much as French law and English law are in France and England. And just as one cannot talk in terms of the supremacy of French law over English law, but only of two distinct legal systems each operating within its own field, so it is possible to treat international law and municipal law in the same way. They are both the legal element contained within the domestic and international systems respectively, and they exist within different juridical orders.

What may, and often does, happen is what is termed a conflict of obligations, that is the state within its own domestic sphere does not act in accordance with its obligations as laid down by international law. In such a case, the domestic position is unaffected (and is not overruled by the contrary rule of international law) but rather the state as it operates internationally has broken a rule of international law and the remedy will lie in the international field, whether by means of diplomatic protest or judicial action.

This method of solving the problem does not delve deeply into theoretical considerations, but aims at being practical and in accord with the majority of state practice and international judicial decisions.[14] In fact, the increasing scope of international law has prompted most states to accept something of an intermediate position, where the rules of international law are seen as part of a distinct system, but capable of being applied internally depending on circumstance, while domestic courts are increasingly being obliged to interpret rules of international law.[15]

The role of municipal rules in international law[16]

The general rule with regard to the position of municipal law within the international sphere is that a state which has broken a stipulation of international law cannot justify itself by referring to its domestic legal situation. It is no defence to a breach of an international obligation to

[14] G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', 92 HR, 1957 II, pp. 5, 70–80. See also C. Rousseau, *Droit International Public*, Paris, 1979, pp. 4–16; E. Borchard, 'The Relations between International Law and Municipal Law', 27 *Virginia Law Review*, 1940, p. 137; M. S. McDougal, 'The Impact of International Law upon National Law: A Policy-Orientated Perspective' in McDougal *et al.*, *Studies in World Public Order*, New Haven, 1960, p. 157.

[15] See further as to relevant theories, Shany, *Regulating Jurisdictional Relations*, pp. 92 ff.

[16] See e.g. C. W. Jenks, *The Prospects of International Adjudication*, London, 1964, chapter 9; H. Lauterpacht, *The Development of International Law by the International Court*, London, 1958, and Morgenstern, 'Judicial Practice', pp. 43 ff.

argue that the state acted in such a manner because it was following the dictates of its own municipal laws. The reasons for this inability to put forward internal rules as an excuse to evade international responsibility are obvious. Any other situation would permit international law to be evaded by the simple method of domestic legislation.

Accordingly, state practice and decided cases have established this provision and thereby prevented countries involved in international litigation from pleading municipal law as a method of circumventing international law. Article 27 of the Vienna Convention on the Law of Treaties, 1969 lays down that in so far as treaties are concerned, a party may not invoke the provisions of its internal law as justification for its failure to carry out an international agreement, while article 46(1) 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.[17] This is so unless the violation of its internal law in question was 'manifest and concerned a rule of fundamental importance'. Article 46(2) states that such a violation is manifest where it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith. The International Court considered this provision in *Cameroon* v. *Nigeria* in the context of Nigeria's argument that the Maroua Declaration of 1975 signed by the two heads of state was not valid as it had not been ratified.[18] It was noted that article 7(2) of the Vienna Convention provided that heads of state belonged to the group of persons who in virtue of their functions and without having to produce full powers are considered as representing their state. The Court also took the view 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'.[19]

[17] Note also article 13 of the Draft Declaration on the Rights and Duties of States, 1949, which provides that every state 'has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty', *Yearbook of the ILC*, 1949, pp. 286, 289.

[18] ICJ Reports, 2002, pp. 303, 430 ff.

[19] *Ibid.*, p. 430. But see the view of the Court in the *Anglo-Norwegian Fisheries* case that the UK as a coastal state greatly interested in North Sea fishing 'could not have been ignorant' of a relevant Norwegian decree, despite claiming that Norway's delimitation system was not known to it: ICJ Reports, 1951, p. 116; 18 ILR, pp. 86, 101.

Such provisions are reflected in the case-law. In the *Alabama Claims* arbitration of 1872, the United States objected strenuously when Britain allowed a Confederate ship to sail from Liverpool to prey upon American shipping. It was held that the absence of British legislation necessary to prevent the construction or departure of the vessel could not be brought forward as a defence, and Britain was accordingly liable to pay damages for the depredations caused by the warship in question.[20] In the *Polish Nationals in Danzig* case, the Court declared that 'a State cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force'.[21]

The International Court, in the *Applicability of the Obligation to Arbitrate* case,[22] has underlined 'the fundamental principle of international law that international law prevails over domestic law', while Judge Shahabuddeen emphasised in the *Lockerbie* case[23] that inability under domestic law to act was no defence to non-compliance with an international obligation. This was reinforced in the *LaGrand* case,[24] where the Court noted that the effect of the US procedural default rule,[25] which was to prevent counsel for the LaGrand brothers from raising the violation by the US of its obligations under the Vienna Convention on Consular Relations, 1963 before the US federal courts system, had no impact upon the responsibility of the US for the breach of the convention.[26] The Court underlined this approach in the *Avena* case,[27] noting that 'The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under the United States constitutional law.' The

[20] J. B. Moore, *International Arbitrations*, New York, 1898, vol. I, pp. 495, 653. See also e.g. the *Free Zones* case, PCIJ, Series A/B, No. 46, 1932, p. 167; 6 AD, p. 362; the *Greco-Bulgarian Communities* case, PCIJ, Series B, No. 17, 1930, p. 32; 5 AD, p. 4, and the *Nottebohm* case, ICJ Reports, 1955, pp. 4, 20–1; 22 ILR, pp. 349, 357–8.

[21] PCIJ, Series A/B, No. 44, pp. 21, 24; 6 AD, p. 209. See also the *Georges Pinson* case, 5 RIAA, p. 327; 4 AD, p. 9.

[22] ICJ Reports, 1988, pp. 12, 34; 82 ILR, pp. 225, 252.

[23] ICJ Reports, 1992, pp. 3, 32; 94 ILR, pp. 478, 515. See also *Westland Helicopters Ltd and AOI* 80 ILR, pp. 595, 616.

[24] ICJ Reports, 2001, pp. 466, 497–8; 134 ILR, pp. 1, 35–6.

[25] This US federal rule of criminal law essentially prevents a claim from being heard before a federal court if it has not been presented to a state court: see ICJ Reports, 2001, pp. 477–8.

[26] See also the Advisory Opinion of the Inter-American Court of Human Rights on the *Promulgation and Enforcement of Law in Violation of the Convention*, 116 ILR, pp. 320, 332–3.

[27] ICJ Reports, 2004, pp. 12, 65; 134 ILR, pp. 120, 168.

Court took a step further in that case, which also concerned the failure to allow foreign prisoners access to the consular officials of their state in breach of the Vienna Convention on Consular Relations, declaring that 'the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts . . . with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice'.[28] By way of contrast, the International Court pointed out in the *Elettronica Sicula SpA (ELSI)* case[29] that the fact that an act of a public authority may have been unlawful in municipal law did not necessarily mean that the act in question was unlawful in international law.

However, such expressions of the supremacy of international law over municipal law in international tribunals do not mean that the provisions of domestic legislation are either irrelevant or unnecessary.[30] On the contrary, the role of internal legal rules is vital to the workings of the international legal machine. One of the ways that it is possible to understand and discover a state's legal position on a variety of topics important to international law is by examining municipal laws.[31] A country will express its opinion on such vital international matters as the extent of its territorial sea, or the jurisdiction it claims or the conditions for the acquisition of nationality through the medium of its domestic lawmaking. Thus, it is quite often that in the course of deciding a case before it, an international court will feel the necessity to make a study of relevant pieces of municipal legislation. Indeed, there have been instances, such as the *Serbian Loans* case of 1929,[32] when the crucial issues turned upon the interpretation of internal law, and the rules of international law in

[28] *Ibid.*, p. 60. President Bush then issued an order to the state courts to give effect to the decision of the International Court: see 44 ILM, p. 461 (28 February 2005). The US also withdrew its acceptance of the Optional Protocol to the Vienna Convention on Consular Relations, which had provided for the jurisdiction of the International Court in cases of dispute over the convention.

[29] ICJ Reports, 1989, pp. 15, 73–4; 84 ILR, pp. 311, 379–80. See also *Compañía de Aguas del Aconquija* v. *Argentina* 41 ILM, 2002, pp. 1135, 1154.

[30] See e.g. Jenks, *Prospects*, pp. 547–603, and K. Marek, *Droit International et Droit Interne*, Paris, 1961. See also Brownlie, *Principles*, pp. 36–40.

[31] See e.g. the *Anglo-Iranian Oil Co.* case, ICJ Reports, 1952, p. 93; 19 ILR, p. 507.

[32] PCIJ, Series A, No. 20; 5 AD, p. 466. See also the *Brazilian Loans* case, PCIJ, Series A, No. 21.

a strict sense were not at issue. Further, a court may turn to municipal law concepts where this is necessary in the circumstances.[33] However, it is clear that caution is necessary where an international court or tribunal is considering concepts of national law in the absence of an express or implied requirement so to do and no automatic transposition should occur.[34]

In addition to the role of municipal law in revealing the legal position of the state on topics of international importance, the rules of municipal law can be utilised as evidence of compliance or non-compliance with international obligations. This was emphasised in the *Certain German Interests in Polish Upper Silesia* case, where the Permanent Court of International Justice declared that:

> 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.[35]

Nevertheless, and despite the many functions that municipal law rules perform within the sphere of international law, the point must be emphasised that the presence or absence of a particular provision within the internal legal structure of a state, including its constitution if there is one, cannot be applied to evade an international obligation. Any other solution would render the operations of international law rather precarious.

[33] See e.g. the *Barcelona Traction* case concerning the nature of a limited liability company, ICJ Reports, 1970, p. 3; 46 ILR, p. 178.

[34] See e.g. the *Exchange of Greek and Turkish Populations* case, PCIJ, Series B, No. 10, pp. 19–21; 3 AD, p. 378. See also the Separate Opinion of Judge McNair in the *South West Africa* case, ICJ Reports, 1950, p. 148; 17 ILR, p. 47, noting that private law institutions could not be imported into international law 'lock, stock and barrel'; the Separate Opinion of Judge Fitzmaurice in the *Barcelona Traction* case, ICJ Reports, 1970, pp. 3, 66–7; 46 ILR, pp. 178, 240–1, and the Separate and Dissenting Opinion of President Cassese in the *Erdemović* case, 111 ILR, pp. 298, 387 ff.

[35] PCIJ, Series A, No. 7, p. 19; 3 AD, p. 5. See also the *Saiga (No. 2)* case before the International Tribunal for the Law of the Sea, 120 ILR, pp. 143, 188, and *Benin* v. *Niger*, ICJ Reports, 2005, pp. 90, 125 and 148. For criticism, see e.g. Brownlie, *Principles*, pp. 38–40.

International law before municipal courts[36]

The problem of the role of international law within the municipal law system is, however, rather more complicated than the position discussed above, and there have been a number of different approaches to it. States are, of course, under a general obligation to act in conformity with the rules of international law and will bear responsibility for breaches of it, whether committed by the legislative, executive or judicial organs and irrespective of domestic law.[37] Further, international treaties may impose requirements of domestic legislation upon states parties,[38] while binding Security Council resolutions may similarly require that states take particular action within their jurisdictions.[39] There is indeed a clear trend towards the increasing penetration of international legal rules within domestic systems coupled with the exercise of an ever-wider jurisdiction with regard to matters having an international dimension by domestic courts. This has led to a blurring of the distinction between the two previously maintained autonomous zones of international and domestic law, a re-evaluation of the role of international legal rules and a greater preparedness by domestic tribunals to analyse the actions of their governments in the light of international law.[40] Further, domestic courts may often have to determine the meaning of an international rule that is relevant for a case before them[41] or to seek to resolve conflicts between international rules,

[36] See e.g. Morgenstern, 'Judicial Practice', pp. 48–66, and Conforti, *International Law*. See also H. Mosler, 'L'Application du Droit International Public par les Tribunaux Nationaux', 91 HR, 1957 I, p. 619; W. Wenger, 'Réflexions sur l'Application du Droit International Public par les Tribunaux Internes', 72 *Revue Générale de Droit International Public*, 1968, p. 921; E. Benveniste, 'Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on "The Activities of National Courts and the International Relations of their State"', 5 EJIL, 1994, p. 423.

[37] See e.g. the *Exchange of Greek and Turkish Populations* case, PCIJ, Series B, No. 10, p. 20, and the *Finnish Ships Arbitration*, 3 RIAA, p. 1484. See further below, chapter 14.

[38] See e.g. as to requirements imposed by anti-terrorist conventions, below, chapter 12, p. 673. See also the decision of Trial Chamber II in the *Furundžija* case, 121 ILR, pp. 218, 248–9.

[39] See as to the effect of counter-terrorism and weapons of mass destruction proliferation measures taken by the Security Council, below chapter 22, pp. 1208, 1210 and 1240.

[40] See e.g. Shany, *Regulating Jurisdictional Relations*; A. Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts', 101 AJIL, 2007, p. 760, and *New Perspectives on the Divide Between National and International Law* (eds. A. Nollkaemper and J. E. Nijman), Oxford, 2007. See also Conforti, *International Law*.

[41] For example, the concept of jurisdiction as laid down in the European Convention on Human Rights: see *Al-Skeini* v. *Secretary of State for Defence* [2007] UKHL 26; 133 ILR, p. 693.

such as that between state immunity and the prohibition of torture[42] and that between treaty rules of human rights and binding Security Council resolutions.[43]

In this section, the approach adopted by municipal courts will be noted. We shall look first at the attitudes adopted by the British courts, and then proceed to note the views taken by the United States and other countries.[44]

The United Kingdom[45]

It is part of the public policy of the UK that the courts should in principle give effect to clearly established rules of international law.[46] Various theories have been put forward to explain the applicability of international law rules within the jurisdiction. One expression of the positivist–dualist position has been the doctrine of *transformation*. This is based upon the perception of two quite distinct systems of law, operating separately, and maintains that before any rule or principle of international law can have any effect within the domestic jurisdiction, it must be expressly and specifically 'transformed' into municipal law by the use of the appropriate constitutional machinery, such as an Act of Parliament. This doctrine grew from the procedure whereby international agreements are rendered operative in municipal law by the device of ratification by the sovereign and the idea has developed from this that any rule of international law must be transformed, or specifically adopted, to be valid within the internal legal order.

[42] See e.g. *Jones* v. *Saudi Arabia* [2006] UKHL 26; 129 ILR, p. 713.

[43] See *Al-Jedda* v. *Secretary of State for Defence* [2007] UKHL 58.

[44] Note the view expressed in *Oppenheim's International Law*, p. 54, that 'states show considerable flexibility in the procedures whereby they give effect within their territories to the rules of international law . . . while the procedures vary, the result that effect is given within states to the requirements of international law is by and large achieved by all states'.

[45] See e.g. Morgenstern, 'Judicial Practice'; H. Lauterpacht, 'Is International Law a Part of the Law of England?', 25 *Transactions of the Grotius Society*, 1939, p. 51; J. E. S. Fawcett, *The British Commonwealth in International Law*, London, 1963, chapter 2; *Oppenheim's International Law*, pp. 39–41, and W. Holdsworth, *Essays in Law and History*, Oxford, 1946, p. 260. See also J. Collier, 'Is International Law Really Part of the Law of England?', 38 ICLQ, 1989, p. 924; Higgins, *Problems and Process*, chapter 12; R. O'Keefe, 'Customary International Crimes in English Courts', 72 BYIL, 2001, p. 293; K. Reece Thomas, 'The Changing Status of International Law in English Domestic Law', 53 NILR, 2006, p. 371; S. Fatima, *Using International Law in Domestic Courts*, Oxford, 2005, and D. Feldman, 'Monism, Dualism and Constitutional Legitimacy', 20 Australian YIL, 1999, p. 105.

[46] See e.g. Upjohn J in *In re Claim by Herbert Wragg & Co. Ltd* [1956] Ch. 323, 334, and Lord Cross in *Oppenheimer* v. *Cattermole* [1976] AC 249, 277; 72 ILR, p. 446.

Another approach, known as the doctrine of *incorporation*, holds that international law is part of the municipal law automatically without the necessity for the interposition of a constitutional ratification procedure. The best-known exponent of this theory is the eighteenth-century lawyer Blackstone, who declared in his Commentaries that:

> the law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and it is held to be a part of the law of the land.[47]

This doctrine refers to customary international law and different rules apply to treaties. However, the previously accepted dichotomy between the reception of custom and treaty if now maintained absolutely would distort the many developments currently taking place. As will be seen, English courts have had to deal with the effect of legal decisions emanating from the EU and its Court of Justice and the European Court of Human Rights,[48] as well as the other consequences resulting from membership of the EU and of the Council of Europe; have been concerned with the interpretation of an increasing number of rules of international law incorporated into English law through the ratification of international treaties (particularly the significant number dealing with terrorist issues) and subsequent domestic legislation that they have required;[49] have sought to tackle conflicts of international legal rules and have dealt with the changing configuration of the doctrine of non-justiciability of issues raising questions as to the executive's conduct of foreign policy. They have also had to concern themselves with the validity of foreign laws deemed to conflict with international law and the acceptability of evidence obtained abroad in circumstances that may have violated international law.[50] English courts take judicial notice of international law, so that formal proof of a proposition does not need to be demonstrated (unlike propositions of foreign law) and this itself has been a key factor in determining the relationship between international law and domestic law. Judges are deemed to know international law. In practice this means that judges and lawyers trained in domestic law have had to grapple with the

[47] *Commentaries*, IV, chapter 5.

[48] See section 3(1) of the European Communities Act 1972 and section 2 of the Human Rights Act 1998, incorporating into domestic law respectively the EU treaties and the European Convention on Human Rights. See also *Kay* v. *Lambeth Borough Council* [2006] UKHL 10.

[49] See below, chapter 12, p. 673.

[50] See below, p. 186. See also *A & Ors* v. *Secretary of State for the Home Department* [2005] UKHL 71.

different sources of international law and the difficulties of this task have percolated through the relationship.

Customary international law

It is in this sphere that the doctrine of incorporation has become the main British approach. It is an old-established theory dating back to the eighteenth century, owing its prominence at that stage to the considerable discussion then taking place as to the precise extent of diplomatic immunity. A few of the more important cases will be briefly surveyed. In *Buvot* v. *Barbuit*,[51] Lord Talbot declared unambiguously that 'the law of nations in its full extent was part of the law of England', so that a Prussian commercial agent could not be rendered liable for failing to perform a decree. This was followed twenty-seven years later by *Triquet* v. *Bath*,[52] where Lord Mansfield, discussing the issue as to whether a domestic servant of the Bavarian Minister to Britain could claim diplomatic immunity, upheld the earlier case and specifically referred to Talbot's statement.

This acceptance of customary international law rules as part and parcel of the common law of England, so vigorously stated in a series of eighteenth-century cases, was subject to the priority granted to Acts of Parliament and tempered by the principle of *stare decisis* or precedent, maintained by the British courts and ensuring that the judgments of the higher courts are binding upon the lower courts of the hierarchical system. Accordingly, a rule of international law would not be implemented if it ran counter to a statute or decision by a higher court.[53] It is also important to admit that during this period the rules of customary international law were relatively few in number so that few conflicts between the systems were to be envisaged.

In the nineteenth century, a series of cases occurred which led many writers to dispute the validity of the hitherto accepted incorporation doctrine and replace it with the theory of transformation, according to which the rules of customary international law only form part of English law if they have been specifically adopted, either by legislation or case-law. The turning point in this saga is marked by the case of *R* v. *Keyn*[54] which concerned a German ship, the *Franconia*, which collided with and sank a British vessel in the English Channel within three miles of the English

[51] (1737) Cases t. Talbot 281. [52] (1764) 3 Burr. 1478.

[53] But see *Trendtex Trading Corporation* v. *Central Bank of Nigeria* [1977] 2 WLR 356; 64 ILR, p. 111; below, p. 144.

[54] (1876) 2 Ex.D. 63.

coast. The German captain was indicted for manslaughter following the death of a passenger from the British ship, and the question that came before the Court for Crown Cases Reserved was whether an English court did indeed have jurisdiction to try the offence in such circumstances.

The Court came to the conclusion that no British legislation existed which provided for jurisdiction over the three-mile territorial sea around the coasts. It was true that such a rule might be said to exist in international law, but it was one thing to say that the state had the right to legislate over a part of what had previously been the high seas, and quite another to conclude that the state's laws operate at once there, independently of any legislation. One thing did not follow from another, and it was imperative to keep distinct on the one hand the power of Parliament to make laws, and on the other the authority of the courts, without appropriate legislation, to apply the criminal law where it could not have been applied before. The question, as Lord Cockburn emphasised, was whether, acting judicially, the Court could treat the power of Parliament to legislate as making up for the absence of actual legislation. The answer came in the negative and the German captain was released.

This case was seen by some as marking a change to a transformation approach,[55] but the judgment was in many respects ambiguous, dealing primarily with the existence or not of any right of jurisdiction over the territorial sea.[56] In many respects the differences between the incorporation and transformation theories have revolved in practice more around evidential questions than any comprehensive theoretical revolution. In any event, any doubts as to the outcome of any further *Franconia* situations were put to rest by the Territorial Waters Jurisdiction Act 1878, which expressed British jurisdiction rights in similar circumstances.

The opinions put forward in the *West Rand Gold Mining Co.* case[57] showed a further blurring of the distinction between the incorporation and transformation theories. Lord Alverstone declared that whatever had received the common consent of civilised nations must also have received the assent of Great Britain and as such would be applied by the municipal tribunals. However, he went on to modify the impact of this by noting that any proposed rule of international law would have to be proved by satisfactory evidence to have been 'recognised and acted upon by our own

[55] See e.g. Holdsworth, *Essays*, pp. 263–6, and W. Halsbury, *Laws of England*, 3rd edn, London, 1968, vol. VII, p. 264.

[56] See e.g. Lauterpacht, 'Is International Law a Part?', pp. 60–1.

[57] [1905] 2 KB 391.

country' or else be of such a nature that it could hardly be supposed any civilised state would repudiate it. Lord Mansfield's view in *Triquet's* case could not be so interpreted as to include within the common law rules of international law which appear in the opinions of textbook writers and as to which there is no evidence that Britain ever assented.[58] This emphasis on assent, it must be noted, bears a close resemblance to the views put forward by the Court in *R* v. *Keyn* as to the necessity for conclusive evidence regarding the existence and scope of any particular rule of customary law. Indeed, the problem is often one of the uncertainty of existence and scope of customary law.

Not long after the *West Rand* case, another important dispute came before the courts. In *Mortensen* v. *Peters*,[59] a Danish captain was convicted by a Scottish court for contravening a fishing by-law regarding the Moray Firth. His ship had been operating within the Moray Firth and was within the area covered by the relevant by-law, but it was beyond the three-mile limit recognised by international law. The issue came to the Scottish Court of Justiciary, where Lord Dunedin, in discussing the captain's appeal, concentrated upon the correct construction to be made of the relevant legislation. He noted that an Act of Parliament duly passed and assented to was supreme and the Court had no option but to give effect to its provisions. In other words, statutes had predominance over customary law, and a British court would have to heed the terms of an Act of Parliament even if it involved the breach of a rule of international law. This is so even though there is a presumption in British law that the legislation is to be so construed as to avoid a conflict with international law. Where such a conflict does occur, the statute has priority and the state itself will have to deal with the problem of the breach of a customary rule.[60]

This modified incorporation doctrine was clearly defined by Lord Atkin in *Chung Chi Cheung* v. *R*.[61] He noted that:

> international law has no validity except in so far as its principles are accepted and adopted by our own domestic law . . . The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having

[58] *Ibid*., pp. 407–8. [59] (1906) 8 F.(J.) 93.

[60] See also 170 HC Deb., col. 472, 4 March 1907 and the Trawling in Prohibited Areas Prevention Act 1909.

[61] [1939] AC 160; 9 AD, p. 264. See also *Commercial and Estates Co. of Egypt* v. *Board of Trade* [1925] 1 KB 271, 295; 2 AD, p. 423.

> found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.

It goes without saying, of course, that any alleged rule of customary law must be proved to be a valid rule of international law, and not merely an unsupported proposition.

One effect of the doctrines as enunciated by the courts in practice is that international law is not treated as a foreign law but in an evidential manner as part of the law of the land. This means that whereas any rule of foreign law has to be proved as a fact by evidence, as occurs with other facts, the courts take judicial notice of any rule of international law and may refer, for example, to textbooks rather than require the presence and testimony of expert opinion.[62]

In ascertaining the existence and nature of any particular rule, the courts may have recourse to a wider range of authoritative material than would normally be the case, such as 'international treaties and conventions, authoritative textbooks, practice and judicial decisions' of the courts of other countries.[63]

The case of *Trendtex Trading Corporation* v. *Central Bank of Nigeria* raised anew many of these issues. The case concerned a claim for sovereign or state immunity by the Central Bank of Nigeria.[64] In *Trendtex* all three judges of the Court of Appeal accepted the incorporation doctrine as the correct one. Lord Denning, reversing his opinion in an earlier case,[65] stressed that otherwise the courts could not recognise changes in the norms of international law.[66] Stephenson LJ emphasised in an important statement that:

> it is the nature of international law and the specific problems of ascertaining it which create the difficulty in the way of adopting or incorporating or recognising as already incorporated a new rule of international law.[67]

[62] *Lord Advocate's Reference No. 1 of 2000*, 2001, SLT 507, 512–13.

[63] Per Lord MacMillan, *The Cristina* [1938] AC 485, 497; 9 AD, p. 250. See *Re Piracy Jure Gentium* [1934] AC 586, 588; 7 AD, p. 213, and Stephenson LJ, *Trendtex Trading Corporation* v. *Central Bank of Nigeria* [1977] 2 WLR 356, 379; 64 ILR, pp. 111, 135. But see also Lauterpacht, 'Is International Law a Part?', p. 87, note m.

[64] [1977] 2 WLR 356; 64 ILR, p. 111. See further below, chapter 13.

[65] *R* v. *Secretary of State for the Home Department, ex parte Thakrar* [1974] 2 WLR 593, 597; 59 ILR, p. 450.

[66] [1977] 2 WLR 356, 365; 64 ILR, pp. 111, 128. See also Shaw LJ, *ibid.*, 386 and Stephenson LJ, *ibid.*, 378–81.

[67] [1977] 2 WLR 356, 379.

The issue of *stare decisis*, or precedent, and customary international law was also discussed in this case. It had previously been accepted that the doctrine of *stare decisis* would apply in cases involving customary international law principles as in all other cases before the courts, irrespective of any changes in the meantime in such law.[68] This approach was reaffirmed in *Thai-Europe Tapioca Service Ltd* v. *Government of Pakistan*.[69] However, in *Trendtex*, Lord Denning and Shaw LJ emphasised that international law did not know a rule of *stare decisis*.[70] Where international law had changed, the court could implement that change 'without waiting for the House of Lords to do it'.[71] The true principle, noted Shaw LJ, was that 'the English courts must at any given time discover what the prevailing international rule is and apply that rule'.[72] This marked a significant approach and one that in the future may have some interesting consequences, for example, in the human rights field.

The dominant incorporationist approach was clearly reaffirmed by the Court of Appeal in *Maclaine Watson* v. *Department of Trade and Industry*.[73] This case concerned the consequences of the demise of the International Tin Council and the attempts *inter alia* to render states that were members of the ITC liable for the debts incurred by that unfortunate organisation. Nourse LJ emphasised that the *Trendtex* case had resolved the rivalry between the incorporation and transformation doctrines in favour of the former.[74] One of the major points at issue in the *Tin Council* litigation was whether a rule existed in international law stipulating that the states members of an international organisation with separate personality could be rendered liable for the latter's debts.

If such a rule did exist, the question would then arise as to how that would be accepted or manifested in the context of municipal law. This, of course, would depend upon the precise content of such a claimed international rule and, as Kerr LJ noted, no such rule did exist in international law permitting action against member states 'in any national court'.[75] It was

[68] See e.g. *Chung Chi Cheung* v. *R* [1939] AC 160, 169; 9 AD, p. 264. But see Morgenstern, 'Judicial Practice', pp. 80–2.

[69] [1975] 3 All ER 961, 967, 969–70; 64 ILR, p. 81.

[70] [1977] 2 WLR 356, 365; 64 ILR, pp. 111, 128.

[71] Per Lord Denning, [1977] 2 WLR 356, 366.

[72] *Ibid*., 388; 64 ILR, p. 152. But cf. Stephenson LJ, *ibid*., 381. See also e.g. Goff J, *I° Congreso del Partido* [1977] 3 WLR 778, 795; 64 ILR, p. 154. This approach was supported by Lord Slynn in *Ex Parte Pinochet (No. 1)* [2000] 1 AC 61, 77; 119 ILR, pp. 50, 65.

[73] [1988] 3 WLR 1033; 80 ILR, p. 49.

[74] [1988] 3 WLR 1116; 80 ILR, p. 132.

[75] [1988] 3 WLR 1095; 80 ILR, p. 109.

also not possible for an English court to remedy the gap in international law by itself creating such a rule.[76] Nourse LJ, however, took a different position on this point, stating that 'where it is necessary for an English court to decide such a question [i.e. an uncertain question of international law], and whatever the doubts and difficulties, it can and must do so'.[77] This, with respect, is not and cannot be the case, not least because it strikes at the heart of the community-based system of international law creation.

Lord Oliver in the House of Lords judgment[78] clearly and correctly emphasised that

> It is certainly not for a domestic tribunal in effect to legislate a rule into existence for the purposes of domestic law and on the basis of material that is wholly indeterminate.[79]

Such approaches find support in the *Pinochet* decisions. Lord Lloyd, for example, in *Ex Parte Pinochet* (*No. 1*) referred to the 'well-established principles of customary international law, which principles form part of the common law of England',[80] while Lord Slynn took the view that the doctrine of precedent did not apply to the incorporation of rules of customary international law.[81] Lord Millett in *Ex Parte Pinochet (No. 3*) stressed that 'Customary international law is part of the common law.'[82] In *Lord Advocate's Reference No. 1 of 2000*, the High Court of Justiciary stated that 'A rule of customary international law is a rule of Scots law',[83] and the point was emphasised by the Arbitration Tribunal in *Sandline* v. *Papua New Guinea* that 'it is part of the public policy of England that its courts should give effect to clearly established rules of international law'.[84]

The doctrine that customary international law formed part of the law of England was discussed by the House of Lords in *R* v. *Jones*,[85] where the issue focused upon whether the customary international law rule prohibiting aggression had automatically entered into English criminal law. Lord Bingham, while noting that the general principle was not at issue

[76] *Ibid.* [77] [1988] 3 WLR 1118; 80 ILR, p. 135.
[78] [1989] 3 All ER 523; 81 ILR, p. 671. [79] [1989] 3 All ER 554; 81 ILR, p. 715.
[80] [2000] 1 AC 61, 98 and see also at 90; 119 ILR, pp. 50, 87.
[81] See *Ex Parte Pinochet (No. 1)* [2000] 1 AC 61, 77; 119 ILR, pp. 50, 65.
[82] [2000] 1 AC 147, 276; 119 ILR, pp. 135, 230. See also *Regina (European Roma Rights Centre)* v. *Immigration Officer at Prague Airport and Another* [2004] UKHL 55, paras. 22 ff. (per Lord Bingham); 131 ILR, pp. 652, 671 ff.
[83] 2001 SLT 507, 512. See also S. Neff, 'International Law and Nuclear Weapons in Scottish Courts', 51 ICLQ, 2002, p. 171.
[84] 117 ILR, pp. 552, 560. [85] [2006] UKHL 16; 132 ILR, p. 668.

between the parties, commented that he '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'. Preference was expressed for the view maintained by Brierly that international law was not a part, but was rather one of the sources, of English law.[86]

More specifically, the House of Lords unanimously accepted that the incorporation doctrine did not apply to the customary international law offence of aggression. While it was accepted that a crime recognised in customary international law 'may' be assimilated into domestic criminal law without statutory provision, this was not automatic.[87] The English courts no longer had the power to create new criminal offences, which could only now be done by statute, and in practice when domestic effect was sought for customary international crimes this was achieved through legislation.[88] Further, a charge of aggression would involve a determination not only of the guilt of the accused, but also of the state itself and possibly of other states, should the state go to war with allies and this raised constitutional issues as to non-justiciability.[89]

Accordingly, a degree of caution may therefore now be necessary with regard to the traditionally and baldly expressed proposition that customary international law is part of English law. This will be subject not only, as in the past, to the rule that common law (including where incorporating an international customary rule) gives way to statute, but also to considerations of a constitutional nature. Courts will be obliged to

[86] *Ibid*., para. 11; 132 ILR, p. 675, and see J. Brierly, 'International Law in England' 51 LQR, 1935, 24, 31.

[87] *R* v. *Jones*, para. 23; 132 ILR, p. 680, per Lord Bingham, who noted that 'customary international law is applicable in the English courts only where the constitution permits', quoting O'Keefe, 'Customary International Crimes in English Courts', p. 335, and that 'international law could not create a crime triable directly, without the intervention of Parliament, in an English court', quoting Sir Franklin Berman, 'Jurisdiction: The State' in *Asserting Jurisdiction: International and European Legal Perspectives* (P. Capps, M. Evans and S. Konstadinidis eds.), Oxford, 2003, pp. 3, 11.

[88] *R* v. *Jones*, para. 28; 132 ILR, p. 683. See also *Knuller (Publishing, Printing and Promotions) Ltd* v. *Director of Public Prosecutions* [1973] AC 435. Lord Hoffmann in *R* v. *Jones* noted that 'new domestic offences should in my opinion be debated in Parliament, defined in a statute and come into force on a prescribed date. They should not creep into existence as a result of an international consensus to which only the executive of this country is a party', para. 62; 132 ILR, pp. 694–5, and see Lord Mance at paras. 102–3; 132 ILR, pp. 705–6. See also *Sosa* v. *Alvarez-Machain* (2004) 159 L Ed 2d 718, 765; 127 ILR, pp. 769, 807 (per Scalia J) and the Federal Court of Australia decision in *Nulyarimma* v. *Thompson* (1999) 165 ALR 621, 630; 120 ILR, pp. 353, 364.

[89] *R* v. *Jones*, para. 30; 132 ILR, p. 684, and Lord Hoffmann, paras. 63–7; 132 ILR, pp. 695–6. See further as to non-justiciability, below, p. 179.

conduct an enquiry, as before, into whether a particular provision indeed constitutes a rule of custom, and additionally into whether there are any constitutional bars to incorporation.

Treaties[90]

As far as treaties are concerned, different rules apply as to their application within the domestic jurisdiction for very good historical and political reasons. While customary law develops through the evolution of state practice, international conventions are in the form of contracts binding upon the signatories. For a custom to emerge it is usual, though not always necessary, for several states to act in a certain manner believing it to be in conformity with the law. Therefore, in normal circumstances the influence of one particular state is not usually decisive. In the case of treaties, the states involved may create new law that would be binding upon them irrespective of previous practice or contemporary practice. In other words, the influence of the executive is generally of greater impact where treaty law is concerned than is the case with customary law and this is particularly so where, as in the UK, ratification of treaties is an executive act.

It follows from this that were treaties to be rendered applicable directly within the state without any intermediate stage after signature and ratification and before domestic operation, the executive would be able to legislate without the legislature. Because of this, any 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.

One of the principal cases in English law illustrating this situation is the case of the *Parlement Belge*.[91] It involved a collision between this ship and a British tug, and the claim for damages brought by the latter vessel

[90] See generally A. D. McNair, *The Law of Treaties*, Oxford, 1961, pp. 81–97; A. Aust, *Modern Treaty Law and Practice*, 2nd edn, Cambridge, 2007, chapter 10; F. A. Mann, 'The Enforcement of Treaties by English Courts', 44 *Transactions of the Grotius Society*, 1958–9, p. 29; R. Higgins in *The Effect of Treaties in Domestic Law* (eds. F. Jacobs and S. Roberts), London, 1987, p. 123; D. Lasok, 'Les Traités Internationaux dans la Système Juridique Anglaise', 70 *Revue Générale de Droit International Public*, 1966, p. 961; I. Sinclair, 'The Principles of Treaty Interpretation and their Application by the English Courts', 12 ICLQ, 1963, p. 508; I. Sinclair and S. J. Dickson, 'National Treaty Law and Practice: United Kingdom' in *National Treaty Law and Practice* (eds. M. Leigh and M. R. Blakeslee), 1995, p. 223, and C. Warbrick, 'Treaties', 49 ICLQ, 2000, p. 944.

[91] (1879) 4 PD 129.

before the Probate, Divorce and Admiralty division of the High Court. The *Parlement Belge* belonged to the King of the Belgians and was used as a cargo boat. During the case, the Attorney General intervened to state that the Court had no jurisdiction over the vessel as it was the property of the Belgian monarch, and that further, by a political agreement of 1876 between Britain and Belgium, the same immunity from foreign legal process as applied to warships should apply also to this packet boat. In discussing the case, the Court concluded that only public ships of war were entitled to such immunity and that such immunity could not be extended to other categories by a treaty without parliamentary consent. Indeed, it was stated that this would be 'a use of the treaty-making prerogative of the Crown . . . without precedent, and in principle contrary to the law of the constitution'.[92]

It is the Crown which in the UK possesses the constitutional authority to enter into treaties and this prerogative power cannot be impugned by the courts.[93] However, this power may be affected by legislation. Section 6 of the European Parliamentary Elections Act 1978 provided, for example, that no treaty providing for any increase in the powers of the European Parliament would be ratified by the UK without being first approved by Parliament.[94] Thus it is that treaties cannot operate of themselves within the state, but require the passing of an enabling statute. The Crown in the UK retains the right to sign and ratify international agreements, but is unable to legislate directly. Before a treaty can become part of English law, an Act of Parliament is essential. This fundamental proposition was clearly spelt out by Lord Oliver in the House of Lords decision in *Maclaine Watson* v. *Department of Trade and Industry*.[95] He noted that:

> as a matter of the constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing.

[92] *Ibid.*, p. 154.

[93] See e.g. *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374, 418. See also *Rustomjee* v. *R* (1876) 2 QBD 69 and *Lonrho Exports* v. *ECGD* [1996] 4 All ER 673; 108 ILR, pp. 596, 611.

[94] See *R* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] 2 WLR 115.

[95] [1989] 3 All ER 523, 531; 81 ILR, pp. 671, 684. See also *Lonrho Exports* v. *ECGD* [1996] 4 All ER 673, 687; 108 ILR, pp. 596, 611.

> Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation.[96]

It therefore followed that as far as individuals were concerned such treaties were *res inter alia acta* from which they could not derive rights and by which they could not be deprived of rights or subjected to obligations.[97] Lord Templeman emphasised that 'Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.'[98] This was reaffirmed by Lord Bingham in *A (FC) and Others (FC)* v. *Secretary of State for the Home Department*, noting that 'a treaty, even if ratified by the United Kingdom, has no binding force in the domestic law of this country unless it is given effect by statute or expresses principles of customary international law'.[99] The interpretation of treaties not incorporated by statute into municipal law, and the decision as to whether they have been complied with, are matters exclusively for the Crown as 'the court must speak with the same voice as the Executive'.[100] An exception is where reference to a treaty is needed in order to explain the relevant factual background,[101] for example where the terms of a treaty are incorporated into a contract.[102] Where the legislation in question refers expressly to a relevant but unincorporated treaty, it is

[96] [1989] 3 All ER 523, 544–5; 81 ILR, p. 701. See also *Littrell* v. *USA (No. 2)* [1995] 1 WLR 82. But see R. Y. Jennings, 'An International Lawyer Takes Stock', 39 ICLQ, 1990, pp. 513, 523–6.

[97] [1989] 3 All ER 523, 544–5; 81 ILR, p. 701. See further as to the non-justiciability of unincorporated treaties, below, p. 183.

[98] [1989] 3 All ER 523, 526; 81 ILR, p. 676. See also *Ex Parte Brind* [1991] 1 AC 696, 747–8; 85 ILR, p. 29, and *R* v. *Lyons* [2002] UKHL 44; 131 ILR, p. 538.

[99] [2005] UKHL 71, para. 27. Lord Bingham in *R* v. *Asfaw* [2008] UKHL 31, para. 29 stated that, 'While, therefore, one would expect any government intending to legislate inconsistently with an obligation binding on the UK to make its intention very clear, there can on well known authority be no ground in domestic law for failing to give effect to an enactment in terms unambiguously inconsistent with such an obligation.'

[100] *Lonrho Exports* v. *ECGD* [1996] 4 All ER 673, 688; 108 ILR, pp. 596, 613. See also *GUR Corporation* v. *Trust Bank of Africa Ltd* [1986] 3 All ER 449, 454, 459 and 466–7; 75 ILR, p. 675, and *Sierra Leone Telecommunications* v. *Barclays Bank* [1998] 2 All ER 821, 828; 114 ILR, p. 466.

[101] Lord Oliver in *Maclaine Watson* v. *Department of Trade and Industry* emphasised that the conclusion of an international treaty is a question of fact, thus a treaty may be referred to as part of the factual background against which a particular issue arises, [1989] 3 All ER 523, 545; 81 ILR, pp. 671, 702. See further below, pp. 183–5.

[102] *Lonrho Exports* v. *ECGD* [1996] 4 All ER 673, 688; 108 ILR, pp. 596, 613.

permissible to utilise the latter in order to constrain any discretion provided for in the former.[103] Further, it has been argued that ratification of an international treaty (where no incorporation has taken place) may give rise to legitimate expectations that the executive, in the absence of statutory or executive indications to the contrary, will act in conformity with the treaty.[104]

However, treaties relating to the conduct of war, cession of territory and the imposition of charges on the public purse[105] do not need an intervening act of legislation before they can be made binding upon the citizens of the country.[106] A similar situation exists also with regard to relatively unimportant administrative agreements which do not require ratification, providing of course they do not purport to alter municipal law. In certain cases, Parliament will give its approval generically in advance for the conclusion of treaties in certain fields within specified limits, subject to the terms negotiated for particular treaties being promulgated by statutory instrument (secondary legislation).[107] Such exceptions occur because it is felt that, having in mind the historical compromises upon which the British constitutional structure is founded, no significant legislative powers are being lost by Parliament. In all other cases where the rights and duties of British subjects are affected, an Act of Parliament is necessary to render the provisions of the particular treaty operative within Britain. In conclusion, it may be stated that parliamentary legislation will

[103] See e.g. *R* v. *Secretary of State, On the Application of the Channel Tunnel Group* 119 ILR, pp. 398, 407–8.

[104] See Lord Woolf MR in *Ex Parte Ahmed and Patel* [1998] INLR 570, 584, relying upon the approach of the High Court of Australia in *Minister of Immigration* v. *Teoh*, as to which see below, p. 167. Hobhouse LJ in *Ex Parte Ahmed and Patel* noted that where the Secretary of State had adopted a specific policy, it was not possible to derive a legitimate expectation from the treaty going beyond the scope of the policy: at 592. Note, as to the special position of human rights treaties as against other multilateral treaties, e.g. *Matthew* v. *Trinidad and Tobago State* [2004] UKPC 33; 134 ILR, p. 687.

[105] See the evidence presented by the Foreign and Commonwealth Office to the Royal Commission on the Reform of the House of Lords, UKMIL, 70 BYIL, 1999, p. 405.

[106] See e.g. S. de Smith and R. Brazier, *Constitutional and Administrative Law*, 6th edn, London, 1989, pp. 140–2, and W. Wade and O. H. Phillips, *Constitutional and Administrative Law*, 9th edn, London, 1977, pp. 303–6. See also *Attorney-General for Canada* v. *Attorney-General for Ontario* [1937] AC 326, 347; 8 AD, p. 41; *Walker* v. *Baird* [1892] AC 491; *Republic of Italy* v. *Hambro's Bank* [1950] 1 All ER 430; *Cheney* v. *Conn* [1968] 1 WLR 242; 41 ILR, p. 421; *Porter* v. *Freudenberg* [1915] 1 KB 857, 874–80, and McNair, *Law of Treaties*, pp. 89–91.

[107] See the evidence presented by the Foreign and Commonwealth Office to the Royal Commission on the Reform of the House of Lords, UKMIL, 70 BYIL, 1999, p. 405, citing the examples of extradition and double-taxation treaties.

be required where a treaty for its application in the UK requires a modification of, or addition to, existing common law or statute, affects private rights, creates financial obligations for the UK, provides for an increase in the powers of the European Parliament, involves the cession of British territory or increases the powers of the Crown.[108]

There is no rule specifying the precise legislative method of incorporation of a treaty[109] and a variety of means are available in practice.[110] For example, a treaty may be incorporated into domestic law by being given the force of law in a statute with or without being scheduled to the relevant act; by being referred to in a statute otherwise than in an incorporating statute; by tangential reference in a statute;[111] and by statutory referral to definitions contained in a treaty.[112]

It is the practice in the UK to lay before both Houses of Parliament all treaties which the UK has either signed or to which it intends to accede.[113] The text of any agreement requiring ratification, acceptance, approval or accession has to be laid before Parliament at least twenty-one sitting days before any of these actions is taken.[114] This is termed the 'Ponsonby Rule'.[115] All treaties signed after 1 January 1997 and laid before Parliament

[108] Sinclair and Dickson, 'National Treaty Law', p. 230.

[109] See *Regina (European Roma Rights Centre)* v. *Immigration Officer at Prague Airport and Another* [2004] UKHL 55, para. 42; 131 ILR, p. 683 (per Lord Steyn).

[110] See e.g. Fatima, *Using International Law*, pp. 57 ff.

[111] For example, section 2 of the Asylum and Immigration Appeals Act 1993 provides that nothing in the immigration rules within the Immigration Act 1971 shall lay down any practice contrary to the Refugee Convention.

[112] See e.g the International Criminal Court Act 2001.

[113] It is also the practice to put before Parliament Orders in Council made under the United Nations Act 1946 in order, for example, to implement United Nations sanctions internally: see s. 1(4) of the Act and H. Fox and C. Wickremasinghe, 'UK Implementation of UN Economic Sanctions', 42 ICLQ, 1993, pp. 945, 959. See also *R* v. *HM Treasury and the Bank of England, ex parte Centro-Com*, Times Law Report, 7 October 1993.

[114] Since 1998, it has been the FCO's practice to apply the Ponsonby Rule also to treaties subject simply to the mutual notification of the completion of constitutional or other internal procedures by each party: see the evidence presented by the Foreign and Commonwealth Office to the Royal Commission on the Reform of the House of Lords, UKMIL, 70 BYIL, 1999, p. 408.

[115] See 171 HC Deb., col. 2001, 1 April 1924. This is regarded not as a binding rule but as a constitutional usage: see Wade and Phillips, *Constitutional and Administrative Law*, p. 304. See also the Foreign and Commonwealth Office Nationality, Treaty and Claims Department's handbook entitled *International Agreements: Practice and Procedure – Guidance Notes*, 1992, quoted in UKMIL, 63 BYIL, 1992, p. 705, and *Erskine May's Treatise on the Law, Privileges, Proceedings and Usages of Parliament* (eds. D. Limon and W. R. McKay), 22nd edn, London, 1997. If primary or secondary legislation is required in order to ensure compliance with obligations arising under a treaty, the Government will not ratify a treaty

under this rule are accompanied by an Explanatory Memorandum.[116] The UK government, however, is currently reviewing issues of governance, including the prerogative powers, which include the making and ratification of treaties, the deployment and use of armed forces abroad, acquiring and ceding territory and the conduct of diplomacy.[117] It has been proposed that the Ponsonby rule be placed on a statutory footing.[118]

There is in English law a presumption that legislation is to be so construed as to avoid a conflict with international law.[119] This operates particularly where the Act of Parliament which is intended to bring the treaty into effect is itself ambiguous. Accordingly, where the provisions of a statute implementing a treaty are capable of more than one meaning, and one interpretation is compatible with the terms of the treaty while others are not, it is the former approach that will be adopted. For, as Lord Diplock pointed out: 'Parliament does not intend to act in breach of international law, including therein specific treaty obligations.'[120]

However, where the words of a statute are unambiguous the courts have no choice but to apply them irrespective of any conflict with international agreements.[121] Of course, any breach of an international

until such legislation has been implemented: see Parliamentary Under-Secretary of State, 220 HC Deb., WA, cols. 483–4, 9 March 1993, quoted in UKMIL, 64 BYIL, 1993, p. 629.

[116] UKMIL, 70 BYIL, 1999, p. 406. See also the Second Report of the House of Commons Select Committee on Procedure – Parliamentary Scrutiny of Treaties, 2000, HC 210 (www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmproced/210/21003.htm). See also the Government Response, HC 990 (www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmproced/210/21003.htm).

[117] See *The Governance of Britain*, Cm 7170, 2007. See also the Prime Minister's statement to the House of Commons, Hansard HC vol. 462 col. 815, 3 July 2007, and C. Warbrick, 'The Governance of Britain', 57 ICLQ, 2008, p. 209. See further *The Governance of Britain – War, Powers and Treaties: Limiting Executive Powers*, Cm 7239, 2007.

[118] *The Governance of Britain*, para. 33, and Warbrick, 'Governance', p. 216.

[119] See e.g. *Garland* v. *British Rail Engineering Ltd* [1983] 2 AC 751; 93 ILR, p. 622, and *Ex Parte Brind* [1991] 1 AC 696, 748; 85 ILR, p. 29, where this presumption is referred to as 'a mere canon of construction which involves no importation of international law into the domestic field'. See also *Maxwell on the Interpretation of Statutes*, 12th edn, London, 1969, p. 183; *A (FC) and Others (FC)* v. *Secretary of State for the Home Department* [2005] UKHL 71, para. 27, and *Al-Skeini* v. *Secretary of State for Defence* [2007] UKHL 26, para. 45; 133 ILR, pp. 715–16 (per Lord Rodger).

[120] *Salomon* v. *Commissioners of Customs and Excise* [1967] 2 QB 116, 143; *Post Office* v. *Estuary Radio Ltd* [1968] 2 QB 740 and *Brown* v. *Whimster* [1976] QB 297. See also *National Smokeless Fuels Ltd* v. *IRC*, *The Times*, 23 April 1986, p. 36, and Lord Oliver in *Maclaine Watson* v. *Department of Trade and Industry* [1989] 3 All ER 523, 545; 81 ILR, pp. 671, 702.

[121] *Ellerman Lines* v. *Murray* [1931] AC 126; 5 AD, p. 342 and *IRC* v. *Collco Dealings Ltd* [1962] AC 1; 33 ILR, p. 1. See Sinclair, 'Principles of Treaty Interpretation', and C. Schreuer, 'The

obligation will import the responsibility of the UK at the international level irrespective of domestic considerations.[122] Attempts have been made in the past to consider treaties in the context of domestic legislation not directly enacting them, or as indications of public policy, particularly with regard to human rights treaties,[123] and it seems that account may be taken of them in seeking to interpret ambiguous provisions.[124] However, ministers are under no obligation to do this in reaching decisions.[125]

One particular issue has arisen in the case of the implementation of international obligations and that relates to United Nations sanctions. In the UK, such sanctions are enforced as a consequence of the United Nations Act 1946 which enables the Crown to adopt Orders in Council so that effect can be given to sanctions.[126] Such secondary legislation tends to be detailed and thus the possibility of differential interpretations arises. It is to be noted that the relevance and application of rules of the European

Interpretation of Treaties by Domestic Courts', 45 BYIL, 1971, p. 255. See also F. A. Mann, *Foreign Affairs in English Courts*, Oxford, 1986, pp. 97–114; R. Gardiner, 'Treaty Interpretation in the English Courts since *Fothergill* v. *Monarch Airlines* (1980)', 44 ICLQ, 1995, p. 620, and Fatima, *Using International Law*, pp. 65 ff.

122 See above, p. 133. 123 See e.g. *Blathwayt* v. *Baron Cawley* [1976] AC 397.

124 See e.g. in the context of the European Convention on Human Rights prior to its incorporation by the Human Rights Act 1998, *R* v. *Secretary of State for the Home Department, ex parte Bhajan Singh* [1975] 2 All ER 1081; 61 ILR, p. 260; *R* v. *Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi* [1976] 3 All ER 843; 61 ILR, p. 267; *R* v. *Secretary of State for the Home Department, ex parte Phansopkar* [1976] QB 606; 61 ILR, p. 390; *Waddington* v. *Miah* [1974] 1 WLR 683; 57 ILR, p. 175; *Cassell* v. *Broome* [1972] AC 1027; *Malone* v. *MPC* [1979] Ch. 344; 74 ILR, p. 304; *R* v. *Secretary of State for the Home Department, ex parte Anderson* [1984] 1 All ER 920; *Trawnik* v. *Ministry of Defence* [1984] 2 All ER 791 and *Ex Parte Launder* [1997] 1 WLR 839. In *R* v. *Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, it was held that subordinate legislation and executive discretion did not fall into this category. See also *Derbyshire County Council* v. *Times Newspapers Ltd* [1993] AC 534 HL; *Rantzen* v. *Mirror Group Newspapers (1986) Ltd* [1993] 3 WLR 953 CA; *Attorney-General* v. *Associated Newspapers Ltd* [1993] 3 WLR 74; *R* v. *Secretary of State for the Home Department, ex parte Wynne* [1993] 1 WLR 115 and *R* v. *Brown* [1993] 2 WLR 556. See also A. Cunningham, 'The European Convention on Human Rights, Customary International Law and the Constitution', 43 ICLQ, 1994, p. 537.

125 See e.g. *R* v. *Secretary of State for the Home Department, ex parte Fernandes* [1984] 2 All ER 390.

126 See e.g. the Iraq and Kuwait (UN Sanctions) Order 1990, SI 1990 No. 1651; the Serbia and Montenegro (UN Sanctions) Orders 1992 and 1993, SI 1992 No. 1302 and SI 1993 No. 1188; the Libya (UN Sanctions) Orders 1992 and 1993, SI 1992 Nos. 973 and 975 and SI 1993 No. 2807; the Former Yugoslavia (UN Sanctions) Order 1994, SI 1994 No. 2673.

Union may also be in issue.[127] Further, one may note the obligation contained in article 29 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by binding UN Security Council resolution 827 (1993), for all states to co-operate with the Tribunal and in particular to 'comply without undue delay with any request for assistance or an order issued by a Trial Chamber', including the arrest and detention of persons and their surrender or transfer to the Tribunal. This was implemented by secondary legislation adopted under the United Nations Act 1946.[128]

In the interpretation of international treaties incorporated by statute, the English courts have adopted a broader approach than is customary in statutory interpretation.[129] In particular, recourse to the relevant *travaux préparatoires* may be possible.[130] However, different approaches have been taken by the British courts as to how to deal with the question of interpretation in such circumstances. In *Sidhu* v. *British Airways*, Lord Hope, adopting the broad approach signalled in *Fothergill* v. *Monarch Airlines*, stated that it was 'well-established that a purposive approach should be taken to the interpretation of international conventions which have the force of law in this country'.[131] Lord Mustill in *Semco Salvage* v. *Lancer Navigation* took a more traditional approach founded upon the relevant articles of the Vienna Convention on the Law of Treaties, 1969,[132] in particular emphasising the significance of a textual interpretation of the words

[127] See e.g. *Ex Parte Centro-Com* [1994] 1 CMLR 109; [1997] ECR I-81, and [1997] 3 WLR 239; 117 ILR, p. 444. See also R. Pavoni, 'UN Sanctions in EU and National Law: The Centro-Com Case', 48 ICLQ, 1999, p. 582. See further below, p. 1251, note 237.

[128] The UN (International Tribunal) (Former Yugoslavia) Order 1996, SI 1996 No. 716. See for differing approaches to this procedure, C. Warbrick, 'Co-operation with the International Criminal Tribunal for Yugoslavia', 45 ICLQ, 1996, p. 947, and H. Fox, 'The Objections to Transfer of Criminal Jurisdiction to the Tribunal', 46 ICLQ, 1997, p. 434.

[129] Lord Slynn stated in *R (Al Fawwaz)* v. *Governor of Brixton Prison* that 'to apply to extradition treaties the strict canons appropriate to the construction of domestic statutes would often tend to defeat rather than to serve [their] purpose', [2001] UKHL 69, para. 39, citing Lord Bridge in *Ex Parte Postlethwaite* [1988] AC 924, 947.

[130] See *Buchanan* v. *Babco* [1978] AC 141 and *Fothergill* v. *Monarch Airlines* [1981] AC 251; 74 ILR, p. 648. Compare in the latter case the restrictive approach of Lord Wilberforce, [1981] AC 278; 74 ILR, p. 656 with that of Lord Diplock, [1981] AC 283; 74 ILR, pp. 661–2. See also *Goldman* v. *Thai Airways International Ltd* [1983] 3 All ER 693. Note also that in *Wahda Bank* v. *Arab Bank plc* Times Law Reports, 16 December 1992, Phillips J referred to UN sanctions resolutions in examining the question of the applicability of the Order in Council implementing the sanctions internally to the case in question. See further *Re H (Minors)* [1998] AC 72.

[131] [1997] 1 All ER 193, 202.

[132] See below, chapter 16, p. 932.

in question as understood in their ordinary meaning.[133] In a rather special position is the Human Rights Act 1998, which incorporated the European Convention on Human Rights. Section 3(1) provides that, 'So far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights', although this does not affect the validity, continuing operation or enforcement of any incompatible primary legislation.[134] The obligation imposed by s. 3 arises crucially in relation to both previous and subsequent enactments.[135] Where legislation cannot be rendered compatible with Convention rights, then a declaration of incompatibility can be made under s. 4 and Parliament may then modify the offending provisions under s. 10. The courts have also adopted a broader, purposive approach to interpretation of domestic legislation in order to ensure its compatibility with the Convention.[136] In the process of interpreting domestic legislation so as to render it compatible if possible with the Convention rights, the courts 'must take into account'[137] any relevant jurisprudence from the European Court of Human Rights, although this is not a provision imposing an obligation to follow such case-law.[138] Reference should also be made to the growing importance of entry into the European Communities in this context. The case-law of the Communities demonstrates that fundamental rights are an integral part of the general principles of law, the observance of which the European Court of Justice seeks to ensure. The system provides that Community law prevails over national law and that the decisions of the European Court are to be applied by the domestic courts of the member states. The potential for change through this route is, therefore, significant.[139] Further, in interpreting domestic legislation made pursuant to the European Communities Act 1972 where the former appears to conflict with the Treaty of Rome (establishing the European Community),

[133] [1997] 1 All ER 502, 512.

[134] Section 3(2)b. Nor that of incompatible subordinate legislation where primary legislation prevents removal of the incompatibility: section 3(2)c.

[135] Section 3(2)a. See further H. Fenwick, *Civil Liberties and Human Rights*, 3rd edn, London, 2002, p. 139, and R. Clayton and H. Tomlinson, *Human Rights Law*, London, 2000, chapter 4.

[136] See e.g. the decision of the House of Lords in *R* v. *A* [2001] 2 WLR 1546 and *R (on the application of Alconbury Ltd)* v. *Secretary of State for the Environment, Transport and the Regions* [2001] 2 All ER 929.

[137] Section 2 of the Human Rights Act.

[138] See further below, chapter 7, p. 351.

[139] See e.g. *Nold* v. *EC Commission* [1974] ECR 491, 508 and *Rutili* v. *Ministry of Interior of French Republic* [1975] ECR 1219.

the House of Lords has held that a purposive approach should be adopted.[140]

The United States[141]

As far as the American position on the relationship between municipal law and customary international law is concerned, it appears to be very similar to British practice, apart from the need to take the Constitution into account. The US Supreme Court in *Boos* v. *Barry* emphasised that, 'As a general proposition, it is of course correct that the United States has a vital national interest in complying with international law.' However, the rules of international law were subject to the Constitution.[142]

An early acceptance of the incorporation doctrine was later modified as in the UK. It was stated in the *Paquete Habana* case[143] that

> 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.[144]

[140] *Pickstone* v. *Freemans* [1988] 3 WLR 265. See also *Litster* v. *Forth Dry Dock Engineering* [1989] 1 All ER 1194.

[141] See e.g. J. F. Murphy, *The United States and the Rule of Law in International Affairs*, Cambridge, 2004, chapter 2; J. J. Paust, *International Law as Law of the United States*, Durham, NC, 1996, and Paust, 'International Law as Law of the United States: Trends and Prospects', 1 Chinese JIL, 2002, p. 615; Morgenstern, 'Judicial Practice'; I. Seidl-Hohenveldern, 'Transformation or Adoption of International Law into Municipal Law', 12 ICLQ, 1963, p. 88; *Oppenheim's International Law*, pp. 74 ff.; C. Dickinson, 'The Law of Nations as Part of the National Law of the United States', 101 *University of Pennsylvania Law Review*, 1953, p. 793; R. A. Falk, *The Role of Domestic Courts in the International Legal Order*, Princeton, 1964; R. B. Lillich, 'Domestic Institutions' in *The Future of the International Legal Order* (eds. C. Black and R. A. Falk), New York, 1972, vol. IV, p. 384; L. Henkin, *Foreign Affairs and the Constitution*, New York, 1972; L. Henkin, 'International Law: as Law in the United States', 82 *Michigan Law Review*, 1984, p. 1555; J. J. Paust, 'Customary International Law: Its Nature, Sources and Status as Law in the United States', 12 *Michigan Journal of International Law*, 1990, p. 59, and L. Henkin, R. C. Pugh, O. Schachter and H. Smit, *International Law: Cases and Materials*, 3rd edn, St Paul, 1993, chapter 3. See also *Treaties and Other International Agreements: A Study Prepared for the Committee on Foreign Relations*, US Senate, 2001.

[142] 99 L Ed 2d 333, 345–7 (1988); 121 ILR, p. 551.

[143] 175 US 677 (1900). See also *Respublica* v. *De Longchamps* 1 Dall. 111.

[144] 175 US 677, 700. See *Hilton* v. *Guyot* 159 US 113 and *United States* v. *Melekh* 190 F.Supp. 67 (1960), cf. *Pauling* v. *McElroy* 164 F.Supp. 390 (1958).

Similarly, the early pure incorporation cases gave way to a more cautious approach.[145]

The current accepted position is that customary international law in the US is federal law and that its determination by the federal courts is binding on the state courts.[146] The similarity of approach with the UK is not surprising in view of common historical and cultural traditions, and parallel restraints upon the theories are visible. US courts are bound by the doctrine of precedent and the necessity to proceed according to previously decided cases, and they too must apply statute as against any rules of customary international law that do not accord with it.[147] The Court of Appeals reaffirmed this position in the *Committee of United States Citizens Living in Nicaragua* v. *Reagan* case,[148] where it was noted that 'no enactment of Congress can be challenged on the ground that it violates customary international law'.[149]

It has been noted that the political and judicial organs of the United States have the power to ignore international law, where this occurs pursuant to a statute or 'controlling executive act'. This has occasioned much controversy,[150] as has the general relationship between custom and inconsistent pre-existing statutes.[151] However, it is now accepted that statutes supersede earlier treaties or customary rules of international law.[152] It has also been held that it would run counter to the Constitution for a court to decide that a decision of the International Court of Justice overrules a binding decision of the US Supreme Court and thus affords a judicial

[145] See e.g. *Cook* v. *United States* 288 US 102 (1933); 6 AD, p. 3 and *United States* v. *Claus* 63 F.Supp. 433 (1944).

[146] See *US* v. *Belmont* 301 US 324, 331, 57 S.Ct. 758, 761 (1937); 8 AD, p. 34 and *Third US Restatement of Foreign Relations Law*, St Paul, 1987, vol. I, pp. 48–52. See also *Kadić* v. *Karadžić* 70 F.3d 232, 246 (2d Cir. 1995); 104 ILR, pp. 149, 159; and *In Re Estate of Ferdinand E. Marcos Human Rights Litigation* 978 F.2d 493, 502 (9th Cir. 1992); 103 ILR, pp. 521, 529. However, see C. A. Bradley and J. L. Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position', 110 *Harvard Law Review*, 1997, p. 816, and J. Paust, 'Customary International Law in the United States: Clean and Dirty Laundry', 40 German YIL, 1997, p. 78.

[147] See e.g. *Schroeder* v. *Bissell* 5 F.2d 838, 842 (1925).

[148] 859 F.2d 929 (1988).

[149] *Ibid.*, at 939. See also *Tag* v. *Rogers* 267 F.2d 664, 666 (1959); 28 ILR, p. 467 and *US* v. *Yunis (No. 3)* 724 F.2d 1086, 1091 (1991); 88 ILR, pp. 176, 181.

[150] See *Brown* v. *United States* 12 US (8 Cranch) 110, 128 (1814) and *Whitney* v. *Robertson* 124 US 190, 194 (1888). See also Henkin, 'International Law', p. 1555. See also *Rodriguez-Fernandez* v. *Wilkinson* 654 F.2d 1382 (1981); 505 F.Supp. 787 (1980); *US* v. *PLO* 695 F.Supp. 1456 (1988) and *Klinghoffer* v. *SNC Achille Lauro* 739 F.Supp. 854 (1990).

[151] See *Third US Restatement of Foreign Relations Law*, pp. 63–9 (§115); the *Reagan* case, 859 F.2d 929, and Goldklang, 'Back on Board the *Paquete Habana*', 25 Va. JIL, 1984, p. 143.

[152] See previous footnote.

remedy to an individual for a violation of the Constitution.[153] However, the question of the impact of a ruling of the International Court upon US courts has been discussed in the light of decisions of the former[154] as to the violation of the Vienna Convention on Consular Relations, 1963 by the failure to permit access to consular officials by imprisoned foreigners.[155]

There does exist, as in English law, a presumption that legislation does not run counter to international law and, as it was stated by the Court in *Schroeder* v. *Bissell*,[156]

> unless it unmistakably appears that a congressional act was intended to be in disregard of a principle of international comity, the presumption is that it was intended to be in conformity with it.[157]

The relationship between US law and customary law has been the subject of re-examination in the context of certain human rights situations. In *Filartiga* v. *Pena-Irala*,[158] the US Court of Appeals for the Second Circuit dealt with an action brought by Paraguayans against a Paraguayan for the torture and death of the son of the plaintiff. The claim was based on the Alien Tort Claims Act of 1789[159] which 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'. The Court of Appeals held that torture constituted a violation of international customary law and was thus actionable. The Court accordingly held against the

153 *Valdez* v. *Oklahoma*, US Court of Criminal Appeals of Oklahoma, Case No. PCD-2001-1011, 2002.

154 See the *LaGrand* case (*Germany* v. *United States of America*), ICJ Reports, 2001, p. 466; 134 ILR, p. 1, and the *Avena and Other Mexican Nationals* case (*Mexico* v. *United States of America*), ICJ Reports, 2004, p. 12; 134 ILR, p. 120.

155 See e.g. *Torres* v. *State of Oklahoma* 43 ILM, 2004, p. 1227, and *Sanchez-Llamas* v. *Oregon* 126 S. Ct. 2669 (2006), holding that a violation of article 36 of the Vienna Convention on Consular Relations did not necessarily require reversal of a criminal conviction or sentence. As to civil remedies, see *United States* v. *Rodriguez* 162 Fed. Appx. 853, 857 (11th Cir. 2006), *Cornejo* v. *County of San Diego* 504 F.3d 853, 872 (9th Cir. 2007) and *Gandara* v. *Bennett*, Court of Appeals for the Eleventh Circuit, judgment of 22 May 2008, holding that the Vienna Convention did not create judicially enforceable individual rights. It was emphasised in *Cornejo* that '[f]or any treaty to be susceptible to judicial enforcement it must both confer individual rights and be self-executing', at p. 856.

156 5 F.2d 838 (1925).

157 *Ibid*., p. 842. See also *Macleod* v. *United States* 229 US 416 (1913) and *Littlejohn & Co.* v. *United States* 270 US 215 (1926); 3 AD, p. 483.

158 630 F.2d 876 (1980); 77 ILR, p. 169. See e.g. R. B. Lillich, *Invoking Human Rights Law in Domestic Courts*, Charlottesville, 1985, and Comment, 'Torture as a Tort in Violation of International Law', 33 *Stanford Law Review*, 1981, p. 353.

159 28 USC 1350 (1988).

defendant despite the fact that both parties were alien and all the operative acts occurred in Paraguay. The Court also noted that in ascertaining the content of international law, the contemporary rules and principles of international law were to be interpreted and not those as of the date of the prescribing statute.[160] Other cases came before the courts in which the incorporation of international customary law provisions concerning human rights issues was argued with mixed success.[161] An attempt to obtain a judgment in the US against the Republic of Argentina for torturing its own citizens, however, ultimately foundered upon the doctrine of sovereign immunity,[162] while it has been held that acts of 'international terrorism' are not actionable under the Alien Tort Claims Act.[163] In *Kadić* v. *Karadžić*,[164] the US Court of Appeals for the Second Circuit held that claims based on official torture and summary executions did not exhaust the list of actions that may be covered by the Alien Tort Claims Act and that allegations of genocide, war crimes and other violations of international humanitarian law would also be covered.[165] However, in *Sosa* v. *Alvarez-Machain*,[166] the Supreme Court held that the Alien Tort Claims Act was a jurisdictional statute creating no new causes of action and enacted on the understanding that the common law would provide a cause of action for

[160] 630 F.2d 876, 881 (1980); 77 ILR, pp. 169, 175. See also *Amerada Hess* v. *Argentine Republic* 830 F.2d 421; 79 ILR, p. 1. The norms of international law were to be found by 'consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law', 630 F.2d 876, 880; 77 ILR, p. 174, quoting *United States* v. *Smith* 18 US (5 Wheat.), 153, 160–1. See also *Kadić* v. *Karadžić* 34 ILM, 1995, p. 1592.

[161] See e.g. *Fernandez* v. *Wilkinson* 505 F.Supp. 787 (1980) and *In re Alien Children Education Litigation* 501 F.Supp. 544 (1980).

[162] *Siderman* v. *Republic of Argentina*, No. CV 82-1772-RMT (MCx) and *International Practitioner's Notebook*, July 1985, p. 1. See also below, chapter 13.

[163] *Tel-Oren* v. *Libyan Arab Republic* 517 F.Supp. 542 (1981), *aff'd per curiam*, 726 F.2d 774 (1984), *cert. denied* 53 USLW 3612 (1985); 77 ILR, p. 192. See e.g. A. D'Amato, 'What Does *Tel-Oren* Tell Lawyers?', 79 AJIL, 1985, p. 92. See also *De Sanchez* v. *Banco Central de Nicaragua* 770 F.2d 1385, 1398 (1985); 88 ILR, pp. 75, 90 and *Linder* v. *Portocarrero* 747 F.Supp. 1452; 99 ILR, p. 55.

[164] 34 ILM, 1995, p. 1592.

[165] Note that the US Torture Victim Protection Act 1992 provides a cause of action for official torture and extrajudicial killing where an individual, under actual or apparent authority or colour of law of any foreign law subjects, engages in such activities. This is not a jurisdictional statute, so that claims of official torture will be pursued under the jurisdiction conferred by the Alien Tort Claims Act or under the general federal question jurisdiction of section 1331: see e.g. *Xuncax* v. *Gramajo* 886 F.Supp. 162 (1995); 104 ILR, p. 165. In addition, local remedies must have been exhausted.

[166] 542 US 692, 714 ff. (2004).

the modest number of international law violations thought to carry personal liability at the time, being offences against ambassadors, violation of safe conducts, and piracy. The federal courts, it was declared, should not recognise claims under federal common law for violations of any international law norm with less 'definite content and acceptance among civilized nations' than these particular offences deemed to exist at the date of the adoption of the act.[167] Accordingly, both 'a specificity comparable to the features of the 18th-century paradigms' and a foundation resting upon 'a norm of international character accepted by the civilized world' were required in order to form the basis of a claim under the statute.[168]

The relative convergence of practice between Britain and the United States with respect to the assimilation of customary law is not reflected as regards the treatment of international treaties.[169] In the United Kingdom, it is the executive branch which negotiates, signs and ratifies international agreements, with the proviso that parliamentary action is required prior to the provisions of the agreement being accepted as part of English law. In the United States, on the other hand, 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.[170]

There is also a difference in the method of approval of treaties, for Article II of the Constitution notes that while the President has the power to make international agreements, he may only ratify them if at least two-thirds of the Senate approve.

There is an exception and this is the institution of the executive agreements. These are usually made by the President on his own authority, but still constitute valid treaties within the framework of international law. As distinct from ordinary treaties, the creation of executive agreements

[167] *Ibid.*, at 732.

[168] *Ibid.*, at 725 and 738. See also *Vietnam Association for Victims of Agent Orange* v. *Dow Chemical Company*, US Court of Appeals for the Second Circuit, Docket No. 05-1953-cv, 22 February 2008.

[169] See e.g. Jackson, 'Status of Treaties', p. 310, and D. Vagts, 'The United States and its Treaties: Observance and Breach', 95 AJIL, 2001, p. 313.

[170] See e.g. *Ware* v. *Hylton* 3 US (3 Dall.) 199 (1796) and *Foster* v. *Neilson* 27 US (2 Pet.) 253 (1829). See also on treaty powers and the 'reserved powers' of the states the tenth amendment, *Missouri* v. *Holland* 252 US 416 (1920); 1 AD, p. 4 and *United States* v. *Curtiss-Wright Export Corporation* 299 US 304 (1936); 8 AD, p. 48.

is not expressly covered by the Constitution, but rather implied from its terms and subsequent practice, and they have been extensively used. The Supreme Court, in cases following the 1933 Litvinov Agreement, which established US recognition of the Soviet government and provided for the assignment to the US of particular debts owing to the USSR, emphasised that such executive agreements possessed the same status and dignity as treaties made by the President with the advice and consent of the Senate under Article II of the Constitution.[171]

American doctrines as to the understanding of treaty law are founded upon the distinction between 'self-executing' and 'non-self-executing' treaties.[172] The former are able to operate automatically within the domestic sphere, without the need for any municipal legislation, while the latter require enabling acts before they can function inside the country and bind the American courts. Self-executing treaties apply directly within the United States as part of the supreme law of the land, whereas those conventions deemed not self-executing are obliged to undergo a legislative transformation and, until they do so, they cannot be regarded as legally enforceable against American citizens or institutions.[173]

But how does one know when an international agreement falls into one category or the other? This matter has absorbed the courts of the United States for many years, and the distinction appears to have been made upon the basis of political content. In other words, where a treaty involves political questions of definition or exposition, then the issue should be left to the legislative organs of the nation, rather than automatic operation.[174] Examples of this would include the acquisition or loss of territory

[171] See e.g. *United States* v. *Pink* 315 US 203 (1942); 10 AD, p. 48. See, as regards the President's power to settle claims and create new rules of law applicable to pending legislation, *Dames & Moore* v. *Regan* 101 SC 2972 (1981); 72 ILR, p. 270.

[172] See e.g. Y. Iwasawa, 'The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis', 26 Va. JIL, 1986, p. 635; J. Paust, 'Self-Executing Treaties', 82 AJIL, 1986, p. 760; T. Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in National and International Law', 235 HR, 1992 IV, p. 303, and C. M. Vázquez, 'The Four Doctrines of Self-Executing Treaties', 89 AJIL, 1995, p. 695.

[173] See e.g. *Foster* v. *Neilson* 27 US (2 Pet.) 253, 311, 7 L.Ed. 415 (1829); *United States* v. *Percheman* 32 US (7 Pet.) 51 (1833); *United States* v. *Postal* 589 F.2d 862, 875 (5th Cir. 1979), *cert. denied*, 444 US 832 and *Linder* v. *Portocarrero* 747 F.Supp. 1452, 1463; 99 ILR, pp. 55, 67–8.

[174] See Chief Justice Marshall, *Foster* v. *Neilson* 27 US (2 Pet.) 253, 314 (1829). See also J. C. Yoo, 'Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding', 99 *Columbia Law Review*, 1999, p. 1955, and Vagts, 'US and its Treaties', p. 321.

and financial arrangements. The Supreme Court in *Edye* v. *Robertson*[175] declared that treaties which

> contain provisions which are capable of enforcement as between private parties in the courts of the country . . . [are] in the same category as other laws of Congress.

This would seem to mean that an international convention would become a law of the land, where its terms determine the rights and duties of private citizens, and contrasts with the position where a political issue is involved and the treaty is thereby treated as non-self-executing.

Of course such generalisations as these are bound to lead to considerable ambiguity and doubt in the case of very many treaties; and the whole matter was examined again in 1952 before the Supreme Court of California in *Sei Fujii* v. *California*.[176] The plaintiff was a Japanese citizen who had purchased some land in 1948 in California. By legislation enacted in that state, aliens had no right to acquire land. To prevent the property from going to the state, the plaintiff argued that, amongst other things, such legislation was not consistent with the Charter of the United Nations, an international treaty which called for the promotion of human rights without racial distinction.

The issue raised was whether the UN Charter was a self-executing treaty and, by virtue of such, part of the law of the land, which would supersede inconsistent local statutes. The Court declared that, in making a decision as to whether a treaty was self-executing or not, it would have to consult the treaty itself to try to deduce the intentions of the signatories and examine all relevant circumstances. Following *Edye's* case it would have to see whether the provisions of the treaty laid down rules that were to be enforceable of themselves in the municipal courts.

The Court concluded after a comprehensive survey that the relevant provisions of the UN Charter were not intended to be self-executing. They laid down various principles and objectives of the United Nations Organisation, but 'do not purport to impose legal obligations on the individual member nations or to create rights in private persons'. The Court held that it was obvious that further legislative action by the signatories would be called for to turn the principles of the UN into domestic laws binding upon the individual citizens of states.[177] Accordingly, they could not be regarded as part of the law of the land and could not operate to deflect

[175] 112 US 580 (1884). [176] 38 Cal (2d) 718 (1952). [177] *Ibid.*, p. 721.

the Californian legislation in question. The case was decided in favour of the plaintiff, but on other grounds altogether.[178]

As is the case with the UK system, it is possible for the US legislature to take action which not only takes no account of international law rules but may be positively contrary to them, and in such an instance the legislation would be supreme within the American jurisdiction.

In *Diggs* v. *Schultz*,[179] for example, the Court had to consider the effect of the Byrd Amendment which legalised the importation into the USA of strategic materials, such as chrome from Rhodesia, a course of action which was expressly forbidden by a United Nations Security Council resolution which in the circumstances was binding. The Court noted that the Byrd Amendment was 'in blatant disregard of our treaty undertakings' but concluded that: 'under our constitutional scheme, Congress can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it.' Although in municipal terms the Amendment was unchallengeable, the United States was, of course, internationally liable for the breach of an international legal rule.[180]

However, there is a presumption that Congress will not legislate contrary to the international obligations of the state[181] and a principle of

[178] See e.g. *People of Saipan ex rel. Guerrero* v. *United States Department of Interior* 502 F.2d 90 (1974); 61 ILR, p. 113. See also *Camacho* v. *Rogers* 199 F.Supp. 155 (1961) and *Diggs* v. *Dent* 14 ILM, 1975, p. 797. Note also O. Schachter, 'The Charter and the Constitution', 4 *Vanderbilt Law Review*, 1951, p. 643. In *Medillin* v. *Texas* 128 S. Ct. 1346 (2008), the US Supreme Court held that the decision of the International Court of Justice in the *Avena (Mexico* v. *US)* case, ICJ Reports, 2004, p. 12, requiring the US to provide 'further review and reconsideration' of the convictions in question, did not constitute directly enforceable federal law as the relevant treaties (the UN Charter, the Statute of the International Court and the Optional Protocol to the Vienna Convention on Consular Relations) were non-self-executing. See further as to the *Avena* case, below, chapter 13, p. 773 and chapter 19, p. 1103, note 305. See also the similar conclusion adopted by the Supreme Court of the Netherlands in *Association of Lawyers for Peace and Four Other Organizations* v. *State of the Netherlands*, Nr C02/217HR; LJN: AN8071; NJ 2004/329.

[179] 470 F.2d 461, 466–7 (1972); 60 ILR, pp. 393, 397. See also *Breard* v. *Greene* 523 US 371, 376 (1998) and *Havana Club Holding, Inc.* v. *Galleon SA* 974 F.Supp. 302 (SDNY 1997), *aff'd* 203 F.3d (2d Cir. 2000).

[180] This, of course, reflects the general rule. See e.g. G. Hackworth, *Digest of International Law*, Washington, 1940–4, vol. V, pp. 185–6 and 324–5. See also *Third US Restatement of Foreign Relations Law*, 1987, para. 115(1)b.

[181] See e.g. Marshall CJ, *Murray* v. *Schooner Charming Betsy* 6 US (2 Cranch) 64; *Weinberger* v. *Rossi* 456 US 25 (1982) and *Cook* v. *United States* 288 US 102 (1933). See also R. Steinhardt, 'The Role of International Law as a Canon of Domestic Statutory Construction', 43 *Vanderbilt Law Review*, 1990, p. 1103, and C. A. Bradley, '*The Charming Betsy* Canon and Separation of Powers', 86 *Georgia Law Journal*, 1998, p. 479.

interpretation that where an act and a treaty deal with the same subject, the courts will seek to construe them so as to give effect to both of them without acting contrary to the wording of either. Where the two are inconsistent, the general rule has been posited that the later in time will prevail, provided the treaty is self-executing.[182]

The question of a possible conflict between treaty obligations and domestic legislation was raised in *United States* v. *Palestine Liberation Organisation*.[183] The Anti-Terrorism Act of the previous year[184] provided for the closure of all PLO offices in the United States and this was construed by the Attorney-General to include the PLO mission to the United Nations, an action which would have breached the obligations of the US under the United Nations Headquarters Agreement. However, the District Court found that it could not be established that the legislation clearly and unequivocally intended that an obligation arising out of the Headquarters Agreement, a valid treaty, was to be violated.[185]

The issue of the relationship between international treaties and municipal law came before the US Supreme Court in *Breard* v. *Greene*.[186] The Court noted that 'respectful consideration' should be given to the interpretation of an international treaty by a relevant international court;[187] however, 'it has been recognised in international law that absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State'.[188] Accordingly, the effect of resort to a domestic procedural rule might result in preventing the provision of an international treaty from being applied in any given case. The Supreme Court also affirmed that international treaties under the Constitution were recognised as the 'supreme law of the land', but so were the provisions of the Constitution. An Act of Congress was

[182] See the decision of the Supreme Court in *Whitney* v. *Robertson* 124 US 190 (1888). The *Third US Restatement of Foreign Relations Law*, pp. 63 ff. suggests that an Act of Congress will supersede an earlier rule of international law or a provision in an international agreement 'if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled'.

[183] 695 F.Supp. 1456 (1988). [184] 22 USCA, paras. 5201–3.

[185] *Ibid.* See the Advisory Opinion of the International Court in the *Applicability of the Obligation to Arbitrate* case, ICJ Reports, 1988, p. 12; 82 ILR, p. 225. See also DUSPIL, 1981–8, part I, pp. 8 ff.

[186] 140 L.Ed. 2d 529 (1998); 118 ILR, p. 22.

[187] The issue concerned the Vienna Convention on Consular Relations, 1963, and the international court in question was the International Court of Justice in *Paraguay* v. *USA*, ICJ Reports, 1998, p. 248; 118 ILR, p. 1.

[188] 140 L.Ed.2d 529, 537 (1998); 118 ILR, p. 22.

'on full parity' with a treaty, so that a later statute would render an earlier treaty null to the extent of any conflict.[189]

Other countries

In other countries where the English common law was adopted, such as the majority of Commonwealth states and, for example, Israel,[190] it is possible to say that in general the same principles apply. Customary law is regarded on the whole as part of the law of the land.[191] Municipal laws are presumed not to be inconsistent with rules of international law, but in cases of conflict the former have precedence.

The Canadian Supreme Court in the *Reference Re Secession of Quebec* judgment[192] noted that it had been necessary for the Court in a number of cases to look to international law to determine the rights or obligations of some actor within the Canadian legal system.[193] As far as treaties are concerned, Lord Atkin expressed the general position in *Attorney-General for Canada* v. *Attorney-General for Ontario*,[194] in a case dealing with the respective legislative competences of the Dominion Parliament and the provincial legislatures. He noted that within the then British Empire it was well enshrined that the making of a treaty was an executive act, while the performance of its obligations, if they involved alteration of the existing

[189] *Ibid.* See above, note 178.

[190] See the *Eichmann* case, 36 ILR, p. 5; R. Lapidoth, *Les Rapports entre le Droit International Public et le Droit Interne en Israel*, Paris, 1959, and Lapidoth, 'International Law Within the Israel Legal System', 24 *Israel Law Review*, 1990, p. 251. See also the *Affo* case before the Israeli Supreme Court, 29 ILM, 1990, pp. 139, 156–7; 83 ILR, p. 121, and *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, HCJ 769/02. See also *A & B* v. *State of Israel*, Israeli Supreme Court, 11 June 2008.

[191] But see as to doubts concerning the application of the automatic incorporation of customary international law into Australia, I. Shearer, 'The Internationalisation of Australian Law', 17 *Sydney Law Review*, 1995, pp. 121, 124. See also G. Triggs, 'Customary International Law and Australian Law' in *The Emergence of Australian Law* (eds. M. P. Ellinghaus, A. J. Bradbrook and A. J. Duggan), 1989, p. 376. Note that Brennan J in *Mabo* v. *Queensland* (1992) 175 CLR 1, 41–2, stated that 'international law is a legitimate and important influence on the development of the common law'.

[192] (1998) 161 DLR (4th) 385, 399; 115 ILR, p. 536. See also G. La Forest, 'The Expanding Role of the Supreme Court of Canada in International Law Issues', 34 Canadian YIL, 1996, p. 89.

[193] See also *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* [1967] SCR 792; 43 ILR, p. 93, and *Reference re Newfoundland Continental Shelf* [1984] 1 SCR 86; 86 ILR, p. 593.

[194] [1937] AC 326; 8 AD, p. 41.

domestic law, required legislative action. 'The question', remarked Lord Atkin,

> is not how is the obligation formed, that is the function of the executive, but how is the obligation to be performed, and that depends upon the authority of the competent legislature or legislatures.[195]

The doctrine that customary international law forms part of the domestic law of Canada has been reaffirmed in a number of cases.[196] This has also been accepted in New Zealand[197] and in Australia.[198] In *Horgan* v. *An Taoiseach*, it was affirmed that 'established principles of customary international law may be incorporated into Irish domestic law *providing* that they are not contrary to the provisions of the Constitution, statute law or common law'.[199] The relationship between treaties and domestic law was examined by the High Court of Australia in *Minister of State for Immigration and Ethnic Affairs* v. *Teoh*.[200] The Court upheld the traditional doctrine to the effect that the provisions of an international

[195] *Ibid*., pp. 347–8; 8 AD, pp. 43–4. See also *Pfizer Inc.* v. *Canada* [1999] 4 CF 441 and *R* v. *Council of Canadians* 2003 CanLII 28426, paras. 35–7 (2005), affirmed 2006 CanLII 400222, 217 OAC 316.

[196] See e.g. *Reference re Exemption of US Forces from Canadian Criminal Law* [1943] 4 DLR 11, 41 and *Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences* [1943] SCR 208.

[197] See e.g. *Marine Steel Ltd* v. *Government of the Marshall Islands* [1981] 2 NZLR 1; 64 ILR, p. 539; and *Governor of Pitcairn and Associated Islands* v. *Sutton* [1995] 1 NZLR 426; 104 ILR, p. 508. The courts have also referred to a presumption of statutory interpretation that, so far as wording allows, legislation should be read in a way that is consistent with New Zealand's obligations: see e.g. *Rajan* v. *Minister of Immigration* [1996] 3 NZLR 543, 551 and *Wellington District Legal Services* v. *Tangiora* [1998] 1 NZLR 129, 137; 115 ILR, pp. 655, 663. See, as to the use of treaties in statutory interpretation, *Attorney-General* v. *Zaoui* [2005] NZSC 38, [2006] 1 NZLR 289, (2005) 7 HRNZ 860. See also *Nguyen Tuong Van* v. *Public Prosecutor* [2004] SGCA 47; 134 ILR, p. 660 with regard to Singapore.

[198] See e.g. *Potter* v. *BHP Co. Ltd* (1906) 3 CLR 479, 495, 506–7 and 510; *Wright* v. *Cantrell* (1943) 44 SR (NSW) 45; *Polites* v. *Commonwealth* (1945) 70 CLR 60 and *Chow Hung Ching* v. *R* (1948) 77 CLR 449. These cases are unclear as to whether the incorporationist or transformation approaches have been adopted as the appropriate theoretical basis. As to the view that international law is the 'source' of domestic law, see Dixon J in *Chow Hung Ching* and Merkel J in *Nulyarimma* v. *Thompson* (1999) 165 ALR 621, 653–5; 120 ILR, p. 353. See also *Public International Law: An Australian Perspective* (eds. S. Blay, R. Piotrowicz and B. M. Tsamenyi), Oxford, 1997, chapter 5, and H. Burmeister and S. Reye, 'The Place of Customary International Law in Australian Law: Unfinished Business', 21 Australian YIL, 2001, p. 39.

[199] 132 ILR, pp. 407, 442.

[200] (1995) 128 ALR 353; 104 ILR, p. 466. See also Blay *et al.*, *Public International Law: An Australian Perspective.*

treaty to which Australia is a party do not form part of Australian law, and do not give rise to rights, unless those provisions have been validly incorporated into municipal law by statute.[201] It was noted that this was because of the constitutional separation of functions whereby the executive made and ratified treaties, while the legislature made and altered laws.[202] The majority of the Court, however, went on to hold that the fact that a treaty had not been incorporated did not mean that its ratification by the executive held no significance for Australian law. Where a statute or subordinate legislation was ambiguous, the courts should favour that construction which accorded with Australia's obligations under the particular treaty,[203] while a statute generally had to be interpreted as far as its language permitted so that it was in conformity and not in conflict with the established rules of international law.[204] Indeed, the Court felt that a narrow conception of ambiguity in this context should be rejected.[205] Referring to *Ex Parte Brind*,[206] the Court stated that this principle was no more than a canon of construction and did not import the terms of the treaty into municipal law.[207] Moving beyond this approach which is generally consistent with common law doctrines, the majority of the Court took the view that ratification of a convention itself would constitute an adequate foundation for a legitimate expectation (unless there were statutory or executive indications to the contrary) that administrative decision-makers would act in conformity with the unincorporated but

[201] See e.g. judgment by Mason CJ and Deane J, (1995) 128 ALR 353, 361. See also *Dietrich* v. *The Queen* (1992) 177 CLR 292, 305 and *Coe* v. *Commonwealth of Australia* (1993) 118 ALR 193, 200–1; 118 ILR, p. 322. Reaffirmed by the High Court in *Kruger* v. *Commonwealth of Australia* (1997) 146 ALR 126, 161; 118 ILR, p. 371. See e.g. *Kenneth Good* v. *Attorney-General*, Court of Appeal Civil Appeal No. 028 of 2005 for the similar situation in Botswana and *Nallaratnam Singarasa* v. *Attorney General*, S.C. Spl (LA) No. 182/99 (2006) with regard to Sri Lanka.

[202] (1995) 128 ALR 353, 362 and see e.g. *Simsek* v. *Macphee* (1982) 148 CLR 636, 641–2.

[203] Judgment of Mason CJ and Deane J. See also *Chung Kheng Lin* v. *Minister for Immigration* (1992) 176 CLR 1, 38. In *Kruger* v. *Commonwealth of Australia*, Dawson J noted that such a construction was not required where the obligations arise only under a treaty and the legislation in question was enacted before the treaty, (1997) 146 ALR 126, 161; 118 ILR, p. 371.

[204] See also *Kartinyeri* v. *The Commonwealth* (1998) 195 CLR 337 at 384 and *Ahmed Ali Al-Kateb* v. *Goodwin* [2004] HCA 37. In the latter case, McHugh J criticised the rule, but concluded that it was too well established to be repealed by judicial decision, *ibid.* at para. 65.

[205] (1995) 128 ALR 353, 361. See also *Polites* v. *The Commonwealth* (1945) 70 CLR 60, 68–9, 77, 80–1.

[206] [1991] 1 AC 696 at 748; 85 ILR, p. 29.

[207] (1995) 128 ALR 353, 362.

ratified convention.[208] This particular proposition is controversial in legal doctrine, but is an interesting example of the fact that internal decision-makers may not always be expected to be immune from the influence of obligations undertaken by the state.[209]

There are further signs of an increasingly flexible approach. For example, in *Hosking & Hosking* v. *Runting and Pacific Magazines NZ Ltd*,[210] the New Zealand Court of Appeal referred to the 'increasing recognition of the need to develop the common law consistently with international treaties to which New Zealand is a party. That is an international trend. The historical approach to the State's international obligations as having no part in the domestic law unless incorporated by statute is now recognised as too rigid.' Further, the Canadian Supreme Court, in noting that genocide was a crime in both customary international law and treaty law, declared that international law was therefore called upon to play a crucial role as an aid in interpreting domestic law, particularly as regards the elements of the crime of incitement to genocide, and emphasised the importance of interpreting domestic law in a manner that accorded with the principles of customary international law and with Canada's treaty obligations.[211] This, however, would go further than most common law states would accept.

Although the basic approach adopted by the majority of common law states is clear, complications have arisen where the country in question has a written constitution, whether or not specific reference is made

[208] *Ibid.*, 365. See also the judgment of Toohey J, *ibid.* at 371–2, and the judgment of Gaudron J, *ibid.* at 375–6. Cf. the judgment of McHugh J, *ibid.* at 385–7.

[209] Note that after the decision in *Teoh*, the Minister for Foreign Affairs and the Attorney General issued a Joint Statement (10 May 1995) denying the existence of any such legitimate expectation upon the ratification of a treaty: see M. Allars, 'One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh*'s Case and the Internationalisation of Administrative Law', 17 *Sydney Law Review*, 1995, pp. 204, 237–41. The Government also introduced the Administrative Decisions (Effect of International Instruments) Bill 1995 into the Parliament with the specific purpose of denying that treaties or conventions give rise to a legitimate expectation of how a decision-maker will make a decision in an area affected by such international instruments. See also *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, a Report by the Senate Legal and Constitutional References Committee, November 1995. See now also *Minister for Immigration and Multicultural Affairs; Ex Parte Lam* [2003] HCA 6, which is critical of *Teoh*.

[210] [2004] NZCA 34, para. 6.

[211] *Mugesera* v. *Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100, para. 82; 132 ILR, pp. 295–6. See also *Baker* v. *Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, paras. 69–71.

therein to the treatment of international agreements. The use of international law in interpreting the Constitution has occasioned much debate in Australia.[212] In *Ahmed Ali Al-Kateb* v. *Godwin*, for example, two judges of the High Court of Australia came to radically different conclusions. One judge regarded the view that the Constitution should be read consistently with the rules of international law as 'heretical',[213] while another declared that 'opinions that seek to cut off contemporary Australian law (including constitutional law) from the persuasive force of international law are doomed to fail'.[214] This debate reflects differing approaches to constitutional interpretation.[215]

The Indian Constitution refers only in the vaguest of terms to the provisions of international law,[216] whereas by contrast the Irish Constitution clearly states that the country will not be bound by any treaty involving a charge upon public funds unless the terms of the agreement have been approved by the Dáil.[217] Under article 169(3) of the Cyprus Constitution, treaties concluded in accordance with that provision have as from

[212] See e.g. D. Hovell and G. Williams, 'A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa', 29 *Melbourne University Law Review*, 2005, p. 95; H. Charlesworth, M. Chiam, D. Hovell and G. Williams, 'Deep Anxieties: Australia and the International Legal Order', 25 *Sydney Law Review*, 2003, pp. 423, 446–63; *International Law in Australia* (ed. K. W. Ryan), Sydney, 1984; Blay *et al.*, *Public International Law: An Australian Perspective*; A. Byrnes and H. Charlesworth, 'Federalism and the International Legal Order: Recent Developments in Australia', 79 AJIL, 1985, p. 622, and *Koowarta* v. *Bjelke-Petersen*, High Court of Australia, 39 ALR 417 (11 May 1982); 68 ILR, p. 181; *Tabag* v. *Minister for Immigration and Ethnic Affairs*, Federal Court of Australia, 45 ALR 705 (23 December 1982); *Commonwealth of Australia* v. *State of Tasmania*, High Court of Australia, 46 ALR 625 (1 July 1983); 68 ILR, p. 266; *Polyukhovich* v. *Commonwealth* (1991) 172 CLR 501 and *Minister for Foreign Affairs* v. *Magno* (1992) 37 FCR 298.

[213] [2004] HCA 37, para. 63 (McHugh J). [214] *Ibid.*, para. 190 (Kirby J).

[215] Simpson and Williams have concluded that '[j]udges will approach extrinsic materials, such as international law, differently depending on whether they favour rigidly applying the Constitution as originally drafted and intended or, at the other extreme, updating the instrument for societal change consistent with a vision of the Constitution as a "living force" ', A. Simpson and G. Williams, 'International Law and Constitutional Interpretation', 11 *Public Law Review*, 2000, pp. 205, 226.

[216] See e.g. D. D. Basu, *Commentaries on the Constitution of India*, New Delhi, 1962, vol. II, and *Constitutions of the World* (ed. R. Peaslee), 3rd edn, New York, 1968, vol. II, p. 308. See also K. Thakore, 'National Treaty Law and Practice: India' in Leigh and Blakeslee, *National Treaty Law and Practice*, p. 79.

[217] Peaslee, *Constitutions*, vol. III, p. 463 (article 29(5)2). Article 29 also states that Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other states. See e.g. *Re O'Laighléis* 24 ILR, p. 420 and *Re Woods* 53 ILR, p. 552. See also *Crotty* v. *An Taoiseach* 93 ILR, p. 480; *McGimpsey* v. *Ireland* [1988] IR 567, and *Kavanagh* v. *Governor of Mountjoy Prison* [2002] 3 IR 97, 125–6; 132 ILR, pp. 394, 401–2. Note also the decision of the Irish High Court in *Horgan* v. *An Taoiseach* on 28

publication in the Official Gazette of the Republic 'superior force to any municipal law on condition that such treaties, conventions and agreements are applied by the other party thereto'.[218] In such cases where there is a written constitution, serious questions of constitutional law may be involved, and one would have to consider the situation as it arises and within its own political context.[219] But in general common law states tend to adopt the British approach.

The practice of those states which possess the civil law system, based originally on Roman law, manifests certain differences.[220] The Basic Law of the Federal Republic of Germany,[221] for example, specifically 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 create rights and duties for the inhabitants of the federal territory.'[222] This provision, which not only treats international law as part of municipal law but regards it as superior to municipal legislation, has been the subject of a great deal of controversy as writers and lawyers have tried to establish whether international legal rules would invalidate any inconsistent municipal legislation and, indeed, whether international rules could override the constitution. Similarly, the phrase 'general rules of public international law' has led to problems over interpretation as it may refer to all aspects of international law, including customary and treaty rules, or merely general principles common to all, or perhaps only certain nations.[223]

April 2003 reaffirming that article 29 does not confer individual rights, 132 ILR, pp. 407, 446.

218 See e.g. *Malachtou* v. *Armefti and Armefti* 88 ILR, p. 199.

219 See e.g. *International Law Chiefly as Interpreted and Applied in Canada* (ed. H. Kindred), 6th edn, Toronto, 2000, chapter 4; *Re Newfoundland Continental Shelf* [1984] 1 SCR 86, and C. Okeke, *The Theory and Practice of International Law in Nigeria*, London, 1986.

220 See e.g. L. Wildhaber and S. Breitenmoser, 'The Relationship Between Customary International Law and Municipal Law in Western European Countries', 48 ZaöRV, 1988, p. 163; *Oppenheim's International Law*, pp. 63 ff., and Henkin *et al.*, *International Law: Cases and Materials*, pp. 154 ff.

221 See H. D. Treviranus and H. Beemelmans, 'National Treaty Law and Practice: Federal Republic of Germany' in Leigh and Blakeslee, *National Treaty Law and Practice*, p. 43.

222 See e.g. the *Parking Privileges for Diplomats* case, 70 ILR, p. 396.

223 See e.g. *German Consular Notification* case (*Individual Constitutional Complaint Procedure*), BVerfG, 2 BvR 2115/01, 19 September 2006, and *Görgülü* case (*Individual Constitutional Complaint*), BVerfG, 2 BvR 1481/04 of 14 October 2004, 111 *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE), 307–32, [2004] *Neue Juristische Wochenschrift* (NJW) 3407–3412. See also D. P. O'Connell, *International Law*, 2nd edn, London, 1970, vol. I, pp. 71–6, and sources therein cited. See also generally A. Drzemczewski, *The European Human Rights Convention in Domestic Law*, Oxford, 1983, and Peaslee, *Constitutions*, vol. III, p. 361.

As far as treaties are concerned, the German federal courts will regard these as superior to domestic legislation, though they will not be allowed to operate so as to affect the constitution. Article 59 of the Basic Law declares that treaties which regulate the political relations of the federation or relate to matters of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies competent in any specific case for such federal legislation. Thereafter such treaties will be treated as incorporated into German law, but with the status (no higher) of a federal law. Such laws may indeed be challenged before the German courts by means of a constitutional complaint if the treaty in question contains provisions directly encroaching upon the legal sphere of the individual.[224]

Article 91(1) of the Netherlands Constitution 1983 requires the prior approval of Parliament before treaties, or their denunciation, become binding, while article 91(3) provides that any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Chambers of the Parliament, provided that at least two-thirds of the votes cast are in favour. Article 93 states that provisions of treaties and of decisions by international organisations which may be binding by virtue of their contents are to become binding after they have been published, while article 94 provides that statutory regulations in force within the kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or with resolutions by international institutions.[225] Customary international law is not referred to in the Constitution. It is deemed to apply internally, although it seems that statute will prevail in cases of conflict.[226] It is for the courts to establish whether the provisions of a treaty or decision by an

[224] See the *Unification Treaty Constitutionality* case, 94 ILR, pp. 2, 54. See also the *East Treaties Constitutionality* case, 73 ILR, p. 691 and *the Görgülü* case (*Individual Constitutional Complaint*), BVerfG, 2 BvR 1481/04 of 14 October 2004, 111 *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE), 307–32, [2004] *Neue Juristische Wochenschrift* (NJW) 3407–12.

[225] See e.g. E. A. Alkema, 'Fundamental Human Rights and the Legal Order of the Netherlands' in *International Law in the Netherlands* (eds. H. Van Panhuys *et al.*), Dordrecht, 1980, vol. III, p. 109; Peaslee, *Constitutions*, vol. III, p. 652; *Oppenheim's International Law*, p. 69, and H. Schermers, *The Effect of Treaties in Domestic Law* (eds. F. Jacobs and S. Roberts), Leiden, 1987, p. 109. See also e.g. *Nordstern Allgemeine Versicherungs AG* v. *Vereinigte Stinees Rheinreedereien* 74 ILR, p. 2 and *Public Prosecutor* v. *JO* 74 ILR, p. 130. Note also J. Klabbers, 'The New Dutch Law on the Approval of Treaties', 44 ICLQ, 1995, p. 629.

[226] See e.g. H. F. van Panhuys, 'The Netherlands Constitution and International Law: A Decade of Experience', 58 AJIL, 1964, pp. 88–108. See also *Handelskwekerij GJ Bier BV* v. *Mines de Potasse d'Alsace SA* 11 Netherlands YIL, 1980, p. 326.

international organisation are binding on all persons within the meaning of articles 93 and 94 of the Constitution.[227]

In a provision contained in other constitutions, article 10 of the Italian Constitution of 1947 stipulates that the Italian legal order 'shall conform with the generally recognised rules of international law'. This is interpreted to indicate that international customary law will override inconsistent ordinary national legislation.[228] Article 8(1) of the Portuguese Constitution provides that the rules and principles of general or customary international law are an integral part of Portuguese law,[229] while under article 87 of Poland's Constitution of 1997, a ratified international treaty, equal to a statute, is one of the sources of law.[230] The Supreme Court of Belgium has taken the view that directly effective treaty provisions have superiority over the Constitution,[231] as well as over a conflicting legislative act.[232]

The French Constitution of 1958 declares that treaties duly ratified and published shall operate as laws within the domestic system.[233] However, the Constitution provides that, although in principle it is the President of the Republic who negotiates and ratifies treaties, with regard to important treaties such as commercial treaties which entail some form of financial outlay, treaties relating to international organisations, treaties modifying legislation and treaties affecting personal status, ratification takes place by Act of Parliament. Once the relevant legislation has been passed, the agreement is promulgated and becomes binding upon the courts.

[227] See *Reinier van Arkel Foundation and Others* v. *Minister for Transport, Public Works and Water Management*, Case Nr 200401178/1; LJN: AR2181; *AB* 2005/12.

[228] Cassese, *International Law*, p. 225, note 21. See also the decision of the Italian Court of Cassation in *Canada* v. *Cargnello* 114 ILR, p. 559, and, for a similar view in Latvia, *Judgment of the Constitutional Court of the Republic of Latvia on a Request for Constitutional Review*, No. 2004–01–06 of 7 July 2004, *Latvian Herald*, 9 July 2004, No. 108, 3056.

[229] See e.g. the decision of the Supreme Court of Portugal in the *Brazilian Embassy Employee* case, May 1984, 116 ILR, p. 625.

[230] See *Resolution of the Supreme Court of 19 February 2003*, I KZP 47/02.

[231] *B.M.*, Cass. 16 November 2004, nr P.04.0644.N, *Pas.* 2004, I, 1795, *RCJB* 2007, 36, *RW* 2005–06, 387, *CDPK* 2005, 610, *RABG* 2005, 504, *T.Strafr.* 2005, 285. See also *Gruyez and Rolland* v. *Municipality of Sint–Genesius–Rode*, Court of Appeal of Brussels, 28 January 2003, AR nr 2002/KR/412.

[232] *Franco-Suisse Le Ski* (*Hof van Cassatie/Cour de Cassation*), 21 May 1971, *Pas.* 1971, I, 886.

[233] See Title VI of the Constitution. See also e.g. Nguyen Quoc Dinh *et al.*, *Droit International Public*, pp. 231 ff.; P. M. Dupuy, *Droit International Public*, 8th edn, Paris, 2006, pp. 422 ff.; D. Alland, 'Jamais, Parfois, Toujours. Réflexions sur la Compétence de la Cour de Cassation en Matière d'Interprétation des Conventions Internationales', *Revue Générale de Droit International Public*, 1996, p. 599; V. Kronenberger, 'A New Approach to the Interpretation of the French Constitution in Respect to International Conventions: From Hierarchy of Norms to Conflict of Competence', NILR, 2000, p. 323.

Article 55 of the Constitution provides that duly ratified or approved treaties or agreements shall upon publication override domestic laws, subject only to the application of the treaty or agreement by the other party or parties to the treaty.[234] It is also now accepted that the French courts may declare a statute inapplicable for conflicting with an earlier treaty.[235] However, the Cour de Cassation has held that the supremacy of international agreements in the domestic order does not extend to constitutional provisions.[236]

In 1993, South Africa adopted a new (interim) constitution.[237] Whereas the previous constitutions of 1910, 1961 and 1983 had been silent on the question of international law, the 1993 Constitution contained several relevant provisions. Section 231(4) states that 'the rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic'. This formulation confirms essentially the common law position and would also suggest that the principle of *stare decisis* is not applicable to customary international law. As far as treaties are concerned, the previous position whereby an Act of Parliament was required in order to incorporate an international agreement has been modified. While the negotiation and signature of treaties is a function of the President (section 82(1)i), ratification is now a function of the Parliament (section 231(2)).[238]

[234] See e.g. O'Connell, *International Law*, pp. 65–8; Rousseau, *Droit International Public*, and Peaslee, *Constitutions*, vol. III, p. 312. See also *SA Rothmans International France and SA Philip Morris France* 93 ILR, p. 308.

[235] See the *Cafés Jacques Vabre* case, 16 *Common Market Law Review*, 1975, p. 336 and *In re Nicolo* 84 AJIL, 1990, p. 765; 93 ILR, p. 286. Under article 54 of the Constitution, the Constitutional Council may declare a treaty to be contrary to the Constitution, so that the Constitution must first be amended before the treaty may be ratified or approved. See e.g. *Re Treaty on European Union* 93 ILR, p. 337. See also *Ligue Internationale Contre le Racisme et l'Antisémitisme*, AFDI, 1993, p. 963 and AFDI, 1994, pp. 963 ff.

[236] See *Pauline Fraisse*, 2 June 2000, *Bulletin de l'Assemblée Plénière*, No. 4, p. 7 and *Levacher*, RFDA, 2000, p. 79. The position with regard to customary law is unclear: see e.g. *Aquarone*, RGDIP, 1997–4, pp. 1053–4; *Barbie*, Cass. Crim., 6 October 1983, Bull., p. 610 and *Kadahfi*, RGDIP, 2001–2, pp. 474–6.

[237] See 33 ILM, 1994, p. 1043. This interim constitution came into force on 27 April 1994 and was intended to remain in force for five years to be replaced by a constitution adopted by a Constitutional Assembly consisting of the National Assembly and Senate of Parliament: see below. See J. Dugard, *International Law: A South African Perspective*, 2nd edn, Kenwyn, 2000, and Hovell and Williams, 'A Tale of Two Systems', pp. 113 ff.

[238] See Dugard, *International Law*. Note that this change means that treaties entered into before the Constitution came into force do not form part of municipal law unless expressly incorporated by legislation, while those treaties that postdate the new Constitution may.

Section 231(3) provides that 'such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this constitution'. Thus South Africa has moved from the British system to a position akin to the civil law tradition. It should also be noted that this interim constitution expressly provides that the National Defence Force shall 'not breach international customary law binding on the Republic relating to aggression', while in armed conflict, it would 'comply with its obligations under international customary law and treaties binding on the Republic' (section 227(2)).[239]

These provisions were considered and refined by the Constitutional Assembly, which on 8 May 1996 adopted a new constitution.[240] Section 231(1) of this constitution provides that the negotiating and signing of all international agreements is the responsibility of the national executive, while such an agreement would only bind the Republic after approval by resolution in both the National Assembly and the National Council of Provinces.[241] Any international agreement becomes domestic law when enacted into law by national legislation, although 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.[242] Section 232 provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament, while section 233 stipulates that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation which is consistent with international law over any alternative interpretation that is inconsistent with international law. It is also to be particularly noted that section 200(2) of the Constitution states that the primary object of the defence force is to defend and protect the Republic,

[239] Note that article 144 of the Namibian Constitution provides that 'unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia': see B. Erasmus, 'The Namibian Constitution and the Application of International Law', 15 *South African Yearbook of International Law*, 1989–90, p. 81.

[240] See 36 ILM, 1997, p. 744.

[241] Section 231(2). This is unless either such an agreement is of a 'technical, administrative or executive nature' or it is one not requiring ratification (or accession), in which case tabling in the Assembly and the Council within a reasonable time is required: section 231(3).

[242] Section 231(4).

its territorial integrity and its people, 'in accordance with the Constitution and the principles of international law regulating the use of force'.[243]

The Russian Federation adopted a new constitution in 1993.[244] Under article 86, the President negotiates and signs treaties and signs the ratification documents, while under article 106 the Federal Council (the upper chamber of the federal parliament) must consider those federal laws adopted by the State Duma (the lower chamber) that concern the ratification and denunciation of international agreements. The Constitutional Court may review the constitutionality of treaties not yet in force (article 125(2)) and treaties that conflict with the Constitution are not to be given effect (article 125(6)). Article 15(4) of the new constitution provides that 'the generally recognised principles and norms of international law and the international treaties of the Russian Federation shall constitute part of its legal 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.' Thus both treaty law and customary law are incorporated into Russian law, while treaty rules have a higher status than domestic laws.[245] The Constitutional Court takes the view that customary international law and international treaties ratified by Russia are norms incorporated into Russian law.[246]

[243] Note that O'Regan J stated in *Kaunda* v. *President of the Republic of South Africa* that 'our Constitution recognises and asserts that, after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law', CCT 23/04, [2004] ZACC 5, para. 222.

[244] See G. M. Danilenko, 'The New Russian Constitution and International Law', 88 AJIL, 1994, p. 451 and Danilenko, 'Implementation of International Law in CIS States: Theory and Practice', 10 EJIL, 1999, p. 51; V. S. Vereshchetin, 'New Constitutions and the Old Problem of the Relationship between International Law and National Law', 7 EJIL, 1996, p. 29, and S. Y. Marochkin, 'International Law in the Courts of the Russian Federation: Practice of Application', 6 Chinese JIL, 2007, p. 329. See, as regards the practice of the Soviet Union, K. Grzybowski, *Soviet Public International Law*, Leiden, 1970, pp. 30–2.

[245] See also article 5 of the Russian Federal Law on International Treaties adopted on 16 June 1995, 34 ILM, 1995, p. 1370. This repeats article 15(4) of the Constitution and also provides that 'the provisions of officially published international treaties of the Russian Federation which do not require the publication of intra-state acts for application shall operate in the Russian Federation directly. Respective legal acts shall be adopted in order to effectuate other provisions of international treaties of the Russian Federation.' See further W. E. Butler, *The Law of Treaties in Russia and the Commonwealth of Independent States*, Cambridge, 2002, who notes that the change brought about by article 15(4) 'is among the most momentous changes of the twentieth century in the development of Russian Law', at p. 36.

[246] Butler, *Law of Treaties in Russia*, p. 37. See also generally, *Constitutional Reform and International Law in Central and Eastern Europe* (eds. R. Müllerson, M. Fitzmaurice

Under article 73(3) of the Japanese Constitution of 1946,[247] the Cabinet has authority to conclude treaties with the prior or subsequent approval of the Diet, although executive agreements may be entered into without such approval, usually by simple exchange of notes. Promulgation of a treaty takes place by publication in the Official Gazette under the name of the Emperor once the Diet has approved and the Cabinet ratified the agreement (article 7). Article 98(2) provides that 'treaties concluded by Japan and established laws of nations shall be faithfully observed' and this provision is taken as incorporating international law, both relevant treaty and customary law, into Japan's legal system.[248] Japan has also experienced some difficulty[249] in the context of the relative definition of self-governing and non-self-governing treaties.[250]

This survey of the attitudes adopted by various countries of the common law and civil law traditions leads to a few concluding remarks. The first of these is that a strict adherence to either the monist or the dualist position will not suffice. Most countries accept the operation of customary rules within their own jurisdictions, providing there is no conflict with existing laws, and some will allow international law to prevail over municipal provisions. One can regard this as a significant element in extending the principles and protection of international law, whether or not it is held that the particular provision permitting this, whether by constitutional enactment or by case-law, illustrates the superiority of municipal law in so acting.

The situation as regards treaties is much more complex, as different attitudes are maintained by different states. In some countries, certain treaties will operate internally by themselves (self-executing) while others must undergo a process of domestic legalisation. There are countries where legislation is needed for virtually all international agreements: for example,

and M. Andenas), The Hague, 1998; T. Schweisfurth and R. Alleweldt, 'The Position of International Law in the Domestic Legal Orders of Central and Eastern European Countries', 40 German YIL, 1997, p. 164; I. Ziemele, 'The Application of International Law in the Baltic States', 40 German YIL, 1997, p. 243, and W. Czaplinski, 'International Law and Polish Municipal Law', 53 ZaöRV, 1993, p. 871.

247 See generally S. Oda, *The Practice of Japan in International Law 1961–1970*, Leiden, 1982, and Y. Iwasawa, 'The Relationship Between International Law and National Law: Japanese Experiences', 64 BYIL, 1993, p. 333. See also H. Oda, *Japanese Law*, 2nd edn, Oxford, 1999, and Y. Iwasawa, *International Law, Human Rights, and Japanese Law – The Impact of International Law on Japanese Law*, Oxford, 1998.

248 Iwasawa, 'Relationship', p. 345. 249 *Ibid.*, pp. 349 ff.

250 See generally with regard to China, T. Wang, 'International Law in China', 221 HR, 1990, p. 195.

Belgium.[251] It is by no means settled as a general principle whether treaties prevail over domestic rules. Some countries allow treaties to supersede all municipal laws, whether made earlier or later than the agreement. Others, such as Norway, adopt the opposite stance. Where there are written constitutions, an additional complicating factor is introduced and some reasonably stable hierarchy incorporating ordinary laws, constitutional provisions and international law has to be maintained. This is particularly so where a federal system is in operation. It will be up to the individual country to adopt its own list of preferences.[252]

Of course, such diverse attitudes can lead to confusion, but in the light of the present state of international law, it is inevitable that its enforcement and sphere of activity will become entangled with the ideas and practices of municipal law. Indeed, it is precisely because of the inadequate enforcement facilities that lie at the disposal of international law that one must consider the relationship with municipal law as of more than marginal importance. This is because the extent to which domestic courts apply the rules of international law may well determine the effectiveness of international legislation and judicial decision-making.

However, to declare that international legal rules therefore prevail over all relevant domestic legislation at all times is incorrect in the vast majority of cases and would be to overlook the real in the face of the ideal. States jealously guard their prerogatives, and few are more meaningful than the ability to legislate free from outside control; and, of course, there are democratic implications. The consequent supremacy of municipal legal systems over international law in the domestic sphere is not exclusive, but it does exist as an undeniable general principle.

It is pertinent to refer here briefly to the impact of the European Union.[253] The European Court of Justice has held that Community law has supremacy over ordinary national law,[254] and indeed over domestic

[251] See article 68 of the Constitution, which deals basically with treaties of commerce and treaties which impose obligations on the state or on individuals.

[252] See generally Drzemczewski, *Domestic Law*, and Peaslee, *Constitutions*, vol. III, pp. 76 and 689. See also, as regards the Philippines, the decision of the Supreme Court (en banc) in *The Holy See* v. *Starbright Sales Enterprises Inc.* 102 ILR, p. 163, and, as regards Poland, W. Czaplinski, 'International Law and Polish Municipal Law – A Case Study', 8 *Hague Yearbook of International Law*, 1995, p. 31.

[253] See e.g. S. Weatherill and P. Beaumont, *EC Law*, 3rd edn, London, 1999; L. Collins, *European Community Law in the United Kingdom*, 4th edn, London, 1990, and H. Kovar, 'The Relationship between Community Law and National Law' in *Thirty Years of Community Law* (Commission of the European Communities), 1981, p. 109. See also above, p. 156.

[254] See *Costa* v. *ENEL*, Case 6/64 [1964] ECR 585; 93 ILR, p. 23.

constitutional law.[255] In addition to the treaties creating the EC,[256] there is a great deal of secondary legislation issuing forth from its institutions, which can apply to the member states. This takes the form of regulations, decisions or directives. Of these, the first two are directly applicable and enforceable within each of the countries concerned without the need for enabling legislation. While it is true that the legislation for this type of activity has been passed – for example section 2(1) of the European Communities Act 1972[257] in the UK, which permits in advance this form of indirect law-making, and is thus assimilated into municipal law – the fact remains that the member states have accepted an extraterritorial source of law, binding in certain circumstances upon them. The effect is thus that directly effective Community law has precedence over inconsistent UK legislation. This was confirmed by the House of Lords in *Factortame Ltd* v. *Secretary of State for Transport*.[258] It was further noted that one of the consequences of UK entry into the European Communities and the European Communities Act 1972 was that an interim injunction could be granted, the effect of which would be to suspend the operation of a statute on the grounds that the legislation in question allegedly infringed Community law. This is one illustration of the major effect which joining the Community has had in terms of the English legal system and previously accepted legal principles. The mistake, however, should not be made of generalising from this specific relationship to the sphere of international law as a whole.

Justiciability, act of state and related doctrines

An issue is justiciable basically if it can be tried according to law.[259] It would, therefore, follow that matters that fall within the competence of the executive branch of government are not justiciable before the courts. Accordingly, the test as to whether a matter is or is not justiciable involves

[255] See *Internationale Handelsgesellschaft* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

[256] Including the treaties of Maastricht (1992), Amsterdam (1997), Nice (2001) and Lisbon (2007, not in force).

[257] See also section 2(4).

[258] See [1990] 2 AC 85, 140 (per Lord Bridge); 93 ILR, p. 652. See also *Ex parte Factortame* (*No. 2*) [1991] 1 AC 603; 93 ILR, p. 731; *R* v. *Secretary of State for Transport, ex parte Factortame*, European Court of Justice case C-213/89, 93 ILR, p. 669 and Case C-221/89, 93 ILR, p. 731.

[259] See Mann, *Foreign Affairs*, chapter 4. See also L. Collins, 'Foreign Relations and the Judiciary', 51 ICLQ, 2002, p. 485.

an illumination of that grey area where the spheres of executive and judiciary merge and overlap. Recent years have seen a reduction in the sphere of exclusive competence of the executive free from judicial oversight and a number of important cases have sought to redraw the boundary. Justiciability as a concept includes the doctrine of act of state, which generally concerns the activities of the executive in relations with other states,[260] but in the context of international law and municipal courts it refers particularly to the doctrine that no state can exercise jurisdiction over another state.[261] As such it is based upon the principles of the sovereignty and equality of states.[262] Non-justiciability acts as an evidential bar, since an issue cannot be raised or proved, in contrast to sovereign immunity, which provides that the courts cannot exercise the jurisdiction that exists with regard to the matter in question due to the status of the entity or individual concerned, although it is open to the state concerned to waive its immunity and thus remove the jurisdictional bar.[263] Non-justiciability will usually concern a clear inter-state relationship or situation which is impleaded in a seemingly private action, while immunity issues will invariably arise out of a state–private party relationship not usually relating to inter-state activities as such.[264]

The concept of non-justiciability rests upon a number of pillars, ranging from prerogative of the executive in the areas of foreign policy and national defence,[265] where it is essentially a rule of law principle in a democratic system of government delineating the separation of powers,[266] to respect for the sovereignty and independence of foreign states.[267] Accordingly, both domestic and foreign executive acts are covered. With regard

[260] See e.g. Wade and Phillips, *Constitutional and Administrative Law*, pp. 299–303; J. B. Moore, *Acts of State in English Law*, New York, 1906; Mann, *Foreign Affairs*, chapter 9; Singer, 'The Act of State Doctrine of the UK', 75 AJIL, 1981, p. 283; M. Akehurst, 'Jurisdiction in International Law', 46 BYIL, 1972–3, pp. 145, 240, and M. Zander, 'The Act of State Doctrine', 53 AJIL, 1959, p. 826.

[261] See Lord Pearson, *Nissan* v. *Attorney-General* [1970] AC 179, 239; 44 ILR, pp. 359, 390.

[262] See *Oppenheim's International Law*, p. 365.

[263] See further as to sovereign or state immunity and diplomatic immunity, below, chapter 13.

[264] See e.g. *Amalgamated Metal Trading* v. *Department of Trade and Industry*, *The Times*, 21 March 1989, p. 40.

[265] In the UK, areas traditionally covered by the Crown prerogative: see above, p. 149.

[266] See e.g. Lord Hoffmann in *R* v. *Lyons* [2002] UKHL 44, para. 40; 131 ILR, p. 555; Lord Millett in *R* v. *Lyons*, para. 105; 131 ILR, p. 575, and Richards J in the *CND* case [2002] EWHC 2777 (Admin), para. 60.

[267] See *Underhill* v. *Hernandez* 168 US 250, 252.

to the former,[268] the courts will refuse, or at the least be extremely reluctant, to adjudicate upon an exercise of sovereign power, such as making war and peace, making international treaties or ceding territory.[269] This would include the definition of territories within the UK[270] as well as the conduct of foreign affairs.[271] Lord Hoffmann held in *R* v. *Jones* that 'the making of war and peace and the disposition of the armed forces has always been regarded as a discretionary power of the Crown into the exercise of which the courts will not enquire'.[272] As far as the latter instance is

[268] See *Nissan* v. *Attorney-General* [1970] AC 179 and *Buron* v. *Denman* (1848) 145 ER 450. See also S. de Smith and R. Brazier, *Constitutional and Administrative Law*, 6th edn, London, 1989, pp. 145–51, and Mann, *Foreign Affairs*, chapter 10.

[269] Not simply because they form part of the Crown's prerogative powers, but because such powers are discretionary: see *Council of Civil Service Unions* v. *Minister for the Civil Service* [1984] 3 All ER 935, 956 and Lord Hoffmann in *R* v. *Jones* [2006] UKHL 16, para. 65; 132 ILR, pp. 695–6. See also Lord Reid in *Chandler* v. *DPP* [1964] AC 763, 791; Simon Brown LJ, *R* v. *Ministry of Defence, ex parte Smith* [1996] QB 517, 539; Laws LJ, *Marchiori* v. *The Environment Agency* [2002] EWCA Civ 3, paras. 38 and 40; 127 ILR, pp. 642 and 643; *CND* v. *Prime Minister* [2002] EWHC 2759 at paras. 15 (Simon Brown LJ), 50 (Maurice Kay J) and 59 (Richards J); 126 ILR, pp. 735, 750 and 753; and *R (on the application of Abbasi)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, para. 106(iii); 126 ILR, p. 725.

[270] See *The Fagernes* [1927] P 311, 324 (per Atkin LJ). See also *Christian* v. *The Queen* [2006] UKPC 47, paras. 9–10 (Lord Hoffmann) and 33 (Lord Woolf); 130 ILR, pp. 699–700, 707.

[271] See e.g. *R (Al-Rawi)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279, paras. 131 ff. (Laws LJ), and cases cited in footnote 266 above.

[272] [2006] UKHL 16, para. 65; 132 ILR, p. 696. He concluded that 'The decision to go to war [against Iraq], whether one thinks it was right or wrong, fell squarely within the discretionary powers of the Crown to defend the realm and conduct its foreign affairs . . . The discretionary nature or non-justiciability of the power to make war is in my opinion simply one of the reasons why aggression is not a crime in domestic law', paras. 66 and 67, *ibid.*, and see also Lord Mance, para. 103; *ibid.*, pp. 705–6. More cautiously, Lord Bingham noted that 'there are well established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services', para. 30, *ibid.*, p. 684. The *Jones* approach was applied by the Court of Appeal in *R* (*Gentle)* v. *Prime Minister* [2006] EWCA Civ 1689, para. 33 (Clarke MR); 132 ILR, p. 737, where it was held that the question whether the UK had acted unlawfully in sending troops to Iraq was non-justiciable for two reasons: first, because it would require consideration of at least two international instruments (Security Council resolutions 678 and 1441) and, secondly, because it would require detailed consideration of policy decisions in the fields of foreign affairs and defence 'which are the exclusive responsibility of the executive government'. In the House of Lords, [2008] UKHL 20, their Lordships essentially focused on the meaning of article 2 of the European Convention on Human Rights, but Lord Bingham referred to the 'restraint traditionally shown by the courts in ruling on what has been called high policy – peace and war, the making of treaties, the conduct of foreign relations', *ibid.*, para. 2, while Lord Hope noted that, 'The issue of legality in this area of international law [the use of force by states] belongs

concerned, Lord Wilberforce declared in *Buttes Gas and Oil Co.* v. *Hammer (No. 3)*:[273]

> there exists in English law a general principle that the courts will not adjudicate upon the transactions of foreign sovereign states . . . it seems desirable to consider this principle . . . not as a variety of 'act of state' but one for judicial restraint or abstention.[274]

Such a principle was not one of discretion, but inherent in the nature of the judicial process. Although that case concerned litigation in the areas of libel and conspiracy, the House of Lords felt that a determination of the issue would have involved the court in reviewing the transactions of four sovereign states and having to find that part of those transactions was contrary to international law. Quite apart from the possibility of embarrassment to the foreign relations of the executive, there were no judicial or manageable standards by which to judge such issues.[275] It has been held, for example, that judicial review would not be appropriate in a matter which would have serious international repercussions and which was more properly the sphere of diplomacy.[276] Although the Court of Appeal has noted that the keeping and disposal of foreign bank notes for commercial purposes in the UK could not be treated as sovereign acts so as to bring the activity within the protection of the *Buttes* non-justiciability doctrine, the acts in question had to be of a sovereign rather than of a commercial nature and performed within the territory of a foreign state.[277] Legislation can, of course, impinge upon the question as to whether an issue is or is not justiciable,[278] while the State Immunity Act 1978 removed sovereign immunity for commercial transactions.[279]

to the area of relations between states . . . [and] . . . is a matter of political judgment . . . It is not part of domestic law reviewable here', *ibid.*, para. 24 (and see para. 26). See also Lady Hale, *ibid.*, para. 58.

273 [1982] AC 888; 64 ILR, p. 331.

274 [1982] AC 888, 931; 64 ILR, p. 344. See also *Duke of Brunswick* v. *King of Hanover* (1848) 1 HLC 1. See Fatima, *Using International Law*, pp. 385 ff. Note also *R* v. *Director of the Serious Fraud Office and BAE Systems* [2008] EWHC 714 (Admin), paras. 74 and 160.

275 [1982] AC 888, 938; 64 ILR, p. 351.

276 See e.g. *R* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte Pirbhai* 107 ILR, p. 462. But see the *Abbasi* case below, p. 188.

277 *A Ltd* v. *B Bank* 111 ILR, pp. 590, 594–6.

278 So that, for example, issues related to war crimes were justiciable in the light of the International Criminal Courts Act 2001: see *R* v. *Jones* [2006] UKHL 16, paras. 4 and 28; 132 ILR, pp. 672 and 683.

279 See *Empresa Exportadora de Azucar* v. *Industria Azucarera Nacional SA* [1983] 2 LL. R 171, 194–5; 64 ILR, p. 368. See further below, chapter 13.