2011

International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion (Introduction)

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Incorporation, Transformation, and Persuasion

Edited by
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OXFORD
UNIVERSITY PRESS

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Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Hierarchy and Sources of Law

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

2.1 Treaties

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

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

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

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

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

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

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

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

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

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

2.2 Custom

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

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

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

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

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

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

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

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

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

2.3 *Jus Cogens*

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

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

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

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

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

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

3. Treaties and Domestic Legal Systems

3.1 The Process of Adherence

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

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

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

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

[27] Eg United States.

[28] Eg Argentina, Japan, Venezuela.

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

[30] Hungary.

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

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

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

3.2 Automatic or Legislative Incorporation of Treaties

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

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

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

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

[35] Eg Greece, Bulgaria, Serbia.

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

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

3.3 Interpretation of Treaties

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

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

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

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

[39] VCLT, above n 6.

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

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

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

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

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

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

3.4 Self-Execution or Direct Applicability

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[52] 548 US 331 (2006).

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

4. Custom

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

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

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

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

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

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

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

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

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

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

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

5. Other Sources of International Law

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

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

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

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

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

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

5.1 Declarations, Resolutions, and Recommendations

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

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

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

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

[63] Ibid at 578.

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

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

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

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

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

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

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

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

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

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

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

5.2 Decisions of International Tribunals

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[83] Human Rights Act 1998, s 3.

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

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

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

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

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

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

7. Federal Systems

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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