Leiden Journal of International Law (2013), 26, pp. 351–368
 doi:10.1017/S0922156513000071

INTERNATIONAL LAW AND PRACTICE

'International Law is Part of the Law of the Land': True or False?

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Abstract
This article addresses the question stated in its title by considering not only the role of national courts but also the roles of national legislatures and executives. That emphasis is called for because most of international law most of the time operates through national, rather than international, institutions and in particular through the executive and the legislature. Before I get to those national institutions, I consider two undisputed propositions of law, the varying characteristics of rules of international law and the impact of those characteristics on different national constitutional and legal systems.

Key words
executive; courts; international law; legislature; national law

My two undisputed propositions of international law are:

1. States must comply with their international obligations whatever their national law provides.
2. How states give effect to those obligations is in general for them to determine in accordance with their constitution, law, and practice.

I. National law cannot justify breach of international obligations

So far as the first proposition is concerned, as long ago as 1872 the Alabama Claims Tribunal ruled that the British government could not justify its failure to comply with its obligations owed to the United States on the basis of the insufficiency of

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the legal means of action which it possessed.[1] The International Court of Justice recalled that ruling and an opinion of the Permanent Court of International Justice to the same effect when in 1988 it restated 'the fundamental principle of international law that international law prevails over domestic law'.[2] So far as treaties are concerned, Article 27 of the Vienna Convention on the Law of Treaties declares that a party to the treaty may not invoke the provisions of its internal law to justify its failure to perform a treaty. That proposition is subject to a very narrowly defined qualification relating to fundamental national requirements concerning consent to treaties. Article 27 follows immediately the positive statement that every treaty in force is binding upon the parties to it and must be performed by them in good faith. To emphasize the pre-eminence of international law over national law, the Diplomatic Conference which drew up the Treaties Convention added the prohibitory provision of Article 27 to the text prepared by the International Law Commission (ILC).[3]

The word 'failure' in the Alabama award and in the Vienna Convention highlights an important point. International law does not consist only of prohibitory rules, of obligations, which states are to 'perform' or 'fulfil', to recall further words used in those texts. International law may confer or recognize powers and rights which states may in their discretion exercise – or may not. Consider, for instance, the powers which states have to make claims to maritime zones off their coasts[4] or to make claims by way of diplomatic protection on behalf of their nationals.[5] Their non-exercise of such a power or right, by its very nature, is not a breach of an obligation under international law.

2. National law determines the means of compliance

It is in general for the constitution, law, and practice of each state to determine how it gives effect to its international obligations. I say 'in general' because some rules of international law may appear to impose particular means of implementation on the states bound by them. I take two examples. The law of foreign-state, diplomatic and consular immunity requires action by executive officials (for instance at the border and police) as well as by courts. Under the 1949 Geneva Conventions for the protection of victims of armed conflicts, state parties 'undertake to enact any legislation necessary to provide effective penal sanctions for persons committing' any of the grave breaches defined in the Conventions. As will appear later, national

1 *Alabama Claims Arbitration 1872 (United States of America v. United Kingdom)*, 1 J. B. Moore, International Arbitration 496 (1898).

2 *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion*, [1988] ICJ Rep. 12 at 34, para. 57.

3 United Nations Conference on the Law of Treaties, First Session, Official Records, 72nd meeting, at 427–8. See now more generally Art. 3 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (2001).

4 Arts. 3, 47 and 57 of the United Nations Convention on the Law of the Sea 1982 (UNCLOS), 1833 UNTS 3.

5 See Art. 2 of the ILC Draft Articles on Diplomatic Protection and also Art. 19 and their commentaries (2006).

https://doi.org/10.1017/S0922156513000071 Published online by Cambridge University Press

legislation in respect of crime defined internationally will often in any event be required for constitutional and practical reasons.

National systems for giving effect to international law may vary, first, for reasons relating to the nature of the particular rules of international law in issue and, second, for reasons related to the local constitutional and legal system. While much attention is given to the latter, the former is of major importance. I consider it in some detail.

3. The varying characteristics of international rules

The nature of the international rules in question can be conveniently considered under four heads.

3.1. Different functions

The first emphasizes their varying functions.[6] Particularly when in treaty form, they may establish constitutions, as with the Charter of the United Nations; they may be equated to legislation, as with the United Nations Convention on the Law of the Sea; they may have a conveyancing character, as with boundary and other territorial matters; or they may, especially on a bilateral basis, have a contractual character, with a mutual exchange of promises for instance in respect of air services or visa waiver.

3.2. Different subject matters

Second, the rules may be organized under subject headings, such as those to be found in the chapters of general texts on international law. The principal areas include:

- *war and peace*, such as the United Nations Charter, treaties of alliance, the Geneva and Hague Conventions relating to warfare and the protection of the victims of armed conflict, armistices, treaties of peace, the Statute of the International Court of Justice, the Hague Convention establishing the Permanent Court of Arbitration, and many other treaties for the resolution of international disputes;
- *statehood*, government recognition, sovereignty, jurisdiction, diplomatic and consular relations;
- *disarmament and arms control*, such as the Partial Nuclear Test Ban Treaty, the Non-Proliferation Treaty, the Convention on the Comprehensive Prohibition of Chemical Weapons, the Statute of the International Atomic Energy Agency, and regional arms control measures, for instance in Latin America, the South Pacific, and Antarctica;

6 See A. D. McNair, 'The Functions and Differing Legal Character of Treaties', (1930) 11 BYIL 100.

https://doi.org/10.1017/S0922156513000071 Published online by Cambridge University Press

- *territory*, acquisition, maritime areas;
- *international trade*, including the World Trade Organization (WTO) agreements, regional economic agreements, and a great number of bilateral agreements;
- *international finance*, including the multilateral agreements establishing the World Bank and the related agencies, regional banks, and numerous bilateral arrangements such as loan agreements and double taxation agreements;
- *international commercial transactions*, concerning both the relationship between states (e.g., customs facilitation, common nomenclature for tariffs) and private commercial transactions (including treaties regulating carriage by sea and air, the international sale of goods, and international commercial arbitrations);
- *international communications*, for example by sea and by air, where many multilateral and bilateral treaties regulate traffic rights, safety, and liability; international telecommunications; the recognition of qualifications, for example in respect of piloting ships and aircraft and driving motor vehicles;
- *the law of international spaces*, particularly the long-established law of the sea much changed in recent decades, the relatively new law of the air, and the much newer law of outer space; and the law relating to specific areas such as Antarctica, international canals and rivers, and areas of particular international concern;
- *the law relating to the environment*, a matter of relatively recent general concern, which includes treaties relating to the protection of marine life and the oceans, climate change, oil pollution, the ozone layer, wetlands, and methods of warfare threatening environmental destruction;
- *labour conditions and relations*, particularly the 189 conventions drawn up by the International Labour Organization since 1919;
- *human rights and related matters*, including the general instruments drawn up by the United Nations (international covenants on economic, social, and cultural rights and on civil and political rights), and on more particular matters (e.g., genocide; refugees; prostitution; women; children; discrimination on grounds of race, sex, and disability), and the regional instruments in Europe, the Americas, and Africa); and
- *other areas of international economic and social co-operation*, such as the gathering and dissemination of information (health and other statistics, and the work of the World Meteorological Organization), and combating crimes with international ramifications (e.g., slavery, drug trafficking, international hostage-taking, and hijacking of aircraft and ships).

3.3. Different relationships

To move to a third matter, the rules of international law may also be differentiated in terms of the relationships they govern. Some rules of international law first and

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foremost create rights and obligations simply for the parties, usually but not always states. Examples are the provisions of the Charter of the United Nations which place duties on states not to use force and oblige them to settle their disputes in a peaceful manner; or more generally much of the body of the law of friendly relations between states,[7] or governing their diplomatic relations. It is in practice members of the executive branch who exercise the functions and powers; under many national constitutional systems the foreign-affairs and defence functions are assigned to the executive even if legislative approval or consultation may be required, for instance, for financial appropriations; and, in general, in international law and practice it is the executive of the state that represents the state in its international relations and speaks for it at the international level.[8]

The rule might, second, have consequences for others (especially individuals) in their dealings with the states parties. The law regulating the public aspects of international trade and communications provides a good example: WTO, customs facilitation, the Chicago Civil Aviation Convention, and bilateral air transport agreements operate on a day-to-day basis between states, but traders and airline companies and their customers have very real interests under them, sometimes matched by rights under the relevant national law (e.g., to particular tariff treatment or to operate their aircraft in and out of foreign airports). It will be through members of the executive – customs, immigration, airport officials – operating under their national law, that this body of law is primarily given effect.

The rule might, third, create rights or declare rights owed to an individual by a state. The whole body of human rights law, for instance, regulates the relationship between a state and its own nationals and residents. By contrast, a treaty might create or declare obligations owed by individuals as with the growing body of the law of international crimes. In the event of disputes arising about the rights or obligations of individuals in terms of that law, courts and other tribunals might well become involved and, for reasons discussed later, national legislative action may be required before litigation can be brought.

Fourth, the rule might in substance regulate rights between individuals, with the state parties having little immediate interest. Examples arise under certain treaties governing international trade and communications, labour, human rights, and other family and personal relations. Again, if disputes arise between the individuals involved in these matters, court or tribunal proceedings may be brought and – again as will appear later – legislation may be needed.

7 At the normative level, see the General Assembly's *Declaration on Principles of International Law Concerning Friendly Relations*, GA Res.2625 (XXV). On the bilateral level, see the many treaties of 'Friendship, Commerce and Navigation', including those at issue in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, [1986] ICJ Rep. 14; and *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, [2003] ICJ Rep. 161.

8 As was recently affirmed by the ICJ, see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, at para. 37.

3.4. Capability of direct judicial enforcement

The final varying characteristic of rights and obligations under international law relates to the question whether, as written, the particular rule or principle is itself capable of direct application in national law by the courts without further action by the national legislature or executive.

The rule might empower the state to take action; it has a choice; this is not a matter of obligation, as illustrated earlier by reference to national claims in respect of maritime zones; in practice it has been national legislatures or occasionally executives which have taken action. In some cases, the executive will have negotiated maritime boundaries with neighbouring or opposite states if the areas in question overlap; the executive and legislature may also have delimited the continental shelf following reference to the Commission on the Limits of the Continental Shelf set up under the 1982 UN Convention on the Law of the Sea.

The obligation might have a programmatic character, as in the International Covenant on Economic, Social and Cultural Rights under which each state party undertakes to take steps to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means, including legislative ones.[9]

The wording of the undertaking might be so broad as not to provide judicially manageable standards. What judges have referred to as 'pious declarations' may require legislative development and refinement.[10]

The obligations may be of a procedural character, for instance, requiring states to notify, inform, and consult, as in many trade and environment treaties;[11] to return to my third heading many, but certainly not all, of those provisions operate at the international level, between states.

The treaty text may state rights or duties of individuals in relation to the state or of individuals in relation to one another in such a form that it may be capable of direct application in court proceedings; that in practice is the position of the Vienna Convention on the International Sale of Goods, the Hague Convention on Abduction of Children, and the Montreal (earlier the Warsaw) Convention on Carriage by Air in many jurisdictions. If the text does have that precise character, national authorities may be well advised to give it direct effect – if that is not already achieved by the constitution – rather than adapting it in some way by local drafting.[12]

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9 Courts in some jurisdictions invoke such international rules when interpreting domestic statutes and constitutional provisions (D. Sloss, 'Treaty Enforcement in Domestic Courts: A Comparative Analysis', in D. Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009), 1 at 27–30; see also, in the same volume, J. Dugard, 'South Africa', 448, at 458, 469–70; J. Jayawickrama, 'India', 243 at 259–60; A. Nollkaemper, 'The Netherlands', 326 at 348–51).

10 *Malachtou v. Armefti and Armefti* (1987), 88 ILR 199, at 212.

11 See, for example, the procedural obligations imposed in the 1975 Statute of the River Uruguay, 1295 UNTS 339, Arts. 7–23, addressed by the ICJ in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, [2010] ICJ Rep. 14, 49–51, paras. 80–81.

12 For examples of problems which can arise where the implementing legislation departs from the text of the treaty, see *In re H (Abduction: Custody Rights)* [1991] 2 AC 476, where a UK statute had omitted certain provisions of the Hague Convention on International Child Abduction, and *Gross v. Boda* [1995] 1 NZLR 569, where the implementing statute used different terms from those used in the convention.

I have outlined those varying characteristics of the vast scope of international law because those characteristics are relevant, even decisive, for the ways states, including their courts, give effect to particular parts of that law. That may be so whatever a state's constitutional and legal system says about the place of international law in national law and in particular in the courts.

By their very nature rules which operate essentially at the international level between states or which place procedural obligations on them or which are written in very broad terms will rarely, if ever, arise within the internal legal system. Consider, for example, treaties of alliance which generally begin with broad declarations of friendship; call for negotiation and consultation in certain circumstances; and contain general, often heavily qualified, promises of military assistance by one party in the event of an armed attack on the other, or the state–state and state–international organization notification and consultation obligations in many environmental treaties.

4. IMPACT OF THOSE CHARACTERISTICS IN VARYING NATIONAL CONSTITUTIONAL LEGAL SYSTEMS

I now turn to the different national systems and also to the conflicting theories about monism and dualism, incorporation and transformation, whether international law is a part of the law of the land or merely one of its sources, and the self-executing nature of treaty provisions. I have almost nothing to say about those theories mainly because, with one important qualification, I do not find them useful. I should say two things, one positive, one negative, about theoretical writing. In this area, as in others, I often do find theoretical writing useful but then there is the warning of that American thinker, Daniel Bell, that conceptual schemes are neither true nor false; they are useful or not.[13]

The qualification is that monism and dualism may be seen as a shorthand way of dividing the world's systems between those whose constitutions provide that international law, particularly treaties, is part of the law of the land and those whose constitutions require legislative action before treaties, at least, have effect within the national legal ones. In the common-law world, the United States provides an example of the first, monistic way and the United Kingdom the second, dualistic, way. But that difference is not as sharp in practice as may at first appear. The difference indeed disappears in some of the circumstances already mentioned, where, for instance a particular rule of international law is permissive or broadly drafted or programmatic. And also very important is the attitude towards, and knowledge of, international law of the legal profession in a given time and place.[14]

13 D. Bell, *The Coming of Post-Industrial Society* (1999), xviii, n. 6.

14 See discussion of varying attitudes in Australia and the UK in J. R. Crawford, 'International Law in the House of Lords and the High Court of Australia 1996–2008: A Comparison', (2009) 28 *Australian Yearbook of International Law*, 1; see also Sloss, *supra* note 9, at 6–8; on the evolving approach of English courts, see R. Higgins, 'Dualism in the Face of a Changing Legal Culture', in S. Schlemmer-Schulte and Ko-Yung Tung (eds.) *Judicial Review in International Perspective: Liber Amicorum in Honour of Lord Slynn of Hadley*, Vol. 2 (2000), 9–22; on the movement by American courts (in the opposite direction), see R. J. Bettauer, 'Recent Books on International Law: Book Reviews', (2011) 105 AJIL 397, at 401–3.

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I return to the example of a treaty requiring that certain crimes of international concern be included in the parties' penal code. The treaty obligation might be stated in a broad form, calling expressly in its own terms for further state action ahead of court enforcement, as with the Racial Discrimination Convention which requires the parties to declare punishable by law, among other things, all dissemination of ideas based on racial superiority or hatred. They are to do this with due regard to the principles in the Universal Declaration of Human Rights and the rights expressly set out in the Convention. Those principles and the rights include freedom of expression. National law giving effect to that obligation will obviously call for the careful balancing of that freedom and the required prohibition. As national legislation on racial hate speech and much litigation interpreting and applying that legislation shows, striking that balance is very difficult, as demonstrated recently by Jeremy Waldron in his Holmes Lectures at the Harvard Law School.[15] A further matter in the area of international criminal law is that the legislature generally will have to determine such matters as who is to prosecute, the court which is to exercise jurisdiction, and the penalties which may be imposed.[16] That is so even if the substance of the treaty language is sufficiently precise to be otherwise capable of direct application in a monistic system or by direct legislative enactment in a dualistic one.

The scholarly literature over recent decades on the place of international law in national legal systems has given limited attention to the issues addressed by those preparing the legislation designed to give effect to international law, especially when that attention is compared with that accorded to the work of the courts.[17] If I might make a cautious suggestion about possible future research, it would be to follow the example from more than 30 years ago of a youthful senior lecturer at the University of Adelaide who examined in valuable detail the international law standard in the statutes of Australia and the United Kingdom – 545 of them – with some reference to Canadian and New Zealand legislation.[18] If you have doubts about the value in professional advancement of such diligent attention to the intricacies of legislation

15 J. Waldron, '2009 Oliver Wendell Holmes Lectures: Dignity and Defamation: The Visibility of Hate' (2010), 123 *Harvard Law Review* 1596.

16 Under Art. 4(2) of the Convention against Torture, for example, contracting states are obliged to make the relevant conduct 'punishable by appropriate penalties which take into account their grave nature' (1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85). Similarly, Art. 5 of the Genocide Convention speaks of 'effective penalties' for persons guilty of the conduct described in that instrument.

17 Some useful sources on the former include: two reports by the New Zealand Law Commission (*A New Zealand Guide to International Law and its Sources* (1996 NZLCR 34) and *The Treaty Making Process* (1997 NZLC R45)); the 'accession kits' prepared by the Commonwealth Secretariat in respect of various international instruments, including model legislation and explanatory materials (earlier these focused on the Hague Conventions on private international law; a more recent example relating to the international counterterrorism conventions can be accessed at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B8AE4DB15–88A5–46F2–8037-357DFF7D3EC1%7D_Implementation%20Kits%20for%20Counter-Terrorism.pdf); the database maintained by the International Committee of the Red Cross on domestic legislation giving effect to international humanitarian law (accessible at http://www.icrc.org/ihl-nat.nsf/WebLAW!OpenView); also D. Hollis, M. Blakeslee, and B. Ederington (eds.), *National Treaty Law and Practice* (2005), which analyses practice in 19 states.

18 J. Crawford, 'The International Law Standard in the Statutes of Australia and the United Kingdom', (1979) 73 AJIL 638.

in a number of jurisdictions let me mention aspects of that author's subsequent career – chairs at Adelaide and Sydney, stints on the Australian and International Law Commissions, a chair at Cambridge and a very extensive international barristerial and arbitration practice.

I now consider relevant legislative practice. I list the main forms that legislation takes in the jurisdictions I know, give some examples, and relate the forms and the examples back to the two preceding parts of the paper.

1. *No legislation is needed.* This may be so for several reasons. The rules in question might operate only between states, as with much, but not all, of the Charter of the United Nations (section 3.3 above). State authorities might make the assessment at the time that acceptance of a treaty is in prospect that the existing state of the law gives effect to its terms, or, to the extent that it does not, reservations, if permitted, might be made. The treaty in question might be seen as stating customary international law in areas which might arise before a national court as with the provisions about interpretation of the Vienna Convention on the Law of Treaties – assuming, that is, that customary international law is part of the law of the land, a matter considered in the next part of this paper.

2. *The legislature gives direct effect to the treaty.* In many cases the legislature has stated that the treaty text – included in the legislation – is part of national law. This is particularly the case with private-law conventions regulating international commercial transactions and family matters such as those mentioned in section 3.4 above. Among the other treaty provisions which are given direct effect are those regulating the status, privileges, and immunities of diplomats, consuls, and international officials, their premises and their facilities. To the extent that those treaties empower the host state to take reciprocal action in response to actions of the sending state, the legislation may expressly confer that power, to recall the distinction made in section 1 between rules imposing obligations and rules conferring powers. Extradition and double taxation treaties are further categories which are frequently given direct effect.

3. *Some treaty wording is incorporated unchanged into the body of law.* The assessment might be made that the provisions in question are better incorporated into an existing statute which deals in a more comprehensive way with the matter. So international crime conventions might be incorporated into an existing criminal code; so too with international maritime and civil aviation regulatory matters and with tariff administration (included in general navigation and civil aviation statutes and customs legislation) along with any necessary administrative and penal provisions. In this case there is real value in indicating the treaty base of the legislation – for instance, in the title to the statute or in a statement of purpose, or in notes. If that is not done, there is the danger that those preparing amendments to the legislation or courts interpreting it might neglect that treaty element. In some cases methods 1 and 3 may be used in the one statute.

4. *The substance of the treaty is incorporated into the body of the law without any obvious sign that that has happened.* The difference from the preceding category is that the wording of the treaty may not be written in terms which, as discussed in section 3.4 above, can apply effectively in a court process, for example, a provision in a convention on narcotic drugs requiring 'heavier' penalties for certain categories of offences; or requiring review and a fair process before aliens are deported; or the protection of privacy; or, to return to an earlier example, a prohibition on hate speech. Much of the law of criminal procedure and police powers may also be seen in this category: relevant treaty law requires fair processes and sets down some specific rights and obligations, for instance, in respect of legal representation and appeal, but national law, including that developed by the courts, will spell out the detail.

5. *Powers conferred on administrations are to be exercised in conformity with relevant treaties or to give effect to international obligations by subordinate legislation.* In the second case the subordinate legislation may take any of the forms 2, 3, or 4 above. The regulation or rule-making power, it is often said, should be limited to matters of detail, of a technical character or of less significance, and should not be concerned with matters of principle and policy. Exceptions to that proposition may occur in emergency situations as illustrated by sanctions adopted by the UN Security Council which states members of the UN are in any event obliged to implement. Delegation of rule-making power is to be found in many areas of international relations, relating to almost all the substantive areas listed in section 3.2 above. The proposition that powers be exercised by state organs consistently with international law is increasingly to be found in decisions of some national courts but again there is value if the relevant legislation does, as appropriate, refer to the international provisions in issue.

5. Customary international law in national courts

National law and practice commonly distinguish between customary international law and treaties.

In much of the common-law world customary international law is said to be part of the law of the land.[19] From time to time difficulties have been raised. Sometimes it is referred to as 'a source' of the law rather than part of it,[20] but is that a distinction without consequence?[21] At other times a step of 'transformation' or 'incorporation' or 'adoption' is said to be required, but, given that courts are at least a permitted means of taking that step, of giving effect to international law, that too appears to be a meaningless requirement. A third matter which, in the past, has been of some consequence is that the system of precedent operating in a particular court system may be seen as preventing the recognition by the courts of a change in customary

19 In English law, this phrase has been traced back to the mid-eighteenth century. See a valuable, questioning discussion in R. O'Keefe, 'The Doctrine of Incorporation Revisited', (2008) 79 BYIL 7, at 12–17.

20 *R v. Jones (Margaret)* [2006] UKHL 16 at para. 11; see also discussion in O'Keefe, *supra* note 19, at 55–63.

21 Crawford, *supra* note 14, at 6–7.

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international law. An instance in England some decades ago was provided by the law of foreign-state immunity particularly in respect of commercial transactions,[22] but perhaps because of changing attitudes to precedent the problem has not recurred.[23]

One established limit to the role of customary international law in some common-law countries relates to crimes of international concern. Either by legislation or by court decision, many countries in the common-law world deny the possibility of common-law crimes. In those jurisdictions, as a matter of national law, only the legislature can create new crimes.[24]

That exception to the general proposition that customary international law is part of the law to be applied by the courts indicates the need to be careful about general propositions in this field, as indeed in the law generally. But the general proposition serves for current purposes. A principal application traditionally and still relates to the extent of national jurisdiction and immunities from that jurisdiction. The collections of decisions of national courts applying international law indicate many other areas of application which change according to time and circumstance. The newly established electronic Oxford Reports on International Law in Domestic Courts[25] mainly cover recent decisions but, from the nineteenth century, we find customary international law judgments of the US Supreme Court relating to piracy,[26] the rights of aliens to residence,[27] and prize.[28] Reports from the last ten or so years again have many cases about the extent of national jurisdiction and immunities, extending in some cases to newer areas for national courts such as genocide and crimes against humanity; other cases relate to the legality of the use of force, the obligations of states and individuals in armed conflict, human rights, extradition, law of the sea, state succession, environmental matters, and so on. The list is almost endless. I make just three points about them.

The first is that in many cases the court will be concerned not simply with a rule of customary international law, but also with a treaty, a statute or both, or all of them. I will shortly come to those interactions. The second is that the cases demonstrate major changes in legal culture and in the attitudes of national judges to international law over the decades and between different countries; the knowledge

22 Contrast the approach taken by the Court of Appeal in *Thai-Europe Tapioca Service Ltd v. Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies (Import and Shipping Wing) (The Harmattan)* [1975] 1 WLR 1485, with the approach by the same Court (differently constituted) in *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] QB 529. In the latter, the Court found that that 'the rules of international law, as existing from time to time, do form part of our English law. It follows . . . that a decision of this court – as to what was the ruling of international law 50 or 60 years ago – is not binding today' (ibid., at 554).

23 The approach taken in *Trendtex* was subsequently approved by the House of Lords in *1 Congreso del Partido* [1983] 1 AC 244. See also *R v. Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 1)* [2000] 1 AC 61, 77; discussion in O'Keefe, *supra* note 19, at 78–84.

24 See, for example, the Criminal Code of Canada (R.S.C 1985, C-46), Art. 9(a); in the UK, see *Knuller (Publishing, Printing and Promotions) Ltd v. Director of Public Prosecutions* [1973] AC 435; more recently, in respect of international crimes, see *R v. Jones (Margaret)* [2006] UKHL 16, at paras. 23–29, 60–62, 101; *R (Gentle) v. Prime Minister* [2008] UKHL 20, at para. 49.

25 Oxford Reports on International Law in Domestic Courts (ILDC), accessible at http://www.oxfordlawreports.com.

26 *United States v. Smith* (1820) 18 U.S. 5 Wheat 153; ILDC 1053 (U.S. 1820).

27 *Fong Yue Ting and others v. United States* (1893) 149 U.S. 698; ILDC 1051 (U.S. 1893).

28 *The Paquete Habana and The Lola* (1900) 175 U.S. 677; ILDC 392 (U.S. 1900).

and education of the legal profession is obviously critical in this. Third, I mention one recurring instance of the use of customary international law in national courts – the law relating to the interpretation of treaties. That customary law is routinely stated in terms of Articles 31 and 32 of the Vienna Convention on the Law of Treaties which are generally accepted by the International Court of Justice and many other courts as reflecting customary international law. National courts in those cases must be acting on the basis that customary international law is part of the law they are to apply, even if they do not say so.

6. Interaction of constitutions, common law, and legislation with treaties and customary international law

I now turn to the increasingly common situation where constitutions, legislation, common law, treaty provisions, and customary international law interact. I need to recall the earlier distinction I drew relating to the status of treaties in national legal systems. In some states they are part of the law of the land by constitutional direction. In others they are not. As I mentioned, the United States is in the first category,[29] the United Kingdom in the second. In that latter country as in many other Commonwealth countries the doctrine is long established that the stipulations of a treaty duly ratified by the executive do not, by virtue of the treaty alone, have the force of national law. Legislative action is required.[30]

I have already made the point by reference to the different characteristics of international legal rules that the contrast is not as sharp as may first appear. In United States law, it is only treaties which are 'self-executing', to use a concept which dates back almost 200 years[31] and appears to be narrowing,[32] that have effect in national law, while in the United Kingdom treaties, even if not brought into national law by legislation, increasingly have significance in national courts, 'increasingly', I say, in part because of changes in culture, attitude, knowledge, and education mentioned earlier.

6.1. Constitutions and common law

International law has been used or invoked in interpreting constitutions for a number of reasons: for instance to determine the scope of the power of colonial legislatures or to interpret constitutional guarantees such as the right not to be subject

29 Art. VI(2) of the Constitution of the United States provides in relevant part that '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'.

30 In 1937, the Judicial Council of the Privy Council, on Appeal from the Supreme Court of Canada, stated that 'Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, require legislative action.' (*Attorney-General for Canada v. Attorney-General for Ontario* [1937] 8 ILR 41, 43; [1937] AC 326, 347).

31 See discussion in Sloss, *supra* note 9, at 38.

32 *Medellin v. Texas*, 136 ILR 689; 552 U.S. 491 (2008).

https://doi.org/10.1017/S0922156513000071 Published online by Cambridge University Press

to cruel and unusual punishment,[33] or the right of freedom of expression. When determining the scope of freedom of speech at common law, for instance, when asked to determine whether a right to privacy exists[34] or the extent of the defences to defamation proceedings,[35] or in determining the rights of indigenous people to their lands,[36] judges have drawn on international law. Although my reference to those situations is brief, the relevant cases are often important and controversial. That may also be so with the final category.

6.2. Legislation – interpretation and application

Throughout this paper, I have referred to major changes of attitude over recent decades by lawyers, including judges in a number of jurisdictions, changes which must be based on better knowledge. To take one aspect of knowledge, the legislation may in some cases not indicate its international-law origins and as a consequence cause difficulty for counsel and court alike. For instance, in a case about slavery, the New Zealand Court of Appeal[37] went to the dictionaries when interpreting the relevant provision of the Crimes Act 1961 (NZ) rather than to the 1926 and 1956 conventions dealing with slavery – which the provision was designed to implement – and to the commentary on those conventions. Counsel and the members of the Court were not helped by the notations to the provisions which referred only to nineteenth-century imperial statutes which were actually replaced by the 1961 Act. As already mentioned, those preparing legislation have a range of ways available to them to inform the reader of the international origin of the provision.

In other cases the particular statute may not have a specific international reference point. Rather the task for counsel and the judges may be to appreciate the statute in its wider context. An employment statute, for instance, may authorize employees to bring grievance proceedings against their employer. What if the employer is a foreign state, as in the case of proceedings brought by a former staff member of an embassy? Courts in such situations have not infrequently recognized the immunity of the foreign state from their jurisdiction.

It is interesting to test that action against some of the formulations of the relevance of international law to the interpretation and application of statutes. According to one commonly stated position, international law can be invoked only if the legislation is ambiguous or was enacted for the purpose of implementing the international obligations in issue.[38] Neither of those conditions is satisfied in the employment case: the legislation is in general terms, applying to 'employment', 'employers', and 'employees', and if any rules of international law were in the minds of those preparing the legislation they would most likely be those of the International Labour

33 In the United States, see *Roper v. Simmons* (2005) 543 U.S. 551; in South Africa, see *S v. Makwanyane and Another*, (1995) 127 ILR 3.

34 *Hosking v. Runting & Others* [2004] NZCA 34; [2003] 3NZLR 385.

35 *Lange v. Atkinson* [2000] NZCA 95; [2000] 1 NZLR 257.

36 *Ngati Apa, Ngati Koata and Others v. Attorney-General and Others* [2003] NZCA 117.

37 *R v. Decha-Iamsakun* [1993] 1 NZLR 141.

38 See the statement by Lord Diplock in *Salomon v. Commissioners of Customs and Excise* [1967] 2 QB 116, at 143–4, discussed more recently by Lord Bingham in *Al-Skeini and Others v. Secretary of State for Defence* [2007] UKHL 26, at para. 12.

Organization conferring rights on workers including the right to bring grievance proceedings before employment and other courts and tribunals – a right which would be denied by an employer successfully invoking state immunity. The routine use by the courts of the interpretation law reflected in the Vienna Convention also cannot be squared with the requirements of ambiguity or the purpose of implementation. Further, the rule of international law relevant to the process of interpretation might have been adopted after the legislation in issue had been enacted.

Courts in a number of jurisdictions increasingly adopt and apply a different approach. They do not require ambiguity in the legislation or a legislative purpose of implementing the international rule. Rather they begin with a presumption or principle of interpretation that, so far as its wording allows, legislation should be read in a way which is consistent with the state's international obligations.[39] Those courts make it express that the presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant international text. Similarly, such courts declare that powers conferred by statute are to be exercised, if the wording will permit, so as to be in accordance with international law, both customary and treaty-based.[40]

What is in issue here is a basic matter of method in interpreting legal texts. While this matter relates very much to my topic it also runs far beyond it.[41] I mention just one aspect of it. Courts in dealing with difficult interpretation matters refer to some or all the terms of the text, its context, its purpose, its drafting history, and subsequent practice in its application. This may be seen as a linear process in which, for instance, the interpreter considers it should not go beyond the text unless it first finds the text to be ambiguous. On this basis, meaning is to be found as one would solve a simple equation which has only one solution, following a step-by-step process. The alternative may be suggested by a contrast with that linear system. The process may be seen as an *encerclement concentrique* or *progressif*,[42] with matters being considered and reconsidered, related, and weighed. On that basis the interpreting of a text is as much an art as it a science.[43]

7. Three cases

Many cases in many courts and many statutes in many countries may be used to demonstrate and test the propositions I have asserted. I choose three cases which relate to customary international law, treaties, and statutes, and to the freedom of the high seas, nationality, non-self-governing territories, and racial discrimination.

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39 *Sellers v. Maritime Safety Inspector* [1999] 2 NZLR 44; nor is this a new approach, see *R v. Keyn* (1876) 2 Ex. D. 63, 85, and discussion in P. B. Maxwell, *On the Interpretation of Statutes* (1875), 123–4.

40 See, for example, the approach in *Attorney-General v. Zaoui and Others* [2005] NZSC 38.

41 For general discussion, see K. J. Keith, 'Interpreting Treaties, Statutes and Contracts', Occasional Paper No. 19, (2009) *New Zealand Centre for Public Law.*

42 See M. Huber, 'Commentaire de l'interprétation des traités', (1952) 44(1) *Annuaire de l'Institut de droit international*, 198, at 200; discussed in Keith, *supra* note 41, at 54–6.

43 On the work of the International Law Commission on treaty interpretation, see Keith, *supra* note 41, at 21–8.

7.1. Murder on the high seas

The first decision, from almost 140 years ago, was given by the Court of Appeal of New Zealand in the very early years of British settlement.[44] William Dodd was charged in Dunedin, New Zealand, with murder committed on an American barque on the high seas in the vast southern ocean. He had been born in Nova Scotia but claimed to be a naturalized American citizen. Did the New Zealand Courts have jurisdiction? The relevant admiralty legislation was written in general terms, no ambiguity was to be seen in it, but counsel[45] for William Dodd persuaded the Court of Appeal in effect to read it down. He argued that only the flag state had jurisdiction over crimes on the high seas. He supported that proposition by citing leading textbooks of the day – Sir Robert Phillimore, Henry Wheaton, James Kent, Emerich de Vattel, and Joseph Story, a mark of the strength back then of his library and the Law Society Library. He put those authorities at the forefront of his argument. It was only after he had discussed them that he turned to the legislation. That process of reading general legislation in the context of, or down by reference to, if not as subject to, rules of customary international law recognizing immunities or limits on national jurisdiction may be found in several common-law jurisdictions over a lengthy period. There is not a word in such cases about an ambiguity prerequisite or the need to see the origin of the legislation in the pre-existing international rule. These days, in a case like *Dodd*, courts are able to rely on the proposition about freedom of the high seas and exclusive flag-state jurisdiction over crimes to be found in the UN Convention on the Law of the Sea rather than in disputed customary international law.

7.2. British subject status in a Mandate

The second decision, given by the Privy Council in London on appeal from New Zealand in 1982,[46] held that persons born in Western Samoa between the enactment of the British Nationality and Status of Aliens (in New Zealand) Act 1928, and its repeal and replacement by the British Nationality and New Zealand Citizenship Act 1948, were natural-born British subjects in terms of New Zealand law and became New Zealand citizens under the 1948 Act when that status was first established. For most of that time Western Samoa was a mandated territory under Article 22 of the Covenant of the League of Nations. In terms of that provision it had 'ceased to be under the sovereignty' of Germany, and in application of 'the principle that the well-being and development of such peoples form a sacred trust of civilisation' it was to be under the 'tutelage' of New Zealand as Mandatory. That tutelage was subject to scrutiny by the League. Western Samoa moved to trusteeship status under the United Nations in 1946 and became independent in 1962. After setting out the procedural history of the case and a related case, the senior judge in the Privy Council mentioned that a formidable argument based on the 1928 Act had unfortunately not been brought to the attention of the New Zealand Court of Appeal and had emerged

44 *R v. Dodd* (1874) 2 NZCA 598.

45 Dodd's counsel was Robert Stout (1844–1930), future Attorney-General (1878–79), Prime Minister (1884, 1884–87) and Chief Justice of New Zealand (1899–1926).

46 *Lesa v. Attorney-General* [1982] 1 NZLR 165; [1982] 79 ILR 684.

https://doi.org/10.1017/S0922156513000071 Published online by Cambridge University Press

for the first time in the closing stages of the opening address of plaintiff's counsel. 'Their Lordships will accordingly go straight to the Act of 1928 and first consider its construction independently of the Act of 1923 which it repealed.' That focus on the particular wording, and in particular on the proposition that the Act was to apply to Western Samoa in the same manner in all respects as if it were part of New Zealand led the Privy Council inexorably, as they saw it, to the conclusion that in the present context Western Samoa was part of His Majesty's dominions and within His Allegiance and that birth there conferred natural-born British subject status. It was only in the last substantive paragraph of the judgment that the Privy Council moved away from the legislation and referred to the 'strongest argument' to the contrary – certain resolutions about nationality in mandated territories adopted by the Council of the League of Nations shortly before the enactment of the 1923 Act. Those resolutions (which the Privy Council did not set out) provided:

1. that the status of native inhabitants is distinct from that of nationals of the Mandatory power;
2. that native inhabitants are not invested with the nationality of the Mandatory Power by means of the protection extended to them;
3. that it was not inconsistent with 1 and 2 that individual inhabitants should voluntarily obtain naturalization from the Mandatory Power under its own law; and
4. that it was desirable that native inhabitants who received the protection of the Mandatory Power should be designated by a descriptive title specifying their status under the Mandate.

Consistently with those resolutions and in accordance with imperial legislation agreed to by the United Kingdom and the then British dominions at imperial conferences, the 1923 and 1928 Acts provided for voluntary naturalization (3 above). The dispute was whether the Acts had any wider effect.

The Privy Council agreed with the Court of Appeal that, although the resolutions did not impose obligations binding on New Zealand under International law (although 1 and 2 could be seen as authoritatively declaring the position under the Covenant and Mandates and interpreting existing obligations), they would be relevant in resolving any ambiguity in the meaning of the legislation. But the Privy Council was unable, for the reasons it had already stated, to find any ambiguity or lack of clarity in that language.

The New Zealand Court by contrast had thought that the legislative provisions so far as they related to Western Samoa could 'not be sensibly considered without a reference to the general background of the relations between that territory and New Zealand up to the time of the passing of the [1923] Act'. The Court began with the German renunciation of right and title to Western Samoa in the Treaty of Versailles and traced the various international, imperial, and national measures that were taken to set up the mandate. The Court recorded two propositions that were not disputed by counsel for the person claiming citizenship: the mandate did not cause

the inhabitants of the territory to become British subjects and they could not be naturalized under the law in force before 1923. The Court then set out the League resolutions mentioned above, and commented that: 'In the absence of unequivocal language it is not to be supposed that the New Zealand Parliament would intend to legislate in a manner inconsistent with moral, if not legal, obligations in this sphere'.

The difference between the two courts can be put in terms of the emphasis each placed on particular legislative words and their 'unambiguous meaning', on the one side, and, on the other, their context (not just the Mandatory system but also the imperial one given the exclusive control exercised at that time by the imperial parliament over the general grant of British subject status and the still subordinate position of Dominion legislatures) and purpose (relevantly here 'to make special provisions for the naturalization of persons resident in Western Samoa' in accordance in fact with agreements reached at an imperial conference). While the Privy Council went 'straight' to the 1928 Act, the New Zealand judges looked at it, like its 1923 predecessor, in its broader contexts. While not denying that they were confined *by* the words of the statute, they did not see themselves as confined *to* them.

7.3. Racial discrimination at Prague Airport

The final decision is one given in 2004 by the House of Lords about the actions taken by British immigration officials, at Prague airport, processing Roma wishing to travel to the United Kingdom. The Law Lords held that the system the officers set up to question Roma was inherently and systematically racially discriminatory.[47]

The principal judgment supporting that holding ruled that the practice in question was unlawful both under the relevant United Kingdom legislation and under customary international law and treaties. The court did not indicate how that body of international law was relevant to the application of the statutory power in question. That application was simply taken for granted. In reaching the conclusion about the state of international law the author of the principal judgment referred to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and a dissenting opinion in the 1966 *South West Africa* cases in the International Court of Justice. Another member of the Lords also referred to the statement of the Court in the 1970 *Barcelona Traction* case about obligations binding *erga omnes*, including protection from racial discrimination.

8. THREE CONCLUDING THOUGHTS

The openness of those senior judges to international law issues is in sharp contrast to the attitudes of judges sitting in London only 10 or 20 years earlier. It is a significant instance of the change of culture I have mentioned a number of times. It may also

47 *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport and Another (United Nations High Commissioner for Refugees Intervening)* [2004] UKHL 55.

be seen as a return to earlier positions, as in the case about murder on the high seas. A broader lesson for all of us is about how important it is to look to wider contexts.

A more specific lesson for the academy is, I might suggest, the real importance of all of us trying to persuade our faculty colleagues to see their particular subject areas in their international – and here not just European – context. To be concrete, I refer to two standard subjects of the law curriculum:

- Do legal system courses follow Chancellor James Kent's approach in his enormously influential *Commentaries on American Law* that the national legal system be seen in its international context: he began with the law of nations?[48]
- Do contract courses discuss the United Nations Sales Convention, the Conventions on the Carriage of Persons and Goods and standard terms prepared by the International Chamber of Commerce and others which between them cover much of the contractual activity reflected in many countries' gross domestic product (GDP)?

A final word to return to the beginning. You will have noticed that I have not answered my question – 'International Law Is Part of the Law of the Land' – True or False? The answer is neither. Some of it has to be – recall the *Alabama* and Article 27 of the Vienna Convention on the Law of Treaties.[49] Some of it will be or will have effect in the national legal system if the state decides to take advantage of it by exercising the powers or rights international law recognizes or confers. And some of it can be operated through executive authority, particularly in the fields of defence and foreign affairs, without more. In this area, as in others, an all-or-nothing approach is not possible.

48 J. Kent, *Commentaries on American Law*, (1832), Vol. I, 'Of the Law of Nations', comprises Part I (at 1–200), while 'Of the Government and Constitutional Jurisprudence of the United States' follows in Part II (at 201–445)

49 *Supra* notes 1, 3.

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