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USING INTERNATIONAL LAW IN DOMESTIC COURTS

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Introduction

1. Traditionally public law in England has been home grown. Foreign imports have been rare. That picture is increasingly obsolescent.

2. Most obviously membership of the European Union and the enactment of the Human Rights Act 1998 have incorporated two bodies of substantive international law into our domestic law. Those changes have had wider implications. In the field of Convention Rights now protected by the ECHR, it is necessary to have regard to the case law relating to other similar Conventions and to developments in international law that the ECtHR takes into account in determining the content and requirements of rights under the ECHR.[1] The HRA 1998 and European law are also having a more subtle effect in influencing how the legality of governmental actions is analysed and what may be regarded as possible in the case of statutory interpretation. In addition there is an increasing recognition in our domestic courts of the value of the case law in overseas courts, notably those in the United States and other parts of the common law world, prompted in part, no doubt, by its increasing accessibility.

3. But the influence of international law more generally is also now widely, and increasingly, felt in domestic law. As Lord Bingham has said[2], "*to an extent almost unimaginable even thirty years ago, national courts in this and other countries are called upon to consider and resolve issues turning on the correct understanding and application of international law, not on an occasional basis, now and then, but routinely and often in cases of great importance.*"

4. In part this increasing importance of international law reflects the increasing number of multilateral treaties to which the United Kingdom is a party generating obligations in more fields with which it has to comply, the increasing number of organisations under such treaties capable of producing rules and rulings under them and a movement toward greater recognition of human rights that are not dependent on their embodiment in municipal legislation.

5. Treaties which have not been formally incorporated into domestic but which are nevertheless used in domestic courts include, for example, the Torture Convention,[3] the International Covenant on Civil and Political Rights[4] and the UN Convention on the Rights of the Child.[5]

6. This paper considers (i) what is regarded as the principal obstacle to the influence on international law in domestic courts, the 'dualist' theory of the relationship between

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[1] **Bankovic v Belgium** (2001) 11 BHRC 435 (ECtHR: "*[T]he principles underlying the ECHR cannot be interpreted and applied in a vacuum. The court must also take into account any relevant rules of international law … although it must remain mindful of the convention's special character as a human rights treaty.*" (at [57]). See **R (Al-Jeddah) v Secretary of State for Defence** [2005] EWHC 1809 (Admin) for a recent example of English courts considering the interaction between the ECHR and other international law instruments.

[2] Foreword to Shaheed Fatima, *Using International Law in Domestic Courts* (2005).

[3] **R v Bow Street Magistrates, ex p Pinochet** *(No.3)* [2000] 1 AC 147

[4] **R v Mullen** [2004] UKHL 18 [2005] 1 AC 1

[5] **R v G** [2003] UKHL 50 [2004] 1 AC 1034

international and domestic law; and (ii) means by which that influence nonetheless has been, or may yet come to be, exerted. In particular it considers (a) the presumption that domestic law should be compatible with international law; (b) the principle of legality; and (c) legitimate expectations arising from treaties.

The Dualist Theory

7. The relationship between international law and municipal law is often analysed by reference to the theories of dualism or monism. Dualism sees international law and municipal law as two separate systems of law, each operating within its own enclosed sphere. On this basis the relevance and application of international law within municipal law is determined by municipal law itself. By contrast, monism sees international law and domestic law as part of an integrated legal system. Reception of international law is not something necessarily requiring any specific decision taken in accordance with domestic law.

8. In these terms English law is often categorised as a dualist system. This classification reflects the outcome of the comprehensive review and analysis of domestic law in this respect by the Appellate Committee in the **International Tin Council** case. Two principles of "*non-justiciability*" that the courts in this country should observe in respect of international law were identified in that case by Lord Oliver[6]:

   (1) the first was that "*it is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law*". Domestic courts have no competence in respect of the legal relations between sovereign states. Thus the exercise of the Royal Prerogative in making treaties and the performance of the obligations created by them are not reviewable.

   (2) the second principle is that, "*as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy without the intervention of Parliament.*" On this basis "*as a source of rights and obligations, [an unincorporated treaty] is irrelevant*".

9. There are some doubts about the extent to which English law is, or should be, wholly based on "*dualist principles*."

10. There is first the position of customary international law. Since the decision of the Court of Appeal in **Trendtex**[7], it has often been assumed that, once a rule of customary international law is shown to exist, it is automatically received into domestic law. It is open to question, however, whether this doctrine of incorporation is reconcilable with the first principle of "*non-justiciability*", and the actual decision, in the **International Tin**

[6] **JH Rayner (Mincing Lane) ltd v DTI** [1990] 2 AC 418.
[7] **Trendtex Trading Corp v Central Bank of Nigeria** [1977] QB 529 (CA), at 533 (Lord Denning).

Council case and with other cases[8]. Even so, it might be thought that in any event the practical effect of the doctrine of incorporation may well be limited in this field. For it is normally difficult to show that a rule has emerged as one of customary international law. Customary international law results from a general and consistent practice of States which is followed by them from a sense of obligation under international law. Such a practice has to be both extensive and virtually uniform in the terms of the rule contended for. Moreover the States concerned must have felt obliged to conform in their practice to a legal obligation in customary international law (*opinio juris*).

11. Notwithstanding these difficulties, two types of argument have been advanced, particularly in the field of human rights designed to treat rights or obligations found in unincorporated treaties as rules of customary international law and thus as part of the common law. The first is to the effect that a rule of customary international law has emerged following the international embrace of a multilateral treaty, for example the International Criminal Tribunal for the former Yugoslavia observed, in **Prosecutor v Furundzija**, "*that these treaty provisions [on the prohibition of torture] have ripened into customary international law is evinced by various factors*"[9]. The second is that a multilateral treaty has merely recognised, it has not led to the creation of, a relevant right or obligation that exists in customary international law. As Dame Rosalyn Higgins has put it[10]:

> "*international law is part of the law of the land. Some rights contained in international human rights treaties are not the produce of inter-State contract, but antedate any such multilateral agreement. The treaty is merely the instrument in which a rule of general international law is repeated. It bears repetition in an international instrument, partly because relatively 'new' rights may also be included, and partly because the treaty may involve procedural undertaking for the states parties. But none of that changes the character of a given right as an obligation of general international law. Freedom from torture, freedom of religion, free speech, the prohibition of arbitrary detention, should all fall in that category. As such-and even were these rights not already secure through a separate domestic historic provenance-they would be part of the common law by virtue of being rules of general international law.*"

12. It has also been suggested by Lord Steyn that the dualist doctrine itself should be reviewed in relation to human rights treaties. As he put it[11]

> "*distinguished commentators have criticised what has been called the narrowness of the decision in the House of Lords [in the International Tin Council case]...There is also growing support for the view that human rights treaties enjoy a special status...Commenting on Lewis v Attorney General of Jamaica [2001] 2 AC 50 Lawrence Collins J commented that "it may be a sign that one day the courts will come to the view that it will not infringe the constitutional principle to create an estoppel against the Crown in favour of individuals in human rights cases"....The rationale of the dualist theory, which underpins the International Tin Council case, is that any inroad on it would risk abuses by the executive to the detriment of citizens. It is, however, difficult to see what relevance this has to international human rights treaties*

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[8] **Cf R v Lyons** [2002] UKHL 447 [2003] 1 AC 976 at [39]-[40]; **Nulyarimma v Thompson** [1999] FCA 1192 at [20]-[31], [36]-[53].

[9] 121 ILR 123 at [138]. The possibility of the creation of a rule of customary international law from treaty provisions was noted by the International Court of Justice in the **North Sea Continental Shelf Cases** ICJ Reports (1969) p3 at [71].

[10] "The Relationship between International and Regional Human Rights Norms and Domestic Law", in Developing Human Rights Jurisprudence (1993), vol 5, pp 16-23 p 20.

[11] See **In re McKerr** [2004] UKHL 12 1 WLR 807, at [49]-[50].

which create fundamental rights for individuals against the state and its agencies. A critical re-examination of this branch of the law may become necessary in the future."

13. Some may think that there are objections in principle to a repudiation even in part of the dualist approach in English law, quite apart from the difficulty of the weight of authority which supports it and the extent to which English law has been moulded by it. These include the basic principle, embodied in English constitutional law since at least the 17th century, that the Crown cannot change English law by the exercise of its powers under the prerogative. Sovereign legislative powers lie with the Queen in Parliament.

14. But it is important to recognise that the two principles of 'non-justiciability' identified in the **International Tin Council** case, as Lord Oliver himself pointed out in that case[12], "*do not, however, involve as a corollary that the court must never look at or construe a treaty*". It may have to do so as a matter of domestic law. In private law, for example, it may need to do so for the purpose of ascertaining the rights and obligations of the parties under their contract. More generally a court may have to consider and construe a treaty if an enactment expressly incorporates the treaty into domestic law or requires regard to be had to its terms[13]. But the fact that an enactment does not require reference to be made to a treaty does not mean that an unincorporated treaty is necessarily irrelevant or that the courts must have no regard to it.

15. This paper focuses on certain ways in which unincorporated treaties may be used by the courts in domestic law, notwithstanding the principles of non-justiciability identified in the **International Tin Council** case.

The Presumption Of Compatibility

16. There is a well recognised *prima facie* presumption that Parliament does not intend to act in breach of the United Kingdom's obligations in international law. Primary and secondary legislation normally falls to be construed, therefore, so as to accord with such obligations, rather than to conflict with them. There are, however, some limitations to this presumption.

17. First it may need to be shown that the legislation was enacted to give effect to the relevant obligation in international law[14] or at least that it was enacted when there was such an obligation[15]. Thus, in the well-known words of Lord Diplock in **Garland v BR Engineering:**[16]

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[12] JH Rayner (Mincing Lane) ltd v DTI [1990] 2 AC 418 at 500d.

[13] Thus, for example, section 2 of the Asylum and Immigration Appeals Act 1993 provides that *"nothing in the Immigration Rules...shall lay down any practice which would be contrary to the [Refugee] Convention"* and an individual can appeal against certain immigration decisions on the ground that his removal in consequence of such a decision would breach the United Kingdom's obligations under that Convention. See section 82 and 83(1)(g) of the Nationality, Immigration and Asylum Act 2002.

[14] See per Diplock LJ **Salomon v the Commissioners of Customs and Excise** [1967] 2 QB 116 at 143-4.

[15] cf **Duke v GEC Reliance Ltd** [1988] AC 618; **Fisher v Minister of Public Safety and Immigration *(No 2)*** [2001] 1 AC 435, 445; **Higgs v Minister of National Security** [2000] 2 AC 228 at 242, 246.

[16] [1983] 2 AC 751 (HL) at 771a-c

"[I]t is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligations of the United Kingdom are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation and not to be inconsistent with it."

There are, however, dicta supporting the application of the presumption even where legislation has been enacted before a particular treaty was ratified on the basis that statutes should be considered to be "*always speaking*", i.e. they "*ought … to be interpreted in light of the contemporary social and scientific world*"[17]. In **Boyce v the Queen,** the majority of the Privy Council noted that "*the principle is obviously at its strongest when it appears that the domestic law was passed to give effect to an international obligation or may otherwise be assumed to have been drafted with the treaty in mind*" and that "*its application to laws which existed before the treaty is more difficult to justify*". They were willing to proceed, however, on the hypothesis that it did at least in that case[18].

18. Secondly, precisely because it is a canon of construction, the presumption must yield to a sufficiently clear intention to legislate contrary to the United Kingdom's obligations in international law. In this context, Lord Diplock in **Salomon** observed that "*the sovereign power of the Queen in Parliament extends to breaking treaties*"[19] and in **Re M and H (Minors) (Local Authority: Parental Rights)** Lord Brandon stated[20] that English courts are "*bound to give effect to statutes which are free from ambiguity in accordance with their terms, even if those statutes may be in conflict with the Convention.*"

19. Thirdly, and most significantly perhaps, the House of Lords has held, most recently in **JA Pye (Oxford) Ltd v Graham and another**, that this presumption applies "*only where there [is] an ambiguity in the language of the statute*" in the sense that the statute is fairly open to more than one meaning[21].

20. The significance of this limitation depends, of course, on what different meanings any enactment may fairly be open to[22]. Where it may have the most significant impact, however, is in relation to unambiguous general words. Thus the House of Lords has refused to imply a limitation on a statutory discretion that it had to be exercised compatibly with the ECHR in **R v Home Secretary ex p Brind**[23] and the courts have also

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[17] **Morris v KLM Dutch Airlines**[2002] UKHL 7 [2002] 2 AC 628, at [25] (Lord Steyn). However, as Lord Bingham has pointed out, "*since a statute is always speaking, the context or application of a statutory expression may change over time, but the meaning of the expression itself cannot change*": see **R v G** [2003] UKHL 50 [2004] 1 AC 1034, at [29].

[18] [2004 UKPC 32, [2005] 1 AC 400, at [26].

[19] See note 14, 143d-e.

[20] [1990] 1 AC 686 (HL), at721g

[21] per Lord Browne-Wilkinson (with whom the other members of the Appellate Committee agreed) [2002] UKHL 30 [2003] 1 AC 419 at [65]; see also per Lord Oliver in **the International Tin Council** case at 500e-f; **R v Home Secretary ex p Brind** [1991] 1 AC 696 at 747h-748a, 749h-750a, 760a-g, 763c; **Boyce v R** [2004] UKPC 32 [2005] 1 AC 400 at [25] (majority) with whom the minority agreed cf [81] and their view in **Matthew v The State** [2004] UKPC 33[2005] 1 AC 433 at [55]).

[22] In **Ghaidan v Godin-Mendoza** [2004] UKHL 30 [2004] 2 AC 557, Lord Nicholls and others made the point that a construction which is possible for the purpose of section 3 of the Human Rights Act 1998 may not be one that is otherwise fairly open in this sense in respect of a particular enactment: see [28]-[29], cf Lord Steyn at [44]; Baroness Hale at [145]; cf also Lord Millett at [60].

[23] [1991] AC 696.

held that, unless a decision maker has undertaken or is required by relevant legislation to do so, any decision he takes under a generally expressed power cannot be impugned on the ground that he failed to take into account a treaty obligation[24].

The Principle Of Legality

21. One judicial response aimed at limiting the effect of unambiguous general words is the '*principle of legality*'. The "*principle of legality*", as stated by Lord Browne-Wilkinson in **R v Home Secretary ex p Pierson**[25], and applied in **R v Home Secretary ex p Simms**[26], is that "*a power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the done of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.*" The sorts of rights to protect which the principle of legality has been applied include, for example, rights of access to court and legal advice[27] and legal professional privilege[28].

22. The "*principle of legality*" when applied to the construction of enactments has thus far been concerned, however, with the impact of new statutory powers on what have previously been rights or principles recognised in domestic law. As Lord Steyn has stated[29], for example, "*the principle enunciated in **Pierson** ...by Lord Browne-Wilkinson cannot in any event apply [if] the necessary contextual backcloth of a relevant basic common law principle is absent*". Accordingly the House of Lords rejected an argument based on the principle of legality on the ground that the claimants had no right in domestic law that was being infringed by the exercise of a statutory power, their claim being based on a right in international law[30].

23. It might thus appear that the principle of legality has little relevance in respect of rights arising under international law. But that may well be a mistaken impression. The common law has not traditionally been expressed in terms of rights. It has been conceived more in terms of residual liberties and privileges, against the interference with which courts lean. The recognition of rights in international law may well prompt the re-conceptualisation (or the development) of the common law in terms of rights, and also assist in their definition, thus producing rights to which the principle of legality may then be applied. The use of article 10 of the ECHR to help define the extent of a prisoner's right to freedom of expression in **R v Home Secretary ex p Simms**[31] can be seen as an illustration of such a process.

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[24] **R v Ministry of Defence ex p Smith** [1996] QB 517 at 558; **R v Home Secretary ex p Launder** [1997] 1 WLR 839 at 867c-d; cf also ***R v Khan*** [1997] AC 558 at 578h, 579g-580d; cf also **R v Home Secretary ex p Valmont** (1996) EWCA Civ 598 per Simon Brown LJ.

[25] [1998] AC 539 at 575.

[26] [2000] 2 AC 115 at 130 and131.

[27] **R v Secretary of State for the Home Department, Ex parte Daly** [2001] UKHL 26 [2001] 2 AC 532

[28] **R (Morgan Grenfell & Co) v Special Commissioner of Income Tax** [2001] UKHL 21 [2003] 1 AC 563

[29] **R v Home Secretary ex p Stafford** [1999] 2 AC 38 at 48c-d.

[30] See **R (ERRC and others) v the Immigration Officer at Prague Airport** [2004] UKHL 55, [2005] 2 WLR 1, at [29].

[31] See note 26 above.

24. However there may well be limitations to the extent to which the common law can be reconfigured in this way. As Sir Robert Megary once said, in a passage recently relied on by the House of Lords[32],

> *"It is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another....It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down rules of common law or equity that will carry out the Crown's treaty obligations, or to discover for the first time that such rules have always existed."*

Legitimate Expectation

25. Unincorporated treaties have, occasionally, been treated as giving rise of themselves to legitimate expectations upon which individuals can rely in actions against executive agencies. This is based on the proposition that, where the executive ratifies a treaty, that act constitutes a positive statement to the public that its administrative decision-makers will act in accordance with the relevant treaty obligations.

26. The development of this jurisprudence stems from case law from New Zealand **(Tavita v Minister for Immigration[33])** and Australia **(Minister for Immigration and Ethnic Affairs v Teoh[34])**. The highest endorsement of this approach in England is to be found in two cases. In **R v Secretary of State for the Home Department, Ex parte Ahmed and Patel**[35] Lord Woolf accepted that,

> *"[T]he entering into a treaty by the Secretary of State could give rise to a legitimate expectation on which the public in general are entitled to rely. Subject to an indication to the contrary, it could be a representation that the Secretary of State would act in accordance with any obligations which he accepted under the Treaty."*

In **R v Uxbridge Magistrates' Court, Ex parte Adimi** Simon Brown LJ (as he then was), when giving the judgment of the Divisional Court, accepted the applicant's argument that the United Kingdom's ratification of the Refugee Convention created a legitimate expectation that its unincorporated provisions would be followed[36].

27. The approach apparently thus taken in both these cases sits uncomfortably, however, with two earlier decisions of the Court of Appeal: **Chundawadra v IAT**[37]and **Behluli v Secretary of State for the Home Department**[38]. There are also other difficulties in principle in treating ratification of a treaty, which involve acceptance by one State that it

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[32] See **Malone v the Metropolitan Police Commissioner** [1979] Ch 344, at 372, 379 relied upon in **Wainwright v the Home Office** [2003] UKHL 53, [2004] 2 AC 406, at [19]-[20].
[33] [1994] 2 NZLR 257 (New Zealand Court of Appeal).
[34] (1995) 183 CLR 273 (High Court of Australia).
[35] [1999] Imm AR 22 (CA), at 36.
[36] [2001] QB 667 (DC), at 686b-e.
[37] In **Chundawadra**, pre-HRA, Glidewell LJ dismissed the argument based on a legitimate expectation arising from ratification of the ECHR in the following terms: *"it is not appropriate to introduce the Convention into the law of England by the back door of legitimate expectation when the front door is firmly barred [because of the principles of non-justiciability and no direct effect; see §§7-9]."*[1988] Imm AR 161 (CA), at 173-174
[38] In **Behluli** Beldam LJ rejected as incompatible with **Brind** the argument that a legitimate expectation could arise from the executive's ratification of a treaty.

has an obligation owed to the other parties to that treaty on the international plane, as involving a representation to others that specific domestic authorities will comply with those obligations as a matter of domestic law.

28. It should be noted, therefore, that in **R (ERRC) v Immigration Officer at Prague Airport** Simon Brown LJ regarded his earlier views in **Adimi** as "*at best superficial*" and his conclusion there as "*suspect*". In the same case Laws LJ regarded **Ahmed** and **Adimi** with "*unease*"[39]. This doubt has been echoed by the High Court of Australia in **Re Minister for Immigration and Multicultural Affairs, Ex parte Lam**[40] in which three judges expressed reservations about the decision in **Teoh**.

29. Attempts to treat ratification of itself as creating a legitimate expectation in domestic law that treaty obligations will be complied with may not prove fruitful. But that does not mean that a decision maker may not himself create a legitimate expectation that he will comply with requirements imposed by a treaty[41].

Conclusion

30. This paper has not attempted to do more than outline some of the ways in which international law, both conventional and customary, may and may not be used by courts in this country. What is apparent, however, merely from a cursory examination of the recent work of the Appellate Committee and the Privy Council is the increasing extent to which international law, particularly in the field of human rights, is coming to influence the determination of cases in this country.

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[39] [2003] EWCA Civ 666 [2004] QB 811, at [51] (Simon Brown LJ), [100] (Laws LJ). The House of Lords, cited above, did not consider this issue.

[40] (2003) 195 CLR 502.

[41] See e.g. **R v Home Secretary ex p Launder [**1997] 1 WLR 839.