The 'New' Uses of International Law in Common Law Countries[1]

Kevin Gray

This Article considers the reception of international law in four legal systems: the United Kingdom, Canada, Australia, and New Zealand. Blackstone's writings on the role of international law have long been taken to express the classical (and canonical) view of the reception of international law at common law. Customary international law is automatically incorporated or adopted (with specific vocabulary depending on the jurisdiction) into the common law, whereas treaties must be enacted through national legislation. On the traditional view, ratified but unincorporated treaties carry no weight, except perhaps to interpret ambiguous legislation. That view has become strained in several key ways. First, courts in many countries—notably Canada and the United Kingdom—have recently started to reject the view that customary international law is automatically incorporated into domestic law, instead requiring judges to ascertain the compatibility of customary international law with domestic legal norms. Second, courts have increasingly relied on unincorporated treaties or soft law instruments to interpret domestic constitutional and legal norms (notably human rights norms). The result is that courts have increasing discretion regarding the adoption of international legal norms. Third, human rights norms have been granted special status for interpreting national rights guarantees. Finally, the Article concludes by discussing judicial pushback against the use of international law and demands for greater explanations of how and why courts are relying on international law.

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I. INTRODUCTION

Each legal system has its own rules for what counts as law.[2] Similarly, in the context of international law, every national legal system "has its own rules of reception [of international law]: that is what it is to be a legal system."[3]

Historically, depending on the mode of reception, states have been classified as monist or dualist. States where international law automatically forms part of the national legal system are monist; those where treaties must be incorporated in order to form part of the legal system are dualist.[4] Common law states have traditionally been viewed as dualist.[5]

The rules governing the use of international law in common law legal systems have begun to change.[6] There is no one reason for this occurrence. However, the emergence of federal systems of government, the increased codification of rights in such systems, including as a result of a change in the

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[2] *See, generally* H.L.A. HART, THE CONCEPT OF LAW (3rd ed. 2012) (discussing the rule of recognition as foundational to law).

[3] James Crawford, *International Law in the House of Lords and the High Court of Australia 1996–2008: A Comparison*, 28 AUSTL. Y.B. INT'L L. 1, 6 (2009).

[4] This Article does not treat so-called Article 38(1)(c) sources—namely general principles of law—for the simple reason that there is virtually no consideration of such principles by national courts. Virtually the only reference to general principles in common law legal systems comes through legislation incorporating the Rome Statute, which makes references to such principles. *See, e.g.*, Crimes Against Humanity and War Crimes Act, S.C. 2000, c 24 (Can.).

[5] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *67.

[6] This Article deals with four common law legal systems: the United Kingdom, Canada, Australia, and New Zealand. The division of powers inside the American legal system, as well as the reliance on interpretive methods unknown outside the United States, makes it inapposite as a potential object of study.

nature of treaties such that they go beyond agreements between states to creating rights, and perhaps most importantly, the increased growth and density of international regulations are all candidates for the growth in jurisprudence governing the application of international law in municipal legal systems.

The result is that the traditional dualism of many common law legal systems is no longer accurate as a model of the relationship between international and national law. Instead, at least with respect to rights adjudication, a third mode of interaction between international and national legal systems has emerged.[7] In the United Kingdom, the focal point has been the ratification of the *European Convention on Human Rights* ("ECHR") and its entry into (and then exit from) the European Union. As a result of the enactment of the *Human Rights Act, 1998* ("HRA"), courts in the United Kingdom have been similarly willing to draw on international human rights norms, at least in the context of administrative law and judicial review.[8] Canada, Australia, and New Zealand, all sharing a common legal heritage with the United Kingdom, show similar patterns concerning the reception and use of international legal norms.

However, while courts have begun to look to international human rights law ("IHRL"), there is simultaneously evidence in the most recent jurisprudence that courts have become more reticent to draw on international legal sources,[9] or have become much more systematic when relying on such sources.[10] For example, in Canada, the Supreme Court has insisted in its recent decisions that in interpreting the *Canadian Charter of Rights and Freedoms*, courts should hew closely to the text rather than engaging in purposive interpretation.[11]

Little comparative legal scholarship exists regarding how common law courts are changing their approach to the use of international law in response to the rise of human rights jurisprudence. Similarly, little comparative research has been done on judicial resistance to the wholesale incorporation of customs or on judicial reliance on unincorporated treaties. This Article attempts to provide an outline for the study of such changes. It identifies similar means of incorporating international law into municipal legal systems in four common law countries while showing that the direction of travel would appear to be from strict dualism (and incorporation of customary international law) to more skeptical, yet simultaneously more permissive, uses of international law.

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[7] *See* Pierre-Hugues Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 AM. J. INT'L L. 514, 515 (2015) (noting the inaccuracy of the labels).

[8] Kevin W. Gray, *A Separate Head of Judicial Review: Divergent Paths in Common Law Rights Review*, 33 CAN. J. ADMIN. L. & PRAC. 305, 320–21 (2020).

[9] Turbide Labbé c. Ministère de la Sécurité publique, 2021 QCCA 1687, para. 143 (Can.); R. v. Klaus, 2021 ABCA 48, para. 50 (Can.) ("[l]imiting Canadian law by reference to foreign law is not a standard interpretational methodology"); Interlake Reserves Tribal Couns. Inc. et al. v. Gov't of Man., 2020 MBCA 126 (Can.); *but see* Bissonnette c. R., 2020 QCCA 1585, para. 106 (Can.).

[10] Hak c. Procureur général du Québec, 2021 QCCS 1466, para. 218 (Can.).

[11] Toronto (City) v. Ontario (Att'y Gen.), 2021 SCC 34, para. 14 (Can.); Can. Pac. Ry. Co. v. Canada, [2021] F.C. 1014, para. 183 (Can.).

II. TRADITIONAL VIEW OF THE RECEPTION OF INTERNATIONAL LAW

The traditional view is that customary international law is automatically incorporated into domestic law. According to both Mansfield and Blackstone, customary international law is adopted to its full extent by the common law.[12] Reflecting on the development of English law following the Glorious Revolution, Blackstone wrote in his *Commentaries*:

> In arbitrary states, this law, whenever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore 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 is held to be the law of the land.[13]

In so far as the Royal Power cannot create new law by fiat, Blackstone argued, customary international law should be properly viewed as part of the common law and, thus, the law of the land. This view, labelled adoption or incorporation depending on the jurisdiction, has been endorsed across all four common law legal systems considered in this Article.

Conversely, in all four common law legal systems, treaties are not self-executing.[14] On the traditional view, they have no function within the national legal system by themselves.[15] They must be enacted.[16] Unincorporated treaties create no domestic rights or obligations.[17]

As the Supreme Court of the United Kingdom noted in *Miller*, dualism is the corollary of parliamentary sovereignty.[18] It allows the executive to enter into treaties while protecting the right of parliament to make or amend laws. In so far as the executive retains the prerogative power to enter into treaties, the power to modify domestic law remains the province of the legislature, not void

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[12] BLACKSTONE, *supra* note 5, at *67; Triquet v. Bath (1764) 97 Eng. Rep. 936 [Gr. Brit.]; Buvot v. Barbuit (1736) 25 Eng. Rep. 777 (Gr. Brit.).

[13] BLACKSTONE, *supra* note 5, at *67.

[14] WILLIAM FIELDEN CRAIES, CRAIES ON LEGISLATION § 3.7.18 (Daniel Greenberg ed., 11th ed. 2020); Maclaine Watson v. Int'l Tin Council [1990] 2 AC 418, 500 (Eng.); R (European Roma Rts. Ctr.) v. Immigr. Officer at Prague Airport [2004] UKHL 55 (UK).

[15] CAMPBELL MCLACHLAN, FOREIGN RELATIONS LAW 80–81 (2014); Canada (Att'y Gen.) v. Ontario (Att'y Gen.), [1937] AC 326 (appeal taken from Can.).

[16] There are very few truly monist legal systems. The Netherlands and Bosnia Herzegovina are often cited as true examples.

[17] R (Friends of the Earth Ltd) v. SOS for Int'l Trade/UK Exp. Fin. (UKEF) [2023] EWCA (Civ) 14, [2023] Env. L.R. 26.

[18] R (Miller) v. SOS for Exiting the Eur. Union [2017] UKSC 5, [55–57]; MCLACHLAN, *supra* note 15, at 156 ("If treaties have no effect within domestic law, Parliament's legislative supremacy within its own polity is secure. If the executive must always seek the sanction of Parliament in the event that a proposed action on the international plane will require domestic implementation, parliamentary sovereignty is reinforced at the very point at which the legislative power is engaged.").

merely because of a violation of international law.[19] Of course, the failure to enact treaties would, in some circumstances, amount to a violation of international law and trigger the responsibility of states on the international plane. For instance, the *Convention Against Torture* requires states to criminalize torture on their territories.[20] However, the failure to do so would not, on the traditional view, lead to an enforceable right at the national level.

In the United Kingdom, the legislature must pass acts to give effect to international obligations. As Lord Oliver stated in *Rayner*:

> [a]s 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 upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. . . . Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta*, from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.[21]

A recent example occurred during Brexit, where the *EU-UK Withdrawal Agreement, 2019* required specific national implementing legislation to give effect to the U.K.'s withdrawal from the European Union.[22] That agreement was implemented via domestic act.[23] Other obvious examples include the *State*

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[19] *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1764) (discussing the role of the legislative and executive branches); ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAWS OF THE CONSTITUTION 62, 63 (10th ed. 1959); J.H. Rayner (Mincing Lane) Ltd. v. Dep't of Trade & Indus. [1990] 2 AC 418, 476 (Eng.) (declaring "[t]he Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty.").

[20] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 2(1), 4, Dec. 10, 1984, 1465 U.N.T.S. 85 (incorporated in the Criminal Justice Act 1988, c. 33 § 134 (UK), https://www.legislation.gov.uk/ukpga/1988/33/contents [https://perma.cc/PPZ5-M8DV]).

[21] Rayner (Mincing Lane) Ltd. [1990] 2 AC 418, 500 (per Oliver, LJ); In Re McKerr [2004] UKHL 12, [65] (per Hoffmann, LJ) ("it should no longer be necessary to cite authority for the proposition that . . . an international treaty . . . is not part of English domestic law").

[22] R. (Miller), [2017] UKSC 5 [55] ("although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law.").

[23] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, art. 4, Nov. 12, 2019, 2020 O.J. (L 29); European Union (Withdrawal Agreement) Act 2020, c. 1 (UK), https://www.legislation.gov.uk/ukpga/2020/1/contents [https://perma.cc/9QG2-U972].

Immunity Act, 1978,[24] the *Human Rights Act, 1998*,[25] and the *International Criminal Court Act, 2001*.[26]

It is Parliament's choice as to how to enact treaties; "there is no rule specifying the precise legislative method of incorporation."[27] A treaty need not be incorporated verbatim. No specific words need be used. In some instances, a treaty may only be partially incorporated.

One common method is scheduling the treaty to an act of parliament.[28] Other times, parliament will copy the language of a convention or a specific clause of a convention. In other cases, parallel or similar words are incorporated into legislation to give effect to international law.[29] Alternatively, parliament may give the government the ability to make delegated legislation to give effect to international obligations.[30] For example, United Nations Security Council Resolutions become part of municipal law through delegated legislation:

> If, under Article forty-one of the Charter of the United Nations signed at San Francisco on the twenty-sixth day of June, nineteen hundred and forty-five, (being the Article which relates to measures not involving the use of armed force) the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by

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[24] State Immunity Act 1978, c. 33 (UK), https://www.legislation.gov.uk/ukpga/1978/33/contents [https://perma.cc/94GX-SLFR].

[25] Human Rights Act 1998, c. 42 (UK), https://www.legislation.gov.uk/ukpga/1998/42/contents https://perma.cc/NKV2-3APP].

[26] International Criminal Court Act 2001, c. 17 (UK), https://www.legislation.gov.uk/ukpga/2001/17/contents [https://perma.cc/NL3X-WEJC].

[27] R (European Roma Rts. Ctr.) v. Immigr. Officer at Prague Airport, [2004] UKHL 55 [42] (per Steyn, LJ).

[28] DIGGORY BAILEY & LUKE NORBURY, BENNION ON STATUTORY INTERPRETATION § 24.16 (LexisNexis, 8th ed. 2017) [hereinafter BENNION]; Diplomatic Privileges Act 1964, c. 81, § 2(1) (UK), https://www.legislation.gov.uk/ukpga/1964/81/contents [https://perma.cc/65LP-L5TB]; R (European Roma Rts. Ctr.), [2004] UKHL 55, [42] (per Steyn, LJ) (it is "clear that the Refugee Convention has been incorporated into our domestic law" via the Asylum and Immigration Appeals Act 1993, s. 2, https://www.legislation.gov.uk/ukpga/1993/23/contents [https://perma.cc/8QMX-S55W]); Human Rights Act 1998, c. 42, § 1 (specifying that Convention rights in the Human Rights Act are the rights and fundamental freedoms contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 Nov. 1950, ETS 5 [hereinafter ECHR]); Carriage by Air Act 1961, 9 & 10 Eliz. 2 c. 27, § 1(1) (UK), https://www.legislation.gov.uk/ukpga/Eliz2/9-10/27/contents [https://perma.cc/4AQC-HV4H] ("The applicable provisions of the Carriage by Air Conventions have the force of law in the United Kingdom.").

[29] BENNION, *supra* note 28, at § 24.16; Criminal Justice Act 1988, c. 33, § 133 (UK), https://www.legislation.gov.uk/ukpga/1988/33/contents [https://perma.cc/PPZ5-M8DV] (enacted to give effect to the United Kingdom's obligations under the International Covenant on Civil and Political Rights, art. 14(6), Dec. 16, 1966, 999 U.N.T.S 171 [hereinafter ICCPR]; although the language closely follows art. 14(6), the word "conclusively" has been replaced with "beyond reasonable doubt.").

[30] CRAIES, *supra* note 14, at § 3.7. As Lord Denning, MR noted, it was well-established that this form of incorporation was permitted. *See*, *e.g.*, The Hollandia [1982] QB 872 (UK).

> Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order.[31]

Finally, legislation can be drafted requiring that decisions made by administrative actors conform to the principles of certain treaties.[32]

The act of transformation, by which a treaty becomes part of municipal law,[33] at least in principle, "serves as an important democratic check on the treaty-making process."[34] It prevents the executive from doing on the international plane what it cannot do on the domestic and unilaterally change the law. To prevent executive overreach, some common law legal systems have gone further, requiring treaties to be submitted to parliament in some form prior to ratification. For instance, the United Kingdom adopted such a requirement in 2010. Under the new rules, the government must lay proposed treaties before Parliament for twenty-one sitting days before ratifying them.[35] During that period, either House may vote against ratification, in which case the government normally cannot proceed.[36]

The rules in Canada are substantially similar to those in the United Kingdom. Canada, like the United Kingdom, is a dualist legal system. Customary international law, as part of the law of nations, is adopted into the legal system of both countries. Conversely, treaties, which may be entered into by the executive, must be enacted by parliament before they become part of the law of Canada.[37] Incorporation can be effected by scheduling, by reference, or by

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[31] United Nations Act 1946, 9 & 10 Geo 6 c. 45, § 1(1) (UK), https://www.legislation.gov.uk/ukpga/Geo6/9-10/45/contents [https://perma.cc/3AUC-98QP].

[32] Asylum and Immigration Appeals Act 1993, *supra* note 28, at § 2.

[33] United Nations Act 1946, *supra* note 31, at § 1(1).

[34] John H. Jackson, *The Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 324 (1992). Of course, the degree of democratic control is significantly attenuated where the implementation of a treaty comes about through delegated legislation.

[35] Verdier & Versteeg, *supra* note 7, at 521 (citing to Constitutional Reform and Governance Act 2010, c. 25, § 20 (UK), https://www.legislation.gov.uk/ukpga/2010/25/contents [https://perma.cc/Y7AH-A8T2]).

[36] *Id.* If rejected, the government may return the treaty to Parliament with a statement explaining why the treaty should nevertheless be ratified, triggering a new twenty-one-day period during which only the House of Commons may block ratification (§ 20(4–5)); INTERNATIONAL AFFAIRS AND DEFENCE SECTION, PARLIAMENTARY SCRUTINY OF TREATIES UP TO 2010, 2010, HC 4693, at 9 (UK). There are exceptions, discussed in Arabella Lang, *Parliament and International Treaties*, *in* PARLIAMENT LEGISLATION AND ACCOUNTABILITY 241 (Alexander Horne & Andrew Le Seur eds., 2016).

[37] Canada (Att'y Gen.) v. Ontario (Att'y Gen.), [1937] AC 326 [331]; Cap. Cities Commc'ns. v. C.R.T.C., [1978] 2 S.C.R. 141 (Can.); Baker v. Canada (Minister of Citizenship and Immigr.), [1999] 2 S.C.R. 817, para. 69; Kazemi Est. v. Islamic Republic of Iran, 2014 SCC 62, [2014] 3 S.C.R. 176, para. 149 (Can.); Nevsun Res. Ltd. v. Araya, 2020 SCC 5, [2020] 1 S.C.R. 166, para. 159 (in dissenting reasons).

the use of similar language.[38] As in the United Kingdom, the traditional Canadian view is that the requirement for incorporation buttresses the principle of parliamentary sovereignty.[39]

Unlike the United Kingdom, in so far as Canada is a federal system, the ability of the federal government to enact legislation is limited by the division of powers contained in sections 91 and 92 of the *Constitution Act, 1867*.[40] The federal government and the provinces share the power to enact treaties.[41]

It is worth noting that devolution can impose a requirement on Scotland, Wales and Northern Ireland that is in many respects the opposite of how federalism functions in Canada. Those subunits may be required to modify their laws to ensure compliance with international treaties. In limited circumstances, they have a separate power to incorporate treaties that the United Kingdom has ratified but not incorporated, provided it is within the scope of their devolved powers.[42]

In Australia, a similar principle applies. Customary international law is automatically incorporated,[43] where treaties must be enacted by statute.[44] In general, mere reference to a treaty as approved is not enough to make it enforceable.[45] Specific statutory language is required. Human rights treaties must also be incorporated.[46] If a treaty has not been incorporated, it cannot be relied upon.[47] Like with Canada, whether an act is enforceable against the province or the state will depend on means of incorporation. However, unlike Canada, the federal government enjoys considerably wider powers in choosing

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[38] RUTH SULLIVAN, ON THE CONSTRUCTION OF STATUTES § 18.40 (LexisNexis, 6th ed. 2014) (noting the possibility of incorporation by reference.).

[39] *Id.* at § 18.30 (understood as based on parliamentary sovereignty). In general, treaties, unlike in the United Kingdom, are not implemented through delegated legislation. However, presumably, regulations made pursuant to a statute could control how the implementing legislation is interpreted.

[40] Canada (Att'y Gen.), [1937] AC 326, 436 (per Atkin, LJ) ("For the purposes of secs. 91 and 92, i.e., the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained.").

[41] *Id.* at 353–54.

[42] *See e.g.,* Rights of Children and Young Persons (Wales) Measure, 2011, nawm 2, s 1 (UK).

[43] *Polyukhovich v Commonwealth* [1990] HCA 32 (Austl.) (noting that custom is incorporated).

[44] GEORGE WILLIAMS ET AL., BLACKSHIELD AND WILLIAMS AUSTRALIAN CONSTITUTIONAL LAW AND THEORY: COMMENTARY AND MATERIALS 989 (7th ed. 2018) (noting § 21.4l) [hereinafter BLACKSHIELD AND WILLIAMS] (citing *Brown v Lizars* (1905) 2 CLR 837; *Chow Hung Ching v R* (1948) 77 CLR. 449; *Dietrich v The Queen* (1992) 177 CLR 292; *Kioa v West* (1985) 159 CLR 550; *Collins v State of South Australia* (1999) 74 SASR 200, 210; *S (A Child) v R* (1995) 12 WAR 392, 403).

[45] DAVID CLARK, PRINCIPLES OF AUSTRALIAN PUBLIC LAW 16 (2nd ed. 2007) (noting § 1.26); *Bradley v Commonwealth* (1973) 128 CLR 558, 582 (referring to the Charter of the United Nations); Stephen Donaghue, *Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia*, 17 ADELAIDE L. REV. 213, 215–24 (1995).

[46] CLARK, *supra* note 45, at § 1.26.12–29.

[47] *Bradley* (1973) 128 CLR 558 (noting no incorporation of the UN Charter or UNGA Resolutions in Australian law, and therefore that they could not be relied on).

which treaties to ratify and how to enact them.[48] The courts have held that section 51(xxix) of the Australian Constitution confers power on the federal parliament to implement treaties on matters that are not within other heads of power. That power is plenary and independent.[49] However, it is subject to the same express or implied limitations as all commonwealth powers.[50] For instance section 51(xxix) cannot prevent the proper functioning of state governments.[51] If a law is passed, it must be an appropriate means of giving effect to an obligation,[52] and it must be enacted in good faith.[53] Presumably parliament can even enact valid legislation to give effect to an underlying invalid treaty.[54]

Similarly, in New Zealand, customary international law is automatically incorporated.[55] Treaties must be enacted.[56] Enactment requires language specifying which provisions of the treaty are being incorporated; vague language is insufficient.[57] As with other commonwealth countries, negotiating a treaty is the province of the executive alone.[58]

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[48] The courts in Canada have not allowed the "peace, order and good government" (POOG) power to be used to enact legislation giving effect to international treaties. *Constitution Act, 1867*, s 91 (Can.).

[49] *Id.* at s 51; LESLIE ZINES, THE HIGH COURT AND THE CONSTITUTION 276 (4th ed. 2013) (citing *R v Burgess* (1936) 55 CLR 608); *Airlines of New S. Wales Pty Ltd. v New S. Wales (No 2)*, (1965) 113 CLR 54; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 190, 213, 223, 254; *Commonwealth v Tasmania (The Franklin Dam Case)* (1983) 158 CLR 1, 97–99 (provided the exercise of power is not limited by the existence of other parts of s 51 or a reserved power); LUKE BECK, AUSTRALIAN CONSTITUTIONAL LAW: CONCEPTS AND CASES (2020); MICHAEL COPER, THE FRANKLIN DAM CASE (1983) (noting that the majority of judges, Mason, Murphy, Brennan. and Deane, JJ, held that the Commonwealth could give effect to the relevant treaty under the external affairs power).

[50] Such as sections 92 and 116 and implied limitations. *See also Melbourne Corp. v Commonwealth* (1947) 74 CLR 31; *Victoria v Commonwealth* (1971) 122 CLR 353.

[51] COPER, *supra* note 49, at 9.

[52] *Burgess* 55 CLR 608 at 642 (per Latham CJ), at 658 (per Starke, J), at 669 (per Dixon, J), at 687 (per Evatt and McTiernan, JJ).

[53] COPER, *supra* note 49, at 9 (however, the doctrine appears to be of marginal utility); *Koowarta* 153 CLR 168 at 200 ("The doctrine of bona fides would be at best a frail shield, and available in rare cases.").

[54] *Horta v Commonwealth* (1994) 181 CLR 183 (Austl.) (here, a treaty with Indonesia that could violate international law and the rights of East Timor).

[55] PAUL MCHUGH, THE MĀORI MAGNA CARTA: NEW ZEALAND LAW AND THE TREATY OF WAITANGI 171 (1991); *Te Heuheu Tukino v. Aotea Dist. Maori Land Bd.* [1939] NZLR 107, 9 (PC); Treasa Dunworth, *The Influence of International Law in New Zealand: Some Reflections*, *in* RECONSTITUTING THE CONSTITUTION 319, 327 (Caroline Morris et al. eds., 2012) [hereinafter *Dunworth*]; *Marine Steel v. Government of Marshall Islands* [1981] 2 NZLR 1 (HC) (finding that the customary international law doctrine of foreign immunity applied); *Fang v. Jiang* [2006] NZAR 420 (HC).

[56] *Te Heuheu Tukino* [1939] NZLR 107 at 324 ("any rights purporting to be conferred by . . . a treaty of cession cannot be enforced in the courts, except insofar as they have been incorporated in the municipal law."); Dunworth, *supra* note 55, at 328 (noting that New Zealand follows the rule from the Privy Council in Canada (Att'y Gen.) v. Ontario (Att'y Gen.), [1937] AC 326); ANTHONY H. ANGELO, CONSTITUTIONAL LAW IN NEW ZEALAND 21 (2nd ed. 2015).

[57] *New Zealand Air Line Pilots' Ass'n Inc. v. Att'y-Gen.* [1997] 3 NZLR 269 at 282.

[58] Dunworth, *supra* note 55, at 321 (Until 1997, the negotiation and conclusion of treaties was an act for the executive alone. However, an increased role for parliament was included in the standing orders in 1997 on the recommendation of the Law Commission; it only applied to multilateral

New Zealand is party to a great many treaties.[59] However, New Zealand has been slower to enact treaties in domestic law than many other countries. For instance, only one provision of the *Charter of the United Nations* has been enacted into New Zealand law. That provision, Article 41, permits the United Nations to adopt sanctions.[60] New Zealand law gives sanctions effect in New Zealand via incorporation. Other treaty norms are imported into New Zealand law via the *Human Rights Act*, *1993* which replaced the previous *Bill of Rights Act, 1990*.[61]

III. TRADITIONAL VIEWS OF INTERPRETATION

In all common law legal systems, international law has also played a limited, hermeneutic role. When parliament legislates, it will be assumed to have legislated in conformity with customary international law.[62]

It is a general rule of international law that states must discharge their treaty obligations in good faith.[63] As the *Vienna Convention on the Law of Treaties* ("VCLT") provides: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[64] The failure to do so would amount to a violation of international law. However, it is equally

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treaties); NEW ZEALAND PARLIAMENT, *Chapter 53 – Foreign Affairs and International Treaties*, 53.4.3 (Sept. 29, 2023), https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand-2023-by-chapter/chapter-53-foreign-affairs-and-international-treaties/#_ftn79 [https://perma.cc/3BV7-94VU] (developing rules for bilateral treaties) (citing Standing Orders of the House of Representatives, s 405(1)(d) (Oct. 5, 2023) (N.Z.).

[59] Kenneth Keith, *Harkness Henry Lecture: The Impact of International Law On New Zealand Law*, 6 WAIKATO L. REV. 1 at 13 (1998) (citing to Law Commission, New Zealand Guide to International Law and its Sources (1996 NZLC R34) Appendix C).

[60] Kennedy Graham, *Global Treaties and the New Zealand Constitution*, *in* RECONSTITUTING THE CONSTITUTION 291, 291 (Caroline Morris et al. eds., 2012); United Nations Act 1946 (N.Z.), at preamble.

[61] Human Rights Act 1993 (N.Z.) (affirming the ICCPR and its optional protocol, replacing the Bill of Rights Act 1990 (N.Z.)).

[62] With respect to the United Kingdom, *see* BLACKSTONE, *supra* note 5, at *67 ("the law of nations . . . is here adopted in it[s] full extent by the common law, and is held to be a part of the law of the land"); Triquet v. Bath (1764) 97 Eng. Rep. 936; Chung Chi Cheung v The King [1939] AC 160 (PC) (Eng.); Trendtex Trading Corp. v Central Bank of Nigeria [1977] 1 QB 529 (Eng. CA); Hersch Lauterpacht, *Is International Law a Part of the Law of England?*, 25 TRANSACTIONS OF THE GROTIUS SOC'Y 51 (1939); IAN BROWNLIE, PUBLIC INTERNATIONAL LAW 41 (2003). With respect to Canada, *see* GIB VAN ERT, USING INTERNATIONAL LAW IN CANADIAN COURTS 131, 184–208 (2d ed. 2008); The Ship "North" v. The King (1906), 37 S.C.R. 385 (Can.); Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts, [1943] S.C.R. 483 [hereinafter Military Reference].

[63] Correspondence, HMG LEGAL POSITION: UKIM BILL AND NORTHERN IRELAND PROTOCOL (Sept. 10, 2020), https://www.gov.uk/government/publications/hmg-legal-position-ukim-bill-and-northern-ireland-protocol [https://perma.cc/C76J-V2SX]; Int'l L. Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art 32, in Int'l L. Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001) ("The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part."); Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J 442, ¶ 133 (July 20) (noting that the provision reflects customary international law).

[64] Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331.

well-established that the government can violate international law if it so chooses to,[65] bearing in mind the likely consequences of such a violation.[66] Where parliament wishes to do so, such a violation must generally be effected by clear language.

A. United Kingdom

The majority view, until recently, was that courts could only look to international law where there was ambiguity on the face of a statute.[67] As a general rule of statutory interpretation, ambiguous statutes will be interpreted to conform with international law.[68]

However, more recently, where a statute is passed to give effect to an international obligation, courts will presume that the statute should be interpreted to give effect to those obligations: "it is a principle of legal policy that the domestic law should be interpreted in a way that is compatible with public international law. This principal forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take it into account."[69] As Denning, MR, wrote, with respect to the ECHR:

> In 1950 there was a convention between many of the European countries . . . I think we are entitled to look at it, because it is an instrument which is binding in international law: and we ought always to interpret our statutes so as to be in conformity with international law. Our statute does not in terms incorporate the convention, nor refer to it. But that does not matter. We can look at it.[70]

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[65] *See, e.g.*, *Plaintiff S195/2016 v Minister for Immigration and Border Prot.*, (2017) 261 CLR 622, [20] (Austl.) ("The course of authority in this Court leaves no room for doubt that neither the legislative nor the executive power of the Commonwealth is constitutionally limited by any need to conform to international law" (citing *Lange v Australian Broadcasting Corporation*, (1997) 189 CLR 520 at 566–67 (Austl.))).

[66] Notably, that such a violation will incur the state's international responsibility. *See* Vienna Convention, *supra* note 63 at art. 27 (in relevant part: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty").

[67] R v. Chief Immigr. Off. Heathrow Airport Ex Parte Salamat Bibi, [1976] 1 WLR 979 (Eng.).

[68] R v. Home Sec'y Ex Parte Brind, [1991] 1 AC 696, 747–48 (Eng.) ("But it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it.").

[69] BENNION, *supra* note 28, at § 26.9 (noting that relevant considerations include respect for the comity of nations).

[70] Salomon v. Customs & Excise Comm'r, [1967] 2 QB 116, 143 (per Diplock, LJ) (Eng.) ("If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties . . . But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law . . . ").

However, it is important to note that when a treaty is incorporated into English law, courts are only giving effect to the statute.[71] For that reason, the metaphor of incorporation is misleading; what is being interpreted is English law, and not international law. Where there is a conflict, courts must follow English law.

Where reference must be made to the text of a treaty, courts will have recourse to the *VCLT*.[72] As Lord Justice Mummery noted in *Commerzbank*, courts should take a four-part approach to determining when reference to a treaty should be made:

> (1) It is necessary to look first for a clear meaning of the words used in the relevant article of the convention, bearing in mind that 'consideration of the purpose of an enactment is always a legitimate part of the process of interpretation' . . .
>
> (2) The process of interpretation should take account of the fact that—'The language of an international convention has not been chosen by an English parliamentary draftsman.['] . . .
>
> (3) Among those principles is the general principle of international law, now embodied in art 31(1) of the Vienna Convention on the Law of Treaties, that 'a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. . .
>
> (4) If the adoption of this approach to the article leaves the meaning of the relevant provision unclear or ambiguous or leads to a result which is manifestly absurd or unreasonable recourse may be had to 'supplementary means of interpretation' including travaux préparatoires.[73]

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[71] R v. Lyons, [2003] 1 AC 976, 992 (per Hoffmann, LJ); In re McKerr [2004] UKHL 12, [25] (courts "fell into error by failing to keep clearly in mind the distinction between (1) rights arising under the Convention; and (2) rights created by the Human Rights Act by reference to the Convention"). The important exception was EU law. BENNION, *supra* note 28, at § 28.2 ("ECA 1972 gave effect to EU law in the United Kingdom. The Act has been described as the 'conduit pipe' by which EU law was introduced into UK domestic law.").

[72] BENNION, *supra* note 28, at § 24.16; MCLACHLAN, *supra* note 15, at § 3.14 ("the common law nevertheless continued to accept that, at least in some circumstances, treaties might be referred to in the construction of legislation as a presumption of consistency between the external and internal legal orders"); Anson v. Comm'rs for Her Majesty's Revenue and Customs, [2015] UKSC 44, [56] (per Reed, LJ) ("Put shortly, the aim of interpretation of a treaty is therefore to establish, by objective and rational means, the common intention which can be ascribed to the parties."); R v. Keyn, (1876) 2 Exch. Div. 63 (UK); Fothergill v. Monarch Airlines Ltd, [1981] AC 251 (UK).

[73] Comm'ns of Inland Revenue v. Commerzbank Att'y Gen., [1990] STC 285, 197 (citing Monarch Airlines, [1981] AC 251 at 272 *et passim*); *see also*, CRAIES, *supra* note 15, at §18.1.13.8-9 (noting that while the VCLT makes it clear that a purposive interpretation is proper in the treaty context, there are limits on what UK courts are permitted to do).

Courts may also look to the interpretation adopted in other countries, under the assumption a treaty's meaning should be uniform across legal systems.[74]

With respect the exercise of powers under administrative law, each of the four states considered here adopts a different approach. In the United Kingdom, when power is granted in general terms to an administrative decisionmaker, there is no presumption that the decisionmaker must exercise it in conformity with international law.

> If an international treaty were to give rise to such an obligation the ratification of the treaty by the executive would effectively have changed domestic law without the sanction of Parliament. Of course, it is always a matter of construction whether a particular statutory power is intended by Parliament to be exercised in conformity with international obligations. Moreover, it will in any event normally be lawful for a decision-maker to have regard to international obligations if they choose to do so.[75]

For example, in *Brind*, which dealt with a ban on the broadcast of certain statements made by individuals accused of terrorism, the House of Lords found that where discretion was granted to the Secretary of State, he did not have to exercise it in accordance with unincorporated international law.[76]As Lord Bridge wrote: "where Parliament has conferred on the executive an administrative discretion without indicating that it must be exercised within the convention limits, to presume that it must be exercised within convention limits would be . . . a judicial usurpation of the legislative function."[77]

B. Canada

As in the United Kingdom, there is a presumption that national legislation will conform with international law.[78] Parliament is presumed not to legislate contrary to international law.[79] Courts have also required statutes to be interpreted in accordance with international comity.[80]

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[74] Corocraft Ltd. v. Pan American Airways Inc., [1969] 1 QB 616 (per Denning, MR); Majrowski v. Guy's and St. Thomas' NHS Trust, [2006] UKHL 34, [40] (per Nicholls, LJ).

[75] BENNION, *supra* note 29, at § 26.9.

[76] Ex Parte Brind, [1991] 1 AC 696, 747–48 (Eng.); *see also,* Ex Parte Salamat Bibi, [1976] 1 WLR 979, 984H-985C (Eng.) (per Denning, MR); R v. Sec'y of State for the Home Dep't, Ex Parte Fernandes, [1981] Imm. A.R. 1, 5–6 (Eng.) (per Waller, LJ); SHAHEED FATIMA, USING INTERNATIONAL LAW IN DOMESTIC COURTS § 11.4 (2005).

[77] Ex Parte Brind, [1991] 1 AC at 706–07.

[78] SULLIVAN, *supra* note 38, at § 18.5; R. v. Hape, [2007] S.C.R. 26, para. 53 (Can.) ("it is a well-established principle of statutory interpretation that legislation will be presumed…"); VAN ERT, *supra* note 62, at 131.

[79] Daniels v. White, [1968] S.C.R. 517, 518 (Can.) (parliament is presumed not to legislate contrary to international law); Hape, [2007] S.C.R. 26, para. 53.

[80] Hape, [2007] S.C.R. 26, para. 47 ("comity is more a principle of interpretation than a rule of law").

That presumption can be rebutted only with clear language.[81] Justice La Forest, then of the New Brunswick Court of Appeal, wrote that the clear language requirement helped "promote second thought and public debate, a debate that all recognize as an essential safeguard in parliament democracy."[82] There is some debate as to the nature of the rule. Originally, the rule was viewed as a means of determining legislative intent; it now appears to be better understood as a rule of judicial policy. It is thought that it is parliament, as the representative of the people, that should make the decision to violate international law, not an unelected body.

As with the United Kingdom, to resort to international law, the old rule was that the text in question must be ambiguous.[83] However, in Canada, that requirement appears less strict than in the United Kingdom and is now not universally applied.[84] When resorting to international law is permissible, the courts will look to the object and purpose of the treaty, as well as potentially the *travaux préparatoires*.[85]

With respect to the question of the exercise of discretion, Canada follows the same pathway as New Zealand.[86] In *Baker*, the leading case to discuss the question, the lower courts initially declined to find that the ratification of the *Convention on the Rights of the Child* created a legitimate expectation that the administrative decisionmaker would take into account family unity in any deportation decision.[87] That decision was ultimately overturned by the Supreme Court.[88] It now appears well established that administrative decisionmakers must take international law into account in arriving at their decisions.

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[81] SULLIVAN, *supra* note 38, at § 18.29 (noting that the presumption is rebuttable).

[82] Gérard La Forest, *The Canadian Charter of Rights and Freedoms: An Overview*, 61 CAN. BAR REV. 19, 20 (1983).

[83] Nat'l Corn Growers Ass'n v. Canada (Imp. Tribunal), [1990] 2 S.C.R. 1324, 1371.

[84] *Compare* SULLIVAN, *supra* note 38, at § 18.26–27 (courts generally require ambiguity); *and* Pfizer v. Canada (Att'y Gen.), [2004] 4 F.C. 95 (Fed. Ct.) (C.A.); *with* Nat'l Corn Growers, [1990] 2 S.C.R. 1324, 1371 (where latent ambiguity is sufficient); *and* Soc'y of Composers, Authors and Music Publishers of Can. v. Ent. Software Ass'n, [2022] S.C.R. 30, para. 45 (no need to find ambiguity to consider the meaning of the terms of a treaty).

[85] Pushpanathan v. Canada (Minister of Citizenship and Immigr.), [1998] 1 S.C.R. 982, para. 55.

[86] *See* discussion *infra* Section 3.D.

[87] Baker v. Canada (Minister of Citizenship and Immigr.), [1997] 2 F.C. 127 (Fed. Ct.) (declining to follow *Minister of State for Immigr. and Ethnic Aff.'s v Teoh*, (1995) 183 CLR 273 (Austl.)); *see infra* note 92.

[88] Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, 69–71 (citing, collectively, to Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Francis v. The Queen, [1956] S.C.R. 618, 621 (Can.); Cap. Cities Commc'ns, [1978] 2 S.C.R. 141 at 172–73; RUTH SULLIVAN, DRIEDGER ON THE CONSTRUCTION OF STATUTES 330 (3rd ed. 1994); *Tavita v. Minister of Immig.* [1994] 2 NZLR 257 at 266 (N.Z.); Vishaka v. Rajasthan, (1997) 3 SCR 404, 413 (India); Slaight Comm'ns v. Davidson, [1989] 1 S.C.R. 1038 (Can.); R. v. Keegstra, [1990] 3 S.C.R. 697 (Can.); G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); G.A. Res. 1386 (XIV), United Nations Declaration of the Rights of the Child (Nov. 20, 1959)). Other cases have embraced the view that the doctrine of legitimate expectations can create only procedural and not substantive rights. *See* Canada (Att'y Gen.) v. Clayton, [2018] F.C. 436, para. 181 (Can.); Ahani v. Canada (Att'y Gen.), [2002] 156 O.A.C. 37, para. 59 (Can.) (affirming creation only of procedural protections); Khadr v. Canada (Minister of Foreign Aff.'s), [2004] F.C. 1145, para. 25. (Can.).

C. Australia

The presumption of conformity with both treaty and customary international law applies equally in Australia as it does in Canada and the United Kingdom.[89] As the court noted in *Jumbunna Coal Line*, "every Statute is to be [so] interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law."[90] As with elsewhere in common law legal systems, uncertainty as to meaning is required.[91] As with the United Kingdom, interpretation will accord with the accepted rules of statutory construction under the *VCLT*.[92]

International law can also be used to develop the common law.[93] However, Australian courts have made it clear that interpretation can only resolve ambiguities in legislation, but it cannot create new rights or causes of action.[94] The requirement for ambiguity is stricter than in Canada, and New Zealand requires ambiguity on its face.[95] Australian courts may not therefore search for latent ambiguity. Some judges have even gone further, and expressed hostility towards the presumption that customary international law can be used in

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[89] PERRY HERZFELD & THOMAS PRINCE, STATUTORY INTERPRETATION PRINCIPLES: THE LAWS OF AUSTRALIA § 4.175 (2014) (presumption of consistency with international law (citing *Jumbunna Coal Mine NL v Victorian Coal Miners' Ass'n* (1908) 6 CLR 309, 363 (Austl.))); *Polites v Commonwealth* (1945) 70 CLR 60, 68–69, 77, 79, 81 (Austl.) (per Latham, CJ, Dixon, J, McTiernan, J, and Williams, J respectively); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 204 (Austl.); *Chu Kheng Lim v Minister for Immigr.* (1992) 176 CLR 1, 38 (Austl.); *Teoh* (1995) 183 CLR 273, 287–88 (per Mason, CJ and Deane, J); *Kartinyeri v Commonwealth* (1998) 152 ALR 540 ¶ 166 (Austl.); *Momcilovic v The Queen* (2011) 280 ALR 221 ¶ 18 (Austl.). Justice Kirby has frequently tried to apply the presumption in favor of international human rights law. *See* discussion *infra* Section 5.C.

[90] *Jumbunna* (1908) 6 CLR at 363 (per O'Connor, J); *Bloxam v Favre* [1883] 8 PD 101, 107; approved of in *Polites* (1945) 70 CLR at 68 (per Latham, CJ).

[91] HERZFELD & PRINCE, *supra* note 89, at § 8.110 ("Where an Act gives effect to an international agreement, it is permissible the agreement to resolve any uncertainty or ambiguity in the Act.").

[92] *Id.* at § 8.115 ("Where provisions of an Act enact an international agreement in terms, or certain parts of an international agreement in terms, the provisions should be interpreted in accordance with the principles applicable to the interpretation of international agreements."); *see, e.g.*, *Shipping Corp. of India Ltd. v Gamlen Chem. Co. (A/Asia) Pty.* (1980) 147 CLR 142 (Austl.); *Povey v Qantas Airways Ltd.* (2005) 223 CLR 189 (Austl.); *Minister for Foreign Affs. & Trade v Magno* (1992) 37 FCR 298 (Austl.); *Gulf Air Co. GSC v Fattouh* (2008) 230 FLR 311 (Austl.); *IMC Aviation Sols. Pty. Ltd. v Altain Khuder LLC* (2011) 38 VR 303 (Austl.); *Commonwealth v Hum. Rts. & Equal Opportunity Comm'n* (2000) 108 FCR 378 (Austl.).

[93] PERRY DAVID HERZFELD ET AL., INTERPRETATION AND USE OF LEGAL SOURCES: THE LAWS OF AUSTRALIA § 25.2.10 (2013) (citing *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, 28–29 (Austl.) (per Brennan, J.); *Dugan v Mirror Newspapers Ltd.* (1978) 142 CLR 583, ¶¶ 3–5 (Murphy, J.) (referring to the UDHR, the ICCPR, the ECHR, as well as decisions of the European Court of Human Rights); *NBGM v Minister for Immigr. & Multicultural Affs.*, [2006] HCA 54 (Austl.).

[94] *Dietrich v The Queen* [1992] HCA 57 (Austl.); *Young v Registrar, Court of Appeal & Another [No. 3]* (1993) 32 NSWLR 262, 274G (Austl.); *Sinanovic v The Queen* [1998] HCA 40, ¶ 25 (Austl.).

[95] *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ¶ 101 (per Gummow and Hayne, JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 512–513; Dan R. Meagher, *The Common Law Presumption of Consistency with International Law: Some Observations from Australia (and Comparisons with New Zealand)*, 2012 N.Z. L. REV. 465, 466 (2012).

resolving ambiguities, arguing that it is incompatible with the modern democratic law-making process.[96]

Australia is closer to the United Kingdom than it is to Canada and New Zealand with respect to the doctrine of legitimate expectations. In *Teoh*, the High Court found that the fact that Australia had ratified an international treaty, albeit not incorporated into legislation, gave rise to a presumption that administrative decisionmakers would comply with its terms, creating a procedural right.[97] The decision was controversial, attracting criticism even within the courts,[98] and prompted government action to reduce its effects.[99] Subsequent case law, such as *Lam*, has reduced the scope of the rule that international law could create legitimate expectations.[100]

D. New Zealand

As elsewhere, there is a presumption that parliament does not intend to violate international law and thus that any ambiguous statute will be interpreted in compliance with the rules of international law.[101] However, parliament can always legislate to the contrary.[102] In exercising discretion under a statute, decision makers in New Zealand must be guided by international legal norms.[103]

IV. SELECTIVE INCORPORATION OF CUSTOM

Having outlined the classical theory of how international law functions in common law legal systems, the final sections of this Article show how the approach of courts is changing. Although it was "once assumed that rules of international law were automatically incorporated into the English common

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[96] *Al-Kateb v Godwin* [2004] HCA 37, ¶¶ 63–65 (Austl.) ("No doubt the rule of construction had some validity when the rules of international law were few and well-known. Under modern conditions, however, this rule of construction is based on a fiction. . . . Given the widespread nature of the sources of international law under modern conditions, it is impossible to believe that, when the Parliament now legislates, it has in mind or is even aware of all the rules of international law.").

[97] *Minister of State for Immigr. & Ethnic Affs. v. Ah Hin Teoh*, (1995) 183 CLR 273, 290–91, 302, 304–05 (per Mason, CJ and Deane, J, Toohey, J, and Gaudron, J respectively) (Austl.).

[98] *Id.* at 353 (per McHugh, J (citing *Chow Hung Ching v. The King* (1948) 77 CLR 449, 478)).

[99] Meagher, *supra* note 95, at 478.

[100] *Re Minister for Immigr. & Multicultural & Indigenous Affs.; ex parte Lam* [2003] HCA 6, (2003) (Austl.).

[101] *Wellington Cooks & Stewards' Union* [1906] 26 NZLR 394 (SC) at 428 (per Chapman, J (citing *R v. Keyn* (1876) 2 Exch. Div. 63 at 85: "It is an established principle as to the construction of a statute that it should be construed, if the words will permit, so as to be in accordance with the principles of international law.")); *Sellers v. Mar. Safety Inspector* [1999] 2 NZLR 44 at 57; Tangiora v. Wellington [1999] UKPC 42; *Governor of Pitcairn & Associated Islands v. Sutton* [1995] 1 NZLR 426 at 433; *Ye & Ors. v. Minister of Immigr. & Anor* [2008] NZCA 291 at [66] (CA).

[102] Dunworth, *supra* note 55, at 327–28.

[103] *Zaoui v. Att'y-Gen. (No 2)*, [2006] 1 NZLR 289 at [90] (citing *Sellers v. Mar. Safety Inspector* [1999] 2 NZLR 44 at 57); J. F. BURROWS, STATUTE LAW IN NEW ZEALAND 341–43 (3rd ed. 2003). Subsequently, the principle was affirmed in *Ye & Ors. v. Minister of Immigr. & Anor* [2008] NZCA 291.

law," that theory developed "at a time when both common law and international law were still evolving and relatively fluid, and when international norms depended not on treaty-making but almost always entirely on 'customary' international law."[104]

Increasingly, there is strong evidence that the theory of transformation, rather than incorporation, is being adopted in many common law countries. A rule of customary international law will be adopted or received into domestic law if it is "not inconsistent with rules enacted by statutes or finally declared by [the courts]."[105]

Courts in all commonwealth countries increasingly reserve for themselves the right to determine when and if custom applies. Although the vast majority of countries appear to accept that CIL is directly applicable, "a growing portion of countries consider custom to be hierarchically inferior to domestic law, which limits the ability of courts to apply it directly in many circumstances and preserves the legislature's ability to displace customary rules."[106]

Any attempt to explain what courts do when interpreting custom risks running together multiple different practices. One way to understand the practice of courts is that they are using customary international law as a means of introducing new principles into the municipal legal system and allowing the common law to evolve (even if, on the view of many judges, that is an impermissible use of custom). In so doing, they announce new principles that become part of domestic law. Alternatively, courts may view themselves as players in the development of customary international law.[107]

The incorporation of custom potentially implicates a number of different policy concerns. First, both commentators and courts are suspicious of the potential for customary international law to override the democratic law-making process. As Sales and Clement have noted: "there is a risk of domestic law being determined directly and without any sufficient mediating process at the domestic constitutional level by the play of power relations between states at the international level."[108] Second, incorporation brings with it the potential to override other important principles governing the functioning of the legal system, such as the principle of stare decisis. As Lord Denning noted in *Trendtex*,

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[104] BLACKSHIELD AND WILLIAMS, *supra* note 44, at § 21.3. Of course, judges and the legislature retain the ability to determine the law; *Nulyarimma v Thompson* [1999] 96 FCR 153 (Austl.) (per Merkell, J, accepting the transformation theory).

[105] Chung Chi Cheung v. The King [1939] AC 160 (PC) 168 (per Lord Atkin LJ).

[106] There is some evidence that this is part of a broader phenomenon. Verdier & Versteeg, *supra* note 7, at 516.

[107] Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMPAR. L.Q. 57, 72 (2011) (noting however that some courts are distinctively worried about this role, and citing to that effect Lord Hoffmann's statement in Jones v. Saudi Arabia [2006] UKHL 26 at [63]*:* that "[i]t is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states").

[108] Philip Sales & Joanne Clement, *International Law in Domestic Courts: The Developing Framework*, 124 L.Q. REV. 388, 392 (2008).

accepting that the common law has adopted incorporation as the means for customary international law to enter common law legal systems: "International law does change: and the courts have applied the changes without the aid of any Act of Parliament . . . International law knows no rule of state decisis."[109] Third, the incorporation of certain types of customary international law norms raises potential due process concerns, such as by leaving individuals vulnerable to prosecution for non-codified crimes. In *Jones*, Lord Bingham noted, with respect to the incorporation of the customary international law crime of aggression: "it is for those representing the people of the country in Parliament, not the executive and not the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties."[110]

For that reason, he rejected the view that automatic incorporation should occur in all circumstances:

> Inasmuch as the reception of customary international law into English law takes place under common law, and inasmuch as the development of new customary international law remains very much the consequence of international behaviour by the Executive, in which neither the Legislature nor the Courts, nor any other branch of the constitution, need have played any part, it would be odd if the Executive could, by means of that kind, acting in concert with other States, amend or modify specifically the *criminal* law, with all the consequences that flow for the liberty of the individual and rights of personal property. There are, besides, powerful reasons of political accountability, regularity and legal certainty for saying that the power to create

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[109] *Trendtex Trading Co. v. Central Bank of Nigeria* [1977] QB 529 at 554 (noting that the doctrine of incorporation (as opposed to transformation) required that the principle of stare decisis be subordinated to changes in customary international law).

[110] R v. Jones (Margaret) [2006] UKHL 16 at [23] ("I would accordingly accept that a crime recognised in customary international law may be assimilated into the domestic criminal law of this country. The appellants, however, go further and contend that that result follows automatically. The authorities, as I read them, do not support that proposition . . . In the context of genocide, an argument based on automatic assimilation was rejected by a majority of the Federal Court of Australia in *Nulyarimma v Thompson* (1999) 120 ILR 353. In the context of abduction it was rejected by the Supreme Court of the United States in Sosa v. Alvarez-Machain et al., 542 U.S. 692 (2004). It is, I think, true that 'customary international law is applicable in the English courts only where the constitution permits': O'Keefe, *Customary International Crimes in English Courts*, (2001) BRIT. Y.B. INT'L L. 293, 335. I respectfully agree with the observations of Sir Franklin Berman . . . answering the question whether customary international law is capable of creating a crime directly triable in a national court: 'The first question is open to a myriad of answers, depending on the characteristic features of the particular national legal system in view. Looking at it simply from the point of view of English law, the answer would seem to be no; international law could not create a crime triable directly, without the intervention of Parliament, in an English court. What international law could, however, do is to perform its well-understood validating function, by establishing the legal basis (legal justification) for Parliament to legislate, so far as it purports to exercise control over the conduct of non-nationals abroad. This answer is inevitably tied up with the attitude taken towards the possibility of the creation of new offences under common law.' FRANKLIN BERMAN, ASSERTING JURISDICTION: INTERNATIONAL AND EUROPEAN LEGAL PERSPECTIVES 11 (Patrick Capps, Malcolm Evans & Stratos Konstantinidis eds., 2003)").

> crimes should now be regarded as reserved exclusively to Parliament, by Statute.[111]

Customary international law forms part of domestic law, he concluded, only where the constitution permits it and when parliament has not legislated against it.[112] For a variety of reasons, therefore, the recent approach of common law courts is that customary international law is only partially adopted.

A. United Kingdom

While the position adopted in *Jones* appears to be increasingly embraced across the common law world, the limits on when it should be incorporated remain ill-defined. As Lord Bingham noted in *Jones*, albeit in *obiter*, judges are reluctant to accept unconditional incorporation:

> The appellants contended that the law of nations in its full extent is part of the law of England and Wales. The Crown did not challenge the general truth of this proposition, for which there is indeed old and high authority . . . I would for my part hesitate, at any rate without much fuller argument, to accept this proposition in quite the unqualified terms in which it has often been stated. There seems to be truth in Brierly's contention ("International Law in England" (1935) 51 *LQR* 24, 31), also espoused by the appellants, that international law is not a part, but is one of the sources, of English law. There was, however, no issue between the parties on this matter, and I am content to accept the general truth of the proposition for present purposes since the only relevant qualification is the subject of consideration below.[113]

Courts continue to struggle with when customary international law should be incorporated and what factors to rely on in making that determination. In *Keyu*, Lord Mance, again in *obiter*, suggested a tentative framework:

> Common law judges on any view retain the power and duty to consider how far customary international law on any point fits with domestic constitutional principles and understandings. Thus, in a number of other cases prior to *R v Jones (Margaret),* courts have rejected suggestions that CIL had expanded the ambit of domestic criminal law: see eg *R v Keyn* (1876) 2 Exch Div 63, 202, *et seq* and *Chung Chi Cheung v The King* [1939] AC 160 . . . Speaking generally, in my opinion, the presumption when considering any such policy issue is that CIL, once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can

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[111] R v. Jones (Margaret) [2006] UKHL 16 at [23].

[112] *Id.* (citing O'Keefe, *supra* note 110, at 335).

[113] *Id.* at [11]; see also, R (Freedom & Just. Party) v. Sec'y of State for Foreign and Commonwealth Affs., [2018] EWCA Civ 1719 at [114] (per Arden, Sales and Irwin, LJJ).

> themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration.[114]

Most recently, in *Debenture Trust*, the Supreme Court expressly repudiated the doctrine of incorporation. Rejecting the Blackstonian approach, the court wrote:

> the application by courts in this jurisdiction of rules of international law is clearly restricted by domestic constitutional principles, including principles of non-justiciability. Moreover, it is not possible to make sweeping deductions from broad statements of principle. The relationship between customary international law and the common law in this jurisdiction is far more complex.[115]

The court then noted that it was preferable "to regard customary international law not as automatically a part of the common law but as a source of the common law on which courts in this jurisdiction may draw as appropriate." [116] The best view would therefore appear to be that there is an assumption in favor of incorporation, subject to conflict with constitutional principles,[117] or other legislation (including legislation which adopted a different view of the scope of rules which now form part of national legislation).[118]

B. Canada

Canadian courts have similarly struggled to determine the extent of the adoption of customary international law. Writing in the early 2000s, Van Ert argued that the Canadian approach remained one of adoption.[119] Until quite recently, that was an arguable position.[120] In *Nevsun*, decided in early 2020, Eritrean conscripts brought suit in British Columbia against Nevsun Resources,

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[114] Keyu & Ors v. Sec'y of State for Foreign and Commonwealth Affs., [2015] UKSC 69 [146], [150] (per Mance, LJ, in *obiter*).

[115] Law Debenture Trust Corp. plc. V. Ukraine, [2023] UKSC 11 at [204] ("Moreover, as Lord Mance pointed out . . . it appears that judges in this jurisdiction may face a policy issue as to whether to recognise and enforce a rule of customary international law. However, given the generally beneficent character of customary international law, the presumption should be in favour of its application").

[116] *Id.* (citing R v. Jones (Margaret) [2006] UKHL 16 at [11]).

[117] Keyu & Ors v. Sec'y of State for Foreign and Commonwealth Affs., [2015] UKSC 69 at [145] (Lord Mance LJ) ("However, as the appellants went on to recognise at least this further qualification exists in relation to CIL, beyond that stated by Lord Denning, namely that: 'The recognition at common law must itself not abrogate a constitutional or common law value'").

[118] *Id.* at [117].

[119] VAN ERT, *supra* note 62, at 183 ("Taken as a whole, however, the Canadian authorities strongly support [customary international law].").

[120] Prior to *Nevsun*, some—albeit not many—Canadian cases appear to have cited either *Keyu* or *Chung Chi Cheung* approvingly for the proposition that not all international law is automatically incorporated. *See* Minister of Nat'l Revenue v. Zachariah Estate, 1970 CanLII 1721, para. 762 (Can. Ex. C.R.); Yin-Tso Hsiung v. Toronto (City), [1950] O.R. 463, para. 4; Military Reference, [1943] S.C.R. 483; Reference as to Powers to Levy Rates on Foreign Legations, [1943] S.C.R. 208; New Brunswick (Att'y Gen.) v. Can. Pac. Ry. Co. et. al., (1925) CanLII 685; Mun. of the City and Cnty. of Saint-John et al. v. Fraser-Brace Overseas Corp. et al., [1958] S.C.R. 263.

a Canadian mining consortium, alleging that Nevsun had committed, *inter alia*, the tort of slavery under customary international law, for which it could be held liable in Canada. Nevsun brought a motion to strike, alleging that the claim disclosed no cause of action. The Supreme Court, by a five-four vote, declined to strike the claim, and allowed the case to proceed to trial in British Columbia.[121]

Justice Abella, writing for the liberal wing of the court, found that it was not plain and obvious that the action was doomed to fail.[122] The dispute with the minority turned on whether the law of nations created an actionable tort in Canada.[123] In *obiter*, Abella, J wrote that national courts, including Canadian courts, should play a role in the development of customary international law: the decisions of Canadian courts, importantly, were evidence of international law.[124] On her view, not only should international law inform the development of Canadian jurisprudence (notably through the adoption of customary international law) but conversely, that national courts could aid in the development of customary international law.[125]

The minority would have allowed Nevsun's motion and struck the lawsuit. It proposed to rely on *Chung Chi Cheung* and find that customary international law is not automatically incorporated.[126] The minority's position appears to have found some, albeit limited, traction with lower courts.[127]

Nevsun dealt only with the adoption of customary international law. However, in another 2020 case, the Supreme Court revisited the role of

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[121] The case ultimately settled, leading to no conclusive determination if this type of cause of action exists in Canadian law. Nevsun Res. Ltd. v. Araya, [2020] 1 S.C.R. 166 (Can.).

[122] *Id.* at para. 25.

[123] *Id.* at para. 86 (The majority took the view that customary international law was automatically adopted. "On the other hand, customary international law is automatically adopted into domestic law without any need for legislative action.").

[124] *Id.* at para. 70 (citing Gérard La Forest, *The Expanding Role of the Supreme Court of Canada in International Law Issues*, 34 CAN. Y.B. INT'L. L. 89, 100–101 (1996) (citing Osnat Grady Schwartz, *International Law and National Courts: Between Mutual Empowerment and Mutual Weakening*, 23 CARDOZO J. INT'L & COMP. L. 587, 616 (2015), René Provost, *Judging in Splendid Isolation,* 56 AM. J. COMP. L. 125, 171 (2008)) (citing *Case concerning certain German interests in Polish Upper Silesia (Ger. v. Pol.)*, Judgment, 1926 P.C.I.J. (ser. A) No. 7, at 19 (May 25) (stating that legal decisions are "facts which express the will and constitute the activities of States")); Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 61 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999); Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 541, 575, 579–89 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint separate opinion of Judge McDonald and Judge Vohrah, ¶ 47–55 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

[125] Nevsun Res. Ltd. v. Araya, [2020] 1 S.C.R. 166, para. 71 (citing Roberts, *supra* note 107, at 69; Jutta Brunnée & Stephen J. Toope, *A Hesitant Embrace: The Application of International Law by Canadian Courts*, 40 CAN. Y.B. INT'L L. 3, 4–6, 8, 56 (2002)); Hugh M. Kindred, *The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach*, *in* OONAGH E. FITZGERALD, THE GLOBALIZED RULE OF LAW: RELATIONSHIPS BETWEEN INTERNATIONAL AND DOMESTIC LAW 5, 7 (Elisabeth Eid et al. eds., 2006).

[126] Nevsun Res. Ltd., [2020] 1 S.C.R., para. 211 (citing R in right of Canada v. Sask. Wheat Pool, [1983] 1 S.C.R 205; Holland v. Saskatchewan, [2008] 2 S.C.R. 551, para. 9 (Can.); West Rand Central Gold Mining Co. v. Rex, [1905] 2 K.B. 391; Chung Chi Cheung v. The King [1939] AC 160 (PC) 168.

[127] Toussaint v. Canada (Att'y Gen.), [2022] ONSC 4747, para. 177 (Can.).

international law as an interpretive mechanism. This time, a slightly reconstituted court split 5-3, with the majority advocating for a reduced role for international law in Canadian courts.[128] The court found that international norms, including customary international law, should play a limited role in determining the meaning of Canadian law.[129]

C. Australia and New Zealand

Courts in Australia have, broadly speaking, adopted transformation rather than incorporation. As Wilcox, J, noted for the majority in *Nulyarimma*, the mere fact that a customary international law norms exists is insufficient to make it part of Australian law.[130] Courts will instead consider numerous factors, including the principle of *nullum crimen sine lege*.

There appear to be few cases in New Zealand to directly consider the issue, but what jurisprudence exists suggests instead that, unlike courts in Australia, Canada or the United Kingdom, its courts will hew closely to the incorporation line.[131] Neither *Chow Hung Ching* nor *Nulyarimma* appear to have ever been cited by the New Zealand courts.

Additionally, courts generally place great weight on the existence of prohibitive customary international law norms. For instance, in *Young*, the New Zealand Court of Appeal found that norms of customary international law on the immunity of states from suit remained the law of New Zealand.[132]

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[128] Québec (Att'y Gen.) v. 9147-0732 Québec Inc., [2020] 3 S.C.R. 426 (Can.) (consisting of one judge who considered it unnecessary to consider the international law question).

[129] *Id*. at para. 22 ("While this Court has generally accepted that international norms *can* be considered when interpreting domestic norms, they have typically played a limited role of providing *support* or *confirmation* for the result reached by way of purposive interpretation. This makes sense, as Canadian courts interpreting the *Charter* are not bound by the content of international norms. As Professor Beaulac and Dr. Bérard explain: [TRANSLATION] In addition to distorting the relationship between the international and domestic legal orders, the suggestion that domestic courts are bound by international normativity is inconsistent with the constitutional mandate and the function of the judiciary, which is to exercise decision-making power under the applicable Canadian and Quebec law. Seeing international law as having persuasive authority is a more appropriate, consistent and effective approach … even though international normativity is not binding in domestic law, what it can and, indeed, should do in appropriate circumstances is to influence the interpretation and application of domestic law by our courts. Except among a few zealous supporters of the internationalist cause, there is general agreement that, in this regard, the criterion for referring to international law in domestic law is that of 'persuasive authority.'").

[130] *Nulyarimma v Thompson* [1999] 96 FCR 153, ¶ 23 (citing BRIAN R. OPESKIN & DONALD R. ROTHWELL, INTERNATIONAL LAW AND AUSTRALIAN FEDERALISM (Brian R. Opeskin & Donald R. Rothwell eds., 1997); Chow Hung Ching v. The King [1948] HCA 37*;* R. v. Keyn [1876] LR 2 Ex. D 63; *Foreign States Immunities Act 1985* (Cth) (Austl.)).

[131] PHILIP A. JOSEPH, CONSTITUTION AND ADMINISTRATIVE LAW IN NEW ZEALAND § 2.5 (Clare Barret ed., 4th ed. 2014); *Marine Steel Ltd. v. Gov't of the Marsh. Is.* [1981] 2 NLZR 1; *Governor of Pitcairn & Associated Islands v. Sutton* [1994] 1 NZLR 426 at 436; Andrew S. Butler & Petra Butler, *The Judicial Use of International Human Rights Law in New Zealand*, 29 VICT. UNIV. WELLINGTON L. REV. 173, 177 (1999).

[132] *Young v. Att'y-Gen.* [2018] NZCA 307 at [101] (N.Z.).

V. SPECIAL STATUS OF HUMAN RIGHTS LAW

Increasingly, commonwealth courts are applying non-binding human rights instruments as a means of interpreting domestic statutes. Although they are limiting the automatic adoption of customary international law, they have at the same time shown greater willingness to grant special status to human rights law. In part, this appears to reflect the fact that the drafters of the various international and regional human rights instruments drew inspiration from each other. The Canadian courts have long taken the lead in this regard, but increasingly, courts in the United Kingdom, and to a lesser extent New Zealand and perhaps Australia, are catching up.

A. United Kingdom

In *R (on the application of SG & Others),* the U.K. Supreme Court considered whether subordinate legislation imposing a cap on the amount of welfare benefits which can be claimed in non-working households unlawfully discriminated between men and women, primarily based on a purported violation of article 14, *ECHR* and article 1 of *Protocol No 1 to the ECHR*.[133] The court found no violation. The use of human rights law emerged as a key tension between the majority and the two judges who would have allowed the appeal. Lord Kerr was the most outspoken in suggesting a turn to international law.

Lord Hughes, who voted to dismiss the appeal, criticized the approach of Lord Kerr:

> Article 3 UNCRC [U.N. Convention on the Rights of the Child] is contained in an international treaty ratified by the UK. It is binding on this country in international law. It is not, however, part of English law. Such a treaty may be relevant in English law in at least three ways. First, if the construction (ie meaning) of UK legislation is in doubt, the court may conclude that it should be construed, if otherwise possible, on the footing that this country meant to honour its international obligations. Second, international treaty obligations may guide the development of the common law. For these two propositions see for example *R v Lyons (Isidore)* [2002] UKHL 44; [2003] 1 AC 976, para 13. Neither has any application to this case. This case is concerned with legislation, not with the common law, and it is not suggested that there is any room for doubt about the meaning of the regulations. Thirdly, however, the UNCRC may be relevant in English law to the extent that it falls to the court to apply the European Convention on Human Rights ("ECHR") via the Human Rights Act 1998. The European Court of Human Rights has sometimes accepted that the Convention should be interpreted, in appropriate cases, in the light of generally

[133] R (on the application of SG & others (previously JS & others)) v. Sec'y of State for Work & Pensions [2015] UKSC 16, [1].

> accepted international law in the same field, including multi-lateral treaties such as the UNCRC.[134]

Lord Hughes rejected Lord Kerr's approach, and in so doing rejected the view that English courts could have reference to other treaties by virtue of the jurisprudence of the European Court of Human Rights ("ECtHR").[135]

Conversely, Lord Kerr argued that the time had come to recognize an exception to the principle that unincorporated treaties can be taken into consideration in human rights cases.[136] While Lord Kerr's position may be the most radical, other authors have advanced similar arguments, at least with respect to the ECtHR. Many of those cases refer only to uses of the ECtHR to interpret domestic legislation.[137]

Shaheed Fatima has provided a helpful list of such cases in her work, noting that the ECtHR has also frequently referenced other international instruments.[138] As the ECtHR noted in *Bankovic*:

> the principles underlying the [ECtHR] cannot be interpreted and applied in a vacuum. The court must also take into account any relevant rules of international law . . . The convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part.[139]

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[134] *Id.* at [137].

[135] *Id.* at [140]. There is considerable other jurisprudence for this proposition. *See, e.g.*, Dir. of Pub. Prosecutions v. Jones [1999] 2 AC 240 at 265D–F (per Slynn, LJ), at 277E–278F (per Hope, LJ) (finding that reference to the ECHR for guidance was inappropriate in context as there was no doubt about the content of the common law); A v. Sec'y of State for the Home Dep't [2004] EWCA (Civ) 11223 [266–267] (per Laws, LJ), [434] (per Neuberger, LJ) (asserting that the common law cannot be used to incorporate treaties through the back door).

[136] R (on the application of SG & Ors) v. Sec'y of State for Work and Pensions [2015] UKSC 16, [248–254] (citing In re McKerr [2004] UKHL 12); for an additional review of the relevant case law, see Sales & Clement, *supra* note 108, at 398.

[137] Fatima, *supra* note 76, at § 7.12, citing to, *e.g.*, R (Smith) v. Parole Bd. [2005] UKHL 1, [74] (per Slynn, LJ: "But the Convention can and does inform the common law, and the common law informs the Convention."); Jones v. Ministry of the Interior Al-Mamlaka Al-Arabiya [2004] EWCA (Civ) 1394, [91] (per Mance, LJ, interpreting the State Immunity Act 1978 c. 33 (UK): "[I]n so far as the present case is concerned with underlying or residual principles, these are themselves sufficiently open and flexible to respond to the inspiration of the European Convention.").

[138] Fatima, *supra* note 76, at § 7.

[139] Bankovic v. Belgium, App. No. 52207/99, ¶ 56 (Dec. 12, 2001), Eur. Ct. H.R.; *see also,* Al-Adsani v. U.K., App. No. 35763/97, (Nov. 21, 2001), Eur. Ct. H.R. (in determining whether Article 5 was violated the court considered, *inter alia*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), Article 5; G.A. Res. 3452 (XXX), at Article 3, (Dec. 09, 1975); and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113) .

U.K. courts have similarly relied on other human rights instruments,[140] or on the jurisprudence of other courts to determine the scope of those obligations.[141]

Recent cases have suggested that there are limits to incorporation. In *SC*, the Supreme Court appeared to suggest that excessive reliance had been placed on international law in some cases:

> The judgment [of the ECtHR and as applied by other domestic courts] does not suggest that domestic courts should approach the question of justification by applying the provisions of the UNCRC, or by deciding whether, in adopting the measure in question, the national authorities complied with their obligations under the UNCRC.[142]

The situation, as with other common law countries, appears unstable. Courts apply international law in deeply unpredictable ways.

B. Canada

As noted above, IHRL does not need to be specifically incorporated to be relied on by courts.[143] The patriation of the Constitution has led to significantly greater use of human rights law.[144] In particular, the drafting of the *Charter of Rights and Freedoms* served as the impetus for increased judicial reference to international law.[145] The *Charter* was not drafted in a vacuum, rather the drafters looked to various international instruments for inspiration.[146]

For example, early work on the s.1 limitations clause drew on the case law of the European Court of Human Rights interpreting the *European Convention on Human Rights*.[147] Similarly, s.8 search and seizure jurisprudence has been

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[140] Fatima, *supra* note 76, at § 1-7.13 (citing to R (R) v. Durham Constabulary [2005] UKHL 21, [26] (per Baroness Hale, referring to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Nov. 29, 1985, G.A. Res. 40/33 at 206 (1985), which are used by the ECtHR)); Dyer v. Watson [2002] UKPC D1 [104–06] (Hope, LJ, interpreting the ECHR by reference to the Beijing Rules); V. v. United Kingdom, 1999-IX Eur. Ct. H.R.; ID v. Home Off. [2005] EWCA (Civ) 38.

[141] Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998 [2022] UKSC 31, [88–89] (relying on jurisprudence of the Supreme Court of Canada).

[142] R (SC) v. Sec'y of State for Work and Pensions [2021] UKSC 26, [86].

[143] De Guzman v. The Minister of Citizenship & Immigr., [2006] 3 F.C.R. 655 (Can).

[144] Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

[145] La Forest, *supra* note 82, at 24.

[146] VAN ERT, *supra* note 62, at 331; citing, *inter alia*, Daniel Turp, *Le recours au droit international aux fins de l'interprétation de la Charte canadienne des droits et libertés: un bilan jurisprudential* [The Use of International Law for the Purpose of Interpreting the Canadian Charter of Rights and Freedoms: A Jurisprudential Review], 18 REVUE JURIDIQUE THÉMIS 353 (1984) (noting the influence of international law on the drafting of the *Charter*); La Forest, *supra* note 82, at 25; Maxwell Cohen & Anne F. Bayefsky, *The Canadian Charter of Rights and Freedoms and Public International Law*, 61 CAN. BAR REV. 265, 265 (1983); W.S. Tarnopolsky, *A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights*, 8 QUEEN'S L.J. 211 (1982).

[147] *See*, *e.g.*, R v. Oakes, [1986] 1 S.C.R 103 (citing to the *ECHR*).

inspired by decisions of the United States Supreme Court, most notable its jurisprudence interpreting the American *Bill of Rights*.[148]

On occasion, Canadian courts have been forced to look to human rights law outside the statutory context because other than the *Refugee Convention*, no major treaties have been incorporated in Canada.[149] Courts have taken six broad approaches to interpreting the *Charter* in light of international law. First, in some cases, international law has been viewed as implementing legislation.[150] Second, courts have relied on the presumption of conformity with international law to interpret the *Constitution* or domestic laws.[151] Third, they have used international law for its persuasive value.[152] Fourth, they have relied on IHRL to provide a minimum level of protection.[153] Fifth, they have adopted the so-called context and values approach.[154] Finally, in rare situations, they have relied on the reception of IHRL through other laws (notably in the refugee context).[155]

As noted above, the Supreme Court has recently considered how far into the Canadian legal system human rights law penetrates. In two recent cases, a schism emerged between different factions of the Supreme Court of Canada. These contemporary disputes mirror disputes that have occurred both in the United States and in the United Kingdom.[156] However, for reasons unique to the Canadian constitutional order, this dispute crystalized later in Canada than elsewhere.

In *9147-0732 Québec*, which was decided after *Nevsun*, the court was asked to consider specifically whether section 12 of the Charter of Rights and Freedom, which prohibits cruel and unusual treatment or punishment, could apply to corporations.[157] A panel of the Quebec Court of Appeal [QCA] had found that a fine levied against a corporation in a regulatory prosecution violated s.12. The Supreme Court overturned that decision and found that corporations enjoyed no

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[148] *See*, *e.g.*, R v. Mann, [2004] 3 S.C.R. 59 (citing to Terry v. Ohio 392 U.S. 1 (1968)).

[149] VAN ERT, *supra* note 62, at 330; *see also* Québec (Commission des droits de la personne et des droits de la jeunesse) v. Université Laval, 2000 CanLII 3 (QC T.D.P.).

[150] VAN ERT, *supra* note 62, at 333. A prominent example is in the reasons of Justice Benzil in R v. Big M Drug Mart Ltd., [1983] 1 S.C.R 295, paras. 88–90 (Can.) ("Thus it can be seen that the *Canadian Charter* was not conceived and born in isolation. It is part of the universal human rights movement.").

[151] *Id.* at 335.

[152] Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313.

[153] VAN ERT, *supra* note 62, at 342.

[154] *Id.* at 347; Baker, [1999] 2 S.C.R. para. 70 ("the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.").

[155] Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, para. 62.

[156] Antonin Scalia, Assoc. Justice, U.S. Supreme Court, Foreign Legal Authority in the Federal Courts, Keynote Address at the Ninety-Eighth Annual Meeting of the American Society of International Law (Apr. 2, 2004), in 98 AM. SOC'Y INT'L L. PROC. 305 (2004).

[157] Québec v. 9147-0732, 3 S.C.R. (analyzing Canadian Charter of Rights and Freedoms, §§ 7, 12 Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c. 11 (UK).

s.12 protections (affirming what most commentators had thought the law was prior to the decision of the QCA).

Importantly, in *9147-0732 Québec*, the majority, in *obiter*, argued that the correct interpretation of s.12, and presumably other Charter provisions, did not require a turn to international law or the constitutional law of other states. The majority argued that international law should play only a limited role in the Canadian constitutional structure.[158] Proposing what most legal scholars would take to be a rereading of the role of international law in Charter jurisprudence, the majority argued that the role of international law "has properly been to *support* or *confirm* an interpretation" of constitutional provisions, not to define the scope.[159] It is clear that at least a significant segment of the Canadian judiciary is worried that international law has penetrated too deeply into the Canadian legal order.

C. Australia

It is a principle of Australian human rights law that the relevant human rights acts are to be liberally constructed.[160] However, the situation is complicated by the fact that there is no constitutionalized bill of rights. As a general rule, courts have found that it is not permissible to interpret the Constitution by reference to developments in international law after Federation.[161]

The only exception to this has been Justice Kirby.[162] Justice Kirby, noted for his frequent dissents, has supported what he called an "interpretive principle"

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[158] *Id.* at para 23.

[159] *Id.* at para 28.

[160] HERZFELD & PRINCE, *supra* note 89, at § 8.140 (human rights act are to be given a liberal construction); *Charter of Human Rights and Responsibility Act 2006* (Vic), s32(2) (Austl.); Human Rights Act 2004 s 30 (N.Z.); *R v. Momcilovic* [2010] 25 VR 436, [2010] VSCA 50 ¶ 124 (referring to other commonwealth jurisprudence).

[161] *Id.* at § 15.210. As Heydon J noted, there are significant authorities opposing the proposition, including: *Polites v Commonwealth* (1945) 70 CLR 60, at 69 (per Latham, CJ), at 74 (per Rich, J), at 75–76 (per Starke J), at 78 (per Dixon J), at 79 (per McTiernan J), at 81 (per Williams, J); *Polyukhovich v Commonwealth*, (1991) 172 CLR 501 at 551; *Horta v Commonwealth* (1994) 181 CLR 183 at 195; *Kartinyeri v. Commonwealth* (1998) 195 CLR 337; *Al-Kateb v Godwin* [2004] HCA 37.

[162] ANTHONY J CONNOLLY, THE FOUNDATIONS OF AUSTRALIAN PUBLIC LAW: STATE, POWER, ACCOUNTABILITY 394 (2017); *Cornwell v R (No S215/2006)*, (2007) 234 ALR 51 at ¶ 175–77; *Thomas v Mowbray* [2007] HCA 33 at ¶ 382; *Newcrest Mining v Commonwealth* (1997) 190 CLR 513 at 147–148, citing to *Mabo v Queensland* [No. 2] (1992) 175 CLR 1 at 148 (No 2); *Kartinyeri v. Commonwealth* (1998) 195 CLR 337 ¶ 166–167; *Al-Kateb v Godwin* [2004] HCA 37 ¶ 168 (per Kirby, J). *See also*, Michael D. Kirby, *Domestic Implementation of Human Rights Norms*, 5 AUSTL. J. HUM. RTS. 109 (1999) (arguing for the use of the *Bangalore Principles* in interpreting constitutional human rights protections); Michael D Kirby MD, *The Growing Impact of International Law on Australian Constitutional Values*, 27 UNIV. TAS. L. REV. 1, 8–9 (2008) ("In a number of cases, I have suggested that the rule of construction permitting reference to universal principles of human rights is just as applicable to resolving uncertainties in the constitutional text as in any other contemporary legal text or legal exposition "); Michael D Kirby, *A Century of Jumbunna—Interpretive Principles and International Law*, 31 ADELAIDE L. REV. 143 (2010); Michael Kirby, *Constitutional Law and International Law: National Exceptionalism and the Democratic Deficit?*, 98 GEO. L. J. 433, 449 (2009).

under which it was permissible to have regard to developments in IHRL to determine the meaning of Australian statutes.[163]

D. New Zealand

As with Australia, New Zealand is the "acme of legislative supremacy."[164] There is no fundamental law or entrenched bill of rights, nor federal division of powers.[165] Instead, the Human Rights Act 1993 was drafted to give effect to international human rights instruments.[166]

The Act has provided a means of entry for human rights law. Its title states that it was an act "to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights."[167] It gives effect to the *Convention on the Elimination of all Forms of Racial Discrimination* and *Convention on the Elimination of Discrimination Against Women*.[168] For that reason, courts have referenced international human rights conventions, even if they are not specifically incorporated in New Zealand law.

Sir Kenneth Keith has further argued that in limited circumstances courts in New Zealand can have recourse to non-binding treaty obligations.[169] Courts have also had recourse, in limited circumstances, to jurisprudence from international and regional courts to determine the scope of common law or treaty rights.[170]

VI. SOFT LAW AND OTHER NON-BINDING LEGAL INSTRUMENTS

An emerging question is how courts should deal with soft law. Mostly, the question has emerged when dealing with vexatious plaintiffs.[171] There have been no shortage of individuals trying to plead violations of the *Universal Declaration of Human Rights* ("*UDHR*"), which is not only unincorporated in common law legal systems but is also non-binding. However, in limited

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[163] BLACKSHIELD AND WILLIAMS, *supra* note 44, at §21.9.

[164] JOSEPH, *supra* note 131 at § 15.4.1.

[165] Robin Cooke, *A Sketch from the Blue Train-Non-Discrimination and Freedom of Expression: The New Zealand Contribution*, 19 COMMONWEALTH L. BULL. 1782, 1791 (1993). An exception may be emerging for the *Treaty of Waitangi*, politically if not legally, but that exception is beyond the scope of the Article.

[166] Kenneth Keith, *The Application of International Human Rights Law in New Zealand*, 32 TEX. INT'L L. J. 401, 410 (1997).

[167] Human Rights Act 1993, tit., (N.Z.). *See Television N.Z. v. R* [1996] 3 NZLR 393 (NZCA) (per Keith, J.); *B & B v Dir.-Gen. of Soc. Welfare (Re J (An Infant))* [1996] 2 NZLR 134 (NZCA) at 145.

[168] Kenneth Keith, *supra* note 166 at 411.

[169] Kenneth Keith, *Roles of the Courts in New Zealand in Giving Effect to International Human Rights—With Some History*, 29 VICT. UNIV. WELLINGTON L. REV. 27, 40 (1999) (citing to *Van Gorkom v. Att'y-Gen.* [1977] 1 NZLR 535 (S.C.), *aff'd*, [1978] 2 NZLR 387 (S.C.)).

[170] *Tavita v. Minister of Immigr.* [1994] 2 NZLR 257, 266 (N.Z.); *but see* for arguable judicial retreat, Puli'uvea v. Removal Rev. Auth. [1996] 3 NZLR 538 at 542; Rajan v. Minister of Immigr. [1996] 3 NZLR 543, 551-552.

[171] Chowdhury c. R, 2002 CanLII 41146, para. 27 (Can.); Meads v. Meads, 2012 ABQB 571 (Can.).

circumstances, courts across the four countries considered in this Article have relied on soft law to interpret municipal law.

Principally, the question of soft law emerges in the administrative law context.[172] Courts have frequently found that a failure to follow non-binding guidelines constitutes a violation of the duty of reasonableness.[173]

Part of the challenge is differentiating between what is soft law and what is binding law.[174] To rely on soft law, courts have adopted several different strategies: referring to soft law instruments as providing meaning for other binding international law instruments which were themselves based on soft law instruments (e.g. relying on the *UDHR*, which has been acknowledged as the inspiration for the two *Covenants*), relying on soft law commentaries to interpret binding instruments, by treating soft law as persuasive authority, or by arguing that soft law has crystalized into customary international law.[175] Many of these cases refer only to the *UDHR*, suggesting that it may be harder to rely on soft law outside of that context. In fact, no case in the United Kingdom appears to have definitively found that international soft law instruments can be relied on by courts. However, in *Gulf Centre for Human Rights*, the Court of Appeal held that plaintiffs could rely on a violation of a soft law instrument—the Ministerial code—to interpret other legal causes of action.[176]

In Canada, courts have been willing to rely on soft law to inform international obligations. In some instances, this is because they misunderstood the nature of the *UDHR* and took it to be a treaty.[177] However, in at least one case, the Federal Court of Appeal has found that soft law could be relied upon if endorsed by Canada.[178] Conversely, in the limited jurisprudence that exists in Australia, courts have concluded that there is no requirement to consider soft law nor can courts rely on it to create rights.[179]

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[172] *See* H.W.R Wade, *Beyond the Law: A British Innovation in Judicial Review*, 43 ADMIN. L. REV. 559 (1991); Lorne Sossin & Chantelle van Wiltenburg, *The Puzzle of Soft Law*, 58 OSGOODE HALL L.J. 623, 625 (2021).

[173] Can. Ass'n of Refugee Laws. v. Canada [2021] 1 FCR 271.

[174] Ainsley Fin. Corp. v. Ontario (Sec. Comm'n) (1994) 77 O.A.C. 155 (Can.).

[175] R v. Immigr. Appeal Tribunal [1999] 4 LRC 195; R v. Sec'y of State for the Home [2008] UKHL 53, at [13]; Brown v. Stott [2001] 2 LRC 612 at 638.

[176] R v. Prime Minister [2018] EWCA (Civ) 1855 at [23]; *see also*, R v. Prime Minister [2021] EWHC 3279 (Admin) at [43] (finding that claims about violations of the ministerial code of justiciable).

[177] *See, e.g.*, R v. Lucas, [1998] 1 S.C.R. 439, para. 50; Can. Egg Mktg. Agency v. Richardson, [1998] 3 S.C.R. 157, para. 58. As the courts in the UK have noted, the ICCPR is an expansion in treaty form of the UDHR and could be relied on for those reasons: Al-Waheed v. Ministry of Def. [2017] UKSC 2, at [42]. Something similar holds true of the ECHR: London Borough of Harrow v. Qazi [2003] UKHL 43 at [121].

[178] VAN ERT, *supra* note 62, at 156 (Stating that §3(3)(f) [of the *Immigration and Refugee Protection Act*] also applies to non-binding instruments to which Canada is signatory). Notably, one judge, Malone. J, cautioned against this interpretation in his concurrence in that case. *Id.*

[179] HERZFELD & PRINCE, *supra* note 89, at §25.2.710; *Collins v State of South Australia* (1999) 74 SASR 200 ¶ 22.

In Australia, Canada, and New Zealand, an emerging issue is to what extent can courts rely on the *United Nations Declaration on the Rights of Indigenous Persons* ("UNDRIP"). In general, courts have concluded that plaintiffs cannot rely on UNDRIP (insofar as it is soft law or otherwise non-binding), except to the extent it has been explicitly incorporated into municipal law.[180]

VII. CONCLUDING REMARKS

Prof. Karen Knop has argued that the reception of foreign law and international law is increasingly indistinguishable in domestic courts.[181] In adopting law, she suggested, they are also transforming it.[182] This Article has shown evidence for Prof. Knop's view. At the same time, it has also identified unique areas of law where the practice of transformation and selective incorporation has occurred in different ways. Put simply, common law courts are increasingly treating different types of law in different ways.

The adoption of customary international law is increasingly subject to considerations of judicial policy, while the reception of treaties and other international legal instruments has been broadened to the point that courts feel empowered to rely on even non-binding treaties when interpreting municipal law. The expansion of human rights law in particular has led to judicial creativity in how international law, including soft law instruments, will be used. The best view would appear to be that courts across the four common law jurisdictions considered here have been willing to rely on international law in wider and more varied contexts than before, while reserving for themselves greater authority to determine when it applies.

Why this has happened depends as much on considerations of democratic legitimacy and concerns for the process of lawmaking as it does on the much-discussed concerns about the fragmentation and densification of international law. When Blackstone wrote, customary international law could be viewed as merely one part of the common law, which judges discovered rather than created. That customary international law was of limited scope and did not rely on the actions of state executives for its creation. Modern customary international law is inherently a product of state executives, depending on state action and assent for its legitimacy. In that regard, its creation largely bypasses parliaments creating concerns that there is no democratic accountability built into the process by which states agree to be bound by it.

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[180] Kevin W. Gray, *Change by Drips and Drabs or No Change at All: The Coming UNDRIP Battles in Canadian Courts*, 11 AM. INDIAN L.J. 1, 8 (2023).

[181] Karen Knop, *Here and There: International Law in Domestic Courts,* 32 N.Y.U. J. INT'L L. & POL. 501, 525 (2000).

[182] *Id.* at 505–06.