Public International Law

Contemporary Principles and Perspectives

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dispute relating to an area where no satisfactory international law exists, and there exists a well-developed and relevant principle at the national level, the court may choose to use that principle.[30] The court may also use a state's law in an evidentiary sense, to determine the state's internal legal position on a disputed issue before the court.[31] Of course, reference to the national laws of states can, given consistency and breadth of practice, give rise to a general principal of international law,[32] or act as evidence of state practice in the determination of customary international law.[33]

3.2.3 Use of National Law by International Tribunals to Resolve Disputes

In a number of cases, issues have come before the courts for which there exists no relevant or applicable legal principle at the international level. In these circumstances, the courts have shown a willingness to borrow relevant national law concepts to apply within the international sphere.[34] The authority for courts to apply national law in the international sphere is found in Article 38(1)(c) of the Statute of the Permanent Court of International Justice,[35] which provides that 'the general principles of law recognized by civilized nations', typically being those derived from the domestic legal systems of states, may be utilized as a source of international law.[36] Thus, a general legal principle that exists at the national level may be imported into the international system, where it is appropriate to do so. Where there is consistency in practice, this can lead to the creation of a general principal of international law. In the *Barcelona Traction* case, the Belgian government sought reparations for damage caused to

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Wrongful Acts in Domestic Courts' (2007) 101 *American Journal of International Law* 799.

[30] See, e.g., *Barcelona Traction, Light and Power Co. Ltd* (*Belgium v Spain*) (Second Phase) [1970] ICJ Rep, 3, discussed in detail below at 3.2.3.

[31] See, e.g., *Anglo-Iranian Oil Co.* case (*United Kingdom v Iran*) [1952] ICJ Rep 93, discussed in detail below at 3.2.4.

[32] For a discussion of general principles as a source of international law, see the discussion in Chapter 2, section 2.2.3.

[33] For a discussion of custom as a source of international law, see the discussion in Chapter 2, section 2.2.2.

[34] See generally Jenks, above note 25, and in particular 547.

[35] Statute of the Permanent Court of International Justice (adopted 16 December 1920) 6 LNTS 380, Art. 38.

[36] See Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), 208, 218; Triggs, above note 5, 162–3. For a detailed discussion of this source of international law, see Chapter 2, particularly section 2.2.3.1.

Belgian nationals (who were shareholders in the Canadian company Barcelona Traction, Light & Power Co. Ltd) from the Spanish government who caused the damage, as the company carried out its operations in Spain.[37]

The Court, in considering the dispute, emphasized the role played by national law:

> If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.[38]

The Court clearly regarded the use of domestic law as an essential element in the resolution of the dispute before it. Interestingly, it was also noted that where domestic law rules are imported, they cannot be modified or altered in the process of applying them to international disputes. An international tribunal may, therefore, import domestic law. Indeed, it may need to do so in the resolution of an international dispute – but may not alter it in the process.

In the *Trail Smelter* arbitral case,[39] the United States brought an action against Canada for alleged air pollution caused by a smelter operated in Canada. The arbitral tribunal noted:

> No case of air pollution dealt with by an international tribunal has been brought to the attention of the Tribunal, nor does the Tribunal know of any such case . . . There are, however, as regards both air pollution and water pollution, certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in this field of international law.[40]

The Court then relied upon a number of judgments from the US Supreme Court, and imported into international law the national law principle established in these cases that 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to

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37 *Barcelona Traction* case, above note 30.
38 Ibid., 50.
39 *Trail Smelter Arbitration* (*United States v Canada*) (1941) 3 RIAA 1911.
40 Ibid., 1963–4.

the territory of another';[41] this has since become an established principle in international law.

Again, the approach of the tribunal to the incorporation of national law into international law so as to make sense of and resolve a dispute reveals a pragmatic, more than a principled, approach. In this case, the tribunal had regard to US case law. This in itself is not objectionable; the general principles of law, as a legitimate source of international law, are often determined in decisions of international courts by reference to a range of practice across a number of relevant national legal jurisdictions. Examples of this process include recognition by the International Court of Justice of the principle of 'good faith' in the creation and performance of international legal obligations,[42] and the acceptance in international decision-making of circumstantial evidence;[43] recognition by the US-Iran Claims Tribunal of the principle of 'unjust enrichment' in international law;[44] and the finding by the International Criminal Tribunal for the former Yugoslavia of the definition of rape as a crime against humanity resulting from the convergence of the principles of the major legal systems of the world.[45]

What may be questionable in the *Trail Smelter* arbitral case is the exclusive reference to US case law which, no matter how sensible or authoritative in its domestic jurisdiction, cannot in itself amount to a rule of international law. The role of national law in international law as mapped out in the *Barcelona Traction* and *Trail Smelter* cases raises an interesting theoretical problem. While the judicial reasoning seems entirely rational and perhaps essential to the proper functioning of the international legal system, it does raise what critical legal scholars would identify as the contradictions and indeterminacy inherent in legal rules. In other words, simply saying that an international court needs to apply national law to resolve an international law dispute does not explain what the legal justification is for doing so. Courts need to be more open and referential to the traditional sources of international law, and their proper application, in

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[41] Ibid., 1965.

[42] See *Nuclear Tests* cases (*Australia and New Zealand v France*) [1974] ICJ Rep 253.

[43] See *Corfu Channel* (*UK v Albania*) [1949] ICJ Rep 4 ('this indirect evidence is admitted in all systems of law, and its use is recognized by international decisions').

[44] See *Sea-Land Service* case [1984] 6 Iran–USCTR 149, 168–9: recognizing that the principle of 'unjust enrichment' is 'widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals'.

[45] *Prosecutor v Furundžija* (Judgment) IT-95-17/1-T (10 December 1998), [178]–[186].

determining disputes, lest the legitimacy of the system of international law be called into question.[46]

Indeed, while national law principles may be applicable in international law, considerable authority cautions against such a practice in the absence of an express or implied requirement to utilize these principles.[47] For example, in the *Exchange of Greek and Turkish Populations* case,[48] an Advisory Opinion was sought from the Permanent Court of International Justice over the interpretation of a Convention concerning the exchange of Greek and Turkish citizens at the end of a conflict between these two states. Specifically, the Court was asked to consider the meaning of the word 'established' as set out in the treaty. In certain cases where persons were not deemed 'established', they were subject to compulsory exchange between the two states; but where they were deemed to be 'established', they were exempt from exchange. The interpretation of the term was thus of crucial importance to the affected people.

The Court took a restrictive approach to the incorporation of national legal principles into the international sphere. It began by noting that there was no express reference to national legislation in determining the definition of 'established', before determining that the Convention made no implicit reference to national legislation. Therefore, the Court rejected Turkey's submission to interpret the Convention as taking into account domestic interpretations of the term, instead relying upon the natural meaning of the word. This had the effect of a broader definition of 'established' and thus allowed for a greater number of people to be excluded from the compulsory exchange between the two states. The Court justified its approach, stating:

> It is a well-known fact that the legislation of different States takes into account various kinds of local personal ties and deals with them in different ways. The application of Turkish and Greek law would probably have resulted in uncertainties, difficulties and delays incompatible with the speedy fulfilment always regarded as essential to the Convention under consideration. Moreover, it might well happen that a reference to Turkish and Greek legislation would lead to the division of the population being carried out in a different manner in

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[46] These cases are far from isolated examples of this problem. Reliance on sparse national law references to resolve aspects of international law is also discussed in Chapter 2, at section 2.2.3.2. For a theoretical discussion on the purpose and legitimacy of international law, see Chapter 1, section 1.4.

[47] See, e.g., the *Exchange of Greek and Turkish Populations* case (1925) PCIJ (Ser. B) No. 10, 19–21. See also the Separate Opinion of Judge McNair in the *South West Africa* case [1950] ICJ Rep 148.

[48] *Exchange of Greek and Turkish Populations* case, above note 47.

> Turkey and in Greece. This, again, would not be in accordance with the spirit of the Convention, the intention of which is undoubtedly to ensure, by means of the application of identical and reciprocal measures in the territory of the two States, that the same treatment is accorded to the Greek and Turkish populations. Nor is there any indication that the authors of the Convention, when they adopted the word which has given rise to the present controversy, had in mind national legislation at all. Everything therefore seems to indicate that, in regard to this point, the Convention is self-contained and that the Mixed Commission in order to decide what constitutes an established inhabitant must rely on the natural meaning of the words as already explained.[49]

The way in which international law borrows from national law is not by means of importing private law institutions 'lock, stock and barrel', ready-made and fully equipped with a set of rules.[50] It would be difficult to reconcile such a process with the application of 'the general principles of law'. The better view of the duty of international tribunals is to regard any feature or terminology which is reminiscent of the rules and institutions of national law as an indication of policy and principles rather than as directly importing these rules and institutions. Therefore, while there are circumstances in which national law will be imported into international law, it should not be an automatic process, nor one to be taken lightly by the international courts and tribunals.

However, where there exist applicable and well-developed principles at the national level, there is clearly scope – where the right circumstances exist and traditional sources of international law are appropriately considered – for these principles to be used in the resolution of a dispute before an international tribunal. As the cases discussed above disclose, there is clearly an element of the pragmatic at work when it comes to interpreting and applying national laws in international law cases.

3.2.4 Use of National Law to Resolve a State's Position on a Question of International Law

Another way in which national law is used by international courts is to ascertain a state's legal position on a given issue.[51] In the *Anglo-Iranian Oil* case,[52] a conflict arose between the Iranian Government, which sought

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[49] Ibid., 20. See also 18–23.

[50] Judge McNair uses this phrase in his Separate Opinion in the *South West Africa* case, above note 47, 148.

[51] *Anglo-Iranian Oil Co.* case, above note 31; Shaw, above note 6, 126; Jenks, above note 25, 577.

[52] *Anglo-Iranian Oil Co.* case, ibid., 93.

to nationalize its oil industry, and the Anglo-Iranian Oil Company, which argued that this nationalization breached an existing treaty. In deciding the issue, a question arose as to whether the International Court of Justice had jurisdiction over treaties or conventions entered into by Iran prior to the ratification of a Declaration made by both the UK and Iran granting the ICJ jurisdiction, or only after this date. The Court's answer to this question would determine whether it had jurisdiction to hear the case before it. While the UK argued that the Court should have jurisdiction over all treaties and conventions entered into by Iran, the Court held that Iran only intended the Court to have jurisdiction over treaties and declarations entered into after the ratification of the Declaration. In coming to this conclusion, the Court looked at existing Iranian domestic law as evidence to support Iran's legal position on the relevant issue, but stated:

> It is contended that this evidence [the relevant Iranian domestic law] as to the intention of the Government of Iran should be rejected as inadmissible and that this Iranian law is a purely domestic instrument, unknown to other governments . . . The Court is unable to see why it should be prevented from taking this piece of evidence into consideration.[53]

By looking at the national law of a state, an international tribunal may be able to determine how the state views various issues including jurisdiction, conditions of nationality, treaty interpretation and territorial sea boundaries.[54] A state's stance on these issues, as evidenced through its domestic legislation, can be of crucial importance in determining a dispute.[55]

National law can also be used to determine whether a state is complying with international obligations (treaty or customary law).[56] The Permanent Court of International Justice, in the *Certain German Interests in Polish Upper Silesia* case, considered an allegation by Germany that Poland had unlawfully taken over a German-controlled nitrate factory based in Chorzow, and had also appropriated agricultural property owned by the company.[57] One of Germany's arguments was that the relevant Polish national law breached the Geneva Convention providing for certain standards relating to the expropriation of property. The Court stated:

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[53] Ibid., 107.
[54] Shaw, above note 6, 136.
[55] See *Serbian Loans* case (1929) PCIJ (Ser. A) No. 20; *Brazilian Loans* case (1929) PCIJ (Ser. A) No. 21.
[56] Brownlie, above note 2, 38; Shaw, above note 6, 126.
[57] *Certain German Interests in Polish Upper Silesia* (1925) PCIJ (Ser. A) No. 6.

> From the standpoint of International Law and of the Court, which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.[58]

The Court ostensibly opted to use Poland's domestic law to help determine whether or not that state had breached an international obligation, determining that a number of breaches of this convention had in fact occurred.[59]

Rosalyn Higgins points out that the reference to judicial decisions as a subsidiary source of law in Article 38(1) of the ICJ Statute is not limited to decisions of the ICJ itself:[60]

> Of course, we think of the judgments of the International Court of Justice and its advisory opinions as being the judicial decisions there referred to. But there is nothing in the wording of Article 38 that limits the reference to the International Court of Justice at The Hague. And it is not specified that the judicial decision be an international one at all. Although it is natural that the judicial decisions of the International Court of Justice will have a great authority, it is also natural in a decentralized, horizontal legal order that the courts of nation states should also have a role to play in contributing to the norms of international law.[61]

Naturally, there are limits on the use by international tribunals of national legislation. For example, they may not declare national rules invalid, as this would impermissibly cross over into the state's domain. Thus in the *Interpretation of the Statute of Memel Territory*, the Permanent Court of International Justice decided that an act by the Governor of Memel in dissolving its Chamber of Representatives was invalid in respect of the relevant treaty. The Court was careful to note, however, that this finding did 'not thereby intend to say that the action of the Governor in dissolving the Chamber, even though it was contrary to the treaty, was of no effect

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[58] *Certain German Interests in Polish Upper Silesia,* (1926) PCIJ (Ser. A) No. 7, 19.

[59] Ibid., 80–82.

[60] See generally Chapter 2 on the sources of international law. See also Jenks, above note 25, 553, 547; Dixon, above note 14, 84.

[61] Higgins, above note 36, 208. Higgins notes at 218 that the scope for courts to examine international law matters is 'substantially reduced in dualist systems whereby interpretation and application of treaties is broadly permissible only when the treaty has been incorporated'.

in municipal law'.[62] This principle thus recognizes the practical reality that situations will arise where, while an act may be in breach of a treaty at the international level, it will nonetheless be treated within the national sphere as if it is a legal act, provided it is in accordance with that state's own laws.[63]

Furthermore, interpretation of a state's laws by its own courts is binding on any international tribunal.[64] As Brownlie notes, this principle is based partially on the 'concept of the reserved domain of domestic jurisdiction' and partially on the need to avoid contradictory interpretations of the law of a state from different sources.[65]

3.3 INTERNATIONAL LAW IN NATIONAL LAW

In an age of increased globalization and evolving interconnectedness between people, states and institutions across borders, the role of international law within states is a developing and important one. In many states, for international rules to become operative, they must be implemented into the national law of a state.[66] As already discussed, states cannot rely upon national law to escape their international law obligations.[67] While there also exists some support for a general principle requiring states to bring their national law in line with their international obligations,[68] whether this principle does in fact exist at the level of customary international law is doubtful,[69] particularly when a multitude of states clearly choose not to bring some or all of their national law in line with their international obligations.

There has been a relatively modern development in this area, concerning treaty obligations and *jus cogens* norms that require states to take positive steps towards implementation of a whole or part of a treaty into their domestic legislation. Examples of this include the four Geneva Conventions of 1949 concerning the victims of war. The Statutes of the

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62 *Interpretation of the Statute of the Memel Territory* (1932) PCIJ (Ser. A/B) No. 49, 336.

63 See also Brownlie, above note 2, 39.

64 *Serbian Loans* case, above note 55, 46; Brownlie, ibid., 39.

65 Brownlie, ibid., 39.

66 See Cassese, above note 4, 217.

67 See above section 3.2.1.

68 *Exchange of Greek and Turkish Populations* case, above note 47, 20; Brownlie, above note 2, 35.

69 See, Cassese above note 4, 218.

International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)[70] require all states to cooperate with and assist requests made by these courts – an obligation which flows from their status as creations under Chapter VII of the UN Charter (which carries with it the authority of the Security Council).[71] The International Criminal Court (ICC) also requires all Member States to provide cooperation to the Court.[72] A range of multilateral treaties regarding the issues of terrorism, international and transnational crime and certain human rights abuses, require states to implement legislation, as well as to prosecute or extradite persons in their jurisdiction.[73]

A key issue that arises in implementing international law at the national level is that of compliance. There exists a general unwillingness on the part of states to criticize one another for failing to implement international law obligations at the domestic level. This stems from the desire by states to be free to conduct their internal affairs without interference from other states or international bodies. This unwillingness extends to the courts of states, as Chief Justice Fuller stated in an oft-cited passage in *Underhill v Fernandez*: 'Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another within its own territory.'[74]

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[70] Statute of the International Tribunal for the Former Yugoslavia, annexed to SC Res. 827, UN SCOR 48th sess., 3217th mtg, UN Doc. S/25704 (1993), Art. 29; Statute of the International Criminal Tribunal for Rwanda, annexed to SC Res. 955, UN SCOR, 49th sess., 3453rd mtg, UN Doc. S/RES/955 (1994), Art. 28.

[71] These ad hoc tribunals were created by the Security Council under its authority to maintain or restore international peace and security – an unusual and controversial exercise of this power (see generally Gabriël H. Oosthuizen, 'Playing Devil's Advocate: the United Nations Security Council is Unbound by Law' (1999) 12 *Leiden Journal of International Law* 549.

[72] Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998), Art. 88.

[73] See, e.g., International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) A/RES/52/164; International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, not yet entered into force) A/RES/59/766; Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277; 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. For a discussion of the principle of *aut dedere aut judicare* (the duty to prosecute or extradite), see Chapter 6, section 6.3.5.2.

[74] *Underhill v Fernandez* 168 US 250 (1897), [252]. For criticism of this approach, see Higgins, above note 36, 217: 'Should we expect this understandable

Even so, there do exist a number of monitoring mechanisms designed to encourage compliance with international law in a range of areas, in particular international human rights and global trade law. In the field of international human rights, for example, the Human Rights Council exists to encourage domestic compliance with the provisions of the International Covenant on Civil and Political Rights (ICCPR).[75] The Council came about from a recognized need to reform its previous incarnation (the Human Rights Committee), which was described by then UN Secretary-General Kofi Annan as facing 'declining credibility and professionalism'.[76]

The Council is made up of independent human rights experts, and is granted a number of powers to assist it in the task of encouraging compliance with human rights. These include a requirement for parties to the ICCPR to submit regular reports on the implementation of the Convention in their state, a complaints process, and the ability to make recommendations to the relevant state. A new power that was previously not available to the Council is that of 'universal periodic review', which allows for the review of all of the UN Member States in four-year cycles, which means that 48 states are reviewed every year.[77] As Sarah Joseph notes, however, whilst the broad mechanisms themselves have been retained, the content of these mechanisms has been altered, some strengthening and some weakening the human rights protection that the powers grant.[78] The overall success of the Council is debatable, given that

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principle to apply when the acts of the foreign state are manifestly in violation of international law?'

[75] See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171 ('ICCPR'), Art. 28. For further information on the role of the Committee, see Arts 40 and 41 ICCPR; Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 19 December 1966) 999 UNTS 171. The Human Rights Council was created by resolution of the General Assembly: Resolution on the Human Rights Council, GA Res. 60/251, UN GAOR, 6th sess., 72nd plen. mtg, UN Doc. A/RES/60/251 (2006). The predecessor to the Council, the Human Rights Committee, was abolished, taking effect on 1 June 2006, by resolution of the Economic and Social Council: Implementation of GA Res 60/251, ESC Res. 2/2006, UN ESCOR, 62nd sess., UN Doc. E/RES/62/2 (2006).

[76] Secretary-General Kofi Annan, 'In Larger Freedom: Toward Development, Security and Human Rights for All', UN Doc. A/59/2005 (21 March 2005), [182].

[77] For further information on the Universal Periodic Review process, see http://www.upr-info.org.

[78] Sarah Joseph, 'The United Nations and Human Rights', in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Cheltenham, UK; Northampton, MA: Edward Elgar, 2010), 10.

its findings and recommendations are not binding and in many countries it has enjoyed limited effectiveness.[79]

Another example of mechanisms encouraging compliance with international law is seen at the World Trade Organization (WTO). The WTO was designed as the world's first global international trade organization, with 149 members.[80] The WTO has an extensive process for resolving disputes between states, through the Dispute Settlement Understanding (DSU).[81] The DSU is a powerful dispute resolution tool, as it establishes compulsory and binding procedures applicable to all members, thus ensuring that their international obligations accrued through the WTO are enforceable. There is a complex and detailed procedure for the resolution of disputes, eventually leading to recommendations made by the panel or Appellate Body that decides the dispute, which generally takes the form of compensation.

If the penalized party fails to comply with these recommendations, an application may be made to request the suspension of various concessions or other obligations that the party may have, in principle in the same trade sector in which the violation took place.[82] By 31 August 2010, over 411 complaints had been notified to the WTO,[83] 98 reports of panels and the Appellate Body had been adopted,[84] and the suspension of concessions

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[79] See, e.g., in relation to Australia, the case of *A v Australia* (560/1993) 30 March 1997, UN Doc. CCPR/C/59/D/560/1993: even though human rights breaches by Australia were found by the Human Rights Committee, it could only make recommendations on how to respond to the situation to Australia, which Australia simply dismissed, resulting in a lack of effective remedy provided by the Committee: Official Records of the General Assembly, 53rd sess., UN Doc. CCPR/A/53/40, Vol. 1 (1998). See also Hilary Charlesworth, 'Human Rights: Australia versus the UN', Discussion Paper 22/06, Democratic Audit of Australia, Australian National University, August 2006, available at http://democraticaudit.anu.edu.au/papers/20060809_charlesworth_aust_un.pdf .

[80] Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('WTO Agreement').

[81] Annex 2, WTO Agreement. Generally, on the DSU, see *Handbook on the WTO Dispute Settlement System by World Trade Organization* (2004); Federico Ortino & Ernst-Ulrich Petersmann (eds), *The WTO Dispute Settlement System, 1995–2003* (The Hague; New York: Kluwer Law International, 2004). For information on the legal documents relating to the WTO, see http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

[82] World Trade Agreement, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 22.1.

[83] Statistics available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

[84] Statistics available at http://www.wto.org/english/tratop_e/dispu_e/stats_e.htm.

had been authorized in 17 cases. The DSU can therefore be described as a highly effective and compelling process for ensuring that states comply with their WTO obligations, considering that 393 out of the total 411 complaints were resolved without the need for concessions to be placed on a state. As well as illustrating the effectiveness of the DSU at the international level, determinations by the DSU will also directly impact on national law. Whilst they are not binding in the sense in which a statute is binding, the decisions will nonetheless have a direct influence upon domestic jurisprudence.[85]

3.4 DIFFERENT APPROACHES TO THE IMPLEMENTATION OF INTERNATIONAL LAW IN NATIONAL LAW

There are two main theories which govern how international law becomes a part of the national law of states: transformation and incorporation. This section will first consider the theories themselves, before examining examples of the practical implementation process of international law within a sample of states. There are apparent differences between the implementation of customary international law (represented largely by the incorporation approach), and treaty law (which generally is implemented through a process of transformation). Regardless of which theoretical approach is adopted, from a practical perspective there are growing calls for national courts, in light of globalization, to take a more 'aggressive' approach to the implementation of international law into national law.[86]

3.4.1 Transformation

The principle of transformation provides that before international law can become part of a state's national law, the state must implement legislation to 'transform', or implement, the international law into national law.[87]

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[85] See, e.g., in relation to the USA, John H. Jackson, *The Jurisprudence of the GATT and WTO: Insights on Treaty Law and Economic Relations* (Cambridge: Cambridge University Press, 2000), 167.

[86] See, e.g., Benvenisti and Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20(1) *European Journal of International Law* 65–8.

[87] For a theoretical consideration of the implementation of international law into national law, see Kelsen, above note 3, 378–83, 388; F Morgenstern 'Judicial Practice and the Supremacy of International Law' (1950) 27 *British Yearbook of International Law* 42.

Transformation is the dominant approach among states in relation to treaty law, which is generally transformed through an Act of Parliament. The content of such an Act of Parliament will normally take one of two forms. The first is a legislative Act setting out all of the relevant treaty provisions within the Act itself, which then becomes part of the domestic law. An example of this is the Australian International Criminal Court Act 2002 (Cth),[88] which aims to 'facilitate compliance obligations' under the Rome Statute of the International Criminal Court, and sets out at length all of the relevant substantive Rome Statute provisions within the domestic Act.[89]

The second approach involves the legislative Act simply acknowledging that the treaty is to become part of the domestic law, without setting out the treaty provisions within the Act itself, but instead annexing the treaty as a schedule. Once the treaty is transformed, it becomes a part of the state's domestic law.[90] An example of this is the Australian Geneva Conventions Act 1957 (Cth),[91] which does not include the provisions of the relevant Geneva Conventions within the Act, but instead attaches them as Schedules to be used in the interpretation of the Act.[92]

3.4.2 Incorporation

The doctrine of incorporation is based on the principle that, in the absence of conflicting domestic legislation, international law should *automatically* become part of a state's law without any need for a specific Act to be passed 'transforming' the international law into national law.[93] The incorporation doctrine can be described as the dominant doctrine in relation to customary international law, although the 'pure' concept of incorporation is altered, and in some cases heavily modified, in the context of each individual state.

The incorporation doctrine is traditionally only employed in relation

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[88] Australian International Criminal Court Act 2002 (Cth), assented to 27 June 2002, all parts commenced operation 26 September 2002.

[89] For a discussion of this process, see, e.g., Gideon Boas, 'An Overview of Implementation by Australia of the Statute of the ICC' (2004) 2 *Journal of International Criminal Justice*, 179.

[90] See Brownlie, above note 2, 44.

[91] Australian Geneva Conventions Act 1957 (Cth), assented to 18 December 2002, commenced operation 1 September 1959.

[92] Ibid. See also Human Rights and Equal Opportunity Act 1986 (Cth), which incorporates a range of human rights treaties in schedules to the Act.

[93] Brownlie, above note 2, 41; Cassese, above note 4, 220; Shaw, above note 6, 140.

to customary international law, not treaty law. The reason for this is that generally the power to negotiate and enter into treaties is given to a state's executive, not its legislature.[94] This would mean that, in the absence of a transformation requirement, the executive could enter into or exit treaties, with all the obligations these actions would entail and without any input from the legislature. These treaties would then be automatically incorporated into the state's national law, bypassing the legislature almost entirely.[95]

An important qualification to the incorporation doctrine is that international law generally only applies insofar as it is not inconsistent with domestic legislation. The practical effect of the incorporation doctrine being applied within a state is thus less powerful than it may initially appear, for in a modern state which has a sophisticated and developed legal framework, the areas on which it would not have legislated, and in which international law would therefore claim substantial influence, are limited. In those areas where the state's domestic law and international law are predominantly in accord it will be the state's domestic law that would take precedence in any dispute between the two areas of law (assuming the absence of any incorporating legislation by the state).

3.4.3 The Implementation of Customary International Law into National Law

For customary international law, the principal approach, particularly in countries that follow the English common law system,[96] is that of automatic incorporation into domestic law, subject to the proviso that these rules are only incorporated to the extent that they are not inconsistent with the state's existing law.[97]

3.4.3.1 Common law states

3.4.3.1.1 The United Kingdom In the United Kingdom, the doctrine of incorporation is generally followed with respect to customary inter-

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[94] This is the case in states based upon the British common law system, including the United Kingdom and Australia. This can be contrasted with states such as the United States, where the executive is given the power to enter into treaties, in light of its more substantive role within the constitutional framework.

[95] There have, however, been some interesting contemporary developments contrary to this traditional approach, in relation to Russia and East Timor (see below section 3.4.4.3).

[96] Shaw, above note 6, 166.

[97] Brownlie, above note 2, 47.

national law.[98] Thus the approach is largely that international law will automatically become part of the law of the UK in the absence of any domestic law to the contrary.[99] There is an extensive line of authority in support of this principle, an early example being the eighteenth century case of *Buvot v Barbuit*, in which Lord Talbot held that 'the law of nations in its full extent was part of the law of England'.[100] More recently, the case of *Trendtex Trading Corporation v Central Bank of Nigeria*[101] endorsed the incorporation approach. In the course of determining the case, involving a complex contractual arrangement for Trendtex to supply cement to Nigeria, Lord Denning made the following comments:

> 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 into English law 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 . . . 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. It is bound down to those rules of international law which have been accepted and adopted in the past. It cannot develop as international law develops.[102]

After considering the historical development of these two theories, Lord Denning then went on to reverse his position in an earlier decision that the doctrine of transformation was to be preferred[103] and, instead, endorsed the doctrine of incorporation:

> Which is correct? 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 a change in the rules of international law. It is certain that international law does change. I would use of international law the words

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[98] Brownlie, ibid., 41; Shaw, above note 6, 141; Dixon, above note 14, 97. See generally David Feldman, 'Monism, Dualism and Constitutional Legitimacy' (1999) 20 *Australian Yearbook of International Law* 105.

[99] Shaw, above note 6, 141–8; Brownlie, ibid., 42–4. Note also that there exists a presumption that domestic legislation does not run counter to international law.

[100] (1736) 3 Burr 1481, as cited by Lord Denning in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 553–4.

[101] [1977] QB 529. See also J.G. Collier, 'Is International Law Really Part of the Law of England?' (1989) 38 *International & Comparative Law Quarterly* 924, 926.

[102] *Trendtex* case, above note 101, 553.

[103] *R v Secretary of State for the Home Department, ex parte Thakrar* [1974] 1 GB 684, 701.

> which Galileo used of the earth: "But it does move." International law does change: and the courts have applied the changes without the aid of any Act of Parliament.[104]

In the more recent *Pinochet* rulings, including those of the House of Lords, the doctrine of automatic incorporation was endorsed.[105] In *Ex parte Pinochet (No. 1)* Lord Lloyd endorsed the incorporation doctrine, referring to the 'principles of customary international law, which principles form part of the common law of England'.[106] This approach was affirmed in *Ex parte Pinochet (No. 3)*, in which Lord Millett reached a similar conclusion, holding that 'customary international law is part of the common law'.[107]

However, doubt has recently arisen as to whether the traditional incorporation approach is still applicable. In the case of *R v Jones*,[108] a question as to whether the customary international law crime of aggression was automatically incorporated into UK law was considered. According to the traditional incorporation approach, in the absence of any domestic legislation (there being no domestic legislation in this case), it would normally automatically become part of the law of the UK. Yet the House of Lords unanimously held that the incorporation doctrine did not apply to the crime of aggression, stating two key reasons. First, it was accepted that UK courts no longer had the power to create new crimes, following a unanimous recent House of Lords decision to that effect,[109] and thus in the absence of statutory guidance they were unable to incorporate the customary international law crime of aggression. As Lord Hoffmann stated: 'While old common law offences survive until abolished or superseded by statute, new ones are not created. Statute is now the sole source of new criminal offences.'[110]

Secondly, Lord Hoffmann stated that 'when it is sought to give domestic effect to crimes established in customary international law, the practice is to legislate.'[111] He then referred to a number of examples where legislation was implemented to address crimes established under customary

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[104] *Trendtex* case, above note 101, 553. The incorporation doctrine was also accepted by the other two judges in this case, Stephenson and Shaw LJJ.

[105] See also Brownlie, above note 2, 41, listing an extensive list of authority in support of this principle.

[106] [2000] 1 AC 61, 98.

[107] [2000] 1 AC 147, 276.

[108] [2006] UKHL 16. See also Shaw, above note 6, 146.

[109] *Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1972] 2 All ER 898, [1973] AC 435.

[110] *R v Jones*, above note 108, [28].

[111] Ibid.

international law, in particular the International Criminal Court Act 2001 (UK),[112] giving effect to the Rome Statute. He noted that this legislation, whilst including crimes such as genocide, crimes against humanity and war crimes, excluded the crime of aggression, which was present in the original Rome Statute. Thus, he stated, '[i]t would be anomalous if the crime of aggression, excluded (obviously deliberately) from the 2001 Act, were to be treated as a domestic crime, since it would not be subject to the constraints applicable to the crimes which were included'.[113] Lord Hoffmann did state that the principle was not absolute, although it could only be departed from where 'very compelling reasons' existed.[114]

Where does that leave the UK's approach to customary international law? Whilst *R v Jones* may not appear to follow the incorporation approach, this can be explained by the specific facts of that case. Thus, it appears that the approach taken in *Trendtex* is still good law, and that the incorporation approach remains dominant. This approach has been adopted and revised to suit the particular circumstances of a number of other states, including the United States and Australia.

3.4.3.1.2 The United States The United States also has an incorporation-based approach similar to that of the United Kingdom, with the added proviso that the incorporation of international law is additionally subject to the US Constitution.[115] In a clear endorsement of the place of international law, the US Supreme Court has held:

> As a general proposition, it is of course correct that the United States has a vital national interest in complying with international law. The Constitution itself attempts to further this interest by expressly authorizing Congress '[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations'.[116]

The Court, however, noted that international law could only be enforced to the extent that it was not incompatible with the Constitution, stating

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[112] International Criminal Court Act 2001 (UK), assented to 11 May 2001, general commencement from 1 September 2001.

[113] Ibid. It is unclear what effect recent amendments to the Rome Statute, to include the crime of aggression (with effect from some time after 2017), will have on this argument.

[114] Ibid., [29].

[115] For an early example of this see *The Schooner Exchange v McFadden*, 11 US (7 Cranch) 116 (1812), 146. See also John Marshall Rogers, *International Law and United States Law* (Aldershot, UK: Ashgate, 1999), 36.

[116] *Boos v Barry,* 485 US 312 (1988) 323.

that, 'at the same time, it is well established that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution'.[117]

The contemporary status of customary international law in the US is subject to some controversy and debate;[118] however, as a general proposition, it can be said that it is treated as federal law, and any determination made by the federal courts is binding upon state courts.[119] As with the UK, the doctrine of incorporation is subject to any existing domestic statute to the contrary, as well as the doctrine of precedent.[120] However, as is also the case in the UK, there exists a presumption that domestic legislation is to be read as being in accordance with international law, 'unless it unmistakably appears that congressional act was intended to be in disregard of a principle of international comity'.[121]

There has been some renewed discussion of the approach taken by the United States in relation to customary law, particularly in the area of human rights. This has arisen from a uniquely American historical peculiarity, in the form of the Alien Tort Statute.[122] This statute provides that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations'.[123] Thus the Act allows for non-nationals to bring an action for a tort committed against them in violation of international law, even outside the jurisdiction of the US. In *Filartiga v Peña-Irala*,[124] a case came before the US Court of Appeals for the Second Circuit involving an action brought by Paraguayans against a fellow Paraguayan for the torture and death of the plaintiff's son. The Court held that torture constituted a violation of the law of nations, as a breach of customary

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117 Ibid., citing *Reid v Covert,* 354 US 1, 16 (1957).

118 See, e.g., Ernest A. Young, 'Sorting out the Debate over Customary International Law' (2002) 42 *Virginia Journal of International Law* 365; Curtis Bradley and Jack Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110 *Harvard Law Review* 815; Harold Koh, 'Is International Law Really State Law?' (1998) 111 *Harvard Law Review* 1824.

119 *United States v Belmont* 301 US 324, 331; *Restatement (Third) of the Foreign Relations Law of the United States*, (1987), Vol. I, 48–52. See also *Kadić v Karadžić* 70 F.3d 232, 246 (2d Cir. 1995).

120 *Schroeder v Bissell* 5 F.2d 838, 842 (1925); *Committee of United States Citizens Living in Nicaragua v Reagan*, 859 F.2d 929 (1988).

121 *Schroeder* case, above note 120.

122 28 USC §1350,

123 Ibid.

124 630 F.2d 876 (1980).

international law,[125] and was thus actionable under the Alien Torts Claims Act.

Subsequent cases involving the Alien Torts Claims Act have seen mixed results in incorporating customary international law provisions into US domestic law. In *Kadić v Karadžić*,[126] the US Court of Appeals for the Second Circuit held that the Act applied to genocide and war crimes committed by Karadžić as a state actor. On the other hand, in the case of *Sosa v Alvarez-Machain*,[127] it was held that the Alien Torts Claims Act did not create new causes of action, and was restricted only to violations of the laws of nations that existed at the time the Act came into effect.

3.4.3.1.3 Australia The Australian approach differs markedly from the UK and US approaches, resembling more of a transformative approach. Such an approach follows the comments of Justice Dixon in the High Court decision of *Chow Hung Ching v The King* where he found 'that international law is not a part, but is one of the sources, of English law'.[128]

In more recent High Court authority, the acceptance of international law as a source of law and influence on national law has been confirmed. In the *Mabo No. 2* decision,[129] Justice Brennan held that, in the event of a clash between domestic binding precedent and international customary law, the court may elect to adopt customary international law. This echoed Lord Denning's statement in the *Trendtex* case that domestic law must adapt to the changing nature of international law. In reconsidering the long-held view that indigenous Australians did not exercise lawful ownership over their land when Europeans originally arrived in Australia, Justice Brennan found that it was no longer acceptable to uphold the international law notion that inhabited land could be classified as *terra nullius* in light of modern developments in international law, including Australia's ratification of the ICCPR, leading to his view that:

> 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 a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[130]

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125 Ibid., 884–5.
126 70 F.3d 232 (1995).
127 542 US 692 (2004), 71ff.
128 (1948) 77 CLR 449.
129 *Mabo v Queensland (No. 2)* 175 CLR 1.
130 Ibid., 42.

Whilst international law appears to operate as an influence on Australian law, the doctrine of automatic incorporation was squarely rejected by the Federal Court in the case of *Nulyarimma v Thompson*.[131] In that case, the majority acknowledged that genocide, the relevant crime in this case, was a peremptory norm (*jus cogens*) of international law but, as genocide was not a defined crime within Australian statutory or common law, it could not be incorporated into Australian law. In this way, the Court adopted the transformative approach, and from a practical perspective based this decision on the *nullen crimen sine lege* maxim (there exists no crime unless expressly created by law).[132] Other recent cases reinforce this distinct lack of clarity in the Australian approach to the implementation of customary international law.[133]

3.4.3.2 Civil law states

3.4.3.2.1 Italy, Germany and Japan A number of states following the Second World War provided for automatic incorporation of customary international law through constitutional provisions.[134] Article 10 of the 1947 Italian Constitution states: 'Italian law shall be in conformity with the generally recognized rules of international law.'[135] However, this does not affect the validity of legislation passed prior to the creation of the constitution.[136]

As required by the Allied countries following the War, Germany and Japan enacted provisions recognizing customary international law. Thus the 1949 Basic Law for the Federal Republic of Germany states, in Article 25, that 'the general rules of public international law are an integral part of federal law. They shall take precedence over the laws and shall directly

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131 (1999) FCR 153.

132 Ibid., Wilcox J at [26], [32], Whitlam J at [54].

133 See, e.g., *Ahmed Ali Al-Kateb v Godwin* 219 CLR 562, [63]: Justice McHugh strongly denounced the use of international law in interpreting the constitution. But see Justice Kirby in the same case at [190] (advocating the use of international law in interpreting the constitution: 'opinions that seek to cut off contemporary Australian law (including constitutional law) from the persuasive force of international law are doomed to fail').

134 Whilst a general outline of a number of constitutional provisions is provided below, it must be remembered, as is the case with the states above, that states seldom adopt a pure form of incorporation, and instead modify it to fit within their particular legal framework. Thus the practical implementation of customary international law in states through national courts will vary.

135 Constitution of the Italian Republic, enacted 22 December 1947, Art. 10.

136 Brownlie, above note 2, 48.

create rights and duties for the inhabitants of the federal territory'.[137] The wording of this article has caused some controversy and confusion,[138] an ongoing debate being whether customary international law could take precedence over the German Constitution.[139]

Article 98(2) of the Constitution of Japan states, somewhat less comprehensively than the Germany Basic Law, that the '[t]reaties concluded by Japan and established laws of nations shall be faithfully observed'.[140] This has been interpreted as incorporating customary law into the domestic legal system.[141]

3.4.3.2.2 Portugal and the Netherlands The 1989 Constitution of the Portuguese Republic, Article 8(1), states that customary international law is an integral part of national law.[142] Whilst the 1983 Netherlands Constitution does not address customary law specifically, commentators have noted that customary international law will automatically apply internally, but will be trumped by statute in the case of conflict.[143]

3.4.3.3 Contemporary developments: growing constitutional recognition of the primacy of customary international law

Leading into the 1990s, a number of states expressly recognized international law in their constitutions. Following the collapse of the Communist regime, the Russian Federation adopted a new constitution in 1993, Article 15(4) of which provides:

> [T]he generally recognized principles and norms of international law and the international treaties of the Russian Federation shall constitute part of its legal

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[137] Basic Law for the Federal Republic of Germany, promulgated on 23 May 1949, Art. 25.

[138] For example, see *German Consular Notification* case (*Individual Constitutional Complaint Procedure*), BVerfG, 2 BvR 2115/01, 19 September 2006. See also A. Drzemczewski, *The European Human Rights Convention in Domestic Law* (Oxford: Clarendon Press, 1983) and Amos J. Peaslee, *Constitutions of Nations* (The Hague: Nijhoff, 1950), Vol. III, 361.

[139] Shaw, above note 6, 171.

[140] Constitution of Japan, enacted 3 May 1947, Art. 98(2).

[141] See Y. Iwasawa, 'The Relationship Between International Law and National Law: Japanese Experiences', (1993) 64 *British Yearbook of International Law* 333.

[142] Constitution of the Portuguese Republic, promulgated 2 April 1976, Art. 8(1).

[143] See, e.g., H.F. van Panhuys, 'The Netherlands Constitution and International Law: A Decade of Experience', 58 *American Journal of International Law*, 1964, 88–108.

> system. If an international treaty of the Russian Federation establishes other rules than those stipulated by the law, the rules of the international treaty shall apply.[144]

In 1996, following the fall of apartheid, the South African Constitution (one of the most progressive) was enacted, section 232 providing: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'[145]

Moving into the twenty-first century, a number of new state constitutions have recognized the supremacy of customary international law. The 2002 Constitution of the Democratic Republic of East Timor states in Article 9(1): 'The legal system of East Timor shall adopt the general or customary principles of international law.'[146] Similarly, the 2008 Kosovo Constitution, recognizes in Article 19(2): 'Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo.'[147]

These developments have had the result of strengthening the role that customary law plays within a state's domestic legal system through its increased automatic acceptance. As a consequence, the growing acceptance of automatic incorporation has also led to potentially enhanced consequences arising from the decision to deem the crystallization of a customary international law norm. This is because the creation of a norm will now have instantaneous and potentially wide-ranging legal effects within the growing number of countries that adopt the approach of automatic incorporation.

3.4.4 The Implementation of Treaty Law into National Law

While there is a large body of states that adhere to the incorporation doctrine in relation to customary international law, treaty law reveals a far greater divergence among states between transformation and incorporation approaches.[148]

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[144] Constitution of the Russian Federation, ratified 12 December 1993, Art. 5.

[145] Constitution of the Republic of South Africa, certified by the Constitutional Court on 4 December 1996.

[146] Constitution of the Democratic Republic of East Timor, entered into force 20 May 2002, Art. 9(1).

[147] Constitution of the Republic of Kosovo, ratified 9 April 2008, Art. 19(2).

[148] See generally Higgins above note 36, 209–10.

3.4.4.1 Common law states

3.4.4.1.1 The United Kingdom While adhering to an incorporation approach in the implementation of customary law, with respect to treaties the UK adopts a transformative approach.[149] This approach requires an Act of Parliament to integrate a treaty into England's domestic law before that instrument will have any effect on domestic law. The reasoning behind such a view is that, while customary international law develops over a period of time through the actions of many states, treaty law can lead to the instant creation of new obligations or laws through the action of a state's executive in choosing to ratify a treaty. In the case of the UK, this would mean that if an incorporation approach were to be adopted in relation to treaty law, the Crown would be handed considerable new powers. In this way, the unelected Crown would be able to ratify and incorporate treaties into English national law, bypassing entirely the legislature.[150] Because of this, as Shaw notes:

> [A]ny incorporation theory approach to treaty law has been rejected. Indeed, as far as this topic is concerned, it seems to turn more upon the particular relationship between the executive and legislative branches of government than upon any preconceived notions of international law.[151]

Once a treaty is ratified in the UK, the question then turns to the interplay between the treaty and UK domestic legislation. There exists a rule of legal construction which provides that where domestic legislation is passed to give effect to an international convention, it is presumed that Parliament intended to uphold its international obligations.[152] This, however, must be read in conjunction with the constitutional principle that, in the case of conflict between a treaty and a later Act of Parliament, the later Act

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[149] See, e.g., Rosalyn Higgins, 'United Kingdom', in Francis G. Jacobs and Shelley Roberts (eds), *The Effect of Treaties in Domestic Law* (London: Sweet & Maxwell, 1987), Ch. 7, 125; Dixon, above note 14, 93. See also Brownlie, above note 2, 44–7.

[150] This can be contrasted with the US, as discussed below, where the executive is elected and plays a very active as opposed to ceremonial role, as is intended by the American Constitution.

[151] Shaw, above note 6, 148. See also Brownlie, above note 2, 45 (noting that 'if a transformation doctrine were not applied, the Crown could legislate for the subject without parliamentary consent'); *Maclaine Watson v Department of Trade and Industry* [1989] 3 All ER 523.

[152] Brownlie, above note 2, 45. See, e.g., *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 141 (Lord Denning MR).

of Parliament will prevail. This constitutional principle has the effect of potentially limiting the legal impact a treaty can have, since any ratified treaty is always subject to the possibility of being overruled by Parliament.

3.4.4.1.2 The United States The United States also subscribes to a transformative approach in relation to treaties, although one that differs substantially from that of the UK. For a treaty to become law, it must be approved by a two-thirds majority in the Senate (the legislature) before being ratified by the President (the executive).[153] The interplay between the legislature and executive is more pronounced than it is in the UK because of the largely ceremonial role played by the Crown compared with the far more substantive role of the President within the US system. Unlike the UK, where the ratification of a treaty is a mere formality carried out by the Monarch, in the US the decision of the President to ratify is a substantive one. Once a treaty is ratified, Article VI, section 2 of the Constitution provides that:

> All Treaties made or which shall be made with the authority of the United States shall be the supreme law of the land and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any state to the contrary notwithstanding.[154]

There is an exception to the requirement of Senate approval for a treaty to come into force, through the medium of executive agreements. These agreements are usually made by the President (without the requirement for Senate approval) but nonetheless constitute valid treaties within the international sphere. These agreements are not explicitly mentioned in the Constitution, but their existence has been implied and they enjoy considerable use.[155]

As to the impact of treaties upon domestic law, there is a distinction between 'self-executing' and 'non self-executing' treaties.[156] This is a somewhat artificial distinction drawn in certain states, including the US, which whilst having no effect upon the ratification process of the treaty, do have an effect upon its use in the domestic sphere. Self-executing treaties do not

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[153] United States Constitution, adopted 17 September 1787, Art. II s. 2. See also Cassese, above note 4, 226; Shaw, above note 6, 161.

[154] United States Constitution, ibid., Art. VI s. 2.

[155] See, e.g., *United States v Pink* 315 US 203 (1942), 48. See also Shaw, above note 6, 161–2.

[156] Brownlie, above note 2, 48–9, Shaw, above note 6, 161–2. See also Benedetto Conforti, *International Law and the Role of Domestic Legal Systems* (Dordrecht; London: Martinus Nijhoff, 1993), 25.

require domestic legislation to come into effect and thus are automatically incorporated, whereas non self-executing treaties do require an enabling act, and consequently must be transformed to become the law of the land. Generally, a self-executing treaty will be one that sets out clear and definable rights and obligations that will arise under the treaty. By contrast, a non self-executing treaty is generally harder to quantify, and can be described more as 'aspirational'.

3.4.4.1.3 Australia The Australian approach to treaty law is largely consistent with the UK approach, adopting a transformation approach that requires an Act of Parliament before a treaty can become law. This was demonstrated in *Nulyarimma v Thompson*,[157] in which an action was brought against a number of government Ministers and Members of Parliament who, it was alleged, had engaged in genocide against Australia's indigenous people. One of the key issues in the case turned on whether the *jus cogens* norm of genocide could be automatically incorporated into Australian law through Australia's ratification of the Genocide Convention, without the need for transformation through domestic legislation – a proposition answered by the majority of the Court in the negative.[158]

A ratified but unincorporated treaty did, however, play a crucial role in the *Teoh* case before the High Court of Australia.[159] In this case, the applicant claimed to have a legitimate expectation that Australia would take into account the interests of his children. This expectation was founded on the UN Convention on the Rights of the Child (UNCRC),[160] which Australia had ratified but not implemented into national law through an Act of Parliament. He argued that if his legitimate expectation was not taken into account, he would be denied procedural fairness. The High Court held that there was a 'legitimate expectation' that arises where a treaty is ratified.[161] In an oft-quoted passage, Mason CJ and Deane J set out the relevant principles governing their decision:

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157 (1999) 96 FCR 153.

158 Ibid., Wilcox J at [20], Whitlam J at [54].

159 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. For a discussion of this case, see Margaret Allars, 'One Small Step for Legal Doctrine, One Giant Leap towards Integrity in Government: Teoh's Case and the Internationalisation of Administrative Law' (1995) 17 *Sydney Law Review* 204.

160 UNGA, Convention on the Rights of the Child (adopted 20 November 1989, came into force 2 September 1990) 1577 UNTS 3 (UNCRC).

161 (1995) 183 CLR 273.