions by executive decision, but does not include the treaty in its text.[30] There are also a significant number of regulations (New Zealand executive legislation) that implement specific technical bilateral agreements (double taxation agreements for example).[31] Again, the exact number is very difficult to determine; such is the intertwining of international and domestic regulation.

Perhaps the most notable references to international law in New Zealand law are in the field of human rights. These have seen international treaties, and at times the jurisprudence of international bodies, implemented in New Zealand law through the medium of the domestic courts. The most visible example of this is the New Zealand Bill of Rights Act (BORA) 1990.[32] The role of international law in the implementation of this statute is confirmed in the second part of the statute's purpose clause:

[28] John Eldon Gorst, one time New Zealand public servant and later UK Conservative politician. As quoted by Richard Wolfe, *Instructions for New Zealanders* (Auckland: Random House New Zealand, 2006) 13.

[29] The Law Commission identified 195 in 1996. *A New Zealand Guide to International Law and its Sources*, NZLC R34 (New Zealand Law Commission, 1996).

[30] The United Nations Act 1946.

[31] Eg SR 1972/244 (Australia), SR 1980/112 (Germany). See Law Commission, 1996 (n 29) 116.

[32] This is not to be confused with the Human Rights Act, which predates BORA and is actually an anti-discrimination measure.

'To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.'[33]

Although this phrase is somewhat vague, it has played a significant role in allowing the judiciary to develop rights protections on the basis of the Act. Perhaps the clearest example of this has been the development of damages as a remedy for a breach of human rights. Traditionally, damages are not available for public law actions in New Zealand. This follows from the British tradition and has its roots in archaic legal theory relating to the development of judicial review.[34] There are significant criticisms of this state of affairs, both in the United Kingdom and New Zealand, but at the present time the rule remains. Despite this, the New Zealand Court of Appeal was able to interpret the remedy of damages into the Bill of Rights Act by relying on the purpose clause's reference to the ICCPR and Article 2(3) of the Treaty itself. This states that 'each state party to the present covenant undertakes . . . to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy' and to 'develop judicial remedies to achieve this'. By reference to these elements of the ICCPR, the Appeal Court was able to develop financial remedies in reference to NZBORA cases notwithstanding the absence of any reference to them in the Act itself. This was despite the intentional removal of a draft clause in an earlier version of the bill that would have explicitly granted such remedies.[35] Although '*Baigents'* damages remain a remedy of last resort the mere fact that such a fundamental principle of New Zealand Public Law has been challenged on the basis of the ICCPR, via the New Zealand Bill of Rights Act, is clear evidence of the importance of international treaties to constitutional rights in New Zealand.

## 1.2 International Law and the Realm of New Zealand

New Zealand does not define itself as a federal country and, lacking a written constitution, it is debatable whether it could ever do so. Although New Zealand had a brief period as a quasi-federal state,[36] today it is one of the most unitary states in the western word, with only very limited powers delegated to local and regional governments. Despite this, New Zealand has a de facto federal relationship with three of its Pacific neighbours. This relationship is particularly relevant to the field of international law.

New Zealand has formal international responsibilities for four external territories. One of these, the Ross dependency, is New Zealand's claim in Antarctica and as such need not detain us here.[37] The other three are Pacific Island states/

[33] Purpose clauses have become a feature of New Zealand statutes since 2000 and tie in with New Zealand's purposive approach to statutory interpretation, established as a result of the 1999 Statutory Interpretation Act.

[34] See Peter Cane, 'Damages in public law' (1999) 9 Otago Law Review 489.

[35] *Simpson v Attn-Gen* (*Baigent's* case) [1994] 3 NZLR 667 (CA).

[36] The New Zealand Provincial Governments lasted from 1841–77, in various forms.

[37] New Zealand inherited this claim from the United Kingdom in 1923. In common with all claims to Antarctica, it was suspended as a result of the Antarctic Treaty in 1960.

territories with specific governance relationships with New Zealand itself. Niue and the Cook Islands are independent states in free association with New Zealand (although the details of the relationship are specific to each territory), while Tokolau is a non-self-governing territory with an autonomous government. In practice, all these states have a quasi-federal relationship with New Zealand, although the specific constitutional arrangements vary and need to be considered individually.[38]

The Cook Islands were annexed by New Zealand in 1900 during a period of colonial expansion by the then dominion. They remained colonies of New Zealand after the latter's independence from the United Kingdom (formally achieved in 1947 with the adoption of the Statute of Westminster) and were not granted self-governing status until 1965. Since this date the Cook Islands have been a self-governing territory in free association with New Zealand. The practical impacts of this relationship include that Cook Islanders are citizens of New Zealand. Constitutionally it means that the Cook Islands government has complete responsibility for domestic affairs while international affairs and defence remain shared with New Zealand. Over time the Cook Islands have developed an increasingly independent international presence, the physical evidence of which is the establishment of formal diplomatic ties between the Cook Islands government and 18 other countries.

The Cook Islands Constitution Act 1965 (a New Zealand Statute) lays down the continued role of the New Zealand government in the defence and external affairs of the Cook Islands:

> Nothing in this Act or in the Constitution shall affect the responsibilities of Her Majesty the Queen in right of New Zealand for the external affairs and defence of the Cook Islands, those responsibilities to be discharged after consultation by the Prime Minister of New Zealand with the Premier of the Cook Islands.[39]

In practice, this relationship is regulated by the Joint Centenary Declaration of the Principles of the Relationship Between New Zealand and the Cook Islands 2001. This makes it clear that New Zealand's role is to support and assist the Cook Islands in their international affairs, not to limit them. Treaties entered into by New Zealand on behalf of the Cook Islands will apply there, but by convention and practice, they will only be entered into by the agreement of the Cook Islands government. Having said this, it is important to understand the nature of Pacific politics. Pacific island nations are heavily reliant upon development and trade relationships with larger states. New Zealand, in relative terms, is one of these larger states and the relationship is thus not an equal one. If New Zealand wishes the Cook Islands to conform with international obligations, the practical consequences of refusal to comply make it unlikely that the Islands government would refuse. However, it is likely that they will have broadly the same interests as their

[38] Ronald Watts, *Comparing Federal Systems* (2nd edn, Montreal/Kingston: McGill-Queens University Press, 1999).

[39] Cook Islands Constitution Act 1964, s 5.

larger cousin.[40] As one of the South Pacific's richer states, the Cook Islands have developed a degree of autonomy in their international affairs while still prospering from their continued place in the 'Realm of New Zealand'.

The same cannot always be said for Niue. Niue is a small island, with a population of just over 2,000 people, all of whom are New Zealand citizens.[41] As with the Cook Islands, the New Zealand government remains formally responsible for international affairs. In the case of Niue, this is translated into a much greater practical role for New Zealand, given the small population of Niue and its almost total reliance upon New Zealand for development aid and transport links at the present time. Niue's forays into international affairs have been far more limited than those of the Cook Islands and in general Niue will conform to the requirements of New Zealand in the international sphere.[42] In practical terms, this can lead to a significant amount of Niue's limited administrative resources[43] being spent on implementing international treaties of dubious relevance into Niuean law.[44] Like the Cook Islands, the state is formally dualist and thus such transposition is required and often demanded by the New Zealand government and other international donors.

Tokelau, despite two attempts by the New Zealand government to encourage support for independence, remains stubbornly a non-self-governing territory.[45] This is a slight embarrassment to the New Zealand government as it remains on the United Nation's list of non-self-governing territories.[46] The continued attempt to achieve independence for Tokelau is more a reflection of New Zealand's obsession with its image as good international citizen, rather than any strong desire of the islanders. Tokelau, with a population of 2,500, situated on three tiny atolls only accessible by overnight ferry from Samoa, faces significant challenges in terms of international affairs. These challenges place significant strains on the limited resources of the islands and would make full independence difficult. In practice it is unlikely that formal independence would make much difference, as Tokelau has its own autonomous government and operates according to a self-governance agreement between the government of Tokelau and New Zealand.[47] Section 10 relates to

[40] There are exceptions to this, most notably the incidents that led to the Winebox Inquiry. This was a scheme by which the Cook Islands government (and possibly elements of the New Zealand government) colluded in a tax avoidance scheme to the detriment of the New Zealand taxpayer. Whether the actions of those involved were actually illegal remains a matter of controversy. See *Report of the wine-box inquiry by New Zealand*, Commission of Inquiry into Certain Matters Relating to Taxation, Government Publications, Wellington, 1997; *Peters v Davison* [1999] 2 NZLR 164; *Peters v Davison* [1999] 3 NZLR 744.

[41] In fact around ten times as many Niueans live in New Zealand than on the island itself.

[42] Tensions have emerged in some areas such as Niue's brief flirtation with offshore banking services (which led to Niue's blacklisting by the OECD Financial Action Task Force) and its establishment of 'diplomatic relations' with China in 2007.

[43] It is the author's understanding that there are only two government lawyers in Niue.

[44] For example, the enactment of the Terrorism Suppression and Transnational Crimes Act in 2006.

[45] In 2006 and 2007.

[46] This list is, of course, highly politicized.

[47] Joint Statement of the Principles of Partnership Between New Zealand and Tokelau, 2003.

the external relations of Tokelau, the details of which are very similar to those applying to the Cook Islands and Niue. There is one significant difference, however, in that Tokelau formally commits to the implementation of international treaties in clause 10.3: 'To the best of its ability and consistent with its commitment to the Partners' shared values, Tokelau will implement within Tokelau the treaty obligations to which it may be bound through New Zealand's treaty action.'

In practice, given the realities of Pacific politics, such actions would be difficult to avoid anyway. In the event of a serious disagreement, all the island governments would come under significant pressure to implement treaty obligations entered into by New Zealand. If the failure was serious enough then each of these states would find it difficult to avoid the pressure New Zealand could exert. If nothing else, the practicalities of international relations in the Pacific remind us of the very different impact of international law in the developing and developed worlds.

## 2. Treaties and New Zealand Law

As a formally dualist system, New Zealand law does not recognize international treaties as part of the domestic legal system. Only when they are incorporated into New Zealand statute will they become part of the domestic legal system and thus actionable in the courts. Unincorporated treaties are therefore not part of the domestic law, at least according to this traditional approach. In fact, as with custom, the reality is far more complex.

The status of unincorporated treaties is an issue that has regularly been brought before the courts in New Zealand.[48] The response of the New Zealand judiciary has been less than consistent and has seen significant movement in recent years. This lack of consistency has led to significant academic debate as to the true status of unincorporated treaties in New Zealand. At this stage it is far from clear what the end result of these academic and judicial debates will be. Whatever the final outcome however, the traditional approach to unincorporated treaties in New Zealand no longer appears sustainable.

Although it has long been accepted that the executive's adoption of international law cannot in itself change New Zealand law, it is equally settled that such international agreements can be an aid to statutory interpretation. In the United Kingdom, the prevailing view has been that treaty law can only be used when the legislation in question is vague or ambiguous.[49] Only in such circumstances would it would be acceptable to reach back to relevant treaty obligations to interpret the statute in question. The rationale for this approach rests on the legal fiction that Parliament would not intentionally legislate against its international obligations. Any ambiguity should therefore be resolved in line with these obligations.

[48] See Claudia Geiringer, 'Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law' (2004) 21 NZULR 66.

[49] *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720.

The application of the principle in New Zealand law differs significantly from the UK example. In a series of cases in the 1990s the New Zealand courts established that no ambiguity is needed, although there is some doubt that such a prerequisite ever existed.[50] In these cases, the Court of Appeal began its reasoning with the relevant international obligations before moving on to the specifics of the statute concerned. As Geiringer has pointed out, the very procedure followed shows that New Zealand law does not need ambiguity for a statute to be interpreted in line with the treaty's requirements.[51] Of course, such a principle can only apply if the statute can bear such an interpretation, which is itself a subjective judgment.

This 'presumption of consistency' as applied in New Zealand has its limits, however. In particular, it was originally held that this principle could not be used to limit broad discretionary power delegated by statute. The reasoning behind this rested on the principle that executive ratification of a treaty could not create law. If the court limits the wide executive discretion granted by Parliament on the basis of international treaty obligations this would be de facto law making by treaty. These limits on the use of unincorporated treaties were made clear in the case of *Ashby v Minister of Immigration*.[52]

The facts of the case surrounded the New Zealand government's decision to allow the South African rugby team to tour New Zealand in 1981. This tour was to prove highly controversial and led to huge protests against the South African team (the Springboks) as representatives of the apartheid regime. The plaintiffs argued that the Minister of Immigration could only exercise his discretion to award visas under section 14 of the Immigration Act 1964 in accordance with New Zealand's international treaty commitments. These included the International Convention on the Elimination of All Forms of Racial Discrimination (1965) of which New Zealand was a signatory. On the basis of this it was argued that his decision to grant the South African team temporary entry permits was *ultra vires*.

This argument was swiftly dealt with by the Court, which stated that, as the Convention had not been incorporated into New Zealand law, it could not limit the statutory authority of the Minister as delegated by Parliament. In the words of Cooke J, 'the Convention cannot possibly override the Immigration Act by depriving the Minister of authority to grant permits to the Springboks'.[53]

However, in the years that followed, the stance of the courts has softened and there are now examples of delegated authority being limited by international treaty obligations. This would depend upon the particular facts of the case in question. These include the wording of the statute in question; the nature of the treaty obligation; and its importance and binding force. Where the international obligation was strong enough and the statute would bear it, then the courts have limited discretionary power in line with such an interpretation. In the *Air Line Pilots' Association* case, this led to one argument being rejected (as the statute could not be read in line with the obligation), but another being accepted (because the statute could be interpreted in such a way).[54]

[50] Geiringer (n 48) 76. [51] Ibid 75. [52] [1981] 1 NZLR 222. [53] Ibid 224.
[54] *New Zealand Airline Pilots' Association v Attn-Gen* [1997] 3 NZLR 269 (CA).

Geiringer argues that this shift has been cemented and perhaps to some extent driven by New Zealand's Human Rights Act.[55] This Act, through its incorporation of the ICCPR, has 'normalized' the notion of the judiciary reading down statutes in line with the principles of BORA and, at times, those of the ICCPR. The courts have made it clear that broad statutory discretion (and even secondary legislation) must be exercised according to BORA.[56] It is but a short step from these general principles, founded as they are in international treaty law to other treaty-based principles of international law.

The presumption of consistency is no longer the lone means of providing a practical role for international treaties in the domestic law of New Zealand. It has now been joined by what Geiringer has rather grandly called the 'mandatory consideration model'.[57] This is the principle that relevant international treaty requirements are a mandatory consideration for the New Zealand executive in the use of its discretion. This general principle is, of course, long established in administrative law.[58] The idea that relevant considerations must be taken into account when a decision-maker exercises their discretion is a relatively settled idea in New Zealand. As with much New Zealand public law, however, the devil is actually in the details. When a decision-maker makes a decision he or she must do so with reference to the relevant factors. Where these are laid down in a statute then there is little debate. The issue arises when the statute is silent or claimants argue that additional factors, not mentioned, are relevant to the decision. In New Zealand public law, both express and implied factors must be taken into account and failure to do so can lead to a decision being ruled invalid.[59] The question that has arisen is whether international obligations are a mandatory consideration.[60]

The courts' view on this has shifted markedly and once again the *Ashby* case is the starting point. The appellants in *Ashby* had argued a secondary point in relation to the Minister's decision to grant the South African rugby team immigration permits. They claimed that the Minister's decision needed to take the UN Convention on the Elimination on Racism and Discrimination into account, which he had not done. This failure, it was argued, made the decision procedurally invalid. Cooke J summed up the views of the court when he stated the traditional position with reference to the *CREEDNZ* case and confirmed that 'it is only when a statute expressly or by implication identifies a consideration as one to which regard must be had that the Courts can interfere for failure to take it into account'.[61]

If we were in any doubt as to where this left international law, Cooke clarified matters later in his judgment:

> To hold that, before exercising an apparently perfectly general statutory discretion in the field of immigration, the Minister was bound, by implication as a matter of domestic statute law to consider a Convention of doubtful bearing on the subject would be, in my opinion,

[55] Geiringer (n 48) 81. [56] *Drew v Attn-Gen* [2002] 1 NZLR 58 (CA).
[57] Geiringer (n 48). [58] Joseph (n 8) 894–9. [59] Ibid.
[60] Dunworth notes that the term 'obligation' rather than treaty is often used, suggesting an (intentional?) conflation between Treaty and Custom. Dunworth (n 82).
[61] [1981] 1 NZLR 222, 226; *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172.

to go beyond the legitimate realm of statutory interpretation. I think it would amount to legislation by the Court, which is not our function.[62]

However, Cooke J, as was his practice, also laid the foundation for later changes in approach. More specifically, he noted that despite the fact that immigration was a matter 'linked with foreign policy' and thus an area where the courts were loath to intervene, he could countenance that 'a certain factor might be of such overwhelming or manifest importance that the Courts might hold that Parliament could not possibly have meant to allow it to be ignored'.[63] That such a 'factor' might be found in the international treaty obligations of New Zealand was not beyond the bounds of possibility.

The modern case-law in this area can be traced to the landmark case of *Tavita*. The case concerned Mr Viliamu Tavita, a Samoan overstayer, whose application for a residence permit to stay in New Zealand had been declined. He faced deportation back to Samoa under the Immigration Act. However, during the period of his sojourn in New Zealand he had married and had a child. Under New Zealand law, this child was a New Zealand citizen.

The claim of Mr Tavita before the court rested upon the argument that in making their decisions both the Minister and the relevant officials were required to take the relevant international treaty law into account. In this case, the relevant instruments would be the ICCPR and the UN Convention on the Rights of the Child. By failing to do so, the decision was invalid. One can see the factual parallels with *Ashby*, but this is not the only similarity. The judgment of the court was delivered by one Cooke J (now President of the Court of Appeal), who had previously left the door to such a possibility ajar in *Ashby*. The judgment itself was a classic piece of New Zealand public law, in that it refused to rule on the specific issue, instead adjourning the case while the Minister was able to hear an appeal based upon the rights of the child.[64] Cooke P, in giving the judgment of the court, however, felt that the argument put forward by the Crown, that it could ignore relevant international obligations was 'unattractive', as it implied 'that New Zealand's adherence to the international instruments has been at least partly window dressing'.[65]

The Appeal Court's view that international treaties might by their very ratification give rise to a mandatory consideration in administrative decision-making is a long way from saying that the executive must follow them and is in sharp contrast to the approach of the Australian Courts in *Teoh*.[66] Nevertheless, the practice of the courts and the executive in the years since *Tavita* suggests that the principle is becoming established in New Zealand constitutional practice.

[62] [1981] 1 NZLR 222, 227.

[63] [1981] 1 NZLR 222, 226, Justice Somers took a similar approach. Note also Cooke's reference to the treaty's 'doubtful bearing' again leaving the question of a relevant treaty unanswered.

[64] The original hearing had not done so.

[65] [1994] NZFLR 97, 106.

[66] *Teoh v Minister of Immigration and Ethnic Affairs* (1995) 183 CLR 273.

The most visible evidence of the impact of *Tavita* is found in the reaction of the New Zealand Immigration Service (NZIS) to the decision. It drew up a code of practice that requires immigration officials to take international treaty obligations into account (particularly the ICCPR, and the UNCRC) in their decision-making. It is not clear whether these guidelines formally apply to ministerial decisions, but given the decision in *Tavita*, it would appear that a minister would be foolish to ignore them.[67] The impact of *Tavita* nevertheless remains unclear, as New Zealand's higher courts have exhibited a degree of ambivalence in defining its practical impact. The Court of Appeal's judgment in *Puli'uvea v Removal Review Authority*[68] endorsed the NZIS response to *Tavita* and rejected the notion that the starting point for any consideration of the individual case had to be the child. This argument had been based upon the UNCRC's wording, which states that the rights of the child must be the 'primary' consideration. The court held that this did not mean that such considerations were paramount. On this questionable reading of the Convention, the NZIS approach was sound. Such an interpretation was only made possible by another aspect of the same judgment, where the court accepted that specific reference to international obligations was not required. The NZIS had failed specifically to refer to the UNCRC and the ICCPR in its reasons, but the court found that this was not fatal to the decision. As long as the 'values' of the international treaties were considered, the mandatory consideration requirements would be fulfilled. This, of course, allows a significant interpretative element to enter the fray, as the 'values' contained in a specific treaty will be open to significant interpretation.[69]

Despite this confusion in the Appeal Court (no case has yet been heard by the Supreme Court) the High Court (the court of first instance for judicial review cases) has taken on board the *Tavita* decision. Nevertheless, the practical application varies considerably depending on the facts of the instant case. In *Raju* the High Court set aside the decision of the Removal Review Authority because although the RRA had considered the rights of the child it had not done so to the extent required by the UNCRC.[70] This was followed by the case of *Mohamed* where again the decision was set aside, although this time on the grounds that the interests of the child had not been considered at all.[71] These judgments can be contrasted with *Elika v Minister of Immigration* where the High Court stated that the starting point of any consideration is not to be the rights of the child but the individual who is the subject of the order, again giving a lesser weight to the UNCRC.[72]

Overall, recent case-law would suggest that the traditional dualist description of treaties in New Zealand law requires revision. Although the traditional dualist

[67] Michelle Poole, 'International Instruments in Administrative Decisions: Mainstreaming International Law' [1999] VUWLRev 29.

[68] (1996) 14 FRNZ 322 (CA)

[69] This approach to Treaty of Waitangi issues has been fraught with difficulties.

[70] *Raju v Chief Executive, Labour Department* [1996] BCL 1328.

[71] *Mohamud v Minister of Immigration* (High Court, Wellington AP262/95) 11 November 1996 (unreported).

[72] [1996] 1 NZLR 741.

superstructure of the system remains, beyond this, the impact of international law is significant and growing. The implementation of international obligations that require formal changes to the domestic law will still require domestic incorporation through the legislative process. Nevertheless, in both the interpretation of statute and the making of administrative decisions international treaties clearly have influence and may even be regarded as 'creating' law or legal obligations. The problem is that the rules that apply to the judicial use of treaty law are neither consistent nor clear. The extent of the relevance of an individual treaty on an individual statute or administrative decision varies according to judicial interpretation of that treaty as well as the domestic context. This makes the application of international treaties in New Zealand extremely difficult to predict. Although the use of treaties in domestic law, particularly in the fields of immigration and human rights, has many advantages, the uncertainty of the current approach leaves much to be desired.

## 3. Customary International Law in New Zealand

According to the traditional view, New Zealand's constitutional framework recognizes the principles of customary international law as part of the common law of New Zealand. Thus in terms of custom, New Zealand uses a monist approach to international law. This practice follows the Westminster model. The classic embodiment of this approach is found in works of the English jurist, Blackstone, who described the relationship in simple terms: 'the law of nations . . . is here adopted in its full extent by the common law, and is held to be part of the law of the land'.[73]

In this principle, international custom is not only a part of the common law of New Zealand but, allied to the lack of a codified constitution, has the potential to be a constitutional source. Given the recent developments in New Zealand jurisprudence towards a limited form of parliamentary sovereignty, this has potential implications for New Zealand's constitutional structure. In practice, although lip-service continues to be given to Blackstone's traditional approach, its practical application appears a lot more circumspect.

The monist application of customary international law directly into New Zealand law always posed a technical problem in New Zealand. As a result of its English legal heritage, the New Zealand legal system operates according to a relatively strict version of precedent. This strict principle of *stare decisis* contrasts with the practice of customary international law, where precedent does not operate as in the classic common law tradition.[74]

It is unnecessary to trace the details of this debate, rooted as it is in the nineteenth century English public law. Suffice to say, the British courts in 1876 in the case of *R v Keyn* decreed that custom, although part of the common law, only became active through its application by an English court. In effect, a form of

[73] *Blackstone's Commentaries on the Laws of England*, *Of Offences Against the Law of Nations*, Book Four, Ch 5.

[74] Although the practical operation of custom sees a version of *jurisprudence constante* in operation.

dualism was recognized with the relevant rule of custom being 'transformed' into common law at a particular time.[75] The rules of precedent would apply to the decision of the national court, thus freezing customary international law at the moment it was incorporated into the common law. It is generally assumed that New Zealand, as a part of the British Empire, followed this decision although examples of customary international law in New Zealand courts are difficult to find.[76] It took another decision of the British courts to alter their approach. In 1977, Lord Denning of the English Court of Appeal gave his famous judgment in the *Trendtex* case[77] and returned the English law to the original pre-1876 position. Denning avoided a decision of the House of Lords,[78] which recognized a broad application of sovereign immunity, by looking to the rules of customary international law upon which they were based. Denning argued that the domestic rules of precedent did not apply to the application of customary international law in domestic English law. Thus he was able to adopt the modified approach to sovereign immunity that had developed in international law and avoid the existing English precedent.[79] The consequence of this decision was to allow English courts to look directly to international custom and apply it in domestic English law. The New Zealand application of the *Trendtex* incorporation doctrine is now well established in the literature. However, on closer inspection, the practical impact of *Trendtex* is perhaps less than is commonly imagined.[80]

Although almost every New Zealand legal textbook blithely states that customary international law is part of the common law in New Zealand (as do most in the common law tradition generally), few give much evidence for its application.[81] In fact, the application of Blackstone's principle is less than consistent in New Zealand and it is at least arguable that the idea has only survived due to its lack of use. The paucity of examples from the courts has been accompanied by a general lack of interest in the subject from academics. Most have been happy to simply repeat the mantra of Blackstone, without any consideration of whether it applies in practice.[82] The efforts of international lawyers and their public counterparts have instead focused on the impact of treaties, examined above. This lack of interest was understandable when custom played such a marginal role in New Zealand (and international law), but is less justifiable now that this is no longer the case.[83]

[75] *R v Keyn* (1876) 2 Ex D 63. There is some debate as to what exactly was decided in this case, given the wide range of judgments given by the individual judges. The 'principle' of transformation accredited to this case owes more to later interpretation than to the decision itself.

[76] Until 2004, and the establishment of the New Zealand Supreme Court, the Judicial Committee of the Privy Council (in London) was the final court of appeal for New Zealand.

[77] *Trendtex Trading Corp Ltd v Central Bank of Nigeria* [1977] QB 529 (CA).

[78] *Compania Naviera Vascongado v SS Cristina* [1938] AC 485 (HL).

[79] The pragmatic nature of Denning's decision to embrace international custom is evidenced by his later decisions that were highly critical of its application in English law.

[80] *Marine Steel Ltd v Government of the Marshall Islands* [1981] 2 NZLR 1.

[81] Alex Conte, *An Introduction to International Law* (LexisNexis, 2006) 71.

[82] The notable exception to this is Treasa Dunworth's work: T. Dunworth, 'Hidden Anxieties: Customary International Law in New Zealand' (2004) 2 NZJPIL 67.

[83] See T. Dunworth, 'The Rising Tide of Customary International Law: Will New Zealand Sink or Swim' (2004) 15 PLR 36.

The growth of custom and its increasing relevance to domestic law thus raises two important questions for New Zealand. How exactly does it apply in New Zealand law and what are the consequences of this for New Zealand's constitutional structure?

Probably the clearest example of the application of international custom in New Zealand is in the field of sovereign immunity.[84] There is little debate that sovereign immunity is part of New Zealand law, but few seem to realize that its application comes directly from customary international law. New Zealand has no legislation on the matter and the case-law relies entirely upon customary international law for its basis. In *Marine Steel Ltd v Government of the Marshall Islands* Barker J stated that '[o]bviously, the Court ought not to give leave to serve proceedings out of the jurisdiction against a foreign government, if to do so would breach the rule of sovereign immunity'.[85] Implicit in this quote is that 'obviously' sovereign immunity should apply, although at no point does Barker J enlighten us as to why this should be the case. As Dunworth has noted, although there are several occasions when courts have applied custom, particularly in the area of sovereign immunity, there are few, if any, examples of them explaining why they have done so. The closest example was Smellie J's quote in *Reef Shipping* (taken from a 1930s English case) that it represents an example of 'customary international law engrafted onto our domestic law'.[86] This implicit and automatic application of customary international law in the field of sovereign immunity perhaps explains the wider assumption that such a 'conveyor belt' approach applies to international custom generally. In practice, however, outside this example, courts have applied custom rather inconsistently, perhaps reflecting a degree of unease with applying international custom in a domestic context.[87]

This inconsistency of application is particularly obvious when the other element of custom is discussed, namely its role in interpreting existing statutes. This use of customary international law has a venerable history in New Zealand that long predates *Trendtex*. Nevertheless, the use of custom has developed significantly in recent years. Although the current New Zealand approach is almost certainly older, the decision of Myres CJ in the 1931 case of *Worth v Worth* is often cited as the classic definition. Myres CJ stated that, 'if the enactment is ambiguous and is capable of two constructions, one of which would, and the other would not, conflict with the rules of international law, the latter construction should prevail'.[88]

However, subtle changes to this approach have been evidenced in recent judgments. In 2008, for example, Clifford J restated the principle in *Zhang*:

[84] Dunworth (n 83) 69.

[85] *Marine Steel Ltd v Government of the Marshall Islands* [1981] 2 NZLR 1, 9–10 (HC). See Dunworth, 'Hidden Anxieties' 70 and Elkind, 'Sovereign Immunity'[1981] NZLJ 505.

[86] *Reef Shipping Co Ltd v The Ship 'Fua Kavenga'* [1987] 1 NZLR 550, 569 citing *Compania Naviera Vascongado v Steamship 'Cristina'* [1938] AC 485, 490 (HL).

[87] Dunworth (n 83).

[88] *Worth v Worth* [1931] NZLR 1109 (CA) 1121.

[A]t the very least, it can be said that the status of a given norm as customary international law will be very influential in persuading the courts to adopt an interpretative approach consistent with that norm. Conversely, however, where legislation clearly precludes the application of customary international law, the legislation must prevail.[89]

The reference to ambiguity in *Worth* was now notably absent.

This approach now appears to be the norm and in some recent cases, the courts have clearly gone beyond the traditional approach of applying custom in cases of ambiguity and instead have gone straight to the custom as a means of interpreting the statute.[90] In *Sellers v Maritime Safety Inspector* the Court of Appeal quashed a conviction under the Maritime Transport Act 1994 on the grounds that the guidelines issued under the Act limited the right of navigation (as recognized in customary international law).[91] The court believed that the statute should be interpreted to exclude this possibility and thus the guidelines themselves were invalid. By doing so they directly applied international custom despite the clear wording of the statute giving no such limitation. More recently, in *Ye v Minister for Immigration* the court considered whether the application of the UN Convention on the Rights of the Child might actually constitute custom and thus apply directly into New Zealand law.[92] Some decisions have taken this even further, arguably elevating custom to a more 'constitutional' level. Under this approach customary principles cannot be overridden by statute unless the legislative wording is explicit in achieving this. As the Court of Appeal stated in *Governor of Pitcairn and Association Islands v Sutton*:

[a] general statute, however apparently comprehensive, is not to be interpreted as contrary to international law on such matters as sovereign immunity. Some sufficiently plain positive indication is required to produce such a result. Generally-worded statutory discretions are not to be exercised without taking into account international obligations.[93]

In other examples, however, the courts appear to have adopted a more circumspect attitude, applying custom when, in the opinion of the court, it has achieved 'sufficient' international status.[94] In *Zhang* for example, the court decided that Article 36 of the Vienna Convention on Consular Relations was not customary and in any event, it was not part of the New Zealand Law as the relevant statute had not incorporated it.[95] In *Zaoui*[96] too the courts were faced with the question of whether Ahmed Zaoui, who had been granted refugee status in New Zealand, could be deported by the Minister for Immigration on the grounds of his alleged security

[89] *Zhang v New Zealand Police* [2008] unreported, High Court, Wellington, CRI- 2007-485-21, 25 January 2008 [29].

[90] This could be seen as a natural extension of the New Zealand purposive approach to statutory interpretation generally.

[91] [1999] 2 NZLR 44 (CA).

[92] [2009] 2 NZLR 596 9.

[93] [1994] 2 ERNZ 492. As quoted in Joseph (n 9) 31.

[94] Dunworth (n 82).

[95] *Zhang v New Zealand Police* [2008] unreported, High Court, Wellington, CRI- 2007-485-21, 25 January 2008.

[96] *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289.

risk, and thus risk refoulement (ie torture in the receiving state). The court concluded that this principle was not part of New Zealand law as such a rule was not customary international law (although the prohibition of torture itself was).[97]

These inconsistencies are examples of what Dunworth has called a 'pedigree' approach, whereby New Zealand accepts customary international law directly into the common law, but only when a threshold, as determined by the courts, is reached. This might also explain why the use of customary law in domestic law has only really occurred in areas where its application has long been accepted, such as sovereign immunity.[98] In any event, the adoption of customary international law in New Zealand is not as straightforward as many textbooks might suggest. In practice, New Zealand appears to use a type of modified monism, the exact nature of which defies easy definition.

## 4. New Zealand's Pick and Mix Approach to International Law

The application of international law in New Zealand is a superficially simple topic which proves to be highly complex upon closer examination. It is proof, if proof were needed, that a good comparison must cut to the function, not merely the form, of the legal system. Although formally a dualist system in relation to treaties and a monist one in relation to custom, the functional reality is much more complex. In fact, we appear to be witnessing a convergence between these two ideal types, with the national courts operating as a filter between the international and the domestic legal systems, whatever the source of the international obligation.

There is much to be said for this approach, as an uncritical acceptance of international law is not necessarily something to be welcomed. International law can be bad law. Given the limited legitimacy that international law has, it is constitutionally questionable whether such 'bad law' should be applied uncritically in the domestic context. These issues are particularly acute in relation to custom, created as it is by state practice. It is therefore ironic that New Zealand has purportedly applied customary international law uncritically while failing to recognize a role for treaties domestically, despite the legitimacy, albeit limited, that the latter enjoy. The irony of this situation cannot have been lost on the judges and it is therefore not surprising that New Zealand has experienced a subtle shift in its approach towards the domestic application of international law.

Dunworth's recognition of the problems associated with custom's adoption into New Zealand law, both in practical and theoretical terms, has led her to advocate a 'pedigree' approach. According to this idea, courts accept international law

[97] In practice this was never tested as Ahmed Zaoui's security certificate was revoked. For the background to this case see W. John Hopkins, 'Piercing the Veil: Executive Detention and Judicial Deference' (2005) 8(1) Yearbook of New Zealand Jurisprudence 239.

[98] Note that in the *Winebox* case, the court interpreted sovereign immunity in a way that avoided its application in the case of an inquiry into the taxation policies of the Cook Islands government. See n 40 above.

according to a threshold that they themselves impose.[99] This approach has much to commend it as it attempts to impose a degree of structure into New Zealand judiciary's adoption of international custom.

The evidence from the inconsistent use of treaties in New Zealand law perhaps suggests that such a 'pedigree' approach is being used in relation to international law in general. Examples of such inconsistencies abound. For example, the extensive use of the ICCPR in *Baigent's* case can be contrasted with the courts discard of it in *Zhang*. These contradictions expose the obvious problem with such an approach. Despite the best efforts of academics to structure judicial discretion in this area, the use of an additional judicial filter in the application of international law still leaves individual judges with the ability to pick and choose the international obligations that they feel able to apply. This has a significant cost in terms of certainty and can lead to accusations that international obligations are not being applied consistently. Uncomfortable consequences can be avoided by such selective application. In *Fang* the *jus cogens* principle of the prohibition against torture was held not to trump the customary law of sovereign immunity in civil actions.[100] Yet in another case, the same concept (sovereign immunity) was shrunk to remove immunity for reasons that are hard to fathom from the judgment.[101] It could be argued that the only clear difference between these two cases is that the first concerned China and the second the Cook Islands.

In conclusion, the incorporation of international law into New Zealand law remains uncertain and fraught with difficulties. Lack of parliamentary oversight means that treaties can be entered into with very limited domestic accountability, and once accepted the executive's duty to follow them is unclear. In terms of custom, the courts' formal acceptance of customary international law must be tempered by their willingness to do so only on their own, often conflicting, terms. New Zealand appears to be stumbling towards a modified monism across both custom and treaty but the judge-made nature of this development leaves the new approach lacking coherence. Despite the unsatisfactory nature of the current situation, political realities mean that the current lack of clarity is unlikely to be resolved any time soon. While academics will attempt to impose a degree of rationality on the system, the reality of the New Zealand judiciary's 'pick and mix' approach to international law is likely to endure.

[99] There is no doubt that Dunworth's work has had influence and it has been quoted in a number of judgments—eg *Ye v Minster for Immigration* [2009] 2 NZLR 596 9, 84, 89.

[100] *Fang v Jiang* [2007] NZAR 420.

[101] *Peters v Davison* [1999] 2 NZLR 164.

# 18

# Nigeria

*Babafemi Akinrinade*

## 1. Introduction

The Federal Republic of Nigeria attained independence from Great Britain on 1 October 1960. Having been governed by successive military regimes a little over five years from independence, it returned to democratic rule in May 1999. Its legal system is based on received English common law, in addition to customary and Islamic law, which operate in various parts of the federation. Nigeria has a presidential system of government, with an executive president and a legislature (National Assembly) comprising the Senate (Upper House) and the House of Representatives (Lower House). The component states of the Nigerian Federation have State Houses of Assembly, with strict allocation of legislative competence. Nigeria has signed numerous international agreements, bilateral and multilateral, and is an eager participant in the international system. Apart from its membership of the United Nations (which it joined on 7 October 1960), it is a member of the African Union (formerly the Organization of African Unity) and the Commonwealth of Nations (The Commonwealth or the British Commonwealth) by virtue of being a former British colony. Nigeria is also a leading member of the Economic Community of West African States (ECOWAS) founded in 1975. Through these fora, Nigeria participates actively in international law and has had several of its nationals serving as judges in various international courts and tribunals.

### 1.1 Relevant Constitutional Provisions

The Constitution of the Federal Republic of Nigeria, 1999, affirms the status of Nigeria as a federation with 36 component states[1] and a 'Federal Capital Territory'.[2] It declares Nigeria to be 'one indivisible and indissoluble sovereign state',[3] with emphasis on undivided sovereignty in external affairs, which 'belongs

[1] See Constitution of the Federal Republic of Nigeria 1999 (1999 Constitution), s 3.
[2] Section 2(2), 1999 Constitution.
[3] Section 2(1), 1999 Constitution.

exclusively to the federal government.'[4] According to the Constitution, the executive powers of the federation are vested in the President,[5] as the 'chief executive.'[6] In this capacity, the President has competence, among other things, to conclude international treaties, declare war and conclude peace, and maintain diplomatic representation with other States.[7] The Constitution grants express powers to the Nigerian President to wage war subject to the approval of the National Assembly sitting in a joint session,[8] while the same constitution subjects the President's power to deploy troops for combat duty outside Nigeria to a prior authorization of the Senate.[9]

Because of its federal status, the Constitution is mostly concerned with the relationship between component units of the federation and not as much with relations with other countries. In delineating responsibilities, it grants to the federal government exclusive powers to make laws over the external affairs of the country.[10] These powers are complemented with powers over other matters related to external affairs, including:

- 'borrowing of moneys . . . outside Nigeria for the purposes of the Federation or of any State';[11]
- citizenship, naturalization and aliens;[12]
- defence of the country,[13] including power to establish, equip and maintain an army, navy and air force 'as may be considered adequate and effective for the purpose of . . . defending Nigeria from external aggression' and maintaining its territorial integrity and securing its borders from violation on land, sea, or air;[14]
- deportation of non-citizens;[15]
- diplomatic, consular and trade representation;[16]
- foreign trade;[17]

[4] See B. O. Nwabueze, *Federalism In Nigeria Under The Presidential Constitution* (London: Sweet & Maxwell, 1983) 253. Nwabueze's treatment of this subject is based on the 1979 Constitution of the Federal Republic of Nigeria, which contains the same provisions in identical language.

[5] Section 5(1), 1999 Constitution. The legislative powers of the country are vested in the National assembly, which comprises the Senate and the House of Representatives, which 'have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Schedule to this Constitution.' See s 4(1) and (2), 1999 Constitution.

[6] Nwabueze, *Federalism* (n 4) 254.

[7] Ibid.

[8] Section 5(4)(a), 1999 Constitution.

[9] Section 5(4)(b), 1999 Constitution.

[10] See item 26, Exclusive Legislative List, Part I, Second Schedule, 1999 Constitution. See also, Nwabueze, *Federalism* (n 4) 254.

[11] Ibid, item 7, Exclusive Legislative List.

[12] Ibid, item 9.

[13] Ibid, item 17.

[14] Ibid, item 38, s 217(1), (2).

[15] Item 18, Exclusive Legislative List Part I, Second Schedule, 1999 Constitution.

[16] Ibid, item 20.

[17] Ibid, item 62. See also items 16 (Customs and excise duties), 24 (Exchange control), and 25 (Export Duties).

- extradition;[18]
- immigration into and emigration from Nigeria;[19]
- implementation of treaties relating to matters on the exclusive legislative list.[20]

The powers contained in the Constitution with regard to external affairs are exercisable concurrently by both the legislative and executive arms of government, with the executive powers subject to the laws passed by the National Assembly.[21]

The main provision of the Constitution dealing with international law is section 12, on the incorporation of treaties into domestic law. As section 12(1) provides, 'No treaty between the Federation and any other country shall have the force of law [except] to the extent to which any such treaty has been enacted into law by the National Assembly.'[22] According to Nwabueze, this provision 'reflects the inherited common law conception that a treaty is a purely executive act, and that if its stipulations require implementation within the country, then this can only be done by legislation enacted by the legislature'.[23] Embedded in this approach is that treaty-making and treaty implementation are distinct notions, one 'for the executive and the other for the legislature'.[24]

Apart from this provision, the Constitution has little reference to international law in its main provisions and there is no reference to customary international law or the law of nations. This has become a tradition of Nigerian constitutions since independence in 1960. At independence, despite the absence of an explicit statement in the Constitution on the relationship between municipal law and international law,[25] Nigeria signaled its readiness to carry out its international

[18] Ibid, item 27.
[19] Ibid, item 30.
[20] Ibid, item 31.
[21] Section 5(1)(a), 1999 Constitution. See also Nwabueze, *Federalism* (n 4) 255.
[22] See generally s 12, 1999 Constitution.
[23] Nwabueze, *Federalism* (n 4) 255. This is noted by Fawcett as well: 'The prerogative power of the Crown to conduct foreign relations . . . ' See J. Fawcett, *The British Commonwealth In International Law* (London: Stevens, 1963) 19, quoted in Felix Chuks Okoye, *International Law And The New African States* (London: Sweet & Maxwell, 1972) 22. See *also John Junior Higgs v The Minister of National Security* [2000] 2 AC 228; Privy Council Appeal No 45 of 1999; Judgment of the Lord of the Judicial Committee of the Privy Council, delivered 14 December 1999. The Privy Council, in considering an appeal from the Court of Appeal of the Bahamas, stated: 'In the law of England and The Bahamas, the right to enter into treaties is one of the surviving prerogative powers of the Crown. Her Majesty does not require the advice or consent of the legislature or any part thereof to authorise the signature or ratification of a Treaty.' Judgment available at <http://www.privy-council.org.uk/output/Page170.asp>.
[24] Ibid.
[25] This position can be compared with those in some constitutions of newly independent African states. The position on incorporation and references to international law, and its relationship with the municipal system, vary from country to country. As Okoye notes, there were five distinct heads by which these could be considered:

(1) References in the preamble to constitutions, to the United Nations Charter and the Universal Declaration of Human Rights; (2) those designed to establish a general relationship of the law of nations with municipal law; (3) those having to do with the power to carry out the decisions of international public organization; (4) those giving to treaties an authority greater than that of national statutes–on condition of reciprocity; (5) those designed to solve the problems of implementing the international obligations of a federal or composite state. See Okoye (n 23) 22–3. The Nigerian constitutional provisions fall into the fifth category outlined by Okoye.

commitments and act in accordance with the principles of the United Nations.[26] With that background it is worth noting that, as part of 'Fundamental Objectives and Directive Principles of State Policy' in Chapter II of the 1999 Constitution, Section 19 (d) states that the 'foreign policy objectives' of Nigeria include 'respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication . . . '.[27] Clearly, 'international law' in the context of section 19 would include 'customary international law' or the 'law of nations'. The rest of the subsection is a restatement of dispute settlement obligations under the UN Charter. The same Constitution renders the provisions of Chapter II non-justiciable and limits the judicial powers vested in the courts in relation to the chapter.[28]

## 1.2 Federal Authority over Matters of International Law

The Nigerian Constitution, seemingly 'designed to solve the problems of implementing the international obligations of a federal or composite State',[29] gives exclusive control of external affairs to the federal government of Nigeria.[30] Additionally, in item 31 on the exclusive legislative list,[31] the Constitution addresses federal competence over international law by placing the implementation of treaties relating to matters on the exclusive legislative list within the domain of the National Assembly to the exclusion of Houses of Assembly of the component states. The National Assembly also has power to make laws with respect to matters not included in the exclusive legislative list, for the purpose of implementing a treaty.[32] While the component states or federating units within Nigeria do not have 'state constitutions', State Houses of Assembly do have legislative competence on matters

[26] See Robert R. Wilson, 'International Law and Some Recent Developments in the Commonwealth' (Apr 1961) 55(2) Am J Int'l L 440, at 440–1.

[27] Section 19(d), 1999 Constitution. The other provisions of s 19 are also relevant to understanding Nigeria's position and priorities in international law. As the section provides: The foreign policy objectives shall be—(a) promotion and protection of the national interest; (b) promotion of African integration and support for African unity; (c) promotion of international co-operation for the consolidation of universal peace and mutual respect among all nations and elimination of discrimination in all its manifestations; (d) respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication; and (e) promotion of a just world economic order.

[28] Section 6(6)(c), 1999 Constitution provides that the judicial powers vested in the courts in accordance with the provisions of s 6 'shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution'.

[29] Okoye (n 23) 23.

[30] See item 26, Exclusive Legislative List, Part I, Second Schedule, 1999 Constitution.

[31] Ibid, item 31.

[32] Section 12(2), 1999 Constitution. This strict bifurcation of authority was totally disregarded during military rule as the ruling federal military government arrogated to itself absolute legislative powers. Because of the hierarchical ordering of the military, the military governors of the component states could generally not question the legislative competence of the federal government. Matters in the concurrent legislative list and the residual list were sometimes legislated by the federal military government. See Nwabueze, *Federalism* (n 4) 220.

that are outside the exclusive legislative list and that relate to treaties or international law. If the National Assembly were to legislate on such matters outside the exclusive legislative list, it would require the consent of a majority of all the State Houses of Assembly in the federation.[33]

The main aim for this strict demarcation of powers is 'to safeguard the states' reserved powers against unilateral take-over by the federal government as well as to ensure that the states will participate effectively in judging the necessity of legislation implementing a treaty on a concurrent or an exclusively state matter'.[34] As Nwabueze further argues, this 'is a desirable compromise between a total denial or an unqualified concession of the power and the requirement of the unanimous consent of all the states which will then enable a single state to prevent the implementation of a treaty of real international and national importance'.[35] Consequently, an Act passed to implement an international treaty or agreement will enter into force unconditionally in the federal territory. However, 'as in many other federations, the Nigerian Parliament may not, in seeking to give effect by legislation to international agreements or decisions biding on Nigeria, either invade the subject-matters of [State] legislative lists or legislate for a [state] without its consent'.[36] An example of the application of this provision is the enactment by the National Assembly of the Rights of the Child Act,[37] intended to give legal effect to the provisions of the Convention on the Rights of the Child[38] and the African Charter on the Rights and Welfare of the Child.[39] However, the welfare of children is arguably not within the legislative competence of the National Assembly. Therefore, according to the provisions of section 12(3) of the Constitution, this Act needed an affirmative vote of two-thirds of State Houses of Assembly before the President could give assent. There was no evidence of such an affirmative vote, but only a presumption of such vote when the President assented to it.[40]

Beyond the aforementioned provision on the incorporation of treaties into Nigerian law, the 1999 Constitution, as with prior Nigerian constitutions, does not specifically call for the application of international law within the domestic legal system. The courts apply international law on a case-by-case basis.

## 2. Treaties and Other International Agreements

Since independence Nigeria has been an eager participant in the international legal system. While Nigeria has been selective in its ratification of treaties, signature and

[33] Section 12(3), 1999 Constitution
[34] Nwabueze, *Federalism* (n 4) 258.
[35] Ibid.
[36] Okoye (n 23) 29.
[37] Act No 26, 16 July 2003.
[38] Convention on the Rights of the Child. Concluded at New York, 20 November 1989, entered into force 2 September 1990. GA Res 44/25 (Annex), UN GAOR, 44th Sess, Supp No 49, at 166, UN Doc A/RES/44/49 (1990); reprinted in (1989) 30 ILM 1448.
[39] African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9 (1990); adopted 11 July 1990; entered into force 29 November 1999.
[40] See Edwin Egede, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria' (2007) 51(2) J Afr L 249, at 268–72.

ratification of major treaties has been the norm rather than the exception. At independence, research revealed that Nigeria was bound by at least 334 treaties inherited from the former colonial power, Great Britain. The colonial powers had advocated and insisted on universal succession to treaties, while at same time making access to the archives of these same treaties difficult.[41] However, inherited treaties were not Nigeria's first interface with treaties. The European powers in their grab for territory had signed and concluded treaties of cession with native authorities that were seen as conferring valid titles.[42] The greater part of Nigeria was acquired through these treaties, which would most likely be regarded as invalid under international law because of the various means of coercion and duress exerted on the natives to induce their consent.[43]

At independence on 1 October 1960, there was an 'exchange of letters' concluded between the United Kingdom and the government of Nigeria, by which the Nigerian government agreed to the following:

> (i) All obligations and responsibilities of the Government of the United Kingdom, which arise from any valid international instrument are from October 1, 1960, assumed by the Government of the Federation of Nigeria in so far as such instruments may be held to have application to or in respect of the Federation of Nigeria.
> (ii) The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to or in respect of the Federation of Nigeria are from October 1, 1960, enjoyed by the Government of the Federation of Nigeria.[44]

By this agreement, the outgoing colonial government devolved to Nigeria rights and obligations arising from treaties and other international agreements that were contracted for or applied to the country before independence. Nigeria, like many other newly independent African countries, thus adopted an attitude that favoured continuity of treaty rights and obligations.[45]

Since independence, Nigeria has entered into various treaties, mostly with free and full consent. The Vienna Convention on the Law of Treaties ('Vienna Convention')[46] was adopted after Nigeria's independence and it is this document that Nigerian courts place reliance when confronted with treaty issues and the task of defining the term 'treaty'. In the case of *General Sani Abacha & Others v Chief Gani Fawehinmi*,[47] Uwaifo JSC of the Nigerian Supreme Court cited the Vienna Convention in defining a treaty as:

[41] See U. O. Umozurike, *Introduction To International Law* (Ibadan, Nigeria: Spectrum Law Publishers, 1993) 176.

[42] See B. O. Nwabueze, *A Constitutional History Of Nigeria* (London: C. Hurst, 1982) 3.

[43] See ibid, 5–19.

[44] The American Consul General at Lagos (Emmerson) to the Secretary of State (Herter) despatch No 137, 8 September 1960. MS Dept of State, file 641.45h9/9-860, cited in Whiteman ADIL, Vol 11, p 1000. See Okoye (n 23) 63–4.

[45] See Okoye, ibid, 62–3, 71.

[46] Vienna Convention on the Law of Treaties, 23 May 1969, entered into fore 27 January 1980, 1155 UNTS 331. Nigeria signed this treaty on 23 May 1969 and ratified it on 31 July 1969.

[47] See *General Sani Abacha v Chief Gani Fawehinmi* [2000] 4 SCNJ 400, 446 (*Abacha v Fawehinmi*).

an international agreement or by whatever name called, eg Act, charter, concordat, convention, covenant, declaration, protocol or statute, concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[48]

There is general reliance on international law in deciding issues of treaty law. Reliance on domestic law is usually limited to issues of domestic enforcement of a treaty regime in the absence of an enforcement procedure under the relevant treaty. Domestic law, especially common law, is also used to show the evolution of a doctrine of international law and the development of customary international law on particular subjects.[49]

The status of international agreements that have not been formally approved as treaties through the constitutional ratification process is not quite clear, and there is no systematic consideration of this issue within domestic case-law. Court dicta suggest that courts will defer to the executive on international agreements outside the framework of treaty law. The most recent challenge to executive authority followed the Greentree Agreement between Nigeria and Cameroon (12 June 2006)[50] on the implementation of the judgment of the International Court of Justice in *Cameroon v Nigeria.*[51] The judgment obligated Nigeria to hand over certain territory to Cameroon, which provoked some outcry in Nigeria. The Nigerian government had initially rejected parts of the judgment that it considered unfavourable and invoked constitutional provisions on the exact composition of the Nigerian territory—already fixed by the Constitution.[52] There was tremendous pressure within Nigeria not to transfer the territory, while there was international pressure on Nigeria to respect the ICJ judgment. This eventually led to the setting up of a commission by the United Nations to work out the modalities of compliance with the judgment and ensuring respect for the rights of individuals affected thereby.[53] This process led to the adoption of the Greentree Agreement in June 2006.

In 2008, before the scheduled date of the handover, some individuals filed a case before a Federal High Court to prevent the implementation of the agreement and the High Court granted a temporary restraining order.[54] The Federal government

[48] Ibid.

[49] See *African Reinsurance Corporation v Abate Fantaye* [1986] 3 NWLR (Pt 32) 811, 824–5: Eso JSC discusses the evolution of the concept of immunity under common law and the immunities accorded 'Public Ministers by the *usages of nations*' (now called international law) and its later incorporation into statute.

[50] See Agreement between the Republic of Cameroon and the Federal Republic of Nigeria Concerning the Modalities of Withdrawal and Transfer of Authority in the Bakassi Peninsula, Greentree, New York, 12 June 2006 (UNTS Registration No I-45354, available at <http://treaties.un.org>)

[51] See *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria(Cameroon v Nigeria: Equatorial Guinea Intervening*) [2002] ICJ Rep 303. Equatorial Guinea also had some of the judgment in its favour with the maritime boundary drawn by the ICJ.

[52] For a fuller discussion, see Colter Paulson, 'Compliance with Final judgments of the International Court of Justice Since 1997' (2004) Am J Int'l L 434, 449–52.

[53] Ibid, 451.

[54] For the case, see *Indigenes of Bakassi Local Council and 8 others v Federal Republic of Nigeria*, Suit No FHC/ABJ/M/143/08.

signaled its intention not to comply with the restraining order since it amounted, in its view, to an order meant to induce its non-compliance with its international obligations. One of the complaints in the case was that the National Assembly had not formally approved the agreement. The government contended that this agreement was not a treaty but was to facilitate Nigeria's compliance with the judgment of the International Criminal Court, and therefore did not need the approval of the National Assembly. The territory has since been transferred to Cameroon.

Treaties are not automatically incorporated into Nigerian law. Each treaty must follow a process of legislative approval before it becomes part of Nigerian law, pursuant to section 12(1) of the 1999 Constitution.[55] In *Abacha v Fawehinmi*, the Supreme Court held that,

> an international treaty entered into by the Nigerian government does not become binding until enacted into law by the National Assembly . . . Before its enactment into law by the National Assembly, an international treaty has no such force of law as to make its provisions justiciable in our courts.[56]

As noted earlier, this is a position inherited from English common law. As Lord Hoffmann stated in *Higgs v Minister of National Security*, 'the corollary of [the] unrestricted treaty-making power [of the Crown] is that treaties form no part of domestic law unless enacted by the legislature'.[57] The consequences of this position are that 'domestic courts have no jurisdiction to construe or apply a treaty' and that 'unincorporated treaties cannot change the law of the land. They have no effect upon the rights and duties of citizens in common or statute law.'[58] Despite this situation, Lord Hoffmann states that unincorporated treaties 'may have indirect effect upon the construction of statutes as a result of the presumption that Parliament does not intend to pass legislation which would put the Crown in breach of its international obligations'.[59] Further, 'the existence of a treaty may give rise to a legitimate expectation on the part of citizens that the government, in its acts affecting them, will observe the terms of the treaty'.[60] Before these two cases, the Nigerian Supreme Court had taken the same position regarding the incorporation of treaties into domestic law. In *African Reinsurance Corporation v Abate Fantaye*, one of the judges of the Nigerian Supreme Court stated that 'treaties do not constitute part of the law of the land merely by virtue of their conclusion by a country', thus implying that a treaty ratified by Nigeria but unincorporated by the legislature pursuant to section 12 does not have any force of law within Nigeria.[61]

This was the position subsequently affirmed in *Abacha v Fawehinmi*, wherein Ejiwunmi JSC adopted the position and the words of Lord Hoffmann: 'It is

[55] See generally s 12, 1999 Constitution.

[56] See *Abacha v Fawehinmi* [2000] 4 SCNJ 400, 421–2.

[57] *Junior Higgs v The Minister of National Security* [2000] 2 AC 228; Privy Council Appeal No 45 of 1999; Judgment of the Lord of the Judicial Committee of the Privy Council, delivered 14 December 1999.

[58] Ibid. [59] Ibid. [60] Ibid.

[61] *African Reinsurance Corporation v Abate Fantaye* [1986] 3 NWLR (Pt 32) 811, 834.

therefore manifest that no matter how beneficial to the country or citizenry, an international treaty to which Nigeria has become signatory may be, it remains unenforceable, if it is not enacted into the law of the country by the National Assembly.'[62] Ejiwunmi JSC then added:

> If such a treaty is not incorporated into the municipal law, our domestic court[s] would have no jurisdiction to construe or apply it. Its provisions cannot therefore have any effect upon citizens' rights and duties. However, it is also pertinent to observe that the provisions of an [unincorporated] treaty might have indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government, in its acts affecting them, would observe the terms of the treaty.[63]

In this context, it is worth noting that one of Nigeria's primary arguments in the *Cameroon v Nigeria*[64] case before the ICJ was that the Maroua Declaration, a partial maritime boundary delimitation agreement between the respective heads of state, which purported to transfer the territory in contention to Cameroon, was invalid because it was not incorporated into Nigerian law by any legislative enactment. Nigeria also contended that the then head of state, General Yakubu Gowon, lacked capacity to conclude such an agreement. The ICJ rejected those contentions but the issue was not resolved in Nigeria. The fact that the agreement was not incorporated in accordance with Nigeria's constitutional provisions meant that Nigeria had a reason to reject the agreement, and the judgment of the ICJ and the subsequent transfer of the territory to Cameroon. In its judgment, the ICJ considered:

> Maroua Declaration constitutes an international agreement concluded between States in written form and tracing a boundary; it is thus governed by international law and constitutes a treaty in the sense of the Vienna Convention on the Law of Treaties (see Art. 2, para. l), to which Nigeria has been a party since 1969 and Cameroon since 1991, and which in any case reflects customary international law in this respect.[65]

In rejecting Nigeria's contention that the Maroua declaration was invalid, the ICJ said:

> [We do not] accept the argument that the Maroua Declaration was invalid under international law because it was signed by the Nigerian Head of State of the time but never ratified. Thus while in international practice a two-step procedure consisting of signature and ratification is frequently provided for in provisions regarding entry into force of a treaty, there are also cases where a treaty enters into force immediately upon signature. Both customary international law and the Vienna Convention on the Law of Treaties leave it completely up to States which procedure they want to follow.[66]

Beyond this, the ICJ also addressed the constitutional question that Nigeria had raised regarding non-compliance with Nigerian rules relating to the conclusion of

[62] See *Abacha v Fawehinmi* [2000] 4 SCNJ 400, 466.
[63] Ibid, 467.
[64] See *Cameroon v Nigeria: Equatorial Guinea Intervening* [2002] ICJ Rep 303 (n 51).
[65] See ibid, [263].
[66] Ibid, [264].

treaties. The Court recalled[67] the provisions of Article 46(1), of the Vienna Convention, which provides that '[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent'.[68] It then disposed of Nigeria's arguments about the competence of the head of state to conclude that agreement, stating that 'there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States'.[69] In the circumstances, the Maroua Declaration was considered 'as binding and establishing a legal obligation on Nigeria'.[70]

## 2.1 The Doctrine of Self-executing Treaties

It should be noted that there is no explicit delineation of treaties as self-executing[71] or non-self-executing when courts consider treaties. Under the 1999 Constitution, a treaty has no self-implementing provision, which when compared with the position under the U.S. Constitution, means that:

> [T]he Nigerian President is denied a potent source of power available to his American counterpart to legislate for the nation by means of treaties and thereby to override laws made by the legislature of states, since the [US] Constitution, acts of [US] congress and treaties made by the [US] president with the concurrence of the [US] senate are, by express constitutional provision, declared the supreme law of the land.[72]

In *African Reinsurance Corporation v Abate Fantaye*, the Supreme Court disagreed with the High (lower) Court's interpretation of the provisions of Agreement Establishing The African Reinsurance Corporation (African Re) as self-executing, and concurred with the dissent in the Court of Appeal, which held that the provisions were 'merely . . . enabling . . . and not executory'.[73] The court's rigid interpretations of section 12 of the Constitution suggest that treaties will not have force of law in Nigeria without a formal incorporation process. This understanding means that all treaties have to go through this process, including a treaty that is self-executing and ordinarily should require no (further) implementing legislation.[74]

[67] Ibid, [265].
[68] See Vienna Convention, 1155 UNTS 331 (n 46).
[69] See *Cameroon v Nigeria* [2002] ICJ Rep 303, [266].
[70] Ibid, [268].
[71] This term 'may be used to state a principle of the particular system of national law that certain rules of international law do not need incorporation in order to have internal effect. However, the term is also used to describe the character of the rules themselves.' Ian Brownlie, *Principles Of Public International Law* (7th edn, Oxford; New York: Oxford University Press, 2008) 48.
[72] B. O. Nwabueze, *The Presidential Constitution Of Nigeria* (New York: St Martin's Press, 1982) 164.
[73] *African Reinsurance Corporation v Abate Fantaye* (n 49) 818–20, 823, 831.
[74] Current interpretation and understanding of s 12 seems to give it a wider scope than the text suggests. The section is a hold-over from prior constitutions, a restatement of the common law heritage of the legal system and is fully confined to issues of domestic treaty implementation in the broadest sense. Some commentaries even suggest that Nigeria cannot be part of a treaty regime without the

Treaties are invoked only when they have been incorporated into domestic law by the legislative arm of government. The most visible cases on this subject regard the domestic incorporation of the African Charter on Human and Peoples' Rights,[75] the Convention on the Rights of the Child,[76] a series of legislation on Civil Aviation, incorporating provisions of the 1929 Warsaw Convention[77] and the Montreal Protocols and Convention,[78] and others related to the law of the sea. In these cases, individuals have standing because of infringement of their rights under the African Charter[79] or loss of life or property in civil aviation cases.[80] The courts do not deny individuals standing if the provisions of the treaty are complied with. In matters relating to diplomatic protection, especially under the Vienna Convention on Diplomatic Relations[81] and the Vienna Convention on Consular Relations,[82] standing is usually denied to aggrieved persons because of immunity granted by international law.[83] Domestic law is not helpful because it would run

approval of the Nigerian National Assembly. This is a radical reinterpretation of the provisions of s 12, which is concerned only with domestic implementation of treaties and not the act of ratifying a treaty at the international level. The confusion engendered by the provisions of s 12 can be illustrated with the position of eminent Nigerian international law scholar, David Ijalaye, who opined in relation to s 104 of the Draft 1979 Constitution, which contains the same provisions as s 12 of the 1999 Constitution. According to Ijalaye, the section 'deals merely with the procedure for the *approval* of treaties at the municipal level'. (emphasis in original). He goes further, 'Once the necessary *approval* has been given by the Nigerian National Assembly, then the Executive can proceed to ratification on the international plane.' (emphasis added). This position is contrary to a literal reading of the text of s 12. While it is true that s 12 provides the basis for approval of treaties at the municipal level, the act of ratification by the executive does precede the municipal approval process. See D. A. Ijalaye, *Nigeria And International Law: Today And Tomorrow*, University of Ife Inaugural Lecture Series 29 (Ile-Ife, Nigeria: University of Ife Press, 1978) 7.

[75] African Charter on Human and Peoples' Rights, 26 June 1981. OAU Doc CAB/LEG/67/3 Rev 5; 21 ILM 59 (1982).

[76] See Convention on the Rights of the Child, 30 ILM 1448 (1989) (n 38).

[77] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed At Warsaw on 12 October 1929 (Warsaw Convention), 49 Stat. 3000, 137 LNTS 11.

[78] See for example, the Civil Aviation (Repeal and Re-enactment) Act, 2006. In *Ibidapo v Lufthansa Airlines* [1997] 4 NWLR (Pt 498) 124, the Supreme Court affirmed the applicability of the Warsaw Conventions, incorporated into Nigerian laws through a 1953 colonial order. The court held: 'From 1960 to date, all the received English laws, multilateral and bilateral agreement concluded and extended to Nigeria, unless expressly repealed or declared invalid by a court of law or tribunal established by law, remain in force subject to the provisions of s 274(1) of the 1979 Constitution. The 1953 Order making the Warsaw Convention a part of the existing law in Nigeria still subsists since it has neither been repealed nor declared invalid.' For the Montreal Protocols, see Additional Protocol Nos 1 (2, 3, 4) to Amend the Warsaw Convention, 25 September 1975, ICAO Docs 9145–8. For the Montreal Convention, see Convention for the Unification of Certain Rules for International Carriage by Air, opened for signature 28 May 1999, S Treaty Doc No 106–45, 2242 UNTS 309.

[79] See African Charter on Human and Peoples' Rights, 21 ILM 59 (1982) (n 74).

[80] For an overview of some of the cases, see Sola Odebunmi, 'A Review of the 2006 Civil Aviation (Repeal and Re-Enactment Act) Explaining Change in Nigerian Law with Reference to Cases on Aviation Law in the Past Decade Identifying Key Contentious Issues', available at <www.strachan-partners.com/publications/AVIATION%20REPORT%202007.aspx>.

[81] Vienna Convention on Diplomatic Relations, 18 April 1961, 23 UST 3227, TIAS No 7502, 500 UNTS 95.

[82] Vienna Convention on Consular Relations, 24 April 1963, 21 UST 77, TIAS No 6820, 596 UNTS 261.

[83] In *Abacha v Fawehinmi* [2000] 4 SCNJ 400 (n 47) 446, the respondent was denied standing because he 'certainly [was] not a party' to the Agreement establishing the appellant corporation.

contrary to Nigeria's obligations under those treaties. During military rule, the government sought to use ouster clauses in military decrees to deny access to courts in cases of infringement of rights. A good number of those cases ended up before the African Commission on Human and Peoples' Rights, which ruled that those decrees were invalid. The government persisted in relying on those decrees before domestic courts and some judges relied on these to deny standing to petitioners. The Nigerian Supreme Court in *Labiyi v Anretiola*[84] enunciated a hierarchy of laws during military rule, which meant that standing could be denied if the courts relied on the laws, even when international law was an issue in those cases.[85] However, many judges especially in the lower courts (High Courts and the Court of Appeal) ruled that Nigeria could not use domestic law to deny access when there is a violation of treaty obligation.

On the relationship between the executive/legislative arms of government and the courts on treaty interpretation, there is no evidence in case-law suggesting that the courts defer unnecessarily to the executive or the National Assembly in the interpretation of treaties. Courts generally apply international rules of treaty interpretation, sometimes citing the Vienna Convention,[86] and paying attention to the fact that domestic legislation must not impede Nigeria's international law obligations. In the *Abacha v Fawehinmi* case, a majority of judges in the Supreme Court disagreed with the government's position on the interpretation of treaty obligations.[87] In *African Reinsurance Corporation v Abate Fantaye*,[88] the Supreme Court took judicial notice of a certificate of the Ministry of External Affairs in determining the status and immunity of the African Reinsurance Corporation and whether or not that immunity is absolute or capable of being waived by implication.

With inherent powers granted by the Constitution, courts have power to decide whether a statement attached by the government or legislature during treaty

See Uwais, JSC 834. But *see African Reinsurance Corporation v J.D.P. Construction Nigeria* Ltd Suit No SC 259/2002, Judgment of 11 May 2007. In this case, the claim of diplomatic immunity did not avail the appellants in a commercial claim by the respondent company. The Nigerian Supreme Court considered the earlier case of *African Reinsurance Corporation v Abate Fantaye* as inapplicable in this instant case since 'the activities covered in this case are commercial in nature' and the appellant was thus 'not covered by the provisions of the Diplomatic Immunity arrangement' it relied on as a defence. Text of JDP Construction judgment available at <http://www.nigeria-law.org/African%20Reinsurance%20Corporation%20v%20J.D.P.%20Construction%20Nigeria%20Ltd.htm>.

[84] [1992] 8 NWLR (Pt 258) 139.

[85] As late as May 1999, right before the onset of the new democratic dispensation, the Supreme Court affirmed the unquestionable validity of ouster clauses in military decrees. According to the Court: 'the exercise of jurisdiction by the courts is founded on the provisions of the constitution and any other jurisdiction that may be vested in them by any other law. *Courts are bound to observe the provisions of the constitution and other enabling laws in the exercise of their jurisdiction. No court has jurisdiction where a Decree has ousted its exercise of jurisdiction. No court has jurisdiction to consider the validity of such Decree or the scope of the Decree so made*. Any decision made on the exercise of such jurisdiction shall be null and void.' *A.G. of the Federation v Guardian Newspapers* (1999) 5 All NLR 1, 3; 15. (2004) All NLR 90, 133

[86] See eg *Abacha v Fawehinmi* [2000] 4 SCNJ 400 (n 47)

[87] Ibid. Despite this, it is conceivable during military rule that some judges would have considered themselves bound by treaty interpretations by the executive, especially when the rules in question conflict with provisions of military decrees and edicts.

[88] See *African Reinsurance Corporation v Abate Fantaye* [1986] 3 NWLR (Pt 32) (n 49) 811.

approval is a reservation and also to determine the scope or legality of a reservation. However, as a matter of practice, Nigeria seldom enters reservations to treaties[89] and this question has not surfaced in case-law. Most likely, the scope and legality of a reservation would be considered as an aspect of sovereignty, with Nigeria being able to determine the boundaries of its obligations in an international agreement. What the courts have made clear in a succession of cases is that Nigeria cannot enter into an international agreement and thereafter use its domestic laws to constrict its obligations. If the government wants to contract out of its obligations, it should do so by using a reservation.

When interpreting or applying domestic laws, Nigerian courts sometimes reference treaties to which Nigeria is not a party. For example, in *Abacha v Fawehinmi*,[90] the Supreme Court cited the European Communities Act of the United Kingdom, which made European Economic Communities (Union) Treaties part of UK law.

The application of international law is not restricted to the federal government in Nigeria. States have competence on matters not included in the exclusive and concurrent legislative lists, and in exercise of this competence, some state legislatures have adopted provisions of ratified treaties into state laws. Many State Houses of Assembly[91] have adopted part of the Convention of the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women,[92] the African Charter on the Rights and Welfare of the Child[93] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.[94] Unhappily, there are also instances of state and local authorities adopting legislation that runs contrary to ratified and other international laws. The most prominent of these are the Islamic Sharia laws introduced into the criminal justice system in many states in northern Nigeria. However, as these laws conflict with Nigeria's obligations under international (human rights) laws, they are void to the extent of their inconsistency.[95]

[89] Rather than reservations, Nigeria apparently finds it more convenient to stay out of particular treaty regimes. An example is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Despite Nigeria's ratification of several human rights treaties, partly due to concerns about allegations of genocide during the Nigerian civil war, 1967–70, it never ratified nor signed the Genocide Convention until its recent accession to the treaty in July 2009 to avoid exclusion from certain trade concessionary regimes by the European Union. See David Cronin, 'Double Standards on Trade', Inter- Press Service News Agency (22 December 2008), at <http://www.ipsnews.net/news.asp?idnews=45201>. For the Genocide Convention, see Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly, 9 December 1948 (GA Res. 2670, 3 GAOR, Part 1, UN Doc A/810, p 174), entered into force 12 January 1951, 78 UNTS 277.

[90] [2000] 4 SCNJ 400 (n 47).

[91] See Egede (n 40).

[92] Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13; reprinted in 19 ILM 33 (1980).

[93] See African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9 (1990); adopted 11 July 1990; entered into force 29 November 1999.

[94] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, OAU Doc CAB/LEG/66.6/Rev1, adopted 11 July 2003, entered into force 25 November 2005.

[95] The adoption of these laws could in a strict sense be considered as an exercise in mischief making by those states to emphasize their nuisance value; the adoptions are more of a political act in response to the political and power dynamics in Nigeria.

## 3. Customary International Law

At independence in 1960 Nigeria, as one of the new states, fell into the controversy of whether new states were bound by existing customary rules of international law. The general notion then was that a newly independent African state 'manifestly cannot be said to have participated in the creation of customary rules already in existence, nor have had opportunity to oppose their formation'.[96] While some considered the new states bound by those rules, others disagreed, noting that some of those customary rules had been utilized in subjugating those entities to colonial exploitation.[97] As newly independent states, they were entitled to all the rights and obligations attached to that status by international law and, 'as a result [became] bound by all those rules of international customary law which are applicable indifferently to all independent States'.[98] As Okoye notes, these newly independent African countries were not

> inclined to reject the whole body of customary international law as such. They however [disputed] the validity of those customary rules which sanctified their subjugations, such as those relating to colonies and protectorates. They also refused to recognise certain customary rules not in accordance with their perceived national interest.[99]

As Nigeria is a common law country by virtue of being a former colony of Britain, customary international law is automatically incorporated into domestic law and requires no further legislation.[100] In the United Kingdom, the competing doctrines on the status and treatment of customary international law are the doctrine of incorporation and the doctrine of transformation.[101] For international law to be part of municipal law, under the doctrine of transformation, it must be 'transformed' into municipal law and there must be a 'positive act' on the part of the state by the enactment of legislation to give local effect to the rule of customary international law.[102] Under the doctrine of incorporation, rules of customary international law are automatically part of English law in so far as they are not inconsistent with an Act of Parliament or authoritative judicial decision.[103] While there is authority that supports the doctrine of transformation,[104] the dominant

[96] Okoye (n 23) 193 (quoting M. Virally, 'Sources of International Law' in *Sorensen's Manual Of Public International Law* (New York: St Martin's Press, 1968) 137.

[97] See Umozurike (n 41) 20.

[98] Okoye (n 23) 193.

[99] Ibid 194.

[100] In *Ibidapo v Lufthansa Airlines* [1997] 4 NWLR (Pt 498) 124, 150. Wali JSC of the Nigerian Supreme Court affirmed this position: 'Nigeria . . . inherited the English common law rules governing the municipal application of international law.'

[101] See Alina Kaczorowska, *Public International Law* (4th edn, Abingdon, Oxon (UK); New York: Routledge, 2010) 152.

[102] Ibid.

[103] Ibid.

[104] The case of *R v Keyn* (1876) 2 Ex D 63 is generally cited in support of the doctrine of transformation. But this is disputed by the authorities. See Brownlie (n 71) 42–3.

principle is the doctrine of incorporation.[105] The same position is reflected in decisions of courts of other Commonwealth countries, of which Nigeria is part. As Brownlie notes, these decisions 'reflect the English accent on incorporation'.[106] A major affirmation of the doctrine of incorporation before English courts was a case involving the Nigerian Central Bank, where Lord Denning commented on the relationship between customary international law and English law as follows:

> A fundamental question arises for decision: what is the place of international law in our English law? One school of thought holds to the doctrine of incorporation. It says that the rules of international law are incorporated automatically and considered to be part of English law unless they are in conflict with an Act of Parliament. The other school of thought holds to the doctrine of transformation. It says that the rules of international law are not to be considered as part of English law except in so far as they have been already adopted and made part of our law by the decisions of the judges, or by an Act of Parliament, or long established custom. The difference is vital when you are faced with a change in the rules of international law. Under the doctrine of incorporation, when the rules of international law change, our English law changes with them. But, under the doctrine of transformation, the English law does not change. It is bound by precedent.
>
> As between these two schools of thought, I now believe that the doctrine of incorporation is correct. Otherwise I do not see that our courts could ever recognise or change the rules of international law.[107]

This position is what was implicitly affirmed in *Ibidapo v Lufthansa Airlines* and other cases. Thus, while the provisions of section 12 of the Nigerian Constitution apply only to 'treaties' and not customary international law,[108] in practice courts do apply customary international law although explicit references are not common.[109] Within judgments, there is reference to general international law and treaties and 'accepted rule[s] of international law'.[110]

On the existence or content of customary international law, courts adopt the same approach in relation to customary international law as they do with treaties and do not defer unnecessarily to the other branches of government on these issues. There is not much discussion of the substance and content of customary international law, an area not well developed in case-law (due to the paucity of cases referencing customary international law). It is sometimes implicit in judgments that courts are taking judicial notice of customary norms but the statements are vague. Not much can be read into those few instances. The primary subject areas in which customary international law have been invoked are human rights and diplomatic immunity and in some instances, civil aviation, as well as law of the sea.

[105] See Brownlie, ibid, 41–4.
[106] Ibid, 44.
[107] *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 2 WLR 356, 365.
[108] See s 12, 1999 Constitution.
[109] An exception to this is the discussion of customary norms of diplomatic immunity in *African Reinsurance Corporation v Abate Fantaye* (n 49) 824–9.
[110] See eg *Abacha v Fawehinmi* (n 47) 453, per Uwaifo JSC: 'Courts will desist from a construction that would lead to a breach of an accepted rule of international law.'

## 4. Hierarchy

Given the provisions of section 1(1) and 1(3) of the Nigerian Constitution which asserts its supremacy over all other laws,[111] international law, including treaties and customary international law would rank below the Constitution and above domestic legislation. While a series of cases in lower courts maintained that the Constitution ranked below international law, the Nigerian Supreme Court has consistently affirmed that the Constitution ranks higher than other legislation, including international law.[112] In cases of conflict, there is a presumption that a domestic statute will not be interpreted to violate a rule of international law.[113] This is similar to the position in the UK's 'well-established rule of construction . . . normally stated thus: where domestic legislation is passed to give effect to an international convention, there is a presumption that Parliament intended to fulfil its international obligations'.[114]

Within the Nigerian judicial system, domestic laws incorporating treaty provisions are regarded as 'statute[s] with international flavor'[115] and thus enjoy special status. Due to the paucity of case-law on international law generally, there is no direct reference to *jus cogens* norms although courts recognize the existence of norms of fundamental importance to the international community from which Nigeria cannot deviate. It is a matter of debate whether or not these are *jus cogens* norms or just the mere assertion of the importance of international law generally.

Nigerian courts also use international law to interpret constitutional provisions, especially guarantees of individual rights. During military rule, especially between 1984 and 1999, the suspension of the Constitution and the provisions of Chapter 4 of the Constitution that guarantees fundamental human rights necessitated recourse to international human rights, especially the African Charter on Human and Peoples' Rights[116] that had been incorporated into domestic law in 1983.[117] Increasing use was made of the provisions of the African Charter because it was not directly suspended like other human rights provisions.[118] It was thus possible to refer to the African Charter's provisions to supplement constitutional provisions guaranteeing human rights. With the return to democratic rule, the African Charter is also being used to elucidate constitutional provisions, now that more and more

[111] Section 1(1) 'This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.'Section 1(3) 'If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.'

[112] See eg *Abacha v Fawehinmi* (n 47) 423.

[113] Ibid, 422–3, 453.

[114] Brownlie (n 71) 45.

[115] *Abacha v Fawehinmi* (n 47) 422–3.

[116] See African Charter on Human and Peoples' Rights, 26 June 1981. OAU Doc CAB/LEG/67/3 Rev 5; 21 ILM 59 (1982).

[117] See African Charter on Human and Peoples' Rights (Ratification And Enforcement) Act, Cap 10, Laws of Federation of Nigeria, 1990

[118] See generally *Abacha v Fawehinmi* (n 47) 427, 434.

people are aware of the existence and utility of the provisions of the African Charter. What remains to be tested is the compatibility of the Charter's provisions on economic, social and cultural rights, which are justiciable and not subject to the 'progressive realization' clause in the International Covenant on Economic, Social and Cultural Rights.[119] Those provisions in the African Charter arguably stand opposed to the Nigerian constitutional provisions that incorporate economic, social and cultural rights with Chapter II of the Constitution as 'Fundamental Objectives and Directive Principles of State Policy' that are not justiciable. On the face of it, since there is a conflict in the justiciability of those provisions, the supremacy clause in the Nigerian Constitution would prevail against the African Charter provisions within domestic law. However, the quandary may not be so easily solved because the Constitution implores all organs of government to ensure the realization of the provisions of Chapter II. Utilizing the provisions of the incorporated African Charter may be one way to realize that constitutional aim.

In its application of international law, Nigerian courts have not indicated any higher status for particular parts of international law. There is usually no specific reference to status. The courts are increasingly confronted with questions of human rights law and civil aviation issues, which are usually dealt with by treaty provisions without much reference to other sources of international law.

## 5. Jurisdiction

Nigeria has ratified the four Geneva Conventions of 1949[120] and the two Additional Protocols of 1977.[121] To give effect to the provisions of the 1949 Conventions, Nigeria enacted the Geneva Conventions Act 1961,[122] by which Nigerian courts can exercise jurisdiction over international crimes. The Act, which is applicable throughout Nigeria,[123] covers persons of all nationalities, regardless of

[119] International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by the General Assembly of the United Nations on 16 December 1966 (Annex to GA Res 2200, 21 GAOR, Supp. 16, UN Doc A/6316, 490); entered into force on 3 January 1976. 993 UNTS 3, 6 ILM 360 (1967).

[120] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 6 UST 3114 (First Geneva Convention); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 6 UST 3217 (Second Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 UST 3316 (Third Geneva Convention); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 UST 3516 (Fourth Geneva Convention) [Collectively referred to as 1949 Geneva Conventions]

[121] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, opened for signature 12 December 1977, UN Doc A/32/144, Annex I, II (1977), reprinted in 16 ILM 1391 (1977) (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, opened for signature 12 December 1977, UN Doc A/32/144, Annex I, II (1977), reprinted in 16 ILM 1442 (1977) (Protocol II).

[122] Geneva Conventions Act, Cap 162, Laws of Federation of Nigeria, 1990.

[123] Section 12, Geneva Conventions Act.

the locus of the offence.[124] However, proceedings under the Act can only be instituted by or on behalf of the Attorney-General of the Federation.[125] Beyond this Act, the provisions of universal jurisdiction within Nigerian laws are exercisable by General Court's Martial under section 130(2) of the Nigerian Armed Forces Act.[126] One of the rare cases of the exercise of jurisdiction over international crimes is the case of *Pius Nwaoga v The State*. The accused person, a rebel officer during the Nigerian civil war (1967–70), was disguised as a civilian when he killed another rebel officer who was unarmed. The accused person was convicted of murder and the conviction was affirmed on appeal to the Nigerian Supreme Court. In reaching that decision, the Supreme Court stated:

> To our mind, deliberate and intentional killing of an unarmed person living peacefully inside the Federal Territory as in this case is a crime against humanity, and even if committed during a civil war is in violation of the domestic law of the country, and must be punished.[127]

There is also paucity of cases on the exercise of civil jurisdiction for international law violations that are committed in other countries. However, there is an instance where the court's jurisdiction was invoked by 12 Cameroonians, alleging before a Federal High Court in Nigeria that their right to self-determination in the African Charter[128] has been infringed by Cameroon. The individuals in *Gunme v Attorney-General of the Federal Republic of Nigeria*[129] sought an order of the Federal High Court requiring Nigeria to present the case for self-determination of southern Cameroons before the International Court of Justice and the UN General Assembly. The Nigerian government's objection to jurisdiction was rejected and eventually the parties reached a settlement wherein Nigeria agreed to institute a case before the International Court of Justice on the issue of self-determination for southern Cameroons. It is worth noting that this case was filed while the case between Nigeria and Cameroon was before the ICJ. In any event, the matter was settled and the proceedings discontinued.

As with the *Gunme* case,[130] the Federal High Court has exclusive jurisdiction in many of the matters relating to Nigeria's international obligations.[131] Originally

[124] Section 3(1) of the Act provides for the conviction and sentencing of any person: 'whether in or outside the Federal Republic of Nigeria, [who] whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the Conventions as is referred to in the articles of the Conventions set out in the first schedule to this Act.' In pursuance of this provision, Section 3(2) provides that 'A person may be proceeded against, tried and sentenced in the Federal Capital territory for an offence under this section committed outside Nigeria as if the offence had been committed in the Federal Capital, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in the Federal Capital.'

[125] Section 11, Geneva Conventions Act.

[126] See Armed Forces Act 1993, Cap 105 Laws of Laws of Federation of Nigeria, 2000.

[127] *Pius Nwaoga v The State* [1977] 1 All Nigerian L Rep (Pt 1), 149; also reported in [1972] ILR 494–7.

[128] See African Charter on Human and Peoples' Rights, 26 June 1981. OAU Doc CAB/LEG/67/3 Rev 5; 21 ILM 59 (1982).

[129] *Gunme v Attorney-General of the Federal Republic of Nigeria*, Suit No FHC/ABJ/CS/30/2002.

[130] Ibid.

[131] Section 251, 1999 Constitution.

established to cover revenue matters, the Federal High Court is now vested with such an expansive jurisdiction[132] that it excludes most state High Courts and is a potential source of friction in the division of functions between the federal government and composite states of the Nigerian Federation.

## 6. Other International Sources

Nigerian courts rely on non-binding texts and sources minimally. There is a preference for 'hard' law, so while these non-binding texts may be cited by counsel in cases, courts would rather rely on the provisions of the constitution as authority for their decisions and would only use non-binding texts if there were no other sources. The notion of 'general principles of law recognized by civilized nations' could be an option for Nigerian courts. However, as with the initial distrust of international law, the newly independent states disliked 'the use of the word ["civilized"], a notion they [regarded] as emanating from the traditional distinction between [civilized] and [uncivilized] nations, the latter deprived of the protection of the law of nations'.[133] Nonetheless, the lack of reference to 'general principles of law recognized by civilized nations' cannot now be attributed to this concern.

While there is a possibility that Nigerian courts would be called upon to apply or enforce a decision of an international court or tribunal, this issue has not yet been directly before the courts. The decision of the International Court of Justice in the *Cameroon v Nigeria* case was indirectly challenged in Nigerian courts,[134] although counsel for the plaintiffs in the case did not consider it a direct challenge to the decision of the ICJ. If the courts were directly confronted with this situation, it would appear that they would consider the decision of the international court binding or, at a minimum, legally persuasive. This would be an affirmation of their position that Nigeria's international obligations should be respected and would be in accordance with section 19(d) of the Constitution, which calls for respect for Nigeria's international law obligations.

Regarding the application or enforcement of a decision or recommendation of a non-judicial treaty body, such as a conference or meeting of the parties to a treaty, there are no direct cases on this point. Following the *Cameroon v Nigeria* case, Nigeria, through a challenge in its domestic courts, was asked to ignore its obligations under the Greentree Agreement, which a section of the Nigerian population believed to be not binding upon Nigeria because it was not incorporated into Nigerian laws in accordance with section 12(1) of the

[132] This includes matters like diplomatic, consular and trade representation, citizenship, extradition, immigration into and emigration from Nigeria, and 'any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the federal government or any of its agencies.' This could conceivably include the negotiation, adoption and ratification of treaties. See ibid.

[133] Okoye (n 23) 194.

[134] See nn 50–4, and accompanying text.

Constitution.[135] The Federal High Court in this case did not directly rule upon the validity of the agreement. If it did, the court would have had difficulty navigating away from Nigeria's obligation under the ICJ judgment. Instead, the Greentree Agreement was submitted to the National Assembly for approval, but that process had no bearing on Nigeria's obligation to comply with the decision of the ICJ.

## 7. Conclusion

Nigeria's common law heritage informs her position on international law. It is a dualist system, albeit with some monist considerations, which uses the doctrine of incorporation in relation to customary international law. Arguably, the contours of the application of international law within the domestic legal system are still being worked out. The relationship between municipal law and international law is evolving and it is hoped that the relationship will be better developed as the most recent constitution goes through a period of amendments and revisions to reflect the reality of present day Nigeria. The provisions of section 12,[136] as it stands, are inadequate and serve to inform a view of international law that is at odds with current international law, especially the perception that Nigeria's international agreements are invalid until domesticated by the National Assembly.

[135] See ibid. [136] See n 22.

# 19

# Poland

*Anna Wyrozumska*

## 1. Introduction[1]

Poland is a republic whose 1997 constitution was enacted to enhance several key elements of democracy, including judicial review and the legislative process, while continuing to guarantee a wide range of civil rights. Under the current constitution, the executive branch of the government includes a council of ministers led by a prime minister, who is typically chosen from the majority coalition in the bicameral legislature's lower house (*Sejm*). Poland also has a president, elected every five years for no more than two terms, who is the head of state and commander-in-chief of the armed forces. The legal system based on continental (Napoleonic) civil law is presided over by a Supreme Court and Constitutional Tribunal. The Constitutional Tribunal has the power of judicial review of legislative acts and its rulings are final. In addition, the courts may ask preliminary questions on issues of European Union law to the European Court of Justice.

Poland joined NATO in 1999 and the European Union in 2004 and accepts compulsory ICJ jurisdiction with reservations.

### 1.1 Relevant Constitutional Provisions

Several provisions of the Polish Constitution of 2 April 1997 refer directly to treaties. They concern two essential issues: the procedure to conclude a treaty and the position of duly entered treaties in the domestic legal order. The treaty-making process is governed generally by the Constitution, the Law on International Treaties of 14 April 2000 and the implementing regulation of the Council of Ministers of 28 August 2000. The Constitution determines the division of treaty-making power

[1] This chapter is confined to international law, excluding European law. However, some courts' decisions concerning EU law are discussed since they have relevance to the application of international law. Poland has been a member state of the European Union since 1 May 2004 and European law is applied in Poland according to its own standards. On European law and international law see L. Garlicki, K. Wojtowicz, and M. Masternak-Kubiak, 'Poland' in *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (10 July 2008) available at SSRN <http://ssrn.com/abstract=1158145>; A. Wyrozumska, *Umowy międzynarodowe, teoria i praktyka* [*International Treaties, Theory and Practice*] (Warszawa: Commerce Law and Practice, 2006).

between the President, the government and the Parliament (there are two Chambers of Parliament: the Sejm (lower) and the Senate (upper)). Under Article 133, paragraph 1(1), 'The President of the Republic, as representative of the State in foreign affairs, shall ratify and renounce international agreements, and shall notify the Sejm and the Senate thereof.' Pursuant to Article 146, paragraph 4(10), to the extent and in accordance with the principles specified by the Constitution and statutes, the Council of Ministers, 'shall conclude international agreements requiring ratification as well as accept and renounce other international agreements'. The powers of the Parliament are specified in the provisions on ratification.

The Constitution distinguishes four modes of ratification. Two of these modes are for treaties delegating the competence of organs of state authority to an international organization or international institution in relation to certain matters. Under Article 90 of the Constitution, their ratification by the President requires either prior consent given in a national referendum or a statute passed by qualified majority of both Chambers of the Parliament. Article 90 is understood to apply to the European integration process, eg the Accession Treaty to the EU of 2003. Article 90 of the Constitution reads:

1. The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.
2. A statute, granting consent for ratification of an international agreement referred to in para.1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.
3. Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125.
4. Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies.

There are also other categories of treaties that have to be ratified with prior consent granted by statute (ie by both Chambers of the Parliament). They are enumerated in Article 89, paragraph 1:

Ratification of an international agreement by the Republic of Poland, as well as renunciation thereof, shall require prior consent granted by statute—if such agreement concerns:

1 peace, alliances, political or military treaties;
2 freedoms, rights or obligations of citizens, as specified in the Constitution;
3 the Republic of Poland's membership in an international organization;
4 considerable financial responsibilities imposed on the State;
5 matters regulated by statute or those in respect of which the Constitution requires the form of a statute.

The statute expressing the consent of the Parliament is passed by the same majority that is required for adopting statutes. No special qualified majority is required in the Parliament.

The fourth mode, called 'simple ratification', covers the treaties that are not enumerated in Articles 90 and 89, paragraph 1 and require the ratification by the President on other grounds. Pursuant to Article 89, paragraph 2, 'The President of the Council of Ministers (the Prime Minister) shall inform the Sejm of any intention to submit, for ratification by the President of the Republic, any international agreements whose ratification does not require consent granted by statute.' Article 89, paragraph 2 provides for a soft form of parliamentary control, and it sometimes happens that the Parliament objects to the choice of the mode of ratification to a particular treaty.

All the other treaties are concluded on the consent of the government. The Constitution refers to them in the above-mentioned Article 146, paragraph 4(10).

The mode of conclusion of a treaty determines its effects in domestic legal order and therefore the Constitution contains an intertemporal clause in Article 241, paragraph 1. According to this clause, treaties previously ratified by the Republic of Poland upon the basis of constitutional provisions valid at the time of their ratification and promulgated in the Journal of Laws shall be considered as treaties ratified with prior consent granted by statute and shall be subject to the provisions of Article 91 of the Constitution, if they cover the matters mentioned in Article 89, paragraph 1 of the Constitution.

The position of a duly entered treaty in internal law is governed inter alia by Articles 87, 88, 90, 91, 188 of the Constitution. Article 87, paragraph 1 provides: 'The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations.'

Article 88, paragraph 3 requires that 'International agreements ratified with prior consent granted by statute shall be promulgated in accordance with the procedures required for statutes. The principles of promulgation of other international agreements shall be specified by statute.'

According to Article 91, paragraph 1:

1. After promulgation thereof in the Journal of Laws of the Republic of Poland (Dziennik Ustaw), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.
2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.
3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

The other important provision of the Constitution in regard to treaties is Article 188 on the competence of the Constitutional Court (which in Poland is called the 'Tribunal'). The Tribunal is granted the power to rule on the conformity of statutory law to treaties ratified by the consent of Parliament and the conformity of acts of central state organs to ratified treaties. According to Article 188:

The Constitutional Tribunal shall have jurisdiction regarding the following matters:

1) the conformity of statutes and international agreements to the Constitution;
2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;
3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes [. . . ].

The Constitution provides for preventive constitutional review of the conformity of a proposed treaty to the Constitution (the control takes place before ratification). Article 133 of the Constitution allows the President to request a ruling thereon from the Constitutional Tribunal. In case of a negative ruling, the Constitution must be amended or the agreement must be either renegotiated or abandoned. A posteriori review, when a treaty enters into force, is possible through preliminary questions submitted by the courts[2] or by the subjects enumerated in Article 191 of the Constitution (ie by the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators) or by a constitutional complaint.[3] The review is limited and must not overstep the limits of the application of a given measure. The review of the Constitutional Tribunal concerns the substantial and formal (procedural) conformity to the Constitution and does not include reviewing, for example, the constitutionality of the Parliamentary statute consenting to ratification.[4]

There are also some incidental provisions of the Constitution that refer to international treaties or to other sources of international obligation. For example, Article 27 reads: 'Polish shall be the official language in the Republic of Poland. This provision shall not infringe upon national minority rights resulting from ratified international agreements.' Article 56, paragraph 2 reads: 'Foreigners who, in the Republic of Poland, seek protection from persecution, may be granted the status of a refugee in accordance with international agreements to which the Republic of Poland is a party.' Article 55 of the Constitution on the prohibition of extradition of a Polish citizen is also worth noting in that respect. The provision was recently amended to allow surrender on the grounds of European Union law (European arrest warrant) or to the International Criminal Court.

[2] Eg Article 193 allows any court to refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreement or statute, if the answer to such question is necessary to enable it to give judgment.

[3] Article 79, para 1 of the Constitution reads: 'In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.'

[4] To date, there are only three cases of constitutional review of treaties. In 2000 the Constitutional Tribunal rejected the complaint on the ground that the treaty had been executed (judgment of 24 October 2000, SK 31/99), see section 2.3. The Tribunal allowed the control in two other cases: the judgment of 11 May 2005 (K 18/05) on the EU Accession Treaty (brought under Article 191); the judgment of 18 December 2007, SK 54/05, on Article 32 of the Protocol No 4 to the Europe Agreement (constitutional complaint).

Unlike previous regulations, the 1997 Constitution adopted some general rules on the application and position of international law in the domestic legal order. First, Article 9 of the Constitution declares that 'the Republic of Poland shall respect international law binding on it'. The provision is contained in chapter one of the Constitution entitled: 'Republic', which sets out the general principles on which the state is based. Over the years Article 9 has acquired actual legal meaning. Judges[5] invoke it as a legal basis for domestic effects of treaties (non-ratified treaties, provisional application under Article 25 of the Vienna Convention on the Law of Treaties ('Vienna Convention')[6] etc) and the other sources of international law, in particular customary law and the decisions of international organs or organizations. The confirmation of the legal effects of Article 9 is found in the judgment of the Constitutional Tribunal of 11 May 2005[7] on the EU Accession Treaty of 2003. The Tribunal declared that,

> Article 9 expresses an assumption of the Constitution that, on the territory of Poland, a binding effect should be given not only to the acts (norms) enacted by the national legislature, but also to the acts (norms) created outside the framework of national law-making authorities. The Constitution accepts that the Polish legal system consists of multiple components/elements.

Consequently, all Polish authorities, including the judges, should give full effect to international law; ie they should develop an interpretation of national law as 'friendly' as possible toward international law.

## 1.2 Legislative Provisions or Regulations concerning International Law

The application of international law in the Polish legal order is authorized not only by the Constitution by also by various kinds of references contained in particular statutes or governmental regulations. For example, Article 68, paragraph 4 of the Road Traffic Law of 20 June 1997 and the Regulation of the Minister of Transport and Marine Economy of 7 October 1999 on homologation of vehicles authorize the application of particular Organization for Economic Co-Operation and Development (OECD) and UN European Economic Commission's regulations and standards. The Aviation Law of 3 July 2002 refers to binding acts of international organizations constituted under ratified treaties, including the International Civil Aviation Organization (ICAO) Article 3. In addition, Article 2 of the Law on Trade

[5] The finding of the courts conforms to the opinion of scholars who have participated in the drafting of the Constitution. Eg R. Szafarz wrote in 1997 that Article 9 'expresses the principle of [ . . . ] Polish legal order in respect to the norms of international law and establishes a presumption of automatic, even if only indirect, incorporation of those norms into that order'. ('Międzynarodowy porządek prawny i jego odbicie w polskim prawie konstytucyjnym' ['International Legal Order and Its Reflection in the Polish Constitutional Law'] in M. Kruk (ed.), *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym* [*International Law and Community Law in the Domestic Legal Order*] (Warszawa, 1997) 19.

[6] See the judgment of the Supreme Administrative Court of 2003 (I SA/Łd 1707/02), discussed below in section 2.2.

[7] K 18/05.

in Strategic Goods, Technologies and Services of 29 November 2000 prohibits international trade-infringing restrictions arising from 'treaties and other international obligations'.

## 2. Treaties and Other International Agreements

### 2.1 Definition and Interpretation of Treaties

Polish courts may refer to the Law on International Treaties of 2000 to define a 'treaty'. Article 1 of the statute provides:

> [I]nternational treaty' means an agreement between the Republic of Poland and another subject or subjects of international law, governed by international law, whether embodied in a single instrument or in more related instruments, regardless of its name and regardless of whether it is concluded on behalf of the State, the government or the minister in charge of a department of the government administration competent for matters regulated by the treaty in question.

This definition is based on the Vienna Convention, but contains some changes. In practice, the Vienna Convention's definition forms part of the Polish law and is applied by courts.

There are very few instances where the courts attempted to establish the legal character of an international text. They have made rather superficial examinations of the instrument at stake. One example is the judgment of 23 December 2008 of the Regional Administrative Court. The Court found that the decisions of the Mixed Commission EC/EFTA No 1/2000 and No 1/2001 were actually international agreements. The Court noted that the Law on International Treaties of 2000 does not expressly regulate when amendments to treaty attachments are done by the body established under such treaty, ie Mixed Commission. Nevertheless,

> taking into account the broad definition of a treaty contained in that statute (Article 2 point 1) and that the consent of the Republic of Poland to be bound by a treaty may also be expressed: by signature, exchange of instruments constituting a treaty or by any other means allowed by international law (Article 13, paragraph 1 of the Statute), so also by means provided for in Article 15 of the Common Transit Procedure Convention (by means of the decision adopted by the Commission), it is proper to assume that the principles on publication of international treaties, contained in Chapter 5 of the above cited Statute, apply equally to the amendment of the attachment to a treaty (Convention) forming its integral part and provided for by international law.[8]

To establish the legal effects of the Charter of Fundamental Rights of the European Union, the Constitutional Tribunal[9] has not referred to the definition of a treaty, but to scholarly opinion. The Tribunal rejected constitutional control of the Charter since it is 'an agreement whose nature is closer to a declaration than binding legal act.

[8] I SA/Go 912/08. See also section 6.3 below.

[9] 18/04 of 11 May 2005.

Its provisions are thus not legally binding. On the legal plane they do not confer any rights on individuals, because such individuals may not—as a sole basis of their rights—invoke rights enumerated in the Charter.'[10] In the same judgment the Tribunal found that the framework decision of the EU Council 2002/589 on the European arrest warrant is not a reviewable act since it 'has features of simplified intergovernmental agreement—and as such does not require ratification'.[11] It has to be implemented in Polish law, and the constitutionality of this legislation could be controlled instead. On the contrary, the Tribunal controlled the constitutionality of the Final Act of the Athens Conference, finding that it formed 'the integral element' of the Accession Treaty. The Tribunal neither referred to the provisions of the Treaty nor to international law or academic writers.[12]

To decide issues of treaty law the courts apply both international law (often superficially) and Polish law. Some courts properly distinguish between the spheres of international law and internal law. Sometimes the courts give precedence to international law; in case of a lacuna they apply domestic law. The courts may also mitigate the legal effects of a treaty toward individuals by referencing general principles of law recognized in domestic law. The most important examples are the judgments of the administrative courts referring to the Vienna Convention (there are more than 300 cases). The courts referred inter alia to Articles 4, 11, 15, 16, 18,[13] 24–28, 31–33, 59 and 70 of the Vienna Convention, in the majority of cases in a superficial manner. In the judgment of 30 May 2005[14] the Regional Administrative Court in Warsaw held:

> [D]espite the lack of formal denunciation of the Europe Agreement [The Association Treaty],[15] it has to be recognized as terminated, according to the provisions of Article 59, paragraph 1(b) of the Convention. Due to the entry into force of the Accession Treaty—signed in Athens on 16 April 2003—it has to be considered as a treaty referred to in Article 59 of the Vienna Convention, terminating the provisions of the Europe Agreement on 1 May 2004.

The Regional Administrative Court in Lublin in the judgment of 7 June 2002[16] referred to the Convention as an additional argument to decide that the agreement in question, ratified in a simplified procedure, was binding upon customs

[10] The judgment of 11 May 2005 (K 18/05) on the EU Accession Treaty [18.8] (internal citations omitted)

[11] Ibid [18.9].

[12] Ibid [19].

[13] For example, the Regional Administrative Court in Rzeszów (SA/Rz 521/05) did not take into account the argument of a party that the state organs under Article 18 of the Vienna Convention (obligation not to defeat the object and purpose of a treaty prior to its entry into force), are bound to interpret national law friendly to European law, even before the Polish accession. Similarly, the judgment of the Supreme Administrative Court (FSK 1115/07).

[14] III SA/WA 492/05.

[15] The Treaty Establishing an Association between the European Communities and their member states, on the one part, and the Republic of Poland, on the other part, done in Brussels on 16 December 1992; Journal of Laws 1994, No 38/11.

[16] I SA/Lu 1048/01.

authorities and individuals. In a judgment of 19 December 2006,[17] the Regional Administrative Court in Gdańsk referred to Articles 11 and 16 of the Vienna Convention and to Article 2 of the Law on International Treaties of 2000 to find that the convention on the avoidance of double taxation between Poland and Iran had not entered into force, since the parties had not exchanged the ratification documents. Also, in the judgment of 22 August 2007,[18] the Regional Administrative Court in Warsaw found the 1993 treaty's reference to two earlier treaties concluded between the parties to be not effective pursuant to Article 70 of the Vienna Convention. The Court found that the latter two treaties had been terminated.

The most interesting example, however, is the decision of the Supreme Administrative Court of 26 March 2003[19] rejecting the application of the Vienna Convention to domestic legal issues. The Court held that the 'possibility of provisional application of a treaty under Article 25, paragraph 1 of the Vienna Convention on the Law of Treaties [. . .] relates to international law and as such is not able to overrule the conditions of the application of an international treaty in internal legal order'. On the other hand,

> since the parties to the Agreement agreed on its provisional application since 1 January 1999 (Article 38, paragraph 2 of the Agreement), to refuse the application before the Agreement is published and ratified would infringe upon Article 9 of the Constitution, which requires the Republic of Poland to respect international law binding on it.

The same reasoning is visible in the judgment of the Supreme Administrative Court of 7 December 1999.[20] The Court refused to recognize the effects of the Armenian rejection of succession to the bilateral free visa movement treaty between Soviet Union and Poland. The court referred instead to general principles of law (principle of legal certainty, protection of legitimate expectations of individuals) to find that since the Armenian note on the succession was not officially published, the individuals may not be obliged to possess visas.

The other examples concern treaty interpretation. In a Supreme Court decision of 2003[21] after having confirmed its competence to interpret a bilateral treaty on extradition in accordance with the rules of the Vienna Convention, the Court actually applied the methods of interpretation used in Polish criminal procedural law. There are some cases of the Supreme or Regional Administrative Courts where the courts interpret international agreements referring to Articles 31–33 of the Vienna Convention. They ground this reference either in the universally binding character of the Convention under Polish law (as the result of Article 87, paragraph 1 and Article 241, paragraph 1 of the Constitution) or on the customary character of the rules contained in the Convention. For example, in the judgment of 12 December 2008[22] the Regional Administrative Court held that the Prague Convention on mutual recognition of education degrees does not apply to distance

[17] I SA/Gd 885/05. [18] I SA/Wa 312/07. [19] I SA/Łd 1707/02.
[20] V SA 726/99. [21] I KZP 47/2. [22] I OSK 538/08.

learning. To reach its decision, the Court invoked the 'universal principles of treaty interpretation' contained in Articles 31–33 of the Vienna Convention.

The courts sometimes note that a treaty has a double character; it is domestic law and international law as well. But the courts emphasize that a treaty has to be interpreted according to the rules of international law. The judgment of 23 September 2004 of the Regional Administrative Court[23] may serve as an example. The Court referred broadly to the principles of the Vienna Convention and used them carefully in its reasoning.

The courts have never checked whether the Vienna Convention is binding on all the parties to the treaty in question. Sometimes although they refer to the rules contained in the Vienna Convention, they finally apply internal law rules. For example, in the decision of the Supreme Court of 2003[24] in an extradition case, the Court made a direct reference to the methods of interpretation utilized in Polish criminal procedural law when interpreting a bilateral treaty.

There are also many cases where the courts interpreted treaties without reference to any particular rule.[25] In the ruling of 2004,[26] the Supreme Court noted that:

> [I]t results from the literal meaning of Article 11, Section 1 of the Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention) of 14 November 1975 that, where a TIR operation has not been discharged, the customs authorities shall not have the right to claim payment of the sums due from the guaranteeing association unless, within a period of one year from the date of acceptance of the TIR Carnet by those authorities, they have notified the association in writing of the non-discharge.

The Court also relied on the purpose of the TIR Convention, indicating that 'the periods defined in Article 11 of the Convention, on the one hand, should facilitate the trade and speed of transport under TIR carnets, and on the other, have a positive impact on the efficiency of the procedure concerning customs duties'. In another judgment of 2004,[27] the same Court observed that commentators disagree about the meaning of Article 40 of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988, to which Poland made a reservation. That is why the Court accepted the meaning of Article 40 that 'results directly from the wording of this provision'. In the ruling of 1999, the Supreme Court[28] interpreted Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction of 1980. The Court took into account the general notion of the 'well-being of the child', as defined in the Convention on the Rights of the Child of 1989. The Supreme Court[29] stated that when Poland adhered to the Hague Convention of 25 October

[23] I SA/Bk 206/04. [24] I KZP 47/02.

[25] See eg, the judgment of 28 February 2007 (V CSK 441/06) in which the Supreme Court interpreted Articles 74–6 of the Convention on Contracts for the International Sale of Goods of 1980; the resolution of the Supreme Court (I KZP 30/08) on execution of criminal penalty under foreign court judgment within a framework of the European Arrest Warrant, in which the Court interpreted the Strasburg Convention on the Transfer of Sentenced Persons of 1983.

[26] IV CK 495/03. [27] I CKN 23/99.

[28] I CKN 23/99. [29] III CKN 1254/00.

1980 it assumed an obligation to respect the main purpose of the Convention, which is to secure the prompt return of children wrongfully removed to or retained in any contracting state. The Court's decision explicitly referred to the purpose of the Convention.

Since ratified treaties enter into the domestic legal order, there is a presumption that they are known to the courts. The judges are not obliged to submit treaty matters to the opinion of the political or legislative branches. Several provisions of Polish law provide a specific procedure for voluntary requesting an opinion. For example, under Article 1116 of the Code of Civil Procedure courts are invited to request information from the executive branch on the scope and substance of diplomatic immunities. Under Article 1113 of the same Code, any court may request the Ministry of Justice to provide information related to the text of a foreign law or to the judicial practice of foreign countries. Such information, however, has no binding authority. Also, the procedure does not apply directly to the treaty interpretation or other treaty matters. Moreover, the independence of the judges is guaranteed under Articles 173 and 175 of the Constitution and the European Convention on Human Rights (emphasized strongly in the judgment of ECHR of 24 November 1994 in the case *Beaumartin v France*[30] on the obligation to submit preliminary question of treaty interpretation to executive branch).

In practice, the courts sometimes ask for or use the information on international treaties obtained from the executive branch. One example is the judgment of the Supreme Administrative Court of 7 December 1999.[31] In that case, the Ministry of Foreign Affairs had submitted an opinion in the deportation proceedings against Karine Galstyan, the Armenian citizen. On the basis of the information in the report, the Minister of Interior decided to expel the individual. In this case, the Armenian Embassy had informed the Polish government through a note that the Republic of Armenia did not consider itself to be a successor to the treaty between Poland and the former Soviet Union on the abolition of *visas*. The Polish government had accepted this note and informed Armenia that the treaty ceased to be in force between Poland and Armenia. In the opinion of the Polish Ministry of Foreign Affairs, this exchange of notes was sufficient to conclude that the treaty no longer applied in the Polish legal order. The Court rejected this reasoning and ruled that the exchange of notes, as such, could not have any effect in the internal legal order because it did not meet the requirement of official publication in a prescribed form. Also, the Foreign Minister's declaration was not published and, as a consequence, not binding for Polish courts adjudicating on the legal status of the Armenian citizen in Poland.

Another example is the judgment of 16 July 2003. In this case, the Supreme Administrative Court[32] rejected the opinion of the relevant ministry regarding the application of Chinese tax treaties to Hong Kong, on the ground that the opinion was not given by the authoritative organ. The Court submitted the case to be reconsidered by the lower court.

[30] 286B ECtHR (24 November 1994).
[31] V SA 726/99. [32] III SA 3042/01.

More recently, the Supreme Court relied strongly on the information and the documents obtained from the Ministry of Justice on the relevant case-law in the field of state immunity and the breach of a *jus cogens* norm.[33]

There is nothing in Polish law to exclude the power of the courts to decide whether a statement attached by the government or legislature during treaty approval is a reservation or to determine the scope or legality of a reservation. However, there is no relevant case-law on this issue. In practice, the courts have considered Polish reservations to a treaty, but have not examined their legality. For example, the Supreme Administrative Court in the judgment of 9 October 2008[34] interpreted the concept of 'a person leaving Polish customs area' contained both in Polish law and in the Polish reservation to the Convention on Temporary Admission, Attachment C Article 9, paragraph 2 (26 June 1990). The Court referred to the text of the reservation in the official announcement of 21 May 2002 published in the Journal of Laws.[35] However, since the reservation was officially published, there was no need to discuss its validity.

The courts sometimes refer to treaties to which Poland is not a party when interpreting or applying domestic law, including constitutional matters. They use these treaties as an additional argument to prove the existence of an international standard in the area in question. For example, the courts invoked the Revised Charter of Social Rights or the Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine of 1997.[36]

## 2.2 International Agreements not Formally Approved as Treaties

The Council of Ministers may conclude agreements of an executive nature. A particular minister may also enter into such agreements, but will need the consent of the Council of Ministers.[37] Those agreements do not require ratification of the President or any involvement of the Parliament in the treaty-making process. They are, however, outside the system of 'the sources of universally binding law' as they are not enumerated in Article 87 of the Constitution. Accordingly, such agreements only bind organizational units subordinated to the government or to a particular minister, and cannot have any direct effect on relations outside the system of public administration. In particular, as the Constitutional Tribunal confirmed,[38] non-ratified agreements cannot create any rights, claims or obligations for individuals and cannot be directly enforced by the courts. These treaties have to be implemented through legislation, statutes, regulations or executive

[33] *Natoniewski* case, IV CSK 465/09, the judgment of 29 October 2010, see section 3 below.
[34] I GSK 1057/07.
[35] See also the judgment of the Supreme Court (IV CK 495/03).
[36] See for example, the judgment of the Constitutional Tribunal of 23 April 2008 (SK 16/07) on freedom of expression and medical ethics, referred to section 4.3 below.
[37] See Article 146, para 4 (10) of the Constitution cited above.
[38] For example, K 33/02, *the Bug-River Judgment* of 19 December 2002; Ts 168/03 of 14 January 2004.

orders passed by the government or the ministers. There is a risk, as many authors point out, 'that the Parliament does not adopt the statute required in time or that it changes its content compared to the agreement'.[39] Implementing legislation, however, can be reviewed in regard to its conformity to the Constitution. That may lead to indirect constitutional control of a treaty. It is, however, doubtful whether in case of omission individuals could request implementation. According to the Constitutional Tribunal, individuals may not invoke Article 9 or 91 of the Constitution, since these articles do not create any individual rights or freedoms. The Tribunal expressly excluded the possibility of using the constitutional complaint to control the failure of state organs to act in such cases.[40]

Once a treaty is implemented it may give rise to legitimate expectations of individuals. In the judgment of 19 December 2002 concerning the so-called 'Bug River claims'[41] the Constitutional Tribunal held:

> Although the Polish Committee of National Liberation was not a constitutionally legitimate organ of a sovereign State, the agreements concluded by the Committee with the governments of the Soviet Republics—Lithuania, Belarus and Ukraine (the so-called 'republican agreements,' which were not promulgated in the Journal of Laws), together with the intergovernmental agreement of 21 July 1952, created legitimate expectations of Polish nationals as regards the domestic legal regulation of compensation for the loss of property beyond the Bug River. The agreements allowed the Polish legislator unfettered discretion as to how to regulate the issue of compensation.[42]

The Tribunal added that the agreements 'cannot per se constitute the legal basis for a substantive right of repatriates for compensation' since, as not ratified nor promulgated treaties, they did not constitute 'a part of the internal legal order of the Republic of Poland'. However, the Tribunal found that the agreements 'gave rise to legitimate expectations of the Polish citizens that internal law would regulate financial settlements due to the loss of property in the aftermath of the Second World War'. The judgment of the Constitutional Tribunal confirmed that non-ratified treaties are not irrelevant for internal law. It reaffirmed the obligation of state organs to carry out a binding international agreement, even if it does not belong to the domestic legal order. In other words, the Tribunal confirmed the principle of respect of international obligations enshrined in Article 9 of the Constitution.

[39] W. Czapliński, *International Law and the Polish Constitution* in M. Wyrzykowski (ed.) *Constitutional Essays* (Warszawa: ISP, 1999) 301.

[40] Ts 168/03 of 14 January 2004, para 3; SK 12/98, judgment of 8 June 1999.

[41] K 33/02.

[42] Under republican agreements Poland undertook to compensate those who had been 'repatriated' from the former Polish provinces, the 'territories beyond the Bug River' and had had to abandon their properties. Since 1946, Polish law has entitled those repatriated in such circumstances to compensation in kind. However, the number of the people involved was huge (around 1,240,000) and up till 1990 not all of them were compensated. The law adopted in 1990 even reduced their chance to be compensated. In such circumstances the Polish Ombudsman addressed the Constitutional Tribunal, arguing that this situation violates inter alia the constitutional principle of certainty of law, principles of reliance or the protection of legitimate expectations.

The non-fulfilment of the state's obligation contained in a non-ratified treaty, in such cases, may lead to a compensation complaint under Article 77 of the Constitution[43] and Article $417^1$ of the Polish Civil Code establishing responsibility for legislative acts or their omissions. The failure of state organs to implement republican agreements was one of the first cases dealt with by the courts under these provisions.

Some courts gave effect to non-ratified treaties due to a clause authorizing the application of an international agreement inserted in a particular statute. The judges probably assumed that the reference effectuated the incorporation of the treaties. For example, the Supreme Administrative Court accepted the effect of such a statutory reference in the judgment of 17 May 199.[44] The case concerned the expropriation decisions of the Minister of Finance taken as a result of executing the indemnity agreement of 1960 concluded (by signature) after World War II between the governments of the United States and Poland (the treaty concerned property claims of the US citizens towards Poland). The treaty provided that in the period of 30 days after its coming into force, the government of the People's Republic of Poland shall pay the sum of $40 million in order to compensate all financial claims against the Polish government put forward by US citizens, be they legal or natural persons, by reason of nationalization or other ways of expropriation of their property, which had taken place before the coming into force of the treaty. The American government was obliged to pay proper compensation and forward a proper note of release to the Polish government, which should protect it from further claims. A citizen who took part in the procedure was obliged to waive his or her property rights by signing a specific declaration. The Court found that the estate in question had not become state property on the basis of the treaty since the treaty was not ratified; the transfer of the property required statutory form to be valid. However, the Court accepted the effect of the treaty derived from the Law on Registering the Rights of the State Treasury in Land Registers of 1968. Article 2 of the said statute authorized the Minister of Finance to pass administrative decisions confirming the transfer of real estate to the State Treasury on the grounds of an international agreement regulating reciprocal financial claims. These decisions allowed for registering the ownership rights in the Land Register. The statute referred generally to agreements concluded by the Polish government with governments of other states. According to the Court, there was no reason to maintain that the notion that 'an international agreement' has to be understood as 'an international agreement that had been ratified and promulgated in the Journal of Laws'. On the contrary, one could reach the conclusion that a statute was adopted because international agreements regulating reciprocal financial claims are not a sufficient legal basis for registering the transfer of real estate property from the citizens of foreign countries to the State Treasury in Land Register. The decision based on the

[43] Article 77 reads: 'Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law. Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.'

[44] OSA 2/98.

statute referred to the non-ratified treaty as a valid ground for registering state ownership of the property. Moreover, the case demonstrates that the court fully recognized the effects of the performance of the treaty. It took the declarations submitted by individuals as fully effective, ie depriving them their property rights.

The same reasoning appears in the decision of the Constitutional Tribunal of 24 October 2000,[45] which rejected a complaint on non-concordance of the indemnification agreement of 1960 to the Constitution. The Tribunal held that the said treaty had been executed and its legal effects were irreversible. To rebut the legality of some of its obligations would be to disrespect international obligations contrary to the Constitution. As a result, the declarations (which were not obligatory) remain effective.

There are also judgments that explicitly refuse to acknowledge the effect on non-ratified treaties of general references to treaties. The Supreme Court in its judgment of 29 November 2000[46] considered the effect of the reference contained in Article 1, paragraph 2 of the statute on Private International Law of 1965. Under Article 1, paragraph 2, the statute is not applicable if an international agreement to which the Republic of Poland is a party provides otherwise. The Court decided that this provision could not form the legal basis for applying the Polish–German agreement on the rules applicable to Polish citizens delegated to work in Germany, since it was not ratified. According to Article 1, paragraph 2:

> [The statute] cannot infringe on the general rule enshrined in Articles 87 and 91 of the Constitution which stipulate that a ratified international agreement is a source of generally binding law. This rule cannot be overruled by an ordinary statute that broadens the scope of international agreements considered to be the sources of generally binding law by including non-ratified agreements therein.

The decisions discussed above demonstrate that the domestic effects of a non-ratified treaty depend strongly on the specific circumstances of the case.

## 2.3 Legal effects of Ratified Treaties

Under the Constitution of 1997 ratified treaties, after their promulgation in the Journal of Laws, are accepted into domestic law. In that regard, the courts refer to Articles 87 and 91 of the Constitution and repeat the same formulas. Article 87 of the Constitution states that ratified treaties become universally binding law. Article 91, paragraph 1 clearly establishes the principle of direct applicability of all ratified treaties. One of the consequences of that principle is that treaty provisions are considered to confer rights or obligations on individuals and, consequently, could

[45] SK 31/99.

[46] I PKN 107/00. In an earlier judgment of 29 December 1999 (I SA/Po 3057/98), the Supreme Administrative Court refused to acknowledge the direct effect of a reference contained in Article 80, para 1 of the 1989 Customs Law with respect to a non-ratified treaty (Agreement on Provisional Application of the Additional Protocol No 4 to the CEFTA Agreement). The Court did not comment on its finding, neither considered the legal character of the above-mentioned agreement, nor the effect of its provisional application.

be applied by the courts as an independent legal basis for judicial decisions.[47] However, the courts should, at first, endeavour to interpret the statute so as to avoid a conflict with the treaty and find a way to apply both simultaneously. If amicable interpretation is impossible, the conflict must be resolved in favour of the treaty. The courts apply the treaty norm and set aside the conflicting statutory norm without submitting the relevant question to the Constitutional Tribunal or waiting for the amendment or repeal of the statute.[48]

Article 91, paragraph 1 of the Constitution defines three conditions for the direct application of a treaty norm: the treaty should be ratified, promulgated in the Journal of Laws, and the norm should be suitable for direct application (not requiring any further implementation). In other words, a treaty provision has to be formulated in such a manner that it allows the courts as well as other state authorities to apply it without waiting for any further legislation.[49]

The place of a ratified treaty in the legal system depends on the procedure by which it was ratified.[50] Under Article 91, paragraph 2 in case of conflict, a treaty ratified upon prior consent granted by statute has precedence over statutes.

## 2.4 The Doctrine of Self-executing Treaties

The concept of self-executing treaties had become well established in Polish judicial practice long before the 1997 Constitution entered into force. However, we will confine ourselves to the developments taking place under the current Constitution, particularly Article 91, paragraph 1, which reflects the concept of self-executing treaties.

In the majority of cases the courts more or less repeat the formula of Article 91, paragraph 1. In the judgment of 21 November 2003[51] the Supreme Court referred to the conditions of direct applicability in the following manner:

> The so-called formal condition is that the treaty must be duly ratified and published in the Journal of Laws. The substantive condition requires the completeness of the treaty provision that enables its operation without any additional implementation.

[47] Eg in the judgment of 30 November 2005 (II OSK 964/05) the Supreme Administrative Court considered whether the refusal of state organs for the foreigner permitted to stay on a temporary basis in Poland and not satisfying the criteria set out in the statute for permanent residence infringe upon Article 8 of the European Convention on Human Rights.

[48] Pursuant to Article 193 of the Constitution, 'Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.' At the beginning Article 193 was a source of controversy between the Constitutional Tribunal and the lower courts. The Constitutional Tribunal interpreted the term 'may' as an obligation on the lower courts to submit such questions. The prevailing interpretation of this provision is that the lower courts should submit to the Constitutional Tribunal questions on the conformity of any legal acts with the Constitution. See L. Garlicki, K. Wójtowicz, M. Masternak-Kubiak (n 1) 7–8.

[49] See section 2.5 below.

[50] See section 4.1 below.

[51] I CK 323/02.

In the judgment of 19 December 2002 on the Bug River claims[52] the Constitutional Tribunal held that the provisions of the so-called republican agreements are non-self-executing. The Tribunal stated: 'The structure of those agreements and the scope of obligations accepted thereby do not allow recognizing them to be a direct legal basis for compensatory claims of the repatriates and their heirs.' Those provisions required transposition into internal law. According to the Tribunal, a treaty norm could be applied directly if it contained all normative elements essential for its judicial application. The Tribunal added that such a view is confirmed by Article 91, paragraph 1 of the Constitution, which stipulates that an international agreement shall be applied directly, unless its application depends on the enactment of a statute.

The Supreme Administrative Court of 8 February 2006[53] concerning the domestic effects of Article 33 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) offers a much broader reflection on the concept. The TRIPS provision reads: 'The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.' According to Polish law of 1972 the patent was protected only for 15 years. The Court explained that two elements are decisive for direct application and direct effect of a treaty norm. One is the intention of the parties to a treaty and its terms (the way the rights or obligations are formulated). The second is the constitutional regulation on incorporation of international law into domestic legal order.

The Court found that in view of the wording of Article 33 of the TRIPS, it was not the intention of the signatories to make its application dependent upon further transformation into domestic law. Moreover, Article 1 gives the parties discretion to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice. They are obliged to adopt a special law only if they want to afford more extensive protection than is required by the Agreement. Also the wording of the other provisions of the Agreement indicates that they are addressed directly to individuals. For example, Article 33 takes into account the situation of the owner of a patent. It has to be read in conjunction with the principle of immediate patent protection enshrined in Article 70, paragraph 2, which also does not require any further implementation.

Responding to the argument of the applicant that Article 33 is not complete because there are issues not regulated in Polish law, eg registration, fees, procedures for extension of a patent protection over 15 years etc, the Court answered that Article 33 satisfies the criteria of precision, clarity and completeness. The Court stated:

> [T]he requirement of completeness of an international norm has to be referred to the norm itself, precisely, to its scope. Article 33 regulates solely the period of the patent protection and in this respect the regulation is complete. It does not require to be complemented by domestic law, because the term of the patent protection could be fixed under this provision, if the protection was not extended by domestic law. The whole subject matter of a norm

[52] K 33/02. [53] II GSK 54/05.

does not have to be exhaustively regulated in international law and in domestic law, but the norm of international law itself has to be complete.

The Court dealt then with constitutional requirements, referring again to Article 91, paragraphs 1 and 2 of the Constitution (dealing with ratification and promulgation). The Court held: '[T]he direct application of international treaty to internal relations is excluded if "its application depends on the enactment of a statute." This dependence may result equally from the will of the treaty parties or from the lack of qualifications of a treaty norms.' In this manner the Court tried to reconcile two main elements distinguished at the beginning of its reasoning.

More stringent conditions of precision and completeness are applied to criminal responsibility. The Supreme Court addressed this issue in the judgment of 19 April 2004[54] concerning Article 1 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949. The Court found that Article 1 was drafted in a manner that excludes its direct application by criminal courts. The wording of that provision indicates that it was directly addressed only to the state, establishing its obligation to adopt corresponding penal norms. Under Article 91, paragraph 2 of the Constitution, direct application of an international penal norm is only possible when that norm, in addition to defining the crime, determines the penalty as well. Limitations on the self-executing effect of international treaties in the area of criminal law result from the particular characteristics of that branch of law. Legal norms establishing criminal responsibility, either domestic or international, must be drafted in a precise and complete manner.

## 2.5 Private Parties and Treaties

The concept of self-executing treaties is closely bound up with the right of private parties to invoke and enforce treaties in litigation. In the resolution of 19 February 1997[55] the Supreme Court noted:

> [There are no obstacles to recognizing] that the provisions of ratified international treaties could be, and even should be, directly applied in the Polish internal legal order—particularly in the area of individual rights and freedoms. This assertion concerns all treaty norms that, due to their nature, are suitable for direct application. In the legal writings, these international provisions are qualified as self-executing, ie creating immediate entitlements for citizens and apt to be applied by the State bodies, especially by the courts and administrative organs.

In the judgment of 10 September 1997 the Appellate Court in Warsaw[56] held that:

> international agreements are obliging both the ratifying States and individuals whose spheres of activity are regulated. Therefore, it is not necessary that the parties—in the private contract—recall the provisions of the binding international agreement as a basis for resolving the disputes between them and satisfying the judicial decision.

[54] V KKN 353/00. [55] I KZP 37/96. [56] I ACz 813/97.

In another decision on 21 November 2003[57] the Supreme Court confirmed that 'international agreement provisions are effective not only with regard to the States, but may provide an independent ground of claims for damages raised before domestic courts (so-called self-executing norms)'.

Ratified treaties are universally binding law with an established position in the hierarchy of legal norms. They could be invoked before domestic courts by private parties against another private party or state's organs, including a constitutional complaint to the Constitutional Tribunal.[58] On the other hand, state's organs may apply a treaty norm against individuals.[59] The courts do not apply different tests to determine standing and private rights of action for a treaty than they do when a party is relying on a statute or other domestic law. However, the court must establish whether the invoked norm has an adequate legal rank, whether it is contained in a duly ratified and officially published international treaty, and whether its provisions meet the criteria of direct applicability. Once those questions are answered in the affirmative, the court would not differentiate between the legal effects of international and domestic norms. The violation of a treaty constitutes an unlawful act and triggers such legal consequences as are provided for a violation of a similar domestic law. An important remedy was introduced in the 2004 Amendment to the Civil Code (Articles 417–421). New provisions extend the scope of the state's civil liability for unlawful actions or omissions of public authorities or agents. As a result, an affected private party may sue the state for the breach of a ratified treaty, including the European Union's secondary law. At the moment it is uncertain whether the concept of unlawful act or omission could encompass other binding norms of international law, for example customary law.

## 3. Customary International Law

It could be said that the direct application of international customary law is well grounded in Polish case-law, beginning with the judgments of 22 October 1925[60] on diplomatic immunities and of 2 March 1926[61] against Czechoslovakia on state immunity. In the judgment of 15 May 1959[62] the Supreme Court held that 'Polish courts generally may not adjudicate in the litigations against foreign states by authority of binding international custom which excludes to sue foreign State before domestic courts.'[63] In the judgment of 10 October 1979[64] the Supreme Court dealt with diplomatic immunities. It held that:

[57] I CK 323/02.
[58] Article 77, para 1 of the Constitution.
[59] For example, in the judgment of 15 February 2007 the Regional Administrative Court (III SA/Wa 4280/06) held that the landlord who made the property lease for diplomatic purposes (for the Embassy) is not under Article 23, para 2 of the Vienna Convention on Diplomatic Relations exempted from taxes (VAT).
[60] Orzecznictwo Sądów Polskich, 1926-V, No 342.
[61] Orzecznictwo Sądów Polskich, 1926-V, No 418.
[62] CR 1272/57.
[63] Similarly, the judgment of the Supreme Court of 26 March 1958 (2 CR 172/56).
[64] III CRN 139/79.

under Article 1111, paragraph 1 of the Civil Procedure Code members of the diplomatic staff of the representations of foreign States in PRL [the Polish Peoples Republic] are exempt from the jurisdiction of Polish courts and they cannot be sued, whereas the lawsuit against such persons should be dismissed (Article 1099 of the Code).

In addition, in the judgment of 18 May 1970[65] the Supreme Court found that:

in international relations, precisely in the relations between the subjects of civil law belonging to different States, first of all the provisions of international law, either relevant conventions or customs, are applied. Only when there are no norms like those the national law or foreign law should be applied.

The Constitution of 1997 does not directly address the relationship between domestic law and customary international law. The prevailing opinion of scholars is that customary law is automatically incorporated into the Polish legal order. This view found its solid basis in Article 9 of the Constitution. Some more specific bases for the direct application of customary law could also be found in statutes. For example, the provisions of Criminal Procedure Code or Civil Procedure Code refer to jurisdictional immunities of diplomats,[66] the Law on Excise Duties of 2004,[67] the Law on Local Taxes or Duties of 1991,[68] and the Road Traffic Law of 1997[69] concern the taxes or duties exemptions for diplomats.

Diplomatic immunities and state immunity are the main areas where customary law is applied. However, court practice under the present Constitution is small. One example of the application of customary international law is the judgment of the Supreme Court of 11 January 2000[70] on the jurisdiction of Polish courts in respect to foreign states. This case concerned the legality of the Embassy of Chile's dismissal of an employee. The Supreme Court held that Polish courts have jurisdiction in cases brought by Polish citizens against a foreign embassy on questions of legality of the dismissal. No reasons were given for this statement except for a laconic reply that state immunity does not encompass state's acts of a private law character. The Court had not deferred to the government or legislature on the existence or content of customary international law in respect to state immunity, nor had relied on Article 9 of the Constitution.

In the judgment of 13 November 2003[71] the Supreme Court confirmed the lower court's decision on the jurisdiction of the Polish courts. The Court held that the Russian state, as a party to the contract on the exchange of the land property of 8 October 1960, 'did not act as a subject of diplomatic relations but as a private party (*acta jure gestionis*) whose acts were not covered by jurisdictional immunity.' The Court continued:

The substance of the present case is to decide on the validity and effectiveness of that contract on the basis of civil law. These matters are adjudicated only by civil courts. It

[65] ICR 58/70. [66] Article 1111, para 1. [67] Article 25, para 1.
[68] Article 13, para 2. [69] Article 77, para 3.
[70] I PKN 562/99. [71] I CK 380/02.

follows from the very nature of the case, the essence of which is to adjudicate on the legal status of the real estate, that the decision rendered by the court, under no circumstances may infringe upon sovereignty of the foreign State [State immunity], protected by the Vienna Convention on Diplomatic Relations of 18 April 1961 [...], nor diplomatic immunity of the diplomatic post or representatives.

In the other case concerning the same parties and the same real property the Appellate Court discussed the legal status of the trade representations of the Soviet Union.[72] The Court found that the Russian trade representation was established in Warsaw upon a decision of the Russian government and the consent of the receiving state (Republic of Poland). It had conducted its functions for many years by, for example, entering into legal transactions. Therefore, the Court stated, 'it has to be considered that by constant practice an international custom had existed, and the said representation was the organ of the Soviet Union acting abroad'. The Court further noted:

[T]he Embassy as a permanent diplomatic mission is the organ of the foreign State which represents it directly in the relations with other States. The Embassy does not possess legal personality in the internal law of the receiving State. However, it performs acts (with some exceptions) in the name of and on behalf of sending State. There was a custom and constant practice also in that area.

The customary international law was also applied in two recent cases concerning state immunity in tort proceedings involving alleged German war crimes committed during World War II on the territory of Poland. In *Krzysztof Skrzypek v Federal Republic of Germany*[73] the judges confirmed that sovereign state immunity applies to acts carried out in the exercise of public powers (*acta de jure imperii*), even if they are contrary to international law. To distinguish *acta de jure imperii* and *acta de iure gestionis*, the courts relied strongly on the concept of 'civil matters' developed in a similar case by the European Court of Justice.[74] The European Court of Justice explained that 'civil matters' within the meaning of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 (and the Regulation of the Council No 44/2001) do not cover a legal action brought by natural persons in a contracting state against another contracting state for acts of armed forces in the course of an armed conflict in the territory of the first state.

The same reasoning was followed by the lower courts in *Winicjusz Natoniewski v Federal Republic of Germany*.[75] In a cassation procedure the petitioner argued strongly that a breach of a *jus cogens* norm demonstrates that the norm is not recognized as *acta de jure imperii*. In the cassation judgment of 29 October 2010, the Supreme Court[76] clarified that customary international law on state immunity

[72] Judgment of 14 June 2004, I ACa 1707/03.
[73] Court of Appeal judgment, I ACz 1097/09.
[74] C-292/05 *Irini Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias* [2007] ECR I-1519.
[75] The Court of Appeal in Gdansk, judgment of 13 May 2008.
[76] IV CSK 465/09.

is determined by Article 9 of the Constitution and Article 38 of the ICJ Statute, which require uniform practice and *opinio juris*. The Court then carefully studied the European Convention on State Immunity (1972), the UN Convention on Jurisdictional Immunities of States and their Property (2004), the national law of the other states, the doctrine on state immunity and the judgments of the international and domestic courts. The court discussed broadly the divergent national practice and opinions in ECtHR cases[77] and concluded that Germany enjoys immunity in cases concerning torts committed by German armed forces on Polish territory during the World War II.

## 4. Hierarchy

The position of a treaty within the Polish legal order depends on the procedure of its conclusion. For these purposes treaties can be divided into ratified and non-ratified treaties. As mentioned above, non-ratified treaties, although they bind the state, do not possess normative character and are outside the legal order (ie universally binding norms).

The rank of a ratified treaty depends on the procedure of ratification. Ratification is within the competence of the President of the Republic. There are four modes of ratification:

(1) ratification upon prior consent granted by statute under Article 89, paragraph 2;
(2) ratification upon prior consent granted by statute and under Article 90, paragraph 2 (applied to treaties delegating state powers on international organization);
(3) ratification upon prior consent passed by national referendum Article 91, paragraph 3; and
(4) ratification without the consent of the Parliament (so-called 'simple ratification').

The first three categories of treaties enjoy a supra-statutory rank. The rank of treaties ratified under Article 89, paragraph 2 and Article 90, paragraph 2 are grounded in Article 91, paragraph 2. This provision provides that 'an international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes'.[78] This means that treaties take precedence as well over all sub-statutory instruments, in particular regulations passed by the Council of Ministers and other state organs. In

[77] Cases discussed include *McElhinny v Ireland* 2001-XI ECtHR (21 November); *Al-Adsani v United Kingdom* 2001-XI ECtHR (21 November); *Kalogeropoulou and others v Greece and Germany* (2002) available at <http://www.echr.coe.int>; *Prefecture of Voiotia v Germany* (*Distomo* case) (1997) 50 Revue Hellénique De Droit International 595 (Court of First Instance of Leivadia, 1997) ; *Margellos v Germany* ; *Von Dardel v Soviet Union* 623 F Supp 246 (Dist DC, 1985); *Helen Liu v China*, 892 F 2d 1419 (CA 9, 1989); *Hugo Princz v Germany*, 813 F Supp 22 (Dist DC, 1992; *Smith v Libya*, 101 F 3d 239 (CA 2, 1996); *Ferrini v Germany*, 87 RDI 2004 539 (Italy, Corte di Cassazione, 2004); *Jones v Saudi Arabia*, 2003 WL 22187644 QBD (High Court, 2003); and *Bouzari v Iran*, 124 ILR 428 (Ontario Superior Court of Justice, 2002).

[78] But note that a treaty ratified upon prior consent granted by statute has a higher rank under the Constitution that the statute.

other words, in case of an irreconcilable conflict, a treaty norm prevails over a statutory or sub-statutory norm, whether prior or subsequent to the treaty.

The Constitution was silent on the rank of treaties concluded on prior consent passed by national referendum. Their position was discussed by the Constitutional Tribunal in the judgment of 11 May 2005 on the constitutionality of the Polish Accession Treaty to the European Union,[79] which was ratified under Article 90, paragraph 3. The Tribunal gave a straightforward answer: the position of such treaties is equal to treaties ratified upon prior statutory consent.[80]

The position of treaties ratified without the consent of the Parliament, ie under Article 89, paragraph 2, is still not clear. A contrario from Article 91, paragraph 2, such treaties cannot take precedence over statutes. The Constitutional Tribunal confirmed this logic in the judgment of 14 January 2004.[81] On the other hand, it could be argued that their respect is guaranteed under Article 9 of the Constitution. In consequence, they should prevail over statutes. There is no confirming practice and the views of scholars remain divided.[82]

The provisions of treaties must conform to the Constitution according to Article 91, paragraph 2 and Article 188 of the Constitution. The Constitutional Tribunal may review the constitutionality of a treaty that has already been ratified, published and become a part of the domestic legal order. If the Constitutional Tribunal finds that a treaty is unconstitutional, it cannot invalidate that treaty as such, but its judgment would bar application of that treaty in domestic relations. Such a ruling would also impose an obligation on the competent authorities to take the necessary steps to amend or renounce the treaty.

This stance was confirmed in the judgment of the Constitutional Tribunal of 11 May 2005[83] on the EU Accession Treaty. The Constitutional Tribunal emphasized that given its supreme legal force provided for in Article 8, paragraph 1,[84] 'the Constitution enjoys precedence of validity and application within the territory of the Republic of Poland'. The precedence of international agreements over statutes in no way signifies an analogous precedence of these agreements over the Constitution. It seems obvious that the same logic would apply to a conflict arising under

[79] K 18/04.

[80] The Tribunal explained that statutes authorizing the ratification of an international agreement are adopted with observance of the appropriate procedural requirements governing the decision-making process within the Sejm and the Senate. These requirements, as regards the regulation contained in Article 90(1) and (2) of the Constitution, which refer to international agreements concerning the delegation of competences of Polish public authority organs to an international organization or international organ, are significantly strengthened—in comparison with the ratification mentioned in Article 89 of the Constitution. In the discussed field, the Sejm and Senate function as organs representing the nation-sovereign, in accordance with the principle expressed in Article 4(2) of the Constitution. The reference to a sovereign decision of the nation is even more intensive and direct where consent for the ratification of an international agreement concerning the delegation of certain competences is not expressed by statute (Article 89(1), read in conjunction with Article 90(2), of the Constitution) but rather via the procedure of a nationwide referendum (Article 90(3)).

[81] Ts 168/03, para 3.

[82] For discussion see L. Garlicki, K. Wójtowicz, M. Masternak-Kubiak (n 1) 8.

[83] K 18/04.

[84] Article 8, para 1 reads: 'The Constitution shall be the supreme law of the Republic of Poland.'

any other norm of international law, including customary law or the decisions of international organizations.

The Constitutional Tribunal further added that if an irreconcilable inconsistency appeared between a constitutional norm and a Community norm (which can be applied by analogy to all other international law norms), the nation as the sovereign, or a state authority organ authorized by the Constitution to represent the nation, would need to decide on: amending the Constitution; causing modifications of the European Community or international law provisions; or, ultimately, Poland's withdrawal from the European Union (or from the treaty).

In the judgment of the Constitutional Tribunal of 27 April 2005[85] an example was given of an irreconcilable conflict between international law and national constitutional law. Actually, the judgment did not concern constitutionality of the international norm itself, but the legislation implementing it.[86] The Tribunal made clear that, should a conflict between the implementing norm and the Constitution arise, unconstitutional statutory provisions would be annulled and the treaty or the decision would not be implemented until a constitutional amendment had been adopted. The treaty itself is thus affected. The case in question concerned the EU Framework Decision on the European Arrest Warrant of 2002. It was implemented in 2004 by an amendment to the Polish Code of Criminal Procedure. The amendment provided for the extradition of every person, including Polish citizens, demanded under the European Arrest Warrant procedure by another EU member state. The Constitutional Tribunal held the amended provisions of the Code invalid because they were contrary to Article 55, paragraph 1 of the Constitution, which forbade the extradition of Polish citizens. However, the Tribunal allowed the application of the invalid provisions of the Code for the next 18 months (under Article 190, paragraph 3 of the Constitution)[87] and indicated that, during this period, the Parliament should adopt a constitutional amendment. Such an amendment was adopted at the end of 2006. The above-mentioned judgment shows that Article 190, paragraph 3 can play a useful role in resolving constitutional conflicts in a manner compatible with the requirements of international law.

## 4.1 Reconciling or Conforming Domestic Law to International Law

The main doctrine developed to reconcile domestic law with international law is the doctrine of friendly or sympathetic interpretation. At first, it was not even

[85] P 1/05.

[86] In judgment of 11 May 2005 the Tribunal emphasized that the Framework Decision on the European arrest warrant and the surrender procedures between member states may not be reviewed from the perspective of its conformity with the categorically formulated provision of Article 55(1) of the Polish Constitution, given the generality of this Framework Decision and the solely directional nature of its disposition.

[87] Pursuant to Article 190, para 3: 'A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act [...]'

named but was applied by the courts to avoid conflicts. There are many examples of the indirect application of treaties in Polish practice; that is to say application for the purposes of interpreting domestic law.[88] A judgment of 11 January 1995 of the Supreme Court should be highlighted in this regard since it formulated a general guideline concerning the application of the European Convention of Human Rights. The statement was later on repeated by many other judgments: 'Since the accession of Poland to the Council of Europe, the case-law of the European Court of Human Rights in Strasbourg should be applied as an essential source of interpretation of the provisions of the Polish domestic law.'[89]

It is also worth mentioning the position of the Constitutional Tribunal towards the EC/EU law before Polish accession in 2004.[90] Adjudicating on the constitutionality of the provision of the Civil Service Law of 1996 requiring women to retire at the age of 60, while men may work up till the age of 65, the Tribunal examined the provision in the light of the non-discrimination standards of European Court of Justice case-law. The Tribunal observed that Poland was not bound by EC law as yet. However, the Europe Agreement of 1992 (Articles 68 and 69) obliged Poland to take all the necessary efforts to ensure the consistency of its law with the law of the EC. This obligation lies not only with the government and the Parliament but also with the courts. They are required to interpret national law as far as possible in a loyal, harmonious way within the spirit of EC law.

The Constitutional Tribunal repeated this statement in Judgment K2/02 of 28 January 2003. The case concerned the concordance of a statutory prohibition on advertising and promoting alcoholic beverages to the Constitution and Article 10 of the ECHR. In this case, the Tribunal confirmed the principle of friendly interpretation towards the EC law. But, the Tribunal derived this decision not only from

[88] See eg the decision of the Supreme Administrative Court of 3 September 1997 (III RN 38/97) in which the Court interpreted the Code of Administrative Procedure in the light of Article 6 ECHR finding that whenever there were serious doubts regarding the admissibility of a recourse, the Court should proceed on the merits since the purpose of the Code seen in the light of Article 6 of the Convention is to allow the citizen to fulfil its right to be heard by an independent tribunal; judgment of the same court of 4 February 1997 (III RN 59/96), interpreting the statute of the Supreme Administrative Court in such a way as to provide for judicial control of an administrative refusal to send a pensioner for spa treatment; decision of the Supreme Court of 11 January 1995 (III ARN 75/94), in which the Court held that the decision to reject a plea for exemption from court costs should be especially carefully assessed in order to exclude barring the individual from access to justice; similarly, the Supreme Administrative Court judgment of 5 December 2001 (II SA 155/01) concerning a journalist's access to official documents; judgment of 13 November 1997 (I CKN 710/97) of the Supreme Court in which the Court interpreted the Unfair Competition Law of 1993 in the light of Article 8 of the Paris Convention of 1883 on industrial property protection as revised by the 1967 Stockholm Act. In the judgment of 17 November 2004 the Supreme Administrative Court held that the concept of pattern, model or sample in the Customs Code of 1997 'has to be understood in the context of Article II of the International Convention to Facilitate the Importation of Commercial Samples and Advertising Materials of 1952 (...) using in that regard the criterion of "negligible value"'. In the judgment of 22 November 2007 the Supreme Court interpreted Polish Transport Law of 1984 in conformity with the *Convention on the Contract for the International Carriage of Goods by Road* (CMR) of 1956, and to interpret the provisions of the said Convention the Court referred to the relevant judgments of French, Austrian and German courts.

[89] III ARN 75/94.

[90] Judgment of 29 September 1997 (K15/97).

Articles 68 and 69 of the Europe Agreement but also from Article 91 of the Constitution. According to the Tribunal, the direct application of treaties referred to in Article 91, paragraph 1 of the Constitution encompasses the application of the treaty to establish the constitutional standard of judicial review. Moreover, interpreting a domestic law contrary to the principles of EC law would violate the principle of the rule of law.

More often than Article 91, paragraph 1, Article 9 of Constitution is viewed by the courts as a basis for the obligation of friendly interpretation. For example, in the judgment of 26 August 1999,[91] the Supreme Administrative Court held that Polish accession to the Geneva Convention on Refugees of 1951 by the act of the President of the Republic did not amount to ratification. (Actually, it was ratified but the official document referred to accession.) Because of that, the treaty was not directly applied by the Tribunal. However, the Tribunal found that Article 9 of the Constitution obliges state organs to interpret, as far as possible, domestic law in conformity with international law. Consequently, the Tribunal interpreted the Code of Administrative Procedure and the Aliens Law in such a way that failure to observe a time limit set in the said statutes could not be the reason to refuse to grant refugee status to an alien. Thus, the meaning of the provision was compatible with the spirit and object of the Convention, which provided for refusal to grant refugee status only if the conditions specified therein were met.

The doctrine of friendly interpretation was recently developed by the Constitutional Tribunal in the Judgment of 11 May 2005.[92] The Tribunal referred to European law, but its logic could be applied to international law in general. The judges noted that Article 9 of the Constitution and general principles of international law require respect for international law. Therefore, Polish law (including the Constitution) should be interpreted in a manner 'friendly' toward international and European legal obligations. There are, however, certain limits:

> The principle of interpreting domestic law in a manner 'sympathetic to European law,' as formulated within the Constitutional Tribunal's jurisprudence, has its limits. In no event may it lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantee functions realized by the Constitution. In particular, the norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of Community provisions.

## 4.2 Use of International Law to Interpret Constitutional Provisions

As shown above, international law is often used by Polish courts to interpret domestic law, including constitutional provisions, especially those guaranteeing individual rights. Since many provisions of human rights treaties were reproduced almost verbatim in the text of the Constitution, the Constitutional Tribunal often finds that a statute is contrary both to the Constitution and to the treaty. For

[91] V SA 708/99. [92] K 18/04.

example, in a judgment of 31 January 2005[93] the Tribunal held that the provisions of Customs Law of 2004 were contrary to Article 2 of the Constitution, in conjunction with Article 15, paragraph 3(3) of the International Covenant of Civil and Political Rights of 1966. Another example is the judgment of 11 May 2007[94] where the Tribunal invalidated several dispositions of the Lustration Law of 2007 as contrary to the Constitution and the European Convention on Human Rights.

Recently, the Constitutional Tribunal struck down statutes as unconstitutional and found it unnecessary to examine separately the statute's conformity to human rights treaties. For example, in the judgment of 27 June 2008[95] on reorganization of intelligence and counter-intelligence services the Tribunal found it unnecessary to refer to Articles 6, paragraph 2 of the European Convention on Human Rights and Article 14, paragraph 2 of the UN Covenant on Human Rights, since the right to a fair trail is enshrined in Article 45, paragraph 1 of the Constitution. However, the Tribunal had to establish the standard of the right protected by the Constitution. In that regard, it referred to human rights treaties and interpreted the constitutional provision in line with those treaties.[96] The Tribunal held similarly in a judgment of 10 July 2008[97] concerning the constitutionality of legislative provisions on public meetings and demonstrations that penalized the lack of notification of so-called 'spontaneous assemblies'. The Tribunal broadly referred not only to the case-law of the European Court of Human Rights, but also to the OSCE guidelines,[98] finding that Article 57 of the Constitution encompasses all those standards. In paragraph 10 the judges emphasized: 'The standards of the Convention may and should be used for construction of the constitutional standard to adjudicate upon its breach by the norms which the court controls.' As the result, the law on petty offences was interpreted in light of those standards to exclude criminal responsibility in specific cases.

The courts have occasionally relied on the jurisprudence of international courts. For example, in the Judgment of 3 June 2008[99] on principles for making case records accessible in the course of preliminary proceedings, the Constitutional Tribunal relied broadly on the jurisprudence of the European Court of Human Rights in Strasbourg to find that it confirmed a broad access of the suspect to case records. The Constitutional Tribunal shared the view that an obligation arising from this jurisprudence guarantees the suspect access to the evidence contained in the records of preliminary proceedings to an extent that is necessary to assess the grounds for a temporary arrest. The right to defence should be the decisive factor in the choice of the part of case records to be made accessible to the temporarily arrested person and defence counsel. All materials of preliminary proceedings justifying

[93] P 9/04. [94] K 2/07. [95] K 51/07.

[96] Similarly the other courts, eg the judgment of the Supreme Court (II KK 187/07), of 9 January 2008

[97] P 15/08.

[98] Office for Democratic Institutions and Human Rights, *Guidelines on Freedom of Peaceful Assembly of 29 March 2007*.

[99] K 42/07.

the motion of a public prosecutor in this respect have to be freely accessible. In the judgment of 23 October 2007[100] on the entitlement to early retirement for males, the Tribunal relied on jurisprudence of the European Court of Human Rights and the European Court of Justice.

The other example is the judgment of the Constitutional Tribunal of 30 September 2008[101] on the permissibility of shooting down a passenger aircraft used for unlawful acts in the event of danger, and where state security is threatened. The Tribunal analyzed relevant international acts, including non-binding documents of the United Nations and of the Council of Europe, such as the UN global strategy on counter-terrorism of 8 September 2006, Security Council resolutions, in particular resolution 1267 (1999) and its successor resolutions, resolutions 1373 (2001) and 1540 (2004), Plan of Action, the Secretary General report of 2006 'Uniting against terrorism: recommendations for a global counter-terrorism strategy',[102] the European Convention on Human Rights of 1950, the European Convention on the Suppression of Terrorism of 1977, amended by the Protocol of 2003, the Council of Europe Convention on the Prevention of Terrorism of 2005, resolutions and declarations of the Committee of Ministers and the Parliamentary Assembly, eg Guidelines on Human Rights and the Fight against Terrorism of 2002, the Opinion of the European Commission for Democracy through Law (Venice Commission) on the Protection of Human Rights in Emergency Situations of 2006 etc. Using these sources, the Tribunal concluded that the obligation to counteract terrorism and the important values of public security and rights and freedoms of the individual do not authorize a more liberal assessment standard than those normally applied.

There are also examples of the Tribunal using non-binding documents as a source of guidelines that should be followed within the framework of domestic law. For example, in the judgment of 23 April 2008[103] on freedom of expression and medical ethics, the Constitutional Tribunal interpreted Polish law in the light of the Council of Europe Convention on Human Rights and Biomedicine of 1997, signed but not ratified by Poland, and a non-binding document of the World Medical Association, the International Code of Medical Ethics, and the numerous judgments of the European Court of Human Rights. In addition, in the judgment of 18 December 2007[104] establishing the content of the right to good administration, the Constitutional Tribunal drew inspiration from the provisions of non-binding documents—Article 17 I 20 of the Code of Good Administration of the EU Parliament of 2001 and Article 41 of the Charter of Fundamental Rights of the European Union. Another example is the judgment of 1 July 2008,[105] where the Constitutional Tribunal found support in the Universal Declaration on Human Rights to prove a constitutional right that no one be forced to assemble or be a member of a trade union (a negative assembly right).

[100] P 10/07. [101] K 44/07. [102] A/60/825. [103] SK 16/07.
[104] SK 54/05 [2.6]. [105] K 23/07.

### 4.3 *Jus Cogens* and Hierarchy within International Law

Except for *Skrzypek* and *Natoniewski*,[106] Polish courts have had no opportunity to adjudicate on *jus cogens* norms of international law. In *Natoniewski* the judges elaborated on the relation between *jus cogens* and state immunity. The Supreme Court discussed the argument that breaching a *jus cogens* norm impliedly waives immunity (including for war crimes and torture) and the hierarchy between *jus cogens* and state immunity.

## 5. Jurisdiction

Article 113 of the Criminal Code is viewed by some commentators as providing a legal basis for universal jurisdiction. Since the provision refers to international treaties, it rather reflects the principle *aut dedere aut iudicare*.[107] Article 113 reads:

> Notwithstanding regulations in force in the place of commission of the offence, the Polish penal law shall be applied to a Polish citizen or an alien, with respect to whom no decision on extradition has been taken, in the case of the commission abroad of an offence which the Republic of Poland is obligated to prosecute under international agreements.

Recently the government has decided to submit a proposal to the Parliament to add to Article 113 the following formula: '. . . or an offence prosecuted under the Rome Statute of the International Criminal Court done in Rome on 17 July 1998'. Taking into account Polish international obligations, its innovative character seems doubtful. Probably the main purpose is to make clear that the most heinous international crimes are covered by the provision. There is no case-law concerning Article 113.

There is no case-law concerning civil actions for international law violations that are committed in other countries. There is no specific legal basis for such cases. They could, probably, come under Article 1096 et seq of the Code of Civil Procedure.

## 6. Other International Sources

### 6.1 Non-binding Declarative Texts

Non-binding declarative texts are used by the courts in interpreting and applying domestic law.[108] For example, when the Regional Administrative Court was asked to interpret several bilateral conventions on the avoidance of double taxation, it had recourse to the OECD Model Convention and the Commentary to the Conven-

[106] Cases discussed in section 3 above.

[107] T. Ostropolski, *Zasada jurysdykcji uniwersalnej w prawie międzynarodowym* [*Principle of Universal Jurisdiction in International Law*] (Warszawa: Europrawo, 2008) part I 5.3.–5.5.

[108] See section 4.3 above.

tion. The Court referred to the context in the meaning of Article 31 of the Vienna Convention. The Court noted that the Model Convention is not a source of law; however, it has an important role in interpreting conventions on avoidance of double taxation based on it. The Court stated:

> Some States view the Model Convention and its commentary as auxiliary means of interpretation or guidelines while the others see it as a context or additional means of interpretation. According to the OECD Council's recommendations Member States are obliged to apply the OECD Model Convention as a base for negotiations, unless one of the negotiating States had made specific reservations or had special reasons not to apply the OECD Model Convention. In such cases subsequent Model Conventions and Commentaries form part of a context, and not a supplementary means in the meaning of Article 32 of the Vienna Convention.[109]

## 6.2 Decisions of International Courts or Tribunals

Except for EU law and the decisions of the European Court of Human Rights, there are no cases where the Polish courts have been asked to apply or enforce a decision of an international court or tribunal. The Polish legal order is only partially prepared to execute the decisions of international courts or tribunals. Recent amendments to the Code of Criminal Procedure of 1997 made it possible to reopen a domestic case due to a decision of an international court or tribunal. Under Article 540, paragraph 3, domestic judicial proceedings that were terminated by a final decision can be reopened for the benefit of the convicted person, if such a need arises out of a decision of an international organ acting on the basis of a treaty ratified by Poland. There is no similar provision in civil procedural law. Article 401 of the Code of Civil Procedure provides that a party to civil proceedings terminated by a final judgment on the merits can request that these proceedings be reopened if the Constitutional Tribunal has found that the law on the basis of which this judgment was given was unconstitutional. These provisions were criticized and caused controversy between the Supreme Court and the Constitutional Tribunal. In 2005, the Supreme Court refused to reopen civil proceedings when asked by an applicant who was successful in the European Court of Human Rights.[110] The Supreme Court did not doubt that:

> A judgment of the ECHR in the complainant's favour does not constitute a ground for reopening of a case. A civil case can be reopened if the proceedings have been tainted with one of circumstances expressly listed in Article 401. A judgment of the [Strasbourg] Court is not listed in the provision. Hence, as the complainant's request has not been based on a statutory ground, it must be rejected.[111]

[109] Judgment of the Regional Administrative Court of 9 September 2009 (III SA/WA 310/09), similarly, judgment of the Supreme Administrative Court of 19 June 2009 (II FSK 276/08).

[110] *Podbielski and PPU Polure v Poland*, Application No 39199/98, judgment of 26 July 2005.

[111] The Supreme Court, judgment of 19 October 2005 (V CO 16/05). See M. Krzyżanowska-Mierzewska, 'The Reception Process in Poland and Slovakia' in H. Keller, *A Europe of Rights* (Oxford: OUP, 2008) 581.

As far as administrative law is concerned, Articles 145, 145a, 146 and 147 of the Code of Administrative Procedure specify situations in which an administrative case can be reopened. They do not contain any specific reference to international law. Such a reference could be found instead in the recently amended Tax Law of 1997. Under Article 240, paragraph 1(10), the tax case could be reopened if 'the final result of the procedure of mutual agreement or arbitration, under a ratified treaty on the avoidance of double taxation or other ratified treaty Poland is the party to has impact on the content of the passed decision'. Article 240, paragraph 1(11) adds that the case could be reopened if 'the judgment of the European Court of Justice has impact on the content of the passed decision'.

The decision of an international court binds state organs on an international plane and could be executed through different means. It often happens that as a consequence of the decisions of the European Court of Human Rights the law is amended. This was the case in *Kudła v Poland*[112] on the lack of domestic remedy against excessive length of proceedings, *Broniowski v Poland*[113] on the effects of the republican agreements, and *Hutten-Czapska v Poland*[114] on the excessive burdens incumbent on property owners towards tenants.

The decisions of international courts are the sources of obligations, but they do not form universally binding law. Hence, they have no rank in domestic legal order.

## 6.3 Decisions or Recommendations of a Non-judicial Treaty Body

Polish courts directly apply European Union law, including regulations, directives and decisions of the EU institutions. They rely as well on non-binding recommendations in a manner consistent with EU law. Not including EU law, there are cases in which the courts have been asked to apply or enforce a decision or recommendation of a non-judicial treaty body. One example is the judgment of the Supreme Administrative Court of 4 February 1999,[115] rendered before the Polish accession to the EU. The Court quashed the decision of the administrative organ, and rejected the preferential custom treatment based on the Polish Customs Law. The Court found that Decision 4/96 of the Association Council, the organ established by the Europe Agreement of 1992, should be applied instead. The Court based its decision on the general wording of Article 91 of the Constitution and Article 3 of the Customs Law. Both provisions refer to the precedential application of ratified treaties, but do not mention the decisions of the bodies set up under the treaty. It seems that the Court understood that the decision derived its effects from the duly ratified treaty.

The Administrative Courts often refer to the recommendations of the Committee of Ministers of the Council of Europe to member states. For example, the

[112] (30210/96) [2000] ECHR 510 (26 October 2000).
[113] (31443/96) 2005-IX ECHR (28 September 2005).
[114] (35014/97) 2006-VIII ECHR (19 June 2006)
[115] VSA 1058/98.

Supreme Administrative Court in the judgment of 18 August 2009[116] noted the soft-law character of Recommendation No R(91) 1 on Administrative Sanctions of 13 February 1991, but interpreted Polish law in the light of the Recommendation.[117] The Supreme Administrative Court in the order of 25 May 2009[118] referred to Recommendation R (89) 8 of 13 September 1989 on provisional court protection in administrative matters. In the resolution of 21 April 2009,[119] the Supreme Administrative Court referred to 'recommendations of the European soft-law', particularly to Recommendation CM/Rec (2007) 7 of 20 July 2007 on Good Administration.

There are also many decisions of the Supreme Administrative Court[120] finding that the interpretation given by the World Customs Organization (WCO) under the competence set out in Article III(d) of the Convention Establishing a Customs Co-operation Council of 1950 ('to make recommendations to ensure the uniform interpretation and application' of the various Customs Conventions') is binding upon Polish customs authorities (because the Convention itself should be observed). In relevant cases the courts refer to the Harmonized Commodity Description and Coding System (HS) implemented by HS Convention of 1983, which came into force for Poland on 1 January 1996. The HS is maintained by the WCO through the Harmonized System Committee.[121]

The most interesting, however, is the Regional Administrative Court[122] judgment of 23 December 2008, rendered under the directives of the cassation judgment in the same case as the Supreme Administrative Court.[123] The case concerned the domestic effect of the amendments to attachments to the Interlaken Convention on the Common Transit Procedure of 1987, made by the decisions of the Mixed Commission EC/EFTA No 1/2000 and No 1/2001. The Court invoked the *pacta sunt servanda* principle as reflected in Article 26 of the Vienna Convention and Article 9 of the Constitution to find that the amendments/decisions were binding upon Poland on the international law plane. Nevertheless, they could not produce any legal effects in domestic law. In the opinion of the Court, the decisions in question were treaties and had to be applied in domestic law according to that law (inter alia Article 87, 91 of the Constitution). The official publication is an important requirement to invoke treaties against individuals. As the decisions were not published, they had not entered into the domestic legal order, and could not be directly applied as a universally binding law. Respectively,

[116] II FSK 591/08.

[117] Similarly eg, judgment of the Regional Administrative Court of 6 August 2009 (III SA/Kr 461/09).

[118] II FZ 131/09.

[119] II FPS 9/08.

[120] Eg V SA 1757/96 of 3 October 1997; I SA/Gd 314/97 of 27 January 1999.

[121] Eg judgments the Regional Administrative Court in Warsaw of 7 May 2009 (V SA/Wa 3045/08); 6 May 2009 (V SA/Wa 3050/08), 29 April 2009 (V Sa/Wa 3049/08).

[122] I SA/Go 912/08.

[123] I GSK 1084/07.

they could not become the basis for customs obligations. There are also several judgments of the administrative courts presuming for example, the binding character of the Decision of the Common Committee EFTA—Poland No 1 of 1997 (published in the Journal of Laws). The judgments do not discuss the character of the decision.[124]

[124] Eg, decisions of the Regional Administrative Courts: III SA/GI 461/04 of 8 November 2005; I SA/Bd 739/06 of 7 February 2007; I SA/Bd 247/08 of 16 July 2008.

# 20

# Portugal

*Francisco Ferreira de Almeida*

## 1. Introduction

Portugal is parliamentary democracy whose constitution was adopted in 1976 and subsequently revised numerous times, most recently in 2005, to, inter alia, limit the powers of the military and President. Under the current constitution, the four main branches of the national government are the Presidency, the Prime Minister and Council of Ministers, the Assembly of the Republic (the Parliament), and the judiciary. The President, elected to a five-year term by direct, universal suffrage, is also the commander in chief of the armed forces. The legal system in Portugal is based on the civil law model, with a Constitutional Tribunal that reviews the constitutionality of legislation and a national Supreme Court that is the court of last resort.

A member of the United Nations since 1955, Portugal joined the European Union in 1986 and has moved toward greater political and economic integration with Europe ever since. Portugal is also a founding member of NATO and accepts compulsory ICJ jurisdiction with reservations.

## 2. International Law in the Constitution of the Republic of Portugal

William Blackstone stated that 'International law is part of the law of the land.' This principle is enshrined in English and American law and, pursuant to the Constitution of the Republic of Portugal of 1976 (CRP), is also a principle of Portuguese law.

An attitude of great receptiveness to international law is immediately apparent in Article 7, which sets out the fundamental principles by which Portugal governs its international relations. With the very authority of the Fundamental Law itself, the principles of general or ordinary international law are reaffirmed therein, which, admittedly, would always bind the Portuguese state[1] even in the absence of any

[1] These are the views of Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada* vol I (4th edn, Coimbra: Coimbra Editora, 2007) 239–40.

express reference thereto in the constitutional text. However, it is Article 8 that truly takes heed of the relevance of the various types or categories of international law within the Portuguese legal order, as explained below.

The text of Article 8 of the CRP (as amended by the 6th constitutional amendment—CL No 1/2004) is as follows:

(1) The rules and principles of general or ordinary international law are an integral part of Portuguese law.
(2) Rules provided for in international conventions duly ratified or approved, following their official publication, apply in national law as long as they remain internationally binding with respect to the Portuguese State.
(3) Rules laid down by the competent organs of international organizations to which Portugal belongs, apply directly in national law insofar as the constitutive treaties as applicable provide to that effect.
(4) The provisions of treaties governing the European Union and the rules issued by its institutions, within the scope of their respective powers, apply directly to national law, as provided by European Union law, with respect for the fundamental principles of the rule of law of a Democratic State.

It should be noted that the wording of Article 8 results from some quite inexplicable inaccuracies. As Canelas de Castro states, 'it is difficult to grasp the essential criterion which presided over the drafting of the rule in question: if it was the type of source of international law (custom or treaty); if it was subjective effectiveness (general or particular) of the rules manifested by such sources; or a combination of the two.'[2]

In our view,[3] the intention of the framers of the CRP was to deal with three distinct categories of international law, even though this objective was not achieved in the formulation of the rule under consideration here, namely: general or ordinary international law (Article 8, paragraph 1), particular international law (Article 8, paragraph 2) and the international law of international organizations (particularly, secondary law laid down by the European Union) (Article 8, paragraphs 3 and 4).

In paragraph 2, international treaty rules are taken into account when their source is custom. Conversely, with respect to general or ordinary international law (paragraph 1), it is not unusual for rules to be included in universal or quasi-universal treaties that are not limited to custom. This results in confusion with the interpretation of Article 8 of the CRP, especially with respect to the inclusion of bilateral and regional customs in our national legal order.[4]

Let us separately consider the various segments that comprise Article 8.

[2] See Paulo Canelas de Castro, *Portugal's World Outlook In The Constitution of 1976*, *BFD*, vol LXXI (Coimbra: Coimbra Editora, 1995) 487.

[3] We agree, on this point, with Albino de Azevedo Soares, *Lições de Direito Internacional Público* (4th edn, Coimbra: Coimbra Editora, 1988) 81.

[4] See Francisco Ferreira de Almeida, *Direito Internacional Público* (2nd edn, Coimbra: Coimbra Editora, 2003) 71.

## 2.1 General or Ordinary International Law (Article 8, paragraph 1)

There is consensus in Portuguese legal theory that Article 8, paragraph 1 of the CRP provides for automatic execution of general or ordinary international law. No other construction of the expression 'are an integral part of Portuguese law'[5] is really possible.

It should be remembered that general or ordinary international law is embodied, in the words of Gomes Canothilho and Vital Moreira, in a collection of rules that can claim to be binding on most states,[6] and that in that sense become a type of international constitutional law. It is comprised of rules of general custom (some of which are binding or *jus cogens*); universal or quasi-universal treaties, accepted precisely as general international law (for example, the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc);[7] and general principles of law recognized by civilized nations that have been assimilated by the international legal order.

Taking into account its nature, it would certainly be surprising if the framers of the constitution had chosen another reception technique for international general or ordinary law, other than automatic or full incorporation. Thus, the rules and principles comprising this law, recognized as such by the international community as a whole, are directly applicable within the Portuguese legal order.

The problem that Article 8, paragraph 1 of the CRP raises for authors and has been a source of intense dissent, is the manner in which bilateral and regional customs are inserted on a national level, and to which this constitutional rule does not allude. Silva Cunha, for example, maintains that on the subject of international relations, the Portuguese state is guided by the principle of national independence, which is the projection of its national sovereignty on the external order (Article 7, paragraph 1 of the CRP). Absent an express constitutional norm to this effect, any restriction of this principle would result in an unacceptable (and unconstitutional) self-limitation of that sovereignty. Silva Cunha writes:

> As it is well known, one of the principal attributes of sovereignty is the power of the State to create the Law of its Land. To permit the validity within its borders of an external Law (International law or law produced by another State), limits that faculty and, therefore,

[5] See, among others, Albino de Azevedo Soares (n 3) 80; Goncalves Pereira and Fausto de Quandros, *Manual de Direito Internacional Público* (3rd edn, Coimbra: Almedina, 1993) 108; Paulo Canelas de Castro (n 2) 488–9; Gomes Canotilho and Vital Moreira (n 1) 254; Jorge Miranda, *Curso de Direito Internacional Público* (3rd edn, Parede: Principia, 2006) 151–2; Jonatas Machado, *Direito Internacional—Do paradigma clássico ao pós-11 de Setembro* (3rd edn, Coimbra: Coimbra Editora, 2006) 162–3; Eduardo Correia Baptista, *Direito Internacional Público—Conceito e Fontes* vol I Lisbon: Lex, 1998) 426–8; and Jorge Bacelar Gouveia, *Manual de Direito Internacional* (3rd edn, Coimbra: Almedina, 2008) 433–4; Francisco Ferreira de Almeida (n 4) 69–70.

[6] Constituição da República Portuguesa Anotada (2007) 254

[7] See Goncalves Pereira and Fausto de Quandros (n 5) 109.

restricts its sovereignty, which can only be accepted when the Constitution expressly so consents.'[8]

Therefore, given that regional or local customs are not directly referred to in Article 8, paragraph 1, automatic validity in Portugal would not be consistent with Article 8, paragraph 1, which instead is a clause of semi-full reception.

Moura Ramos, in turn, criticizes the concept of absolute sovereignty that underpins Silva Cunha's position.[9] In keeping with leading legal theory, he believes that Article 8, paragraph 1 is a clause of automatic reception, and provides a different interpretation of the norm in question. His interpretation is seconded by Gonçalves Pereira and Fausto de Quadros:[10] '[W]e cannot see why, in receiving into its internal legal order this law to which it is bound at the international level, it would exclude a part thereof—the part comprising local or regional customs.'[11]

Azevedo Soares on the other hand, leans towards another interpretation. He emphasizes that the prior version of Article 8[12] distinguished between three major types of international law: general international law (paragraph 1); particular international law, despite considering only international treaties (paragraph 2); and special (secondary) international law (paragraph 3). In this way, only by using a broad interpretation would it be possible to resolve the issue of incorporating local or regional customs into our legal order.

A distinction must be made between local or regional customs, in whose creation Portugal may have participated (eg a western European custom) and those in which Portugal had no involvement (eg a Latin American custom). The former would become part of the national order through automatic reception as foreseen in Article 8, paragraph 1. In effect, a broad interpretation of this rule would allow them to be considered general law for all states bound by them. The latter, on the contrary, could only bind the Portuguese state by means of an express declaration of acceptance or express act of recognition, contained in an international instrument.[13] Consequently, only through Article 8, paragraph 2, is their inclusion in our legal order achieved. Indeed, this is because it would then be a matter of concluding an international agreement or treaty with states already bound by such customs.

It the author's firm belief that if the objective of Article 8, paragraph 2 was to govern the incorporation of international particular law into the Portuguese legal order, reference would have been made therein to bilateral or regional customs;

[8] See. J da Silva Cunha, *Direito International Público—Introdução e Fontes* (5th edn, Coimbra: Almedina 1991) 94–5. See also J da Silva Cunha and Maria da Assunção do Vale Pereira, *Manual de Direito International Público* (2nd edn, Coimbra: Coimbra, 2004) 112–15.

[9] See Rui Moura Ramos, 'A Convenção Europeia dos Direitos do Homem. Sua Posição Face ao Ordenamento Jurídico Português' in *Da Comunidade International e Do Seu Direito. Estudos de Direito International Público e Relações International* (Coimbra: Coimbra Editora, 1996) 36–7.

[10] See Goncalves Pereira and Fausto de Quandros (n 5) 110.

[11] See Rui Moura Ramos (n 9) 36–7.

[12] It should be remembered that the opinion of Azevedo Soares on the matter in question herein was developed well before the 6th constitutional amendment of 2004.

[13] See Albino de Azevedo Soares (n 3) 82–3.

rather than in paragraph 1, which is dedicated to general or ordinary international law. However, as Gonçalves Pereira and Fausto de Quadros rightly argue, even if a particular customary law does not fit into the scope of any of the paragraphs of Article 8, it would be absurd to conclude that such law is not valid in Portugal, while binding the Portuguese state internationally.[14]

Given the above, the broad interpretation of Article 8, paragraph 1 that is defended by Azevedo Soares is preferable. Undoubtedly, Portugal was involved in the adoption of the precedents deemed acceptable for the emergence of such customary rules or, at least made a statement of belief as to their mandatory nature, without which the process of creation of a customary rule would be thwarted.

Consequently, despite a certain distortion of the very concept of general international law implicit in this position, we are not averse to considering such customs as being general international law for the states bound by them, by means of a broad interpretation of paragraph 1, Article 8 of the CRP. This is notwithstanding their remaining particular international law in the eyes of third parties.

However, the author disagrees with the position of Azevedo Soares with respect to the customs in whose formation the Portuguese state did not participate. Instead, the authors agree with Silva Cunha, that the problem of the applicability of bilateral and regional customs within the Portuguese legal order is only relevant with respect to those that bind Portugal internationally, that is, customs in whose formation we have participated.[15]

## 2.2 Particular International Law (Treaty Based) (Article 8, paragraph 2)

For rules contained in international treaties, the CRP also uses a system of automatic reception, but, in this case, *conditional* automatic reception. The Portuguese Constitution adopts a generic designation for international treaties but, strictly speaking, the latter include two distinct types of normative instruments: formal treaties, which require ratification by the President of the Republic; and agreements in simplified form, which have no such requirement. In legal theory and in diplomatic practice, however, the terms treaty and convention generally tend to be synonymous, despite other designations also being frequently used: eg exchange of letters, pacts, protocols, etc.

The CRP requires international treaties to have been 'regularly ratified or approved' (in fact, all of them need to be approved, whereas ratification, as stated above, is only required of formal treaties) and to be formally published in the Official Gazette. Such requirements, it should be noted, are not conditions for the treaty to be valid at the national level,[16] but are merely prerequisites for entry into force internationally.[17] Once met, the prerequisites determine that the

[14] See Goncalves Pereira and Fausto de Quandros (n 5) 110. See also Rui Moura Ramos (n 9) 36–7.
[15] See J. Silva Cunha (n 8) 95, fn 96.
[16] See Albino de Azevedo Soares (n 3) 83.
[17] See Goncalves Pereira and Fausto de Quandros (n 5) 111; and Paulo Canelas de Castro (n 2) 489–90.

provisions of international conventions are applicable internally as rules of international law.[18]

Furthermore, the final part of paragraph 2, Article 8 stipulates that international conventions shall apply in the internal order 'for as long as they bind the Portuguese State internationally'. This phrase has a double meaning. On the one hand, the international convention can only enter into force at the national level from the moment it enters into force internationally. Hence, the mere fact that a treaty was approved, ratified and, perhaps, even published in Portugal does not constitute a sufficient guarantee of its internal relevance. This is because it is possible for the treaty to not have the number of ratifications required for entry into force internationally. In this case, as indeed Gomes Canotilho and Vital Moreira have observed, the essential basis for reception is absent, because the international norm has not yet entered into force.[19] This means that approval, ratification and publication may, in certain cases, be necessary conditions but not sufficient for national applicability of an international convention.

On the other hand, Gomes Canotilho and Vital Moreira add 'when, for any reason, the treaty or agreement ceases to be valid or to be in effect in the external legal order (withdrawal, expiry, etc.), its norms also, automatically, cease to be in force in the internal legal order, without need of a legislative act of any kind at the national level'.[20]

As a consequence, in Portugal, once the above-mentioned conditions have been met, nothing prevents a Portuguese judge from directly applying, as an immediate source of national law, the rules contained in international conventions, provided that such rules are self-executing provisions.

## 2.3 The Law of International Organizations (Article 8, paragraphs 3 and 4)

Paragraph 3 of Article 8 of the CRP was added to the initial version in the constitutional amendment of 1982, with a view to adapting our legal order to Portugal's foreseen accession to the European Communities. The initial draft of Article 8 contained no basis to support the constitutionality of acts, issued by a supra-national international organization, being validly in force in the internal order.[21] Hence there was a need to establish generic provision in which normative acts by the European Community could be legally incorporated.

[18] See Gomes Canotilho and Vital Moreira (n 1) 255–6. See also, Jorge Bacelar Gouveia (n 5) 436–7. This is 'notwithstanding the internal efficacy of conventions whose content is not immediately applicable being dependent on the requisite legislative or regulatory mediation.' See Jonatas Machado (n 5) 164.

[19] See Gomes Canotilho and Vital Moreira (n 1) 256.

[20] Ibid 256.

[21] And perhaps also international co-operation organizations with normative powers in relation to member states. Ibid 263. See, on the reception of resolutions by the United Nations which deal with threats to peace and international security, Jonatas Machado (n 5) 166.

By reading said paragraph 3 of Article 8, one can immediately conclude that no internal formality is required for acts of secondary community law to acquire relevance in the Portuguese legal order. Once again, we are confronted with a system of automatic incorporation, with the particularity that the former enjoy a regime of direct applicability.[22]

The direct applicability of an international norm results in its automatic relevance within the internal legal order, ie it is binding on the state and on individuals (who can immediately avail themselves of the rights expressed therein), without it being necessary to adopt any act to transpose it into the internal order (eg approval, ratification or publication). Canelas de Castro tends to assimilate this concept to the notion of direct effect, which is discernable in a norm's ability to be invoked by private individuals before bodies having national jurisdiction, either against the state (vertical direct effect), or against other individuals (horizontal direct effect).[23]

As it happens, however, the provision that concerns us here imposes two conditions for the law of supra-national international organizations to be effective internally. On the one hand, it requires that rules be issued by or derive from 'the competent organs' within such organizations. It also requires that the said regime of direct applicability 'be foreseen in the respective constitutive treaties'. Let us examine the actual scope of these conditions.

As to the first, it should be emphasized that no parallel can be found in the original community law (that is in the treaties that instituted the three European Communities and those that modified them subsequently), community case-law, or international practice relating to this subject matter.[24] In fact, it has always been understood that a community regulation adopted by a body without competence to do so still has legal force within the European Union. Such a regulation produces effects in the internal order of member states and can only cease to be applicable through a declaration of invalidity by the Court of Justice of the European Union.[25] It is thus evident that the (more restrictive) solution expressed in our Fundamental Law, requiring that normative acts be issued by the competent bodies of the European Union in order to be applicable in Portugal, goes against the regime foreseen in community law itself.

With regard to the second condition, here also we come up against several obstacles, as highlighted by Gonçalves Pereira and Fausto de Quadros,[26] which appear at first sight to be difficult to surmount. In effect, the only act of secondary

[22] See Goncalves Pereira and Fausto de Quandros (n 5) 112. The authors speak of 'automatic applicability' and not 'automatic reception' because, as they explain, the problem of internal reception does not arise in relation to community law. Jorge Miranda, in turn, speaks of '. . . automatic reception at its maximum level'. See Jorge Miranda (n 5) 154. Calling attention to the need for Article 8, paragraph 3 to be interpreted in conjunction with Article 7, paragraphs 5 and 6, in the third (1992) and sixth (2004) constitutional amendments, Gomes Canotilho and Vital Moreira (n 1) 263.

[23] See Paulo Canelas de Castro (n 2) 494 fn 55.

[24] Ibid 493.

[25] These are the precise terms in which Canelas de Castro expresses his view, while conceding, nevertheless, that, faced with the applicability of community law norms, national entities will not, as a rule, oppose their respective validity. Ibid 493–4, n 54.

[26] See Goncalves Pereira and Fausto de Quandros (n 5) 114–15.

community law to which the Treaty of Rome (the treaty which instituted the European Economic Community) expressly attributes direct applicability is the regulation.[27] Yet, as a consequence of the contributions of both community case-law and legal theory to clarifying the problem at hand, there is no doubt that other acts also benefit from the direct effect. For example, decisions (to preserve their utility or practical effect), directives, and certain provisions of the constitutive treaties and international conventions concluded by the European Union similarly enjoy this prerogative.

The initial text of Article 8, paragraph 3 did foresee the possibility of direct application of acts emanating from certain international organizations, so long as expressly provided for in the respective constitutive treaties. Now, in the constitutional amendment of 1989 the adverb expressly was removed, which means implicit acquiescence on the direct effect in Portugal of other acts of secondary community law, in addition to regulations.[28]

Even so, the legal precept under analysis herein can continue, nonetheless, to be critically assessed, even if only due to that apparently minor detail of its reference to rules by international organizations and not, eg acts. The terminology appears to indicate that non-normative acts, namely European Union decisions, which are aimed at the individual subjects of member states (and therefore analogous to administrative acts, that is individual acts and not rules), are not included in the regime of insertion of secondary community law, found in Article 8, paragraph 3. Yet, as we have seen, community case-law has tended to affirm the direct effect of certain decisions, notwithstanding their general and abstract nature.[29] It seems to the authors that the interpretation that is best suited to the general interests of the European Union is that they should also include acts.[30]

Paragraph 4 of Article 8, in turn, was introduced by CL 1/2004, achieving a change of great significance: '[O]ne of the most important amendments that was ever introduced into the system of sources of law of the Portuguese constitutional legal order, indeed, one of the most important constitutional amendments since the inception of the CRP.'[31] No doubt inspired by the provisions of Article 10 of the failed Project of a European Constitution, it does not address the reception of community law within the Portuguese legal order or in the light of the principle of the primacy of European Union law. Therefore, additional observations relating to this last provision of Article 8 have been left to the following section, aimed at addressing precisely the problem of the hierarchy of international and national norms.

[27] See Article 189 of the Treaty, Article 249 of the Treaty of the European Union and Article 288 of the Treaty of Lisbon.

[28] See Paulo Canelas de Castro (n 2) 495; Francisco Ferreira de Almeida (n 4) 78–9.

[29] See Goncalves Pereira and Fausto de Quandros (n 5) 114–15; and Paulo Canelas de Castro (n 2) 494.

[30] See Jorge Miranda (n 5) 154; and Paulo Canelas de Castro (n 2) 496.

[31] Gomes Canotilho and Vital Moreira (n 1) 264.

## 3. Hierarchy

Having examined the reception of various types or categories of international law in the internal Portuguese order, the problem of the hierarchical value of received international norms vis-à-vis the various sources of Portuguese law, which is of paramount importance, remains to be addressed. The fate of a related question also depends upon the correct solution being found: that of the contradictions that may exist in the content of rules originating in both legal orders.

Yet, the indisputable relevance of these problems seems to have been inversely proportional to the attention they received in the CRP. In fact, the CRP does not expressly resolve them in any of its provisions, especially Article 8, which would be the appropriate place to do so. As a consequence, it is legal theory that assists us in pointing the way toward possible solutions to these essential questions that our Fundamental Law did not address. Let us attempt, therefore, to examine, the principal problems regarding the hierarchical value of international norms received into our internal legal order. For this purpose, we will follow the order in which the various types of international law have been arranged in Article 8 of the CRP.

Authors, almost unanimously, ascribe a supra-legal value to general or ordinary international law. But opinions are divided regarding international law's hierarchical position in relation to the CRP. For some, international law (or, at the very least, a part thereof) must yield to the Fundamental Law, while for others, general or ordinary international law has a supra-constitutional value. There are even those who attribute constitutional value to some international rules. With respect to ordinary legislation, there does not appear to be much room for hesitation. As we have seen, the Portuguese Constitution considers that the rules and principles of general or ordinary international law comprise an integral part of Portuguese law (Article 8, paragraph 1).

If, for the sake of argument, an ordinary law opposed a principle (even an imperative one) of general or ordinary international law, it would cease to be an integral part of Portuguese law, rendering paragraph 1, Article 8 of the CRP a dead letter. This would concurrently render meaningless the very concept of general or ordinary international law, which, by definition, is a law possessing relevance *erga omnes*. It would become, in other words, a *contradictio in adjectu.*[32]

The same conclusion must be reached regarding international law's position in relation to the Constitution. The author believes that the arguments set out above in support of the supremacy of international general law over ordinary legislation are also valid to attest to its supremacy over the Fundamental Law itself.

It should be remembered that general or ordinary international law involves basic rules of the relations between states, principles that safeguard values, to which the internationally community has, by mutual consent, agreed to grant special pre-eminence. By virtue of this, they have become solidly embedded in the collective

[32] See Albino de Azevedo Soares (n 3) 65. See also Gomes Canotilho and Vital Moreira (n 1) 259–60.

legal consciousness of the community. How then, can it be permissible for one state to lay down constitutional norms in derogation of such a law, which is common to all? To prevent such a result, the framers of our Constitution, in formulating Article 8, paragraph 1, availed themselves of the aforementioned expression, as the only means of ensuring that the rules and principles of general or ordinary international law are an integral part of Portuguese law, thereby, logically, recognizing their prevalence over the Constitution itself.[33]

In addition, Article 16, paragraph 2 of the CRP states: 'constitutional and legal precepts relating to fundamental laws should be interpreted and integrated in accordance with the Universal Declaration of Human Rights'. This means that, on the subject of fundamental rights, a principle of interpretation in accordance with the Universal Declaration prevails,[34] which, in the author's view, points implicitly to its hierarchical superiority in relation to the CRP.[35]

Certainly, one may also accept the fact that the principles that comprise the category of general or ordinary international law are different in nature and legal substance, chief of which are imperative principles or *jus cogens*. Such a different nature could not but be reflected in their respective hierarchical position in relation to the CRP: in some cases, these principles would have supra-constitutional value (*jus cogens*), in others, constitutional value (eg the non-imperative principles laid down in the UDHR), and in the remaining cases, of equal value to ordinary law (eg those referred to in Article 29, paragraph 2 of the CRP).[36] However, this ideal is not the reality.

Constitutional principles of general or ordinary international law may be subject to gradation,[37] from the double perspective of letter and spirit; but not so far as to conflict with its hierarchical position in relation to the various sources of Portuguese law and, in particular, to the CRP. It is our firm belief that we are, in any case, in the presence of a general or ordinary law.

It is worth noting that the knell has sounded long ago for a voluntaristic law of peoples, a law of mere co-ordination between sovereign entities that held themselves to be perfect communities, enjoying an almost unrestricted freedom of action. The creation of an international normative hierarchy, enabled by the theories of *jus cogens*, of obligations *erga omnes,* and illicit state acts of exceptional gravity, as well as the emergence of international penal law and international crimes (crimes of war, crimes against humanity, genocide, etc),[38] have rendered

[33] See Albino de Azevedo Soares (n 3) 96–7. But see J da Silva Cunha and Maria da Assunção do Vale Pereira (n 9) 115; and Jorge Bacelar Gouveia (n 5) 450.

[34] See Gomes Canotilho and Vital Moreira (n 1) 367. These authors warn, however, that '. . . the principle of interpretation and treatment of undefined concepts only in accordance with the UDHR is only valid in so far as it achieves a constitutionally acceptable meaning . . . ' Ibid 368.

[35] See Goncalves Pereira and Fausto de Quandros (n 6).

[36] See Jorge Miranda (n 5) 157–9.

[37] A simple question can make this clear: Who, within the international community, has the capability of clearly establishing the frontier between imperative rules and mere obligations?

[38] See Francisco Ferreira de Almeida, *Os Crimes Contra a Humanidade no Actual Direito Internacional Penal* (Coimbra: Almedina, Coimbra, 2009).

anachronistic the idea that the constitutions of states assume the role of exclusive (or principal) arbiters of international law.[39]

Azevedo Soares hypothesizes:

> If our Constitution, instead of the current article 7, contained an article stipulating that Portugal be governed in its international relations by the principles of the inequality of States, of conflict resolution by the use of force and interference in the internal affairs of other States, what significance or value should be ascribed to such a norm?[40]

Certainly no state would adopt rules with such content, even if its political *praxis* refuted its proclamation of law.

Similarly, the CRP has yet to resolve the problem of the relationship between international treaty (particular) law and ordinary national law. Despite this, legal theory for the most part favours the thesis of the supra-legal value of international treaties, with which case-law, especially that of the Constitutional Court, has tended to coincide.

Let us examine the arguments that can be put forward to defend this position. As underscored by Gomes Canotilho and Vital Moreira,[41] it would suffice for international treaties to be of no lesser value than laws, for them to prevail, by direct application of the principle *lex posterior priori derrogat,* over rules contained in a prior national law. However, only if they are recognized as possessing supra-legislative value can they also prevail over subsequent national laws, which, consequently, would lead to the invalidity or inefficacy of any internal law in conflict with an international treaty, in force within our internal legal order.

This second possibility appears to find support in the letter of Article 8, paragraph 2 of the CRP, which, in effect, stipulates that the international treaties 'apply in national law . . . as long as they remain internationally binding with respect to the Portuguese State'. Thus, we can logically infer that if a national law were permitted subsequently to alter or revoke the rules of an international treaty law, they would cease to apply in the national order, despite continuing to bind the Portuguese state internationally. In other words, the aforementioned constitutional clause would become *tábula rasa*.

However, this argument does not appear to convince some authors, namely, Gomes Canotilho and Vital Moreira. Actually, the expression included in paragraph 2 of Article 8 of the Constitution could be construed somewhat differently: as intended to establish a mere condition, necessary but insufficient, for the national applicability of international treaty law. This would require that international treaties bind the Portuguese state internationally for them to also apply on the national level. However, nothing would prevent the position they occupy in the hierarchy of sources of law from being on a par with ordinary legislation in Portugal.[42]

[39] See Paulo Canelas de Castro (n 2) 498–502. See also Gomes Canotilho and Vital Moreira (n 1) 260, who admit that the norms and principles of general or ordinary international public law may even constitute 'a limit to the constitutive power itself and to the Constitution . . . '.

[40] See Albino de Azevedo Soares (n 3) 96.

[41] See Gomes Canotilho and Vital Moreira (n 1) 259.

[42] Ibid 260.

Nevertheless, we do not hold this to be so. The above interpretation would only be acceptable if the CRP stipulated, for example, that international treaties apply nationally, from the moment that they are internationally binding with respect to the Portuguese state. In such a case, there would be room for conjecture as to the possibility of Article 8, paragraph 2 establishing a condition that was merely necessary but not sufficient for rules of international treaties to apply nationally. The fact is, however, that instead the framers of the Constitution wrote: 'as long as they remain internationally binding with respect to the Portuguese State'. From this statement, one can conclude, without hesitation, that the former will continue to be in force nationally during the period (which is, objectively, the meaning of 'as long as') in which they bind Portugal internationally. This can only occur through the recognition of the supremacy of international treaty law in relation to national laws.[43]

In addition, two other arguments (both pointed out, for example, by Gomes Canotilho and Vital Moreira), while not decisive, can be, admittedly, called into play to give credence to the theory of the hierarchical superiority of international treaties. The first deals with the already mentioned CRP's attitude of receptivity to international law. While not exactly proposing such a thesis, this attitude or philosophy with regard to international relations does at least suggest that it has strong grounds. The second refers to the criteria by which the various normative instruments are ordered, eg in Article 119 (international treaties precede legislative acts, figuring second, immediately after constitutional laws).[44]

It is our guiding principle that international treaties have a value that is hierarchically superior to laws. The question is whether this holds true in absolute terms, ie independently of the nature of the norms—international or national—that are at stake (eg a treaty or agreement in simplified form versus an organic law, ordinary common law, regional law or regulation). In fact, it may appear somewhat incongruous in the light of the constitutional system of sources 'that, for example, a "law of reinforced value" (arts. 112, 3, 280, 2/a) and 281, 1/b)) may have to yield to a mere agreement in simplified form . . . '.[45]

In our view, three principal arguments justify that the aforementioned normative primacy of international treaties apply, effectively, under any circumstances. The first is that no real support can be found in the CRP permitting any distinction to be made in this regard. The second argument is based on the firm belief that what we are dealing with is a material problem, of relative value, rather than a merely formal question of the sources or of the organs responsible for granting them effectiveness at the national level.[46] The third, and last, is concerned with the

[43] See Francisco Ferreira de Almeida (n 4) 83–4.

[44] See Gomes Canotilho and Vital Moreira (n 1) 260; Rui Moura Ramos (n 10) 144ff.; Jorge Miranda (n 6); Albino de Azevedo Soares (n 3) 99–100; Afonso Queiró, *Direito International Público I* (Coimbra: Coimbra, 1960) 71ff.

[45] See Gomes Canotilho and Vital Moreira (n 1) 261. See also Jonatas Machado (n 5) 177; and Rui Medeiros, *Relações entre normas constantes de convenções international e normas legislativas na Constituição de 1976,* in *O Direito* (1990) 355ff.

[46] See also Paulo Canelas de Castro (n 2) 508.

need to first examine international practice regarding the formation of international treaty law, in relation to this problem, under the penalty of undesirable unilateralism. Such an examination reveals a clear tendency, as evidenced in the 1997 amendment to our Constitution, to supplant the figure of a formal treaty with agreements in simplified form, for which the conclusion process is much faster.

Having established that international treaty law (always) has supra-legal value, the question remains as to what type of flaw affects a national rule that is in conflict with the provisions of an international treaty. For some considerable time this has been the subject of controversy both in legal theory and case-law, with opposing views having been adopted even by both sections of the Constitutional Court. In the abstract, we are decidedly more inclined toward the thesis of inefficacy, given that the sanction of invalidity or of atypical unconstitutionality (illegality) does not appear to fit the manner in which the international and national legal orders interrelate.[47] This relationship is not reduced to a federal model, whereby the sanction of inefficacy or inapplicability is more in keeping with the monism of international law.

Thus, whenever a national law opposes the provisions of an international treaty, Portuguese courts should refuse to apply such a law while the treaty in question continues to be in force internationally.[48] The Law of the Constitutional Court, as amended by Organic Law 85/89 of 07/09, partially resolved this question, given that it permanently discarded the thesis of unconstitutionality, as had been previously expressed. Instead, it established it as a problem of the disconformities between infra-constitutional norms, subject to a specific regime of control. Whereby, Gomes Canotilho and Vital Moreira write:

> [I]f in a given court case, the court rejects the application of a rule of national law because it violates an international law, an appeal can only be filed with the Constitutional Court if it is a question of a legislative rule, and the competence of the Constitutional Court is limited to deciding questions of an international and constitutional legal nature (Law of the Constitutional Court, article 71, paragraph 2), but not the specific issue of 'legality' which gave rise to the appeal, in other words, the concrete disconformities between the norms in conflict.[49]

Far less controversial is the problem of the hierarchical value of international treaties in relation to the Constitution. In fact, the Constitution foresees (Article 278 et seq) that treaties or agreements be subject to constitutional control, whether successive (concrete or abstract), or preventive. There is no doubt, therefore, as to the infra-constitutional character of international treaties.[50]

However, if it is a question of a general or ordinary international law (which does not necessarily spring from a customary source), it is situated on a plane that is above the Constitution itself, whereby it does not make sense to submit it to the

[47] See Goncalves Pereira and Fausto de Quandros (n 5) 123.
[48] Ibid 123.
[49] See Gomes Canotilho and Vital Moreira (n 1) 262–3.
[50] See Francisco Ferreira de Almeida (n 4) 87.

above-mentioned regime of constitutional control. In our view, improperly, the Fundamental Portuguese Law did not consider this possibility.

It remains for us to tackle one final question, which also was not addressed by the framers of the Constitution: precisely the question of the hierarchical relationship between the rules issued by international organizations of which Portugal is a member (as is the case of the European Union) and national law.

Of the two facets of this issue, the least problematic is the one that refers to infra-constitutional national law. Effectively, Article 8, paragraph 3 of the CRP, points to the primacy or prevalence of community law in relation to national law. But it is questionable whether the prevalence is only over prior or also over subsequent national law.

The concept, defended above, of the supra-legal value of international treaties, permitted us to conclude—even a fortiori, taking into account the special duty of solidarity and loyalty to this international organization, claimed by the participation of states in institutions of the supra-national type[51]—that a similar solution would be valid for community law: the latter would automatically replace any existing national rules that were contrary to its provisions. Similarly, it would prevail over such rules created at a later date and that also conflicted with this supra-national law.[52]

It may always be said that, in joining these international organizations, every member state consents to a delegation of its sovereign powers in favour of the institution, which, undeniably, includes a transfer of normative powers in certain domains. This is implicit in Article 8, paragraph 3 of the CRP.

Furthermore, paragraph 6 of Article 7 of the Constitution—introduced by the extraordinary revision of 1992, with a view to obtaining parliamentary approval and subsequent ratification of the Treaty of Maastricht, the text of which was later modified by the constitutional amendments of 2001 and 2004—should also be emphasized given that it expressly ensures the legitimacy of the aforementioned transfer of certain normative powers to the Union. It is stated therein:

> Subject to reciprocity and to the respect for the fundamental principles of a democratic state based on the rule of law and for the principle of subsidiary, and with a view to achieving the economic, social and territorial cohesion of an area of freedom, security and defence and the definition and implementation of a common external policy, Portugal may enter into agreements for the exercise jointly, in cooperation with, or by, the institutions of the Union, of the powers needed to construct and deepen the European Union.

The consequence or sanction for a state rule that conflicts with a community rule will certainly not be its invalidity, but merely its inefficacy or inapplicability. In other words, it is necessary to comply with the priority or preference in application of community law (idea of preferential application).[53]

[51] See Paulo Canelas de Castro (n 2) 510–11.
[52] Francisco Ferreira de Almeida (n 4) 87–8.
[53] Ibid 88.

The second facet of the issue we are examining herein has, however, always been far more complex: that of the relationship between the law emanating from (supranational) international organizations and the CRP. The new paragraph 4 of Article 8, introduced by Constitutional Law 1/2004, contributed decisively to clarifying this question and the preceding one as well. Gonçalves Pereira and Fausto de Quadros had already previously affirmed: 'Studying the place that Community Law should occupy in the hierarchy of sources of Law in the Portuguese Legal Order is akin to defining the scope of the primacy of Community Law over Portuguese Law.'[54]

Now, in the well-known and evocative formulation of P. Pescatore, the primacy of community law over the national laws of member states corresponds to a truly 'existential existence' of that law. The European Union does, in fact, comprise an area for the integration of its members, based on the uniformity of interpretation and application of community law—original and secondary—in all of its territory. Hans-Peter Ipsen also considers primacy as the principal manifestation of the *Prinzip der Sicherung ihrer Funktionsfahigkeit* (that is the principle of its capacity to guarantee the fulfilment of the Communities' function) and, therefore, ultimately guarantee the survival of the Communities themselves.

It goes without saying that the primacy of community law must be absolute and unconditional.[55] It is precisely under such terms that it has consistently been held in the case-law of the European Court of Justice, which has reinforced the view 'in the daring praetorian construction'[56] of many of its decisions that, by virtue of its specific nature, community law cannot be set aside by national rules of any kind whatsoever. It therefore follows that primacy translates into an imposition of community law and not exactly a concession of the national law of member states.[57]

However, a possible retort to this would be to underscore the fact that the 'community' vision of the problem, as conveyed above, would necessarily have to be in line with Portuguese constitutional law, under penalty of such an analysis being one-sided and therefore, incomplete.

In any event, what is certainly clear is that—as Cardosa da Costa argued even before the last two constitutional amendments—constitutional provisions relating to the control of constitutionality (namely, Articles 204 and 277) have no other significance than that of subjecting all rules that comprise the Portuguese legal order, to such control—both those produced by the national legislator, as well as those received from other legal orders, *maxime* rules derived from secondary community law.[58]

[54] See Goncalves Pereira and Fausto de Quandros (n 5) 124.
[55] Ibid 125–6.
[56] Jorge Miranda (n 5) 162.
[57] See Francisco Ferreira de Almeida (n 4) 89.
[58] See José Manuel Cardoso da Costa, 'O Tribunal Constitucional Português e o Tribunal de Justiça das Comunidades Europeias' in *AB UNU AD OMNES 75 Anos da Coimbra Editora—1920–1995* (Coimbra: Coimbra Editora, 1998) 1374.

It is true that the provisions of the aforementioned paragraph 6 of Article 7 of the CRP could allow for a different interpretation of the Portuguese system of constitutionality control, in terms of excluding from such control, precisely those rules of community law.[59]

A positive response—which, in addition to being in accordance with the construal of community case-law regarding the primacy theory, could, unquestionably, offer advantages with respect to the objective of uniform application of community law throughout the integrated area of the Union—would seem, nonetheless, to come up against an obvious obstacle: that such a restriction or limitation of powers of the Constitutional Court's normative control would presuppose a degree or level of integration that is far from having been achieved.[60] In such a scenario, and if one accepts the inevitability of a reduction in the scope of the Portuguese Constitutional Court's involvement, with respect to controlling the constitutionality of its respective norms, Cardoso da Costa inclined toward a more mitigated solution.[61] Cardoso da Costa suggested that the judicial organ in question should do no more than examine the compatibility of provisions contained in community law with the 'fundamental and structuring principles' of the CRP. The Portuguese Constitutional Court (or any other similar court in member states of the Union) could never relinquish safeguarding that 'hard core' or 'vital essence.'[62] Certainly the use of the mechanism of petitioning a preliminary ruling by the Constitutional Court would relegate the Constitutional Court's powers of control to mere intervention of last resort regarding community norms that contravene the 'radical basic principle'.[63]

It should be added that the Treaty of the European Union, in deeming binding on the Union both the fundamental laws enshrined in the European Convention on Human Rights and those derived from the constitutional traditions common to member states (further confirming the evident position of the Court of Justice), most certainly contributed to a significant reduction in the scope of potential conflict between the rules of community law and the constitutions of member states.

As it happens, however, the subsequent addition of paragraph 4 to Article 8 of the CRP, in the sixth constitutional amendment, had the effect of rendering the controversy meaningless. Paragraph 4 of Article 8 stipulates that the provisions of the Treaties governing the European Union and the rules of its institutions are applicable in the national order under the terms defined by Union law. Therefore, it is definitively self-evident that such rules and provisions prevail over the rules of national law, including those of the Constitution itself. Furthermore, since the rule of conflict between European Union law and national law has been raised to the level of Portuguese constitutional law, it could be said that the acceptance of the

[59] Ibid 1375.
[60] Ibid 1375–6.
[61] See Francisco Ferreira de Almeida (n 4) 90–1. Paulo Canelas de Castro has also previously been inclined towards a similar interpretation. See Paulo Canelas de Castro (n 2) 517–18.
[62] José Manuel Cardoso da Costa (n 62) 1376.
[63] Ibid 1376–7.

supremacy of community law is the result of a 'constituent decision' by the Portuguese people, enshrined in a law of amendment.[64]

Jónatas Machado states that the survival, integrity and operability of community law require its supremacy over national law, in the name of the principles community legality, the equality of states before community law, the equality of citizens before community law, reciprocity in the relations between member states, community loyalty, and legal certainty and protection of the public trust. He subsequently asks, however, that such supremacy be 'functionally adequate and conditional'.[65]

It should be noted that more than being an axiom of normative supremacy, the primacy of European Union law must be understood as being a conflict rule, which leads to the preferential application of community law.[66] On the other hand, it should be remembered that the primacy theory is limited by the constitutional preserve of safeguarding the fundamental principles of the rule of law of a democratic state (Article 8, paragraph 4, *in fine*), the said hard core that must be preserved above all.[67] In conclusion, it is our view that the supremacy of European Union law is the natural corollary of the need to set aside pre-existing rules of national (ordinary) law that conflict with community law and, additionally, of the ineffectiveness and inapplicability of subsequent, incompatible norms.[68]

[64] Gomes Canotilho and Vital Moreira (n 1) 265. The CRP's inclusion of a norm with the content of Article 8, paragraph 4, diminishes the significance, in any case, of the objections raised echoed by Jorge Miranda: 'How is it conceivable that bureaucratic and technocratic normativity such as the one that emanates from these organs can be imposed on the democratic Constitutions of European countries?' See Jorge Miranda (n 5) 170.

[65] See Jonatas Machado (n 5) 168–9.

[66] See Gomes Canotilho and Vital Moreira (n 1) 266. The authors emphasize that the conflict norm is 'fundamentally a norm intended to safeguard powers and not a hierarchy of values'.

[67] Jonatas Machado refers to 'safeguarding the essential systemic dimensions of human rights and rule of law of the State that are constitutionally enshrined.' See Jonatas Machado (n 5) 169.

[68] See Gomes Canotilho and Vital Moreira (n 1) 271.

# 21

# Russia

*Yury Tikhomirov*

## 1. Introduction

Russia is a federation whose precise distribution of powers between central government and the regional and local authorities is still evolving. The Constitution, adopted in 1993, gives the President significant executive power, particularly since there is no vice-president, and the bicameral legislature is comparatively weak. The President nominates the highest state officials, including the Prime Minister, who must be approved by the lower branch of Parliament. The President can also pass decrees without consent from the legislature and is head of the armed forces and of the Security Council. The Russian legal system is based on the civil law model and allows limited judicial review of legislative acts. The judicial system has recently undergone significant reform to increase judicial independence and include more individual protections. This system is presided over by the Supreme Court of the Russian Federation, which is the court of last resort for general jurisdiction matters; and the Constitutional Court of the Russian Federation, which is a court of limited subject-matter jurisdiction.

Following the demise of the Soviet Union, Russia took steps to be involved in international organizations and in 1991 assumed the permanent UN Security Council seat formerly held by the Soviet Union. Russia also is a member of the Organization for Security and Co-operation in Europe (OSCE) and the Euro-Atlantic Partnership Council (EAPC). Russia signed a Partnership and Co-operation Agreement with the European Union (EU) and signed the North Atlantic Treaty Organization (NATO) Partnership for Peace initiative in 1994. However, Russia has not accepted compulsory ICJ jurisdiction.

Russia attaches importance to the development and consolidation of international relations on the basis of rigid observance of principles and norms of international law. These principles and norms reflect the policy of the international community to solve common and concerted problems while simultaneously maintaining and strengthening the sovereign rights of each state. The basic relationship between international law and domestic law is set forth in the Constitution of the Russian Federation. It allows the state to implement norms of international law in national legislation, on one hand, and, on the other hand, to influence their development and collaborate in international organizations.

## 1.1 Relevant Constitutional Provisions

Under Part 4 Article 15 of the Constitution of the Russian Federation, the universally recognized principles and norms of international law and international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation establishes rules other than those envisaged by existing law, the rules of the international agreement shall be applied.

International relations and international treaties of the Russian Federation are under the authority of the Russian Federation under paragraph (к) Article 71 of the Constitution of the Russian Federation. The Russian Federation and the subjects of the Russian Federation have joint jurisdiction over the fulfilment of international treaties of the Russian Federation under paragraph (о) Part 1 Article 72 of the Constitution of the Russian Federation.

Under paragraph (б) Article 86 of the Constitution of the Russian Federation the President of the Russian Federation shall sign the Russian Federation's international treaties and agreements.

Under paragraph (г) Article 106 of the Constitution of the Russian Federation, federal laws on the ratification and denunciation of international treaties must be considered by the Council of the Federation.

In accordance with Part 6 Article 125 of the Constitution of the Russian Federation international treaties inconsistent with the Constitution of the Russian Federation cannot be enforced or applied.

Under Part 3 Article 46 of the Constitution of the Russian Federation everyone has the right to appeal, according to international treaties of the Russian Federation, to international bodies for the protection of human rights and fundamental freedoms, if all the existing domestic remedies have been exhausted.

Under Article 62 (Parts 1–3) of the Constitution of the Russian Federation international treaties may regulate the opportunity to possess foreign citizenship (dual citizenship); they may provide exceptions to the rights and obligations of dual citizens.

Part 2 Article 63 of the Constitution of the Russian Federation contains a provision that the extradition of a person accused of a crime and rendition of a convicted person to serve a sentence in another state shall be carried out on the basis of federal law or an international treaty of the Russian Federation.

Under Part 2 Article 67 of the Constitution the Russian Federation shall possess sovereign rights and exercise jurisdiction on the continental shelf and in the exclusive economic zone of the Russian Federation according to the rules established by federal law and the norms of international law.

Under Article 69 of the Constitution the Russian Federation shall guarantee the rights of the indigenous minority peoples according to the universally recognized principles and norms of international law and international treaties of the Russian Federation.

Under Article 79 of the Constitution the Russian Federation may participate in interstate associations and transfer to them part of its powers according to interna-

tional treaties and agreements if this does not involve limiting the rights and freedoms of man and citizen and does not contradict the principles of the constitutional system of the Russian Federation.

The Constitution of the Russian Federation does not refer to 'Customary International Law' or 'Law of Nations', but it does mention universally recognized principles and norms of international law, and international treaties of the Russian Federation.

There is no reference to the declarations and decisions of international tribunals in the Constitution of the Russian Federation. The Constitution of the Russian Federation mentions only universally recognized principles and norms of international law and international treaties of the Russian Federation, which are component parts of the legal system of the Russian Federation under Part 4 Article 15 of the Constitution of the Russian Federation. Nonetheless, the Preamble of the Constitution of the Russian Federation contains a provision stating that the Constitution is adopted in accordance with the universally recognized principles of equality and self-determination of peoples.

In accordance with Part 1 Article 17 of the Constitution, in the Russian Federation the rights and freedoms of man and citizen are recognized and shall be guaranteed according to the universally recognized principles and norms of international law and according to the Constitution.

Under Part 1 Article 63 of the Constitution the Russian Federation shall grant political asylum to foreign nationals and stateless persons according to the universally recognized norms of international law.

## 1.2 Domestic Application of International Law

The general rule that regulates the application of international law in the national legal system is Part 4 Article 15 of the Constitution of the Russian Federation, which states that the universally recognized principles and norms of international law and international treaties of the Russian Federation shall be a component part of its legal system.

## 1.3 Federation Allocation of Authority over International Law

Under the Constitution of the Russian Federation, the fulfilment of international treaties of the Russian Federation is included in the joint jurisdiction of the Russian Federation and the subjects of the Russian Federation (paragraph (o) Part 1 Article 72 of the Constitution of the Russian Federation). Local self-government is not included in the system of state authorities. If the participation of local self-government is necessary to implement an international treaty, such participation shall be ensured. An international treaty is binding for all branches of state power even if the agreement mostly applies to a certain branch and despite the place of the authority in the governmental hierarchy.

As a rule, component parts of the Russian Federation refer to these categories of international law in their constitutions: 'international treaties', and 'universally

recognized principles and norms of international law'. The mentioned categories are also reflected in the laws of subjects of the Russian Federation.

Certain constitutions refer to the Universal Declaration of Human Rights. A number of laws of subjects of the Russian Federation also refer to certain international documents, such as the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. This may be explained by a provision of paragraph (o) Article 72 of the Constitution of the Russian Federation under which the joint jurisdiction of the Russian Federation and the subjects of the Russian Federation includes co-ordination of international and foreign economic relations of the subjects of the Russian Federation, and fulfilment of international treaties and agreements of the Russian Federation.

Under paragraph (г) Part 2 Article 125 of the Constitution of the Russian Federation, the Constitutional Court of the Russian Federation shall consider cases on the compatibility with the Constitution of the Russian Federation of international treaties and agreements of the Russian Federation that have not come into force. Similar provisions are contained in Federal Constitutional Law No 1-ФКЗ of 21 July 1994 on the Constitutional Court of the Russian Federation and also in Federal Law No 101-ФЗ of 15 July 1995 on the International Treaties of the Russian Federation.

The right to pose the compatibility question to the Constitutional Court is granted certain authorities: the President of the Russian Federation, the Council of the Federation, the State Duma, one-fifth of the members of the Council of the Federation or of the deputies of the State Duma, the government of the Russian Federation, the Supreme Court of the Russian Federation, and the Higher Arbitration Court of the Russian Federation, or the bodies of legislative and executive power of the subjects of the Russian Federation.

Under paragraph 1 Article 8 of Federal Law No 101-ФЗ of 15 July 1995 on the International Treaties of the Russian Federation, recommendations on the conclusion of a treaty may be presented for the consideration of the President of the Russian Federation or the government of the Russian Federation by the chambers of the Federal Assembly of the Russian Federation, and for the subjects of the Russian Federation by competent bodies.

Recommendations may also be presented by the Supreme Court of the Russian Federation, the Higher Arbitration Court of the Russian Federation, the Prosecutor General's Office of the Russian Federation, the Central Bank of the Russian Federation and the Federal Ombudsman within their authorities.

Under Part 2 Article 16 of Federal Law No 101-ФЗ of 15 July 1995 on the International Treaties of the Russian Federation, the Ministry for Foreign Affairs independently or jointly with federal executive authorities presents to the President of the Russian Federation and the Federal government an international treaty for approval and introduction for ratification. Federal laws on ratification of international treaties adopted by the State Duma must be considered by the Council of the Federation.

Subjects with the power to initiate legislation may make a motion to pass legislation relevant to matching federal legislation with an international obligation of the Russian Federation. Under Part 1 Article 104 of the Constitution of the Russian Federation, the power to initiate legislation belongs to the President of the Russian Federation, the Council of the Federation, the members of the Council of the Federation, the deputies of the State Duma, the government of the Russian Federation, and the legislative (representative) bodies of the subjects of the Russian Federation. The power to initiate legislation also belongs to the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation, and the Higher Arbitration Court of the Russian Federation on the issues within their authority.

## 2. International Treaties and the Other International Agreements

The notion of international treaty is contained in paragraph (a) Article 2 of Federal Law No 101-ФЗ of 15 July 1995 on the International Treaties of the Russian Federation. An international treaty of the Russian Federation is defined as an international agreement concluded between the Russian Federation and a foreign state (or states), international organization, or other body that is capable of concluding a treaty, in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

The existing doctrinal provision that an international treaty has priority over federal law is based on a norm of Part 4 Article 15 of the Constitution of the Russian Federation. Under this article, if an international treaty of the Russian Federation establishes rules other than those envisaged by law, the rules of the international agreement shall be applied. However, this constitutional provision is rather general and may not solve all conflicts between international treaties of the Russian Federation and federal laws. For instance, it does not answer the question of whether an international treaty of the Russian Federation has to correspond to certain conditions to have priority over federal law.

The Presidium of the Supreme Court of the Russian Federation interpreted the constitutional provision in Decision No 8 of 31 October 1995 and Decision No 5 of 10 October and recognized that not every international treaty of the Russian Federation has priority over federal laws, but only ratified treaties. Unratified international treaties of the Russian Federation have no priority in case of conflict between the treaties and federal laws.

Under Part 3 Article 5 of Federal Law No 101-ФЗ of 15 July 1995, officially published international treaties of the Russian Federation that do not require a domestic act for their application shall operate directly. For implementation of the other provisions of international treaties of the Russian Federation relevant acts are adopted.

In accordance with the Constitution of the Russian Federation, the universally recognized principles and norms of international law and international treaties of

the Russian Federation shall be a component part of its legal system. However, their correlation and impact on the Russian legal system are not characterized in detail in Russian legislation. Unlike the notion of the international treaty, the universally recognized principles and norms of international law are not defined in Russian legislation.

The Presidium of the Supreme Court of the Russian Federation interpreted the constitutional provision in Decision of 31 October 1995 No 8 to state that universally recognized principles and norms of international law shall be set directly in international documents. Presidium Decision of the Supreme Court of the Russian Federation of 10 October 2004 No 5 stated that 'universally recognized principles of international law' are defined as fundamental imperative norms departure from which is inadmissible while 'universally recognized norms of international law' are standards of conduct, accepted and applicable as legally binding by the international community of states.

The Courts of the Russian Federation recognize as legally binding the provisions of international treaties, consent to be bound by which may be expressed in ways other than ratification (for instance by signature, accession, approval, etc).

Decision No 5 of the Presidium of the Supreme Court of the Russian Federation of 10 October 'Of application of universally recognized principles and norms and international treaties of the Russian Federation by federal courts of general jurisdiction' (hereafter 'Decision No 5')) establishes:

> The courts shall take into consideration that an international treaty is applicable if the Russian Federation expressed by competent authorities its consent to be bound by the treaty through its action (signature, expressed of instruments constituting a treaty, ratification, acceptance or approval, accession or by any other means if so agreed) and on the assumption of entry into force for the Russian Federation.

After international treaty ratification and the treaty's entry into force it becomes a part of the legal system of the Russian Federation. The issuance of other normative legal documents (except federal law on ratification) is not required.

## 2.1 The Doctrine of Self-Executing Treaties

Russian courts apply the doctrine of self-executing and non-self-executing treaties. Decision No 5 establishes that under Part 3 Article 5 of Federal Law No 101-ФЗ of 15 July 1995 on International Treaties of the Russian Federation, provisions of officially published international treaties of the Russian Federation that do not require the issuance of domestic acts shall have direct application. For the implementation of other provisions of international treaties, appropriate legal acts are required; for instance, if the treaty contains an obligation to modify legislation of states parties.

### 2.2 Treaty Interpretation

Decision No 5 established that in case of necessity courts may apply for interpretation of an international treaty to the Ministry for Foreign Affairs and the Ministry of Justice of the Russian Federation. However, the courts shall interpret international treaties in accordance with the provisions of the Vienna Convention on the Law of Treaties 1969 (Vienna Convention).

Under the legislation of the Russian Federation, courts are not competent to identify the contents or legitimacy of reservations to the international treaties of the Russian Federation. The conclusion of international treaties and the formulation of reservations are within the authority of executive and legislative power (in case of ratification). Reservations are formulated in accordance with the Vienna Convention and treaty provisions.

The Constitutional Court of the Russian Federation may refer to provisions of international treaties not obligatory for the Russian Federation to explain its legal position. For instance in 2003 the Constitutional Court of the Russian Federation referred to the European Social Charter, which was ratified by the Russian Federation only in 2009. The Constitutional Court of the Russian Federation applied the Charter provisions although the Russian Federation was not a party to it.

## 3. Customary International Law

Under Part 4 Article 15 of the Constitution of the Russian Federation, the universally recognized principles and norms of international law and international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation establishes rules other than those envisaged by law, the rules of the international agreement shall be applied.

Thereby, if universally recognized principles or norms of international law are expressed as international custom, they are incorporated in the legal system of the Russian Federation: in this respect there is an automatic incorporation of recognized international law customs in legal system of the Russian Federation.

Russian courts do not apply international customary law generally, but instead refer to international treaties of the Russian Federation. In fact, in Russian legal practice, neither courts nor parties refer to international law norms. State authorities also apply international treaties. An exception is references to international law customs inherent in diplomatic practice.

## 4. Hierarchy

Under Part 4 Article 15 of the Constitution of the Russian Federation, if an international treaty or agreement of the Russian Federation establishes rules other

than those envisaged by law, the rules of the international agreement shall be applied. Thereby, the Russian legal system includes international treaties of the Russian Federation, that is treaties by which the Russian Federation expressed consent to be bound and that come into force, and also recognized international law customs. Only treaties to which consent to be bound is expressed by federal law (for instance ratified international treaties) have priority over Russian laws. The Constitution of the Russian Federation does not establish priority of international customary norms over laws. There are different positions on that matter in the Russian international law doctrine.

## 4.1 Conforming Domestic Law to International Obligations

Russian courts, particularly the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation and the Higher Arbitration Court of the Russian Federation, assume that international law and domestic law are independent legal systems and norms of international law recognized by the Russian Federation as legally binding may regulate corresponding relations.

Decision No 5 establishes that on consideration of civil, criminal, and administrative cases an international treaty of the Russian Federation is to operate directly if it has come into force and become legally binding for the Russian Federation and if its provisions do not require the issuance of domestic acts for its application, making it capable of creating rights and obligations for subjects of national law (Part 4 Article 15 of the Constitution of the Russian Federation, Part 1, Part 3 Article 5 of the Federal Law on International Treaties of the Russian Federation, Part 2 Article 7 of the Civil Code of the Russian Federation).

The Constitutional Court of the Russian Federation actively applies international treaties on human rights, such as the International Covenant on Civil and Political Rights 1966, the International Covenant on Economical, Social and Cultural Rights 1966, the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, and also recommendatory acts (the Universal Declaration of Human Rights 1948).

## 4.2 The Doctrine of *Jus Cogens*

Russian courts, in line with other public authorities, acknowledge the doctrine of *jus cogens* (imperative norms of international law). The courts apply norms of *jus cogens* in accordance with Article 53 of the Vienna Convention. The Constitutional Court of the Russian Federation actively applies universally recognized principles of international law. The Constitutional Court applies the principles of responsibility of states for aggressive war, the principle of respect of human rights and fundamental freedoms, the principle of sovereign equality of states, the principle of territorial integrity, etc.

## 6. Other International Law Sources

### 6.1 Declarations and Recommendations

Recommendations, including UN resolutions and similar acts, are referred to by the Constitutional Court of the Russian Federation for elaborating a legal position. The Supreme Court of the Russian Federation in some cases also refers to recommendations and other non-binding texts, including the Standard Minimum Rules for the Treatment of Prisoners. Recommendations are neither included directly in the Russian Federation legal system nor regulate internal relations. However, such texts may be applicable in court practice for interpreting constitutional provisions.

### 6.2 Decisions of International Courts

The Russian Federation recognizes as compulsory the jurisdiction of European Court of Human Rights on questions of interpreting and application of Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols, in case of alleged violation of their provisions by the Russian Federation. Decisions of the European Court of Human Rights in relation to the Russian Federation are legally binding for all authorities including courts. In jurisprudence the question of the place of a decision of the European Court of Human Rights in the legal system is debatable. When some jurists consider that decisions of the European Court of Human Rights are the source of Russian law, others criticize such a position and hold a different opinion.

### 6.3 Decisions and Recommendations of Treaty Bodies

Recommendations of international treaty bodies are not considered to be legally binding. However, recommendations of conferences or meetings of the parties may be considered as subsidiary sources of interpretation or application of international treaties by courts. The Constitutional Court of the Russian Federation has referred in its decisions to documents of the Conference on Security and Co-operation in Europe—Helsinki Final Act 1975, the Concluding Document of the Vienna meeting 1986, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe 1990, etc.

# 22

# Serbia

*Sanja Djajić*

## 1. Introduction

The republic of Serbia has a newly adopted Constitution that came into effect on 10 November 2006. Under the new Constitution, executive power is granted to the President, who is elected by direct vote, and to the Prime Minister, who is elected by the National Assembly. The National Assembly, a unicameral legislature, is the law-making body for Serbia. Judicial authority in this civil law system rests in courts of general jurisdiction, the highest of which is the Supreme Court of Cassation; and courts of special jurisdiction.

Following the break up of the former Republic of Yugoslavia, Serbia, as the successor state to the former Republic of Yugoslavia, in 2000 regained its seat in such international organizations as the Organization for Security and Co-operation in Europe (OSCE) and the UN. Serbia is now actively participating in International Monetary Fund (IMF) and World Bank projects, was admitted to the Council of Europe in 2003, and is pursuing membership of the European Union (EU).

### 1.1 Relevant Constitutional Provisions

The Constitution of the Republic of Serbia was adopted on 8 November 2006,[1] after the cession of the State Union of Serbia and Montenegro in May 2006. Since the State Union was a federation of very loose character established in 2003 as the continuation of the Federal Republic of Yugoslavia established on 27 April 1992, it was necessary to adopt a new Constitution when Serbia emerged as a new independent country. Similar to constitutions that emerged in central and eastern Europe during the 1990s,[2] the 2006 Constitution of Serbia makes ample references to international law in general and to international law sources in particular.

[1] Constitution of Republic of Serbia, *Official Journal of Republic of Serbia* (*Sl glasnik RS*) 98/2006.

[2] See generally, Eric Stein, 'International Law in Internal Law: Toward Internalization of Central-Eastern European Constitutions?' (1994) 88 AJIL 427. Similarly, but with respect to the issue of post-totalitarian constitutions, see Antonio Cassese, 'Modern Constitutions and International Law' (1985) 192 Recueil des Cours de l'Academie de Droit International 331, 351.

A number of these provisions refer to the general position of international treaties within the national legal order, whereas several constitutional provisions discuss treaties within a more particular context. Therefore, the overview of the constitutional provisions that refer to international treaties will be structured along these lines: (1) general constitutional provisions on the position of international treaties within the Serbian national legal order, and (2) particular constitutional provisions regarding the application of international treaties within specific contexts in the Serbian legal order.

### *General constitutional provisions on the position of international treaties within the Serbian legal order*

**International relations—Article 16**
The foreign policy of the Republic of Serbia shall be based on generally accepted principles and rules of international law.

Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system of the Republic of Serbia and directly applicable. Ratified international treaties must be in conformity with the Constitution.

**Judiciary Principles—Article 142(2)**
Courts shall be a separate branch of government and independent in their work that shall adjudicate on the basis of the Constitution, statutes and other general legal acts as provided for by the law, generally accepted rules of international law and ratified international treaties.

**Judicial decisions—Article 145(2)**
Judicial decisions shall be based on the Constitution, law, ratified international treaty and regulations adopted in accordance with the law.

**Jurisdiction of the Constitutional Court—Article 167(1)**
Constitutional Court shall have jurisdiction to decide on:

1. Conformity of statutes and other general legal acts with the Constitution, generally accepted rules of international law and ratified international treaties;
2. Conformity of ratified international treaties with the Constitution;
3. Conformity of other general legal acts with statutes;
4. Conformity of basic acts of autonomous provinces and local self-government with the Constitution and statutes;
5. Conformity of regulations for public institutions, political parties, trade unions, non-governmental associations and collective agreements with the Constitution and statutes.

**Hierarchy of national and international legal norms—Article 194**
Legal order of Republic of Serbia shall be integral.

Constitution is the highest legal act in Republic of Serbia.

All laws and other general legal acts enacted in the Republic of Serbia must be in conformity with the Constitution.

Ratified international treaties and generally accepted rules of international law shall be an integral part of the legal order of Republic of Serbia. Ratified international treaties must not be contrary to the Constitution.[3]

Statutes and other general legal acts enacted in the Republic of Serbia must not be contrary to ratified international treaties and generally accepted rules of international law.

## *Other constitutional provisions regarding the implementation of international treaties (human and minority rights, rights of aliens, use of force, the conduct of referenda and position of certain state authorities)*

### Human and minority rights and freedoms[4]

**Direct Application of Human Rights—Article 18**

Human and minority rights guaranteed by the Constitution shall be directly applicable.

This Constitution guarantees and makes directly applicable those human and minority rights which are guaranteed by the generally accepted rules of international law, ratified international treaties and the law. Enjoyment of rights and freedoms may be further regulated by the law only if the Constitution explicitly provides so or if it is necessary due to the nature of the right, provided that the law in no way impairs the guaranteed right.

Provisions on human and minority rights shall be interpreted so as to promote the values of a democratic society and in accordance with international human and minority standards as well as the practice of international institutions monitoring their enforcement.

**Protection of human and minority rights and freedoms—Article 22**

Everyone shall have the right to judicial protection if his or her right or freedom has been violated or denied as well as the right to have all consequences arising from the violation undone.

Citizens shall have the right to address international institutions for the protection of their rights and freedoms guaranteed by the Constitution.

[3] Similar but different wording of the same rule is to be found in Articles 194 and 16 of the Constitution. The different wording was criticized in this particular instance by the Venice Commission: 'Finally, rules similar to Article 16 appear, in a different wording, in Article 194. Such repetitions, especially if not identical, are undesirable since they risk opening delicate issues of interpretation.' European Commission for Democracy through Law (Venice Commission), Opinion on the Constitution of Serbia, (adopted by the Commission on its 70th plenary session, Opinion No 405/2006, CDL-AD(2007)004, Strasbourg, 19 March 2007), 6 [19], available at: <http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.pdf>.

[4] Venice Commission, (n 3) 6–7 [21] ('Part II of the Constitution deals with "human and minority rights and freedoms". This Part comprises Arts 18 to 81; it is subdivided into three parts, ie Fundamental Principles (1, Arts 18 to 22), Human Rights and Freedoms (2, Arts 23 to 74), and Rights of Persons Belonging to National Minorities (3, Arts 75 to 81). Moreover, in Part III of the Constitution (Economic System and Public Finances) there are a number of additional guarantees which are—on the basis of their content—to be qualified as fundamental rights as well (Arts 82 to 90). In sum, nearly 70 Arts are dedicated to fundamental rights, ie approximately one third of the 206 Arts of the Constitution. From an international and a comparative perspective this number is quite remarkable, in absolute and in relative terms. It shows that human rights form an integral and important part of constitutional law and it makes it clear that attention is paid to this element and basic feature of a democratic society in the sense of european standards such as the European Convention on Human Rights.').

**Rights of persons belonging to national minorities—general provisions**
**Article 75(1)**
Persons belonging to national minorities shall enjoy, in addition to Constitutional rights guaranteed to all citizens, additional individual and collective rights. Individual rights shall be enjoyed individually while collective rights shall be enjoyed in association with other members of the minority, in accordance with the Constitution, laws and international treaties.

**Status of Aliens—Article 17**
Aliens shall, in accordance with international treaties, enjoy all rights and freedoms as citizens of Serbia except in those cases when certain rights have been reserved for the citizens of Serbia by the Constitution and the law.

**Property rights of Aliens—Article 85(1)**
Foreign natural and juridical persons may acquire ownership of real estate in accordance with the law and international treaties.

**Use of Force—Army of Republic of Serbia—Article 139**
Army of Serbia shall defend the country from aggression and perform other missions and tasks in accordance with the Constitution, law and principles of international law on the use of force.

**Referendum—Article 108(2)**
Obligations arising from international treaties, human and minority rights and freedoms, tax and other financial legislation, budget, state of emergency, amnesty and electoral competence of the National Parliament may not be subject to referendum.

**Public Prosecutor—Status and competences—Article 156(2)**
Public Prosecutor performs his competences in accordance with the Constitution, law, ratified international treaty and regulations adopted in accordance with the law.

It is worth noting that some constitutional provisions on human rights were taken verbatim from international human rights treaties, notably the International Covenant on Civil and Political Rights (ICCPR)[5] and the European Convention on Human Rights (ECHR),[6] which can be clearly seen in the formulation of these provisions. For example, the right to a fair trial, freedom of religion, freedom of expression, and others, are taken directly from the ECHR.

### *Provisions on customary international law*

The Serbian Constitution refers to customary international law as 'generally accepted rules of international law'. The references, however, are of a more

[5] International Covenant on Civil and Political Rights (adopted 16 December 1966) 999 UNTS 171 (ICCPR).
[6] European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (ECHR).

general, declaratory nature without much practical relevance. There are no specific instructions on the content of customary international law and the method of applying it. Therefore, unlike treaties that have a clear framework of application in the Constitution, there is no clear guidance on how to implement customary law. There are fewer provisions referring to generally accepted rules of international law than provisions on treaties. Additionally, customary international law is usually coupled with a reference to a treaty, and does not possess a constitutional position independent from treaties. These provisions are as follows (emphasis added):

**International relations—Article 16**
The foreign policy of the Republic of Serbia shall be based on *generally accepted principles and rules* of international law.

*Generally accepted rules of international law* and ratified international treaties shall be an integral part of the legal system of the Republic of Serbia and directly applicable. Ratified international treaties must be in conformity with the Constitution.

**Direct Application of Human Rights—Article 18**
Human and minority rights guaranteed by the Constitution shall be directly applicable.

This Constitution guarantees and makes directly applicable those human and minority rights which are guaranteed by the *generally accepted rules of international* law, ratified international treaties and the law. Enjoyment of rights and freedoms may be further regulated by the law only if the Constitution explicitly provides so or if it is necessary due to the nature of the right, provided that the law in no way impairs the guaranteed right.

**Judiciary Principles—Article 142(2)**
Courts shall be a separate branch of government and independent in their work that shall adjudicate on the basis of the Constitution, statutes and other general legal acts as provided for by the law, *generally accepted rules of international law* and ratified international treaties.

**Jurisdiction of the Constitutional Court—Article 167(1)**
Constitutional Court shall have jurisdiction to decide on:

Conformity of statutes and other general legal acts with the Constitution, *generally accepted rules of international law* and ratified international treaties;

**Conformity of ratified international treaties with the Constitution;**
Hierarchy of national and international legal norms—Article 194

Ratified international treaties and *generally accepted rules of international law* shall be an integral part of the legal order of Republic of Serbia. Ratified international treaties must not be contrary to the Constitution.

Statutes and other general legal acts enacted in the Republic of Serbia must not be contrary to ratified international treaties and *generally accepted rules of international law*.

*Other sources*

Apart from generally tailored constitutional principles in Article 1, which, inter alia, refer to 'European principles and values' the Constitution refers to international legal sources other than treaties and customary law on several occasions. For example, Article 18(3) of the Constitution calls for the implementation of international human rights jurisprudence in the following manner: 'Provisions on human and minority rights shall be interpreted so as to promote the values of a democratic society and in accordance with international human and minority standards as well as practice of international institutions monitoring their enforcement.' According to the opinion of the Venice Commission, this provision enables international case-law to be introduced into the Serbian constitutional system: 'From a European perspective this means that above all the case-law of the European Court of Human Rights is of highest significance for the interpretation of fundamental rights in the Constitution of Serbia.'[7]

## 1.2 Legislative Provisions or Regulations Relating to International Law

Many legislative texts call for the application of international law within the Serbian national legal system. With respect to international human rights only, there are over 30 pieces of legislation referring to their application, but in a general tone without specific commitments.[8] Those pieces of legislation that do incorporate international law in a less declaratory way cover areas of state immunity, diplomatic and consular privileges and immunities, private international law, law on civil and criminal procedure, etc.

For example, the Civil Procedure Act, Article 26(1)[9] provides that rules of international law shall regulate the jurisdiction of courts in cases involving aliens enjoying immunity as well as foreign states and international organizations. Therefore, rules of international law regarding immunity of foreign states, international organizations and aliens enjoying immunity are directly applicable by virtue of this statutory provision. There are similar provisions in the Civil Enforcement Act,[10] the Administrative Procedure Act,[11] and the Criminal Procedure Code.[12] There are

[7] Venice Commission (n 3) [26].

[8] See generally, Sanja Djajić, 'Use, misuse and abuse of human rights rhetoric: the case of Serbia' *Discussion Papers* (2006) DP41. Centre for the Study of Global Governance, London School of Economics and Political Science, London, UK, available at: <http://eprints.lse.ac.uk/23368/>.

[9] Civil Procedure Act (*Sl glasnik RS* 125/2004) Article 26(1).

[10] Civil Enforcement Act (*Sl glasnik RS* 125/2004) Article 26.

[11] Administrative Procedure Act (Official Journal of Federal Republic of Yugoslavia (*Sl list SRJ*) 33/97, 31/2001) Article 25(1) ('As to jurisdiction of administrative authorities in matters in which one of the parties is an alien enjoying diplomatic immunity in the Federal Republic of Yugoslavia, or a foreign state or an international organization, the rules of international law shall apply.').

[12] Criminal Procedure Code (*Sl glasnik RS* 20/2009) Article 219(1) ('As to exclusion of criminal prosecution against aliens enjoying immunity in Serbia and Montenegro, the rules of international law shall apply.').

other pieces of legislation that explicitly give precedence to international treaties over statutory provisions for those matters covered by applicable treaties. For example, the Conflict of Laws Act (also known as the Private International Code),[13] Customs Act,[14] Arbitration Act,[15] Act on Criminal Penalties,[16] Inheritance Act,[17] and Foreign Affairs Act[18] contain such provisions. In certain cases domestic legislation directly refers to international law rules, the breach of which is a precondition for applying domestic criminal provisions.[19]

## 2. Treaties and Other International Agreements

### 2.1 The Definition and Interpretation of Treaties

When applying treaties domestic courts begin with the Official Journal of Republic of Serbia,[20] which publishes international agreements in the special edition with a clear designation that these instruments are international agreements. Therefore, domestic courts are relieved of the duty to define international agreements since it is the legislator who designates acts as international agreements. Before a domestic court enters the discussion on the applicability of the particular treaty, it simply cites the relevant Official Journal without discussing the nature of the legal act that already has been defined as a treaty. Accordingly, political commitments are not published in the official edition of the Parliament devoted to international legal instruments, so courts would never consider their application in the course of the judicial proceeding. This practice has been firmly established for years during several constitutional periods and is also required by the Constitution now in force. Article 16 of the Serbian Constitution (which is similar to provisions in previous constitutions) provides for the application of 'ratified conventions' only, which means that only such agreements qualify as treaties.

However, once a legal instrument officially becomes a treaty through ratification and is published in the Official Journal, courts rely on international law to decide issues of treaty law, such as entry into force, reservations, termination, scope of application, etc. In many instances domestic courts will not explain the grounds for their interpretation of treaty provisions, but the interpretation would simply follow the rules of international treaty law.

[13] Conflict of Laws Act (*Sl glasnik RS* 46/2006) Article 3.
[14] Customs Act (*Sl glasnik RS* 62/2006) Article 21.
[15] Arbitration Act (*Sl glasnik RS* 46/2006) Article 8.
[16] Act on Criminal Penalties (*Sl glasnik RS* 85/2005) Article 1(2).
[17] Inheritance Act (*Sl glasnik RS* 101/2003) Article 7.
[18] Foreign Affairs Act (*Sl glasnik RS* 116/2007 and 41/2009) Article 1(2).
[19] Chapter XXXIV of the Criminal Code contains so-called international crimes. Definitions of most of these crimes begin with reference to the breach of international rules. Criminal Code (*Sl glasnik RS* 85/2005).
[20] As well as Official Journals of FR Yugoslavia and State Union of Serbia and Montenegro.

For example, Serbian courts were asked on two occasions to apply the Agreement on Succession Issues[21] before it entered into force. This Agreement was signed on 29 June 2001 between five Socialist Federal Republic of Yugoslavia (SFRY) successor states and provided that it would enter into force after all five signatories deposited ratification instruments in accordance with Article 12 of the Agreement. The Federal Republic of Yugoslavia, as one of the five successor states, ratified this treaty on 1 July 2002. The High Commercial Court in Belgrade denied the request because the Succession Agreement had not entered into force within the meaning of Article 12, despite the fact that Serbia had ratified the treaty. Here the Serbian court applied international rather than domestic rules on a treaty's entry into force. Part of the reasoning is as follows:

> On July 1, 2002 the Federal Parliament adopted the Act on ratification of the Agreement on Succession Issues which was signed on June 29, 2001 in Brussels. The Act on Ratification entered into force on the eighth day after it was published in the Official Journal of FR Yugoslavia—International Treaties on July 3, 2002. Acting upon the request of the plaintiff, this Court was informed from the Ministry of Foreign Affairs that this Agreement still has not entered into force since the Republic of Croatia has not ratified it yet, while this Agreement shall enter into force 30 days after the deposit of all ratification instruments according to its Article 12. Therefore, the plaintiff's request is denied as premature. This Agreement has not come into force for any of the signatories. Though the request relies on the Act on ratification, which, according to the plaintiff did enter into force, it is to be noted that it does not mean that the Agreement as such, which is applicable for the issues raised in the plaintiff's request, has come into force.[22]

Similarly, the same court denied the application of the Agreement on Succession Issues because the Agreement as such did not enter into force although the Act on its ratification did.[23]

In similar vein, the Supreme Court of Serbia denied the request for denationalizing property that the owner was deprived of after World War II. The court invoked rules on temporal application of treaties and their non-retroactivity and denied the request because the Convention was not in force at the time the deprivation occurred.[24]

Thereby, domestic courts differentiated between international and national entry into force and made clear that both conditions need to be fulfilled in order to rule on an international treaty. This also proves that it is the international treaty rules that govern the entry into force rather than domestic rules.

[21] Agreement on Succession Issues (*Official Journal of FR Yugoslavia—International Treaties* (*Sl list SRJ—Međunarodni ugovori*) 6/2002).

[22] *British Airways et al v FRY Flight Control Commission High Commercial Court in Belgrade,* Decision Pž 6322/2002 of 25 October 2002. Published in *Časopis za privredno pravo*, 4/2002, 44.

[23] *Primat—Tovarna kovinske opreme v Bratstvo,* High Commercial Court in Belgrade, Decision Pž 6619/2003 of 7 October 2003. Published in: *Časopis za privredno pravo*, 4/2003, 52.

[24] Supreme Court of Serbia, Judgment No Rev 971/2007(2) of 6 September 2007.

In respect of agreements not approved as treaties, the Dayton Peace Agreement signed between Bosnia and Herzegovina, Croatia and FR Yugoslavia, which marked the end of war in the territory of Bosnia, entered into force on the day of its signature on 14 December 1995 according to its Article 11. According to international treaty rules no ratification was required for this Agreement to be binding and applicable. However, the constitutional provision requires ratification and publication before an international agreement is applicable to national authorities. That is why this treaty was ratified by the Yugoslav Parliament in December 2002.[25]

Previous constitutional periods allowed the conclusion of administrative agreements, which were widely used by various ministries. The Act on the Conclusion and Enforcement of International Treaties provides that '[p]rotocols, memoranda and other acts adopted solely for the enforcement of international treaties by the organs authorized by these treaties, which do not impose any new international obligations (administrative agreements) shall not be considered as international treaties within the meaning of this Act'. [26] This Act is not fully consistent with the 2006 Serbian Constitution, so a new draft of the Act is in the process of adoption. In the meantime, ministries still use administrative agreements when authorized by international treaties. However, these agreements are usually subject to provisional application.

The Serbian Constitution provides that 'Courts shall be a separate branch of government and independent in their work that shall adjudicate on the basis of the Constitution, statutes and other general legal acts as provided for by the law, generally accepted rules of international law and ratified international treaties'[27] and that 'judicial decisions shall be based on the Constitution, law, ratified international treaty and regulations adopted in accordance with the law'.[28] These provisions imply that courts should be independent when interpreting and applying international law. However, several pieces of legislation direct courts to consult competent ministries (ie the executive branch) when deciding issues of international law. For example, Article 26 of the Civil Procedure Act[29] provides that international law directly governs the immunity of foreign states, international organizations and individuals enjoying immunity.[30] The same provision provides that 'in case of doubt on the existence and scope of the immunity, courts should consult the ministry of justice'. This provision is also in the Criminal Procedure Code[31] and Administrative Procedure Act.[32] As a result, mixed signals are sent to

[25] Act on Ratification of the General Framework Agreement for Peace in Bosnia and Herzegovina (*Sl list SRJ—Međunarodni ugovori* 12/2002).
[26] *Sl list SFRJ* 55/78, 47/89, Article 2(2).
[27] Article 142(2).
[28] Article 145(2).
[29] Civil Procedure Act 2004, Article 26.
[30] See section 1.3 above.
[31] Criminal Procedure Code 2009, Article 219(2).
[32] Administrative Procedure Act 2001, Article 25(2).

the courts. In practice courts tend to consult ministries not only because of these legislative solutions, but also because of the long-standing tradition of socialism, when courts had to consult the executive branch on issues of international (and foreign) law. Courts will also routinely consult the ministry of foreign affairs to check whether an international treaty is in force. Courts will never challenge the opinion of the ministry in this respect, which is problematic because it disturbs the position of the courts as the legal branch and increases the influence of ministries over the courts. However, in cases of human rights treaties, it seems that domestic courts deal with these matters more independently than with other types of treaties.

Courts do not cite the Vienna Convention (though they are entitled by constitutional provisions to do so). Still, courts tend to apply international treaty rules when assessing the validity of treaties and scope of their application. Therefore, treaties are interpreted in accordance with international treaty law rather than statutory law. This is illustrated by the case-law on the application of the Agreement on Succession Issues, where courts refused to give effect to the Agreement because it had not yet come into force according to international rules, even though it had come into force according to domestic law.[33] In one of these cases the court made this explicit: 'Conditions for entry into force of international agreements, treaties, convention, etc. are to be determined by these instruments and not by internal acts of signatory states.'[34] Similarly, domestic courts refused to apply the European Convention on Human Rights and Fundamental Freedoms to the alleged violation of human rights that had occurred before Serbia ratified the ECHR. In reaching its decision the court relied on the principles of the temporal scope of application of treaties and non-retroactivity.[35]

## 2.2 Domestic Incorporation and Application

Treaties are automatically accepted into domestic law once they are ratified by the Parliament. This is evident both from the Constitution and the case-law. Article 16 (2) of the Serbian Constitution provides that '[g]enerally accepted rules of international law and ratified international treaties shall be an integral part of the legal system of the Republic of Serbia and directly applicable'. The wording 'integral part of the legal system' existed in previous constitutions (federal constitutions of 1992 and 2003) and was widely accepted by the courts as the ground for direct application of the treaties. The last Serbian Constitution of 2006 goes one step further and clarifies the point by adding 'shall be applied directly' confirming both the previous constitutional solutions and existing case-law. This provision clearly positions Serbia as a monist country regarding the direct application of treaties.

Thus, Serbian courts are empowered to apply treaties without demanding any implementing legislation. However, the act of ratification by the Parliament is still

[33] See section 2.1 above.

[34] *British Airways* (n 22) 44.

[35] See section 2.1 above. Supreme Court of Serbia, Judgment Rev 971/2007(2) of 6 September 2007.

important for two reasons. First, ratification shows the consent of Serbia to be bound by a treaty on the international plane within the meaning of the Vienna Convention on the Law of Treaties (the Vienna Convention).[36] The act of ratification, at the same time, introduces the treaty into the domestic legal order without the need for adopting any implementing legislation (unless the treaty in question requires implementing legislation).

Direct applicability of treaties has been consistently accepted by the courts. When giving reasons for direct applicability of treaties courts usually rely on the following statement:

> According to Article 16 of the Constitution, FR Yugoslavia is to perform its treaty obligations in good faith. International treaties which have been ratified and published in accordance with the Constitution, as well as generally accepted rules of international law, are integral part of domestic legal order. Therefore, the lower court was correct in rejecting the defendant's motion asking the court to order the plaintiff to deposit *cautio iudicatum solvi*, since the 1954 Hague Convention on Civil Procedure relieves the foreign plaintiff of this obligation.[37]

In another case, the Supreme Court of Serbia found that electoral disputes must be resolved before a competent court as required, inter alia, by Articles 13 of the ECHR (right to effective remedy) and Article 3 of Protocol I to the Convention[38] (right to elections). The court stressed that direct applicability of these treaties, as envisaged by the Constitution, imposed obligations upon courts to hear these cases.[39] There are also examples when the Constitutional Court struck down certain provisions of the Act on Pensions and Disability Allowances as contrary to the International Covenant on Economic, Social and Cultural Rights (ICESCR) [40], thereby granting direct applicability to the treaty that is not generally assumed to be of direct applicability.[41] As already mentioned, direct applicability of treaties has not been an issue for domestic courts.

When applying international treaties, courts routinely begin by examining whether a particular treaty has been published in the Official Journal, which is evidence of its binding force on Serbia. Therefore, in cases when a treaty is not binding upon Serbia, courts will deny its application on this particular ground. However, in a very few instances Serbian courts applied international treaties that were not binding upon Serbia, but as an illustration of the content of certain

[36] Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331 (the Vienna Convention).

[37] *Zastava kamioni and Iveco spa v Strela—Transport* High Commercial Court in Belgrade, Decision Pž 480/2000 of 10 February 2000.

[38] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952) (Protocol I to ECHR).

[39] Supreme Court of Serbia, Judgment No Už. 74/2004 of 6 September 2004. Published in *Bilten sudske prakse Vrhovnog suda Srbije* (*Bilten VSS*), 2/2004, 111.

[40] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966) 993 UNTS 1 (ICESCR).

[41] The Constitutional Court found that restrictions imposed by the Law on Pensions and Disability Allowances were contrary to Article 3, 6(1), 11 of the ICESCR.

international human rights[42] or as an additional argument to support the conclusion reached based on other binding instruments.[43] Overall, it is not plausible to claim that there is a widely accepted practice of Serbian courts applying non-binding international treaties.

## 2.3 The Doctrine of Self-Executing Treaties

As mentioned above, both the Constitution and the courts deem all treaties to be self-executing once they are ratified by the Parliament. However, there are treaties that contain provisions that per se are non-self-executing or which explicitly demand the adoption of national legislation. In these cases courts will look at the intent of the parties and deny direct application. Still, this denial will not be the result of the domestic doctrine of 'self-executing' treaties but rather the interpretation of international legal commitments in light of the intent of the parties and in line with the rules of interpretation envisaged by the Vienna Convention. There are several cases that illustrate this point.

In those cases that dealt with the Agreement on Succession Issues after it entered into force, petitions for establishment of property rights (by which plaintiffs aim to prove ownership when no other evidence of their property right exists, such as a deed, etc) were denied on the date of succession, 31 December 1990, due to the wording of Annex G to the Agreement on Succession Issues. Annex G (Private Property and Acquired Rights) provides, inter alia, that state parties shall protect and, when necessary, restore all property and acquired rights as they stood on 31 December 1990. The issue before domestic courts was whether this Agreement, read as a whole, was ground for the restoration of property rights or whether national measures were required to implement the rights. Domestic courts opted for the latter option when the petition was aimed at the establishment of property rights (but not when the existence of the property right was undoubted). In reaching this decision, one court offered the following reasoning:

> Agreement on Succession Issues envisaged that successor states shall take such action as may be required by general principles of law and otherwise appropriate to ensure the effective

[42] Belgrade District Court granted prohibitory injunction to stop the distribution of the information contained in the newspaper article. In its reasoning the court rejected arguments of respondents based on the ICCPR and ECHR relying on national security and proper administration of justice. The court noted that ECHR at that time was not in force for Serbia: 'Despite the fact that the European Convention was not ratified by the State Union of Serbia and Montenegro, the Court still decided to take into consideration its provisions. . . . Therefore, apart from the restrictions based on national security and public order, which have been laid down in the Act on Public Information, the European Convention also envisages the possibility to restrict freedoms in order to maintain the authority and impartiality of the judiciary.' *Public Prosecutor v Magazine 'Svedok'*, Belgrade District Court, Judgment of 6 June 2003 in: 127 ILR 315, 319.

[43] *Zavarovalnica Triglav v Termoelektro-Holding* High Commercial Court in Belgrade, Decision Pž 4039/2004 of 15 September 2004. The issue before the court was the recognition of the foreign non-judicial decision. In reaching its conclusion that under certain circumstances foreign non-judicial decisions may be equated with judicial decisions, the court relied, inter alia, on international instruments which were not binding upon Serbia and Montenegro.

application of the principles set out in this Annex, such as concluding bilateral agreements and notifying their courts and other competent authorities. According to Articles 4 and 7 of the Annex G to the Agreement on Succession Issues, it is clear that the intent of parties to this Agreement was to conclude bilateral agreements in order to set forth procedures for handling these requests and to establish special commissions for these procedures and implementation of the Agreement so that natural and legal persons may have their petitions for establishment of property rights heard. Only after this procedure, as to be envisaged by a bilateral agreement, and if their petitions are denied, the courts will be entitled to hear these cases. Therefore, any judicial determination on these issues is conditioned upon the preliminary proceeding before these commissions in the procedure to be set forth in the bilateral agreements of successor states, which is, for this Court, a preliminary procedural issue.[44]

The same reasoning was adopted in similar cases that followed.[45] Courts also invoked Article 16 of the Constitution, which provides for priority and direct applicability of treaties, but concluded that the intent of the parties in this particular case was not for the provisions to be directly applicable.

## 2.4 Private Parties and Treaties

Due to the direct applicability of treaties and the fact that there is no domestic doctrine of self-executing treaties that could impede their application before domestic courts, Serbian courts routinely recognize the right of standing for private parties on the basis of international conventions in the same manner as they check the standing regarding domestic law. Not all treaties would serve as a ground for granting rights to private parties, but this would depend on other circumstances of the case rather than the standing doctrine.

The case-law proves that the issue of standing is not cumbersome for applicants. Serbian courts do not discuss standing as an issue when applying the European Convention on Human Rights, the ICCPR, the UN Convention on the Status of Refugees,[46] the Hague Conventions on Private International Law, etc. This will be illustrated here briefly with a few domestic cases. In one case the appellate court found that the right to a fair trial in Article 6(1) of the European Convention on Human Rights guarantees the plaintiff the right to have his case heard on the merits if all jurisdictional requirements have been satisfied.[47] Similarly, standing was not an issue in the electoral dispute heard by the Supreme Court.[48] In these and other cases national courts did not challenge the application of the European Convention on Human rights on the ground of standing. Additionally, the Hague Convention

[44] *Astra Internacional v Komerc Sistem* High Commercial Court in Belgrade, Decision Pž 9881/2005 of 11 November 2005.

[45] *Javor Repromaterijal ad v Javor tp and Gradjevinar dd NIS* High Commercial Court in Belgrade, Decision No Pž 255/2006 of 24 January 2006; *FDS Marketing v Fabrika Duvana sp* High Commercial Court in Belgrade, Decision Pž 6178/2006 of 30 October 2006.

[46] United Nations Convention Relating to the Status of Refugees (adopted 28 July 1951) 189 UNTS 137 (Refugee Convention).

[47] District Court, Valjevo, Judgment Gž 1564/2006 of 16 November 2006.

[48] See Protocol I to ECHR (n 38).

on Civil Procedure is routinely applied by domestic courts when the foreign plaintiff is the national of a party to the Hague Convention.[49]

Private rights of action based on treaties will exist when treaties themselves guarantee such a right, or when the breach of a treaty can be qualified as the 'breach of civil and individual rights', which can be pursued as a violation of domestic law in accordance with the Law on Civil Obligations.[50] Therefore, there are two avenues for the aggrieved party to pursue remedies for the violation of international law: solely on the ground of a treaty or breach of the treaty in conjunction with national civil law provisions for damages. The choice will depend on the wording of the treaty, type of breach and remedies sought.

For example, the Supreme Court of Serbia awarded damages to persons of Roma ethnic origin since they were the victims of a breach of the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[51] The Court ruled that discrimination occurred when the victims were not allowed to enter the pool simply because they were Roma. The Supreme Court found that these circumstances were contrary to Article 26 of the ICCPR as well as Article 5(f) of the CERD, which specifically guarantees 'The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.'[52] In awarding damages the Supreme Court looked to national provisions on remedies in the Law on Civil Obligations, namely Article 157 (cessation of activities violating personal rights) and 199 (damages for violation of personal and civil rights and freedoms). The Court explained that discrimination as such necessarily produces pain and anguish that is the prerequisite for awarding damages on the ground of the Law on Civil Obligations.

A similar approach was taken in a string of human rights cases filed against the Republic of Serbia by refugees who were forcefully sent back to territories from which they had fled.[53] The Supreme Court of Serbia held that the Republic of Serbia was responsible for a violation of, inter alia, the UN Convention on the Status of Refugees.[54] Damages were awarded pursuant to Articles 172 (state responsibility for wrongful acts of its organs) and 200 (pecuniary compensation for the breach of civil rights and liberties) of the Law on Civil Obligations.

Apart from damages, national courts, in very few cases, have awarded other types of remedies. This seems to be especially relevant in criminal cases. For example, an appellate court found that the length of the criminal proceeding violated the right

[49] See n 36 and accompanying text.

[50] Law on Civil Obligations (*Sl list SFRJ* 29/78, *Sl list SCG* 1/2003).

[51] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966) 660 UNTS 195 (CERD).

[52] Supreme Court of Serbia, Judgment Rev 229/2004/1 of 21 April 2004. Published in *Bilten VSS*, 2/2004, 64.

[53] For the critical appraisal of these cases, see Sanja Djajić, 'Serbian Judiciary and Transition: Recent Jurisprudence' (2007) 14 Transition Studies Review 81, 83.

[54] Legal Opinion of the Supreme Court of Serbia adopted on 21 June 2001, published in: *Bilten VSS*, 1/2002, 81.

to a fair trial of the accused by exceeding the reasonable time standard.[55] The court *ex officio* commuted the sentence of imprisonment to parole, finding that in light of the violation, imprisonment would not be a justifiable measure under criminal law. The court found this remedy appropriate because of the Recommendation of the Committee of Ministers of the Council of Europe on the Improvement of Domestic Remedies (REC (2004)6),[56] which recommends that a more lenient sentence be imposed when the criminal proceedings have exceeded a reasonable time. The Supreme Court of Serbia, however, struck down this decision on the appeal of the prosecutor. Another example of special damages being awarded is when the Constitutional Court found a breach of the presumption of innocence guaranteed by the Constitution and Article 6(2) of ECHR. The special remedy for this breach was the publication of the decision in the Official Journal of Republic of Serbia.[57]

## 3. Customary International Law

According to Article 16 of the Serbian Constitution, '[g]enerally accepted rules of international law . . . . shall be an integral part of the legal system in the Republic of Serbia and thereby applied directly'. The term 'generally accepted rules of international law' is considered to be customary international law, which is automatically incorporated into domestic law and is directly applicable in national courts.

Despite the fact that the constitutional provision enabling direct application of customary international law has been present for several constitutional periods, courts do not rely on this source.[58] Courts routinely cite this provision when applying treaties, but rarely use it for customary international law. Only in several cases have courts more than simply mentioned the possibility of applying 'generally accepted rules of international law'. In these cases courts used customary international law as an additional argument for their holding, rather than the basis. Here we also include cases where courts cite non-binding international instruments to demonstrate 'international principles'.[59]

For example, when assessing the constitutionality of the Act on Public Information, the Constitutional Court concluded that statutory principles further develop international principles on the freedom of public information.[60] The High Commercial Court in Belgrade relied on 'generally accepted international principles' when framing the concept of '*ordre publique*' regarding the recognition and enforcement of foreign judicial decisions. In doing so, the court concluded that part

[55] District Court in Subotica, Criminal Law Section, Judgment Kž 266/05 of 15 August 2005.

[56] Recommendation of the Committee of Ministers of the Council of Europe on the Improvement of Domestic Remedies REC (2004)6 (12 May 2004).

[57] Constitutional Court of Serbia, Decision Už 1036/2008 of 19 March 2009, *Sl glasnik RS* 36/2009 of 15 May 2009.

[58] M. Stanivuković and Z. Živković, 'Private International Law—Supplement 21—Serbia' in R. Blanpain (ed.), *International Encyclopaedia of Laws* (Leiden: Kluwer Law International, 2009) 50, [69].

[59] See section 6.1 below.

[60] Decision of the Federal Constitutional Court 143/98, 152/98, 162/98, 169/98, 173/98 of 15 December 2000, published in (*Sl list SRJ* 1/2001 of 15 January 2001).

and parcel of the '*ordre publique*' are principles such as *audiatur et altera pars*, independent and impartial courts, prohibition of fraudulent behaviour, right to appeal, etc.[61] In another case a domestic court applied Article 3 of the Universal Declaration on Human Rights (right to life), without any reference to customary international law. Since this was a war crime case, the court felt bound to give extensive reasoning regarding the protection of the right to life. Among other national and international legal sources, the court also relied on the 1948 UN Universal Declaration on Human Rights.[62]

In a recent decision the Constitutional Court tested the constitutionality of the Act on Judges in the light of customary international law.[63] This is the first decision of a national court where the nature and domestic applicability of customary international law were discussed. The court stated:

> This Court finds that generally accepted rules of international law are the legal source within our legal order. This is the source of law which either requires certain conduct from subjects of international law as the result of widespread and consistent practice of States regarding some generally accepted values (e.g. absolute protection of physical integrity, prohibition of genocide, slavery and racial discrimination) or relies on some principles which are to be applied in the absence of more specific rules. These principles are derived from the rules widely accepted by all or majority of modern democratic legal systems. In relation to human rights law these principles primarily serve the purpose of describing or clarifying certain standards of international law. In the opinion of the Constitutional Court, there is no need to apply rules of customary international law or general principles of law in this particular case, since the relevant conduct cannot be derived from international custom or connected to the interpretation of legal standards.[64]

Since case-law on the national application of customary international law hardly exists, it is difficult to make an assessment of whether courts would defer to the government or legislature regarding the existence or content of customary international law. Existing legislation gives mixed signals to the courts regarding the application of customary international law. According to the Serbian Constitution, the 'Judiciary is a separate branch of government and independent in performing its judicial function in accordance with the Constitution, statutes and other general acts as prescribed by the law, generally accepted rules of international law and ratified treaties'.[65] This provision implies that the judiciary should be independent in assessing the existence and content of customary international law. This conclusion is further fostered by Article 145, which guarantees that 'judicial decisions are binding and may not be subject to extrajudicial review, but only to judicial review of the competent court within the prescribed period of time'. However, the same article omits any mention of generally accepted rules of international law. In any

[61] *Zavarovalnica Triglav* (n 43)

[62] *District Public Prosecutor v Nikolic*, Case No Kž I 1594/02, Supreme Court of Serbia, 24 February 2003, 128 ILR 691 (2006).

[63] Constitutional Court of Serbia, Decision Už 43/2009 of 9 July 2009, *Sl glasnik RS* 65/2009 of 14 August 2009.

[64] Ibid.

[65] Article 142.

case, this provision supports the conclusion that the judiciary is independent enough to assess the existence and content of the customary international law.

This approach has been furthered by some innovations introduced by the 2004 Civil Procedure Act, which provides the procedure for resolving disputed legal questions. These provisions (Articles 176–180) provide that the first instance court, *proprio motu* or at the request of one of the parties, may initiate a procedure before the Supreme Court if there is a legal issue decisive for the case at hand and which may be of relevance for a great number of other cases.[66] This preliminary question procedure enables the Supreme Court to decide any relevant legal issue, presumably including the existence and content of international law. Though this option has not been used by domestic courts yet, it is a possible avenue for resolving issues of customary international law in the future, and doing so solely through the judiciary.

However, those pieces of legislation that direct courts to apply international law in certain areas also clearly instruct courts to consult the executive branch regarding the application of international law. For example, the 2004 Civil Procedure Act states that the

> [j]urisdiction of domestic courts for lawsuits against aliens enjoying immunity and foreign states and international organizations shall be regulated by rules of international law. In case of doubt regarding the existence and content of the immunity, the explanation thereto shall be provided by the ministry of justice.[67]

Also, the General Administrative Procedure Act states:

> As to jurisdiction of administrative authorities in matters in which one of the parties is an alien enjoying diplomatic immunity in the Federal Republic of Yugoslavia, or a foreign state or an international organization, the rules of international law shall apply. In case of doubt on the existence and content of diplomatic immunity, the court shall consult the ministry of foreign affairs.[68]

The Criminal Procedure Code follows the same pattern: 'Suspension of criminal prosecution against aliens who enjoy the criminal immunity in Serbia shall be regulated by rules of international law. In case of doubt whether the alien enjoys immunity, the court shall consult the ministry of foreign affairs.'[69] However, the Act on Conflict of Laws and Jurisdictions provides a somewhat different solution. This Act instructs courts to determine the content of foreign law *ex officio*, but gives

[66] M. Stanivuković and Z. Živković, (n 58) 49 [66] ('The 2004 Law on Civil Procedure in Serbia (Articles 176–80) has introduced a procedure for resolution of disputed legal questions. A first instance court may initiate this procedure before the Supreme Court of Serbia, either at its own initiative or at the request of the party, if there is an issue which is of decisive importance for deciding a large number of cases pending before it. The Supreme Court must decide the disputed issue within 90 days from the date of receiving such request. The position taken by the Supreme Court on the disputed issue is published in the Bulletin of the Court. If the Supreme Court has taken a position on such issue, the parties in the proceedings that are pending in which the same issue arises, are not entitled to seek its re-examination.')

[67] Article 26.

[68] Article 25.

[69] Article 219.

courts the possibility of consulting the Ministry of Justice regarding the content of the foreign law.[70]

In terms of the role of the courts in determining matters of customary international law, it seems that courts would be free either to proceed *ex officio* and acquire relevant information from the executive, or allow the parties to provide evidence on the existence and content of the rule. In addition, there is a possibility to initiate preliminary proceeding before the Supreme Court of Serbia, which may be done at the initiative of the court or the party before it.[71] Before the Constitutional Court, the requesting party will be required to invoke all relevant legal sources, including customary international law.

## 4. Hierarchy

Article 194 (*Hierarchy of national and international legal acts*) of the Serbian Constitution provides explicitly that statutes and other national legal acts must be in conformity to ratified international treaties and generally accepted rules of international law. The same provision confirms that international legal sources (ratified treaties and generally accepted rules of international law) are part of the legal order of the Republic of Serbia, and that ratified treaties must not be contrary to the Constitution. This hierarchy of legal norms is further confirmed by Article 167 of the Constitution, which defines the jurisdiction of the Constitutional Court of Serbia. This provision gives the Constitutional Court power to decide on the conformity of statutes with the Constitution, ratified treaties, and generally accepted rules of international law. It also gives the Constitutional Court power to decide on the conformity of ratified international treaties with the Constitution. If national legislation is not in conformity with treaties the Constitutional Court will strike down the inconsistent domestic statute, in part or in whole.

Priority of international treaties over national legislation has been recognized within the constitutional system of Serbia throughout several constitutional periods. The two last federal constitutions envisaged exactly the same hierarchical position of treaties within the national legal order.[72] Due to the unchanged legal framework for the application of treaties before national courts the case-law from decades past remains relevant. National courts read these constitutional provisions as an authorization to give priority to treaties over national legislation.

Case-law on this matter is abundant. The priority of treaties over national legislation has not been controversial for domestic courts. For example, in a series of cases involving the conflict between the Insurance Act and several bilateral treaties on social security, domestic courts routinely gave preference to bilateral treaties. The courts found that 'in case of conflict between the treaty and domestic

[70] Article 13.

[71] See section 2.3 above.

[72] FR Yugoslavia Constitution 1992, Article 16; Constitutional Charter of the State Union of Serbia and Montenegro 2003, Article 16.

legislation, the treaty shall be applied'.[73] It is also a well-established practice of domestic courts to remove the requirement of *cautio iudicatum solvi*, envisaged by the Civil Procedure Act for foreign plaintiffs in civil litigations, if a treaty providing for such an exemption is applicable to the case at hand.[74]

Constitutionality cases also prove the supremacy of treaties over national legislation. For example, the Constitutional Court struck down several provisions of the Refugees Act[75] as incompatible with the Convention Relating to the Status of Refugees. One legislative provision removed the status of refugee from an individual who refused to return to his country because the circumstances changed. The court found that this legislative provision was incompatible with Articles 1(A) and (C) of the Refugees Convention, because it did not allow for consideration of any other reasons for a well-founded fear of persecution.[76]

In the absence of any other provisions, national courts will apply an international treaty over contrary national legislation, even though the result would not necessarily lead to the proper application of the treaty at hand. This is because national courts in Serbia have never had the power of judicial review, so they could not strike down the inconsistent statute but rather deny its application in the particular case. The novelty introduced by the Constitutional Court Act[77] of 2007 substantially restricted the power of national courts to effectuate the priority of treaties over inconsistent national legislation. Article 63 of the 2007 Constitutional Court Act provides that:

> If there is the issue of compatibility of statute or other domestic piece of legislation with the Constitution, generally accepted rules of international law, ratified international treaties in the proceeding before the court, that court will suspend the proceeding and initiate the constitutionality proceeding before the Constitutional Court.

Therefore, despite direct applicability and priority of treaties, national courts now have to suspend the proceeding and refer the question of compatibility to the Constitutional Court.

Additionally, the 2006 Constitution altered the priority of treaties by changing the hierarchical relationship between the Constitution and treaties. While previous constitutions assumed equality between the Constitution and treaties or even priority of treaties over the Constitution, the 2006 Serbian Constitution clearly positions the Constitution over treaties, providing that 'ratified treaties must not be contrary to the Constitution'. Although this hierarchy is not unique in comparative

[73] See, *Algemeine Unfallversicherungsandtalt-Hauptstelle v Osiguranje Dunav* High Commercial Court in Belgrade, Decision Pž 333/2001 of 26 January 2001; High Commercial Court in Belgrade, Decision Pž 7768/2001 8 February 2001; *Landesvershidherungsantalt Niederbajer Oberfalz v Dunav-Osiguranje* High Commercial Court in Belgrade, Decision Pž 4212/2001 13 July 2001.

[74] See, M. Stanivuković and Z. Živković (n59) 224, para 468.

[75] Refugees Act (*Sl glasnik RS* 18/92, 30/2010).

[76] Federal Constitutional Court, Decision IU 18/94 and 253/2001 of 25 July 2002, published in the *Sl list SRJ* 42/2002 of 2 August 2002. Though it seems that Article 33 of the Convention on the Status of Refugees was more applicable to the case, the Constitutional Court did not make any reference to this treaty provision.

[77] Constitutional Court Act (*Sl glasnik RS* 109/2007).

constitutional law, it was criticized because it might cause a number of practical problems. First, the article provides that *ratified treaties* must not be contrary to the Constitution, which means that only after the Parliament ratifies a treaty may it be subject to the constitutionality procedure. The Constitution did not provide for a constitutionality test prior to ratification, which could have upheld the priority of the Constitution over treaties without compromising international responsibility of the state. In other words, after consent to be bound by the treaty is given, a treaty can be subject to the domestic constitutionality test, which favours domestic law over international law and potentially leads to a violation of Article 27 of the Vienna Convention. This constitutional provision was criticized by the European Commission for Democracy through Law (Venice Commission).[78] The Venice Commission concluded:

15. By contrast, the third section of the Article, according to which 'ratified international treaties must be in accordance with the Constitution' raises important issues. First of all, the Serbian authorities will, at the international level, have to respect the Vienna Convention on the Law of Treaties. Under its Article 27, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. If Article 16.3 in conjunction with Article 167.2 enables the Constitutional Court to deprive ratified international treaties of their internal legal force when they do not comply with the Constitution, then the Serbian State, in order not to violate its international obligations deriving from ratified treaties, would either have to amend the Constitution—which will not always be possible in view of the complex procedure provided for in Article 203—or denounce the treaty or withdraw from it, if the possibility to do so is provided for in the treaty itself or is in compliance with article 56 of the Vienna Convention on the Law of Treaties.

16. As the international liability of the Serbian State might be at stake, it would be preferable by far to try avoiding these situations by providing for an a priori verification of the compliance of a treaty with the Constitution, before the treaty is ratified. The procedure for the 'assessment of the constitutionality of the law prior to its coming into force,' provided for in article 169 of the Constitution, could therefore be expanded to the assessment of the constitutionality of treaties prior to their ratification.

17. In addition, the Serbian authorities should try avoiding any conflicts between international law and the national Constitution. Other European countries, including in particular many established democracies, also give a higher rank to the national Constitution with respect to international treaties. This does, however, not mean that the Constitution is interpreted without having regard to international law. On the contrary, this means that the national authorities, including the Constitutional Court, interpret the Constitution in a manner designed to avoid conflicts between national and international rules.[79]

The Constitutional Court Act was adopted not long after the Venice Commission delivered its opinion.[80] This piece of national legislation relaxed the rule by

[78] The Venice Commission, *Opinion on the Constitution of Serbia* (n 3). This decision was also criticized in R. Etinski, 'Medjunarodnopravni osvrt na predloge za novi ustav Srbije', *Evropsko zakonodavstvo*, 11/05, 67–70 (trans R. Etinski, *International Law Overview of the New Serbian Constitutional Draft*).

[79] The Venice Commission (n 3), [15–17].

[80] Constitutional Court Act 2007. This Act entered into force on 6 December 2007.

providing the following: 'Provisions of the ratified international treaty, which were found to be unconstitutional, shall cease to be effective pursuant to the provisions of that treaty and generally accepted rules of international law.'[81] This prevents unilateral termination of the treaty solely on the grounds of domestic law and shift the issue back to the Vienna Convention. It still remains to be seen how this will be implemented in the practice of the Constitutional Court.

## 4.1 Reconciling Domestic and International Law

It seems that Serbian courts have not developed any doctrines for reconciliation of domestic and international law in case of their conflict, partly due to the clear provision on the priority of international treaties. However, it might be expected that a doctrine of this kind will be developed regarding the relationship between the Constitution and treaties.

The Constitution of Serbia, especially in sections dealing with human and minority rights, explicitly provides that constitutionally guaranteed rights should be interpreted in conformity with international standards and international case-law: 'Provisions on human and minority rights shall be interpreted so as to promote the values of a democratic society and in accordance with international human and minority standards as well as the practice of international institutions monitoring their enforcement.'[82]

Serbian courts, both regular and constitutional courts, usually invoke constitutional and international provisions when assessing violations of human rights. In doing so, courts take these provisions in concert, still treating each source in its own right. This is possible because of the position of international treaties within the national legal system and because of Article 18 of the Constitution. Both constitutional and international provisions tend to serve the same purpose rather than to supplement each other. However, despite the fact that the Constitutional Court tends to use both treaties and the Constitution, the decision is usually based solely on the Constitution rather than on the Constitution and a treaty together. For example, in an individual petition claiming a breach of the presumption of innocence, the Constitutional Court invoked both Article 6(2) of the European Convention on Human Rights and Article 34 (3) of the Constitution.[83] The Court found that the presumption of innocence was breached by the decision on custody and thereby was contrary to Article 34(3) of the Serbian Constitution but omitted to mention the European Convention on Human Rights in the operative part of the decision. It is not quite clear whether the European Convention, which at the time was binding upon Serbia, was used more as the interpretation tool or was supposed to be invoked in the operative part of this decision since this Convention can also be used to test the constitutionality of domestic legal acts. Although this is

[81] Article 58(2).
[82] Article 18(3).
[83] Decision of the Constitutional Court, Už No 1036/2008 of 19 March 2009, published in the *Sl glasnik RS* 36/2009 of 15 May 2009.

the norm, there are also examples to the contrary, when the Constitutional Court based its decisions on both the Constitution and treaty.[84]

### 4.2 The Doctrine of *Jus Cogens*

So far Serbian courts have not recognized the doctrine of *jus cogens* norms.

## 5. Jurisdiction

### 5.1 Universal Criminal Jurisdiction

Criminal legislation in Serbia allows criminal courts to prosecute international crimes on the basis of universal jurisdiction. The Criminal Code provides jurisdiction for the whole set of criminal offences that belong to the category of international crimes.[85] The scope of application is determined by several principles, most importantly the territoriality and personality principles,[86] but also the protective[87] and universality principles.[88] Article 10(3) of the Criminal Code provides that an alien may be prosecuted for crimes committed abroad if those crimes violate international law provided that the accused is in the territory of the Republic of Serbia. Therefore, universal jurisdiction is not absolute. Rather, it is conditioned on the presence of the accused in the territory of Serbia. However, courts have never exercised universal jurisdiction so there is no relevant case-law on the matter.

The universality principle has been recently modified in order to respond adequately to prosecuting international crimes that occurred in the area of former Yugoslavia and in connection with the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia. In 2003 the Special Chamber of the Supreme Court of Serbia was established exclusively for

> international crimes envisaged in Articles 370–386 of the Criminal Code as well as for grave breaches of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991, as recognized by the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY).[89]

Accordingly, the Special Prosecutor's Office for War Crimes has been established to aid in this goal. Most international crimes envisaged by the Criminal Code of

[84] See section 4.1 above.

[85] Criminal Code of Serbia 2005, c XXXIV (in force as of 1 January 2006), is entitled as 'Criminal Offenses against Humanity and International Law' and comprises 23 criminal offences (Article 370–93). These offences include, inter alia, genocide, crimes against humanity, war crimes, racial discrimination, human trafficking, slavery, international terrorism, etc. What all these crimes have in common is that for the criminal offence to exist there must be a violation of international law, as explicitly provided for in description of each criminal offence.

[86] Criminal Code 2005, Articles 6 and 8.

[87] Criminal Code 2005, Article 9.

[88] Criminal Code 2005, Articles 9(2) and 10(3).

[89] Act on the Organization and Jurisdiction of State Authorities for Prosecuting War Crimes (*Sl glasnik RS* 67/2003, 101/2007), Article 2.

Serbia have been thereby transferred to the jurisdiction of this Chamber.[90] In this case the universality principle has been restricted to the area of former Yugoslavia, which means that the Chamber would be competent for all international crimes in the territory of former Yugoslavia regardless of the nationality of the accused or victim, even if the crime was not committed in the territory of Serbia.[91] Still, this jurisdiction is not as wide as universal jurisdiction. On the other hand, thanks to this rule, the Special Chamber for War Crimes proceeds without examining jurisdictional conditions (other than where the crime was committed). So far the Special Chamber has handed down 12 final judgments and ten first instance judgments now pending on appeal, with ten more ongoing trials and a number of cases under investigation.[92] Despite the restricted universality principle it is worth noting that in reality almost all cases have a close connection to Serbia either through active or passive personality principles.

### 5.2 Civil Jurisdiction

So far courts have not exercised jurisdiction over civil actions for international law violations that are committed in other countries.

## 6. Other International Sources

### 6.1 Declarations and Recommendations

Though this approach has not been fully embraced by domestic courts, there are a few examples of courts using non-binding international texts as a tool of interpretation. For example, the Constitutional Court of Serbia struck down several provisions of the Act on Election of Judges as unconstitutional on the ground that they were contrary to the principle of independence and impartiality of judges required by, inter alia, European Charter on the Statute for Judges, adopted by the Council of Europe in July 1998,[93] and the United Nations Basic Principles on the Independence of the Judiciary, endorsed by the United Nations General Assembly

[90] International crimes which were left out of the jurisdiction of the Special Chamber are those envisaged in Articles 387–393 of the Criminal Code, such as prohibition of racial discrimination, human trafficking and international terrorism. These crimes may be prosecuted before criminal courts of general jurisdiction.

[91] Act on the Organization and Jurisdiction of State Authorities for Prosecuting War Crimes (n 89) Article 3: 'State authorities of Republic of Serbia, as authorized by this Act, shall be competent to prosecute for criminal offenses envisaged in Article 2 of this Act which were committed in the territory of the former Socialist Federative Republic of Yugoslavia, regardless of the nationality of the victim or accused.'

[92] <http://www.tuzilastvorz.org.rs/html_trz/PREDMETI_ENG.htm> (visited on 25 November 2010).

[93] Available at <http.www.summitofhighcourts.com/docs/standarts/COE1.doc>. Its non-conventional character has been clearly underlined by the explanatory memorandum to this instrument: 'The value of this Charter is not a result of a formal status, which, in fact, it does not have, but of the relevance and strength that its authors intended to give to its contents.'

in November 1985.[94] In a similar constitutionality case, the Constitutional Court again invoked Articles 1 and 3 of the European Charter on the Statute for Judges to confirm the generally accepted principle of judicial independence not being decreased by national legislation. On these grounds, the Constitutional Court struck down one provision of the Act on Election of Judges.[95] The Supreme Court of Serbia adopted the Legal Opinion on the issue of judicial immunity of judges[96] basing its decision on national legislation, the Serbian Constitution, and European legal standards. When examining European legal standards, the Court relied heavily on the United Nations Basic Principles on the Independence of the Judiciary, endorsed by the UN GA Res 40/32,[97] the European Charter on the Statute for Judges of the Council of Europe, and the Council of Europe Committee of Ministers Recommendation No R (94)12 on the Independence, Efficiency and Role of Judges, adopted in 1994.[98] In a recent case, the Constitutional Court again referred to these instruments and gave reasons to apply them, saying:

> The Court finds that these instruments are not formal sources of law within the meaning of Article 167 of the Constitution and, therefore, may not serve as a ground for constitutionality test. Still, the Constitutional Court has in mind that diferent international instruments (resolutions, recommendations, charters, etc.) which have been adopted by various universal and regional organizations, contain rules important for human rights provisions. These instruments are not international treaties and may not be subject to ratification, but they still have moral and political value which motivate States to respect them. Therefore, the Constitutional Court also took into account provisions of these instruments on which the petitioners rely but still did not find any rules which differ from Constitutional provisions with respect to which the constitutionality test has already been carried out.[99]

In addition, the High Commercial Court in Belgrade relied on 'generally accepted international principles' when framing the concept of *ordre publique* regarding the recognition and enforcement of foreign judicial decisions. In doing so, the court concluded that part and parcel of the *ordre publique* are principles such as: *au diatur et altera pars*, independent and impartial courts, prohibition of fraudulent behaviour, the right to appeal, etc.[100]

In another case a domestic court applied Article 3 of the Universal Declaration on Human Rights (right to life), without any special reference to customary international law. Since this was a war crime case, the court felt bound to give extensive reasoning regarding the protection of the right to life. Among other national and international legal sources, the court also relied on the 1948 UN

[94] Decision of the Constitutional Court of Republic of Serbia, No 122/2002 of 11 February 2003, published in the *Sl glasnik RS* 17/2003.

[95] Decision of the Constitutional Court of Republic of Serbia, 232/2003 of 18 March 2004, published in the *Sl glasnik RS* 35/2004.

[96] Legal opinion of the Supreme Court of Serbia (Civil Law Section) adopted on 15 March 2007.

[97] UNGA Res 40/32 (1985).

[98] Council of Europe Committee of Ministers Recommendation No R(94)12 (adopted on 13 October 1994).

[99] Constitutional Court of Serbia, Decision Už 43/2009 of 9 July 2009, *Sl glasnik RS* 65/2009 of 14 August 2009.

[100] *Zavarovalnica Triglav* (n 43).

Universal Declaration on Human Rights.[101] Lastly, the District Court (Criminal Chamber) found that the length of a criminal proceeding breached the standard of 'reasonable time' guaranteed by Article 6(1) of the European Convention on Human Rights.[102] Since this was a criminal case regarding a human rights violation the court relied on the Council of Europe Committee of Ministers' Recommendation on the Improvement of Domestic Remedies.[103] The result was that the court commuted the sentence of imprisonment to parole.[104]

## 6.2 Decisions of International Courts

There are several examples of courts applying or enforcing decisions of international courts and recommendations of the UN treaty-based bodies for the protection of human rights. The legal framework of Serbia enables the application of international decisions both for the purpose of interpreting treaties and for the enforcement of an international decision, provided that the remedy requested by the international decision can be awarded by the domestic court. According to Article 18(3) of the Constitution, which deals with direct implementation of human and minority rights, the '[p]rovisions on human and minority rights shall be interpreted so as to promote the values of a democratic society and in accordance with international human and minority standards as well as practice of international institutions monitoring their enforcement'. Although this provision enables national courts to apply international case-law at large when interpreting constitutional and treaty provisions on human rights, the case-law on this matter is quite scarce. For example, the Supreme Court of Serbia denied a claimant's request for damages caused by reputational harm, saying that there is no legal basis in domestic law to grant damages for this cause of action. Although the claimant relied on the case-law of the European Court of Human Rights in order to prove that reputational harm has been recognized and protected by the European Convention on Human Rights, the Supreme Court refused to apply the ECHR's rationale because of the temporal limitation on the application of the European Convention.[105] In another case it was again the temporal limitation that led to the rejection of a petition for restitution of nationalized property. In this case, the Supreme Court relied on the

[101] *Nikolic* (n 62).

[102] District Court in Subotica (Criminal Section), Judgment Kž 266/05 of 15 August 2005.

[103] Recommendation of the Committee of Ministers to Member States on the Improvement of Domestic Remedies, REC (2004)6 (adopted on 13 October 1994).

[104] The court found the following: 'Having found that the reasonable time has been violated in this case, the strict criminal sanction of imprisonment is not a justifiable measure under criminal law, pursuant to the Recommendation of the Committee of Ministers REC (2004) 6 on the Improvement of Domestic Remedies, which finds that where the criminal proceedings have exceeded a reasonable time, this may result in a more lenient sentence being imposed.' See, Sanja Djajić, 'Victims and Promise of Remedies: International Law Fairytale Gone Bad' (2008) 9 San Diego International Law Journal 329, 354.

[105] Supreme Court of Serbia, Judgment Prev 265/2007 of 10 June 2008.

case-law of the European Court of Human Rights that confirmed the non-retroactivity of Article 1 of Protocol I to the European Convention on Human Rights.[106]

Regarding the enforcement of international decisions, domestic legislation provides a quite specific legal framework. Article 422(10) of the Civil Procedure Act introduces the possibility of reopening a case if 'after the final decision had been handed down before the domestic court, European Court for Human Rights reached contrary conclusion in a decision in the same or similar matter against Serbia'. Therefore, revision of the final judgment would be possible on the grounds of the European Court of Human Rights' judgment. Similarly, Article 414 of the Criminal Procedure Code provides for a remedy against a final judgment in criminal matters and for reopening the criminal proceeding. This remedy may be lodged after 'a decision of an international court established the breach of his right or fundamental freedom during the criminal proceeding before domestic court'. These provisions seem to be an adequate method for compliance with Article 46 of the European Convention on Human Rights and Fundamental Freedoms and decisions of international courts, when reopening of a criminal procedure has been requested. These provisions are also in line with the Recommendation of the Committee of Ministers of the Council of Europe 2000 (2) on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights.[107]

There are a few examples of domestic courts being asked to enforce international decisions, but some of them were filed before domestic enforcement procedures were introduced into the Serbian legal system. This fact may also explain why Serbian courts have different approaches for handling this type of case. The first of these cases dealt with the implementation of the decision of *Ristić v Yugoslavia,*[108] a case before the UN Committee Against Torture. The UN Committee Against Torture found a violation of Articles 12–14 of the Convention against Torture and ordered Yugoslavia to carry out an investigation, after which damages would be decided.[109] Parents of the victim returned to the national court with a request for enforcement of this decision. However, the first instance court in Serbia refused to order an investigation or publication of the UN Committee Against Torture decision because it found these requests inadmissible before a civil court. On the other hand, the same court ordered damages for the violation of human rights in the amount of €12,000 as a just satisfaction for the breach of the right to an effective remedy.[110] More precisely, the national court could not order an investigation but ruled that the failure of competent authorities to order the investigation

[106] Supreme Court of Serbia, Judgments Rev 971/2007(1) and Rev 971/2007(2) of 6 September 2007.

[107] Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies, available at: <https://wcd.coe.int/ViewDoc.jsp?id=334147&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>.

[108] UN Comm. Against Torture, Comm. No 113/1998, *Ristić v Yugoslavia*, UN Doc. CAT/C/26/D/113/1998 (2001) (11 May 2001).

[109] For more information on this case, see S. Djajić, (n 104) 342–3, 354–5.

[110] First Municipal Court in Belgrade, Judgment P.2236/04, 30 December 2004.

was a breach of human rights that deserved pecuniary satisfaction. Damages for the violation were granted on the basis of domestic law, ie Article 200 of the Civil Obligations Act (damages for the violation of individual rights). Both the District and Supreme Courts affirmed the decision of the lower court.[111] The national courts thus implemented the decision of the UN Committee Against Torture in the way they found it to be compatible with their jurisdiction.

In the *Bodrožić v Serbia & Montenegro* case,[112] the UN Human Rights Committee (HRC) found the state responsible for a breach of Article 19 of the ICCPR because the criminal conviction and damages issued against the applicant by Serbian courts amounted to an infringement of the right of expression. The case involved a defamation case initiated by a local politician against a journalist who wrote an article criticizing his political affiliations. All national courts confirmed the conviction for slender and defamation, but the HRC disagreed, basing its decision on the well-known concept of freedom of expression and press within the political sphere:

> in circumstances of public debate in a democratic society, especially in the media, concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high. It follows that the author's conviction and sentence in the present case amounted to a violation of article 19, paragraph 2, of the Covenant.[113]

The HRC ordered Serbia to provide the applicant with 'an effective remedy, including quashing of the conviction, restitution of the fine imposed on and paid by the author as well as restitution of court expenses paid by him, and compensation for the breach of his Covenant right'.[114] However, national judicial implementation of this case was not successful. After the HRC's decision in 2005, the Public Prosecutor initiated a proceeding before the Supreme Court of Serbia to quash the conviction of Bodrožić (but did not reference the HRC decision). The Supreme Court denied the request. At that time the remedy of reopening criminal proceedings was not available. Since all judicial avenues were closed, the applicant was remedied through a settlement with the Ministry for Human Rights by which Serbia paid around €10,000 in damages for the breach of human rights. However, the criminal conviction was not deleted.

Two other similar cases involving journalists convicted of libel for political publications were reviewed by the European Court for Human Rights (ECtHR). These two cases, *Lepojić v Serbia*[115] and *Filipović v Serbia*,[116] have a similar background to the *Bodrožić case* before the HRC. Similarly, ECtHR found Serbia

[111] District Court in Belgrade, Judgment No Gž 3979/05, 31 May 2005; Supreme Court of Serbia, Judgment No Rev 66/06, 8 February 2006 (on file with author).

[112] UN Human Rights Committee, Comm No 1180/2003, *Bodrožić v Serbia & Montenegro*, UN Doc. CCPR/C/85/D/1180/2003 (31 October 2005), available at: <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/63eec7b059550fadc9780199694907ea?Opendocument>.

[113] *Bodrožić* (n 112) [7.2].

[114] Ibid [9].

[115] *Lepojić v Serbia* (App No 13909/05) ECHR 6 November 2007.

[116] *Filipović v Serbia* (App No 27935/05) ECHR 20 November 2007.

responsible for a violation of Article 10 (freedom of expression). In the *Lepojić* case the ECtHR ordered damages amounting to €3,000, but in the *Filipović* case no damages or other remedy was awarded. Due to the character of remedies ordered, national enforcement was not an issue. However, the Supreme Court of Serbia, aware of the sombre record regarding the freedom of expression in Serbia before international bodies, decided to adopt the Legal Opinion on criminal offences of libel and defamation[117] to limit future violations of the freedom of expression. Therefore, this legal opinion represents a *sui generis* enforcement of international judicial decisions, as it was requested by the permanent representative of Serbia at the European Court of Human Rights. In this opinion the Supreme Court ruled that the threshold for acceptable criticism is higher when the criticism regards public figures rather than private ones. Public figures are necessarily exposed to the public eye, the Supreme Court opined, so their words and actions are more highly scrutinized by journalists and the public at large. Therefore, public figures must show a higher level of tolerance. Freedom of expression does not include only the exchange of acceptable ideas and information, but also information that shocks or disturbs, as these pursue the legitimate aim of public interest and as such are necessary in a democratic society. In line with this conclusion, the Serbian Supreme Court adopted the legal opinion regarding the interpretation of the criminal offence of libel that should be weighed in light of the fact that public figures enjoy less protection than private persons. The Supreme Court emphasized that this opinion was adopted as a directive for lower courts in future similar cases so that domestic case-law would be aligned with the rulings of the European Court of Human Rights.[118]

## 6.3 Decisions and Recommendations of Treaty Bodies

Apart from recommendations coming from the treaty human rights bodies, such as the Committee Against Torture or HRC, and declarations adopted by domestic courts without reference to their binding effect (mentioned above), there are no cases that could highlight this issue.

[117] Legal Opinion of the Supreme Court of Serbia (Criminal Section) regarding the Freedom of Expression and Criminal Offenses of Libel and Defamation adopted on 25 November 2008, *Bilten VSS*, 1/2008, 57–62.

[118] Interestingly, the same journalist who initiated the proceeding before the HRC claiming the breach of the freedom of expression, Bodrožić, won two other cases, this time before the European Court of Human Rights for the breach of freedom of expression as the result of two different newspapers articles (*Bodrožić v Serbia* (App No 32550/05) ECHR, 23 June 2009; *Bodrožić and Vujin v Serbia* (App No 38435/05) ECHR, 23 June 2009). Again, the European Court of Human Rights found the breach of Article 10 in both of these cases, extending the notion of 'public figure' within the meaning of freedom of expression, namely extending this notion to a historian and a lawyer representing local factory in an insolvency case. Though Legal Opinion of the Supreme Court was adopted at the end of 2008 and before these two ECHR decisions were handed down in 2009, it still was not available at the time domestic proceedings, giving rise to the breach, were finalized.

## 7. Conclusion

Although the existing legal framework seems favourable to the application of international law in its various forms, there are a number of problems that prevent the comprehensive and viable application of international law within the Serbian legal system. The reasons are not those that usually prevent national courts from following the international legal discourse in the manner expected by international law or international bodies. Serbian courts do have the instruments to do what other national courts usually fail to do. On the other hand, the lack of comprehensive application of international law is visible in the fact that there are far more international instruments binding on Serbia than cases in which these instruments could have been effectively applied. One reason for this is that Serbian courts are still not well trained in the application of international law and very rarely will proceed *ex officio* to apply international law. The lack of training also explains the inadequate legal arguments given by the courts when analyzing international treaties. Interpreting and applying international law seems to be cumbersome for domestic courts and has been extensively discussed in domestic literature.[119]

Another reason for the not so stunning performance of domestic courts is the deference of courts to the executive.[120] The examples given above do not necessarily paint the whole picture when it comes to the application of international law, as evidenced by the record of Serbia before the European Court of Human Rights. Two conclusions can be drawn from the existing, and quite sombre, record of Serbia before this Court. First is that in almost all cases (around 40) Serbia was found responsible for a breach of the European Convention on Human Rights. This could show that Serbian courts have not succeeded to remedy international law violations through domestic courts. A second conclusion is that the European Court for Human Rights routinely rejects the non-exhaustion of local remedies argument raised by Serbia, claiming that the legal framework is not effective.[121] More importantly, the European Court in most of these cases found a violation of the right to a fair trial and the right to an effective remedy, which seriously undermines the idea of effective protection of human rights within domestic sphere. These negative records may also be seen as the result of a rocky road of transition in applying international law.

[119] See, M. Stanivuković, 'Serbian Arbitration Law' in: E. E. Bergsten (ed.), *International Commercial Arbitration* (New York: Oceana, 2008) 1, 26–7.

[120] For critical appraisal of recent legal reforms in Serbia, see: R. Etinski, 'Effectiveness of Human Rights Protection in Serbia: Two Steps Forward, Three Steps Back' Noua Revista de Drepturile Omului 3/2009.

[121] See, *Bodrožić v Serbia* (n 112) [33–8]; *Lepojić v Serbia* (n 115) [54]; *Milošević v Serbia* (App No 31320/05) ECHR 28 April 2009, paras 43–7, etc. Reasoning of the ECHR regarding the effectiveness of remedies in Serbia is almost identical in all cases where the government raised the non-exhaustion of local remedies as preliminary objection.

# 23

# Slovakia

*Dagmar Lantajová, Juraj Jankuv, and Jozef Kušlita*

## 1. Introduction

The Slovakia Constitution came into force in 1992 in conjunction with the expected peaceful separation of the Slovaks and the Czechs. The 1992 Constitution was amended in September 1998 to allow direct election of the President and amended again in February 2001 to allow Slovakia to enter NATO and the European Union. Slovakia subsequently joined both NATO and the EU in the spring of 2004 and the Euro area in 2009.

Slovakia is now a parliamentary democracy with some institutions of direct democracy, such as referendum. The President is elected by popular vote for a five-year term and the country has a Prime Minister who is generally the leader of the primary party in the unicameral legislature—the National Council of the Slovak Republic. The judicial system in Slovakia is based on the civil law/continental law model, modified to comply with the international obligations of Slovakia (including those coming from Council of Europe and EU membership). There is also the Constitutional Court of the Slovak Republic that serves as the final arbiter of the Constitution. The Public Prosecution and the Public Defender of Rights join the Constitutional Court to protect human rights and fundamental freedoms. Slovakia also accepts compulsory ICJ jurisdiction with reservations.

### 1.1 Relevant Constitutional Provisions

The Constitution of the Slovak Republic[1] contains the following provisions concerning international treaties and customary international law:

*Article 1*
The Slovak Republic acknowledges and adheres to general rules of international law, international treaties by which it is bound, and its other international obligations.

[1] Act No 460/1992 of Coll in the wording of later amendments.

*Article 7, paragraphs (2), (4), (5)*

(2) The Slovak Republic may, by an international treaty, ratified and promulgated as laid down by law, or on the basis of such treaty, transfer the exercise of a part of its powers to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Article 120 Paragraph (2).

(4) The validity of international treaties on human rights and fundamental freedoms, international political treaties, international treaties of a military character, international treaties from which a membership of the Slovak Republic in international organizations arises, international economic treaties of a general character, international treaties for whose exercise a law is necessary and international treaties which directly confer rights or impose duties on natural persons or legal persons, require the approval of the National Council of the Slovak Republic before ratification.

(5) International treaties on human rights and fundamental freedoms and international treaties for whose application a law is not necessary and international treaties which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated as laid down by law shall have precedence over domestic laws.

*Article 86, letter (d)*

The powers of the National Council of the Slovak Republic shall be particularly to:

(d) before ratification to approve international treaties on human rights and fundamental freedoms, international political treaties, international treaties of military nature, international treaties from which a membership of the Slovak Republic in international organizations arises, international economic treaties of general nature, international treaties for whose exercise a law is necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons, and concurrently determine whether they are international treaties according to Article 7 Paragraph (5).

*Article 120, paragraph (2)*

(2) If specified by a law, the Government shall also be authorized to issue regulations on the implementation of the Europe Agreement Establishing an Association between the European Communities and their Member States as one party, and the Slovak Republic as the other party, on execution of international treaties according to Article 7 Paragraph (2).

*Article 154c*

(1) International treaties on human rights and fundamental freedoms which the Slovak Republic has ratified and were promulgated as laid down by law before taking effect of this constitutional act on July 1, 2001, shall be a part of its legal order and shall have precedence over domestic laws if they provide a greater scope of constitutional rights and freedoms.

(2) Other international treaties which the Slovak Republic has ratified and were promulgated as laid down by law before this constitutional act takes effect on July 1, 2001, shall be a part of its legal order, if so provided by law.

*Article 125*

(1) The Constitutional Court shall decide on the conformity of
   (a) laws with the Constitution, constitutional laws and international treaties to which the National Council of the Slovak Republic has expressed its assent and which were ratified and promulgated as laid down by law,
   (b) government regulations, generally binding legal regulations of Ministries and other central state administration bodies with the Constitution, with constitutional laws and international treaties to which the National Council of the Slovak Republic has expressed its assent and which were ratified and promulgated as laid down by law and with laws,
   (c) generally binding regulations pursuant to Article 68, with the Constitution, with constitutional laws and international treaties to which the National Council of the Slovak Republic has expressed its assent and which were ratified and promulgated as laid down by law, save another court shall decide on them,
   (d) generally binding legal regulations of the local bodies of state administration and generally binding regulations of the bodies of territorial self-administration pursuant to Article 71 Paragraph (2), with the Constitution, with constitutional laws, with international treaties promulgated as laid down by law, with laws, with government regulations and with generally binding legal regulations of Ministries and other central state administration bodies, save another court shall decide on them.

(2) If the Constitutional Court accepts the proposal for proceedings pursuant to Paragraph (1), it can suspend the effect of challenged legal regulations, their parts, or some of their provisions, if fundamental rights and freedoms may be threatened by their further application, or if there is a risk of serious economic damage or other serious irreparable consequence.

(3) If the Constitutional Court holds by its decision that there is conflict between legal regulations stated in Paragraph (1), the respective regulations, their parts or some of their provisions shall lose effect. The bodies that issued these legal regulations shall be obliged to harmonize them with the Constitution, with constitutional laws and with international treaties promulgated as laid down by law, and if it regards regulations stated in Paragraph (1) letters b) and c) also with other laws, if it regards regulations stated in Paragraph (1) letter d) also with government regulations and with generally binding legal regulations of Ministries and other central state administration bodies within six month from the promulgation of the decision of the Constitutional Court. If the bodies fail to do so, these regulations, their parts or their provisions shall lose effect after six months from the promulgation of the decision.

(4) The Constitutional Court shall not decide on the conformity of a draft law or a proposal of other generally binding legal regulation with the Constitution, with an international treaty that was promulgated as laid down by a law or with constitutional law.

(5) The validity of a decision on the suspension of effect of the challenged legal regulations, their parts or some of their provisions shall terminate upon promulgation of the decision of the Constitutional Court in the case, if the Constitutional Court has not already cancelled the decision on suspension of the effect of the challenged legal regulation because the reasons for which it was adopted have terminated.

(6) A decision of the Constitutional Court issued pursuant to Paragraphs (1), (2) and (5) shall be promulgated in the same manner as laws. The valid judgment of the Constitutional Court shall be generally binding.

*Article 125a*

(1) The Constitutional Court shall decide on the conformity of negotiated international treaties to which the assent of the National Council of the Slovak Republic with the Constitution and constitutional law is necessary.
(2) The President of the Slovak Republic or the Government may submit a proposal for a decision pursuant to Paragraph (1) to the Constitutional Court prior to the presentation of a negotiated international treaty for discussion of the National Council of the Slovak Republic.
(3) The Constitutional Court shall decide on proposals, pursuant to Paragraph (2) within a period established by law; if the Constitutional Court holds in its decision that the international treaty is not in conformity with the Constitution or constitutional law, such international treaty cannot be ratified.

Article 127

(1) The Constitutional Court shall decide on complaints of natural persons or legal persons if they are pleading the infringement of their fundamental rights or freedoms, or human rights and fundamental freedoms resulting from an international treaty which has been ratified by the Slovak Republic and promulgated as laid down by law, save another court shall decide on protection of these rights and freedoms.
(2) If the Constitutional Court accepts a complaint and holds in its decision that the rights or freedoms according to Paragraph (1) were infringed by a valid decision, measure or by other action, it shall cancel such a decision, measure or other action. If the infringement of rights or freedoms according to Paragraph (1) emerges from inactivity, the Constitutional Court may order the one who has infringed these rights or freedoms to act in the matter. The Constitutional Court may also remand the matter for further proceedings, prohibit continued infringement of fundamental rights and freedoms or human rights and fundamental freedoms resulting from the international treaty which has been ratified by the Slovak Republic and promulgated as laid down by law, or if possible, order one who has infringed the rights or freedoms according to Paragraph (1) to reinstate the status before the infringement.
(3) The Constitutional Court may, by the decision in which it allows a complaint, award the one whose rights according to Paragraph 2 were infringed adequate financial satisfaction.
(4) The responsibility of the one who has infringed the rights or freedoms according to Paragraph (1), for the damage or other injury shall not be affected by the judgment of the Court.

Article 144

(1) Judges, in the performance of their function, shall be independent and, in decision making shall be bound by the Constitution, by constitutional law, by international treaty pursuant to Article 7 Paragraphs (2) and (5), and by law.
(2) If a Court assumes that other generally binding legal regulation, its part, or its individual provisions which concern a pending matter contradicts the Constitution, constitutional law, international treaty pursuant to Article 7 Paragraph (5) or law, it shall suspend the proceedings and shall submit a proposal for the commence of proceedings according to Article 125 Paragraph (1). Legal opinion of the Constitutional Court of the Slovak Republic contained in the decision shall be binding for the Court.

## 1.2 Legislative Provisions Referring to International Law

The following are the main legislative provisions relating to the application of international law within the national legal system:

(1) *Act about Collection of Laws*[2]
§ 1(1) The Constitution of the Slovak Republic, constitutional and other acts by National Council of the Slovak Republic,. . . . and international treaties (§ 6) are declared by promulgation in the Collection of Laws of the Slovak Republic ('Collection of Laws').
(2) The Collection of Laws promulgates the following: . . .
e) adjudications made by international authorities, international organisations and decided by the Ministry of Foreign Affairs of the Slovak Republic to be promulgated in the Collection of Laws,
§ 2 All matters promulgated in the Collection of Laws are presumed to have known by all relevant bodies from the day of their publication, and the presumed knowledge of declared commonly binding legislative provisions is irrebutable.
§ 3 (3) An international treaty enter into force on the day its text specifies or in any other way provided by international law. An international treaty is included in the Collection of Laws immediately after its submission and publication (Article 10 Paragraph (3)) and at the latest on the day of its entry into force for the Slovak Republic, except when the date of entry into force is different from that specified in the international treaty itself. Inclusion of the treaty in the Collection of Laws makes it obligatory for natural and legal bodies.
§ 6(1) The following international treaties binding the Slovak Republic are proclaimed in the Collection of Laws:
(a) treaties ratified by the President of the Slovak Republic,
(b) other treaties including amendments related to the legal status of physical and corporate bodies or their legitimate interests.
(2) When an international treaty is to take precedence over domestic laws the announcement about the treaty's conclusion shall include a decision about this fact made by the National Council of the Slovak Republic. Simultaneously, the full wording of the international treaty shall be promulgated, and the confirmation by the National Council of the Slovak Republic is required before its ratification. In cases where the Ministry of Foreign Affairs of the Slovak Republic does not proclaim the full wording of an international treaty, the announcement about the conclusion of the treaty shall contain information about where the international treaty is available for examination.
(3) The Ministry of Foreign Affairs of the Slovak Republic announces any termination of an international treaty for the Slovak Republic, declares reservation to the international treaty and other facts related to the declared international treaty.
(4) Ministries and other central organs of state administration in the Slovak Republic and National Bank of Slovakia shall ensure that international treaties and decisions made by international authorities and international organisations, whose full wording have not been promulgated, will be available, from the day their conclusion or adoption is announced, to everybody for examination at all sites specified in the announcement, and in Slovak language as well.

[2] No 1/1993 of Coll in the wording of later provisions.

(2) *Code of Civil Procedure*[3] § 109
(1) A Court shall interrupt a proceeding when:
(b) adjudication depends on an issue the Court is not authorised to resolve in the proceeding. This also applies when the Court concludes that ordinary and binding legislative regulation related to the case conflicts with the Constitution, a law or an international treaty binding on the Slovak Republic. In such instance the Court will forward a request for adjudication to the Constitutional Court,
(c) it decides that European Court of Justice must decide a preliminary issue under an international treaty.
(3) Act about International Private Law[4]
§ 2 International treaties:
Provisions under this act will apply only when an international treaty binding the Slovak Republic or an act issued to perform an international treaty do not provide differently.
(4) Criminal Code[5]

§ 7 Jurisdiction under international treaties:
(1) Criminality of conduct is judged under this act even though an international treaty so determines, and the treaty was ratified and declared in the manner set by law and the Slovak Republic is bound by this treaty.
(2) Provisions under § 3 to 6 (related to personal and territorial jurisdiction of act) are not exercised in case an international treaty does not admit so, and the treaty was ratified and declared by law and the Slovak Republic is bound by this treaty.

The following are the examples of special regulation:

(1) *Act about Citizenship in the Slovak Republic*[6]
§17: In case an international treaty bounding the Slovak Republic regulates some issues regarding citizenship differently to this act, an amendment in the international treaty is valid.

(2) *Customs Act*[7]
§ 90: Provisions under this act are not exercised in case an international treaty binding the Slovak Republic provides differently.

(3) *Act about Income Tax*[8]
§ 1 (2) An international treaty approved, ratified and declared in the manner determined by law ('international treaty' hereinafter), has its precedence over this act.

## 2. Treaties and Other International Agreements

### 2.1 Definition and Interpretation of Treaties

Judges in the performance of their functions are independent and, in decision-making are bound by the Constitution, by constitutional law, and by international

[3] Act No 99/1963 of Coll, in the wording of later provisions.
[4] No 97/1963 of Coll, in the wording of later provisions.
[5] Act No 300/2005 of Coll, in the wording of later provisions.
[6] No 40/1993 of Coll, in the wording of later provisions.
[7] No 199/2004 of Coll, in the wording of later provisions.
[8] No 595/2003 of Coll, in the wording of later provisions.

treaty pursuant to Article 7, paragraphs (2) and (5). In addition, under the Constitution judges are obliged to respect international treaties valid in the Slovak Republic. Courts rule on civil and criminal matters and also review the legitimacy of decisions made by bodies of public administration and the legality of decisions, measures, or other actions of bodies of public authority. If a court finds in a pending matter that another generally binding legal regulation, as a whole or in its individual provisions, contradicts an international treaty, pursuant to Article 7, paragraph (5) or law it shall suspend the proceedings and shall submit a proposal to commence proceedings in the Constitutional Court according to Article 125, paragraph (1). The legal opinion of the Constitutional Court of the Slovak Republic on the matter is thereafter binding on the lower Court.

Judges cannot determine treaty matters without looking to the legislative history. Courts apply the intent of the contracting parties in the treaty and international rules of treaty interpretation, including the Vienna Convention on the Law of Treaties.

## 2.2 Domestic Incorporation and Application

The method of incorporation depends on the kind of treaty, as shown by Article 7, paragraphs (4) and (5) of the Slovak Constitution, quoted in section 1.1 above. It is generally the case that the Collection of Laws includes an announcement of the conclusion of an international treaty. This announcement contains either full wording of the treaty or the note of where its full version is available (usually it is with a state authority concluding the treaty).

## 2.3 The Doctrine of Self-Executing Treaties

Identification of a treaty as self-executing or non-self-executing is made during the legislative process and courts accept these facts that have been given in the resolution and other approved explanatory documents by the Parliament (ie Parliament passing an international treaty before its ratification by the President of the Slovak Republic determines at the same time, preference of the treaty to statute under Article 7 paragraph 5 of the Constitution of the Slovak Republic). In case of a dispute, the court will identify whether the treaty is self-executing and therefore directly applicable, by investigating whether the treaty provisions contain the rights of natural and legal bodies that are clearly set out and particular enough.

## 2.4 Private Parties and Treaties

If an international treaty is promulgated in the Collection of Laws, becoming a common legislative regulation, its provisions can be directly invoked. The Constitutional Court decides on complaints of natural persons or legal persons who plead violation of their Constitutional fundamental rights or freedoms, or human rights and fundamental freedoms resulting from an international treaty ratified and promulgated by the Slovak Republic, unless another court decides on protection

of these rights and freedoms. There are no specific tests announced to determine standing and private rights of action.

## 3. Customary International Law

In Article 1, paragraph (2) of the Constitution the Slovak Republic acknowledges and adheres to general rules of international law, international treaties by which it is bound, and its other international obligations. There is little relevant case-law on this provision. The Constitutional Court in its resolution dated 21 October 2003[9] adopted this legal opinion:

> Article 1 Paragraph (2) of the Constitution refers to all international commitments of the Slovak Republic regardless of their contents and determines the obligation to meet them. All international commitments of the Slovak Republic are included either in the international treaty, international custom or in another source of international law. Consequently the relevant internal act can be in disagreement with an international commitment. In such a disagreement the constitutional court is authorised to decide the compliance of legal provisions (provided that procedural conditions are met).

Finally, it should be emphasised that customary international laws are covered by the term of general rules of international law.

## 4. Hierarchy

International treaties have a ranking below the Constitution (constitutional laws) but above other laws. Regarding customary international law there is no relevant case-law. Judges in their decision-making process are bound by the Constitution, by constitutional law, by international treaties pursuant to Article 7, paragraphs (2) and (5), and by law, therefore, and due to reliance on the Constitution (especially Article 154c) courts have not generated any presumptions or special doctrines to reconcile or conform domestic law to international law.

The Vienna Convention on the Law of Treaties, containing the doctrine of *jus cogens*, is binding on the Slovak Republic and therefore the doctrine of *jus cogens* norms must be applied by the courts. There is no relevant case-law.

The courts use international law to interpret constitutional provisions concerning guarantees of individual rights so there is relevant if not extensive jurisprudence. In general, international treaties on human rights and fundamental freedoms ratified and promulgated in the way laid down by a law shall have precedence over domestic laws. In addition, international treaties on human rights and fundamental freedoms that the Slovak Republic ratified before 1 July 2001 were incorporated into the legal order and given precedence over other laws if they provide a greater scope of protection that do constitutional rights and freedoms. Therefore courts do not

[9] No PL ÚS 44/03.

deal with this issue separately, given Article 2, paragraph (5) and Article 154c of the Constitution as well as Act No 460/2002 of Coll on exercising international sanctions guaranteeing international peace and security, which are obligatory on courts.

## 5. Jurisdiction

Courts exercise jurisdiction over international crimes but only in cases where the relevant international treaty grants jurisdiction. This is set out in section 7 paragraph (1) of the Criminal Code:

(1) Punitiveness of action is judged under this act even though an international treaty determines so, and the treaty was ratified and declared in the manner set by law and the Slovak Republic is bound by this treaty. (Positive jurisdiction)

(2) Provisions under § 3 to 6 (related to personal and territorial force of law) are not exercised in case an international treaty does not admit so, and the treaty was ratified and declared in the manner set by law and the Slovak Republic is bound by this treaty. (Negative jurisdiction)

There is no relevant practice on international civil litigation.

## 6. Other International Sources

Co-operation with international criminal courts is foreseen, including acceptance and enforcement of such court's decisions, as provided in section 480 of the Code of Criminal Procedure.[10] The particular procedure is regulated by sections 515–527 of the Code of Criminal Procedure. Basically, if the conditions under sections 515–516 are met and a recognition procedure under section 518 of Code of Criminal Procedure has taken place, then the legal effect of the accepted foreign decision is the same as a decision made by the Slovak Court.

**Code of Criminal Procedure sections 480, International courts**

(1) Procedure in cases of international court requests is also followed in accordance with this part.
(2) The extradition procedure established under the second chapter of this part shall be followed in proceedings and decisions about the surrender of a person to an international court.
(3) The execution of a sentence of an international court on the territory of the Slovak Republic shall be determined according to the provisions of the third chapter of this part about executing foreign decisions.

[10] Act No 301/2005 of Coll, in the wording of later provisions.

## 7. Commentary

The issue of legal regulations/enactment and the rank and status of international law within the legal order of the Slovak Republic have acquired increasingly higher importance, especially due to current requirements for the functional application of international rules and the increased number of international commitments.

The relationship between international law and municipal law in the Slovak Republic may be characterized as tending toward a moderate form of dualism. However, an inclination toward monism, giving preference to international law, can also be seen since 2001. Relevant law includes:

- the Constitution of the Slovak Republic[11]
- the Act about Collection of Laws[12]
- the Act about Official Journal of the European Union[13]
- the Act about Constitutional Court Organization[14]
- the Code of Civil Procedure[15]
- the Code of Criminal Procedure[16]
- the Act about Private International Law and Rules of International Procedure[17]
- the Act on exercising international sanctions guaranteeing international peace and security.[18]

The relationship between international law and domestic law in the Slovak Republic is more complex than in the past, particularly since the Constitutional Act No 90/2001 has come into effect. In general this Act deals with all substantial issues related to the international commitments of the Slovak Republic and their subsequent incorporation into municipal law. The enactment embraces constitutional as well as statutory regulation in several spheres. Firstly, Article 1, paragraph (2) of the Constitution generally confirms the applicability of international law and stipulates: 'The Slovak Republic recognizes and respects the general principles of international law, international treaties of which it is a contracting party and its other international commitments.'

Moreover, there is an enactment regarding the implementation of international treaty commitments. This enactment is subdivided. It embraces the implementation of international treaty commitments by direct application pursuant to Article

[11] No 460/1992 of Coll in the wording of later amendments, predominantly the Constitutional Act No 90/2001.
[12] No 1/1993 of Coll, in the wording of later provisions.
[13] No 416/2004 of Coll, in the wording of later provisions.
[14] No 38/1993 of Coll, in the wording of later provisions.
[15] Act No 99/1963 of Coll, in the wording of later provisions.
[16] Act No 301/2005 of Coll, in the wording of later provisions.
[17] No 97/1963 of Coll, in the wording of later provisions.
[18] Act No 460/2002 of Coll, in the wording of later provisions.

7, paragraph (5) of the Constitution (with reference to so-called self-executing treaties). Thereinafter, the above-mentioned constitutional regulations include other patterns of implementation for non-self-executing treaties. For such treaties the adoption of an act or statute is required pursuant to Article 7, paragraph (4) and Article 86 letter (d) of the Constitution. Such a pattern of implementation is used for international treaties that have been adopted within the European Union or European Community as well as for the secondary legislation of the European Union and European Community that can be executed pursuant to an Act or government regulation. Lastly, the constitutional regulations embrace the implementation of commitments emerging from international treaties that bound the Slovak Republic prior to 1 July 2001 pursuant to Article 154c of the Constitution and sections 1 and 3 of Act about Collection of Laws.

Furthermore, there are regulations dealing with the implementation of commitments emerging from other sources of international law, such as international custom and decisions of international bodies and organizations. These implementation regulations are based on Article 1, paragraph (2) of the Constitution and section 1 paragraph (2) letter (e) of Act about Collection of Laws Act. There is also a special enactment regarding the performance of decisions made by the Security Council of the United Nations or other international bodies and organizations.[19] On the basis of this Act secondary legislation is adopted, such as the government regulation on promulgation of sanctions securing international peace and security adopted by the United Nation Security Council and the Council of Europe. The constitutional regulations deal with the performance of other international commitments of the Slovak Republic either of 'primary' or 'secondary' origin, but there are few examples.

To ensure conformity between a treaty and implementing legislation there is a priori control of the constitutionality of the negotiated international treaty in accordance with Article 125a of the Constitution and the Act about the Constitutional Court's organization, as well as a posteriori review in accordance with Article 125 of the Constitution and same Act. Furthermore, the Constitutional Court has competence to hear and decide the complaints of individuals and legal entities regarding a violation of human rights guaranteed by an international treaty pursuant to Article 127 of the Constitution and the Constitutional Court Organization Act. Finally, the remaining spheres are related to the process of negotiation and ratification of international treaties,[20] added to the domestic law approving the international treaties[21] and judges are obligated to apply international treaties.[22]

[19] Act No 460/2002.
[20] Article 102, para (1) letter (a) of the Constitution.
[21] Article 7, para (4), Article 86 letter (d) of the Constitution.
[22] Article 144, para (2) of the Constitution, s 109 para (1), letters (b) and (c) of Code of Civil Procedure.

## 8. Conclusion

Given all the above, we conclude that Slovakia uses both the dualistic and monistic approaches. The monistic approach (with international law priority) can be seen in Article 7, paragraph (5) of the Constitution, but it has an 'ex-nunc effect' because it has been applied to self-executing treaties ratified after the Constitutional Act No 90/2001 came into effect, making these treaties directly applicable in domestic law. It is also necessary to indicate that after the accession of the Slovak Republic to the European Union the monistic approach with *acquis communitaire* priority is applied to the relationship between Slovak municipal law and European law in accordance with Article 7, paragraph (2) of the Constitution. According to *acquis communitaire* the European Union member states do not have the choice between monism and dualism. Rather, they are obliged to apply so-called 'community monism' with the *acquis communitaire* priority. As far as the international treaties ratified and promulgated prior to the Constitutional Act No 90/2001 are concerned, however, a soft dualist approach has been preserved (according to Article 154c of the Constitution).

# 24

# South Africa

*Erika de Wet*

## 1. Introduction

After the first multi-racial elections in 1994 brought an end to apartheid and ushered in majority rule, South Africa enacted a Constitution that entered into effect in 1997. Under this Constitution, executive power is vested in a President, who is both the chief of state and head of government. Legislative authority is granted to a bicameral legislature consisting of the National Assembly, which elects the President; and the National Council of Provinces, which has special powers to protect regional interests, including the cultural and linguistic traditions of ethnic minorities. The judicial system is based on a combination of Roman-Dutch law and English common law. The Constitutional Court is the highest court for interpreting and deciding constitutional issues, while the Supreme Court of Appeal is the highest court for non-constitutional matters.

Following the 1994 elections, most sanctions imposed by the international community in opposition to the system of apartheid were lifted. South Africa rejoined the Commonwealth on 1 June 1994 and was accepted by the UN General Assembly on 23 June 1994. South Africa also served as the African Union's (AU) first president from July 2003 to July 2004. However, South Africa has not yet accepted compulsory ICJ jurisdiction.

### 1.1 Relevant Constitutional Provisions

The Republic of South Africa is a unitary state with a common law tradition. Its common law is a blend of Anglo-American and Roman-Dutch Law. The latter refers to the legal system that applied in Holland during the seventeenth and eighteenth centuries. It comprised a mixture of medieval Dutch law and the Roman law of Justinian as received in Holland.[1] Roman-Dutch law was transported to the Cape when the Dutch settled there in 1652. Subsequently the principles of Roman-Dutch

[1] J. Dugard, 'South Africa' in D. Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement* (New York: Cambridge University Press, 2009) 449.

law were strongly influenced by English law, following the British occupation of South Africa in the early nineteenth century.[2]

Although South Africa achieved full independence from the United Kingdom only in 1960, it has been self-governing since 1910. In the context of this self-governing status, apartheid became the official state policy after the victory of the National Party in 1948. Between 1948 and the country's first democratic elections in 1994, the country's apartheid policies lead to its international isolation. During this time South Africa refused to become a party to many multilateral treaties, particularly in the field of African organization, human rights, and humanitarian law.[3]

However, this position changed significantly after 27 April 1994 with the enactment of the interim Constitution.[4] Unlike the earlier constitutions of 1910, 1961, and 1983, the interim Constitution expressly recognized international law and the role it had to play in municipal law. The provisions in the interim Constitution that specifically dealt with international law covered the signature and ratification of international agreements and their application in domestic law,[5] the status of customary international law in South African domestic law,[6] as well as the interpretive role of international law.[7] The final Constitution of 1996 envisaged only minor changes with respect to these provisions.[8] Of particular importance are sections 231–233 of the Constitution, as well as section 39, which constitutes a part of the Bill of Rights.

Section 231 regulates the signing, ratification, and implementation of international agreements (treaties):

1) The negotiating and signing of all international agreements is the responsibility of the national executive.
2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

[2] Ibid. [3] Ibid 448.

[4] Interim Constitution of the Republic of South Africa Act 200 of 1993 <http://www.constitutionalcourt.org.za/site/constitution/english-web/interim/index.html> (7 August 2010). D.J. Devine, 'The Relationship between International Law and Municipal Law in the Light of the Interim South African Constitution 1993' (1995) 44 ICLQ 1; J. Dugard, 'International Law and the South African Constitution' (1997) 8 Eur J Intl L 77; R. Keightly, 'Public International Law and the Final Constitution' (1996) 12 South African Journal on Human Rights 406 (SAJHR or S Afr J Hum R); T. Maluwa, 'International Human Rights Norms and the South African Interim Constitution' (1994) 19 South African Ybk Intl L 29.

[5] Interim Constitution of the Republic of South Africa 1993, c VI s 82(1)(i), c XV s 231(2), (3).

[6] Ibid c XV, s 231(4).

[7] Ibid c III, s 35(1). C XIV, s 227(2)(d), (e) (concerning the National Defence Force). Keightly (n 4) 406.

[8] Constitution of the Republic of South Africa 1996, c XIV, ss 231–233 <http://www.acts.co.za/constitution/index.htm> (7 August 2010).

4) Any international agreement becomes law in the Republic when it is enacted into law 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 an Act of Parliament.
5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

Section 232 concerns customary international law and determines that 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'

Section 233 requires an international law friendly interpretation of legislation: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

Of particular importance in the practice of courts is section 39 concerning the interpretation of the constitutional Bill of Rights:

1) When interpreting the Bill of Rights, a court, tribunal or forum:
   a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
   b) must consider international law; and
   c) may consider foreign law.
2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Reference should also be made to section 200(2) of the Constitution, which regulates the Defence Force: 'The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.'

These provisions marked a formal turning point in the country's approach towards international law, especially regarding the use of international human rights law as a guideline for interpreting the Constitution. Although South Africa's common law tradition implies that decisions of foreign courts have been influential since its inception, until 1994 this influence was largely restricted to areas of private and commercial law.[9] Before 1994 no reference was made to decisions of international monitoring bodies in the human rights field because South Africa was not party to any human rights treaties. However, since the adoption of the interim and final Constitutions, decisions of international human rights bodies and of foreign courts pertaining to international law are frequently invoked.[10]

## 1.2 Statutory References to International Law

It is also worth noting that an increasing number of statutes refer expressly to international law, in accordance with section 233 of the Constitution, which requires

[9] Dugard (n 1) 466. [10] Ibid.

ordinary legislation to be interpreted in accordance with international law.[11] In some instances the legislation makes clear that it is to be interpreted in accordance with international law. In other instances the statute incorporates language that resembles that contained in international instruments, including ones that are not binding on South Africa. This enhances the ability of the executive and the courts to interpret the legislation in accordance with present and future developments in relation to the relevant area of international law.[12]

An example of a statute that explicitly requires interpretation consistent with international law is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. This provides that any person interpreting the Act may be mindful of international law.[13] Similarly, the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 provides that a court applying the Act must consider conventional and customary international law.[14] In addition, the Labour Relations Act 66 of 1995 states that one of the primary objects of the Act is to give effect to obligations incurred by the Republic as a member state of the International Labour Organization (ILO) and requires the Act to be interpreted in compliance with the public international law obligations of the Republic.[15]

## 2. Treaties and Other International Agreements

### 2.1 The Definition and Interpretation of Treaties

The term 'international agreement' in the Constitution is synonymous with the term 'treaty' as defined in Article 2(1) in the Vienna Convention on the Law of Treaties 1969 (Vienna Convention).[16] This meaning has developed in the practice of the Office of the Chief State Legal Adviser in the absence of a definition of 'international agreement' in the Constitution and despite the fact that South Africa is not a party to the Vienna Convention. The term 'international agreement' in section 231 is therefore to be understood as referring to written agreements between subjects of international law that embody legally enforceable rights and obligations.[17]

[11] Ibid 463.

[12] E Couzens, 'The Incorporation of International Environmental Law (and Multilateral Environmental Agreements) into South African Domestic Law' 30 South African Ybk Intl L 138 (2005).

[13] Section 3(2)(a).

[14] Section 2.

[15] Sections 1, 3. Dugard (n 1) 463.

[16] Vienna Convention of the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention).

[17] Ibid, Article 2(1) determines that: 'a "treaty" means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.' See also J. Schneeberger, 'A Labyrinth of Tautology: The Meaning of the Term 'International Agreement' and its Significance for South African Law and Treaty Making Practice' 26 South African Ybk Intl L 3 (2001); Dugard (n 1) 457.

This view also seems to have been endorsed by the Constitutional Court in the *Harksen* case,[18] which concerned the attempt by Jürgen Harksen to prevent his extradition to Germany where he was charged with fraud.[19] One of the issues central to the dispute was whether ad hoc extradition under section 3(2) of the Extradition Act[20] (where South Africa had not concluded an extradition agreement with the requesting state) should also comply with the constitutional prerequisites for an international agreement. The question was whether the signature (consent) of the South African President to a statement that permitted the extradition of Harksen to Germany constituted an international agreement.[21] The Constitutional Court determined that presidential consent in terms of section 3(2) of the Extradition Act was a domestic act, implying that in accordance with South African domestic law Harksen could be brought before a magistrate's court in order to initiate the extradition proceedings.[22] It did not amount to an 'international agreement' in terms of section 231 of the Constitution, as it was not an instrument that intended to create international legal rights and obligations between state parties.[23]

No provision is made for oral agreements or for unilateral acts in either the Constitution or in the Manual on Executive Acts of the Office of the President of South Africa (Manual), which serves as a guide to the practice of the Office of the Chief State Legal Advisor.[24] As far as the written agreements are concerned, section 231 of the Constitution distinguishes between two types of agreements. The first requires parliamentary approval in terms of section 231(2), meaning that they have to be approved by both houses of Parliament (the National Assembly and the National Council of Provinces) sitting separately, before they will bind the Republic on the international level.[25]

The second concerns technical, administrative or executive agreements that can, in accordance with section 231(3), be concluded by the national executive alone.[26] Although Parliament has to be notified about these agreements, they are exempt

[18] *Harksen v President of the RSA* (CCT 41/99) 2000 ZACC 29.

[19] Ibid [1].

[20] Act 67 of 1962 <http://www.info.gov.za/acts/> (22 April 2011). Section 3(2) deals with extradition to countries with which South Africa has not concluded an extradition agreement.

[21] *Harksen* (n 18) [13].

[22] Ibid [21].

[23] Schneeberger (n 17) 30.

[24] N. Botha, 'Treaty making in South Africa: A reassessment' (2000) 25 South African Ybk Intl L72. ch 5; *2006 Manual on Executive Acts of the Office of the President of South Africa* (the Manual) [on file with the author]; Schneeberger (n 17) 38. The Constitutional Court did not elaborate on the criteria to be considered when determining the intention of the parties where this was not stated clearly. In practice the Office of the Chief State Legal Adviser has developed guidelines similar to those of the US Department of State. These include the significance of the arrangement and the substantive provisions used; the specificity or generality of the language used; the form of the arrangement; the absence of familiar treaty clauses such as entry into force; amendment and termination provisions; and the name of the agreement.

[25] Botha (n 24) 79.

[26] In practice, only ministers sign international agreements. The Manual (n 24) [5.1.5]; Schneeberger (n 17) 3. See also *Hugh Glenister v the President of the RSA*, Case CCT 48/10 [2011] ZACC 6 [89].

from the sometimes lengthy parliamentary approval procedure. The Constitution does not give any indication of which agreements would qualify as technical, administrative or executive.[27] The internal practice that has developed within the Office of the Chief State Legal Adviser is to consider as 'technical' those agreements that do not have major political significance; do not require additional budgetary allocation from Parliament over and above the budget provided by particular government department; and agreements that do not impact domestic law.[28] They are often of a bilateral nature and concern routine agreements for which a single government department is responsible for implementation. This encompasses the vast majority of agreements that South Africa has concluded since 1994.[29]

The procedure foreseen for 'technical' agreements in section 231(3) requires an average of three months. Despite being of an expedited nature, the procedure is not always fast enough to accommodate the requirements of modern-day international relations. In such circumstances the executive prefers informal agreements because of their simplicity, swiftness, flexibility, and confidentiality. However, they do not create reciprocal rights and duties under international law, even though they are almost always honoured in practice.[30] Since they are of a non-binding nature, they are also exempt from the procedures prescribed in section 231 of the Constitution.[31]

The frequent use of technical agreements and informal agreements implies that a large number of agreements are excluded from the democratic verification process. The situation is particularly acute in relation to informal agreements. Whereas Parliament is at least notified about the conclusion of technical agreements in accordance with section 231(3), no such notification occurs in relation to informal agreements.[32] Although these expedited procedures are necessary for the conduct of efficient international relations in the twenty-first century, it can be problematic from the perspective of democratic accountability that lies at the heart of section 231(2).[33] However, at the time of writing there has not yet been any case before a South African court challenging a particular classification of an agreement by the executive as 'technical', nor of the validity of informal agreements.

The role of Parliament in the ratification process also has implications for reservations to treaties. In those instances where treaties are subject to the parliamentary process foreseen in section 231(2), Parliament will have the opportunity to scrutinize the reservation attached by the executive.[34] In addition, Parliament may

[27] In practice the terms 'technical, administrative and executive agreements' in s 231(3) of the Constitution form a single category and are interchangeable; The Manual (n 24) [5.5]; Botha (n 24) 76.
[28] The Manual (n 24) [5.5]; Schneeberger (n 17) 4.
[29] Schneeberger (n 17) 4–5; Botha (n 24) 76.
[30] Schneeberger (n 17) 7.
[31] Ibid 28.
[32] Ibid 7.
[33] The democratization of the treaty-making process as foreseen in s 231(2) of the Constitution does not encompass the negotiation and signature of treaties. In accordance with s 231(1) of the Constitution, those functions vest solely in the hand of the executive. Botha (n 24) 77, 80.
[34] The Manual (n 24) [5.11]; Botha (n 24) 84.

also insist on additional reservations. The issue of reservations does not, however, seem to play a prominent role in South African treaty-making and the domestic courts have not yet been confronted with interpretation issues pertaining to reservations, such as their legality or scope.

The issue of treaty termination is not regulated in the Constitution or by statute. However, in practice it seems that where a decision to terminate a treaty is taken, this will be done in accordance with international law practice, including the provisions of the VCLT.[35] Although the decision to terminate a treaty vests in the executive, it is arguable that the spirit of section 231(2) would require parliamentary involvement in the same manner as foreseen for ratification. This would imply the consent to termination of both Houses of Parliament in relation to all 'non-technical' treaties.[36] Where a treaty has been incorporated into municipal law in terms of section 231(4) of the Constitution, the implementing law will also have to be repealed by the legislature. As long as the legislation is in place, the treaty obligations will de facto still be in force in the Republic, despite the fact that South Africa would not be bound formally by them on the international level.[37]

It is also worth noting that treaties are not published systematically in South Africa.[38] However, interested parties can obtain information, including copies of the treaty in question, from the Office of the Chief State Legal Adviser.[39]

## 2.2 Treaty Implementation and the Doctrine of Self-Executing Treaties

Before launching into the issue of treaty implementation, one must note that in accordance with section 231(1) of the Constitution the negotiation and signature of treaties is the exclusive competence of the executive; Parliament has no role to play at this level. Moreover, the Manual indicates that the provinces may not enter into agreements governed by international law, except as agents of the national executive. The individual concerned would therefore have to require specific authorization to this effect by way of Presidential Minute together with credentials issued by the Department of International Relations and Co-operation.[40]

Section 231(2) and (3) of the Constitution only determine when the Republic would be bound by international agreements on the international level. In order for treaties to apply domestically, section 231(4) prescribes that these agreements must first be enacted into domestic law by means of legislation, unless their provisions are

[35] Vienna Convention (n 16) Article 3. The general principle concerning termination is contained in Article 54 VCLT, 'The termination of a treaty or the withdrawal of a party may take place: (*a*) in conformity with the provisions of the treaty; or (*b*) at any time by consent of all the parties after consultation with the other contracting States.'

[36] Botha (n 24) 85. [37] Ibid. [38] Ibid 87.

[39] See <http://www.dfa.gov.za/department/dfa-officials.pdf>.

[40] The Manual (n 24) [5.25]; *Glenister* case (n 26) [89]; Botha (n 24) 956. Theoretically the possibility also exists that unauthorized agreements concluded between the provinces and foreign entities enjoying treaty-making capacity could receive the subsequent approval of the national executive in accordance with Article 8 of the VCLT. Such an agreement would still be subject to parliamentary approval in terms of s 231(2) of the Constitution, unless it qualifies as a s 231(3) agreement.

self-executing. This approach was confirmed by the Constitutional Court in the *AZAPO* and *Glenister* cases,[41] as well as the Supreme Court of Appeal in the *Progress Office Machines* case.[42] The *AZAPO* case concerned the 1949 Geneva Conventions on the Laws of War, while the *Glenister* case pertained to various international and regional treaties combating corruption. The *Progress Office Machines* case for its part concerned the World Trade Organization (WTO) Agreement and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade. The *AZAPO* and *Progress Office Machines* cases will be explored in more detail in sections 3 and 4 respectively. Although the issue of self-executing treaties will also be illuminated below, this concept has thus far remained a dead letter in the practice of South African courts.[43]

Four principle methods are employed to transform treaties into municipal law. The first and most simple technique of incorporation is considering the pre-existing legislation sufficient to give effect to subsequent treaty obligations. An example is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973, which South Africa ratified in 1975.[44] Second, the provisions of a treaty may be embodied in the text of an Act of Parliament. This, for example, was the case with the Implementation of the Rome Statute of the International Criminal Court Act, which implemented South Africa's obligations under the Rome Statute of the International Criminal Court 1998, which South Africa ratified in 2000.[45] Third, the treaty may be included as a schedule to a statute. One example of such wholesale importation is the World Heritage Convention Act 49 of 1999. By way of a schedule, the Act incorporates into South African law the entire Convention concerning the Protection of the World Cultural and Natural Heritage of 1972.[46] Sometimes incorporations of this kind delegate particular powers related to the enforcement of the international agreement to the relevant cabinet minister. For example, The Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986 (MARPOL Act) incorporates the International Convention for the Prevention of Pollution from Ships 1973 through a schedule. Section 3 of the MARPOL Act provides that the Minister of Transport may make regulations relating to carrying out the provisions of the Convention.[47]

[41] *Azanian Peoples Organisation (AZAPO) v President of the RSA* (1996) (4) SA 671 (CC). On 17 March 2011 the Constitutional once again confirmed this approach in the *Glenister* case (n 26) [92]

[42] *Progress Office Machines CC v SARS* (2007) SCA 118 (RSA). In essence, this reaffirms the dualist approach which was also endorsed by the highest court (the Appellate Division of the Supreme Court) in South Africa before 1994. *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A).

[43] Dugard (n 1) 455.

[44] Couzens (n 17) 143.

[45] The definitions of the crimes of genocide, war crimes and crimes against humanity included in the Rome Statute were directly taken over through a schedule appended to the Act, to ensure consistency. The same does not apply to the newly defined crime of aggression, which still has to be implemented into domestic law. M. du Plessis, 'International Criminal Courts, the International Criminal Court, and South Africa's Implementation of the Rome Statute' in J. Dugard, *International Law: A South African Perspective* (3rd edn, Claremont: Juta, 2005) 197.

[46] Couzens (n 17) 130.

[47] Couzens (n 17) 133.

Finally, an enabling Act of Parliament may grant the executive the power to bring a treaty into effect in municipal law by means of proclamation or notice in the Government Gazette.[48] A pertinent example in this regard is the Extradition Act 67 of 1962 (last amended in 1996). It constitutes a framework Act that deals with a specific class of international agreements, namely those pertaining to extradition. Section 2(1)(a) of the Act provides that the President may enter into agreements with foreign states to provide for the surrender, on a reciprocal basis, of persons accused or convicted of the commission of extraditable offences.[49] Once ratified by Parliament,[50] the Minister gives notice of the agreement in the Government Gazette.[51] This proclamation effectively amounts to a simplified incorporation procedure for a large number of similar agreements. The Constitutional Court in the *Quagliani* case unfortunately overlooked the role of the proclamation in the Government Gazette as an element of the incorporation process. The case concerned the validity and enforceability of an extradition agreement concluded in 1999 between the United States and South Africa. Sachs J, on behalf of the Court, correctly noted that the nature and number of the extradition agreements makes it desirable that they be implemented in an effective manner.[52] However, he then confused matters by stating:

> [The Agreement] either became law in South Africa as a result of the prior existence of the Act which constitutes the anticipatory enactment of the Agreement for the purpose of section 231(4) of the Constitution. Or the Agreement has not become law in the Republic as contemplated by section 231(4) but the provisions of the Act are all that is required to give domestic effects to the international obligation that the Agreement creates.[53]

Not only is it difficult to follow the meaning of this contradictory statement,[54] but it would seem to overlook the fact that one is in fact dealing with a simplified incorporation procedure. The Extradition Act is indeed anticipatory in as far as it provides a simplified procedure for a class of agreements that still have to be concluded. However, that does not change the fact that they are dependent on incorporation into municipal law, in the form of ministerial proclamation, as foreseen by Parliament in the Extradition Act.

Another area where the issue of expedited implementation through secondary legislation is of significance concerns the implementation of Security Council decisions adopted under Chapter VII of the United Nations Charter 1945. As it stands, South Africa has no general legislation in place that would facilitate expedited implementation of such decisions. Instead, it relies on issue specific

[48] Dugard (n 1) 453 ; *Glenister* case (26) [99].

[49] Section 2(1)(a). *President of the RSA v Nello Quagliani; President of the RSA v Stephen Mark van Rooyen;* and *Steven William Goodwin v D-G, Department of Justice and Constitutional Development* [2009] ZACC 1 [42].

[50] Ratification is explicitly required in the Extradition Act 1967, s 3(a).

[51] Ibid.

[52] *Quagliani* (n 49) [45].

[53] Ibid [47].

[54] For criticism, see N. Botha, 'Rewriting the Constitution: The "strange alchemy" of Justice Sachs indeed!' (2009) 34 South African Ybk Intl L 253.

legislation, which can result in a fragmented (or even conflicting) approach to enforcement. It also carries the risk that in areas where no issue specific legislation exists, Security Council decisions will not be implemented on the domestic level or only implemented with great delay.[55]

This situation is a remnant of South Africa's years of isolation when some of the most significant United Nations sanctions were directed at South Africa itself.[56] During the early 1990s, while the new constitutional dispensation was negotiated and in anticipation of South Africa's reintegration into the international community, the last apartheid government designed the Application of Resolutions of the Security Council of the United Nations Act 172 of 1993. Under section 1 of this Act the State President could by proclamation in the Government Gazette declare that any resolution of the Security Council shall apply in the Republic to the extent specified in the proclamation. Any such proclamation was subjected to Parliamentary approval in terms of section 2.[57] Although the Act was assented to on 8 December 1993, its date of commencement was never proclaimed and it was effectively (and rather ironically) shelved by the new democratically elected government barely six months later.[58]

As a result, South Africa still has to rely on the issuing of specific legislation to enforce Security Council resolutions, almost 20 years after reasserting itself as a member of the international community. The most flexible tool for this purpose, specifically in relation to trade sanctions, is the Import and Export Control Act 45 of 1963. Section 2(2) of the Act empowers the Minister of Trade and Industry to restrict the importation of certain goods to and from South Africa whenever he deems it necessary or expedient in the public interest. It was first used as a vehicle to enforce Security Council sanctions in 1993 in relation to the former Yugoslavia.[59]

Another prominent area for which specific legislation was introduced concerns the Protection of Constitutional Democracy against Terrorism and Related Activities Act 33 of 2004. Section 25 provides for giving effect to Security Council resolutions adopted in terms of Chapter VII of the United Nations Charter. It obliges the President to give notice in the Government Gazette if the Security Council has identified a specific entity as being involved in terrorist activities, or as an entity against whom United Nations member states must take action specified in Security Council resolutions with a view to combat or prevent terrorism. Proclamations of this nature are subject to parliamentary scrutiny and Parliament is also empowered to decide the appropriate way in which domestic effect must be given to such resolutions.[60] This means that the manner for implementation remains subject to democratic control, although this can have an impact on the swiftness with which measures are implemented. A similar procedure was foreseen in the Application of Resolutions of the Security Council of the United Nations Act 172 of 1993, which never entered into force.

[55] H. Strydom and T. Huarka, 'South Africa' in V Gowlland-Debbas (ed.), *National Implementation of United Nations Sanctions: A Comparative Study* (Leiden: Martinus Nijfhoff Publishers, 2004) 430, 432.

[56] Ibid 430. [57] Ibid 432. [58] Ibid 430. [59] Ibid. [60] Ibid.

Once implemented, it seems that the courts broadly follow the international law rules of treaty interpretation contained in Article 32 of the Vienna Convention, when interpreting the incorporated version.[61] Although this is not directed by the Constitution or statute, it follows from the fact that the South African rules of statutory interpretation conform to a large extent with those contained in the Vienna Convention. South African law also recognizes the textual, intent, and purposive approaches to statutory interpretation that constitute the core principles of interpretation in the Vienna Convention.[62]

As has been indicated above, the second part of section 231(4) provides that 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 an Act of Parliament. At first sight this phrase seems to imply that a clause in a treaty will only be self-executing when the language of the treaty so indicates and when existing municipal law, either common law or statute, is adequate in the sense that it fails to place any obstacle in the way of treaty application.[63] In concrete terms this would mean that the nature and content of the relevant treaty provision is such that it is capable of judicial enforcement in the absence of any further measures for implementation (ie self-executing).[64] In addition, the direct enforcement should not result in a conflict with existing domestic law.

However, whether this interpretation will persevere in practice remains to be seen. No South African court has thus far been willing to engage in the meaning of self-execution, let alone hold a provision of a multilateral treaty, which has not been expressly incorporated by Parliament, to be self-executing.[65] In the *Grootboom* case (concerning the constitutional right to housing), the Constitutional Court merely noted in passing that where a relevant principle of international law binds South Africa, it may be directly applicable.[66] In the *Quagliani* case the Constitutional Court skirted the issue by stating that it was not necessary to consider the question of the self-executing nature of the agreement.[67]

[61] Dugard (n 1) 464.

[62] Courts have also on occasion invoked the preparatory works of incorporated treaties in their process of interpretation, as permitted by Article 32 of the Vienna Convention. In *Portion 20 of Plot 15 Athol (Pty) Ltd v Rodriguez* (2001) (1) SA 1285 (W) 1293, the High Court considered the preparatory works of the International Law Commission when interpreting the Vienna Convention of Diplomatic Relations 1961, which is incorporated into South African Law. Dugard (n 1) 464–5.

[63] Dugard (n 1) 455.

[64] This is the practice that has been followed by courts in the Netherlands, where all substantive rights in the European Convention of Human Rights have over time been recognized as self-executing. E. de Wet, 'The Reception Process in The Netherlands and Belgium' in H. Keller and A. Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford: OUP, 2008) 229.

[65] M. Killander, 'Judicial Immunity, Compensation for Unlawful Detention and the Elusive Self-executing treaty provision: *Claassen v Minister of Justice and Constitutional Development* (A/238/09)' (2010) (6) SA 399 (WCC), in (2010) 26 *South African Journal on Human Rights* 356 (SAJHR).

[66] *Government of RSA v Grootboom* (CCT11/00) [2000] ZACC 19 [26].

[67] *Quagliani* (n 49) [36]. Given the fact that the Extradition Act provided for simplified incorporation of extradition agreements, it was indeed not necessary to decide on the issue of their self-execution. However, the Court's convoluted reasoning reignited the doctrinal debate. See G. Ferreira and W. Scholz, 'Has the Constitutional Court found the lost ball in the high weeds? The interpretation of section 231 of the South African Constitution' (2009) XLII Comparative & International Law

More recently the Western Cape High Court rejected the self-execution of the International Covenant on Civil and Political Rights 1966 (ICCPR) as a whole in the *Claassen* case.[68] Although the ICCPR was ratified by South Africa in 1998, it has not yet been incorporated into domestic law.[69] In this instance the appellant claimed damages, based on delict, arising out of alleged unlawful detention. The action was brought, inter alia, against the magistrate in his personal capacity. Of particular relevance was whether the unlawful committal of the appellant to prison in breach of the right to freedom and security of the person in section 12(1) of the Constitution,[70] or of the breach of the right to compensation for unlawful detention in Article 9(5) of the ICCPR,[71] affected the judicial immunity that would otherwise protect the magistrate from liability under domestic law.[72] In reaching the conclusion that this was not the case, the Court noted that the ICCPR is not a self-executing legal instrument. The formal adoption of its provisions did not, of itself, amend the established domestic law.[73] Not only does this statement seem to be based on the (highly inaccurate) assumption that the ICCPR as a whole is in conflict with existing domestic law, but it also ignores the fact that the Constitution requires a 'provision-by-provision' approach to self-execution. Section 231(4) of the Constitution refers to a 'self-executing provision of an agreement' and not 'self-executing agreement'. The Court should therefore first have examined whether Article 9(5) of the ICCPR is clear and precise enough to be directly applicable (self-executing), whereafter it should have considered whether it indeed conflicts with existing domestic law.

The flipside of the de facto irrelevance of self-execution in South African treaty law is that treaties do not serve as a direct basis for litigation between private parties. The basis for legal standing is to be sought in domestic law on the basis of constitutional, statutory, or common law. The treaty (or other relevant international law instrument) may however constitute an important guideline for interpreting the disputed domestic law.

Journal of Southern Africa 269, 271 (CILSA). They argued that the Court's judgment amounted to an implicit acceptance of the self-executing nature of the extradition agreement. In reaching this conclusion they overlooked the incorporating effect of the ministerial proclamation in the Government Gazette.

[68] *Claassen* (n 65).

[69] Dugard (n 1) 454.

[70] Section 12(1) of the Constitution determines that:

> 1) Everyone has the right to freedom and security of the person, which includes the right:
> (a) not to be deprived of freedom arbitrarily or without just cause;
> (b) not to be detained without trial;
> (c) to be free from all forms of violence from either public or private sources;
> (d) not to be tortured in any way; and
> (e) not to be treated or punished in a cruel, inhuman or degrading way.

[71] Article 9(5) ICCPR determines that: 'Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.' <http://www2.ohchr.org/english/law/ccpr.htm> (7 August 2010).

[72] *Claassen* (n 65) [5], [24].

[73] Ibid [36].

## 2.3 Deference to the Executive

Since the adoption of the new constitutional order in 1994, the courts have indicated on several occasions that the conduct of foreign relations is not—in principle—beyond judicial scrutiny. This is notably the case where such conduct has a direct impact on the fundamental rights of individuals with standing before the South African court in question.[74] However, the courts nonetheless grant significant deference to the executive in matters of foreign relations. This has been particularly visible in the area of diplomatic protection, where disagreement erupted in relation to the level of scrutiny that a court can apply in such instances.

The *Kaunda* case was the first of the series of diplomatic protection cases, and thus far the only one to have appeared before the Constitutional Court.[75] The case acknowledged a role for courts in issues of diplomatic protection, but with considerable deference toward the executive in relation to the type of action to be undertaken. The Constitutional Court was confronted with whether South Africa had to prevent the extradition of South African nationals from Zimbabwe to Equatorial Guinea, where they would face the death penalty for plotting a coup against the government. In answering this question in the negative, the Constitutional Court determined that no right to diplomatic protection existed under international law. South African citizens facing adverse state action in foreign countries were nonetheless entitled under section 3 of the Constitution to request protection from the government against acts that violated obligations. Similarly, the government had to consider such a request and its decisions in these matters were subject to constitutional control.[76]

However, courts had to acknowledge that diplomatic protection concerned an area with that the executive was better placed to deal with than the courts. Where, for example, the government refused to consider a legitimate request for diplomatic protection, or dealt with it irrationally or in bad faith, a court could require the government to deal with the matter properly. But in doing so a court had to respect the broad discretion of the executive, which was essentially responsible for determining the nature of the protection as an aspect of foreign policy.[77] The nature of

[74] *Kolbatschenko v King NO* 2001 (4) SA 336 (C); *Geuking v President of the RSA* (2003) (3) SA 34 (CC) [27E]. In this instance, no extradition treaty existed between South Africa and the state involved. The Court determined that the President's consent to classify a particular individual as 'person liable to be extradited' was a foreign policy decision, but one which was subject to limitations. These limitations were abuse of power by the President, or action which was contrary to the provisions of the Constitution. N. Botha and M. Oliver, 'Ten years of international law in the South African courts: Reviewing the past and assessing the future' (2004) 29 South African Ybk Intl L 356–7; Dugard (n 1) 471.

[75] *Kaunda v President of the RSA* (2005) (4) SA 235 (CC) [67].

[76] Ibid [67].

[77] Ibid [77], [80]-[81]. The principle that a court could not prescribe to government how to conduct foreign affairs and make diplomatic interventions was also applied by the SCA in *Van Zyl & Others v Government of the RSA & Others* (2007) SCA 109 (RSA) [59]. This case concerned the expropriation of property of a South African citizen by the Lesotho government.

the reaction called for government expertise and it would be inappropriate for a court to propose a different course of action.[78]

Subsequently in the *Von Abo* cases, the North Gauteng High Court relied on the *Kaunda* decision to prescribe the specific type of action that the government had to undertake in order to give effect to Von Abo's request for diplomatic protection.[79] In doing so, it defied the Constitutional Court's view that considerable judicial deference is required in this particular area. The case was marked by a long history of dismissive behaviour on the part of the government towards Von Abo's request for diplomatic protection, following the expropriation without compensation of his property by the Zimbabwean government. The undisputed reluctance of the government to address Von Abo's request lead the High Court to conclude that his request was not considered 'properly' as prescribed by the *Kaunda* case. Moreover, the High Court assumed that the concept of 'proper consideration' implied an obligation on the South African government to bring about an effective remedy in Zimbabwe that would include material redress in the form of compensation for damages.[80]

Although one has to agree with the conclusion that the government's treatment of the Von Abo request was inappropriate, one cannot but disagree with the conclusion that proper consideration would necessarily oblige the government to facilitate material redress for the applicant. It determines policy in the area of foreign relations in a manner that shows scant understanding of the wide range of factors that need to be considered when determining a particular route of action. It further ignores the fact that South Africa cannot enforce its laws in the territory of another sovereign state. This was essentially also the view of the Supreme Court of Appeal which overturned the decision of the High Court in April 2011 and confirmed the need for judicial deference to the executive in the area of diplomatic protection. The fact that the Constitution granted an individual seeking diplomatic protection the right to have the request considered, does not amount to a right to any particular type of diplomatic protection.[81]

## 3. Customary International Law

As indicated at the outset, section 232 of the Constitution determines that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. This means that South Africa has a monist approach towards customary international law and that in the domestic

[78] *Kaunda* (n 75) [144]. In this particular instance the South African High Commissioner had made representations to the Zimbabwean government and it was not established that the South African government had violated either international law or the Constitution.

[79] *Von Abo v Government of the RSA* (3106/07) [2008] ZAGPHC 226.

[80] Ibid [37], [66], [145], [161]. The sequel decision in *Van Abo v The Government of the RSA* (3106/07) [2010] ZAGPPHC 4 [58]-[54], [66][67].

[81] *The Government of the Republic of South Africa v Von Abo* (283/10) [2011] ZASCA 65 (4 April 2011) [22] [26] [39] [40]; see also A. Stemmet, ILDC 1026 (ZA 2008) A2.

legal order it constitutes a particular species of the common law.[82] However, customary international law does not feature prominently in court practice. Where reference is made, it tends to be short and to inform the reasoning or interpretation already decided on by the court, rather than being the basis of the decision. This scant treatment of customary international law in court practice forms a strong contrast with the extensive references to international human rights instruments in court practice, as will be illuminated in section 4 below. This is most likely a result of the fact that most litigators and judges are not yet well versed in public international law beyond the area of human rights, despite the fact that 15 years have gone by since the adoption of the new constitutional dispensation. Also, the vague nature of many customary international law obligations reduces their utility as a guideline for interpretation.

The references to customary law have however featured in cases pertaining to treaty law, international humanitarian law and jurisdiction. In the *Harksen* decision the Cape High Court accepted that the definition of a treaty in Article 2(1)(a) of the Vienna Convention was a codification of customary international law.[83] Subsequently on appeal the Constitutional Court was reluctant to accept the customary law status of Article 46 of the Vienna Convention, according to which a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its national law.[84] The Court noted that the extent to which the Vienna Convention reflects customary international law was by no means settled. However, it did not attempt to draw a distinction between those obligations in the Vienna Convention that were generally accepted as customary international law and those that were more contentious.[85]

The customary international law status of international humanitarian law has thus far also received only superficial attention. The most prominent example remains the *AZAPO* case, which was one of the very first cases that the Constitutional Court had to decide when taking up its work in 1995.[86] In addition to it historic importance in the South African context, it also reflects the Constitutional Court's willingness to give precedence to the clear language of the Constitution, if such language were to result in a conflict with customary international law. The *AZAPO* case concerned the constitutionality of the Truth and Reconciliation Commission, which was set up to deal with crimes committed during the era of apartheid. In its terms of reference it was awarded the power to grant amnesty

[82] Dugard (n 1) 474.

[83] *Harksen v President of the RSA* (1998) (2) SA 1011 (C); N. Botha, 'Extradition on the basis of a treaty: section 5 of the Extradition Act 67 of 1962 considered' (2000) 25 South African Ybk Intl L 249.

[84] Article 46 (1) VCLT determines that: 'A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.'

[85] *Harksen* (n 18) [26].

[86] *AZAPO* (n 41); A.M. Gross, 'The Constitution, Reconciliation and Transitional Justice: Lessons from South Africa and Israel' (2004) 40 Stanford Journal of International Law 47, 69–77 (Stan J Intl L) (discussing the mandate and operations of the South African Truth and Reconciliation Commission).

under certain conditions to individuals responsible for violations of human rights.[87] Some of the members of families who had lost persons close to them as a result of the death and torture squads of the apartheid regime challenged the constitutionality of the so-called Reconciliation Act, which established the Truth and Reconciliation Commission.[88]

The Constitutional Court essentially decided that the so-called post-amble to the interim Constitution (which was in force at the time), required that amnesty be granted to persons who had violated the law in the course of the conflicts of the past and allowed for the modalities to be established by national legislation.[89] Essentially, the constitutional terms were conclusive of the matter to the extent that they presupposed full amnesty to be given.[90] The Constitutional Court doubted whether the Geneva Conventions 1949 were relevant, since the Court regarded the obligation to prosecute those guilty of grave breaches of the Geneva Conventions applicable only to international armed conflict.[91] The Court also submitted that neither of the two Additional Protocols 1977 to these Conventions were applicable, since they were never signed or ratified by South Africa.[92] Consequently, there was nothing in the Promotion of National Unity and Reconciliation Act that constituted a breach of the obligations of South Africa in terms of the instruments of international law, as relied on by the applicants.[93]

Implicit in the Court's decision was also the assumption that the potential customary international law norms relevant to the question before it were too imprecise to overcome the strong language of the amnesty.[94] The language of amnesty indicated that in order to reveal the truth, effect closure, and protect the new democratic government from huge economic liability for the crimes of the previous government, there should be indemnity both from civil and criminal liability for the perpetrators of apartheid crimes.[95]

Had the Court in the *AZAPO* case engaged in a more extensive survey of the relevant international practice in the area, it would have found additional support for its conclusion and not (as was implicitly feared), opposition to its views. For example, according to the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadic* case,[96] the Geneva Conventions clearly indicate that acts that must be prosecuted by states under the rubric of 'grave breaches' are only classified as such if such acts occur against persons or property protected by the Conventions.[97] This is a restrictive definition and does not include

[87] The Promotion of National Unity and Reconciliation Act 34 of 1995.
[88] *AZAPO* (n 41) [6]. [89] Ibid [7]. [90] Ibid [9]. [91] Ibid [30].
[92] Ibid [29].
[93] Presentation by former Justice of the Constitutional Court of South Africa, Albie Sachs, at a seminar in Amsterdam on 7 March 2003 (speaking notes at seminar; on file with the author).
[94] *AZAPO* (n 41) [34].
[95] Sachs (n 93).
[96] *Prosecutor v Tadic (Jurisdiction)* (1996) 35 ILM 32.
[97] Ibid [81]; eg, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva I) Article 50. ('Grave breaches to which the [Convention] relates shall be those involving any of the following acts, if committed against persons or property protected by the

persons participating in, or civilians affected by, an internal conflict.[98] The Court could have backed its conclusion by the *Tadic* decision, but refrained from doing so.

In addition, the *Tadic* decision provided support for the fact that an obligation to prosecute for acts committed at the time in question could not easily be derived from customary law as codified by Common Article 3 of the Geneva Conventions.[99] While the ICTY affirmed that Common Article 3 governed internal strife and had acquired customary law status,[100] violations of Common Article 3 had, nonetheless, at that point in time, never been treated as crimes under international law.[101] Although violations of Common Article 3 could exist as international offences subject to universal jurisdiction, they did not yet implicate the mandatory type of jurisdiction envisioned by the Geneva Conventions.[102] The same consideration applied to Additional Protocol II to the Geneva Conventions.[103] The ICTY further submitted that 'many' of Additional Protocol II's provisions would also enjoy some degree of customary character.[104] However, the ICTY's reference in

Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'). Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva II) Article 51; Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva III) Article 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (Geneva IV) Article 147.

[98] C. Greenwood, 'International Humanitarian Law and the *Tadic* Case' (1996) 7 European J Int Law 265, 275–6 (Eur J Intl L). The Appeals Chamber considered the concept of grave breaches under the Convention inseparable from the concept of protected persons and property, and believed that neither concept featured in Common Article 3, the only provision in the Conventions applicable to internal armed conflicts. *Tadic* (n 96) [81].

[99] Geneva I Article 3; Geneva II Article 3; Geneva III Article 3; Geneva IV Article 3 (Common Article 3). Common Article 3 determines, inter alia, that the following acts are and shall remain prohibited with respect to civilians: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

[100] *Tadic* (n 96) [98], [103], [109], [116], [134]; UN Security Council, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) [Contains text of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991] Resolution 820 (1993) Adopted by the Security Council at its 3200th meeting, on 17 April 1993*, S/RES/820 (1993).

[101] Greenwood (n 98) 279–80; *Tadic* (n 96) [83], [134] ('All of these factors confirm that customary international law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.')

[102] *Tadic* (n 96) [81].

[103] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) reprinted in 1125 UNTS 609 (Protocol II).

[104] *Tadic* (n 96) [117].

this regard is rather vague and Additional Protocol II has not generally been regarded as declaratory of customary international law.[105]

A similar conclusion could have been drawn from an inquiry into whether other principles of customary international law relating to torture, war crimes, and crimes against humanity required prosecution of offenders. On the one hand, apartheid has been labelled as a crime against humanity by the General Assembly[106] and the Apartheid Convention.[107] This may suggest a customary international law obligation to prosecute those who committed the crime of apartheid, particularly with respect to systematic murder, torture, and disappearances, which were all crimes under South African law before 1990. However, a survey of state practice at the time would probably have revealed that state practice was still too uncertain and unsettled to support such a rule.[108]

In essence, therefore, a proper interpretation of the amnesty clause in light of South Africa's international customary obligations would have added authority to the position asserted by the Constitutional Court. In addition to the unfamiliarity of the judges with international humanitarian law, the Constitutional Court's failure to engage in such a process was also due to time constraints.[109] Although several months had already passed since the establishment of the Truth and Reconciliation Commission,[110] it could not start functioning until there was a ruling on the legality of the amnesty. Moreover, the language of the interim Constitution was explicit, resulting in the Constitutional Court's inclination towards giving preference to it, even if this could potentially lead to a violation of customary international law obligations.[111]

The *Basson* case also concerned the issue of extra-judicial killings committed during the apartheid era, but in this instance on Namibian soil, at a time when the country was still de facto administered by South Africa.[112] In this case the Court had to determine whether South African courts had jurisdiction to try the case of Wouter Basson, who was allegedly involved in acts of chemical and biological warfare. Although the case turned on domestic law, the Constitutional Court did refer to the customary nature of fundamental principles of international humanitarian law with reference to International Court of Justice (ICJ) and ICTY

[105] Greenwood (n 98) 278; *Tadic* (n 96) [107], [110].

[106] UNGA Res 39 (1972) GAOR 39th Session, UN Doc A/RES/39/72 (1984) (confirming that apartheid is a threat to international peace and security).

[107] International Convention on the Suppression and Punishment of the Crime of Apartheid UNGA Res 3068 (1973) GAOR 28th Session Supp 30, UN Doc A/9030.

[108] Relevant case-law already available at the time of the *AZAPO* decision included decisions of the Inter-American Commission of Human Rights involving Uruguay and Argentina; *Consuelo et al Case* 28/92 Inter-Am CHR 14 (1992) and; *Mendoza et al Case* 29/92 Inter-Am CHR 25 (1992). *Rodriguez Case (Judgment)* Inter-American Court of Human Rights Series C 4 (29 July 1988) and reported in 95 ILR 259 (holding that a successor government was obliged to prosecute those members of the previous government responsible for human rights violations).

[109] Sachs (n 93).

[110] The Commission was founded through the Promotion of National Unity and Reconciliation Act 34 of 1995 <http://www.justice.gov.za/legislation/acts/1995-034.pdf> (3 September 2010).

[111] Sachs (n 93).

[112] *S v Basson* (CCT30/03A) [2005] ZACC 10.

decisions. It described the apartheid government's extra-judicial killing of captives during the liberation struggle in Namibia as violating the minimal standards of international humanitarian law which, according to the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,[113] constituted intransgressible principles of customary international law.[114] The Court further referred to the *Nicaragua*[115] and *Tadic* decisions[116] when underscoring that obligations under Common Article 3 of the 1949 Geneva Conventions have obtained customary status.[117] However, the Constitutional Court stopped short of determining the concrete implications of these obligations for South Africa in the particular case.

The most prominent reliance on customary law up to date was in a case decided by the South African Competition Appeals Court in 2002. In the *American Soda Ash* case,[118] the appellant faced a complaint of predatory conduct that contravened section 8 of the Competition Act 89 of 1998. The appellant, relying on a restrictive interpretation of section 3(1) of the Competition Act, argued that the dispute fell outside of the purview of the Act. Section 3(1) provided that the 'Act applies to all economic activity within, or having an effect within, the Republic'. According to the appellant, the word 'effect' in section 3(1) should be read to mean 'negative or deleterious effect' in as far as it concerned foreign based acts. The appellant based his argument on a customary international law argument pertaining to extra-territorial jurisdiction, according to which harm is an essential element of the 'effects doctrine'.

When deciding the issue, the Competition Appeals Court addressed the status of customary international law in the Republic explicitly. It first noted that section 1 (2)(a) of the Competition Act provided that the Act must be interpreted in 'compliance with the international law obligations of the Republic'. Thereafter it confirmed that customary international law constituted municipal law in the domestic legal system, unless conflicting with legislation in accordance with section 232 of the Constitution. It further underscored that domestic legislation should be interpreted in accordance with international law where reasonable, in accordance with section 233 of the Constitution.[119]

Subsequently the Competition Appeals Court relied on ICJ practice and foreign case-law and legislation for clarifying the scope of the 'effects doctrine' in customary international law. This in turn was then used as a guideline for interpreting the 'effects doctrine' in section 3(1) of the Competition Act, in accordance with section 233 of the Constitution.[120] The Competition Appeals Court cited the reference to the Perma-

[113] [1996] ICJ Rep 226.
[114] *Basson* (n 112) [174].
[115] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14.
[116] (1996) 35 ILM 32.
[117] Dugard (n 1) 466.
[118] *American Soda Ash Corp CHC Global (Pty) Ltd v Competition Commission of South Africa* (12/CAC/DEC01) [2003] ZACAC 6.
[119] Ibid [15].
[120] Ibid [18]-[21]; D Tladi (2002) ILDC 493 (ZA).

nent Court of International Justice (PCIJ) in the *Lotus* case[121] on the power of states to exercise jurisdiction over foreign acts having effects in their territory.[122] It also considered several US cases,[123] which the appellant relied on, as well as Article 81 of the Treaty Establishing the European Community (EC Treaty),[124] which prohibited practices that might affect competition within the European common market. However, the Competition Appeals Court found that none of these sources supported the view that harm is an essential element of the 'effects doctrine'.

## 4. Hierarchy

The Constitution is the supreme law of South Africa. A treaty enacted into law will have the same status in domestic law as the Act through which it is incorporated.[125] This means that a treaty enacted into law by an Act of Parliament will enjoy the same status as other Parliamentary Acts. A treaty enacted into law through subordinate legislation, such as a ministerial proclamation in the Government Gazette, will be on par with other subordinate legislation.[126] As noted above in section 2.2, United Nations Security Council obligations are for the most part implemented by means of subordinate legislation. It remains to be seen whether courts will nonetheless treat measures implementing Security Council obligations with more deference in light of Article 103 of the United Nations Charter, despite the fact that they would constitute mere secondary obligations under domestic law that rank well below the Constitution.

Similarly, the issue of the status of *jus cogens* obligations (peremptory norms of international law) in the municipal order has not yet been at issue before the courts. Since the very few peremptory norms currently generally acknowledged in international law[127] also constitute elements of customary international law,[128] they

[121] *Lotus Case* (*France v Turkey*) [1927] PCIJ Rep Series A No 10.

[122] *American Soda Ash* (n 118) [17].

[123] *Lotus* (n 121); *American Banana Co v United Fruit Co* 213 US 347 (1909); *United States v Aluminium Co of America (Alcoa)* 148 F 2d 416 (1945); *Continental Co v Union Carbide* 370 US 690 (1962); *Timberlane Lumber Co v Bank of America* 549 F 2d 597 (1976); *Mannington Mills Inc v Congoleum Corp* 595 F2d 1287 (1979); *Matsushita v Zenith Radio* 475 US 574 (1986); *Hartford Fire Insurance Co v California* 509 US 764 (1993); *Metro Industries Inc v Sammi Corp* 82 F 3d 893 (1996); *United States v Nippon Paper Industries Co Ltd* 109 F 3d 1 (1997).

[124] Article 81 (previously Article 85) Treaty Establishing the European Community (adopted 25 March 1957, entered into force 1 January 1958) 298 UNTS 11.

[125] *Glenister* case (n 26) [100]; Dugard (n 1) 463.

[126] An example would be the extradition agreements referred to above in connection with *Quagliani* (n 49); Dugard (n 1) 463.

[127] The most widely accepted peremptory norms include the prohibition of aggression; slavery; slave trade; genocide; racial discrimination; apartheid; and torture as well as basic rules of the law of armed conflict and the right to self-determination. International Law Commission, 'Report of International Law Commission on the Work of the 58th Session' (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10 ch 12 [233]-[251] 400. *Armed Activities on the Territory of the Congo (DRC v Rwanda) (Judgment)* [2006] ICJ Rep 6 [64].

[128] Vienna Convention (n 16) Article 53: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by

would constitute elements of the domestic common law in South African in accordance with section 232 of the Constitution. The human rights obligations flowing from *jus cogens* norms would most likely also find resonance in the Bill of Rights in the Constitution and to that extent have a superior position in the domestic legal order.

Non-self-executing treaties (and it would seem that in practice this constitutes all treaties) that have not been incorporated, will have no direct force of law but can be used to interpret legislation and the common law.[129] This follows from section 39 (1) of the Constitution, which determines that courts must consider international law when interpreting the Bill of Rights; section 39(2) of the Constitution, which requires courts to promote the spirit of the Bill of Rights when interpreting the common law or legislation;[130] and section 233 of the Constitution, which requires an interpretation of legislation that is in conformity with international law, where reasonable.

As will be illustrated below, the impact that particular international human rights instruments have had as a guideline for interpreting of the Bill of Rights in the Constitution has been significant. In particular, the approach of the Constitutional Court has been very progressive and frequently relies on non-binding instruments as interpretive guidelines. The reliance on international treaties and other instruments in areas other than human rights occurs much less frequently. This was illustrated above in section 3 in connection with the limited impact that customary international law thus far has had as a guideline for interpretation. As indicated, this is mainly the result of the limited experience of South African litigators and judges with public international law outside the area of human rights law.

However, before turning to the issue of interpretation, it is important to note that an unincorporated treaty can also be used to challenge and invalidate subordinate legislation. This was confirmed by the Supreme Court of Appeal, in the *Progress Office Machines* case.[131] The question concerned whether an anti-dumping duty period, contained in secondary legislation issued by the Ministry of Finance, violated Article 11(3) of the World Trade Organization Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade. The Supreme Court of Appeal stated that although South Africa has ratified the WTO Agreement in 1995 it has not yet been enacted into municipal law, nor has the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade. No rights are therefore derived from these international agreements.

the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

[129] Dugard (n 1) 463.

[130] Since s 39(1) requires the consideration of international law when interpreting the Bill of Rights itself, this would imply that in order to promote the spirit of the Bill of Rights, relevant international law should also be considered.

[131] *Progress Office Machines* (n 42) [11].

However, the International Trade Administration Act 2002 had to be interpreted in accordance with international law, where reasonable, as required by section 233 of the Constitution.[132]

The Supreme Court of Appeal continued by stating that subordinate legislation (such as the notice by the Minister of Finance imposing an anti-dumping duty) must be reasonable and that a court may insist that the subordinate legislation be in compliance with a state's international obligations in order to be valid.[133] This meant that subordinate legislation that violated international obligations would as such be unreasonable and to that extent invalid.[134] In line with this reasoning the Supreme Court of Appeal invalidated an anti-dumping duty that exceeded the period provided for by the international agreements.[135]

When the clauses in the Constitution referring to the status of treaty and customary international law in municipal law are read literally, they presuppose the possibility of a sharp conflict between the international and national legal orders.[136] However, in practice this has not yet resulted in a head-on collision between the two legal regimes and such a collision is unlikely to happen frequently in the future. This is due to the mediating role of sections 39 and 233 of the Constitution.[137]

Section 39(1) has proven to be of particular relevance for court practice. Since its inception the Constitutional Court has regularly resorted to international instruments in order to reinforce its own position on a matter, as these instruments constitute a source of profound values that are compatible with the whole underlying core of the South African constitutional order.[138] However, a closer look at the Constitutional Court's practice reveals that the manner in which it resorts to non-binding international instruments is open to criticism. From the outset, the Constitutional Court regarded the interpretation clauses to refer to binding as well as non-binding international instruments.[139] These would include treaties that South Africa has not or cannot ratify (notably the Convention for the Protection of Human Rights and Fundamental Freedoms 1950[140]), as well as non-binding instruments such as the Universal Declaration of Human Rights (UDHR); General Comments of United Nations human rights bodies; and resolutions of the General Assembly that are not meant for ratification.

The choice of non-binding instruments sometimes appears inconsistent, with a tendency to rely on non-binding European instruments while excluding instruments that South Africa has ratified. One such example was the *Christian Education* decision.[141] It considered the complaint of an American-based church group that

[132] Ibid [6].
[133] Ibid [12]. The Supreme Court of Appeal cited favourably the position of J Dugard (n 45) 66.
[134] *Progress Office Machines* (n 42) [12].
[135] Ibid [12], [20].
[136] Sachs (n 93).
[137] Ibid; *Glenister* case (n 26) [179].
[138] Ibid; *Glenister* case (n 26) [192].
[139] *S v Makwanyane* (CCT/3/94) [1995] ZACC 3.
[140] European Convention on Human Rights 312 UNTS 221.
[141] *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11.

established schools in South Africa during the 1980s on the principle that the Bible deemed corporal punishment as a necessary form of discipline for children.[142] The issue in question was whether the prohibition of corporal punishment in all schools, as prescribed by section 10 of the South African Schools Act 84 of 1996, violated the constitutional right to religious freedom of parents who, in accordance with their religious convictions, had consented to the corporal punishment of their children by teachers.[143]

While referencing applicable jurisprudence pertaining to the European Convention on Human Rights, the Constitutional Court made no mention of the African Charter on the Rights and Welfare of the Child 1999 (African Charter).[144] In the present context, Articles XI(4) and XI(5) of this unmentioned Charter are of particular interest. Whereas the former guarantees the rights of parents to ensure the religious and moral education of the child in a manner consistent with the child's evolving capacities, the latter requires the state to ensure that parental or educational disciplinary measures conform to notions of humanity and inherent dignity. These two clauses would seem to illustrate the challenge that the Constitutional Court confronted in the *Christian Education* case, specifically, the reconciling of religious rights of parents and the protection of children against harm. By also referring to Articles XI(4) and XI(5) in its judgment, the Court would have contributed to the development of an African regional human rights instrument and also strengthened the notion of human rights as a true African value.[145]

The Court's affinity for the European Convention on Human Rights could be explained by the fact that the individual complaints procedure under it is elaborate and has produced an extensive jurisprudence to which common law-trained judges eagerly turn for guidance.[146] Since the complaints procedure of the African Charter and other African human rights instruments are not yet as well developed, the same judges (and litigators) tend to neglect these instruments.[147] Nonetheless, this should not lead to the neglect of regional human rights instruments to which South Africa is a party, nor of other African human rights instruments that could serve as guidance for interpretation. By relying on the European Convention on Human Rights to the exclusion of applicable African instruments, the Court can entrench the image of human rights as being a set of primarily Western values that are being imposed on African societies. It could also give the impression that the African human rights instruments are inferior to the other mentioned instruments.

[142] Ibid [2].

[143] Interim Constitution (n 4) c XV [1] and c XXX [1].

[144] *Christian Education* (n 141) [43]-[45]; African Charter on the Rights and Welfare of the Child (adopted July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49 (1990) arts XI(4) and XI(5) <http://www.chr.up.ac.za/images/files/documents/ahrdd/treaties/African_Charter_-Rights_Welfare_Child.pdf> 03 September 2010).

[145] Declaration on the Rights and Welfare of the African Child (1979) AHG/St 4 (XVI) Rev 1 <http://www.chr.up.ac.za/images/files/documents/ahrdd/theme06/children_declaration_rights_welfare_1979.pdf> (3 September 2010).

[146] C. Heyns, 'The African Regional Human Rights System: The African Charter' (2004) 108 Pennsylvania State Law Review 679, n 115.

[147] Ibid 694–5.

These critical remarks are not directed at the fact that the Constitutional Court relies on non-binding international or European instruments when formulating its human rights jurisprudence, as the depth that this broad approach has contributed to the human rights jurisprudence is not disputed. Pertinent examples from the large number of decisions that have been enriched in this manner include the *Grootboom* and *Treatment Action Campaign* cases.[148] The Constitutional Court, inter alia, underpinned the enforceability of the constitutional rights of access to housing and health respectively with extensive references to certain General Comments adopted by the United Nations Committee on Economic, Social and Cultural Rights despite the fact that South Africa is not a party to the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR). Similarly, in the *Mazibuko* case the High Court (Witwatersrand Division) relied on the views of the United Nations Committee on Economic, Social and Cultural Rights and World Health Organization Guidelines to quantify basic water access, in order to give effect to the right of access to sufficient water.[149] In the *Fourie and Bonthuys* case, the Constitutional Court relied on Article 16(3) of the UDHR and Article 23 of the ICCPR to determine that the common law definition of marriage was unconstitutional to the extent that it did not allow same-sex couples to enjoy the status and benefits enjoyed by heterosexual couples.[150]

The progressive stance of the South African courts on these issues, buttressed by international human rights instruments, is to be welcomed and has drawn wide attention internationally. However, the courts can benefit from a more rigid methodology that reflects a uniform and consistent strategy as to which international instruments to consider as guidelines for interpretation. Otherwise judges may be perceived as picking amongst those international human rights instruments that are closest to their own personal views and in accordance with the political mood of the day, as opposed to drawing from an international value system that is consonant with the South African constitutional order. In addition, there is the risk that African human rights instruments would be sidelined and the perception that human rights norms constitute a mere by-product of western imperialism would be entrenched.

[148] *Government of South Africa v Grootboom* (CCT38/00) [2000] ZACC 14; *Minister of Health v Treatment Action Campaign* (CCT 8/02) [2002] ZACC 16.

[149] *Mazibuko v City of Johannesburg* (2008) ILDC 973 (ZA).

[150] *Minister of Home Affairs & D-G of Home Affairs v Fourie & Bonthuys, Lesbian and Gay Equality Project v Minister of Home Affairs* (CCT60/04) [2005] ZACC 19. For an earlier case in which the Constitutional Court used international law as a tool for interpreting the common law, *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22. Relying inter alia on the Convention on the Elimination of All forms of Discrimination against Women, the Court developed the law of delict to include a duty on the state to prohibit and prevent all gender-based discrimination that impairs the fundamental rights of women. N. Botha, 'The role of international law in the development of South African common law' (2001) 26 South African Ybk Intl Law 253, 259; Dugard (n 1) 462.

## 5. Universal Jurisdiction

Since the adoption of the Implementation of the Rome Statute of the International Criminal Court Act of 2002, South African courts have universal criminal jurisdiction over genocide, war crimes, and crimes against humanity. According to section 4(3)(c) of this Act, the jurisdiction of a South African court will be triggered where a person who committed one of these crimes outside the territory of the Republic is subsequently present in the territory of the Republic.[151] Whereas the remaining subsections of section 4(3) provide for the more traditional grounds for jurisdiction such as the active and passive nationality principle, as well as close and substantial links to the country at the time of the crime, section 4(3)(c) is grounded in the notion of universal jurisdiction. This concerns jurisdiction that exists for all states in respect to certain crimes, because of their egregious nature.[152] But, in order for this jurisdiction to be triggered, the suspected perpetrator actually has to be present in the Republic. So far, no prosecution has been conducted on the basis of section 4 (3)(c).

## 6. Other Sources of International Law

The question of the standing of decisions of international courts in the domestic legal order is of great relevance to South Africa, which has become party to various international courts and tribunals since 1994. The Constitution is silent on the standing of decisions emanating from these bodies in the domestic legal order and it will be up to the courts to clarify such status on a case-by-case basis. Of particular relevance in the southern African context are the future decisions of the African Court of Human and Peoples' Rights,[153] as well as the Southern African Development Community (SADC) Tribunal.[154]

[151] The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 s 4(3) determines:
. . . any person who commits a crime contemplated in subsection (I) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if:

(a) that person is a South African citizen; or
(b) that person is not a South African citizen but is ordinarily resident in the Republic; or
(c) that person, after the commission of the crime, is present in the territory of the Republic; or
(d) that person has committed the said crime against a South African citizen or against a person who is ordinarily in the Republic.

[152] Du Plessis (n 45) 199.

[153] The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998) CAB/LEG/66.5 <http://www.chr.up.ac.za/images/files/documents/ahrdd/treaties/Protocol_African_Charter_Human_Peoples_Rights_African_Court.pdf> (3 September 2010).

[154] Treaty establishing the Southern African Development Community (SADC) 17 August 1992; Protocol and Rules of Procedure of the SADC Tribunal 7 August 2000, reprinted in S. Ebobrah and A. Tanoh (eds), *Compendium of African Sub-Regional Human Rights Documents* (Pretoria: PULP, 2010) 339.

Although South African courts have thus far not been faced with a binding decision directed against the country itself, it was at the time of writing confronted with the enforcement of a binding judgment issued by the SADC Tribunal against Zimbabwe. The *Campbell* case concerned the expropriation practices of the Zimbabwean government and the disproportionate impact thereof on white farmers in the country.[155] The SADC Tribunal concluded that the expropriation under the circumstances amounted to discrimination on the base of race and that Zimbabwe had to pay fair compensation to the applicants.

In accordance with Article 32(3) of the Protocol on the SADC Tribunal, the decisions of the Tribunal are binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the states concerned. This means that although the decision itself was directed only at Zimbabwe, other SADC member states have a role to play in its enforcement. More concretely, Article 32(1) determines that the law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the state in which the judgment is to be enforced shall govern enforcement.[156] Article 32(2) also determines that the states and institutions of the Community shall take forthwith all measures necessary to ensure the execution of decisions of the Tribunal.

Subsequently the North Gauteng High Court recognized the *Campbell* decision and declared it enforceable in accordance with Article 32 of the Protocol.[157] This in turn has lead to attempts by the applicants in the *Campbell* case to attach property of the Zimbabwean government in South Africa for the purpose of executing a judgment. At the time of writing, the Zimbabwean government was involved in various cases before the High Courts in Gauteng to resist attachment of state property on the basis of sovereign immunity.

In this particular instance Article 32 of the Protocol on the SADC Tribunal gave a clear indication of how its judgments should be enforced. In addition, the domestic law necessary to give effect to Article 32 was already in place, as a result of which the North Gauteng High Court could declare the decision recognizable and enforceable without legal obstacles. However, it remains to be seen how the courts will deal with decisions from international courts and tribunals where these two conditions are not met. This is new and unexplored territory for a country that has only recently begun to accept the jurisdiction of international courts and tribunals, after decades of isolation.

## 7. Conclusion

In conclusion, it is fair to say that South Africa's track-record of receiving international law into the domestic legal order since the introduction of the new constitu-

[155] *Zimbabwe: Mike Campbell (Pvt) Ltd & Others v Zimbabwe* (2008) AHRLR (SADC 2008).
[156] Ebobrah and Tanoh (n 155) 380.
[157] *Louis Carl Fick v The Government of the RSA* (77881/2009) 25 February 2010 North Gauteng High Court Pretoria [On file with author].

tional order in 1994 is mixed. On one hand, the Constitution of 1996 is very receptive to international law, notably as a guideline for interpretation. Also, the courts are keen to use international human rights instruments as a guideline for interpreting the Constitution, even though their methodology in this regard is open to criticism. Similarly, the executive follows the basic principles of the Vienna Convention when negotiating and executing treaties, despite the fact that South Africa is not a party to the Vienna Convention.

On the other hand, the courts are much more reluctant to resort to international law as an instrument of interpretation in areas outside human rights law. Parliament's track-record in implementing non-self-executing and non-technical treaties is inconsistent. While the Rome Statute of the International Criminal Court was implemented within four years of its conclusion, the ICCPR and the WTO Agreement have still not been implemented, despite the fact that they have been ratified for more than a decade. Similarly, the Geneva Conventions of 1949, which were already ratified during the apartheid era, were never incorporated into domestic law. Neither does any general enabling legislation exist that can facilitate expedited implementation of binding United Nations Security Council decisions. These selected examples from a few key areas reflect that the domestic implementation of obligations binding on the country on the international level still has significant room for improvement.

South Africa's inconsistent approach may relate to the fact that expertise in the field of public international law—in contrast to expertise pertaining to international human rights law—is limited across the country. Most judges, litigators and lawmakers are not well versed in public international law, partly due to the fact the subject matter has traditionally been neglected at universities. This in turn is a remnant of the country's years of isolation and hostile attitude towards international law before 1994. Although some progress has been made in overcoming this attitude, the capacity deficit at universities in this area of law is still significant. It also aggravated by the fact that several of the South Africans who do have internationally recognized expertise in the field of public international law are based in Europe or North America and only spend a limited amount of time at institutions of higher education in the country.

The new constitutional order, notably through the work of the Constitutional Court, has laid important groundwork during the first decade of its existence for enhanced interaction between national and international human rights law. However, much work still needs to be done before this trend also becomes visible in the area of public international law proper. This reality poses a challenge to various sectors of the judicial profession, including the judiciary, the bar, legislature, and in particular the law faculties who produce the international lawyers of the future.

# 25

# Uganda

*Henry Onoria*

## 1. Introduction

Uganda has had four written constitutions since its independence from the United Kingdom in 1962.[1] The latest of these is the 1995 Constitution, which was amended in 2005. The Constitution established a republican form of government with executive power vested in the President, who is both the chief of state and head of government. Legislative power rests with the unicameral National Assembly, members of which are appointed by the President to serve in the cabinet. As a former protectorate of the United Kingdom, Uganda's legal system is based on English common law. The Ugandan judiciary is an independent branch of government and includes a Constitutional Court and a High Court. In addition, Uganda accepts compulsory ICJ jurisdiction with reservations.

### 1.1 Relevant Constitutional Provisions

The current 1995 Constitution makes a singular direct reference to international law, stating that the 'foreign policy of Uganda' is based on the principle of 'respect for international law and treaty obligations'.[2] Additionally, the Constitution recognizes the importance of international treaties to which Uganda is a party, urging one institution 'to monitor the Government's compliance with international treaty and convention obligations on human rights'.[3] The Constitution further makes reference to acts performed in pursuit of foreign relations and instruments concluded as a result. Thus it provides for the exercise of treaty-making powers and domestic ratification of treaties.[4] It also states that treaties that Uganda was party to on or after 9 October 1962 or before inception of the 1995 Constitution are still

[1] These include the Uganda Independence Constitution 1962, the Interim Constitution 1966, the Constitution of the Republic of Uganda 1967 and the Constitution of the Republic of Uganda 1995.

[2] 1995 Constitution, ibid, National Objectives and Directive Principles of State Policy, objective XXVIII(i)(b).

[3] Ibid Article 52(1)(h). This is one of the functions of the Uganda Human Rights Commission established under Article 51 of the Constitution.

[4] Ibid Article 123.

valid.[5] Significantly, although the Constitution is cognizant of international law, it is silent on its status in Uganda's legal system. Some provisions of the Constitution seem to incorporate principles of international law (especially in the Bill of Rights) as do some domestic laws. It is therefore evident that international law has a marked presence in Uganda's legal system.

Traditionally, as with most common law (or Anglophone African) states, Uganda adopts a dualist approach to international law. The dualist view raises a number of questions. Firstly, the status of treaties as a constitutive source of law in Uganda's legal system is unclear. A treaty's hierarchical status in the domestic legal system is also unclear, given the 'supremacy clause' that subordinates 'any other law' to the Constitution.[6] Thirdly, although the Constitution recognizes the importance of treaties to which Uganda is a party, the courts are not expressly empowered to refer to such treaties when interpreting the Constitution.[7] However, the absence of such a provision has not deterred courts, especially in the past decade, from relying on or giving prominence to international law, especially in human rights cases.

## 1.2 Legislative References to International Law

There are various instances of domestic implementing laws referring to international law. The references are however not to 'international law' as a phrase but to treaties (or provisions thereof) that tend to be annexed as schedules to the implementing legislation.[8] Some implementing legislation specifically refers to principles of international law embodied in the provisions of the scheduled (or referred to) treaty. The Geneva Conventions Act thus domesticates, as an offence in Uganda, a 'grave breach of any of the [four Geneva] conventions',[9] a principle that is now regarded as part of customary international law. The Diplomatic

[5] Ibid Article 287. The 'treaty continuance' clause is cognizant of the treaty-making powers of Uganda as an independent sovereign state as from 9 October 1962. Notably, treaty-making had been part of Uganda's international relations and foreign policy prior to its independence in 1962. As a protectorate from 1894–1962, treaties were entered into by Great Britain on behalf of Uganda or their application was extended to Uganda in the form of orders under the 1890 Foreign Jurisdictions Act. For examples of such orders in the Uganda Protectorate, see the British Protectorate (Geneva Conventions) Order-in-Council 1917, General Notice No 88/1918; The Copyright (Rome Convention) Order 1933, Legal Notice No 128/1933; the Carriage by Air (Colonies, Protectorates and Mandated Territories) Order 1934, Legal Notice No 195/1934; the Treaty of Peace (Covenant of the League of Nations) Order 1935, Legal Notice No 166/1935. For an exposition of treaty practice during British colonial rule, see R. Stewart, *Treaty Relations of the British Commonwealth of Nations* (New York: MacMillan Co, 1939). The nature of a protectorate is to grant the exercise of foreign power and international relations of a protected entity to a protecting power. *Case concerning Rights of Nationals of the United States of America in Morocco (France v United States of America)* [1952] ICJ Rep 176, 188.

[6] 1995 Constitution (n 1) Article 2(2).

[7] This position is to be contrasted to that in the constitutions of certain African countries. See eg Constitution of the Republic of Malawi 1994, s 11(2)(c); Constitution of the Republic of South Africa 1996 Article 39(1)(b).

[8] See text to nn 47–53.

[9] N 40, s 2. See also text to n 48.

Privileges Act gives effect to specific principles on diplomatic immunities and privileges under the 1961 Diplomatic Relations Convention.[10] The International Criminal Court Act domesticates obligations under the Rome Statute to punish the 'international crimes' of 'genocide, crimes against humanity and war crimes'.[11] To define the crimes, the Act defers to the definition in the Rome Statute.[12] The Act further enjoins the application, with necessary modifications, of 'general principles of criminal law' stipulated in the provisions of the Statute,[13] and provides that a person charged with the domesticated crimes may rely on a 'defense available . . . under international law'.[14] The Act additionally envisages that Ugandan courts may have regard to any 'elements of crimes' adopted or amended in accordance with the provisions of the Statute.[15] Overall, with a significant part of the Statute given the force of law in Uganda, there are numerous references to the provisions of the Statute in the Act.[16]

Additionally, the legislative references are to treaties ratified (or acceded to) by Uganda bearing on rights and obligations in international law in respect to matters addressed by the domestic legislation. The Refugee Act refers to both the UN and AU refugee conventions[17] as well as the human rights conventions ratified by Uganda[18] while the Children's Act refers to the ratified UN and AU child conventions.[19]

[10] See text to nn 40 and 49.

[11] International Criminal Court Act No 11/2010, s 2(b)–(c).

[12] Regarding genocide and crimes against humanity, the Act defers to the 'acts' specified in Articles 6 and 7 of the Statute. Ibid, ss 7(2) and 8(2). For war crimes, the Act defers to 'acts' specified in the provisions of Article 8(2)(a), (b), (c) and (e) of the Statute (on 'grave breaches' of the Geneva conventions, 'other serious violations of the laws and customs' applicable to 'international armed conflict' and 'armed conflict of a non-international character' as well as 'serious violations of article 3 common to the four Geneva conventions'). Ibid, s 9(2). Notably, the Act does not 'affect or limit the operation of s 2 of the Geneva Conventions Act (which makes a grave breach of the Geneva Conventions an offence under Uganda law).' Ibid, s 9(4).

[13] Ibid, s 19(1)(a). The applicable principles of criminal law referred to are as provided in Articles 20, 22(2), 24(2), 25–6, 28–9 and 30–3 of the Statute.

[14] Ibid, s 19(1)(c).

[15] Ibid, s 19(4)(a). See also text to n 62.

[16] The provisions of the Act making references to the Statute include ss 20–1, 26, 28(3), 29, 32(1)(b), 33(b), 41(4)-(6), 43–5, 47–8, 52, 56–61, 64, 65(1) and (3), 66, 71, 76, 81–2, 84(3), 85–7, 88(2)-(3), 90, 98 and 101(3).

[17] The Act refers to 'refugee entitlements' and 'rights of refugees while in Uganda' in light of the principles under the Geneva and OAU/AU conventions. Refugee Act (n 46), s 28. The Act recognizes the right to a travel document in terms of 'a travel document issued under or in accordance with Article 28 of the Geneva Convention.' Ibid, s 31(5).

[18] The Act guarantees the rights of refugee children in light of the African Charter of the Rights and Welfare of the Child, the UN Convention on Rights of the Child and the Geneva Convention. Ibid, s 32(2). It also guarantees the rights of women refugees in light of the UN Convention on Elimination of all forms of Discrimination against Women and the African Charter on Human and Peoples' Rights: Ibid, s 32(3).

[19] See text to n 88.

## 2. Treaties and Other International Agreements

### 2.1 Treaty Ratification or Approval

The 1995 Constitution provides for treaty-making and ratification as:

> (1) The President or a person authorised by the President may make treaties, conventions, agreements, or other arrangements between Uganda and any other country or between Uganda and any international organisation or body, in respect of any matter.
> (2) Parliament shall make laws to govern ratification of treaties, conventions, agreements or other arrangements made under clause (1) of this article.[20]

The Constitution essentially affirms the power of the executive to negotiate and conclude treaties. This power had similarly been provided for under the 1967 Constitution.[21] Secondly, the Constitution grants the executive the power to conclude treaties, but tasks the Parliament with 'mak[ing] laws to govern the ratification of treaties'.[22] In that regard, in 1998 the Parliament enacted the Ratification of Treaties Act.[23] The Act essentially provides for 'domestic' treaty ratification or pre-ratification of treaties by the Ugandan government. Specifically, the Act provides for a two-tier domestic treaty-ratification process involving both the cabinet (executive) and the Parliament (legislature). All treaties are to be ratified by the cabinet except for certain specific treaties that require ratification by the Parliament.[24] Parliamentary ratification is required for treaties that 'relate to armistice, neutrality or peace'[25] and for treaties 'in respect of which the Attorney General has certified in writing that their implementation in Uganda would require amendment of the Constitution'.[26] These treaties can be referred to as *constitutionally significant* treaties. All treaties ratified by cabinet are to be laid before the Parliament[27] and deposited with the Minister for Foreign Affairs.[28] The Act is cognizant of ratification at the international level, and thus requires that the ratification instrument be signed, sealed and *deposited* by the Minister for Foreign Affairs.[29]

[20] 1995 Constitution (n 1) Article 123.

[21] 1967 Constitution (n 1) Article 76 stipulated:

(1) Subject to the provisions of this article, the President or a person authorised by him in that behalf may make treaties, conventions, agreements, or other arrangements between Uganda and any other country or between Uganda and any international organization or body in respect of any matter.

(2) A treaty made under the provisions of this article shall be in such terms as may be approved by the Cabinet and, subject to the provisions of clause (3) of this article, shall be subject to ratification by the Cabinet.

(3) Any treaty, convention, agreement, or other arrangements made by virtue of this article which relates to armistice, neutrality or peace shall be subject to ratification by the National Assembly signified by resolution of the Assembly.

[22] 1995 Constitution (n 1) Article 123(2).

[23] Cap 204.

[24] Ibid, s 2(a).

[25] Ibid, s 2(b)(i). This is similar as the position under Article 76(3) of the 1967 Constitution.

[26] Ibid, s 2(b)(ii). This parameter of parliamentary ratification was not provided for under the 1967 Constitution.

[27] Ibid, s 4. [28] Ibid, s 5. [29] Ibid, s 3.

The legal effect of the domestic treaty ratification under the 1998 Act is unclear. It is evident however that the role of the Parliament cannot be regarded as a form of democratic participation in the treaty-making process. The requirement that all treaties ratified by the cabinet be laid before the Parliament is merely intended to inform Parliament of Uganda's treaty obligations and does not enable the Parliament to debate, reject, or approve them. However, constitutionally significant treaties do involve the democratic process. The exclusive power of the Parliament to ratify such treaties is derived from other provisions of the Constitution and the principle of the separation of powers. The Parliament's power to authorize the ratification of constitutionally important treaties is derived from provisions of Article 79 of the Constitution, which provides:

> (1) Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda.
> (2) Except as provided in this Constitution, no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament.
> (3) Parliament shall protect this Constitution and the democratic governance of Uganda.

The exclusive power of the Parliament to ratify constitutionally significant treaties emanates from its primary law-making power as the legislature. Firstly, the Parliament makes laws in respect of peace and order in Uganda and plays a central role in approving or revoking states of war initiated by the President.[30] Therefore, the Parliament must oversee treaties for the securing of peace, neutrality or armistice.[31] Secondly, the Parliament's law-making powers are exercisable to preserve and protect the integrity of the Constitution as the primary legal text of the country. This grants legislative authority over any other legal instrument, including a treaty whose implementation in Uganda requires amendment of the Constitution.[32]

More critically, the status of a treaty after domestic treaty ratification is not defined in the Ratification of Treaties Act. The Act states that the treaty is set for international ratification following domestic ratification,[33] but is silent on the effect or status of the treaty in domestic law. It has been argued that, in light of

[30] 1995 Constitution (n 1) Article 124.

[31] The Parliament has been involved in peace and war (armed conflict) situations and recently passed resolutions regarding peace overtures in Juba, Southern Sudan, in respect to the conflict in Northern Uganda. See Motion for a resolution of Parliament on the ongoing peace talks between the Government of Uganda and the Lords' Resistance Army in Juba, Southern Sudan, *Parliamentary Debates, Hansard* 7 September 2006, cols 1011–35; and on the deployment of troops in the conflict in Somalia, see Motion for a resolution of Parliament in accordance with Article 210 of the 1995 Constitution (and s 99(2) of the Uganda Peoples Defence Forces Act 2005); on Parliamentary approval to deploy UPDF troops in Somalia, see *Parliamentary Debates*, *Hansard* 13 February 2007, cols 1511–55.

[32] 1995 Constitution (n 1) Articles 258–60. The stringent character of the procedures for the amendment of 1995 Constitution has been affirmed by the Supreme Court in *Paul Ssemwogerere v Attorney General* [2004] 2 EA 276, judgments of Kanyeihamba JSC 287–92, Karokora JSC 297–8, Odoki CJ 311–2 and Oder JSC 325.

[33] Text to n 29 above.

Article 123 of the Constitution, 'treaties which are negotiated by the Executive and ratified by Parliament become part of the municipal law and stand at par with other Acts of Parliament'.[34] However, this is not entirely correct for a number of reasons. Firstly the parliamentary ratification of treaties derives from the legislative competences of the Parliament under the Constitution. Secondly, the ratification of a constitutionally significant treaty is premised on the assumption that its implementation will require amending the Constitution. The supposition that Parliament-ratified treaties are part of municipal law would imply a presumptive amendment of the Constitution (or, for that matter, of any existing domestic legislation). This argument is not supported by treaty practice in Uganda in the wake of the Ratification of Treaties Act. The debate on the motion for a resolution to ratify the East African Community Treaty in April 2000[35] reflects expectations that the ratification would follow amendment or revision of the Constitution and therefore the proposed amendments to the Constitution should have been presented with the motion.[36] Thirdly, although ratified treaties can be seen as constitutive sources of law, ratification in itself is not sufficient to transform every treaty into a self-executing treaty capable of affecting rights and obligations in domestic law. It is therefore arguable that ratified treaties require further parliamentary intervention to be implemented in domestic law.

[34] G.P. Tumwine-Mukubwa, 'International Human Rights Norms in the Domestic Arena' (1996) 3 East Afr J Peace & H Rghts 32, 35. In effect, it is argued that such treaties are 'self-executing.' Ibid 48, 50.

[35] Motion for a resolution of Parliament to ratify a treaty under s 3(b)(ii) of the Ratification of Treaties Act 1998 (Act No 5 of 1998), *Parliamentary Debates, Hansard* 27 April 2000, cols 9632–45.

[36] See eg in response to concerns voiced as to the absence of a bill on constitutional amendments, the statement of State Minister for Foreign Affairs, Hon Amama Mbabazi, who moved the motion: 'We will come up with the Bill later on, because, as the certificate of the Attorney General says, some of the provisions of this Treaty require further action on the part of this Parliament. We either have to amend the Constitution in order to give full force for the operation of some of the articles of this Treaty, or it will have some financial implications. Therefore, we will come with the Bill before Parliament for full debate of the Treaty and adoption of this Treaty, as part of our domestic law.' Ibid 9634. The State Minister would later reiterate that subsequent scrutiny of a Bill on the Treaty, in terms of provisions of the Treaty, especially those that directly affect the Constitution, was envisaged. Ibid 9644. Elsewhere, Hon Manuel Pinto (MP for Kakuuto County) observed: '[A]s outlined in the certificate of the Attorney General, it is very clear that the Constitution will have to be amended in order for this Treaty to take effect. At what stage do we plan to amend the Constitution? Do we plan to amend it after we have ratified the Treaty, or does the process of ratification also include the amendment of articles 2, 129 and 132, as clearly spelt here?' Ibid 9636. In the end, in offering an interpretation of the ratification law, Hon Edward Ssekandi, the Speaker of Parliament, stated: '[We] seem to think that as we ratify, we must also amend the Constitution . . . My reading [of s 3 of the Ratification of Treaties Act] . . . is, when it comes to implementing the Treaty in Uganda, it will affect our Constitution and, therefore, we will have to amend the Constitution. So any fears that by ratifying you are ipso facto amending the Constitution, may not be something to really worry about.' Ibid 9637. The reference to s 3 is in respect of the original 1998 Act (No 5 of 1998), for the provision later became s 2 with the 2000 revision of the laws of Uganda. In the end, the Speaker cautioned: '[t]he ratification of the Treaty does not necessarily put it into operation.' Ibid 9643.

## 2.2 Domestic Incorporation

Although the Constitution is silent on the status of international law in Uganda's legal system, it is clear that, 'except under authority conferred by an Act of Parliament' upon any other persons or bodies, the 'Parliament shall have power to make provisions having the force of law in Uganda'.[37] With an exception intended to cover subsidiary legislation,[38] treaties must be implemented by the legislature to have the *force of law* in Uganda's legal system. The ratification of a treaty and its implementation are separate and distinct acts. While parliamentary ratification of a constitutionally significant treaty is an exercise of legislative competence of the Parliament, the domestic implementation of a treaty is an exercise of law-making authority. Although most treaties require states to undertake domestic legislative measures (such as implementing the treaty provisions), certain treaties such as the East African Community Treaty[39] expressly require domestic incorporation by legislation.

The incorporation of treaties into Uganda's law has been provided for in language that underscores the intent of the Parliament to domesticate the provisions of the treaty. Such language ranges from 'giving effect to (the provisions of) the treaty in Uganda',[40] to 'give the force of law in Uganda' to the treaty,[41]

[37] 1995 Constitution (n 1) Article 79(2).

[38] Tumwine-Mukubwa (n 34) 34.

[39] Treaty for the establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000) 2144 UNTS I-37437 (East African Community Treaty) Article 8(2):

> Each Partner State shall, within twelve months from the date of signing this Treaty, secure the *enactment* and the effective *implementation* of such *legislation* as is necessary to give effect to this Treaty, in particular–
>
> (a) to confer upon the Community the legal capacity and personality required for the performance of its functions; and
> (b) to confer upon the legislation, regulations and directives of the Community and its institutions as provided under this Treaty, the *force of law* within its territory.' (emphasis added)

Uganda enacted the domestic implementing legislation in 2002 (East African Community Act No 13/2002) and it came into force as law on 15 January 2005 (East African Community Act (Commencement) Instrument SI 29/2005).

[40] See eg Uganda Wildlife Act Cap 200, s 90(1)(c)-(d); Diplomatic Privileges Act Cap 201 (long title states that the Act is 'to enable *effect* to be *given* to the Vienna Convention on Diplomatic Relations signed on [18 April 1961]'); Geneva Conventions Act Cap 363 (long title states that the Act is 'to enable *effect* to be *given* to certain international conventions done at Geneva on [12 August 1949]'); Patents (Amendment) Act 2002 (long title states that the Act is to 'amend the Patents Statute, 1991 to provide for international applications and connected matters by *giving effect in Uganda* to the provisions of Patents Co-operation Treaty'); International Criminal Court Act (n 11) (long title states that the Act 'to *give effect* to the Rome Statute'). See also Eastern and Southern African Trade and Development Bank Act Cap 53 (long title).

[41] See eg Uganda Wildlife Act (n 40), s 90(1)(b); Diplomatic Privileges Act ibid, s 1; Eastern and Southern African Trade and Development Bank Act (n 40), s 3 ('[A]rticles 24 and 25 of the charter . . . set out in the Schedule to this Act shall have the *force of law* in Uganda'); East African Development Bank Act Cap 52, s 3 ('[t]he provisions of the charter annexed to the Treaty of 1980 and set out in the schedule to this Act have *force of law* in Uganda'); Patents (Amendment) Act (n 40), s 24L (envisages any revision to the Patent Co-operation Treaty to be given, by a ministerial statutory order, the '*force of law* in Uganda'); East African Community Act (n 28) (long title and s 3(1)); International Criminal Court Act (n 40), ss 2(a) and 4–5.

'implement the treaty' in Uganda,[42] and 'perform obligations or exercise rights' under the treaty.[43] For example, the Uganda Wildlife Act provides:

> (1) The purposes of this Act are to promote–
> (h) the *implementation* of relevant international treaties, conventions, agreements or other arrangements to which Uganda is a party;[44]
>
> (1) Where Uganda is party to any convention or treaty concerning wildlife, or in a case where such convention or treaty is required by the Constitution to be ratified, the Minister may, by statutory order, and with the approval of Parliament signified in its resolution–
> (a) *set out the provisions* of the convention or treaty;
> (b) give the *force of law in Uganda* to the convention or treaty or any part of the convention or treaty required to be given the *force of law in Uganda*;
> (c) amend any enactment, other than the Constitution, for the purpose of *giving effect to* the convention or treaty;
> (d) make such other provision as may be necessary for *giving effect to* the convention or treaty in Uganda or for enabling Uganda to *perform its obligations or exercise its rights* under the convention or treaty.[45]

On occasion, domestic implementing legislation will also refer to the treaty it is intended to implement.[46]

Incorporation has been undertaken by at least two approaches. Firstly, a treaty can be implemented through an Act of Parliament indicating that a treaty or sections of a treaty are to be part of the law of Uganda. In several of the Acts of Parliament, a treaty in its entirety or specific provisions being given the force of law are 'scheduled'. Although scheduling alone is not sufficient to give domestic effect, it is evidence of the intent of Parliament to incorporate the treaty.[47] The treaties for which only a few specified provisions are given the force of law in Uganda include the Geneva Conventions,[48] the Diplomatic Relations

[42] See eg Uganda Wildlife Act (n 40), s 2(1)(h).

[43] See eg Uganda Wildlife Act ibid, s 90(1)(d); International Criminal Court Act (n 11), s 2(b); East African Development Bank Act (n 41) (long title states that the Act 'to provide for the carrying out of the *obligations of Uganda* under the treaty amending and re-enacting the charter of the East African Development Bank').

[44] Uganda Wildlife Act (n 40), s 2(1)(h). The Act was enacted after the 1995 Constitution and so employs the descriptive language of international instruments used in Article 123 of the Constitution.

[45] Ibid, s 90(1) (emphasis added).

[46] See eg Refugee Act No 21/2006. The long title provides that the Act is 'to make new provision for matters relating to refugees in line with the 1951 Convention . . . and other obligations of Uganda relating to the status of refugees.' The Act refers to (and incorporates) principles embodied in the 1951 Convention, OAU Refugee Convention and various human rights instruments—this in respect of criteria for grant (and exclusion and cessation) of refugee status (ss 4–6); general rights of refugees (ss 28–9); right to a travel document (s 31(5)); rights of refugee children and women refugees (ss 32(2) and 33).

[47] The treaties annexed in their entirety include the four Geneva Conventions, Diplomatic Relations Convention, East African Community Treaty and the Rome Statute. The treaties for which only the specific provisions given the force of law are annexed include the Charter of the Eastern and Southern African Trade and Development Bank and the Charter of the East African Development Bank.

[48] Geneva Conventions Act (n 40), s 2(1). The Act gives domestic effect to (and makes it an offence under the laws of Uganda) a 'grave breach of any of the [four Geneva] conventions'—in particular Articles 50, 51, 130 and 147 of the conventions I, II, III and IV respectively.

Convention,[49] the Charter of the Eastern and Southern African Trade and Development Bank,[50] and the Charter of the East African Development Bank.[51] The Rome Statute is an example of a treaty for which very significant parts are given the force of law in Uganda[52] while the East African Community Treaty was given the force of law in Uganda in its entirety.[53] Secondly, domestic incorporation can be effected by a ministerial order, as subsidiary legislation, with the approval of the Parliament. This is the case with future acts to be performed to implement a range of treaties (as under the Uganda Wildlife Act)[54] or with an envisaged revision of a treaty (as under the Patents (Amendment) Act).[55] Instead of requiring the enactment (or amendment) of principal legislation, the incorporation is envisaged through subsidiary legislative acts, albeit with approval of Parliament.

## 2.3 Treaty Definition and Interpretation

Although Uganda is party to the Vienna Convention on the Law of Treaties (Vienna Convention),[56] neither the legislature nor the courts have referenced the Vienna Convention when interpreting or defining a treaty. Neither the Constitution nor the Ratification of Treaties Act defines a treaty, with the latter only providing that 'in this Act, unless the context otherwise requires, treaty includes a convention, agreement or other arrangement made under article 123(1) of the Constitution'.[57] This is not very helpful as a definition of a treaty. However, there is a presumption that an executive act is evidence of the treaty's meaning. For example, the Uganda Wildlife Act provides:

> The provisions of any convention or treaty set out in any *order* made under this section shall be evidence of the contents of the convention or treaty in any proceedings or matter in which the provisions of the convention or treaty came into question.[58]

[49] Diplomatic Privileges Act (n 40), s 1. The Act gives effect to only Articles 22–24 and 27–40 of the Convention.

[50] Eastern and Southern African Trade and Development Bank Act (n 40), s 3. The Act gives force of law only to Articles 24 and 43 of the Charter (and only the two provisions are annexed in the schedule).

[51] East African Development Bank Act (n 41), s 3. The Act gives force of law only to Articles 24–25, 43–47, 50 of the Treaty of 1980 as annexed to the Charter (and only the specified provisions are annexed in the schedule).

[52] International Criminal Court Act (n 11), ss 4–5. The Act gives the force of law to parts 2, 3, 5, 6, 7, 8, 9 and 10 (as well as Articles 51–52) of the Rome Statute.

[53] East African Community Act (n 28), s 3(1). The section provides that: 'The Treaty as set out in the Schedule to this Act shall have the force of law in Uganda.'

[54] N 40, s 90(1). See text to n 45.

[55] N 40, s 24L. Notably, the wildlife law requires the approval of Parliament to be 'signified by its resolution' while the patents law is silent as to how the parliamentary approval is to be undertaken, although it is to be supposed that it is similarly by the adoption of a resolution.

[56] 1155 UNTS 331 (1969). Uganda ratified the Convention on 24 June 1988.

[57] N 23, s 1.

[58] N 40, s 90(4). The 'order' mentioned in the sub-section includes the 'statutory order' of the Minister to domesticate or give effect to ratified wildlife treaties or conventions under s 90(1) of the Act. See text to n 45.

The Geneva Conventions Act similarly provides:

> Whenever in any proceedings under this section in respect of a grave breach of any of the conventions any question arises under article 2 of that convention, that question shall be determined by the Minister, and a *certificate* purporting to set out that determination and to be signed by or on behalf of the Minister shall be received in evidence and may be deemed to be so signed without further proof, unless the contrary is shown.[59]

The 'proceedings' referred to in both the Acts include *judicial* proceedings and therefore require the court to give due regard to the executive's interpretation of the treaty. The executive acts must however be a formal exercise of a ministerial power in the form of an order or certificate.[60]

While it is likely that executive acts may relate to a question of treaty interpretation, the courts will not necessarily defer to the executive interpretation since that is a *judicial* function. Nonetheless, when interpreting the provisions of domestic implementing legislation, it is unlikely that the courts will follow the rules of domestic statutory interpretation. This is because, firstly, the interpretation accorded to the text (or provisions) of a treaty in *international law* should inform the interpretation of a domestic implementing law. This is particularly pertinent when treaty provisions are scheduled to the domestic implementing legislation, as with the Geneva Conventions Act, the Diplomatic Privileges Act and the International Criminal Court Act. For example, in the *Emmanuel Bitwire* case, the High Court addressed the diplomatic immunity of certain attached premises in light of Articles 22 and 30 of the Vienna Convention on Diplomatic Relations. The court referred to the 'definition' clause in Article 1 of the Convention, even though the clause is not given the force of law under the Diplomatic Privileges Act:

> The definition of the terms '*premises of the mission,*' '*diplomatic agent*' and '*members of staff of the mission*' are defined in Article 1 of the Convention, which is not given the force of law. '*Premises of the mission*' are the buildings or parts of buildings and the land auxiliary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission . . . Article 1 of the Convention defines a diplomatic agent as the head of a mission or a member of the diplomatic staff of the mission and the members of the diplomatic staff are the members of staff of the mission having diplomatic rank.[61]

Notably, the International Criminal Court Act envisages the courts in Uganda relying on Rome Statute's interpretations of international crimes. The Act provides:

[59] N 40, s 2(4).

[60] See eg *Emmanuel Bitwire v The Representative of the Zaire (represented by its Embassy)*, Civil Suit No 858/1993 [1998] KaLR 524 (HC). The High Court rejected a Diplomatic and Councilor List Book 1997 issued by the Protocol and Councilor Department of the Ministry of Foreign Affairs (listing certain premises as residence of the Second Councilor and First Secretary of Embassy of the Republic of Zaire to Uganda) as 'it is not expressed to be published by the Government of Uganda' noting that it could not rely on 'such information without the confirmation of the . . . Ministry of Foreign Affairs.' Ibid 527–8.

[61] Ibid 526–7 (italics in original). At the outset, the Court noted that certain provisions of the Convention (including Articles 22 and 30 that were in issue) were given the force of law in Uganda under s 1 of the Diplomatic Privileges Act. Ibid 526.

(4) For the purposes of interpreting and applying articles 6 to 8 of the Statute in proceedings for an offence against section 7 or section 8 or section 9–
(a) The Ugandan Court exercising jurisdiction in the proceedings may have regard to any elements of crimes adopted or amended in accordance with article 9 of the Statute.[62]

In addition, the Patents (Amendment) Act provides for certain terms to 'have the same meanings as in the Patent Co-operation Treaty'.[63] In effect, the interpretation to be assigned to provisions of domestic implementing laws should mirror the interpretation given to the provisions of the treaty itself. Secondly, the interpretation of provisions of domestic implementing laws should inform international obligations under a treaty or international law.

The Constitutional Court adopted an interesting interpretation of the East African Community Treaty. In *Jacob Oulanyah v Attorney General*,[64] the Court applied provisions of Article 50 of the Treaty vis-à-vis the election of Uganda's members to the East African Legislative Assembly. Notably, the petitioner had not even referred to the treaty, instead challenging the constitutionality of the election procedures. By referring *proprio motu* to Article 50 of the Treaty and the decision of the regional East African Court of Justice in *Prof Peter Anyang' Nyong'o v Attorney General of Kenya*[65] the Court determined that the procedure adopted by the Parliament of Uganda was not a valid election of Uganda's members to the Legislative Assembly. The instructive judgment of Mpagi-Bahigeine JA noted:

Even if the rules decided to define 'election' as 'the approval of names' by the House, this appears not to have been carried out. The process clearly omits the process of *election, though voting might take different forms . . . by show of hands, secret ballot or acclamation.* The Court . . . is thus left in doubt as to how this 'process of approval of names' took place. [We] would thus hold that no elections ever took place.[66]

This judgment largely mirrors that of the regional court in the *Prof Peter Anyang' Nyong'o* case, which stated:

[I]t [is] unlikely that in adopting article 50, the parties to the Treaty contemplated, let alone intended, that the National Assembly would elect members of the Assembly other than through voting procedure . . . *[An] election through voting may be accomplished using such diverse procedures as secret ballot, show of hands or acclamation.* The electoral process may or may not involve such preliminaries as campaigns and/or nominations. An election may be contested or uncontested . . . [T]he bottom line for compliance with article 50 is that the decision to elect is a decision of and by the National Assembly.[67]

[62] International Criminal Court Act (n 11), s 19(4)(a). The international crimes in Articles 6–8 of the Statute—genocide, crimes against humanity and war crimes—are given effect under ss 7–9 of the Act.

[63] N 40, s 24A—the terms are 'designate', 'designated office', 'elect', 'elected office', 'international application', 'international filing date', 'international preliminary examination', and 'receiving office'.

[64] Constitutional Petition No 28/2006 (unreported) (CC) (30 May 2008).

[65] EACJ Reference No 1/2006 (unreported). This reference was in itself challenging the election of Kenya's members to the Legislative Assembly.

[66] Ibid 22 (emphasis added). See also judgments of Mukasa-Kikonyogo DCJ 15–16, Okello JA 7–8, Kitumba JA 16 and Byamugisha JA 16–17.

[67] Ibid 34 (emphasis added).

Both courts found there had been no 'election' on part of Kenya's National Assembly and Uganda's Parliament as envisaged under Article 50 of the Treaty.[68]

Apart from *proprio motu* relying on provisions of the Treaty, the judgment of the Constitutional Court offers additional interesting aspects. Firstly, the Court relies on the treaty provisions and makes no reference to the domestic implementing law, the East African Community Act.[69] The Court does not defend its reliance on the treaty. Presumably the Court either regarded the treaty to be applicable because it was annexed to the Act or regarded the treaty to be directly applicable in Uganda's legal system. Given that an interpretation of the relevant provision of the treaty had already been rendered by the regional Court, the Constitutional Court could aptly rely on that interpretation in addressing the contested election of Uganda's members. Secondly, the Court does not indicate which treaty interpretation principles it used to interpret Article 50 of the treaty. However, the court may have found it unnecessary to do so since the regional Court based its decision on the Vienna Convention principles.[70] The role of the regional Court is particularly important in this case because the treaty does envisage its interpretation by the national courts (unless the interpretation is *incidental* to the *primary* jurisdiction of the regional court).[71]

## 2.4 Self-execution and Direct Applicability

The question of the enforceability of a treaty by a private party before the courts has not been definitively addressed, although it has been discussed in various decisions. In *Paul Ssemwogerere v Attorney General*,[72] the petitioners relied on provisions of the Constitution as well as international human rights conventions to enforce the rights to freedom of assembly and association. In an initial ruling the Constitutional Court discussed the petitioners' reliance on the international conventions:

> The International Human Rights Conventions mentioned in the petition *are not part of the Constitution of the Republic of Uganda*. Therefore, a *provision of an Act of Parliament cannot be interpreted against them*. This issue was, therefore, misconceived.[73]

[68] Ibid 29–30; *Oulanyah* case (n 64) judgments of Kitumba JA 16 and Byamugisha JA 17. For a discussion of the judgments of the two courts, see H. Onoria, 'Botched-up Elections, Treaty Amendments and Judicial Independence in the East African Community' (2010) 54 Journal of African Law 74, 76–80.

[69] The Act came into force as law on 15 January 2005: Text to n 28. It was therefore operational as the domestic implementing law at the date of the filing of the petition (after the contested elections in October 2006) and rendering of the judgment of the Court in May 2008.

[70] The regional Court primarily relied on Article 31 of the Vienna Convention. For an analysis of the Court's application of the Vienna Convention principles, see Onoria, 'Interpretation of the East African Community Treaty: An appraisal of Recent Decisions' (2008) 14 East Afr J Peace & H Rghts 509, 515–25.

[71] East African Community Treaty (n 28) Articles 23, 33(2) 34. On the regional–national court nexus, see Onoria, 'Interpretation of the East African Community Treaty' (n 70) 511–14.

[72] Constitutional Petition No 5/2002 [2003] UGCC 4 [2003] KALR 134 (CC) (Ruling of 21 March 2003 and Judgment of 9 May 2003).

[73] Ibid Ruling of 21 March 2003 135 (emphasis added).

In the subsequent judgment, only one judge of the Court, Twinomujuni JA, addressed the issue in detail:

> In my view, article 286 [of the Constitution] only acknowledges the existence of these conventions and the fact that they continue to be binding on Uganda after the coming into force of the Constitution. Of course, we know that a great deal of those conventions have been *incorporated* in chapter IV of the Constitution which is on the protection of fundamental and other human rights and freedoms. However, article 286 did not *incorporate the conventions* themselves *into the Ugandan Constitution*. They are *part of our law* but they are *not* necessarily *part of our Constitution*.[74]

However, in *Uganda Law Society v Attorney General*,[75] Twinomujuni JA considered that 'the African Charter on Human and Peoples' Rights . . . [is] *part and parcel of our Constitution* . . . by virtue of article 287 of the Constitution'.[76] This is seemingly the position of the Court since the other judges were agreeable and supportive of his 'reasoning and findings.'[77] Although, while Kavuma JA agreed that the Charter 'remains *part of our law*', he was '*unable* to state with absolute certainty' that the Charter '*automatically* became *part of our Constitution*'.[78]

The decision in the *Law Society case* is evidently a departure from the position of the Court in its ruling in *Ssemwogerere* case.[79] Neither the ruling in the *Ssemwogerere* case nor the decision in the *Law Society* case is however couched in in-depth analysis. It is therefore unclear why the human rights conventions are part of the 'Constitution' or 'law' of Uganda. The apparent premise is the 'treaty continuance' clause in the Constitution. However, this poses a separate question as to whether this clause applies only to human rights conventions or to all ratified treaties. If it is only to the human rights conventions, are they part of the Constitution or law on the premise that they are incorporated in chapter IV of the Constitution? And, if so, does the incorporation render the said conventions self-executing? The inference is that requiring states to adopt legislative or other measures in respect of obligations on human rights demonstrates an intention to render the human rights conventions enforceable. It has been argued that certain of the 'treaties which Uganda has ratified are self-executing', including the African Charter on Human and Peoples' Rights.[80] Likewise, it has been argued that the 'other rights' clause in Article 45 of

[74] Ibid Judgment of 9 May 2003, Twinomujuni JA 160–1 (emphasis added). The reference to Article 286 is to the 'treaty continuance' clause as it became Article 287 prior to the 2005 amendment of the Constitution. The other two judges who addressed the issue largely reiterated what was stated in the ruling of 21 March. Ibid Mpagi-Bahigeine JA 147 and Engwau JA 157.

[75] Constitutional Petition Nos 2 and 8/2002 [2009] UGCC 1 (CC) (5 February 2009).

[76] Ibid 25. The lead judgment was delivered by Twinomujuni JA. The decision in the *Law Society* case was rendered in 2009, almost six years after the ruling and judgment in the *Ssemwogerere* case.

[77] Ibid judgments of Mpagi-Bahigeine JA 31 and Engwau JA 32. See also Kitumba JA (concurring) 32.

[78] Ibid 45 (emphasis added).

[79] Notably, save for Kavuma JA, the other judges in the *Law Society* case—Twinomujuni JA, Mpagi-Bahigeine JA, Engwau JA and Kitumba JA—were part of the panel in the *Ssemwogerere* case.

[80] Tumwine-Mukubwa (n 34) 48.

the Constitution[81] 'incorporates all other rights internationally recognized but not included in the Constitution'.[82] This argument is supported by the *Law Society* case, where the court used the 'other rights' clause and Article 7 of the African Charter on Human and Peoples' Rights to find a constitutionally protected right of appeal.[83]

The Court's decision in the *Law Society* case has significant ramifications for the import and scope of the 'other rights' clause. The clause is intended to allow the courts to read into the Constitution rights not specifically enumerated. The clause is therefore not the premise for generally invoking international human rights law,[84] but has been used to read into the Constitution a range of socio-economic rights—rights to health, food, shelter, etc.[85] The premise for these rights is invariably international human rights instruments, particularly the International Covenant on Economic, Social and Cultural Rights.[86]

Whether conventions, such as the African Charter on Human and Peoples' Rights, are self-executing has not been answered by the courts. Notably, the Constitution makes no mention of self-execution.[87] The recognition of conventions in the Constitution, such as the Charter, essentially renders such conventions capable of direct applicability in Uganda. There are instances where existing legislation renders specific conventions directly applicable in Ugandan law. An example is the Children's Act which provides:

> 4. A child shall have the right–
> (c) to exercise, in addition to all the rights in this schedule and this Act, *all the rights* set out in the United Nations Convention on the Rights of the Child and the Organization of African Unity Charter on the Rights and Welfare of the Child with appropriate modifications to suit the circumstances in Uganda, *that are not specifically mentioned in this Act*.[88]

[81] Article 45 of the Constitution stipulates: 'The rights, duties, declarations and guarantees relating to the fundamental rights and freedoms specifically mentioned in this chapter shall not be regarded as excluding others not specifically mentioned.'

[82] S. Kiapi, 'The Right to Health under the African Charter' (2005) 11 East Afr J Peace & H Rghts 1, 18.

[83] *Law Society* case (n 75) judgment of Twinomujuni JA 13, 26.

[84] This reflects the position adapted by the Uganda Human Rights Commission in a number of its decisions, See eg *Ronald Bagonza v Attorney General*, Complaint UHRC/445/2003 (22 November 2010) 6; *Johnson Zirimu v Attorney General*, Complaint UHRC/344/2004 (1 December 2010) 3–4.

[85] See eg Kiapi (n 82) 17–18; B Twinomugisha, 'Challenges to progressive realisation of the Human Right to Food in Uganda' (2005) 11 East Afr J Peace & H Rghts 241, 251–2;H Onoria, 'Guaranteeing the Right to adequate Housing and Shelter in Uganda: The case of Women and Persons with Disabilities' HURIPEC Working Paper No 6 (2007) 11, 18. Save for the right to education (Article 30), right to practice a culture (Article 37), right to a clean and healthy environment (Article 39) and rights at work (Article 40), the majority of the socio-economic rights are provided for under the National Objectives and Directive Principles of State Policy. See Objective XIV(b) (education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits); Objective XXI (clean and safe water) and Objective XXII (food security and nutrition).

[86] Uganda acceded to the International Covenant on Economic, Social and Cultural Rights on 21 January 1987.

[87] Compare with the legal position under the South Africa Constitution (n 7) Article 231(4).

[88] Cap 59 First Schedule r 4(c) (emphasis added).

This rule in the Schedule to the Act in effect renders key child conventions directly applicable in Uganda. Similarly, the Refugee Act renders UN and AU conventions on refugees and on the rights of women and children directly applicable in Uganda.[89]

The self-executing character of a treaty is more evident with the East African Community Treaty. As a supranational law, the Treaty underscores its supremacy (and that of the organs, institutions and laws of the Community) over the domestic laws and institutions of partner states.[90] However, the status of the Treaty and the nascent Community law in Uganda's legal system differs. While the treaty was given effect in Uganda's law by the East African Community Act as a domestic implementing law, the Community law (in the form of legislation, regulations and directives) is given the 'force of law' in a self-executing manner under both the Treaty[91] and the Act.[92] In effect, the Community law is directly applicable in Uganda's legal system.

## 2.5 Locus Standi and Private Rights of Action

There is no provision in the Constitution granting a substantive or procedural right to invoke or rely on a treaty or international law. The existing right of standing is granted only to litigate provisions of the Constitution or legislation.[93] For several treaties given the force of law in Uganda, the locus standi is granted by the implementing legislation rather than the treaty. In these cases, the Act is invoked primarily for the purposes of interpreting the domestic law.[94]

The locus standi to enforce rights or claims and to challenge governmental or official acts is premised a fortiori on the substantive and procedural provisions of the domestic implementing law. Thus an individual's entitlement to legal representation or other procedural guarantees in proceedings for a grave breach of the conventions or an international crime is determinable by reference to the Geneva Conventions Act or the International Criminal Court Act.[95]

The question of locus standi is also pertinent under the East African Community Treaty. The domestic implementing law, the East African Community Act, is silent on the issue of standing. The Act however provides for the recognition, enforce-

[89] See text to n 46 above and n 120 below.

[90] East African Community Treaty (n 28) Article 8(2), (4)-(5).

[91] The Treaty implores partner states to adopt legislative measures to 'confer upon the legislation, regulations and directives of the Community . . . as provided under this Treaty, the force of law within . . . territory' and 'precedence' (or supremacy) of Community laws. Ibid Article 8(2)(b) and (5).

[92] East African Community Act (n 28), s 9(1). The section confers the force of law on 'provisions of any Act of the community' upon its publication in *The Gazette*. *The Gazette* is, in the context of the Act, the 'Official Gazette of the Community'. Ibid, s 2.

[93] See eg 1995 Constitution (n 1) Articles 50 and 137. The provisions grant locus standi in respect of enforcement of the Bill of Rights or conformity of domestic legislation and governmental actions to the Constitution.

[94] In the *Emmanuel Bitwire* case, the parties were entitled to rely on the provisions of the 1961 Vienna Convention on Diplomatic Relations as to the entitlement of the attached premises to state immunity in light of the provisions of the Diplomatic Privileges Act. See text to n 61 above.

[95] Geneva Conventions Act (n 40), s 4, International Criminal Court Act (n 11), s 19(1)(c).

ability and availability in Uganda of all 'rights, powers, liabilities, obligations and restrictions' and 'remedies and procedures' created or provided for by or under the Treaty.[96] Additionally, the supremacy of the Treaty and the direct effect of the Community laws renders rights and obligations under the Treaty and Community law capable of being directly invoked by litigants before Ugandan courts.

## 3. Customary International Law

The silence of the Constitution on the status of international law in Uganda's legal system extends to customary international law.[97] Nonetheless, as is the case with other common law countries, customary international law automatically forms part of the law of Uganda unless it is inconsistent with statute. The principles of customary international law are recognized as part of common law, which the Judicature Act[98] enjoins the High Court of Uganda to apply provided they are not in conflict with existing law. It has been strongly argued that international human rights norms should be applied as custom. To that end, Tumwine-Mukubwa has noted:

> [I]nternational human rights instruments and norms are mere declarations of common law. In all commonwealth countries and jurisdictions which are descendants of the common law tradition, international human rights norms will automatically apply. In the case of Uganda, this is particularly so because the . . . Judicature Act, which ranks second in importance to the constitution, enjoins [the courts] to apply the common law. It would also follow that decisions of courts from common law areas, although not binding, are highly persuasive. Hence, they provide a proper guide as to what the common law is and will accordingly be used to give content to the protected rights and freedoms.[99]

In spite of the strong argument made for the customary international law status of human rights norms, there is in fact a dearth of judicial decisions on their application by courts in Uganda. In one notable instance the Supreme Court considered a plea of sovereign immunity in a suit against a diplomatic mission in Uganda in which it rightly considered the sovereign state 'indirectly impleaded'.[100] The Court viewed the subject matter of the dispute to be a commercial transaction and held that '[s]overeign immunity cannot be claimed in respect of such transactions' and that the 'courts of this country should have jurisdiction in cases where the immunity is

[96] East African Community Act (n 28), s 3(2).

[97] There are a number of African state constitutions that refer to customary international law, such as the Malawi Constitution (n 7) Article 211(3) and the South Africa Constitution (n 7) Article 232. See also Constitutional Law of the Republic of Cape Verde 1992 Article 12(1) and (4) (on 'general or common international law'); Constitution of the Republic of Namibia 1990 Article 144 (on 'general rules of public international law').

[98] Cap 13, s 14.

[99] Tumwine-Mukubwa (n 34) 49.

[100] *Eddie Rodrigues v British High Commission,* Civil Appeal No 8/1987 [1993] KaLR 212 (SC).

restricted'.[101] The Court therefore upheld the restrictive doctrine of sovereign immunity as a principle of customary international law.

The other notable instance is in *Col (Rtd) Dr Kizza Besigye v Yoweri Kaguta Museveni*, where the Chief Justice of the Supreme Court deferred to the provisions of the Universal Declaration on Human Rights in the context of presidential election petitions. In this case, the Chief Justice invoked the 'will of the people' in Article 21(3) of the Declaration, essentially deferring to a customary law norm.[102] However, although the Chief Justice referred to the provisions of Article 21(3) of the Declaration to aid his argument,[103] there was no discussion of the character of the Declaration, either as declaratory of custom or as a 'soft-law' instrument.

## 4. Hierarchy

The position of international law in Uganda's legal system is deducible from recent judicial decisions. In the *Ssemwogerere* case, the Constitutional Court's assertion that the conventions could not be invoked against an Act of Parliament was largely concerned with the hierarchical status and positioning of treaties in Uganda's legal system.[104] In fact, the inference from the Court's ruling vis-à-vis the judgment of Twinomujuni JA was that, although part of the law of Uganda, treaties ranked lower than domestic legislation. However, the Court's subsequent decision in the *Law Society* case elevated treaties, particularly human rights treaties, to a constitutional rank. In that regard, such treaties have supremacy over domestic law. This is evident from the Court's consideration of statutory prescriptions of a right of appeal vis-à-vis the provisions of the African Charter on Human and Peoples' Rights:

> It is said that there is no right of appeal as such unless that right has been specifically created by the relevant statute. This means that where a Statute grants a jurisdiction to a court, then unless the Statute states that a person aggrieved by a decision of such a court can appeal, then there is no right of appeal. This further means that there is no automatic right of appeal. This is frequently asserted in our courts as if we forget that the African Charter on Human and Peoples' Rights . . . is part and parcel of our Constitution.[105]

In effect, the Court read into the right to a fair hearing under the Constitution a 'right of appeal' as guaranteed under the Charter. Elevated to a constitutional rank, the Charter trumped a prevailing legal position in domestic law.

[101] Ibid 213.

[102] *Col (Rtd) Dr Kizza Besigye v Yoweri Kaguta Museveni*, Election Petition No 1/2001 [2001] UGSC 3 (SC) (21 April 2001) judgment of Odoki CJ 39–40.

[103] Ibid 40. The Chief Justice also referred to provisions of Article 25 of the International Covenant on Civil and Political Rights and, as with the Universal Declaration of Human Rights, there is no elaboration on the basis for the reliance on the Covenant.

[104] See text to nn 73–4 above.

[105] *Law Society* case (n 75) judgment of Twinomujuni JA 25.

The Court's decision is restricted to human rights conventions, and therefore it cannot be presumed that a constitutional equivalence is conferred *carte blanche* to all ratified treaties. Rather, the majority of other treaties are, given their incorporation by domestic implementing laws, prima facie at par with domestic legislation. And, in that regard, as part of the law of Uganda, such treaties are subject to the 'supremacy' clause in the Constitution. However, given the presumption that domestic law should conform to international law, the treaties might in fact enjoy a slightly higher status than domestic legislation.[106] The situation of the East African Community Treaty is unique given that the Treaty and the nascent Community law is accorded supremacy over domestic legislation.[107]

The position of customary international law is such that, given its recognition as part of common law, it is subject to existing domestic legislation. It is not clear whether the presumption of conformity to international law extends to domestic legislation vis-à-vis customary international law.[108]

## 5. (In)direct Application: Using International Law to Inform Domestic Law

The absence of a provision expressly requiring the courts to consider international law when interpreting the Constitution has resulted in international law being either completely ignored or referred to cursorily. This situation was exacerbated by several other factors. First, the case for the application of international law has tended to be perfunctorily presented in petitions and submissions before the courts, or been avoided by parties entirely.[109] Secondly, the courts have tended to ignore any such references made to international law by the parties. Thirdly, the initial reluctance of the courts to refer to international law was the result of concerns over its hierarchical status in Uganda's legal system.[110] This make courts more inclined to address questions exclusively from a constitutional law perspective.

[106] In the *Law Society* case, in recognizing the Charter as part of the law of Uganda, Kavuma JA upheld the right of appeal as an aspect of the right to a fair hearing under Article 28 of the Constitution. He regarded the Charter as 'playing the role of being the equivalent to an operationalizational [*stet*] law to Article 28 of the Constitution,' in providing 'the necessary bridge between the [Uganda Peoples' Defence Forces Act] and Article 28 which calls for confirmation of the death sentence by the highest [appellate] Court' and therefore removing 'an apparently serious lacuna in our law.' Ibid 45–6.

[107] See text to n 90 above. The hierarchical supremacy of the Treaty over domestic legislation is affirmed by the domestic implementing legislation—the East African Community Act—which required necessary amendments to bring 'written law into conformity with the provisions of the Treaty' and further provides for the coming into operation of any amendments to the Treaty on the date such amendments are 'laid before Parliament'. East African Community Act (n 8), ss 10, 11.

[108] The closest to such presumption is the Chief Justice's construing of Article 21(3) of the Universal Declaration on Human Rights and the provisions of Article 1(4) of the Constitution (and the presidential election law) in *Presidential Election* (2001) case. See text to nn 102–3 above.

[109] See eg, *Uganda Association of Women Lawyers v Attorney General*, Constitutional Petition No 2/2003 [2004] UGCC 1 (10 March 2004) (CC) 27. Twinomujuni JA expressed concern that no party discussed 'whether contravention of an International Human Rights Convention amounts to a contravention of the Constitution'.

[110] See text to nn 73 and 74.

In the past decade the courts have been gradually increasing their use of international law. The premise for relying on international law, especially human rights conventions, has been two-fold: firstly, the courts should give effect to obligations assumed by Uganda under the treaties and, secondly, the courts should refer to treaties for the purpose of construing provisions of the Constitution or domestic law. The basic underlying presumption in both instances is that Ugandan law should conform to international law. Notably, the courts have primarily relied on international law to interpret provisions of the Constitution rather than to ensure conformity to treaty obligations.

In the *Susan Kigula* case, the Supreme Court invoked international human rights law to arrive at its decision regarding the death penalty. At the outset, the Court noted that '[i]n discussing this matter we will make reference to international instruments on the subject'.[111] In upholding the constitutional permissibility of the death penalty, the Court regarded such permissibility to conform to international human rights law and Uganda's obligations under the relevant treaty instruments.[112] Further, the Court observed that the penalty in international law was underpinned by fair trial and other human rights safeguards.[113] Additionally, the Court analyzed international legal texts and found no conflict between the right to life and the freedom from cruel, inhuman and degrading treatment or punishment. On the use of hanging as the manner of executing the penalty, the Court similarly found this to conform to international law since the definition of torture under the Convention against Torture left 'no doubt that it does not apply to a lawful death sentence'.[114] In the end, the Court noted that '[t]he retention of capital punishment by itself is not illegal or unlawful or a violation of international law'.[115]

Another instance where courts have deferred to Uganda's international obligations is on women's rights and gender equality. In *Uganda v Peter Matovu*,[116] the High Court considered the rule requiring corroboration of a victims' allegation of sexual offences to be in violation of international law:

[111] *Attorney General v Susan Kigula* Constitutional Appeal No 3/2006 [2009] UGSC 6 (SC) (21 January 2009) 12.

[112] Ibid 12–18. The Court examined the scope of the right to life under the treaty instruments such as the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966 and the African Charter on Human and Peoples' Rights 1981. In particular, the Court highlighted the use of the word 'arbitrary' in the provisions of the instruments on the right to life as recognition that 'under certain acceptable circumstances a person may be lawfully deprived of his life.' Ibid 14, 18–19. Notably, although the Court referred to the Second Optional Protocol to the International Covenant on Civil and Political Rights that seeks to universally abolish the death penalty, it did not highlight the fact that Uganda has yet to ratify the Protocol. Ibid 16–17. Subsequently, the Court observed that Article 22(1) of the Constitution '[c]learly . . . conforms to the international human instruments . . . particularly the International Covenant on Civil and Political Rights to which Uganda is a party.' Ibid 23.

[113] Ibid 15.

[114] Ibid 17. The Court referred to the definition of torture under Article 1 of the Convention in its excepting of 'pain or suffering arising only from, inherent in or incidental to lawful sanctions.' Ibid 17–18.

[115] Ibid 20.

[116] Criminal Session Case No 146/2001 [2002] UGHC 72 (19 October 2002) (HC).

[M]ore importantly, . . . the . . . rule discriminates against women who are, by far, the most frequent victims of sexual offences . . . [I]ts effect is to single out women for disfavor in cases involving sexual allegations in the sense that it nullifies the recognition, enjoyment or exercise of their rights to equality before the law and equal protection of the law . . . *Uganda ratified CEDAW and . . . various conventions, which constitute the International Bill of Rights*. In addition, under article 21 of the Constitution that proclaims equality of all persons under the law, equal protection of the law and prohibition against discrimination on ground of sex, Uganda enacted the heart of the . . . international instruments in one stroke. Therefore, Uganda has an *obligation* to *give effect to the contents of those international instruments*. For that reason, the . . . rule that discriminates against women and is inconsistent with *Uganda's international obligations* and the Constitution is not legally justifiable.[117]

The call for the greater adherence to international obligations on women's rights has in fact been voiced by a justice of the Constitutional Court. When the Court has hesitated or not been inclined to refer to treaty obligations, Mpagi-Bahigeine JA has been at the forefront in urging compliance with such obligations. In the *Women Lawyers* case, she observed:

The concept of equality in the 1995 Constitution is founded on the idea that it is generally wrong and unacceptable to discriminate against people on the basis of personal characteristics such as their race or gender. Legal rules, however, continue to be made gender neutral so much so that there are no more husbands or wives, only spouses. This step is in the right direction. It is further important to note and appreciate that the 1995 Constitution . . . is fully in consonance with the *international and regional instruments* relating to gender issues (*The Convention on the Elimination of all forms of Discrimination against Women . . . which is the women's Bill of Rights and the Maputo Protocol on the Rights of Women in Africa* . . . ).[118]

In the *Law and Advocacy for Women* case, she urged judicial activism on the part of the courts in interpreting and applying domestic laws in ways that conform to, rather than breach, Uganda's international obligations:

[S]ince Parliament has already *outlawed the practice of female genital mutilation in accordance with the International Treaties*, it is now incumbent upon the judiciary to play a very important role in completely eliminating any form of violence against women including female genital mutilation . . . The judiciary being part of the State machinery is enjoined to address this issue aggressively whenever it comes before court by involving innovative and progressive interpretation of the laws. Failure to do so would be tantamount to a *breach of the State* of its *international obligations*.[119]

[117] Ibid 4–5 (emphasis added). The Court regarded the rule as one of practice rather than one of law that found its way into common law and is 'part of Uganda's colonial legacy.' Ibid 3.

[118] N 109 52–3 (emphasis added). The reference to the Maputo Protocol on Rights of Women in Africa is interesting for its timing since the judgment was delivered on 28 July 2010 only six days after Uganda ratified the Protocol on 22 July 2010.

[119] N 150 23 (emphasis added). In spite of the judge's urging on 'international obligations', her judgment does not offer any detailed analysis. In the lead judgment, Twinomujuni JA observed that 'the practice of Female Genital Mutilation is condemned by both the Constitution of Uganda and International Law'. Ibid 20. Uganda has enacted several pieces of legislation in the past two years that seek address rights of women, including the Prohibition of Female Genital Mutilation Act 2009, the Prevention of Trafficking in Persons Act 2009 and the Domestic Violence Act 2010.

The courts have relied on international law norms to interpret the Constitution and domestic law in several decisions. For constitutional interpretation, the reliance has particularly been necessary because the Bill of Rights does not define the fundamental rights and freedoms stipulated in the Constitution. In the *Onyango-Obbo* case the court examined the freedom of expression stipulated under Article 29(1)(a) of the Constitution:

> [The provision] does not stipulate or specify what a person is free to say or express. The Constitution, unlike its 1967 predecessor, does not provide a definition of the freedom of expression or of the press. Nor does it describe the *scope* of that freedom. Even the Press and Journalist Act . . . , which was enacted in 1995 'to ensure the freedom of the press,' does not define that freedom.[120]

The Court considered it 'instructive to look at definitions of the same freedom in international instruments to which Uganda is party'.[121] The Court examined the texts of the African Charter on Human and Peoples' Rights and the Covenant on Civil and Political Rights (as well as a Declaration of Principles on Freedom of Expression in Africa)[122] and concluded that: '[f]rom the . . . different definitions, it is evident that the right to freedom of expression extends to holding, receiving and imparting all forms of opinions, ideas and information'[123] and that '[i]t is not confined to categories, such as correct opinions, sound ideas or truthful information'.[124]

The Constitutional Court has similarly relied on the provisions of human rights conventions to construe the right to freedom from torture and the right to a fair trial. On freedom from torture, the Court noted that Article 24 of the Constitution does not define torture and then referred to the definition in Article 1 of the Convention against Torture.[125] For the right to a fair trial, the Court has interpreted the right to include an 'automatic right of appeal' in light of the 'other rights' clause in Article 45 of the Constitution and Article 7 of the African Charter on Human and Peoples' Rights.[126]

[120] (N 144) judgment of Mulenga JSC 9.

[121] Ibid.

[122] Ibid 9–10. On the Court's reliance on the Declaration as 'soft law' see text to n 143–4.

[123] Ibid 10. On construing the freedom of expression in light of human rights conventions, see also judgment of Odoki CJ 2. For references to Uganda being a party to the conventions, see judgment of Tsekoko JSC at 8. See however Byamugisha Ag. JSC who chose to interpret the domestic law without making reference to international law. Ibid 6–8.

[124] Ibid judgment of Mulenga JSC 10. The Court therefore declared the penal law provisions on 'false news' to infringe the right to freedom of expression and the press guaranteed under Article 29(1)(a) of the Constitution. Ibid judgments of Mulenga JSC 11–33, Odoki CJ 2–8, Tsekoko JSC 8–10, Kanyeihamba JSC 3–6, Karokora JSC 2–3, Byamugisha Ag JSC 9–14.

[125] *Dr Kizza Besigye v Attorney General*, Constitutional Petition No 7/2007 [2010] UGCC 6 (CC) (12 October 2010) 28. The Court did not engage in any in-depth examination of the import of the Convention definition, only observing that the petitioners were subjected to 'humiliating, cruel and degrading treatment that is prohibited by Articles 24 and 44(a) of [the] Constitution'. Ibid. The Uganda Human Rights Commission has in several of its decisions referred to the Convention definition of torture. See text to n 128 below.

[126] *Law Society* case (n 75) judgment of Twinomujuni JA 25–6. See also judgment of Kavuma JA 45–6.

The use of human rights conventions to interpret the Bill of Rights has not been restricted to the courts. As a quasi-judicial body, the Uganda Human Rights Commission has, in the exercise of its protectionist mandate to receive complaints on violations of human rights,[127] referred to ratified human rights conventions. It has done so regarding the rights to life and liberty and the freedom from torture guaranteed under Articles 22(1), 23 and 24 of the Constitution. However, in the majority of the decisions the Commission did not elaborate on the international obligations. In spite the lack of elaboration, reference to the conventions has served to highlight Uganda's obligations under the said conventions. In certain decisions, the Commission has referred to the conventions to construe the meaning and scope of the rights and freedoms under the Constitution.[128] In *Kalyango Mutesasira v Kunsa Kiwanuka*,[129] the Commission considered whether a failure or refusal to pay due pension constituted a violation of the human rights of the beneficiaries.[130] The Commission upheld the existence of the 'right of persons who retire from public service to receive a pension' that translated into a 'right to property' once it was due and owing.[131] Additionally, it construed pension as 'social security' and as obtaining as a human right in that sense. Noting the absence of any specific provision on social security under the Constitution, the Commission treated the duty placed on the state to make provision for the 'welfare of the aged' under the National Objectives and Directive Principles in the Constitution as underpinning the making of provision for 'social security':

> Pension should not only be considered earned property but a social security. The Constitution though does not provide [for] social security, although the National Objectives and Directives Principles (No. VII) calls upon the State to make reasonable provision for the welfare of the aged. We know however that pensions are designed to give retired workers income support and financial security during their old age.[132]

[127] 1995 Constitution (n 1) Article 52(1)(a).

[128] Regarding the right to life, reference has been made to Article 6(1) of the Covenant on Civil and Political Rights to underscore the fact that the right in Article 22(1) of the Constitution is 'not absolute' and that there are 'circumstances under which taking of life may be lawful'. *John Bindemeseze v Attorney General*, Complaint No UHRC/FP/69/2003 (unreported) 7. Regarding the freedom from torture, the court has referenced the definition of torture in the Convention against Torture. See eg *Mwangu Yahaya Yarabi v Attorney General*, Complaint No UHRC/J/74/2003 (unreported) 12 ('The Constitution does not define what torture is nor . . . [is there] any other legislative provision which . . . [defines] torture', so the court looked to the 'ordinary meaning of the word torture' and 'definition in the Convention against Torture ratified by Uganda'); *Joseph Kiiza Kibate v Attorney General*, Complaint No UHRC/95/2003 (unreported) 6 (considered the Convention definition 'persuasive given that the Convention had been ratified by Uganda'); *Fred Tumuranye v Gerald Bwete,* Complaint No UHRC/264/1999 (unreported) (considered the Convention definition of torture narrow because it primarily concerns governmental or official acts).

[129] Complaint No UHRC/501/2001 (unreported).

[130] Ibid 3.

[131] Ibid 4, 8–9. Notably, the Commission addressed the existence of a human right in the context of the provisions of the laws of Uganda (including Article 254 of the 1995 Constitution and the Pensions Act Cap 281). In addition, the Commission examined the various regulations relating to pensions in Statutory Instruments Nos 40/1976, 6/1978 and 6/1995.

[132] Ibid 6.

The Commission also referred to the right to social security under international human rights law and observed that Uganda, having acceded to the Covenant on Economic, Social and Cultural Rights, was under an obligation to ensure the realization of social security as a right:

> International Human Rights law recognises social security as a human right. Article 9 of the International Covenant on Economic, Social and Cultural Rights provides that '*The State Parties to the present Covenant recognize the right of everyone to social security, including social insurance.*' Uganda is a signatory to this Convention and is therefore bound by its provisions in the absence of any domestic law to the contrary. Pension being a social security is therefore a human right under international law. Refusal or non-payment of pensions to those who qualify under the law would therefore violate the right to social security which is recognised as a right by Uganda.[133]

The reference to international obligations undertaken by Uganda upon acceding to the Covenant on Economic, Social and Cultural Rights is an example of judicial activism. The Commission adopted a principle of construction by which the muted and vague provisions of the Constitution were interpreted as far as possible as to be consistent with Uganda's international obligations undertaken under the Covenant.

## 6. Jurisdiction

The exercise of jurisdiction in Uganda has primarily been premised on territoriality save for specific instances of extra-territoriality.[134] The evolution of international law norms, especially international crimes, has caused new laws to embrace other principles of jurisdiction, including passive nationality and universal jurisdiction. For example, the Geneva Conventions Act allows the exercise of universal jurisdiction over grave breaches of the conventions,[135] and the International Criminal Court Act does so over genocide, crimes against humanity and war crimes.[136] The exercise of universal jurisdiction is also recognized in other legislation, such as the Anti-Terrorism Act.[137]

[133] Ibid 4–5 (emphasis in original). Although the Commission regarded Uganda as a 'signatory', Uganda's position is in fact one of 'accession' to the Convention in 1987. Ultimately, the Commission considered the delay in payment of pension . . . a serious violation 'which not only denies pensioners the right to property but also the right to social security'. Ibid 6.

[134] See eg Penal Code Act Cap 120, ss 4–5. The Act provides for jurisdiction over nationals or persons ordinarily resident in Uganda for certain offences (eg treason and terrorism) committed outside Uganda: ibid, s 4(2) and encapsulates the so-called 'effects doctrine.' Ibid, s 5.

[135] N 40, s 2(1)-(2).

[136] N 40, s 18(d). On exercise of jurisdiction on basis of passive nationality principle, see ibid, s 18(c).

[137] Act No 14/2002, s 4(1)(b)(viii).

## 7. Other Sources of International Law

There is no reference to the other 'traditional' sources of international law such as general principles of law, teachings of publicists, etc in either the Constitution or legislation. Nor are there are any references to 'soft law' such as declarations, resolutions, and decisions of international organizations.[138] The absence of such reference has not dissuaded the courts, especially the Supreme Court, from referring to and relying on non-binding sources of international law during the past decade.

The foremost non-binding source of international law that the courts have relied on is resolutions and declarations of international organizations. The courts have referred to these 'soft-law' documents without explaining their status in Uganda. The inference is that the courts consider them persuasive sources for interpreting primary international law texts or sources. Thus the Supreme Court has referred to the Universal Declaration on Human Rights without clarifying its status as either 'custom' or 'soft law' when addressing the permissibility of the death penalty in international law[139] and the place of elections as an expression of the will of the people.[140] When addressing the death penalty, the Court also referred to the ECOSOC Resolution on Safeguards Guaranteeing Protection of the Rights of those facing Death Penalty[141] to highlight the guarantees regarding the penalty and the manner of its execution.[142] Further, the Court examined the Declaration of Principles on Freedom of Expression in Africa[143] when determining the content and scope of the freedom of expression under Article 29(1)(a) of the Constitution.[144]

The Supreme Court has also referred to the jurisprudence of international human rights bodies. In the *Susan Kigula* case, having determined that the provisions of the Civil and Political Rights Covenant were on the same subject as provisions of the Constitution, the Court referred to a decision of the UN

[138] As a 'soft law' instrument, few African state constitutions refer to the Universal Declaration of Human Rights. See eg Cape Verde Constitutional Law (n 97) Article 17(3); Constitution of the Republic of Guinea-Bissau 1984 Article 29. The provisions call for interpretation of the Bill of Rights in light of (or in harmony with) the Declaration. Certain constitutions refer to the 'judicial acts . . . of supranational organisations': eg Cape Verde Constitutional Law (n 97) Article 12(3). Other provisions refer to 'reports, decisions and opinions' of international and regional human rights enforcement institutions or bodies: eg Constitution of the Republic of Seychelles 1993 Article 48(c). A number of constitutions require courts to consider 'comparable foreign case law' (eg Malawi Constitution (n 7) Article 12(2)(c)) and foreign law. (eg South Africa Constitution (n 7) Article 39(1)(c)) when interpreting the constitution.

[139] *Susan Kigula* case (n 111) 12–14. The Court referred to provisions of Articles 3 and 5 of the Declaration. The reference to the Declaration was however made in the overall context of human rights conventions ratified by Uganda.

[140] *Presidential Election* (2001) case (n 102) 39–40.

[141] ECOSOC Res 1984/50, 25 May 1984.

[142] *Susan Kigula* case (n 111) 19–20.

[143] The declaration was adopted by the African Commission on Human and Peoples' Rights at its 32nd Ordinary Session, 17–23 October 2002, Banjul, The Gambia.

[144] *Charles Onyango-Obbo v Attorney General*, Constitutional Appeal No 2/2002 [2004] UGSC 1 (11 February 2004) (SC) 7. The lead judgment was delivered by Mulenga JSC.

Human Rights Committee to address the right to life and freedom from torture in both the Covenant and the Constitution. The Court explained:

> It is noteworthy that the . . . provisions [of Articles 6 and 7] of the Covenant are in *pari materia* with articles 22(1) and 24 of the Constitution of Uganda. We do not see nor can we find any conflict between Articles 6 and 7 of this Covenant. This issue was considered by the Human Rights Committee . . . in *Ng v Canada* . . . where the majority of the Committee held that because the International Covenant contained provisions that permitted the imposition of capital punishment for the most serious crimes, but subject to certain qualifications, and notwithstanding the view of the committee that the execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant, the extradition of a fugitive to a country which enforces the death sentence in accordance with the requirements of the International Covenant could not be regarded as a breach of the obligations of the extraditing country.[145]

The other source of international law utilized by the courts in Uganda is reports and publications of international organizations. The Supreme Court has referred to the Guidelines and Explanatory Report on a Code of Good Practice in Electoral Matters[146] as well as a press release by the Inter-Parliamentary Union[147] on principles of a free and fair election and the relationship between respect for human rights and a democratic electoral process.[148] On the other hand, the Constitutional Court relied on a WHO Interagency Statement on Eliminating Female Genital Mutilation[149] to find the practice of female genital mutilation in violation of the rights of women under the Constitution and international law.[150]

The Supreme Court has also drawn utility and relevance from the writings of publicists with regard to concepts or principles of international law.[151] The instances in which the Ugandan courts relied upon other sources of international law have offered courts the opportunity to enrich the interpretation and application of provisions of the Constitution and legislation.

[145] *Susan Kigula* case (n 111) 15–16. See also text to nn 111–15 above.

[146] CDL-AD (2002) 023rev. The report was adopted by the European Commission for Democracy through Law of the Council of Europe at its 52nd session, 18–19 October 2002, Venice, Italy.

[147] Press Release No 222, 24 March 2006.

[148] *Rtd Col Dr Kizza Besigye v Electoral Commission*, Election Petition No 1/2006 [2007] UGSC 3 (21 April 2007) (SC) judgment of Odoki CJ 36–8.

[149] 'Eliminating Female Genital Mutilation: An Interagency Statement' (WHO, 2008) 14–18.

[150] *Law and Advocacy for Women in Uganda v Attorney General*, Constitutional Petition No 8/2007 [2010] UGCC 4 (28 July 2010) (CC) 8–10, 17–19. The lead judgment was delivered by Twinomujuni JA.

[151] In the *Susan Kigula* case, the Court referred to Paul Sieghart's conceptual premise in his treatise *The International Law of Human Rights* (1993) that 'international human rights law assigns a higher value to the quality of living as a process than the existence of life as a state'. (n 111) 27–8. Although the Supreme Court did not rely on the scholarly opinion, the inference is that the freedom from torture under Article 24 of the Constitution pertains to the quality of living as a process, while the right to life under Article 22(1) of the Constitution is concerned with the existence of life as a state.

## 8. Conclusion

The relationship between international law and the domestic legal system in Uganda is characterized by constitutional silence juxtaposed with legislative references and judicial pronouncements. The result is a fluid situation in which the legislature and the judiciary have endeavoured to assign international law a position in Uganda's domestic legal system. While the exercise of the legislative powers of Parliament in implementing treaties attests to the dualist traditions, the judicial approaches mark an effort to step out of that framework. The decisions of the courts underscore the significant role of treaties and treaty obligations especially for the protection and enforcement of human rights. Although the judicial decisions regarding customary international law are scanty, they demonstrate a growing reliance on non-traditional sources of international law, including 'soft law' instruments. However, the status and hierarchical position of treaties and international law in general in Uganda's legal system is desirous of a more authoritative pronouncement from the highest court, the Supreme Court of Uganda.

# 26

# United Kingdom

*Stephen C. Neff*

## 1. Introduction

The United Kingdom of Great Britain and Northern Ireland, which includes England, Scotland, and Wales as well as Northern Ireland, is a constitutional monarchy whose legal system is based on common law tradition, with early Roman and modern continental influences. A bicameral Parliament consists of the House of Lords, with a mixture of life peers, hereditary peers, and clergy, and the House of Commons, whose members are elected by popular vote to a serve five-year terms unless the House is dissolved for early elections.

The Supreme Court of the United Kingdom was established in October 2009, taking over appellate jurisdiction formerly vested in the House of Lords. The senior courts of England and Wales comprise the Court of Appeal, the High Court of Justice, and the Crown Courts. There are also the Court of Judicature (Northern Ireland); Scotland's Court of Session and High Court of Justiciary. The United Kingdom has been a party to the European Convention on Human Rights since its entry into force in 1953. The Human Rights Act of 1998 provided for the pronouncement by courts on the compatibility, or incompatibility, of Acts of Parliament with the Convention (although this is in the nature of declaratory action only, not entailing the overturning of the legislation in question).

The United Kingdom is one of five permanent members of the UN Security Council and a founding member of NATO. The United Kingdom is also an active member of the EU, although it opted to remain outside the Economic and Monetary Union (ie the Eurozone). The Scottish Parliament, the National Assembly for Wales, and the Northern Ireland Assembly were established in 1999; and devolution was fully completed in March 2010.

## 2. Constitutional and Legislative Texts

In Britain, there is no written constitution. Moreover, regarding Britain as a whole, there are no legislative provisions or regulations that call for the application of international law, in a generic sense, in the national legal system.[1]

[1] See also section 3.1 below.

The United Kingdom is not a federal system, although powers have been devolved to Wales, Northern Ireland and Scotland. The basic arrangement in all three cases is that the central government in London can order officials of the devolved regions to take any steps that are necessary to give effect to 'any international obligation' of the United Kingdom, and conversely can forbid the devolved governments from taking any action that would be incompatible with the UK's international obligations.[2] No distinction is made in this regard between obligations under treaty law and under customary international law.

In addition, there are restrictions placed upon each assembly in the devolved regions, essentially prohibiting the passage of legislation that would be incompatible with the UK's obligations under European Community law or under the European Convention on Human Rights. In the case of Scotland and Northern Ireland, it is provided that any such measures that are enacted are 'not law'.[3] The regions can go further, however, in accepting international commitments. In 2001, the Scottish Parliament enacted the International Criminal Court (Scotland) Act 2001, bringing provisions of the Rome Statute of 1998 into Scottish law.

## 3. Treaties and Other International Agreements

### 3.1 The Treaty-Making Process

Treaty-making is the prerogative of the Crown. In theory, the monarch, as head of state, could enter a treaty personally. In practice, however, treaties are concluded on behalf of the Crown by members of the government—either the Prime Minister or the Secretary of State for Foreign and Commonwealth Affairs.[4] It is also the prerogative of the Crown to determine the content of a treaty, thereby precluding challenges in courts to the terms of a treaty.[5] In the Constitutional Reform and Governance Act 2010, the Parliament was given, for the first time, the power to prevent the government from ratifying treaties negotiated by it. The procedure is that the text of the treaty is laid before Parliament for 21 days prior to the contemplated ratification, to give either House the opportunity to object. In normal cases, if either House objects, then ratification cannot take place. In exceptional cases, however, the executive can override these objections. This exceptional executive power to override can itself, however, be overridden by

[2] See Scotland Act 1998, s 58; Northern Ireland Act 1998, s 26; and Government of Wales Act 2006, s 82.

[3] See Scotland Act 1998, s 29; Northern Ireland Act 1998, s 6. For analogous restrictions on the Welsh government, see the Government of Wales Act 2006, ss 80–81.

[4] UK law grants general full powers to Secretary of State for Foreign and Commonwealth Affairs, together with ministers of state and under secretaries of state. 18(2) *Halsbury's Laws of England* (4th edn, 2000) 477–8.

[5] In *Blackburn v Attorney General* [1971] 1 WLR 1037, the Court of Appeal left open the possibility of a challenge to legislative giving effect to a treaty which purported to bind the sovereignty of Parliament in the future.

the House of Commons (but not by the House of Lords), by way of a second objecting vote.[6]

Treaties to which the United Kingdom is a party do not automatically become part of UK law. They become part of UK law—and hence binding on courts—only when their contents are enacted into law by Parliament.[7] That is to say, there is no distinction in UK law between self-executing and non-self-executing treaties. In effect, all treaties are non-self-executing, since all treaties require legislative action before they become part of British law. There is one notable exception to this general principle: treaties concluded by the institutions of the EU with outside states, pursuant to the powers possessed by those institutions under relevant EU law. These treaties have been held, as a matter of European Community law, to be directly enforceable within the member states.[8] It would appear, however, that, as yet, there has not been case-law in British courts applying this principle.

Incorporation takes place in a variety of ways, usually by legislative enactment, but in some instances by executive acts (orders) of a minister who has been previously delegated authorization to act by legislation. The issue is complicated by the fact that legislative history may demonstrate that an act is intended to give effect to a treaty, without the law itself making any reference to the agreement.[9] In other instances, the legislation may not explicitly incorporate the entire treaty,[10] either because certain provisions are not accepted by the Parliament, or because the provisions are deemed to be already effective as a matter of law.[11] Legislative enactments may stand alone and be more expansive than treaty language or may refer to the treaty being included as a schedule. Finally, the most usual practice is for the statute to state that it gives effect to the treaty, the full text of which is scheduled to the Act. In such instances, the substantive part of the domestic legislation is the text of the treaty itself, which has been transformed into domestic law.

When (and if) a treaty is incorporated into domestic law by Parliament, the norms contained in it thereby become norms of national law. As a result, it is, therefore, strictly speaking, national law that parties invoke in the British courts,

[6] Constitutional Reform and Governance Act 2010, ss 20–25.

[7] See *Maclaine Watson & Co. Ltd v Department of Trade and Industry* [1990] 2 AC 418, speech of Lord Oliver at 500; and *British Airways v Laker Airways* [1985] AC 58.

[8] See *Bresciani Case* [1976] ECR 129; and *Kupferberg Case* [1982] ECR 3641.

[9] *In Re Westinghouse* [1978] AC 547, the House of Lords opinions revealed that all of them were aware that the Evidence (Proceedings in other Jurisdictions) Act 1975 was adopted to give effect to the Hague Convention on the Taking of Evidence abroad in Civil or Commercial Matters 1970, but the 1975 Act failed to refer to the treaty. See F.A. Mann, *Foreign Affairs in English Courts* (Oxford: Clarendon, 1986) 97.

[10] Examples are given in Mann (n 9) 97–9. In at least one case, *Wilson Smithett and Co., Ltd v Terruzzi* [1976] 1 QB 683, 711, Lord Denning is said to have assumed that the entire Articles of Agreement of the International Monetary Fund had been incorporated, although the legislation only referred to certain provisions.

[11] See the discussion in R. Higgins, 'United Kingdom,' in Francis G. Jacobs and Shelley Roberts (eds), *The Effect of Treaties in Domestic Law* (London: Sweet and Maxwell, 1987), at 123–39 of the partial incorporation of the Vienna Convention on Diplomatic Privileges and Immunities by the Diplomatic Privileges and Immunities Act 1964.

rather than the treaty as such.[12] There are, accordingly, no special rules regarding standing for the invoking of treaty rights per se. It is not open to individuals to claim that a treaty is not being performed or is otherwise being violated, unless the treaty itself (as incorporated into domestic law) grants rights directly to individuals.

There has been judicial speculation—though as yet no more than that—to the effect that the position might be different regarding agreements that deal entirely with identified individuals (such as a memorandum of understanding providing for the transfer of an identified individual to another country). It might be that the identified individuals in question could contest the agreement in court even in the absence of any implementing legislation or statutory instrument.[13]

## 3.2 Judicial Application and Interpretation

Once a treaty has become incorporated into British law, it is the task of the courts to interpret it. There would appear to be no instances in which courts have deferred to executive interpretations, in the sense of, say, operating on the basis of a presumption that the interpretation endorsed by the British executive is the correct one. It cannot, however, be said that this would never occur. There may be instances in which a court is interpreting a bilateral agreement, in which there is no public record of *travaux préparatoires*, but in which the British executive informs the courts of the interpretation that it and the other state party jointly had in mind at the time of the conclusion of the agreement.

Regarding deference to the legislature, it may be noted that there can be, and sometimes are, statutory instructions to the courts as to interpretation.[14] In such instances, the courts are, of course, bound to follow the statutory commands.

When interpreting legal norms that have their origins in international treaties, courts have held that, even though the treaty norms have been transformed into domestic law, it is necessary that the 'international character' of those norms 'be respected'.[15] This means that, in the interest of uniformity of interpretation of the treaty amongst the states parties, British courts should follow generally accepted principles of treaty interpretation, rather than the rules of interpretation applicable to British statutes specifically.

Also in the interest of ensuring uniformity of interpretation amongst treaty parties, British courts tend to defer to an international consensus as to the correct interpretation of a treaty, if such a consensus exists. For this purpose, they will take account of court decisions in other countries interpreting the treaty in question.[16]

[12] See *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, [2002] 3 WLR 1562, [2002] 4 All ER 1028, speech of Lord Hoffmann [27].

[13] See *Brown v Rwanda* [2009] EWHC 770 (Admin) [30].

[14] See, for example, the Carriage by Air Act 1961, s 4A, concerning interpretation of terms in the Warsaw Convention of 1929.

[15] *Fothergill v Monarch Airlines Ltd* [1981] AC 251, [1980] 3 WLR 209, speech of Lord Scarman, 294.

[16] See *R v Asfaw* [2008] UKHL 31, speech of Lord Hope [53].

British courts, when interpreting treaties, have regularly and explicitly resorted to the rules of interpretation set out in the Vienna Convention on the Law of Treaties (which the United Kingdom ratified on 25 June 1971).[17]

## 3.3 Treaties and Non-binding Agreements

It would appear that there is no case-law in the United Kingdom regarding a distinction between treaties and mere political commitments, although during the height of the British Empire the East India Company and other trading companies concluded agreements as agents of the Crown. Scholars have debated whether or not such agreements are treaties governed by international law.[18] On the question of whether a memorandum of understanding is legally binding, British courts have held that this is determined by the presence (or, as the case may be, absence) of an intention to create a legal obligation, on the part of the states parties concerned, at the time of entry into the arrangement.[19] The British executive has taken the position that memoranda of understanding are fully equivalent to treaties, but courts have not yet made a finding on that broad point.[20] It has been established, however, that a memorandum of understanding dealing with extradition qualifies as equivalent to an extradition treaty, in the sense of falling under the category of 'arrangements . . . made between the United Kingdom and another territory for the extradition of a person', under the Extradition Act 2003, s 194.[21]

When considering the effect of a memorandum of understanding providing that a person sent from the United Kingdom to the other state will not be mistreated in that state, the courts have regarded the matter basically as a question of fact. That is, they have not taken the position that the existence of the obligation in the memorandum constitutes, ipso facto, a guarantee that mistreatment will not occur. Rather, the courts will look to all the circumstances of the situation at hand to assess the actual risk of mistreatment.[22] The clear implication is that, if a genuine risk of torture or inhuman or degrading treatment exists, then the court will bar the government from giving effect to the memorandum. There is not, as yet, an example of a court making such a finding. The practice appears to be that courts will in practice give great—but not conclusive—weight to assurances by foreign governments set out in memoranda of understanding.

[17] See, for example, *Fothergill v Monarch Airlines Ltd* [1981] AC 251, [1980] 3 WLR 209, speech of Lord Diplock, 282; *The Republic of Ecuador v Occidental Exploration & Production* [2007] EWCA Civ 656 [26]; *The Czech Republic v European Media Ventures SA* [2007] EWHC 2851 [15]; (Comm); and *R v Asfaw* [2008] UKHL 31, speech of Lord Mance [125]-[126].

[18] Higgins (n 11) 123.

[19] See *Donegal International Ltd v Zambia* [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep 397 [113], concerning a memorandum of understanding between Romania and Zambia.

[20] See *Brown v Rwanda* [2009] EWHC 770 (Admin) [30].

[21] See *Brown v Rwanda*,[2009] EWHC 770 (Admin).

[22] See *RB (Algeria) v Secretary of State for the Home Department*, [2009] UKHL 10, speech of Lord Hope [236].

### 3.4 Indirect Effect of Treaties

Treaties, even if they have not been incorporated into British law, might nonetheless exert a certain influence over the courts. This has been stated to be the case regarding the European Convention on Human Rights, which, even prior to the enactment of the Human Rights Act 1998, was said to have exerted 'a persuasive and pervasive influence on judicial decision-making . . . , affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law'.[23] As an example, in 2004, the House of Lords considered the extent of the government's obligation, under a British statute, to pay compensation to a person for wrongful conviction for a criminal offence. In the course of determining the government's obligation (ie of interpreting the statute), the House gave consideration to an analogous provision in Protocol 7 of the European Convention on Human Rights—to which the United Kingdom was, however, not a party. The House of Lords referred not only to the text of the Protocol itself, but also to the explanatory report accompanying it.[24]

Regarding treaties generally, British courts will take account of international obligations of the United Kingdom, in the sense of presuming, when interpreting legislation (or statutory instruments or orders in council), that the British Parliament did not intend to legislate in violation of Britain's international obligations.[25] It should be noted, however, that this general presumption of Parliament's legislating compatibly with the UK's international obligations is rebuttable. And it has been rebutted on several occasions.[26]

The position is somewhat more complicated regarding the grant of discretionary powers to officials by statutes. It has also been stated, in the House of Lords case, that there is a presumption that Parliament would not intend for any discretionary power to be conferred by statute that could be exercised in a manner contrary to the UK's treaty obligations—even where the treaty obligation postdated the legislation granting the discretion.[27] It should be noted, however, that in that case, restrictions on the discretion of the officials already existed in English law, prior to and independently of the treaty commitment. The House of Lords was therefore not actually relying exclusively (or even primarily) on the treaty to find the limits to the

[23] *R v Lyons* [2003] 1 AC 976, [2002] UKHL 44, [2002] 3 WLR 1562, [2002] 4 All ER 1028, speech of Lord Bingham [13]. See also *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, speech of Lord Goff, 283.

[24] *R v Secretary of State for the Home Department* [2004] UKHL 18, speech of Lord Bingham [9].

[25] See *Mortensen v Peters* (1906) 8 F 93; *Collco Dealings* Ltd *v IRC*, [1962] AC 1; *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116; *Post Office v Estuary Radio Ltd* [1968] 2 QB 740; *Post Office v Estuary Radio Ltd* [1968] 2 QB 740; *Garland v British Rail Engineering Ltd* [1983] 2 AC 751; *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, [2002] 3 WLR 1562, [2002] 4 All ER 1028; and *A (FC) v Secretary of State for the Home Department* [2005] UKHL 71.

[26] See, for example, *Mortensen v Peters* (1906) 8 F 93; and *Collco Dealings Ltd* v *IRC*, [1962] AC 1.

[27] See *R v Secretary of State for the Home Department, ex p Venables* [1997] 3 WLR 23[1998] AC 407, speech of Lord Bingham, 499.

discretion. In this connection, it should be noted that, in a previous House of Lords case, one judge 'unhesitatingly and unreservedly' rejected the idea that an unincorporated treaty could restrict the scope of discretionary powers that had been granted by statute after the ratification of the treaty. Such a conclusion, it was asserted, would amount to 'imputing to Parliament an intention to import the [treaty] into domestic law by the back door, when it has quite clearly refrained from doing so by the front door'.[28] This was so even though the treaty in question predated the legislation (and therefore might be thought to have been taken account of by the legislature).

Regarding the European Convention on Human Rights specifically, British courts are now under a statutory obligation, pursuant to the Human Rights Act 1998, to interpret legislation, '[s]o far as it is possible to do so', in a manner compatible with the European Convention on Human Rights.[29] If it should not prove 'possible' for courts to interpret legislation compatibly with the Convention, then the courts must enforce British law rather than European Convention law. When that occurs, the courts will issue a declaration of incompatibility, which will activate a sort of fast-track procedure for the alteration of the legislation by the Parliament, so as to bring British law into line with European Convention law.[30] As of June 2009, 17 of these declarations had been issued in final form.

For the sake of completeness, it should be noted that even non-binding international acts, such as model rules, can exert some impact on British courts, if only marginally. Such international instruments have been employed to supplement or reinforce other support for judgments reached. They have not, however, been applied entirely on their own as sole authority.[31]

## 4. Customary International Law

### 4.1 Domestic Incorporation

Customary international law appears to be, in principle, automatically incorporated into domestic law. The leading authority in English law is the Court of Appeal case, *Trendtex Trading Corp v Central Bank of Nigeria*,[32] in which one judge on the Court of Appeal stated:

> Seeing that the rules of international law have changed—and do change—and that the courts have given effect to the changes without any Act of Parliament, it follows . . .

[28] *R v Secretary of State for the Home Department, ex p Brind* [1992] 2 WLR 588, [1991] 1 AC 696, speech of Lord Donaldson, 718.

[29] Human Rights Act 1998, s 3.

[30] Human Rights Act 1998, s 4.

[31] See, for example, *Napier v Scottish Ministers* [2005] 1 SC 229, [50]; *R (R) v Durham Constabulary* [2005] UKHL 21; [2005] 1 WLR 1184; [2005] 2 All ER 369; [2005], speech of Baroness Hale, [25]–[26], [28].

[32] [1977] QB 529, [1977] 2 WLR 356, [1977] 1 All ER 881.

inexorably that the rules of international law, as existing from time to time, do form part of our English law.[33]

The issue was and is of considerable importance because it potentially provides a means by which lower courts can depart from established precedents. For example, an existing precedent would normally require a lower court to decide similar subsequent cases in the same manner. But if a relevant norm of customary international law, requiring a different outcome, emerged *after* the laying down of that precedent, then a lower court would be free to follow the international law rule rather than the precedent.

Some caution is advisable on this point, however. For one thing, in the *Trendtex* case, it should be noted that only one of the three judges (Lord Denning) made the automatic incorporation of customary international law the basis of his decision in the case. One other judge (Stephenson LJ) agreed with the result in the case, but based his decision on other grounds. It should also be borne in mind that the *Trendtex* judgment came from the Court of Appeal and not from the highest court in England, which was (at the relevant time) the Judicial Committee of the House of Lords. In a later House of Lords judgment, Lord Wilberforce said, of Lord Denning's judgment in *Trendtex*, that 'it is perhaps right to avoid commitment to more of the admired judgment of Lord Denning MR [in the *Trendtex* case] than is necessary'.[34] This remark would leave scope for concluding that, although the result in *Trendtex* was correct, the pronouncement in favour of automatic incorporation of customary international law might not be.

Moreover, it is clear that the doctrine of automatic incorporation of customary international law into English law falls short of being wholly comprehensive. In the House of Lords case of *R v Jones*[35] it was held that customary international law cannot have the effect of creating criminal offences in English law. That can only be done by Parliament. In the course of his judgment, one of the lords commented, concerning the general principle of automatic incorporation of customary law:

I would for my part hesitate, at any rate without much fuller argument, to accept this proposition in quite the unqualified terms in which it has often been stated. There seems to be truth in Brierly's contention ('International Law in England' (1935) 51 LQR 24, 31) . . . that international law is not a part, but is one of the sources, of English law.[36]

Further caution arises from the following statement from the Court of Appeal in 2009:

[T]he . . . proposition that the customary rule may be sued on as a cause of action in the English courts is perhaps not so clear cut. It would of course have to be shown that the rule

[33] Lord Denning, 554. For further authority to this effect, see *The Campaign for Nuclear Disarmament v The Prime Minister of the United Kingdom* [2002] EWHC 2777 (Admin); [2003] ACD 36 [23]; and *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1.

[34] *I Congreso del Partido* [1983] 1 AC 244, [1981] 3 WLR 328, [1981] 2 All ER 1064, speech of Lord Wilberforce, 261–2.

[35] [2007] 1 AC 136, [2006] 2 WLR 772, [2006] 2 All ER 741.

[36] Ibid speech of Lord Bingham, [11]

did not conflict with any provision of English domestic law . . . . I apprehend the rule would also have to possess the status of jus cogens erga omnes (a peremptory norm binding on all States).'[37]

It has also been stated, cautiously, that '[t]he issue of the incorporation of customary international law into domestic law is not susceptible to a simple or general answer'.[38]

The principle of automatic incorporation of customary law appeared later in Scotland than in England, but in rather clearer fashion.[39] It would seem reasonable to surmise, though authority is lacking, that this proposition would be subject to the same restriction as in England concerning criminal law, ie that customary international law could not have the effect of creating new criminal offences in Scots law.

## 4.2 Judicial Application of Customary International Law

In *Trendtex Trading Corp v Central Bank of Nigeria*,[40] the customary law rule in question was that of restrictive state immunity. British courts have also recognized torture as a violation of a *jus cogens* norm under public international law, with the implication that the prohibition against torture is a rule of domestic common law (even if it had not been such already).[41] The *Trendtex* case, however, would appear to be the only example of customary international law actually bringing about a *change* in pre-existing domestic common law (as opposed to merely reinforcing it).

Concerning the manner in which the contents of customary international law norms are discerned, there is, as yet, no evidence of judicial deference to the executive or legislature. It is entirely possible, however, that a high degree of deference might be shown, were an appropriate case to arise.

In Scotland, courts have dealt more squarely with the matter—or at least with certain aspects of it—and have ruled that questions of the content of customary international law are for the judge and not the jury. Consequently, international law is determined by consideration of the pleading and arguments of the lawyers in the same manner as domestic law; and it is not appropriate for the parties to attempt to prove the contents of customary international law by way of expert testimony, as would be the case if customary international law were regarded as a foreign legal system.[42]

[37] *R (Faisal Attiyah Nassar Al-Saadoon, Khalaf Hussain Mufdhi) v The Secretary of State for Defence* [2009] EWCA Civ 7, [59].

[38] *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910, [40].

[39] See *Lord Advocate's Reference (No 1 of 2000)* 2001 JC 143, 152, 2001 SLT 507, (stating that '[a] rule of customary international law is a rule of Scots law').

[40] N 32.

[41] See *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [1999] 2 WLR 827, [2000] 1 AC 147, Lord Browne Wilkinson, 198; Lord Hope, 244–5, 247; Lord Hutton, 261; and Lord Millett, 275; *R (Binyan Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin), [170]-[176]; and *A (FC) v Secretary of State for the Home Department* [2005] UKHL 71, speech of Lord Bingham, [33].

[42] See *Lord Advocate's Reference (No 1 of 2000)* 2001 JC 143, 2001 SLT 507, [21]-[27].

## 5. Hierarchy

So far as presently determined, norms of customary international law rank equally with other norms of British common law. This means that, in the event of a clash between them, the more recent in time prevails. It should be appreciated, though, that norms of common law and of customary international law are both capable of being overridden by statute.

Treaties that are incorporated by statute into domestic law thereby become equivalent to other statutes. If a statutory rule of treaty origin conflicts with a statute of purely domestic law origin, then general principles of statutory construction provide that whichever is the later in time prevails. It is the task of the courts to determine whether or not such a conflict exists.

If an unincorporated treaty conflicts with a statute or common law, then the domestic law will prevail.

British courts also have held that binding resolutions of the UN Security Council, adopted under Chapter VII of the UN Charter, prevail over Britain's obligations under the European Convention on Human Rights. This is fundamentally a question of the hierarchy of different norms of international law vis-à-vis one another. It does, however, have repercussions in British domestic law, in that it prevents a litigant from invoking the norms of the European Convention when these have been 'trumped' or overridden by the UN Security Council.[43]

## 6. Jurisdiction

British courts exercise universal jurisdiction in a number of cases. The most long-standing of these is piracy, which has, in effect, been treated as qualifying for universal jurisdiction since the Middle Ages.[44] Other, and more recent, exercises of universal jurisdiction have been provided for by statutes that were enacted pursuant to treaty obligations into which the United Kingdom had entered. These exercises of universal jurisdiction cover a variety of matters of international concern: grave violations of the Geneva Conventions;[45] hostage-taking;[46] attacks against protected persons and sites (such as foreign government officials, diplomats or diplomatic premises);[47] torture;[48] and attacks against UN personnel.[49] In addition, universal jurisdiction has been instituted regarding a number of terrorist and terrorist-related

[43] See *R (Al-Jedda) v Secretary of State for Defence House of Lords* [2007] UKHL 58, [2008] 1 AC 332, [2008] 2 WLR 31, [2008] 3 All ER 28, [2008] HRLR 13, [2008] UKHRR 244.
[44] See *Re Piracy Jure Gentium* [1934] AC 586.
[45] Geneva Conventions Act 1957.
[46] Taking of Hostages Act 1982.
[47] Internationally Protected Persons Act 1978.
[48] Criminal Justice Act 1988, s 134.
[49] United Nations Personnel Act 1997.

activities: airline hijacking;[50] the hijacking of and violence against ships at sea (including violence against fixed platforms at sea);[51] violence at airports;[52] terrorist bombings;[53] financial support for terrorism (including money-laundering);[54] and the encouragement or dissemination of information regarding terrorist acts, membership of proscribed terrorist organizations, training for terrorist acts, plus the making or possession of radioactive devices.[55]

Interestingly, universal jurisdiction has not been invoked in British law against genocide or crimes against humanity. Genocide was criminalized in 1969,[56] and crimes against humanity in 2001.[57] But the relevant legislation only applies to acts that are committed in UK territory or, if abroad, by a UK national.

The British courts will entertain civil tort actions for wrongs committed abroad, if at all, only under the general rules of private international law. There are no special provisions in this regard concerning acts that violate international law. Basically, in the case of torts, English courts apply the law of the place where the alleged tort was committed,[58] although there is also a general requirement of double actionability. This means that, in general, the tort must be actionable in England as well as in the relevant foreign jurisdiction, even if the foreign law is the basis of the cause of action.

[50] Aviation Security Act 1982.
[51] Aviation and Maritime Security Act 1990, ss 9–14.
[52] Ibid, s 1.
[53] Terrorism Act 2000, s 62.
[54] Ibid, s 63.
[55] Terrorism Act 2006, s 17.
[56] Genocide Act 1969; re-enacted in the International Criminal Court Act 2001, s 51.
[57] International Criminal Court Act 2001, s 51.
[58] Private International Law (Miscellaneous Provisions) Act 1995, s 11.

# 27

# United States

*Paul R. Dubinsky**

## 1. Introduction

Imagine a multiple-choice examination with the following question: In which of the following respects is the relationship between international law and the US legal system currently unsettled?

(1) the status of treaties in the US legal system;
(2) the status of non-treaty law in the US legal system;
(3) the method of interpreting treaties;
(4) the extent of deference accorded to international tribunals;
(5) the extent to which federal officials possess exclusive authority to determine the manner in which the country will comply with its international obligations.

Actually, a sixth choice is needed: 'All of the above'. All of these facets of the relationship between international law and the US legal system currently is the subject of dispute, and more could be added to the list. Ambivalence about international law and international institutions can be found in all corners of American society: federal and state courts, the political branches of government, universities, the media, the business community, labour unions, grassroots political movements, and elsewhere.[1] Moreover, this uncertainty and ambivalence is not confined to esoteric or marginal issues. Extremely important matters hang in the balance—questions that go to where ultimate power resides, how political communities are defined, and what the American conception of the rule of law means.

Given this state of affairs, one observing recent developments in this area is drawn to a compelling set of questions: How can there be so much uncertainty so late in the game? How can a legal system more than two centuries old be in a state of flux about its fundamental orientation toward the wider legal world? Why is this instability manifested in so many ways? This chapter seeks to shed light on some of these questions.

* The author would like to thank Gregory Fox and Olive Hyman.

[1] The academy of international law scholars in the United States is somewhat unique in that it includes a number of scholars who have spent the better part of their careers questioning whether international law is actually law or rather something else.

The task can be put in perspective by considering the following vignettes:

(1) In 2008, the executive branch negotiated a status of force agreement (SOFA) with Iraq in furtherance of efforts to wind down US military involvement in that country. The negotiations revealed a lack of consensus regarding the prerogatives of Congress and the President with respect to this type of international agreement—whether a congressional–executive agreement, rather than a sole-executive agreement was needed—even though the United States previously had entered into many SOFAs with other countries. For months, a high profile debate about separation of powers played itself out in the context of the 2008 elections, in the pages of leading law journals, and on the editorial pages of newspapers. In this debate, the central separation-of-powers issue in the treaty formation context was not definitely resolved.

(2) In a departure from past practice, nominees to the nation's courts today face questions from the Senate Judiciary Committee regarding the status of international and foreign law within the US legal system. This questioning in the context of televised confirmation hearings has a ritual-like dynamic: Certain senators raise the dark spectre of illegitimate foreign influence on American courts. Nominees put some distance between themselves and prior opinions, statements, or extrajudicial writings that show any affinity for comparative law or any enthusiasm for international judicial institutions. The proper place of international and foreign law within the US legal system is never discussed in depth during the hearings or afterwards. The nominee is confirmed.

(3) In connection with a clear and repeated treaty violation by state law enforcement officials, President Bush in 2005 asserted the constitutional authority to direct that the United States comply with its treaty obligations by having state courts review the convictions and sentences of foreign nationals possibly harmed by the violation.[2] In a 2008 case, the US Supreme Court disagreed. It concluded that the President lacked such authority,[3] even though the remedy chosen by the President was responsive to a judgment of the International Court of Justice. Further, the Court said that the federal judiciary also lacked power to order state courts to impose a specific measure, suppressing evidence, as remedy for a treaty violation if the right-holder had failed to comply with a state court system's procedural rules.[4] In other words, two key aspects of the country's foreign policy turn on compliance with state rather than federal law: the ability of foreign

[2] See Memorandum from the President to the Attorney General (29 February 2005) (determining that the US will comply with a judgment of the ICJ by 'having State courts give effect to the decision in accordance with general principles of comity'): available at <http://www.asil.org/avena-memo-050308.cfm>.

[3] See *Medellín v Texas*, 552 US 491, 525 (2008) ('The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them.').

[4] See *Sanchez-Llamas v Oregon*, 548 US 331 (2006). For another important instance in which a state court's procedural rules had a profound impact on the enforcement of treaty rights by foreign nationals in the US, see ICSID Case No Arb (AF)/98/3, *Loewen Group and Raymond Loewen v USA* (26 June 2003) (exorbitant appellate bond required by state law).

nationals to assert their treaty rights in the US legal system and the ability of the President to choose the manner in which the nation will comply with a treaty and with a judgment of an international tribunal.

(4) Although publication of the Restatement (Third) of the Foreign Relations Law of the United States occurred more than two decades ago and although parts of that document are substantially dated, little discussion has taken place about undertaking a Fourth Restatement. Disagreement among scholars about major issues is so large that even the initial step of selecting reporters for the project likely would fail.

(5) Over the last 25 years, an increasing stream of work about international law and its relationship to American constitutionalism has appeared in the country's most influential general law journals rather than primarily, as typical in the past, in specialized international law journals. An important segment of this work advances expansive and highly controversial theses articulated in a manner likely to appeal to a general rather than a specialized audience.

(6) In recent presidential administrations, leading international law scholars have served in high-level positions within the executive branch.[5] Some of these scholars have become lightning rods for ideological criticism to a far greater extent than was typical in the past.[6]

(7) The judicial response to a recent request for rehearing en banc in a case concerning the prolonged detention of aliens at an American base at Guantanamo Bay, Cuba was conveyed in a set of splintered and lengthy opinions by judges of the DC Circuit Court of Appeals,[7] even though it is highly unusual for a court of appeals to write so extensively in declining to rehear a case already decided by a three-judge panel. Some of those opinions include lengthy repudiations of well-established precedent regarding the place of international law within the US legal system.[8]

(8) In the past decade, American scholars have advanced a large number of proposals in favour of substantially departing from the well-established aspects of American practice regarding international law. These proposals—denying customary international law the status of federal common law and the capacity to trump state law,[9] providing a new foundation for the United States to renounce preexist-

[5] The list includes Curtis Bradley, Sarah Cleveland, Jack Goldsmith, Harold Hongju Koh, Harold Maier, Anne-Marie Slaughter, Paul Stephan, Edward Swaine, and John Yu.

[6] For example, in 2009 the confirmation of Harold Hongju Koh, dean of Yale Law School and a leading scholar of international law, to become Legal Advisor of the State Department, was opposed by 35 senators, even though in the past sub-cabinet nominations of this type were confirmed routinely. Part of the opposition to Dean Koh's nomination was based on his supposedly 'radical transnationalist views'. See, eg, Ed Whelan, 'Review of Transcript of Koh Confirmation Hearings', Part I, *National Review Online* (30 April 2009) available at <http://www.nationalreview.com/bench-memos/50228/review-koh-confirmation-hearing-transcript-mdash-part-1/ed-whelan>, last visited May 8, 2011.

[7] See *Al-Bihani v Obama*, 619 F3d 1 (DC Cir 2010).

[8] Ibid. at 9-53 (Kavanaugh J concurring).

[9] See Curtis A. Bradley and Jack L. Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position', 110 Harv L Rev 815 (1997). Professors Bradley and Goldsmith maintain that the subject of their critique is not a traditional understanding but rather a consensus that is fairly recent.

ing CIL obligations,[10] doing away with customary international law altogether,[11] treating the treaty-creation process set out in Article II of the Constitution as vestigial[12]—were published by well-established law journals and academic presses.

Perhaps none of these developments individually is symptomatic of a system in flux or disarray. Taken together, however, these vignettes show that the relationship between the domestic US legal system and the wider legal world is very much unsettled. For centuries the United States has used treaties, custom, and other sources of international law initially to legitimate its entry into the community of nations[13] and later as a potentially useful tool in furthering US interests and promoting its core values in the global arena.[14] Throughout much of the era of American hegemony, presidents regarded the capacity to shape international law as part of that hegemony. Thus, the United States played a critical role in creating nearly every significant international institution in the world today. In constructing an intellectual and ideological case against its adversaries, the US repeatedly turned to concepts such as the global rule of law, the community of 'civilized nations', and the imperative of protecting universal human rights. In light of the considerable success that the US has enjoyed in furthering its interests in these ways over a substantial period of time, one might think that Americans would be hesitant to depart from a well-established legal tradition on these issues. But one would be wrong. The place of international law within the US legal system is the subject of more debate today than it has been in a long time.

This chapter attempts to assess where the US legal system stands today on a range of issues at the interface of international and domestic law. Examination of these issues reveals high-decibel ideological debate, numerous appeals to first principles and the original intent of those who drafted and ratified the Constitution, intense disagreement over precedent and tradition; and disputes about both substance and method.

This chapter begins with an overview of the key provisions of the US Constitution central to any inquiry into the relationship between international law and the

[10] See Curtis A. Bradley and Mitu Gulati, 'Withdrawing from International Custom', 120 Yale LJ 202 (2010).

[11] See J. Patrick Kelly, 'The Twilight of Customary International Law', 40 Va J Int'l L 449 (2000) (arguing that CIL 'should be eliminated as a source of international legal norms' and replaced by 'consensual processes').

[12] See Oona A. Hathaway, 'Treaties End: The Past, Present, and Future of International Lawmaking in the United States', 117 Yale LJ 1238, 1240–1 (2008)(arguing that 'nearly everything that is done through the Treaty Clause can and should be done through congressional-executive agreements approved by both houses of Congress' and that the reason for the Treaty Clause of the Constitution lies in a 'history that should be left behind').

[13] See generally Mark Weston Janis, *America and the Law of Nations 1776-1939*, pp 24-48 (Oxford: OUP, 2010).

[14] See generally Michael P. Scharf and Paul R. Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Advisor* (Cambridge: CUP, 2010) (discussing national interests and values such as democratic governance, free markets and competition, the rule of law, and respect for human rights).

US legal system. The importance of these provisions cannot be overstated. The United States has long been a constitution-venerating society, and much of the subject matter of this chapter has a substantial constitutional overlay. From this brief examination of the constitutional text, the chapter then moves on to present what might be called the 'traditional understanding' as to the interaction between international law and the domestic legal system. This understanding includes a considerable judicial gloss on the constitutional provisions previously considered. The chapter then turns to contemporary revisionist challenges to the traditional understanding. The conclusion offers some thoughts as to why today, more than two centuries into the process of wrestling with the questions raised at the outset of this chapter, the United States finds itself on unsteady ground with respect to the status of international law within the domestic legal system.

## 1.1 International Law and the US Constitution

Those who wrote and ratified the US Constitution in the late eighteenth century wanted to ensure that a new and relatively weak nation would be able to avail itself of certain benefits of international law, especially secure borders, freedom of navigation on the seas, and the right of neutral countries to trade freely during periods of belligerency among European powers. The widely held view among Americans of this founding generation was that compliance with international law was in the country's essential interests.

In light of this widely shared concern with compliance, it is frustrating (at least to the modern mindset) that so many seemingly crucial questions are not addressed expressly in the Constitution. No provision says whether the US legal system is monist or dualist. No provision defines a hierarchy among treaties and federal statutes. Nowhere does the document tell us the relationship between international law and the Constitution itself.

The Constitution does deal with international law in a few places. It makes reference to treaties in two places and to the 'Law of Nations' in a third. The first of these references addresses the role of the executive branch in negotiating treaties and the prerogatives of the Senate in approving them. The second reference to treaties delineates their status within the hierarchy of federal and state legal norms. The reference to the 'Law of Nations' is in a provision conferring power on Congress to define and punish crimes on the high seas and 'Offences against the Law of Nations'.[15]

In addition to its direct references to international law, the Constitution alludes to the creation and implementation of international law within the US legal system. It does so in addressing the duties and powers of the three branches of the federal government in Articles I, II, and III. Article I confers authority on Congress to regulate commerce with foreign nations and to prescribe 'Rules concerning

[15] US Const, Article I, s 8, cl 10 (conferring power to 'define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations').

Captures on Land and Water'.[16] Other activities of Congress (eg, borrowing money, imposing taxes, and declaring war) routinely involve interpreting international law and sometimes contributing to its formation by acts or omissions that are either consistent with international custom or contrary to it. These specific delegations of power are supplemented by the 'Necessary and Proper' clause.[17] That provision confers broad authority on Congress to enact legislation reasonably related to specific delegations of power.

Article II enumerates certain powers of the President with regard to relations with foreign countries. These include nominating and appointing US ambassadors, public ministers and consuls,[18] and receiving the ambassadors and public ministers of other countries.[19] Alongside these specific grants of power, Article II contains references that are less specific. That article makes reference to 'the executive Power' and says that the President is the 'Commander in Chief' of the country's military forces,[20] without addressing the extent to which the commander-in-chief duties must be carried out in a manner consistent with international law. The President is to 'take Care that the Laws be faithfully executed',[21] but this provision does not indicate whether international law is among the 'Laws' that must be faithfully executed. The President proposes legislation to Congress,[22] a function that includes laws intended to implement treaties and other sources of international obligation. Finally, the President negotiates treaties, determines whether and when to submit them to the Senate or to the full Congress for approval, interprets treaties, decides whether to ratify them, and determines how the country should comply with its international obligations.[23]

Article III contains provisions that address the responsibilities of courts with respect to international law. The jurisdiction of the federal judiciary extends to cases arising under treaties, cases involving foreign ambassadors,[24] and controversies in which foreign states or foreign citizens are parties.[25] The federal judicial power also extends to other categories of disputes for which international law often is relevant: cases arising under federal law and cases involving admiralty and maritime jurisdiction. Although there is some clarity to these jurisdictional provisions, they also raise many questions, both practical and theoretical: What does it mean for a case to arise under a treaty? Does a ratified treaty automatically supply a rule of law within the US legal system? What is the relationship between the judicial

[16] Ibid.

[17] US Const, Article I, s 8, cl 18 (conferring power to 'make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof').

[18] US Const, Article II, s 2.

[19] US Const, Article II, s 3.

[20] US Const, Article II, s 2.

[21] Ibid.

[22] Ibid. (the President may 'recommend such Measures as he shall judge necessary and expedient').

[23] Many treaties, however, require an appropriation of money by Congress in order to be carried out.

[24] The text refers to cases 'affecting Ambassadors' or 'other public Ministers and Consuls.' US Const, Article III, s 2.

[25] US Const, Article III, s 2.

branch's interpretation of a treaty and the interpretation arrived at by the other branches?

Finally, the Constitution addresses the relationship between state authorities and international law. In some places, it appears to do so with precision. Under Article VI's Supremacy clause, treaties constitute the 'supreme Law of the Land', capable of trumping conflicting state statutes, state constitutions, and state common law,[26] but does supremacy extend to procedural law? That is, what is the result if a state rule of procedural law, as opposed to one of substantive law, stands in the way of enforcing a treaty-based right? Article I bars the political authorities of state governments from entering into binding agreements with foreign countries,[27] but elsewhere the Constitution is less clear about what constraints apply to state courts with respect to treaties. Typically such courts have their own conflict-of-law rules,[28] enjoy concurrent jurisdiction with federal courts in cases arising under treaties, and even their own methods of interpretation. Must state courts follow the treaty interpretations of lower federal courts or only of the US Supreme Court?

Notwithstanding the many areas of ambiguity noted above, the first important point to make is that at an early juncture the American legal system arrived at answers to many of these questions. In fact it did better than that; it generated something close to a consensus as to the process and principles to be used in resolving the Constitution's potentially divisive ambiguities relating to international law. Starting with the British example, pre-constitutional American history, precedent-setting bridges crossed in the early years of the Republic, and widely shared views among scholars, Americans gradually came up with a framework for how important matters implicating international law should be decided and who should decide them. Over time there developed, in a phrase, a 'traditional understanding'. The rest of this section and sections 2 and 3 present the outlines of that traditional understanding in three main areas: comity, treaties, and customary international law.

## 1.2 Comity and the *Charming Betsy* Canon

One pillar of the traditional understanding relates to comity, a concept with many manifestations: caution in asserting jurisdiction extraterritorially, readiness to provide judicial assistance to the courts of other countries (eg service of process, gathering evidence), a predisposition to extend preclusive effects to the final judgments of foreign courts, a readiness to consult foreign or international law when these sources shed light on a case being litigated in a US court.

[26] US Const, Article VI, s 2: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.'

[27] US Const, Article I, s 10 ('No State shall enter into any Treaty, Alliance, or Confederation').

[28] See, eg, *Estate of Wright*, 637 A2d 106 (Maine 1994) (applying renvoi to a bilateral treaty between the US and Switzerland). Most states in the US have abandoned renvoi.

A legal system's inclination toward comity is repeatedly tested in those instances in which international law and domestic law are in tension with one another. The tension can be direct and irreconcilable, such as when a statute says 'do X' and a treaty says 'do not do X'. More often, the tension is subtle or inadvertent and susceptible to some kind of reconciliation among different sources of legal norms. One of the remarkable aspects of American law is that the Constitution does not provide explicit guidance as to what to do in either of these two situations. Notwithstanding the obvious importance of the issue and the likelihood that such tension will surface in politically sensitive circumstances, the tools for determining what to do reside in one of those areas of constitutional ambiguity noted in the previous section of this chapter.

As a result of judicially created doctrines originally dating from the nineteenth century and refined since then, for a long stretch of American legal history there has been a stable consensus as to how to resolve this set of problems. In cases of direct conflict between international law and a federal statute, the later-in-time rule determines which applies. If the statute was enacted after the treaty entered into force, the statute will be regarded as impliedly repealing those provisions of the treaty that are inconsistent with the statute, and vice versa.[29] In cases of tension that fall short of a head-on collision, courts apply the *Charming Betsy* principle, which instructs them to construe US statutes and international law as consistent with one another.[30]

Like a number of opinions of the Marshall court addressing fundamental power relationships,[31] the *Charming Betsy* became seminal. Hesitant to precipitate a row between the United States and other countries, lower courts repeatedly cited the case in going out of their way to conclude that a long list of statutes containing words like 'any' and 'every' did not actually mean any and every. Thus, the antitrust laws did not prohibit conspiracies in restraint of trade without substantial nexus to the United States.[32] Federal anti-discrimination laws did not confer a cause of

[29] See Restatement (Third) of the Foreign Relations Law of the United States s 115. This rule is judicially created, see *Whitney v Robertson*, 124 US 190 (1888).

[30] The pedigree for this interpretive approach dates to Chief Justice John Marshall's opinion in *Murray v Schooner Charming Betsy,* 6 US (2 Cranch) 64, a case from 1804 involving, on the one hand, a statute authorizing the recapture of American ships wrongly seized by European powers and, on the other hand, international custom barring interference with free navigation on the high seas. Marshall articulated the following canon of statutory construction: 'An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.' The result in that case was that the capture of a French vessel pursuant to the statute was illegal because in using the word 'any,' Congress did not really mean any. The implied intent of Congress was to authorize the recapture of 'any' ship, provided the act of recapture was consistent with the law of nations.

[31] See, eg, *Marbury v Madison,* 5 US (1 Cranch) 137 (1803) (establishing judicial review of federal legislation); *Fletcher v Peck,* 10 US 87 (1810) (establishing federal judicial review of state legislation); *McCulloch v Maryland*, 17 US 316 (1819) (establishing federal supremacy in matters of taxation); *Gibbons v Ogden*, 22 US 1 (1824) (broadly interpreting the Necessary and Proper clause).

[32] See, eg, *United States v Aluminum Co. of America*, 148 F2d 416, 443 (1945) ('[I]t is quite true that we are not to read general words, such as those in [the Sherman Act of 1890] without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the Conflict of Laws.')

action against foreign-based employers protected by FCN treaties.[33] A statute conferring rights on 'all' seaman did not confer such rights on foreign nationals injured outside US waters aboard a foreign flag ship.[34]

As doctrine, the *Charming Betsy* became an important rule of statutory construction telling courts what to do in this narrow set of circumstances. More generally, the *Charming Betsy* came to stand for a broader principle, that US courts should be predisposed toward comity. Thus judicial citations to the *Charming Betsy* turn up not only in the context of statutory interpretation but also in other situations in which the issue is whether the US legal system will take into account the effect that an action by domestic actors will have on other countries or on international institutions. The principle in effect puts in place a judicial tripwire in those instances in which inadvertence, negligence, or momentary passion might cause the United States to fail to live up to its international commitments. The principle does not make such failure impossible, but it does make it less likely.

After being applied repeatedly and with respect to many different statutes over a 200-year period, the *Charming Betsy* seemed not only an especially secure principle of American law but also a landmark by which one gets one's bearings on a host of issues pertaining to the US legal system's relationship with international law.

## 2. Treaties and Other International Agreements

As with comity, in the realm of treaty law there is much about which the Constitution silent, thus creating a need for judicial gloss. Three questions are especially important: (1) Under what circumstances do treaties have the status of law within the US legal system, to be applied as rules of decision by courts? (2) How are courts to interpret treaties? and (3) What is the position of state law and state authorities with respect to treaties?

The first question is not addressed explicitly in the text of the Constitution.[35] As with the *Charming Betsy* issue, the traditional understanding that emerged in the nineteenth century with respect to treaty incorporation supplied predictability and consensus where the framers had bequeathed a text with much ambiguity. As with comity, the basis for the traditional understanding with respect to treaties was a set of implicit understandings attributed to the founding generation and a pattern of post-1789 behaviour by the political branches. Thus in *Foster v Neilsen* (1829),[36] Justice Marshall embraced for the United States a modified version of British

[33] See, eg, *Speiss v C. Itoh & Co. (America)*, 643 F2d 353 (5th Cir 1981), vacated on other grounds 457 US 1128 (1982) (interpreting the word 'any' in Title VII of the Civil Rights Act of 1964 in light of the employer choice provision of the FCN Treaty between Japan and the US and permitting a hiring policy giving preference to Japanese nationals).

[34] See *Lauritzen v Larsen*, 345 US 571 (1958) (interpreting Jones Act in light of principles of private international law).

[35] The Supremacy Clause of Article VI makes plain that treaties are hierarchically superior to state law, but that clause does not indicate where treaties stand vis-à-vis federal statutes.

[36] 27 US 253 (1829).

dualism: international agreements often require implementing legislation in order to function as rules of decision in US courts, but implementing legislation is not always necessary. If the political branches involved in treaty creation make clear by means other than implementing legislation that they intend for the treaty to be 'self-executing', then the treaty will become law within the US legal system even in the absence of such legislation. In other words, some treaties are to be regarded essentially as contracts between nations. Remedy for their breach lies with international-law processes, such as negotiation, arbitration, retorsion, and the like. Other treaties automatically become law in the US legal system, sometimes with the capacity to confer rights on non-state actors who are third parties in relation to the agreement between nation states.

The traditional understanding not only supplied an answer to an apparent anomaly in the wording of the Supremacy clause—a wording that suggests that all treaties are the supreme law of the land, even those that have not become an integral part of the US legal system—it also provided somewhat of a roadmap for determining which treaties are self-executing and which are not. To be sure, this roadmap was less than precise,[37] but over many decades, there was some degree of predictability to self-execution analysis and no groundswell of opinion that more predictability was essential. *Foster v Neilsen* and its progeny were applied repeatedly to all sorts of treaties.[38]

Courts over time found evidence of self-executing intent in many places, not solely in the treaty text. Case law supported the view that the 'wall' that had to be surmounted for treaty norms to become part of domestic law was not terribly high. The treaty did not need to say in so many words that it was self-executing. Congressional hearings and committee reports did not need to contain an express statement to that effect. Support for self-execution could be found in the treaty's overarching purpose, its negotiating context, or its similarity to other treaties that already had been found to be self-executing. Thus, over the course of the twentieth century, there was a good deal of difference between American practice and British dualism.

As for treaty interpretation, traditionally American courts employed a contract analogy. Judicial opinions of every era are replete with references to treaties being 'contracts among nations'.[39] There was interpretive significance to this metaphor. Interpretation of contracts is driven by the intent of the parties—*both* parties. In the realm of private law relationships, parties enter into contracts in order to advance their own interests. The role of courts in adjudicating contract disputes is to determine which interests were the basis of a mutual bargain and then to fashion

[37] See Carlos Vasquez, 'The Four Doctrines of Self-Executing Treaties', 89 Am J Int'l L 695 (1995).

[38] See generally *Medellín v Texas*, 552 US 491, appendix A (2008) (Breyer J dissenting) (cataloguing the wide variety of treaties found by US courts to be self-executing, in whole or in part).

[39] See, eg, *US v Stuart*, 489 US 353, 368 (1989) (referring to 'hornbook contract law' and the Restatement (Second) of Contracts in resolving an issue of treaty interpretation); *Sullivan v Kidd*, 254 US 433, 439 (1921) ('Writers of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals').

remedies designed to protect the reasonable expectations that went into the contractual relationship.

In an era in which most treaties were bilateral, perhaps the contract analogy seemed natural. Even though treaties are public law agreements between sovereign entities, this species of agreement also embodies mutual expectations, and the judicial protection of those expectations (either on behalf of the states themselves or third parties) works best if those expectations are communicated according to established formalities and conventions. Under the traditional approach to treaty interpretation, US courts do not confine their interpretive inquiry to the goals sought by just one treaty party. They consult statements by US negotiators and the language contained in US implementing legislation, but they also consider the entire treaty *travaux*. They consider the overall purpose of the treaty and, in the case of treaty texts in two or more authoritative languages, they are ready to consider the non-English version.

Third, the traditional view is that state law-making processes are severely marginalized by federal interests in foreign policy. State statutes are readily trumped by express federal action and susceptible to preemption even if Congress has not actually spoken to an issue. This feature of the traditional understanding is grounded in several explicit constitutional provisions—Article I's bar on states entering into treaties of their own,[40] Article I's grant to Congress of authority to regulate commerce with foreign nations,[41] and provisions addressing activities that in practice are most likely to implicate foreign policy concerns.[42]

Above and beyond these constitutional provisions expressly subordinating state authority to federal authority in foreign affairs, the traditional position draws upon historical example and accumulated judicial gloss. The difficulty of conducting an effective national foreign policy under the Articles of Confederation is often cited as foundation for an overarching principle that state-created impediments to uniformity and clarity in foreign policy must be swept aside in favour of federal law or federal policy-making. Thus action by state governments is preempted by federal law or policy if the former *might* frustrate attainment of federal goals. Under the traditional view, the preemptive effect of such federal power can extend to the activities of state courts.

In short, under the traditional view the federalism-based prerogatives of the component states are at their low point when international agreements or foreign policy is involved. In that arena, the law-making authority of the federal government is at its high point[43] and may have sufficient force to

[40] US Const, Article I, s 10 ('No State shall enter into any Treaty, Alliance, or Confederation').

[41] US Const, Article I, s 8, cl 3.

[42] US Const, Article I , s 8, cl 10 (Congressional power to 'define and punish Piracies and Felonies committed on the high Seas and Offenses against the Law of Nations'); art. II, s.2, cl.2 (executive power to appoint ambassadors); Article II, s 3 (executive power to receive ambassadors and other public ministers).

[43] See *Missouri v Holland*, 252 US 416 (1920) (suggesting that federal authority to regulate migratory birds is greater when acting by treaty than when acting through legislation under the Interstate Commerce Clause).

sweep aside state law even in areas traditionally reserved to state governance in the domestic realm.[44]

## 3. Customary International Law

American courts have interpreted and applied customary international law (CIL) since the beginning of the Republic. They have done so in many contexts, and they have done so in the absence of federal statutes expressly incorporating customary international law into the US legal system.

According to the traditional understanding, the relationship between customary international law and the US legal system is close to being monist.[45] CIL is a kind of common law, and like other kinds of common law, it has the status of law even in the absence of an affirmative act by the legislative or executive branches. This is the understanding famously articulated by the Supreme Court in 1900 in a case concerning the law of prize as applied to the seizure of civilian fishing boats off the coast of Cuba during the Spanish–American War. In the *Paquete Habana*, the Court laid out a formulation that remains the most widely cited encapsulation of the traditional understanding of CIL:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.[46]

For many decades, American courts have been receptive to CIL in this manner, even though for much of this time the precise basis for regarding CIL as 'part of our law' was not completely fleshed out. The Constitution, after all, contains only one express reference to the 'Law of Nations',[47] and that provision addresses itself to domestication through legislation. Power is conferred on Congress 'to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations'.

Given that the Constitution says little about CIL, other than its few references to piracy and potential criminal violations of the Law of Nations, what is the status of the larger body of CIL within the US legal system? The traditional answer is that rules of CIL presumptively are sources of law within the United States. They are

[44] See, eg, *Zschernig v Miller*, 389 US 429 (2003) (invalidating provision in a state intestacy statute with adverse impact on certain foreign nationals).

[45] The practical utility of CIL in US courts depends on whether the CIL in question creates private rights, whether a litigant has standing to assert a claim or defence grounded in CIL, whether a CIL-based claim is barred by immunity or similar doctrines, and by a long list of procedural-law prerequisites. The legal systems of some other countries are more monist than that of the United States in the sense that fewer such obstacles potentially block the practical application of CIL norms.

[46] 175 US 677, 700 (1900).

[47] US Const, Article I, s 8, cl. 10.

sources of law in the sense that state and federal courts may apply CIL (where relevant to resolving a dispute) as a rule of decision. They also are sources of law in the sense that CIL may serve as a tool of interpretation.

This monist perspective on CIL rests on the following main premises:[48] (1) The founding generation drafted a constitution, not a statute and not a learned treatise. The framers did not spell out every detail. Implicit in their work were understandings so widely shared and self-evident as not to require express reference. Among these understandings was the existence of a body of international legal norms and principles such as the sovereignty of nation states,[49] the immunity accorded to states and certain state officials, and the limits of prescriptive jurisdiction.[50] (2) The starting point for CIL's status in the US legal system was CIL's relationship to English law in the eighteenth century, a relationship that was monist. (3) The founding generation's use of the phrase 'Law of Nations', must be understood in the context of a pre-positivist understanding of law[51] and a commonly held belief that certain principles of justice were an integral part of any civilized legal system.[52] To the framers the universe of legal rules and ideas was not clearly separated between those that were home grown and those derived from the practices of other countries. (4) Successive generations of Americans have embraced this monist conception of CIL.

This set of explanations, some more prominent than others at various points in time, coalesced into the traditional American view of CIL. This account was traditional because towering figures of the early republic were associated with it; it was grounded in English practice; it was applied by courts over a long period of time; influential legal scholars propounded it; no significant criticism was voiced against it (until quite recently); and it was incorporated into influential codifications of American Law.[53]

[48] In the scholarly literature one finds nuances and variations on each of the arguments that follow. These variations, which do not relate directly to the main points of this chapter, need not distract us here.

[49] See, eg, *Chisholm v Georgia*, 2 US (2 Dall) 419, 423 (1793) (analyzing a question of constitutional law, amenability of a state to suit in federal court, with reference to 'the law of nations, on the subject of suing sovereigns').

[50] Cf *The Antelope*, 22 US 66, 123 (1825), an opinion by Chief Justice John Marshall stating, without any apparent need for supporting citation, that '[t]he Courts of no country execute the penal laws of another'.

[51] See Edwin D. Dickinson, 'Changing Concepts and the Doctrine of Incorporation', 26 Am J Int'l L 239, 253 (1932) ('In an age dominated by [ideas of reason and natural justice] nothing could have been more plausible than the conclusion that international law formed an integral part of the national law governing matters of international concern.').

[52] See, for example, Justice Joseph Story's exposition of this idea in *United States v The Schooner La Jeune Eugenie* (1822), Fed Cas No 15551, p 846 ('[E]very doctrine that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligations, may theoretically be said to exist in the law of nations; and unless it be relaxed or waived by the consent of nations, which may be evidenced by their general practice and customs, it may be enforced by a court of justice, whenever it arises in judgment.').

[53] See, eg, American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States, s 111, comment D ('Customary international law is considered to be like common law in the United States, but it is federal law').

## 4. The Contemporary Assault on the Traditional Understanding

### 4.1 Customary International Law

The traditional view of customary international law—that it enjoys something approaching a monist relationship with the American legal system, that it is a subset of federal common law, and that it trumps state law—remains the dominant view. A number of Supreme Court cases decided after the *Paquete Habana* (and many more lower court cases) are consistent with the monist/federal common law theory, and two very recent Supreme Court cases, *Sosa v Alvarez-Machain*[54] and *Samantar v Yousuf*,[55] do not depart from that theory, though there was ample room in both cases for the majorities in these cases to distance themselves from the monist/federal common law theory had they wanted to do so. The dominance of the traditional view is further supported by scholarly work written over a long period of time.[56]

Notwithstanding this pedigree, the status of CIL within the American legal system is now among the most contentious subjects, especially among international law scholars. Doubts about the traditional understanding are now surfacing in courts, state legislatures, Congress, and the executive branch of the federal government. Moreover, the proposition that American law is being influenced by custom and decision-making from abroad has provoked a negative reaction among a portion of the American public.[57]

There appear to be several triggers for the current challenge to the traditional view of CIL. First, the process of drafting and vetting the Third Restatement in the 1980s played a part. Section 114 of that document articulated a strong form of the traditional view and, in doing so, became a lightning rod for criticisms by those inclined to think that the Restatement overstated things and that the US legal system had swung too far in the direction of embracing new forms of international law too readily. Second, debate over the place of CIL within the US legal system has

[54] 542 US 692, 737–8 (2004). Justice Souter's majority opinion in *Sosa* cites s 702 of the Restatement (Third) of the Foreign Relations Law of the United States, and in so doing seems to endorse the Restatement's approach to CIL, though strictly speaking, he is looking to the Restatement on a narrower issue: what kinds of arbitrary detention violate international law.

[55] 130 S Ct 2278 (2010) (holding that high-level foreign official is not entitled to immunity from suit under the Foreign Sovereign Immunities Act but may be entitled to immunity under the common law). Presumably, the *Samantar* court's references to the 'common law' mean federal common law, which on the subject of state immunity and official immunity is informed by CIL.

[56] See, eg, Harold Hongju Koh, 'Is International Law Really State Law?' 111 Harv L Rev 1824, 1824 (1998) (characterizing the incorporation of CIL into federal common law as a 'hornbook rule'); Louis Henkin, 'International Law as Law in the United States,' 82 Mich L Rev 1555 (1984); Dickinson, 'The Law of Nations as Part of the National Law of the United States (Part I)', 101 U Pa L Rev 26 (1952).

[57] Consider, for example, the approval in November 2010 by voters in Oklahoma of a state constitutional amendment to bar judges from citing international or foreign law in their decisions. See State Question 755 (2010) amending Article 1, s 7 of the Oklahoma Constitution. 70 per cent voted in favour of the measure, which has been challenged in federal court as inconsistent with the federal constitution. Similar initiatives have been launched in Arizona, Arkansas, Indiana, Missouri, and Wyoming.

been fuelled by major changes in the nature of CIL. Third, the shortfall in democratic accountability in international law-making also has prompted new caution about monist incorporation of CIL.

In the academy, the contemporary assault was launched in earnest two decades ago. Shortly after publication of the Restatement,[58] Professor Harold Maier criticized the Restatement position on CIL and voiced misgivings about the process through which the Restatement was drafted, vetted, and finalized. Maier argued that it had never been the intent of the founding generation to incorporate 'the entire international legal regime into the hierarchy of United States law'.[59] He maintained that any act of a US court in drawing upon customary international law principles required some political authorization.[60]

In the late 1990s, scepticism regarding the automatic incorporation of CIL into the US legal system was further fuelled by scholarship arguing that the monist incorporation of customary international law was inconsistent with democratic governance; if customary international law automatically were part of US law, these scholars argued, then internationally-generated legal norms entered the US legal system without any democratically elected body evaluating the desirability of these norms and acting affirmatively to adopt them.[61] Moreover, if CIL entered the US legal system as federal common law then, by virtue of the Supremacy clause, global custom systematically trumped the law generated by the country's component states. The wishes of small democratic communities would be subordinated to global rules, some of which might be poorly adapted to local conditions.

Some of the scholarly attack on the traditional view of CIL has centred on the indeterminacy of modern CIL. Properly understood, this is a criticism not of the pathway by which CIL has entered the US legal system but of the content of the norms that enter. Several concerns have been voiced. First, unlike eighteenth-century CIL, contemporary CIL has not evolved over long periods of time. Under the traditional approach to CIL creation, ill-considered impulses and actions prove ephemeral. The passage of time acts as a filter. Much of contemporary CIL, however, is based on human activity that transpires over relatively short periods of time—periods in which key assumptions have not yet proven their staying power.

During the early years of the Republic, CIL was a product of repeated state practice (the objective element) undertaken out of a sense of legal obligation (the subjective element). The requirements that state practice with respect to some international issue occur over a substantial period of time, among a critical mass of states, and accompanied by the subjective element,[62] increased the likelihood that

[58] See Harold G. Maier, 'The Authoritative Sources of Customary International Law in the United States', 10 Mich J Int'l L 450 (1989).

[59] Ibid. at 461.

[60] Ibid. at 475–6.

[61] The seminal article is Curtis A. Bradley and Jack L. Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position', 110 Harv L Rev 815 (1997).

[62] For an important recent study of the current status of state practice and the subjective element in the formation of CIL, see International Law Association, Committee on Formation of Customary (General) International Law, Part III—London Conference Report (2000) (characterizing the subjective

the rule enjoyed support that was solid, rather than tepid and ephemeral. Non-treaty rules dealing with safe passage and ambassadorial immunity had, by the eighteenth and nineteenth centuries, gone through interstate conflicts vividly showing whether support for such rules was widespread and firmly held. By contrast, the critics argue, rules of CIL based primarily on declarative treaties or General Assembly Resolutions may be less likely to embody circumspection. Countries may cast their vote in favour of such instruments without concern that the legal norms voted upon are likely to impact their interests anytime soon. Countries may vote with the belief that no international enforcement mechanism exists to police violations of such norms. In sum, much of contemporary CIL is seen as not anchored in actual state practice. Rather the claim that certain conduct is either required or prohibited can be based on declarative texts.[63]

This transformation in the conception of CIL can be seen in the adjudication of international human rights claims in US courts from 1980 until 2004. From the landmark *Filartiga* case,[64] to subsequent cases over the next 24 years, federal courts ruled that a substantial part of the modern customary international law of human rights is a part of the US legal system and is actionable under an eighteenth-century federal statute, the Alien Tort Statute (ATS), that imposes civil liability for certain violations of the 'Law of Nations'.[65] In these cases, handed down in nearly every region or circuit of the country, a majority of circuit courts concluded that the eighteenth-century term 'Law of Nations' encompassed the kinds of contemporary international norms articulated in contemporary human rights treaties such as the Torture Convention.

Among the human rights abuses held to be CIL violations actionable even in the absence of modern implementing legislation were genocide, crimes against humanity, torture, ethnic cleansing, forced disappearance, apartheid-related offences, and certain acts of terrorism.

In 2004, however, the Supreme Court applied the brakes, at least in part, to this case-law development. In *Sosa v Alvarez-Machain*,[66] which concerned an ATS claim by a foreign national abducted from Mexico and brought to the United States under the direction of officials of the US Drug Enforcement Administration, the Court held that a brief period of arbitrary detention and kidnapping was not the kind of CIL violation that Congress in 1789[67] had intended to make actionable.

element requirement as 'highly controversial'): available at <http://www.ila-hq.org/en/committees/index.cfm/cid/30>.

[63] For example, by the early 1980s, the prohibition against torture had become recognized as a customary international law norm even though the Torture Convention had not yet been widely ratified and even though the incidence of torture around the world was all too common. See *Filartiga v Pena-Irala*, 630 F2d 876 (2d Cir 1980) (holding that torture under colour of law is a violation of the law of nations).

[64] Ibid.

[65] See Charles Alan Wright, Arthur R. Miller and Edward Cooper, *Federal Practice & Procedure*, s 3661.1 (collecting cases).

[66] 542 US 692 (2004).

[67] The ATS was originally enacted in 1789, as part of the first Judiciary Act.

What is most important about *Sosa* is the majority's cautious tone and the more-than-cautious scepticism of three concurring justices. Justice Souter's majority opinion repeatedly uses variations on the word 'caution' in telling lower courts not to be overly eager 'in adapting the law of nations to private rights'.[68] This statement and others in the opinion are symptomatic of an attempt to find some sort of filtering mechanism, some way of trolling in the large ocean of CIL and picking up some subset of CIL fit to enter the US legal system.[69] Justice Scalia's concurring opinion is not so much cautious about CIL as hostile toward it.[70] It is the first Supreme Court opinion to evaluate modern CIL through the lens of the *Erie* case[71] and to draw considerably upon revisionist scholarly work attacking the traditional understanding of CIL.[72]

*Sosa* may turn out to be a watershed with respect to US incorporation of CIL. On the other hand, none of the opinions in the case repudiated the *Paquete Habana*. To the contrary, Justice Souter said that the US legal system is receptive to contemporary customary international law norms of a type comparable in terms of universality to eighteenth-century CIL prohibitions such as piracy, violations of the rights of safe passage, and offences against ambassadors.[73] That assurance, however, must be read together with recent jurisprudence on self-executing treaties[74] and the opposition to consulting foreign legal sources in interpreting the US constitution.[75] *Sosa* has not ended ATS litigation based on modern CIL, but it has altered the approach that had been followed by most lower courts in the previous two decades and it has implications for the approach toward CIL followed by US courts for a much longer period of time.

## 4.2 Comity and the *Charming Betsy*

If CIL is at the epicentre of the current challenge to the traditional understanding, the modern scepticism toward comity is not far away. As summarized earlier, traditional American comity takes several forms: reluctance to assert legislative or adjudicative jurisdiction in a manner contrary to CIL; readiness to recognize the judgments of foreign courts; willingness to provide judicial assistance to foreign authorities pursuing evidence or witnesses located in the United States;

[68] 542 US, at 694.

[69] For the view that CIL cannot become law within the US legal system in the absence of some action by the political branches of government, see *Al-Bihani v Obama*, 619 F.3d 1, 10, (9th Cir 2010) (Brown J.) (denying rehearing en banc) ('[International-law norms are not enforceable in federal courts unless the political branches have incorporated the norms into domestic US law.').

[70] 542 US, at 750 ('For over two decades now, unelected federal judges have been usurping th[e] lawmaking power by converting what they regard as norms of international law into American law.); ibid, at 748 (criticizing the Second Circuit Court of Appeals for bringing the federal judiciary into 'confrontation with the political branches').

[71] 542 US, at 740–1, referring to *Erie R. Co. v Tomkins*, 304 US 64 (1938).

[72] Ibid., at 739–40 (citing Professors Bradley, Goldsmith and Young).

[73] 542 US, at 729 ('[T]he door is still ajar, subject to vigilant doorkeeping').

[74] See the discussion of *Medellín v Texas*, below.

[75] See below.

and a long-standing tradition of interpreting domestic legislation in a manner consistent with the country's international obligations.

This last facet of comity, known as the *Charming Betsy* canon or principle, was applied without erosion or criticism until quite recently.[76] In the last decade, however, its status has become less secure. Beginning with scholarly work appearing in the late 1990s, this aspect of American comity has been the subject of reevaluation.

The tools used to dissect the *Charming Betsy* canon are similar to those employed by revisionists with respect to CIL. Revisionists argue that, as with CIL, the judiciary should not be involved in foreign affairs decisions better suited to the political branches.[77] Second, they maintain that today the canon is not especially likely to advance legislative intent, at least in the contemporary era in which Congress is less deferential toward international law than in the past. Third, some writers claim that the original purpose of the *Charming Betsy* canon has been forgotten and that it mainly was created to serve separation of powers principles rather than to promote compliance with international law.

Reevaluation of this traditional facet of American judicial comity has now moved from the academy to the courts. In *Serra v Lappin*[78] and *Al-Bihani v Obama*[79] the 9th and DC Circuit Courts of Appeals went out of their way to cast doubt on the traditional understanding of the *Charming Betsy*: These courts articulated new limitations on the principle's applicability, cited the academic work noted above, and failed to grapple with the historical materials and Supreme Court case-law that long have been a foundation of the traditional position.

*Serra v Lappin* involved a suit over whether prison wages were so low as to be illegal under two sources of law: the US Constitution and international law in the form of CIL and treaty law.[80] It was not a difficult case. With respect to international law, it would have been sufficient to have said that no clearly established rule of CIL supported the plaintiffs' claims and that no treaty conferred private rights. The court went on, however, to say more than this. In rejecting the argument that the wage-setting statute and regulations at issue should be interpreted in light of international law, the court took aim at the *Charming Betsy* principle. That canon of statutory construction, said the court, 'bears on a limited range of cases',[81] namely cases in which a party shows that failure to comply with international comity may 'embroil the nation in a foreign policy dispute'.[82] Thus the principle

[76] All concede as much. See, eg, Curtis A. Bradley, 'The *Charming Betsy* Canon and Separation of Powers: Rethinking the Interpretive Role of International Law,' 86 Geo L J 479, 536 (1997) ('The *Charming Betsy* canon has, to date, been largely uncontested').

[77] See Roger Alford, 'Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy', 67 Ohio St LJ 1339 (2006).

[78] 600 F3d 1191 (9th Cir 2010).

[79] 619 F3d 1 (DC Cir 2010).

[80] The complaint relied upon the International Covenant on Civil and Political Rights and the Standard Minimum Rules for the Treatment of Prisoners.

[81] 600 F3d, at 1198.

[82] Ibid.

did not apply in cases such as *Serra* in which a US party litigating a case involving purely domestic behaviour sought to inject international norms.

The *Serra* court did not defend this gloss on the *Charming Betsy* with the extensive analysis of judicial precedent, constitutional history, nineteenth-century international law, and academic writings that one would expect from so new a take on so old a pillar of American law. In fact, one could be excused on a first reading of *Serra* for mistaking this relatively short opinion by a unanimous panel for being the routine application of existing law or perhaps a minor clarification of precedent. It is not. If accepted by the Supreme Court or by other courts of appeals, *Serra* will amount to a significant diminution of American comity. *Serra's* key assumption—that foreign countries do not care about the manner in which the US legal system treats US nationals, even if contrary to international law—is not only wholly undefended, it also is clearly contrary to decades of US foreign policy.[83] Such an assumption runs counter to the foundation of modern human rights law and to years of State Department country reports taking various countries to task for failing to treat their citizens in accordance with international standards. Yet under *Serra* the universe of statutory interpretation is divided in two: cases whose outcome might attract the attention of other countries and cases whose outcome will not. According to *Serra*, the *Charming Betsy* does not apply to cases in the latter category, and cases that superficially appear wholly domestic belong in the latter category.

A second entirely recent gloss on the *Charming Betsy* emerges from *Al-Bihani v Obama,* the facts of which relate to the war on terror and the wide-ranging and long-running detention policy carried out by the executive branch of the US government acting under powers conferred by an extremely broad statute.[84] Foreign nationals detained at the US facility at Guantanamo Bay sought habeas relief with respect to their prolonged detention as contrary to the Geneva Conventions and other sources of law in the absence of a fact-based determination as to future dangerousness if released. A three-judge panel of the DC Circuit denied the habeas petition.

In light of the breadth of the AUMF, it would have been extraordinary if the statute had not contained major ambiguities. It did: What does it mean for the use of military force to be 'appropriate?' Does the statute confer authority solely to combat acts of terrorism against the territory of the United States, or also acts of violence against American troops stationed abroad? As a result, several factors were in place for a traditional application of the *Charming Betsy*: (1) statutory ambiguity,

[83] Consider, for example, US foreign policy toward Burma/Myanmar, China, and Cuba regarding how regimes in those countries treat their own citizens. It would be odd in the extreme to posit that the United States is unconcerned with whether domestic laws in those countries are interpreted in a manner consistent with treaties or CIL.

[84] The statute is the Authorization for the Use of Military Force ('AUMF'), Pub L 197–40 (18 September 2001), which provides in relevant part that the 'President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.'

(2) in an area (the law of armed conflict) in which there is a well-established body of international law, (3) prior instances in which the Geneva Conventions and customary humanitarian law had been used as interpretive tools by American courts.

The fact that a principle of American law as entrenched as the *Charming Betsy* should in recent years be subjected to erosion and criticism is a significant indication that the ground, so to speak, is not steady. Another example further illustrates this point. In a series of cases that drew much attention not only from lawyers but also from the public at large, the Supreme Court considered whether some provisions of the US Constitution should be interpreted in light of either international legal texts or the norms that prevail in other societies. Provisions subjected to this inquiry have included the Eighth Amendment's prohibition on cruel and unusual punishment, the Fourteenth Amendment's guarantee of the equal protection of the laws, and the Fifth and Fourteenth Amendments requirement of due process of law.

These cases produced a divided court and a divided country—divided between those, on the one hand, who believe that the US Constitution is the foundational document of a specific political community that should not be overly concerned with the choices made by other political communities and those, on the other hand, who believe that open-ended phrases such as 'cruel and unusual' should be understood not only with regard to American values but also with an eye on global standards. In a set of cases invalidating certain applications of capital punishment, some members of the Court referred to the near global consensus against capital punishment for minors[85] and for the mentally retarded.[86] In other recent cases, the Court drew support from the case-law of the European Court of Human Rights.[87] Other members of the Court strongly criticized reliance on the case-law of foreign or international tribunals. In a case closely followed around the country regarding race-conscious college admissions policies, a concurring opinion found support for such programmes in the International Convention on the Elimination of All Forms of Racial Discrimination.[88]

Despite lengthy opinions and numerous pointed dissents and concurrences in these cases, there is at present no closure on this set of issues. No single approach to the use of foreign law has commanded a majority of the Court and done so consistently. Nor is there anything approaching a consensus in Congress. Instead, the issue is likely to emerge again in controversial cases in the future. In the meantime, the Senate Judiciary Committee now has made it common practice to ask judicial nominees for their views on the appropriate use of foreign law and international law in constitutional interpretation and often to do so in ways that

[85] See *Roper v Simmons*, 543 US 551 (2005).

[86] See *Atkins v Virginia*, 536 US 304, 316, n 21 (2002).

[87] See *Lawrence v Texas*, 539 US 558, 573 (2003) (invalidating state law punishing homosexual conduct).

[88] See *Grutter v Bollinger* 539 US 306, 344 (2003) (Ginsberg J concurring).

suggests that the issue is a litmus test for some senators.[89] Members of the Supreme Court have addressed this issue in their extrajudicial writings, in their speeches, and even in television programmes addressed to the general public.[90] Congress has entertained several proposals to bar federal judges from relying on foreign law.[91] Finally, a prolific and robust scholarly debate about these questions continues.

## 4.3 Treaties

Like the *Charming Betsy* principle and the traditional monist stance toward CIL, the traditional position on the self-executing treaty doctrine tends to promote American compliance with international law. In the nineteenth century, the creation of the self-executing treaty doctrine brought a departure from the strict dualism that was characteristic of the British legal system. As the doctrine developed over time, treaty norms were applied as law in US courts even in the absence of implementing legislation, so long as there was some evidence that the executive and legislative branches intended for such a result.

As with comity and CIL, recent case-law and scholarship on treaty law has thrown into doubt key aspects of the traditional understanding of the status of international law within the US legal system. The key development is *Medellín v Texas*,[92] in which the Supreme Court dealt with self-execution in the context of the criminal conviction of a Mexican national denied the right to consult with his consulate upon arrest. In separate litigation between Mexico and the United States in the International Court of Justice,[93] the ICJ ruled in favour of Mexico, finding that the US had breached the Vienna Convention on Consular Relations. By way of remedy, the ICJ judgment said that the US needed to review and reconsider the cases of Mexican nationals who had been sentenced to death notwithstanding their

[89] At their confirmation hearings, Justices Roberts and Alito assured the Senate Judiciary Committee that they saw no role for foreign law in interpreting the US Constitution. See Transcript: Day Three of the Roberts Confirmation Hearings (Morning Session: Sens. Brownback and Coburn), <http://www.washingtonpost.com>, 14 September 2005, available at 2005 WLNR 14639466 (remarks of Senator Tom Coburn (R-OK)); Transcript: Day Two of the Roberts Confirmation Hearings; (Part III: Senators Kyl and Kohl) <http://www.washingtonpost.com>, `13 September 2005, available at 2005 WLNR 14576513; US Senate Judiciary Committee Holds a Hearing on the Nomination of Judge Samuel Alito to the US Supreme Court, 12 January 2006, Westlaw, allnewsplus database.

[90] See Stephen Breyer, 'Constitutionalism, Privatization, and Globalization: Changing Relationships among European Constitutional Courts', 21 Cardozo L Rev 1045 (2000); Ruth Bader Ginsburg, 'Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication', 22 Yale L & Pol'y Rev 329 (2004); Sandra Day O'Connor, 'Federalism of Free Nations', in Thomas M. Franck and Gregory H. Fox (eds), *International Law Decisions in National Courts* (1996). See also the exchange of views between Justices Breyer and Scalia on 13 January 2005 at a debate at the American University's Washington College of Law, available at <http://www.freerepublic.com/focus/news/1352357/posts>.

[91] See S Res 92, 109th Cong (2005); H Res 97, 109th Cong (2005); Constitution Restoration Act, S 520, HR 1070, § 201,109th Cong (2005); American Justice for Americans Citizen Act, HR 1658, § 3 (2005).

[92] 552 US 491 (2008).

[93] See *Case Concerning Avena and Other Mexican Nationals (Mexico v US)*, 2004 ICJ 12 (Judgment of 31 Mar 2004).

inability effectively to exercise their consular treaty rights in the US legal system.[94] Thus the main issue in *Medellín* was the status of an ICJ judgment within the US legal system. Did such a judgment supply the rule of decision in litigation within the US legal system? If Article 94 of the UN Charter[95] were not self-executing, the answer to this question would be no.

By a vote of 6 to 3, the Court held that Article 94 is not a self-executing treaty obligation and that ICJ judgments do not automatically have the status of law within the US legal system. Such judgments create legal obligations for the United States under public international law. They might be accorded 'respectful consideration'[96] by US courts, but they are not to be accorded the status of binding law in the absence of action by the political branches of the US government, such as enactment of implementing legislation.

As with *Sosa*, what is most significant about *Medellín* is not the result but the method employed. In *Medellín*, the majority leads with a textual analysis pursuant to which a treaty provision is self-executing if the intent to bring about that result is expressed in the text of the treaty itself and is expressed clearly.[97] Up against this test, the phrase 'undertakes to comply' in Article 94 of the UN Charter does not articulate such an intent with sufficient clarity as would be true if the text said 'shall comply' or 'must comply'.[98] After carrying out this clear statement approach and finding that the text of Article 94 does not 'contemplate the automatic enforceability of ICJ decisions in domestic courts',[99] the majority then 'confirmed' this result by analyzing the 'enforcement structure' of Article 94.[100] As Justice Breyer argued in dissent, under the majority's new approach many treaties held in the past to be self-executing would not be found self-executing today.[101] In doing so, a majority of the Court backed away from a long line of precedent permitting treaties of all sorts and in various periods of time to be deemed self-executing, even though the text of those treaties was not clearer with respect to intent than Article 94 of the UN Charter.

[94] Paragraph 9 of the judgment in *Avena* states 'that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals'.

[95] That article states that '[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.' Article 94 then goes on to state that recourse against a state that fails to comply with an ICJ statement lies with the Security Council.

[96] 552 US, at 513, n 9 (quoting *Breard v Greene*, 523 US 371, 375 (1998)).

[97] Ibid. at 517 (referring to a 'clear and express statement').

[98] Ibid. at 508.

[99] Ibid. at 509.

[100] Ibid. at 509–11.

[101] Under Justice Breyer's minority approach, which was joined by two other justices, courts can infer the intent to create self-executing law from such extra-textual sources as drafting history, the subject matter of the treaty, and the treaty's specificity. The treaty provision at issue need not 'specifically mention judicial enforcement of its guarantees or even expressly state that its provisions were intended to confer rights on the foreign national'.

The full implications of *Medellín* are not yet clear.[102] At one extreme, there is some basis for reading the majority opinion as saying that non-self-executing treaties have no status as law in the US legal system at all.[103] On the other end, there is some basis for concluding that the case does not really articulate a clear statement rule at all.[104] It is reasonably safe to say that in the future treaties will have a diminished role as a source of rights within the US domestic legal system, at least when not accompanied by implementing legislation.[105] In addition, *Medellín* may have a practical impact on American federalism. Although a literal reading of the Supremacy clause suggests that all treaties trump contrary state law,[106] American courts long have interpreted this language to mean that only those treaties that have been domesticated in the US legal system have this effect. As a result, state courts may interpret *Medellín* as permitting state common law rules, state statutes, and state constitutions to trump international agreements that fail *Medellín*'s test for self-execution. State courts may conclude that, if a treaty is not law within the US legal system, then its provisions do not enjoy supremacy over any domestic law, even state law.[107] Alternatively, state courts may choose to regard treaties as hierarchically superior forms of law even though the US Supreme Court has told them they need not do so. Perhaps state courts will develop state versions of a *Charming Betsy* principle, but then again they may not. Perhaps some states will opt for one of these courses of action and other state courts will opt for others. In that event, perhaps Congress will enact federal legislation to clean up the mess and ensure some measure of uniformity.

*Medellín* also must be read in conjunction with *Sosa* and with *Sanchez-Llamas v Oregon* rather than in isolation. *Sosa* restricts the range of customary international law rules that are actionable in US courts under the ATS. It also is most easily read

[102] Among the questions raised by *Medellín* is the status of treaties previously held to be self-executing under the Court's prior approach. Is the status of those other treaties in the US legal system subject to reconsideration now?

[103] 552 US, at 505 (stating that treaties are 'not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be "self-executing"'). This statement suggests not only that such treaties are not enforceable in US courts but also that they cannot serve as the basis for executive orders, are not to be used as tools of interpretation, and perhaps, at the very extreme, do not function as a basis for determining where in Justice Jackson's tripartite framework in *Youngstown* the President is acting. See *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579 (1952) (Jackson J concurring).

[104] As noted above, Justice Roberts does make reference to non-textual tools of interpretation.

[105] An important caveat should be noted. Although the majority in *Medellín* leads with a textual analysis and says that this analysis by itself decides the case before it, the Court does also make reference to other interpretive tools, such as 'negotiation and drafting history,' 'post-ratification understanding', a treaty's 'enforcement structure', and 'general principles of interpretation'. The majority opinion, however, provides no sense of the relative weight of these interpretive tools and whether they could ever prove decisive. The main impression left by the Roberts opinion is that it will be rare for treaty language to pass the new self-execution test and that these other factors may, on occasion, be thrown in to confirm a conclusion based almost completely on a clear-statement rule and a textual analysis.

[106] US Const, Article VI, cl 2 (stating that '*all* treaties made, or which shall be made, under the authority of the United States' constitute the 'supreme Law of the Land') (emphasis added).

[107] In his concurring opinion in *Medellín,* Justice Stevens's answer to this possibility is that 'sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation.' 552 US, at 536.

as discouraging lower federal courts from warmly embracing CIL outside the ATS context too. *Medellín* curtails the range of treaty-based norms that may be raised in US courts, either as a source of affirmative rights or defences. Under *Sanchez-Llamas*, even when treaty provisions confer rights within the domestic US legal system, those rights are easily waived.

The shift toward greater dualism brought about by *Sosa*, *Medellín*, *Sanchez-Llamas*, and *Serra*, is accentuated by recent trends in treaty interpretation. Traditionally, American treaty interpretation has been modelled on contract interpretation, with the significance of this analogy being that contract interpretation requires considering the intent of all parties to the agreement. Increasingly, however, American judicial opinions have drifted away from this traditional interpretive approach. Increasingly, courts analogize treaties to statutes.[108] With this change in analogy comes greater textualism and less interest in determining the intent of the treaty parties. Another by-product of using the statutory analogy is that domestic baggage comes along with it—specifically, the increasingly expressed hostility toward legislative history.[109]

With this shift in analogy, American legal scholars with expertise in administrative law and constitutional law urge that key aspects of administrative law (eg deference to executive branch agencies with responsibility for implementing statutory/treaty norms) be imported into the law of treaty interpretation.[110] In short, the traditional American understanding of treaties as a specialized kind of contract for which the key to interpretation lies in determining the purposes of the treaty parties is now on shaky ground. In recent decades, much of the most interesting American thinking on the subject of interpretation has centred on statutory interpretation and constitutional interpretation, with the result that scholarship in these areas is impacting how Americans today, as compared to in the past, interpret treaties.

The transition from one analogy to the other creates confusion and incoherence. Consider the majority and dissenting opinions in *Abbott v Abbott*.[111] The result in that case turned on the meaning of the phrase 'right of custody' in the Hague Convention on the Civil Aspects of International Child Abduction. A six-justice

[108] See, eg, *Medellín v Texas* 552 US 491, 506 (2008) ('The interpretation of a treaty, like the interpretation of a statute, begins with its text'). In *Medellín,* Justice Roberts actually manages to employ both the contract analogy and the statute analogy in a manner that some may find result-oriented. At the outset, he says that the UN Charter is a contract or compact among nations. He does so on the road to justifying a baseline assumption that the only remedies for breach of Article 94 are political ones or legal remedies in some forum external to the United States. 552 US, at 505–6. Immediately after making this move, however, he then employs the statute analogy for the purpose of interpreting Article 94 and other treaty provisions. The statute analogy allows him to be US-centric in the range of sources consulted (Senate hearings, statements by the State Department Legal Advisor, the consistently expressed view of the executive branch) in a way that a true contractual approach would not permit.

[109] See, eg, *Samantar v Yousuf*, 130 S Ct 2278, 2293–4 (concurring opinions of Justices Alito, Thomas, and Scalia criticizing majority's reliance on legislative history to interpret the Foreign Sovereign Immunities Act).

[110] See, eg, Eric A. Posner and Cass R. Sunstein, 'Chevronizing Foreign Relations Law', 116 Yale L J 1170 (2007); Curtis A. Bradley, '*Chevron* Deference and Foreign Affairs,' 86 Va L Rev 649 (2000).

[111] 130 S Ct 1983 (2010).

majority opinion begins with the statute analogy and a textual analysis[112] but then broadens out to consider the treaty's main purposes in dealing with transnational child abduction and how the courts in other countries have interpreted the same treaty.[113] This majority opinion is written by Justice Kennedy (who was part of the majority in *Medellín*) and joined by Chief Justice Roberts, who authored the majority opinion in *Medellín*. Deliciously, the dissenting opinion in *Abbott* chides the majority for being 'atextual',[114] and this dissent is joined by Justice Breyer, who wrote the dissent in *Medellín*.

## 5. Conclusion

This volume presents a panoramic view of the status of international law in domestic legal systems. This chapter contributes one picture to that panorama. In the case of the United States at this point in time, it is a moving picture. So much of importance is so fluid. Within the confines of a short country report with page constraints, this chapter seeks to convey how unsettled the law is. It is unsettled because so many of the legal questions currently being revisited are of fundamental rather than marginal importance. It is unsettled because not long ago these issues seemed resolved, at least in substantial measure. It is unsettled because the impetus for carrying out this reevaluation comes from many corners—Congress, the executive branch, the judiciary, the academy, state officials, and elsewhere.

Although a broad challenge to the traditional way of understanding the place of international law in the US legal system is still a minority viewpoint, it would be a mistake to underestimate the significance of this challenge. Within a decade, revisionist ideas originating in the academy have gained some traction in the minds of people with power. Even if substantial portions of the traditional understanding survive intact, future US practice still will be noticeably different from the past. For example, one of the likely responses to *Medellín* is that Congress will be called upon to enact more implementing legislation than in the past. It is predictable that some of this implementing legislation will differ in subtle or not-so-subtle ways from the treaties being implemented.

The current state of flux with regard to CIL also has far-reaching implications. Traditionally, the easy incorporation of CIL exemplified the monist side of the US legal system. In the past, even when the United States refrained from entering into a treaty, some provisions of the treaty might be applied by US courts if those provisions were deemed to codify preexisting CIL.[115] By this reasoning, the door was open for US courts to consult the opinions of foreign courts, not as a means of making the treaty binding on the United States but rather as evidence of CIL. If in

[112] Ibid. at 1990, citing *Medellín*.

[113] Ibid. at 1993 (asserting that in interpreting treaties, US courts should consider judicial opinions from other countries interpreting the treaty at issue).

[114] Ibid. n 110.

[115] A large portion of the Vienna Convention on the Law of Treaties, for example, has long been regarded by the US State Department and by US courts as a codification of CIL.

the future the US legal system is considerably less monist toward CIL (or some subset of CIL),[116] then there likely will be less engagement between US judges and foreign legal sources.[117] Moreover, in evaluating the likelihood of this eventuality, one cannot look at the current interaction between CIL and the US legal system in isolation; if movement on the treaty side is toward greater dualism, as suggested by *Medellín* and views expressed in Congress, it is likely that the reception accorded CIL will be affected. That is, it is hard to imagine deliberately creating new barriers or filters to domestic enforcement of treaties but leaving the door wide open to the entrance of treaty norms through the vehicle of CIL.

Added to the state of flux with regard to treaty law and CIL is uncertainty regarding comity, as illustrated by recent scholarship and case-law relating to the *Charming Betsy*. The display of comity by courts in the context of statutory interpretation and otherwise has been a feature of the US legal system for a long time. Yet critics of the traditional understanding maintain that compliance with international law by the political branches of the US government can no longer be regarded as the default position. Their efforts to reformulate and narrow the *Charming Betsy* canon are especially noteworthy. The cases that have served as a platform for reevaluating the *Charming Betsy* hardly present compelling fact patterns for repainting a venerable precedent;[118] rather, *Serra* and *al-Bihani* come across as the beginning of an assault.

The small space remaining allows us to consider, but not fully explore, the next obvious question: Why is the relationship between international law and the US legal system so fluid at the moment? Is there something about the present that accounts for a wide-ranging challenge to the received understanding? In fact, to many readers the main points of this chapter may come as a surprise: The American legal and political system, in many respects, is a hallmark of stability. The Constitution dates from 1789 with few amendments. Now more than ever the United States is linked to other countries all around the world in a network of trade relationships, security arrangements, and long-standing alliances. The foreign reader turning to this chapter might have expected to read about a few interesting developments in an otherwise constant sea. Why then are key actors in the United States reexamining so much concerning the place of international law in the domestic legal system?

[116] Under *Sosa,* some CIL provides the basis for a cause of action under the Alien Tort Statute (ATS) and some CIL does not. Segregating and ranking CIL in this way is grounded in the history and legislative intent behind the ATS. A question left open is whether *Sosa* shows the way to treating different kinds of CIL differently for the purpose of the monism/dualism question generally, outside the ATS context.

[117] In 200 years, Congress has enacted few statutes expressly incorporating CIL. There was no need to do so. Since the early 1800s at least, Congress has legislated with the understanding that courts regard CIL as an integral part of the US legal system, without the need for implementing legislation.

[118] The canon relates to interpreting statutes of Congress. Presumably, if Congress believed that the canon distorted legislative intent, Congress would address the problem itself rather than wait for the courts to correct the problem.

This is an intriguing question unlikely to have a single answer, but several partial explanations seem plausible. First, it is tempting to say that the movement away from the traditional understanding is a movement away from enforceability of international legal norms and that the explanation for this is fairly simple. Much of the traditional understanding took shape prior to the point at which the United States became a global or even a regional power. In an earlier age, the predominant view was that adherence to international law usually was in the country's fundamental interest in minimizing the activities of European powers in the western hemisphere and in permitting the US economy to benefit from trade even during periods of belligerency among European powers. But with the rise of American military and economic power, the argument proceeds, the old quasi-monist rules seem to present obstacles to US interests more often than advancing those interests. So, some argue, the current state of flux with respect to CIL, comity, and treaties may well be a period of transition; what we are seeing is a great power withdrawing from international law or rewriting the rules as it sees fit because it has the power and influence to do what it wishes.

Tempting as this account sounds, there is reason to doubt it presents the whole story. If what is at work is a coherent, systematic, deliberate effort, driven by changed circumstances and national interest, to change the place of international law within the US legal system, then one would expect more of the change to be originating with political actors than with courts and legal scholars. One would expect to see statutes modifying or repealing the *Charming Betsy* just as Congress recently amended the Foreign Sovereign Immunity Act, in response to political events and perceptions about the national interest, despite tension between that legislative action and relevant CIL.[119] Moreover, if the basic storyline is that a relatively weak state grows into a powerful one and then changes the rules of the game, one would expect that much of what is taking place now would have taken place several decades ago, when relative American power arguably was at a higher point in the sky.

Second, the present controversy over CIL, comity, and the place of treaties takes place in an era in which many fundamental aspects of the American legal system are the subject of heated dispute: the limits of executive power, the continuing vitality of federalism, and the extent to which the boundaries among equality, privacy, and civic duty are to be drawn by electoral majorities or courts. At stake are issues about which passions run high—abortion, affirmative action, same-sex marriage, capital punishment. In today's disagreements over international law, it is not difficult to

[119] With the Flatow Amendment, included in the Antiterrorism and Effective Death Penalty Act, Pub L No 104-132, 110 Stat. 1241 (1996), codified at 28 USC, s 1605, note, Congress amended the FSIA so as to strip the immunity of certain states sponsoring acts of terrorism. At the time the Flatow Amendment was enacted in 1996, there was more than some doubt as to whether this statutory amendment was consistent with the body of CIL relating to the immunity of sovereign states in national courts. In the 15 years since the Flatow Amendment became law in the US, CIL seems to have moved in the direction of limiting immunity with respect to state-sponsored terrorism. In the same year, 1996, the US enacted the Libertad Act, widely attacked by US allies and legal scholars as contrary to international law, including CIL. See Cuban Liberty and Democratic Solidarity Act of 1996, codified at USC, s 6021 et seq.

hear echoes of these domestic disputes.[120] After all, much of modern CIL—CIL dealing with how a country treats its nationals and residents—is associated by many Americans with leniency in criminal justice, acceptance of gay marriage, prohibitions on gun ownership, high taxes to support bloated social welfare systems, expansive economic rights, and so on. The more wide open the door is to CIL, the more these norms become a part of adjudicating all sorts of issues in domestic courts. Similarly, when a closely divided Supreme Court splits over whether treaties are law for purposes of adjudication in US courts, the justices may be in disagreement about more than method. Underlying the disagreement may be conflicting perceptions about the kind of treaty norms that should be permitted to become part of the US legal system.

Second, the extensive current debate about the status of international law in the US legal system is not just the continuation of a domestic brawl in a different venue. There is something genuinely international about it. The contentious back-and-forth about CIL and the status of foreign jurisprudence, for instance, really is about the world out there and its relationship to what transpires in the lives of typical Americans and with the legal problems that they bring to US courts. It has been a great while since international law had the potential to impact the lives of Americans in a significant way. This state of affairs appears to be changing, and a growing proportion of Americans are becoming aware of the change. It has been for a longer period of time that other societies have come to terms with the fact that security and prosperity are not wholly within their own control. Many in the United States are just now confronting interdependence (eg, on the environment, on nonproliferation, on global finance) as perhaps a future fact of life. The society has yet to have a full-throated debate about the full costs and benefits of multilateralism. Rather, so often Americans treat multilateral mechanisms as a supplement to unilateralism rather than as a substitute for it.[121] With this set of issues as a backdrop, the confrontation between traditionalists and revisionists on discrete doctrinal issues (eg, the incorporation of CIL) appears to be a set of piecemeal skirmishes, perhaps a prelude to a wider societal debate or perhaps a substitute for such a debate.

Third, a central aspect of the current debate about international law pertains to the power of elites, always a sensitive subject in American life. Although exposure to international and comparative law has increased in the US,[122] there is still something of the exotic and suspect about these fields. A considerable majority of

[120] The US legal system has long responded to international and transnational legal issues by treating them as variations on more familiar domestic legal problems. See generally Paul R. Dubinsky, 'Is Transnational Litigation a Distinct Field: The Persistence of Exceptionalism in American Procedural Law, 44 Stan J Int'l L 301 (2008) (demonstrating that US courts treat transnational problems of procedural law as variations on superficially similar interstate procedural problems).

[121] See, eg, *US v Alvarez-Machain*, 504 US 655 (holding that bilateral extradition treaty with Mexico is not a substitute for unilateral action by US authorities); *Société Nationale Industrielle Aerospatiale v US District Court*, 482 US 522 (1987) (concluding that the Hague Evidence Convention was intended as a supplement to unilateral civil discovery mechanisms rather than as a substitute for them).

[122] See Paul R. Dubinsky, 'Is Transnational Litigation a Distinct Field: The Persistence of Exceptionalism in American Procedural Law, 44 Stan J Int'l L 301, 302–3 (2008).

lawyers, judges, and even law professors feel at sea when asked to deal with treaties, diplomatic documents, the output of international tribunals, the decisions of foreign courts, and virtually anything not originally written in English.[123] Of course this has been true for a long time, but in the current generation some changes have made international law potentially more threatening. More is at stake. For CIL to pop up in the occasional admiralty case decades ago was one thing. For it to be relevant to a multinational corporate client's liability for conditions in its overseas factories is something else. Not long ago, one could be a well-regarded antitrust lawyer even if one knew nothing about EU competition law. Today, such a lawyer is less well regarded, at least in the view of blue-chip clients, bar associations, and law-school hiring committees. In other words, as with any transformation, the globalization of legal norms and sources of law is a process that produces winners and losers. An increase in the relevance of foreign legal sources strengthens the hand of elites best positioned to benefit from the change. One would expect such a shift to be opposed by those likely to come up on the short end of such a transformation in American legal culture.

[123] One teaching conflict of laws cannot help but notice the number of instances in which courts in the US either assume that foreign law is the same as the law of the forum or that a false conflict exists for some other reason that relieves the court of having to carry out a rigorous examination of foreign law.

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# Venezuela

*Eugenio Hernández-Bretón*

## 1. Introduction

Venezuela is a federal republic where democratically elected governments have ruled since 1959. The current Constitution, enacted in 1999, established a political system with a President who is both head of the government and chief of state, elected by popular vote to serve six-year terms. According to a 2009 referendum, there is now no limit on the number of terms elected members of the government, including the President, can serve. Legislative power is vested in the National Assembly, a unicameral legislature consisting solely of the Chamber of Deputies. There are three additional branches of the federal government designated by the Constitution—the judicial, citizen, and electoral branches. The judicial system is based on adversarial proceedings and is presided over by the Supreme Tribunal of Justice, composed of six chambers, whose 32 justices are appointed by the National Assembly for a single 12-year term. The citizens branch consists of three components—the General Prosecutor ('Fiscal General'), the 'Defender of the People' or Ombudsman, and the Comptroller General, who together may challenge actions they believe are illegal before the Supreme Tribunal of Justice, particularly those that violate the Constitution. Finally, the 'Electoral Power', otherwise known as the National Electoral Council, is responsible for organizing elections at all levels. Legislation can be initiated by the executive branch, the legislative branch, the judicial branch, the citizen branch, or a public petition signed by at least than 0.1 per cent of registered voters.

Venezuela is a member of the United Nations and the Organization of American States, but has not accepted compulsory ICJ jurisdiction.

## 2. Constitutional and Legislative Texts

There are several provisions of the 1999 Venezuelan Constitution that refer to international agreements or treaties.[1] However, probably the most relevant

[1] Articles 10, 23, 31, 37, 73, 153, 154, 155, 187.18, 217, 236.4, 285.1, 336.5.

provisions are: (1) Article 154, which generally requires an Act of Parliament before the President of the Republic ratifies an international treaty; and (2) Article 23 that grants human right treaties constitutional hierarchy to the extent that those treaties contain provisions more favourable than domestic legislation, and also orders their direct and immediate application by courts and public offices.

There are also several provisions of the 1999 Venezuelan Constitution that refer to the law of nations (public international law). For example, Article 11, third paragraph refers to public international law for determining the terms and conditions for the exercise of sovereignty and jurisdiction over the continental shelf, the exclusive economic zone, and the contiguous maritime zone. Article 13 refers to public international law for determining the subjects of international law besides foreign states. The last paragraph of Article 126 indicates that the term 'people', as used therein in respect of indigenous peoples, shall not be interpreted in the sense given to that term by international law. Article 155 mandates to insert in international treaties a clause whereby the contracting parties shall resort to the specific mechanisms recognized by international law in order to settle any controversies that may arise between/among them in respect of the interpretation or enforcement of those treaties.

The last paragraph of Article 31 refers to the measures to be taken by Venezuela in order to enforce 'decisions adopted by international organs created by international treaties to hear petitions for protection, or complaints for violation of human rights'. The last part of Article 153 provides that norms adopted within the framework of the Latin American and Caribbean integration treaties shall be deemed to be part of the Venezuelan legal order, and of direct and preferential application vis-à-vis domestic legislation. Article 217 mentions 'international usages' regarding the publication (in the Official Gazette) of Parliamentary Acts that authorize the President of the Republic to ratify a treaty.

Article 1 of the 1998 Act on Private International Law calls for the preferential application of norms of international law to regulate cases connected with foreign legal systems (ie cases of private international law or conflict of laws), in particular calling for the application of norms contained in international treaties.

## 3. Treaties and Other International Agreements

Generally, Venezuelan courts adopt the definition of treaty established in the Vienna Convention on the Law of Treaties regardless of the fact that Venezuela is not a party thereto. For the examination of issues of treaty law, Venezuelan courts rely on a mixture of domestic and international authorities. However, issues of treaty law that are dealt with in the Constitution are decided as a matter of domestic constitutional law. Accordingly, the legally-binding nature of international texts will be examined partly under Venezuelan constitutional law rules, and under the international law of treaties.

Pursuant to Article 154 of the Constitution, international treaties must be ratified by the President of the Republic subject to the prior approval of the

Parliament in the form of an act. The latter is a requirement for the validity of international treaties. Failure to comply with the constitutional ratification process will be tantamount to absence of ratification by Venezuela, and the treaty will not be considered as legally-binding by Venezuelan courts.

In certain exceptional cases established in the same Article 154 of the Constitution (treaties perfecting pre-existing international commitments of Venezuela, treaties applying principles expressly acknowledged by Venezuela, performance of ordinary acts in international relations, or treaties related to the performance of acts exclusively entrusted to the National Executive branch) there is no need for an Act of Parliament, but in any event those treaties must be published in the Official Gazette, and comply with all other applicable norms of international law.

Upon ratification of the treaty, and deposit or exchange of the ratification instrument, as the case may be, the treaty becomes part of the Venezuelan legal system, subject to the terms and conditions of the relevant treaty.

Venezuelan courts recognize the doctrine of self-executing and non-self-executing treaties. Courts distinguish between them based on the specificity of the commitments established in the relevant treaty.

Generally, once international treaties become part of domestic legislation, courts treat them as any other statute or domestic law. There are no differences in respect to standing and private rights of action. Private parties can invoke and seek the enforcement of treaties exactly as with any domestic law.

Usually, courts apply international treaties *ex officio*, and do not defer to the views of other government bodies in the interpretation of treaties. However, the interpretation of treaties is often conducted by mixing domestic rules of legal interpretation and international rules of treaty interpretation. It is also common that courts cite the Vienna Convention on the Law of Treaties, even though Venezuela is not a party.

The Supreme Court of Venezuela has adopted the position that it has the power to determine the legal nature of any statement attached by the government or legislature during treaty approval. Accordingly, the Supreme Court, as the maximum interpreter of the Constitution, has also affirmed its power to determine the scope or legality of a reservation.[2]

It is not uncommon that courts, including the Supreme Court of Justice, cite treaties to which Venezuela is not a party in interpreting or applying domestic law as persuasive authority.

## 4. Customary International Law

There are no specific provisions governing this issue. In practice, no particular procedure is followed for the incorporation of customary international law into

[2] Supreme Court of Justice en banc, decision of 25 September 1990, *Jose Guillermo Andueza* case [1990] 149(I) Gaceta Forense, Third Series, Caracas 124–56.

Venezuelan law. The courts apply customary international law; for example issues of immunity from jurisdiction are mainly dealt with as matters of customary law.[3]

Courts determine by themselves the existence or content of customary international law. However, they may refer to the government in order to determine the facts supporting a specific rule of customary law. Courts may also consult with the government in respect to international customary law but without any binding authority. Because international customary law is part of the Venezuelan legal system, courts take judicial notice of customary international law.

The primary subject areas of customary international law, including the issues of immunity from jurisdiction, and of privileges and immunities of foreign states and international organizations, are matters of jurisdiction for Venezuelan courts.

## 5. Hierarchy

Treaties are considered to have the same hierarchy as laws, but treaties are given preferential application vis-à-vis domestic laws in respect of the subject matter regulated by the treaty. This is because of the special constitutional authority granted to the President of the Republic to conduct the international affairs of Venezuela on matters subject to ordinary legislation.[4] The issue of the hierarchy of customary international law has not been addressed by Venezuelan courts. According to the Supreme Court of Justice international law must conform to the Constitution, otherwise it will not be enforceable in Venezuela.[5]

Although the doctrine of *jus cogens* is recognized by commentators, there appear to be no cases where it was applied by Venezuelan courts.

It is common that Venezuelan courts resort to international law to interpret constitutional provisions. However, the Supreme Court considers itself to be the exclusive interpreter of the Constitution, and therefore it is not bound by any such rule of international law.[6]

Courts have applied Article 23 of the Constitution that grants constitutional hierarchy to human rights treaties. Otherwise there is no indication of a higher status for any specific part of international law.

[3] See eg, Political Administrative Chamber of the Supreme Court of Justice, decision of 5 May 1994, *SELA* case (1996) 98 Revista de la Facultad de Ciencias Jurídicas y Políticas 233–56.

[4] Articles 156.1, 154, 187.18, 217 and 236.4 of the Constitution.

[5] Constitutional Chamber of the Supreme Court of Justice, decisions of 15 July 2003, *Rafael Chavero* case, Decision No 1.942, File No 01-0415 <http://www.tsj.gob.ve/decisiones/scon/Julio/1942-150703-01-0415.htm>; 17 October 2008, *Article 258 of the Constitution* case; 18 December 2008, *Corte Primera de lo Contencioso* case, Decision No 1.939, File No 08-1.572 <http://www.tsj.gob.ve/decisiones/scon/Diciembre/1939-181208-2008-08-1572.html>; 11 February 2009, *Articles 1 and 151 of the Constitution* case, Decision No 97, File No 08-0306, <http://www.tsj.gob.ve/decisiones/scon/Febrero/97-11209-2009-08-0306.html>.

[6] *Rafael Chavero* case (n 5).

## 6. Jurisdiction

Venezuelan courts will have jurisdiction over international crimes if the crime is committed in Venezuela[7] or if the crime is committed abroad by Venezuelan citizens or foreigners (1) in cases regulated in Article 4.9 of the Criminal Code (piracy, crimes against humanity), and (2) in case of crimes committed by members of the armed forces in transit through neutral territory against the population of that territory,[8] or by Venezuelan citizens in cases regulated by Article 4.10 (slavery).

Venezuelan courts can also exercise jurisdiction over civil actions for international law violations that are committed in other countries if the bases for jurisdiction provided in the 1998 Act on Private International Law are satisfied, eg the defendant is domiciled in Venezuela (Article 39), the violation has effects in the Venezuelan territory (Article 40.2), the defendant is personally summoned in the Venezuelan territory (Article 40.3), or the parties voluntarily submit to the courts of Venezuela (Article 40.4).

## 7. Other International Sources

Non-binding declarative texts are considered to have persuasive authority, relevant in interpreting and applying Venezuelan law, however subject to strict conformity with the Constitution.

The Constitutional Chamber of the Supreme Court of Justice[9] denied enforcement of a ruling rendered by the Inter-American Court of Human Rights on 5 August 2008 against the Republic of Venezuela, holding that such ruling violated the Venezuelan constitutional order.

The Constitutional Chamber of the Supreme Court of Justice in the *Rafael Chavero* case[10] declared that recommendations issued by the Inter-American Human Rights Commission under the Inter-American Convention on Human Rights were not binding, do not have a higher status than the Constitution, and were to be adopted by the Venezuelan government only if they do not violate the Venezuelan constitutional order.

In light of recent case-law discussed above, the trend in Venezuela would be to restrict the application of international law to those cases in which it conforms to the Constitution.[11]

[7] Article 3 of the Criminal Code.
[8] Article 4.13 of the Criminal Code.
[9] *Corte Primera de lo Contencioso* case (n 5).
[10] *Rafael Chavero* case (n 5).
[11] See *Rafael Chavero* case (n 5), *Article 258 of the Constitution* case (n 5); *Corte Primera de lo Contencioso* case (n 5); and *Articles 1 and 151 of the Constitution* case (n 5).

# APPENDIX

## National Reports Questionnaire[1]

The reports on this topic should aim to provide as much information as possible on how the domestic legal system incorporates and makes use of international law at all levels of governance and from all sources of international law. Citations to constitutional provisions, legislation and significant domestic cases should be included. If there is relevant information not covered by any of the questions, please so indicate and include it in the report.

1. *Constitutional and legislative texts*
   - 1.1. What are the provisions of the national Constitution that refer to international agreements or treaties?
   - 1.2. What are the provisions of the national Constitution that refer to customary international law or the law of nations?
   - 1.3. What mention, if any, is made in the Constitution to other sources of international law, eg general principles of law, the decisions of international tribunals, or declarative texts like the Universal Declaration of Human Rights?
   - 1.4. Are there any legislative provisions or regulations that call for the application of international law within the national legal system?
   - 1.5. For federal systems, do the constitutions of the component parts of the system (states, provinces, cantons) refer to international law?
   - 1.6. For federal systems, are there constitutional or statutory provisions at the federal level addressing federal authority over matters concerning international law?
2. *Treaties and Other International Agreements*
   - 2.1. How do domestic courts define 'treaty' and distinguish legally-binding international texts from political commitments? Do they rely on domestic or international law in deciding issues of treaty law?
   - 2.2. Do the courts recognize as legally-binding those international agreements that have not been formally approved as treaties through the constitutional ratification process, eg presidential agreements, memoranda of understanding, etc.?
   - 2.3. Are ratified treaties automatically accepted into domestic law or must they be incorporated, through legislation following formal approval, to become part of the domestic legal system?
   - 2.4. Do domestic courts recognize the doctrine of self-executing and non-self-executing treaties? If so, what test is applied to distinguish a self-executing treaty from a non-self-executing one?
   - 2.5. Under what conditions or circumstances can treaties be invoked and enforced in litigation by private parties (please discuss issues of standing and private rights of action)? Do the courts apply different tests to determine standing and private rights of action when the issue involves a treaty than they apply when a party is relying on a statute or other domestic law?

[1] Prepared for the XVIIIth International Congress on Comparative Law, *International Law in Domestic Systems* (Washington DC 2010).

2.6. Do the courts defer to the views of the government or legislature in interpreting a treaty provision or do the courts determine treaty matters without deference to the political branches? Do courts apply international rules of treaty interpretation? Do they cite to the Vienna Convention on the Law of Treaties?

2.7. Do the courts have power to decide whether a statement attached by the government or legislature during treaty approval is a reservation? Can the courts determine the scope or legality of a reservation?

2.8. Do courts make reference to treaties to which the state is not a party in interpreting or applying domestic law, including constitutional matters?

2.9. For federal systems, can and have state or local authorities adopted the substantive provisions of ratified or unratified treaties into law?

3. *Customary international law*

3.1. Is customary international law automatically incorporated into domestic law?

3.2. Do the courts apply customary international law in practice?

3.3. Do the courts defer to the government or legislature on the existence or content of customary international law?

3.4. Do judges take judicial notice of customary international law or must it be proved by the party asserting the norm?

3.5. What are the primary subject areas or contexts in which customary international law has been invoked or applied?

4. *Hierarchy*

4.1. Where do treaties and customary international law rank in the hierarchy of legal norms in the domestic legal system?

4.2. Have the courts developed any presumptions or doctrines to reconcile or conform domestic law to international law?

4.3. Have the courts recognized the doctrine of jus cogens norms? If so, how has the doctrine been applied and what is the impact of the doctrine in practice?

4.4. To what extent do the courts use international law to interpret constitutional provisions, such as those guaranteeing individual rights?

4.5. Have the courts indicated any higher status for any specific part of international law, eg human rights or UN Security Council decisions?

5. *Jurisdiction*

5.1. Do the courts exercise universal jurisdiction over international crimes?

5.2. Do the courts exercise jurisdiction over civil actions for international law violations that are committed in other countries?

6. *Other International Sources*

6.1. To what extent do the courts view non-binding declarative texts, like the UN Standard Minimum Rules on the Treatment of Prisoners, as authoritative or relevant in interpreting and applying domestic law?

6.2. Have the courts been asked to apply or enforce a decision of an international court or tribunal? If so, how have the courts responded? Do they view such decisions as legally-binding? Where do such decisions sit in the hierarchy of domestic law?

6.3. Have the courts been asked to apply or enforce a decision or recommendation of a non-judicial treaty body, such as a Conference or Meeting of the Parties to a treaty? If so, how have the courts responded? Do they view such decisions as legally-binding?

7. Please provide any other relevant information about international law as it applies within the national system.

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