

*International law today is not confined to regulating the relations between the states. Its scope continues to extend. Today matters of social concern, such as health, education, and economics apart from human rights fall within the ambit of international regulations. International law is more than ever aimed at individuals.*¹

Treaty Enforcement in Domestic Courts: A Comparative Analysis

David Sloss

This book presents a comparative analysis of the role of domestic courts in treaty application. In evaluating the role of domestic courts, it is helpful to distinguish among three types of treaty provisions. “Horizontal” treaty provisions regulate relations between states; “vertical” provisions regulate relations between states and private parties; and “transnational” provisions regulate relations among private parties that cut across national boundaries. Domestic courts are rarely invited to apply horizontal treaty provisions. However, private parties frequently seek access to domestic courts to vindicate rights that arise from vertical and/or transnational treaty provisions.

The use of treaties to regulate vertical and transnational relationships is not a new phenomenon. Two centuries ago, Chief Justice Marshall, writing for the U.S. Supreme Court, declared: “Each treaty stipulates something respecting the citizens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected.”² Although states have used treaties to regulate transnational and vertical relationships for centuries, there has been an exponential growth in treaty making in this area over the past few decades. The rapidly growing number of treaties that involve transnational and vertical relationships is one reason why it is important to understand the role of domestic courts in treaty enforcement.

Domestic adjudication is not the only mechanism for private parties to vindicate their treaty-based rights, but it is an important mechanism. On the international plane, there is frequently a gap between rights and remedies, because treaty provisions that are intended to protect the rights of private parties often do not grant the intended beneficiaries a right of access to international courts to adjudicate claims arising under those treaties. Insofar as treaties create private rights without granting private parties access to international tribunals, the effective enforcement of transnational and vertical treaty provisions may depend on the willingness of domestic courts to enforce treaty-based rights on behalf of private parties.

This book examines the application of treaties by domestic courts in twelve countries: Australia, Canada, China, Germany, India, Israel, the Netherlands, Poland, Russia, South Africa, the United Kingdom and the United States. These twelve countries were not chosen at random: wealthy, democratic countries are over-represented in the sample. It is difficult to draw reliable conclusions about the 190-plus states in the world based on the twelve states analyzed in this

¹ People’s Union for Civil Liberties v. Union of India, 18 December 1996, [1999] 2 LRC, 1 at 12, per Kuldeep Singh J.

² Owings v. Norwood’s Lessee, 9 U.S. (5 Cranch) 344, 348 (1809).

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volume. Even comparisons among the twelve countries are not wholly “scientific.” The book includes one chapter on each of the twelve countries; each chapter is written by a different author. Comparisons across countries are invariably influenced, to some degree, by the individual authors’ decisions about which points deserve emphasis. Despite these caveats, though, the analysis in the subsequent chapters does support several interesting conclusions.

The central question addressed in each of the twelve country chapters is this: do domestic courts provide remedies to private parties who are harmed by a violation of their treaty-based primary rights? I use the term “remedies” here, and throughout this Introduction, in a broad sense to include a judicial order designed to prevent an incipient treaty violation or to halt an ongoing violation, as well as orders designed to compensate victims for past harms. In brief, the most significant conclusions that emerge from this study are as follows:

- Domestic courts in eight of the twelve countries examined in this volume -- Australia, Canada, Germany, India, the Netherlands, Poland, South Africa and the United Kingdom -- generally do enforce treaty-based rights on behalf of private parties. On the other hand, the evidence is somewhat mixed for the other four countries: China, Israel, Russia and the United States.
- In China, Israel and Russia, the trends are moving in the direction of greater judicial enforcement of treaties on behalf of private parties. The United States is the only country studied in this volume where the trends are moving in the opposite direction.³
- The conventional wisdom is wrong, insofar as the conventional wisdom holds that direct judicial application of treaties is a more effective means of treaty enforcement than indirect application. In countries such as Canada and India, where domestic law precludes direct application of treaties, domestic courts play an active role in treaty enforcement by applying treaties indirectly. In contrast, in the United States and China, for example, although domestic courts have the authority to apply treaties directly in some cases, they rarely utilize their judicial power to remedy treaty violations committed by government actors.

Comparative analysis of the role of domestic courts in treaty enforcement is a topic that has received insufficient scholarly attention. Prior comparative studies of treaties within domestic legal systems have tended to focus primarily on the roles of the legislative and executive branches.⁴ The most significant prior work that focused on the role of domestic courts is now more than twenty years old, and it dealt only with Western Europe and the United States.⁵ In contrast, this book provides an updated analysis of the domestic judicial enforcement of

³ Throughout the nineteenth century, U.S. courts routinely enforced treaties on behalf of private parties. See David Sloss, *When Do Treaties Create Individually Enforceable Rights?*, 45 Colum. J. Trans'l L. 20 (2006). In recent years, though, U.S. courts have been far less hospitable to treaty claims. See U.S. Chapter in this volume.

⁴ See, e.g., *National Treaty Law and Practice* (Duncan B. Hollis, Merritt R. Blakeslee & L. Benjamin Ederington, eds.) (2005); *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (Stefan A. Riesenfeld and Frederick M. Abbott, eds.) (1994).

⁵ *The Effects of Treaties in Domestic Law* (Francis G. Jacobs & Shelley Roberts, eds.) (1987).

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treaties in countries from Africa, the Middle East, the Asia-Pacific region, Eastern and Western Europe, and North America.⁶

This book consists of fifteen chapters, including this Introduction. Chapters Three through Fourteen provide detailed analyses of the judicial enforcement of treaties in the twelve countries identified above. Chapter Two, written by Professor Sean Murphy, addresses the question whether international law obligates states to grant private parties access to national courts to vindicate treaty-based rights. Chapter Fifteen, written by Professor Michael Van Alstine, provides an overall summary of the twelve country chapters.

In light of the contributions by Professors Murphy and Van Alstine, this Introduction is intended to accomplish three distinct tasks. Part One presents some general comments on the scope and relevance of the overall project. Part Two provides a summary of the twelve country chapters, focusing on the question whether domestic courts provide remedies to private parties who are harmed by a violation of their treaty-based rights. Part Two differs from Professor Van Alstine's chapter in that he provides a broad-based overview of the materials presented in the twelve country chapters. In contrast, Part Two draws selectively from the country chapters to provide a more narrowly focused analysis of a single question.

Part Three presents an alternative perspective on some of the international law issues analyzed in Professor Murphy's chapter. In his contribution, Professor Murphy presents a very thorough and insightful analysis of the question whether international law obligates "a state to open its courts for private persons to vindicate rights or benefits that a treaty accords to them."⁷ He concludes that the answer is generally "no," except insofar as a specific treaty creates an explicit or implicit obligation to do so. Part Three of this Introduction frames the question in a slightly different way: it asks whether customary international law obligates states to provide remedies for private parties who are harmed by a violation of their treaty-based rights. By posing a different question, I reach a slightly different answer. Part Three contends that international law sources provide some support for the proposition that customary international law obligates states to provide remedies for private parties who are harmed by a violation of their treaty-based rights. Ultimately, though, I agree with Professor Murphy that there is presently insufficient evidence of state practice or *opinio juris* to establish such a rule of customary international law. Professor Murphy contends, and I agree, that there may be an emerging rule of customary law along these lines.

I. Preliminary Issues

The bulk of this Introduction is devoted to an analysis of judicial practice in the twelve states surveyed in this volume. Before turning to that subject, however, there are two points that merit brief preliminary comments.

⁶ The project originally envisioned chapters on Argentina, Brazil, Mexico, Nigeria and South Korea, in addition to the other countries noted above. Unfortunately, none of those chapters materialized.

⁷ See Murphy Chapter, pg. 1.

A. Domestic Courts as Transnational Actors

There are at least three distinct reasons why it is important for domestic courts to provide remedies for individual victims of treaty violations. First, many modern treaties codify an agreed understanding about the content of universal moral norms. Human rights treaties and humanitarian law treaties, in particular, express the collective moral judgment of people from many different cultures about the standards of conduct that determine what is, and what is not, an acceptable way for governments to treat individual human beings. To the extent that domestic courts enforce the norms embodied in those treaties, governments are more likely to comply with those norms. Judicial enforcement by domestic courts is not the only factor that influences governmental compliance, but it is a significant factor. The better the record of governmental compliance, the closer we come to realizing in practice the humanitarian ideals that underlie contemporary human rights and humanitarian law.

Second, there are numerous treaties that do not reflect universal moral norms, but that codify agreements designed to promote more efficient and effective transnational relations between and among private parties. For example, the New York Convention⁸ facilitates arbitration of international business disputes by establishing rules that promote effective enforcement of arbitral awards in domestic courts. Similarly, the Warsaw Convention⁹ facilitates international aviation by providing a set of agreed rules governing the liability of airlines for international transportation of cargo and passengers. The New York Convention and the Warsaw Convention are just two examples of broad-based, multilateral treaties that ultimately rely on domestic courts as a principal enforcement mechanism. These and other treaties help promote the growth of a global economy that provides economic benefits for billions of people. If domestic courts failed to enforce such treaties, the private actors whom the treaties are designed to benefit could be deprived of those benefits.

Third, as mentioned above, the fact that many treaties create private rights without granting private parties access to international dispute resolution mechanisms creates a right-remedy gap on the international plane. Domestic courts are not the only actors capable of filling that gap, but they can play a vital role in bridging the gap. Conversely, insofar as domestic courts fail or refuse to apply treaty-based norms, there is a risk that those norms may be under-enforced.

Of course, there are limits on the role of domestic courts in enforcing treaties. Domestic courts can help promote compliance with vertical and transnational treaty obligations, but they do not ordinarily become involved in regulating horizontal relations between states. Additionally, there are some vertical and transnational treaties that create international dispute resolution mechanisms, thereby relegating domestic institutions to a secondary role.¹⁰ For some treaties that lack international enforcement mechanisms, some states may prefer to rely on

⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, U.N. Registration No. I-4739 [hereinafter, New York Convention].

⁹ Convention for the Unification of Certain Rules Relating to International Carriage by Air, opened for signature Oct. 12, 1929, Registration No. LoN-3145 [hereinafter, Warsaw Convention].

¹⁰ For example, bilateral investment treaties typically rely on investor-state arbitration as the primary dispute resolution mechanism.

domestic administrative mechanisms, rather than courts, for the domestic application of vertical and/or transnational treaty provisions.¹¹ Despite these and other limitations,¹² though, the chapters in this volume show that domestic courts in many countries do play a significant role in treaty enforcement. This is a very positive development because vigorous application of treaty norms by domestic courts helps promote better compliance with those norms.

B. Monism and Dualism

The terms “monism” and “dualism” are often used to describe two different theoretical perspectives on the relationship between domestic and international law. “Monists” believe that domestic and international law are both parts of a single global legal system. “Dualists” believe that domestic law and international law are independent legal systems.¹³ However, the terms “monism” and “dualism” are also used to describe different types of domestic legal systems.¹⁴ When used in this way, the proposition that state X is “dualist” does not say anything about the relationship between domestic and international law generally; it merely says something about the status of international law in the domestic legal system of state X.

Although scholars use the terms “monist” and “dualist” to describe different types of domestic legal systems, the actual legal systems of many states do not fit neatly into either of these two categories.¹⁵ Nevertheless, it is helpful to divide the twelve countries analyzed in this volume into two broad groups: traditional dualist states and “hybrid monist states.”¹⁶ Australia, Canada, India, Israel and the United Kingdom are traditional dualist states; treaties never have the force of law within their domestic legal systems. China, Germany, the Netherlands, Poland, Russia, South Africa and the United States are hybrid monist states; in these states, at least some treaties do have the force of law within the domestic legal system.¹⁷

One might assume that domestic courts play a more active role in enforcing treaties in hybrid monist states than they do in traditional dualist states. However, the evidence in the ensuing chapters belies that assumption. In the five traditional dualist states examined in this volume, domestic courts play a fairly active role in treaty enforcement, but they apply treaties *indirectly*, not *directly*. There are many variations on the theme of indirect application. The most common approaches are for legislatures to enact legislation to incorporate a treaty into domestic law, and for courts to apply a presumption that statutory and/or constitutional provisions should be interpreted to conform to international obligations codified in unincorporated treaties. In four

¹¹ For example, many states have created administrative mechanisms to implement their obligations under the Refugee Protocol. In these circumstances, courts typically provide a fallback mechanism to help ensure the integrity of the administrative process.

¹² See *infra* notes 343-49 and accompanying text (in this Introduction).

¹³ See, e.g., Ian Brownlie, *Principles of Public International Law* pg. 31-33 (7th ed. 2008).

¹⁴ See, e.g., Anthony Aust, *Modern Treaty Law and Practice* 181-95 (2d ed. 2007).

¹⁵ See *id.* at 181-82.

¹⁶ I credit Professor Michael Van Alstine with coining the term “hybrid monist states.” See Van Alstine Chapter in this volume. I prefer the term “hybrid monist state” because it is doubtful whether there are any actual states that adopt a pure monist system – i.e., a system in which all international legal rules trump all domestic legal rules.

¹⁷ Although it is true that at least some treaties have the force of law in hybrid monist states, these states adopt very different approaches to the hierarchical relationship between treaties and other laws. See Van Alstine Chapter (comparing hybrid monist states in this respect).

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of the five dualist states (Australia, Canada, India and the United Kingdom), the judicial presumption of conformity, combined with the legislative practice of enacting statutes to implement treaties that require domestic implementation, means that private parties who are harmed by a violation of their treaty-based rights can usually obtain a domestic legal remedy, even though the courts do not apply treaties directly. State practice in Israel is similar, except for cases involving the Occupied Territories, where there is a history of judicial complicity in government violations of the Geneva Conventions.¹⁸

In the seven hybrid monist states, domestic courts sometimes apply treaties directly as law because, in these states, at least some treaties have the status of law within their domestic legal systems. In four of these states – Germany, the Netherlands, Poland, and South Africa – the evidence suggests that domestic courts play a fairly active role in treaty enforcement. In these four states, private parties who are harmed by a violation of their treaty-based rights can generally obtain a domestic legal remedy.¹⁹

In the United States, Russia and China, the evidence is somewhat mixed. To appreciate this point, it is helpful to distinguish between “transnational” cases, where private parties seek to enforce treaties against other private parties, and “vertical” cases, where private parties seek a remedy for an alleged treaty violation by a government actor. The country chapters show that domestic courts in the United States, Russia and China routinely apply treaties to help resolve transnational disputes between private actors.²⁰ However, domestic courts in Russia and China rarely grant judicial remedies to private parties who are the victims of treaty violations committed by the host government.²¹ U.S. courts occasionally grant remedies to private actors in these types of cases, but U.S. courts frequently avoid holding government actors accountable for treaty violations by adopting an interpretive methodology that favors the government’s interpretation of a treaty, or by applying judicial avoidance doctrines to refrain from deciding the merits of a treaty-based claim.²²

In sum, there does not appear to be any significant correlation between the monist/dualist dichotomy and the actual practice of domestic courts, except for the purely formal matter that courts in hybrid monist states sometimes apply treaties directly, whereas courts in dualist states apply treaties only indirectly. In terms of practical results, though, “[t]he attitude of courts themselves may be as important as the formal features of the constitutional system.”²³

II.

An Analysis of State Practice

Part Two analyzes judicial practice in the twelve states surveyed in this volume, focusing on the question whether domestic courts provide remedies to private parties who are harmed by a violation of their treaty-based primary rights. Part Two is divided into five sections. The first

¹⁸ See Israel Chapter.

¹⁹ See *infra* Parts II.A and II.C (in this Introduction).

²⁰ See chapters in this volume on China, Russia and the United States.

²¹ See *infra* Part II.E (in this Introduction).

²² See U.S. Chapter in this volume.

²³ Andre Nollkaemper, Netherlands Chapter, text at note 158.

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section analyzes state practice in three continental European states: Germany, Poland and the Netherlands. The second section addresses three Commonwealth states: Australia, Canada and the United Kingdom. The third section discusses judicial practice in two other Commonwealth States: India and South Africa. India and South Africa are unique because their highest courts have an established record of judicial activism. Domestic courts in these eight states generally do provide remedies for treaty violations.

The fourth section addresses Israel and the United States, countries with independent judiciaries that have been hesitant to play an active role in overseeing executive compliance with national treaty obligations. The final section analyzes judicial practice in Russia and China, two states that do not have strong, independent judiciaries. In these four states, domestic courts generally do enforce transnational treaty obligations. However, with respect to vertical treaty obligations, domestic courts in Russia, China and the United States do not consistently provide remedies for private parties who are harmed by a violation of their treaty-based primary rights. In Israel, the problem of judicial under-enforcement relates primarily to the Occupied Territories.

A. Germany, Poland and The Netherlands

In Germany, Poland and the Netherlands, domestic courts play an active role in promoting compliance with treaty obligations. Courts in these countries generally do provide remedies for individuals who are harmed by a violation of their treaty-based primary rights. There are four key features of these legal systems that help explain this judicial practice. First, in all three states, many treaties are a part of the domestic legal order. Second, the domestic courts in these states recognize that many treaties have “direct effect” and that individuals have standing to invoke treaties before domestic courts. Third, the courts in all three states often apply treaties indirectly to harmonize domestic law with the state’s international obligations. Finally, all three states are members of the European Union. This section briefly analyzes the significance of each of these factors.

1. *Treaties within the Domestic Legal Order:* Under the constitutional systems of Germany, Poland and the Netherlands, at least some treaties have the status of law within the domestic legal system. In the Netherlands, “[a]ll treaties that are binding on the Netherlands as a matter of international law are automatically incorporated and thus have the force of law in the domestic legal order.”²⁴ In Germany, “[u]nder the prevailing interpretation of Article 59 of the Grundgesetz, duly ratified treaties are part of German law.”²⁵ In Poland, “[a] ratified treaty becomes, by virtue of its ratification, a ‘part of the domestic legal order’.”²⁶ However, “agreements of a purely administrative nature” that are binding on Poland as a matter of international law, but that enter into force without ratification, are not part of the domestic legal order.²⁷

Although many treaties are part of the domestic legal orders in Germany, Poland and the Netherlands, the three states differ in terms of the status accorded to treaties. In the Netherlands,

²⁴ Netherlands Chapter, text after note 23.

²⁵ Germany Chapter, text at note 2.

²⁶ Poland Chapter, text at note 38 (quoting Article 91, sec. 1 of the Constitution).

²⁷ Id., text at note 27.

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treaties have a higher rank than statutes: in the event of a conflict between a statute and a treaty, the treaty takes precedence, even with respect to a later-in-time statute.²⁸ Indeed, “the supremacy of treaties over domestic law applies even to the Constitution itself, at least in those cases where a treaty has been adopted pursuant to article 91(3) of the Constitution, which requires a two-thirds majority vote in both Chambers of Parliament.”²⁹

In Poland, the rank of a treaty within the domestic legal order depends upon the process that precedes ratification. Certain important categories of treaties cannot be ratified without prior statutory authorization.³⁰ “Treaties ratified upon statutory authorization enjoy a suprastatutory rank. . . . This constitutional arrangement places the rank of treaties on a higher level than the rank of authorizing statutes.”³¹ In contrast, treaties ratified without statutory authorization do not take precedence over statutes. “[S]ome authors accept that such treaties have a rank equal to ordinary statutes; others assign them a sub-statutory position.”³²

In Germany, also, the rank of a treaty within the domestic legal system depends on the domestic process used to authorize ratification. Article 59 of the German Constitution authorizes the President to conclude treaties. However, “ratification requires the prior consent of the Parliament if the treaty deals with the ‘political relations’ of the Federation, or if it relates to matters that would require legislation when regulated domestically.”³³ “The domestic rank of treaties concluded with legislative consent is equal to that of domestic legislation.”³⁴ In contrast, treaties ratified without legislative consent have a lower rank.

2. *The Direct Effect of Treaties and the Rights of Private Parties:* A treaty provision has “direct effect,” or is “directly applicable,” if domestic law authorizes a domestic court to apply that treaty provision as a rule of decision. A treaty provision is “invocable” by a private party if that person is empowered to invoke that provision before a domestic court.³⁵ Conceptually, “invocability” and “direct effect” are two distinct issues. However, these two issues are closely linked in the judicial practice of courts in Germany, Poland and the Netherlands. In all three countries, treaty provisions that protect individual rights are generally considered to be directly applicable and invocable by private parties.

The Constitution of the Netherlands, article 93, specifies that treaty provisions “that are binding on all persons by virtue of their contents shall become binding after they have been published.”³⁶ This provision “has been interpreted in case law to mean that a treaty provision has to be sufficiently clear to function as ‘objective law’ in the domestic legal order.”³⁷ Thus, treaty provisions have direct effect if they are “sufficiently clear, by virtue of their contents, that

²⁸ Netherlands, text at note 32 (citing Art. 94 of the Dutch Constitution).

²⁹ Id., text at note 33.

³⁰ See Poland chapter, text at notes 28-29.

³¹ Id., text at notes 42-43.

³² Id., text after note 48.

³³ Germany chapter, text at notes 26-27.

³⁴ Id., text preceding note 41.

³⁵ See Netherlands Chapter, Part VI.B.

³⁶ Constitution of the Netherlands, art. 93 (quoted in Netherlands Chapter, after note 27).

³⁷ Netherlands Chapter, text at note 28.

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private parties can ascertain what conduct is permitted or prohibited.”³⁸ By its terms, Article 93 specifies who is bound by a treaty provision; it does not specify who is entitled to invoke a treaty before a domestic court. “In practice, though, Article 93 is also interpreted and applied in such a way that individuals may invoke a” treaty only if it satisfies the requirements of Article 93.³⁹

In the Netherlands, the question whether a treaty provision protects individual rights is understood to be an issue of treaty interpretation. Dutch “courts ask whether the parties intended to grant rights to individuals. . . . If the intention of the parties is not clear from the treaty or its negotiating history, the court will analyze the nature and content of the treaty to ascertain whether its provisions are designed to protect the interests of individuals.”⁴⁰ If a treaty is designed to protect the interests of private parties, the Dutch courts will say that it grants rights to private parties. Moreover, “[i]f a treaty does confer rights on private parties, then, as a matter of Dutch law and practice, those parties can invoke the treaty before a domestic court.”⁴¹ Thus, in the Netherlands, if a treaty grants rights to private party P, P can invoke the treaty before a domestic court and the court will apply the treaty as a rule of decision in an appropriate case.

The situation in Poland is similar. The Polish Constitution specifies that a treaty provision is not directly applicable if it “depends on the enactment of a statute.”⁴² A treaty provision that depends on the enactment of a statute is “not self-executing”; other treaty provisions are “self-executing.” Polish case law establishes that a treaty provision is self-executing, and hence directly applicable, if it “has been drafted in a complete manner, i.e., in a manner allowing its use as an exclusive legal basis for resolving an individual case or controversy.”⁴³ Moreover, if a treaty provision is self-executing, it is “regarded as conferring rights on individuals and, consequently, may (and should) be applied by the courts as an independent legal basis for judicial decisions.”⁴⁴ Thus, in practice, Polish courts, like Dutch courts, link the ideas of private rights, invocability and direct effect. A treaty that confers rights on private parties is invocable by the right-holder; it can also be applied directly by a court.

In Germany, as in Poland, courts distinguish between self-executing and non-self-executing treaties. A self-executing treaty is invocable by private parties and can be applied directly by the courts. In Germany, direct judicial application of treaties on behalf of private parties is “not considered controversial as long as [the treaty] create[s] rights and obligations in the relationship between the State and its citizens . . . when individual citizens claimed rights against the State on the basis of international law, it was quite natural that the State that had given its word to other states could be regarded also bound towards its own citizens.”⁴⁵ In short, if a treaty grants rights to private parties and imposes corresponding duties on the State, the judiciary will enforce those rights on behalf of an aggrieved individual.

³⁸ Id., text at notes 28-29.

³⁹ Netherlands Chapter, part VI.B.

⁴⁰ Id., text after note 79.

⁴¹ Id., text after note 78.

⁴² See Poland Chapter, text preceding note 129.

⁴³ Id., text preceding note 129.

⁴⁴ Poland Chapter, text at note 42.

⁴⁵ Germany Chapter, text after note 12.

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Courts in all three countries have stated (or assumed) that the European Convention on Human Rights is both directly applicable and invocable by individual litigants.⁴⁶ Additionally, courts in the Netherlands “have identified a large number of international treaties and agreements that create individual rights that are invocable in domestic courts. These include all the conventions on human rights, the Convention relating to the Status of Refugees, various treaties covering social security and labour law, and numerous other agreements.”⁴⁷ The Polish Supreme Court has held that Article 8 of the Paris Convention for the Protection of Industrial Property “is directly enforceable in the domestic legal system.”⁴⁸ Similarly, Polish courts frequently apply the Hague Convention on Civil Aspects of International Child Abduction as a self-executing treaty.⁴⁹

In Germany, Poland and the Netherlands, the fact that (some) treaties are part of the domestic legal order makes it possible for domestic courts to apply treaties directly. If a treaty provision is sufficiently clear, and if it is designed to benefit private parties, judicial practice establishes that the provision is invocable by private parties and directly applicable by the courts. This helps explain why judicial practice in these countries is generally consistent with the principle that private parties who are harmed by a violation of their treaty-based primary rights are ordinarily entitled to a judicial remedy for the harm they suffered.

3. *Friendly Interpretation and Indirect Application:* Although Germany, Poland and the Netherlands all permit direct application of treaties by domestic courts, the courts in these countries also apply treaties indirectly to promote compliance with international obligations. Indirect application occurs when a court invokes a treaty as an aid to interpretation of a domestic constitutional or statutory provision.

Article 9 of the Polish Constitution specifies that “the Republic of Poland shall respect international law binding on it.”⁵⁰ Accordingly, Polish courts accept that “domestic law (including the Constitution) should be interpreted in a manner ‘friendly’ towards obligations resulting from international and European law.”⁵¹ In Germany, the Constitution does not state explicitly that courts must respect international law. Nevertheless, the German Constitution is “famous for its ‘friendliness’ towards international legal relations.”⁵² Accordingly, the task of domestic courts “is to allow Germany to fulfill her international obligations by faithfully interpreting German law in accordance with Germany’s international obligations, in particular treaty obligations.”⁵³ Similarly, in the Netherlands, the Supreme Court has stated that “Dutch

⁴⁶ See, e.g., Germany Chapter, text at note 108 (quoting the Federal Constitutional Court for the proposition that the European Convention on Human Rights “must . . . be complied with by the judiciary”); Poland Chapter, text after note 148 (“The direct applicability of the Convention seems so evident that the Supreme Court has simply assumed that the ECHR is directly applicable, without ever deciding that question explicitly”); Netherlands Chapter, text at note 64 (Dutch courts have accepted that “all the substantive provisions of the European Convention on Human Rights (ECHR), and most of the substantive provisions of the International Covenant on Civil and Political Rights (ICCPR)” should be given direct effect by Dutch courts).

⁴⁷ Netherlands Chapter, text after note 79.

⁴⁸ Poland Chapter, text at note 132 (quoting judgment of June 14, 1988).

⁴⁹ Id., text at notes 154-55.

⁵⁰ Constitution of Poland, Art. 9 (quoted in Poland Chapter, at notes 22-23).

⁵¹ Poland Chapter, text at note 53.

⁵² Germany Chapter, text at note 1.

⁵³ Id., text after note 4.

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courts should, as far as is possible, interpret and apply Dutch law in such a way that the State meets its treaty obligations.”⁵⁴

In Germany, as noted above, treaties and statutes have equal rank. Consequently, a later-in-time statute would theoretically take precedence over an earlier-in-time treaty under the *lex posterior* principle.⁵⁵ However, in cases where there is an apparent conflict between an earlier treaty and a later statute, German courts often apply the treaty as *lex specialis* to avoid a ruling that would place Germany in violation of its international obligations. “German courts assume that the legislature, had it anticipated a conflict between a treaty and a statute, would have provided a legislative exception to accommodate the treaty.”⁵⁶ Thus, the German Constitutional Court has stated: “it cannot be assumed that the legislature, insofar as it has not clearly declared otherwise, wishes to deviate from the Federal Republic of Germany’s international treaty commitments or to facilitate violation of such commitments.”⁵⁷

In Poland, it is more common for domestic courts to apply treaties indirectly than it is for courts to apply treaties directly.⁵⁸ As Professor Nollkaemper explains, courts may prefer indirect application, even in cases where they could apply a treaty directly, because direct application might produce a conflict with domestic law, and “courts usually prefer a conciliatory solution over the acknowledgment and resolution of a conflict of law.”⁵⁹ By construing domestic law in a manner that is consistent with the state’s treaty obligations, the courts in Germany, Poland and the Netherlands promote national compliance with those obligations.

4. *The Influence of European Law:* European Union (EU) law exerts tremendous influence over the national legal systems of the 27 countries that are members of the European Union. The most obvious reason for this influence is that “the case law of the European Court of Justice (ECJ) . . . establishes that European law requires the direct effect of community law in the domestic legal order.”⁶⁰ Thus, the domestic courts in EU member states routinely give direct effect to European law – not only to primary law (which is codified in treaties and in laws enacted by the European Parliament), but also to the secondary law codified in regulations enacted by the European Commission.⁶¹

Not only does the ECJ demand the direct effect of EU law within national legal systems, it also “demands supremacy of European law over domestic law.”⁶² Thus, domestic courts in EU member states routinely resolve conflicts between EU law and domestic statutes in favor of

⁵⁴ Netherlands Chapter, at note 85 (quoting Supreme Court judgment of November 16, 1990).

⁵⁵ Germany Chapter, text at note 88.

⁵⁶ *Id.*, text at notes 92-93.

⁵⁷ *Id.* at note 93 (quoting BVerfGE 74, 358 at 370).

⁵⁸ See Poland Chapter, text at notes 142-43 (noting that “co-application of an international norm and a domestic norm” is “the most typical technique” of treaty application).

⁵⁹ Netherlands Chapter, text after note 86.

⁶⁰ Germany Chapter, text at notes 6-7.

⁶¹ See Poland Chapter, text at note 62, text after note 63; Germany Chapter, text at note 75 (noting that individuals in Germany may raise a constitutional claim before the German Constitutional Court “against a lower court accused of disregarding its obligations under the” Treaty on the European Community).

⁶² Germany Chapter, text at note 7.

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EU law.⁶³ In principle, domestic courts reserve the right to reject the ECJ's interpretation of a European law if it would "lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantee functions realized by the [national] Constitution."⁶⁴ The German Constitutional Court has maintained its prerogative "to overrule the ECJ . . . if human rights protection in the European Union breaks down . . . [and] in cases where European organs act beyond the scope of their legitimate authority."⁶⁵ However, the German Constitutional Court has never actually overruled an ECJ decision. Thus, in practice, Community law as interpreted by the ECJ "plays a paramount role in the" domestic legal systems of EU member states.⁶⁶

Apart from the direct application of Community law, EU membership influences judicial application of international law by domestic courts in three other ways. First, as a practical matter, decisions of the European Court of Human Rights (ECtHR) have tremendous influence within domestic legal systems, even though, in contrast to ECJ decisions, ECtHR decisions do not have direct effect within national legal systems. For example, in the Netherlands, "[t]he practice of following interpretations of the ECtHR is such that, in practice, they have almost a dispositive effect."⁶⁷ Professor Nollkaemper suggests that "the acceptance of the legal relevance of such interpretations has been enhanced by the fact that courts have become accustomed to" following decisions of the ECJ.⁶⁸

Second, in at least some EU member states, domestic courts have become sufficiently accustomed to following ECJ decisions that their receptivity to decisions of international tribunals extends beyond European courts to other international courts. For example, "[i]n a 2006 Chamber decision, the Federal Constitutional Court [in Germany] applied the reasoning of" a prior decision involving the European Convention on Human Rights "to the relationship between the International Court of Justice and the Federal Constitutional Court."⁶⁹ Under this approach, German courts do "not follow a path of complete subservience to international courts and tribunals," but "the principle of 'friendliness to international law' enshrined in the German constitution . . . require[s] domestic courts to 'take into account' decisions of the International Court of Justice that are binding on Germany."⁷⁰ Professor Paulus explains that "[t]he German Court's decision . . . emphasizes that international integration is also a constitutional value."⁷¹

Finally, it is important to bear in mind that the European Union itself is a member of the international community subject to both customary and conventional international legal

⁶³ See Germany Chapter, text at notes 74-78; Poland Chapter, text at notes 62-64 and 95-101; Netherlands Chapter, text before note 149 (stating that "large sections of EC law have direct effect in the member states, taking precedence over contradictory rules in national law").

⁶⁴ Poland Chapter, text at note 119 (quoting Judgment of Constitutional Court of May 11, 2005).

⁶⁵ Germany Chapter, text at notes 79-82.

⁶⁶ Poland Chapter, text before note 63.

⁶⁷ Netherlands Chapter, text after note 141. See also Germany Chapter, text at notes 105-112; Poland Chapter, text at note 78 (stating that "the case law of the ECtHR is a binding part of the Convention").

⁶⁸ Netherlands Chapter, text at note 138.

⁶⁹ Germany Chapter, text at note 116.

⁷⁰ *Id.*, text at notes 117-21.

⁷¹ *Id.*, text after note 121.

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obligations. The ECJ “has ruled that international regulations in areas where the European Union exercises jurisdiction are automatically part of the EU legal order.”⁷²

This situation has direct consequences for the national legal orders of the member states. It means that member states receive international law into their domestic legal systems not only directly (as independent members of the international community) but also indirectly, as members of the EU, because international obligations that form part of the European legal order are binding on member states as an element of core Community law.⁷³

Consequently, “as member states transfer more and more powers to the European Union, they are increasingly incorporating international law into their own legal orders as a part of European law.”⁷⁴

B. Australia, Canada and the United Kingdom

Australia, Canada and the United Kingdom are strict dualist states: a treaty has no legal force within their domestic legal systems unless the legislature has incorporated the treaty into domestic law. Consequently, domestic courts in these countries never apply treaties directly as law. Even so, courts routinely grant remedies to private parties who have been harmed by a violation of their treaty-based primary rights. Courts typically achieve this result by applying a statute that was enacted to implement a treaty, or by interpreting a statute to conform to treaty obligations codified in an unincorporated treaty. This section analyzes the domestic application of treaties in Australia, Canada and the United Kingdom. The first sub-section addresses the legislature’s role in incorporating treaties into domestic law. I then examine the judiciary’s role in applying incorporated treaties, unincorporated treaties and partially incorporated treaties. The final sub-section addresses judicial application of treaties as an aid to constitutional interpretation.

1. *Legislative Incorporation:* The legal systems of Australia and Canada, like most other Commonwealth states, are based on the British model. Under this model, treaty-making is understood to be an executive function; the executive does not need legislative approval to make a binding international treaty commitment on behalf of the nation. However, law-making is a legislative function. This is why treaties do not have the status of law in the domestic legal system, and the domestic effects of treaties are generally controlled by statutes that incorporate treaties into domestic law.⁷⁵

Not all treaties require legislative incorporation. “For those treaties that operate purely on the international plane, without requiring any domestic legal effect from the parties,”⁷⁶ legislative implementation is not necessary. Similarly, if a treaty obligates a state to protect

⁷² Netherlands Chapter, text at note 149.

⁷³ Id., text at note 150.

⁷⁴ Id., text at note 153. For further elaboration of this point, see id., text at notes 149-57.

⁷⁵ See U.K. Chapter, text at notes 6-7; Canada Chapter, text at notes 5-7; Australia Chapter, text at notes 55-56 (quoting *Minister of State for Immigration and Ethnic Affairs v. Teoh*, (1995) 128 ALR 353).

⁷⁶ Canada Chapter, text after note 10.

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certain private rights within its domestic legal system, but pre-existing legislation already protects those rights to the full extent required by international law, additional legislation would be superfluous.⁷⁷ Thus, legislative action is needed only if a proposed treaty: (1) does not operate purely on the international plane and (2) obligates the state to protect private rights that are not already protected by pre-existing domestic law.

In all three states, the political branches try to ensure treaty compliance by enacting the legislation necessary to implement treaty obligations *before* the treaty enters into force on the international plane. For example, “the unwavering practice of the [British] Government is to” examine each treaty in detail “to see whether there will be any need for new legislation to enable a provision to be enforceable in domestic law. It is invariable British practice never to ratify a treaty until any such legislation has first been made.”⁷⁸ Similarly, “[t]he usual Canadian practice is not to allow treaties requiring implementation to enter into force for Canada until the federal government has ensured the treaty’s implementation. The reason for this is simply that, where a treaty requires domestic legal action by states parties, failure to take that action may breach the treaty.”⁷⁹

Legislative incorporation can take many forms. The simplest case is when the legislature includes the text of a treaty as an attachment to a statute and declares that the attached treaty shall have the force of law in the domestic legal system.⁸⁰ Alternatively, the legislature might amend a pre-existing statute “to bring it into conformity with the treaty’s requirements,”⁸¹ or delegate authority to an executive official to adopt regulations to implement the treaty.⁸² In Australia, if the legislature determines that the text of a treaty “is not suited to simple transportation into Australian law, . . . the Commonwealth and where necessary State legislation will seek to adapt the international instrument to Australian conditions.”⁸³ This approach sometimes results in partial incorporation, rather than total incorporation, a subject that is addressed below.

2. *Full Incorporation of Treaties:* If a treaty-based primary right has been fully incorporated into domestic law, domestic courts enforce that right in the same way they enforce any other law. Thus, in Australia, “where municipal legislation imports international agreements, conventions and treaties, those international instruments will have operative effect.”⁸⁴ Similarly, in Canada, “[w]here the treaty right upon which a claimant seeks to rely is implemented in Canadian law, there may be no need to refer to the international aspect of the right at all. The right has descended from the lofty heights of international law to the solid ground of domestic law and will be applied in the same way as any other domestic provision.”⁸⁵

⁷⁷ *Id.*, text at note 13 (“Another way of ensuring domestic conformity with treaty obligations, in many cases, is simply to retain laws which predate the treaty but which, as it happens, suffice to discharge the state’s responsibilities under the supervening treaty.”)

⁷⁸ U.K. Chapter, text at notes 48-49.

⁷⁹ Canada Chapter, text at note 149.

⁸⁰ See U.K. chapter, text at notes 18-19; Canada chapter, text at note 11.

⁸¹ Canada Chapter, text at notes 11-12.

⁸² See U.K. chapter, text at notes 26-30.

⁸³ Australia Chapter, text at notes 181-82.

⁸⁴ Australia Chapter, text before note 181.

⁸⁵ Canada Chapter, text before note 145.

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If a treaty has been fully incorporated into domestic law, and a private claimant seeks a domestic judicial remedy for a treaty violation, the court will have to decide whether the implementing statute confers a primary right. If the claimant cannot show that the statute creates a primary right, he will not be entitled to a remedy.⁸⁶ Conversely, “if a court does find that the implementing legislation (not the treaty itself) does confer a private right, it would be rare indeed if it did not also find some sort of remedy.”⁸⁷ As a formal matter, the court applies the statute, not the treaty. Even so, as a practical matter, if the treaty has been fully incorporated into domestic law, and if the treaty itself creates primary rights for private parties, the statute will also create primary rights for private parties and will generally be enforceable by the right-holders.

When a treaty has been fully incorporated into domestic law, the courts are often called upon to interpret the treaty. The courts in Australia, Canada and the United Kingdom interpret treaties in accordance with internationally agreed rules of treaty interpretation.⁸⁸ By looking primarily to international law, rather than domestic law, as a guide to treaty interpretation, the courts help promote compliance with the state’s international obligations.

If the political branches had perfect foresight, and if treaty compliance was always the paramount objective, then every treaty requiring legislative implementation would be fully incorporated in a domestic statute, and such treaties would be privately enforceable in precisely the same way as other laws. However, foresight is not always perfect. Moreover, when enacting implementing legislation for treaties, legislatures sometimes try to balance the treaty goals with competing domestic objectives. As a result, some treaties that require domestic application remain unincorporated or partially incorporated. In recent years, the courts in Australia, Canada and the United Kingdom have begun to play a much more active role in enforcing these types of treaty provisions.

3. *Unincorporated Treaties*: One of the features of a strict dualist system is that a conflict between a statute and an unincorporated treaty is invariably resolved in favor of the statute. “Nothing in the written constitution of Canada prevents Canadian legislatures from enacting laws contrary to the state’s obligations under treaties.”⁸⁹ The same is true for Australia’s written constitution and the United Kingdom’s (largely) unwritten constitution. Thus, if the legislature adopts a statute that conflicts with the state’s treaty obligations, the state may well violate its treaty obligations, and individuals harmed by such a violation will have no remedy. However, courts in all three countries are hesitant to conclude that there is an irreconcilable conflict between a statute and a treaty, and they have developed a variety of mechanisms to apply even unincorporated treaties.

⁸⁶ See U.K. Chapter (first para. in Part III).

⁸⁷ U.K. Chapter, text after note 49.

⁸⁸ See, e.g., U.K. Chapter, text at notes 38-39 (“When a treaty has been incorporated by attaching all or part of it to legislation, since the treaty is a creation of international law the English courts will interpret it according to the rules of international law.”). See also Australia Chapter, text at notes 148-55; Canada Chapter, text at notes 65-72 (suggesting that “international treaty interpretation rules supplant domestic interpretive rules where the two approaches differ”).

⁸⁹ Canada Chapter, text preceding note 103.

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The most important mechanism for judicial application of unincorporated treaties is the presumption of conformity. “[W]hen construing domestic laws Canadian courts apply an interpretive presumption that those laws conform to the state’s obligations under treaties and other sources of international law.”⁹⁰ Similarly, “[u]nclear legislation will be interpreted in a way that is consistent with any applicable international obligations of the United Kingdom, including customary international law and unincorporated treaties.”⁹¹ And in Australia, “[i]n resolving ambiguity in a statute, courts favour a construction which accords with Australia’s obligations under a treaty, on the basis that they presume that parliament intends to legislate in accordance with, rather than contrary to, its international obligations.”⁹²

All agree that the presumption of conformity applies when a statute is ambiguous. But how much ambiguity is needed to trigger application of the presumption? Before 1990, the prevailing view was “that courts could not invoke a treaty for interpretive purposes unless the statute under consideration was first determined to be ambiguous on its face.”⁹³ However, the Supreme Court of Canada held in 1990 “that a court or tribunal may make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, patent or latent, in the domestic legislation.”⁹⁴ Since that time, Canadian courts “need not justify their resort to relevant treaties binding on the state by purporting to find some patent ambiguity on the face of the legislation.”⁹⁵ Justice Kirby, a Justice on the Australian High Court, has forcefully advocated the adoption of a similar approach in Australia.⁹⁶ However, his view remains a minority view in Australia.⁹⁷ There is no indication that courts in the United Kingdom have deviated from the traditional view that there must be ambiguity on the face of the statute to justify reliance on an unincorporated treaty as an aid to statutory interpretation.

A separate question concerns the extent to which courts can or should apply unincorporated treaties in the context of judicial review of discretionary decisions by administrative agencies. The Australian High Court has endorsed the so-called “legitimate expectations” doctrine, first articulated in the famous *Teoh* case.⁹⁸ In that case, a Malaysian citizen facing deportation argued that immigration authorities should exercise their discretionary powers under federal statutes in accordance with Australia’s obligations under the Convention on the Rights of the Child, an unincorporated treaty. The High Court stated: “[R]atification of a convention is a positive statement by the executive government . . . [that] its agencies will act in accordance with the Convention. The positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention.”⁹⁹ As applied by Australian courts, this doctrine does not compel an administrative decision-maker to decide a

⁹⁰ Canada Chapter, text preceding note 94.

⁹¹ U.K. Chapter, text at note 36.

⁹² Australia Chapter, text at note 158 (quoting Chief Justice Gleeson).

⁹³ Canada Chapter, text at note 112.

⁹⁴ *Id.*, text after note 112.

⁹⁵ *Id.*, text after note 114.

⁹⁶ Australia Chapter, text at notes 158-59; text at notes 169-70.

⁹⁷ *Id.*, text at notes 164-65; text at note 168.

⁹⁸ *Minister of State for Immigration and Ethnic Affairs v. Teoh*, (1995) 128 ALR 353.

⁹⁹ *Id.* (quoted in Australia Chapter, text at note 132).

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case in a particular way, but it does require the decision-maker to “take account” of unincorporated treaties in the process of making a decision.

British and Canadian courts have declined to follow the legitimate expectations doctrine.¹⁰⁰ In Canada, though, courts may have achieved essentially the same result by applying the presumption of conformity to review discretionary decisions by administrative decision-makers. For example, *Baker v. Canada*,¹⁰¹ like *Teoh*, was a case in which a foreign national facing deportation challenged an administrative decision on the grounds that immigration authorities “failed to give sufficient weight to . . . Canada’s obligations under the 1989 Convention on the Rights of the Child.”¹⁰² The Supreme Court accepted that the Convention had not been incorporated into Canadian law, “but held nevertheless that the minister’s decision was an unlawful exercise of discretion because . . . it unreasonably neglected . . . Canada’s obligations under the Convention.”¹⁰³ This approach has not gained wide traction in the United Kingdom, but in a 1997 decision “one judge in the House of Lords was prepared to consider the legality of the exercise of a statutory power in the light of an unincorporated treaty, the Rights of the Child Convention.”¹⁰⁴

4. *Partial Incorporation*: The term “partial incorporation,” or “quasi-incorporation” refers to two distinct types of domestic statutes. The first type includes “laws which are based . . . on international instruments and are clearly designed to give effect to international obligations,”¹⁰⁵ but which do not fully incorporate a treaty because the implementing statute adapts the treaty to domestic requirements. Judicial application of these types of statutes is similar to judicial application of fully incorporated treaties, insofar as the treaty is incorporated, and similar to judicial application of unincorporated treaties, insofar as the treaty is unincorporated.

A distinct variety of partial incorporation occurs when a statute requires an administrative decision-maker to exercise his discretionary authority in conformity with treaty obligations. For example, in the *Project Blue Sky Case*,¹⁰⁶ an Australian statute specifically directed the Australian Broadcasting Authority (ABA) “to perform its functions in a manner consistent with ‘Australia’s obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country.’”¹⁰⁷ This situation differs from the “legitimate expectations” doctrine in *Teoh*, because in *Teoh* there was no statute that specifically instructed immigration authorities to exercise their discretion in conformity with the Convention on the Rights of the Child. The petitioners in *Project Blue Sky* argued that the ABA had violated the statute by enacting regulations that were inconsistent with a bilateral free trade agreement between Australia and New Zealand.¹⁰⁸ The High Court held that the “ABA was precluded from

¹⁰⁰ See U.K. Chapter, footnote 37; Canada Chapter, text at notes 22-24.

¹⁰¹ [1999] 2 SCR 817.

¹⁰² Canada Chapter, text at note 120.

¹⁰³ *Id.*, text at notes 121-22.

¹⁰⁴ U.K. Chapter, text at note 73.

¹⁰⁵ Australia Chapter, text before note 181.

¹⁰⁶ *Project Blue Sky Inc. v. Australian Broadcasting Authority* (1998) 153 ALR 490.

¹⁰⁷ Australia Chapter, text at note 106 (quoting Broadcasting Services Act 1992).

¹⁰⁸ Australia Chapter, text at notes 104-110.

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making a Standard inconsistent with the”¹⁰⁹ free trade agreement, and that “the Standard had been unlawfully made.”¹¹⁰ Consequently, even though the free trade agreement had not been incorporated into domestic law, the petitioners were able to obtain a remedy (i.e., a judicial order blocking enforcement of the regulation) by invoking a statute that referred indirectly to the treaty.

Project Blue Sky is not a unique case. “[T]here are other Commonwealth statutes which make reference to international instruments without directly incorporating those treaties into Australian law.”¹¹¹ Similarly, the U.K. chapter discusses several cases where petitioners have obtained judicial remedies by invoking a statute that requires an administrative decision-maker to exercise his authority in conformity with treaty obligations.¹¹² In some cases, the statute refers to one particular treaty or group of treaties.¹¹³ In other cases, though, as in *Project Blue Sky*, the relevant statute imposes a more general requirement for the administrative decision-maker to act in conformity with the state’s treaty obligations. As the Australia chapter notes, “[r]equiring a statutory instrumentality to act in accordance with a state’s international obligations without giving any precise direction as to which international obligations in particular may be relevant will potentially open the door for a vast array of international instruments to be considered” in actions for judicial review of administrative decisions.¹¹⁴

5. *Treaties and Constitutional Interpretation:* The preceding sections discussed the use of treaties as an aid to statutory interpretation. In Australia, Justice Kirby has advocated the use of treaties as an aid to constitutional interpretation to promote Australia’s compliance with its treaty obligations.¹¹⁵ However, the majority of Justices on the High Court have firmly and consistently rejected the idea that unincorporated treaties provide a useful guide to issues of constitutional interpretation.

In contrast, the Supreme Court of Canada has apparently embraced the idea that the presumption of conformity applies not only to ordinary statutes, but also to the Canadian Charter of Rights and Freedoms, a part of Canada’s written constitution since 1982. Until recently, there was a lively debate within Canada about whether the presumption of conformity applied to the Charter.¹¹⁶ However, “two recent decisions of the Supreme Court of Canada, released one day apart [in 2007], appear to establish the court’s determination to subject the Charter to the same presumption of conformity that is applicable to the rest of Canadian law.”¹¹⁷

¹⁰⁹ Id., text at note 116.

¹¹⁰ Id., text at note 119.

¹¹¹ Id., text at note 184 (citing examples).

¹¹² See U.K. Chapter, text at notes 65-66 (noting that “there have been numerous successful challenges by way of judicial review to [administrative] decisions on claims to refugee status”); id., text at notes 67-69 (discussing the *Quark* case); id., text at notes 70-71 (noting that “the Antarctic Act 1994 . . . requires a permit from the Secretary of State to conduct various activities in Antarctica . . . [and] section 15 requires the Secretary of State to have regard to [a specific treaty] when considering a permit application”).

¹¹³ For analysis of a Canadian case that is similar, see Gib Van Ert, *Using International Law in Canadian Courts* 155-56 (2nd ed. 2008) (discussing the Federal Court of Appeal decision in *DeGuzman v. Canada* (Minister of Citizenship and Immigration) (2005) 262 DLR (4th) 13 (FCA)).

¹¹⁴ Australia Chapter, text at note 191.

¹¹⁵ Australia Chapter, text at notes 171-77.

¹¹⁶ Canada Chapter, text at notes 127-34.

¹¹⁷ Id., text after note 134. See also id., text at notes 135-41.

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There are two main reasons why this issue has not arisen in the United Kingdom. First, the British constitution is “mainly, but not entirely, unwritten.”¹¹⁸ Second, the 1998 Human Rights Act effectively incorporated the European Convention on Human Rights (ECHR) into British law. “The Act does not formally make the ECHR part of domestic law, but requires courts and public bodies to apply existing and future legislation ‘so far as possible’ in a way ‘which is compatible with’ rights under the ECHR.”¹¹⁹ The Human Rights Act has had far-reaching implications for the judicial protection of individual rights in the United Kingdom.¹²⁰ As a result of the Act, domestic courts routinely provide remedies for violations of internationally protected individual rights – rights that in many countries are protected by a written constitution – but they do so without reference to a written constitution.

In sum, judicial practice in Australia, Canada and the United Kingdom is generally consistent with the principle that states should provide remedies to private parties who are harmed by a violation of their treaty-based primary rights. Each state reaches this result in a slightly different manner. The United Kingdom relies heavily on legislative action to achieve total or partial incorporation of treaties; the 1998 Human Rights Act, in particular, has substantially expanded the judicial role in providing remedies for violations of internationally protected private rights. In Canada, the courts make fairly aggressive use of the presumption of conformity in both statutory and constitutional interpretation. In Australia, courts apply the legitimate expectations doctrine; they also play a fairly active role in supervising application of partially incorporated treaties. Even so, in all three states, dualist principles establish a clear limit to the judicial role in providing remedies: if the legislature enacts a statute that is clearly inconsistent with the state’s treaty obligations, domestic courts will apply the statute.

C. India and South Africa

Like their counterparts in Australia, Canada and the United Kingdom, domestic courts in India and South Africa apply treaties in cases where the legislature has incorporated a treaty into domestic law. They also apply unincorporated treaties in the context of statutory interpretation and judicial review of administrative action. However, India and South Africa differ from the states discussed above because courts in India and South Africa make fairly aggressive use of international law as an aid to constitutional interpretation. By construing constitutional provisions to promote compliance with treaty obligations, they ultimately remedy treaty violations by enforcing the constitution.

This section summarizes judicial practice in India and South Africa. It begins with a brief review of the relevant constitutional background. It then discusses the use of international law generally, and treaties in particular, as an aid to constitutional interpretation. The next sub-section explains how courts in India and South Africa have adapted traditional remedial and procedural mechanisms to promote aggressive enforcement of treaties. The final sub-section

¹¹⁸ U.K. Chapter, text at note 6.

¹¹⁹ *Id.*, text at notes 51-52.

¹²⁰ See *id.*, text at notes 51-62.

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touches briefly on judicial application of unincorporated treaties in the context of statutory interpretation and judicial review of administrative action.

1. *Constitutional Background:* At the end of the apartheid era, South Africa adopted an interim constitution in 1994, and then adopted its current constitution in 1996.¹²¹ Section 231(4) of the 1996 Constitution states: “Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”¹²² The first clause makes clear that the South African system is largely dualist, in that most treaties require legislative incorporation. The second clause provides that self-executing treaty provisions are automatically incorporated into domestic law without the need for legislative action, apart from legislative approval of the treaty itself, which is necessary for international entry into force.¹²³ To date, no South African court has actually held that a particular treaty provision is self-executing.¹²⁴ Thus, although the clause allowing for self-executing treaties has generated substantial scholarly debate,¹²⁵ direct application of treaties by South African courts remains a theoretical option, but not a practical reality.

Three other constitutional provisions exert a significant influence over the judicial application of treaties in South Africa. First, sec. 233 stipulates: “When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”¹²⁶ This provision effectively elevates the presumption of conformity to constitutional status. Next, section 39(1) provides: “When interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law; and may consider foreign law.”¹²⁷ This section requires courts to apply the presumption of conformity in the context of constitutional interpretation, at least when the Bill of Rights is at issue. Finally, section 39(2) states: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”¹²⁸ The Constitutional Court has taken the view “that the spirit, purport and objects of the bill of rights . . . are inextricably linked to international law and the values and approaches of the international community.”¹²⁹

With respect to treaties, the Indian Constitution follows the British model. India is a traditional dualist state in which all treaties require legislative incorporation to give them the force of law within the domestic legal system.¹³⁰ Thus, in contrast to South Africa, direct

¹²¹ See South Africa Chapter, text before note 12.

¹²² Section 231(4) of the 1996 Constitution (quoted in South Africa Chapter, text before note 17).

¹²³ See South Africa Chapter, text at notes 17-24.

¹²⁴ Id., text before note 25.

¹²⁵ Id., text at notes 25-32.

¹²⁶ South African Constitution, sec. 233 (quoted in South Africa Chapter, text after note 41).

¹²⁷ South African Constitution, sec. 39(1) (quoted in South Africa Chapter, text after note 43).

¹²⁸ South African Constitution, sec. 39(2) (quoted in South Africa Chapter, text after note 43).

¹²⁹ South Africa Chapter, text at note 60 (quoting Neville Botha, *The Role of International Law in the Development of South African Common Law*, *South African Yearbook of International Law* 253, 259 (2001)).

¹³⁰ India Chapter, text at notes 9-11.

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application of treaties is not even a theoretical possibility in India because all treaties are non-self-executing.¹³¹

Part III of the Indian Constitution concerns fundamental rights. Part IV contains the “Directive Principles of State Policy.” In contrast to the fundamental rights provisions, the directive principles are “not directly enforceable by any court.”¹³² Even so, the Supreme Court maintains that Parts III and IV “are supplementary and complementary to each other, and that the fundamental rights must be construed in light of the directive principles.”¹³³ For present purposes, the key directive principle is section 51(c), which provides: “The State shall endeavour to . . . foster respect for international law and treaty obligations in the dealings of organized peoples with one another.”¹³⁴ In light of this directive principle, the Supreme Court’s interpretive approach is “that any international convention not inconsistent with the fundamental rights provisions in the Constitution and in harmony with its spirit must be read into those provisions to enlarge the meaning and content thereof.”¹³⁵ Thus, like section 39 of the South African Constitution, section 51(c) of the Indian Constitution, as interpreted by the Supreme Court, requires courts to construe individual rights provisions of the Constitution in accordance with international law.

2. *International Law in Constitutional Interpretation:* Both the Indian Supreme Court and the South African Constitutional Court make extensive use of international human rights law as a tool for interpreting individual rights provisions of their domestic constitutions. For example, the Indian Supreme Court has invoked the Convention on the Elimination of Discrimination Against Women (CEDAW) to support its interpretation of gender equality provisions in the Indian Constitution.¹³⁶ Similarly, it has invoked article 17 of the International Covenant on Civil and Political Rights (ICCPR) to support its holding that the constitutional guarantee of “personal liberty” includes a right to privacy,¹³⁷ and article 9(5) of the ICCPR to support its holding that surviving family members of individuals killed in police custody have a constitutional right to monetary compensation.¹³⁸ Likewise, the South African Constitutional Court has relied heavily on international human rights norms to support holdings that the death penalty is unconstitutional, that corporal punishment is unconstitutional, that the state may not imprison a person for failure to pay a debt, that the constitution bars criminal punishment for sodomy, and that the state could not deport a person “to a country in which there was a real risk that he might be subjected to cruel, inhuman or degrading treatment.”¹³⁹

The South African Constitutional Court has stated explicitly that the constitutional requirement to consider international law “include[s] non-binding as well as binding law.”¹⁴⁰ In accordance with this approach, the Constitutional Court and lower courts have routinely cited

¹³¹ See India Chapter, text at notes 9-11; 83-84.

¹³² Id., text before note 15.

¹³³ Id., text at note 17.

¹³⁴ Indian Constitution, Sec. 51 (quoted in India Chapter, text after note 15).

¹³⁵ India Chapter, text after note 20.

¹³⁶ See India Chapter, text at notes 51-62.

¹³⁷ Id., text at notes 63-66.

¹³⁸ Id., text at notes 67-71.

¹³⁹ South Africa Chapter, text at notes 88-99 (citing cases).

¹⁴⁰ South Africa Chapter, text at note 45 (quoting *S v. Makwanyane*).

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decisions of the U.N. Human Rights Committee, the European Court of Human Rights, and the European Commission of Human Rights as aids to constitutional interpretation, even though the decisions of those bodies have no binding force in South Africa.¹⁴¹ The Indian Supreme Court also relies on both binding and non-binding international norms. For example, in decisions construing constitutional provisions protecting gender equality, the Court has invoked the Beijing Principles (a non-binding declaration) and the views of the CEDAW Committee (also non-binding).¹⁴² The Court relied on a non-binding U.N. resolution, among other things, to support its conclusion that the right to life under Article 21 of the Constitution includes a right of access to clean drinking water.¹⁴³

The courts' reliance on international law as a tool of constitutional interpretation is not limited to human rights law. For example, the South African "Constitutional Court considered the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, a treaty to which South Africa is a party, to help evaluate a claim that a Rastafarian was entitled to possess and use cannabis in the exercise of his freedom of religion."¹⁴⁴ The Indian Supreme Court referred to the same treaty in adjudicating a case in which the petitioner challenged the constitutional validity of a statute that precluded suspension or commutation of sentences for individuals convicted of drug offenses.¹⁴⁵

Some scholars urge that international law is a primary tool of constitutional interpretation, to be consulted in every case; others contend that courts should "consider only as an afterthought whether international law supports or is in conflict with" a particular interpretation.¹⁴⁶ Professor Dugard argues that the former view is correct "because there can be no 'proper' interpretation of the [South African] Constitution without a consideration of international law."¹⁴⁷ He cites the Constitutional Court's decision in *Azapo v. President of the Republic of South Africa*¹⁴⁸ in support of this viewpoint. It is unclear whether the Indian Supreme Court has directly addressed this question.

3. *Remedies and procedure:* Both the South African Constitutional Court and the Indian Supreme Court take a remarkably broad view of the judiciary's remedial powers. These courts use their power to fashion far-reaching remedial orders, primarily to remedy constitutional violations. However, since they routinely construe constitutional provisions to promote compliance with treaty obligations and other international norms, they ultimately provide remedies to victims of treaty violations by enforcing the constitution.

Courts in South Africa "are given wide powers to review administrative action and legislation."¹⁴⁹ In *Minister of Health v. Treatment Action Campaign*,¹⁵⁰ the Constitutional Court

¹⁴¹ See South Africa Chapter, text at notes 88-112 (citing numerous cases).

¹⁴² See India Chapter, text at notes 51-62.

¹⁴³ *Id.*, text at notes 75-78.

¹⁴⁴ South Africa Chapter, text at note 46.

¹⁴⁵ India Chapter, text at notes 79-80.

¹⁴⁶ South Africa Chapter, text after note 55.

¹⁴⁷ *Id.*, text after note 56.

¹⁴⁸ 1996 (4) SA 671 (CC).

¹⁴⁹ South Africa Chapter, text at note 123.

¹⁵⁰ 2002 (5) SALR 721 (CC).

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invoked the International Covenant on Economic, Social and Cultural Rights (ICESCR) to support its holding that the government violated sections 27(1) and 27(2) of the Constitution by failing “to devise and implement . . . a comprehensive and coordinated program to realize progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.”¹⁵¹ The Court announced a set of measures to combat mother-to-child transmission of HIV and ordered the government to implement those measures.¹⁵² Similarly, in *Government of the RSA v. Grootboom*,¹⁵³ the Constitutional Court invoked the ICESCR in support of its holding that the government housing program “fell short of the obligations imposed upon the state by section 26(2) [of the Constitution] in that it failed to provide for any form of relief to those desperately in need of access to housing.”¹⁵⁴ The Court issued a declaratory order requiring the government “to devise, fund, implement and supervise measures to provide relief to those in desperate need.”¹⁵⁵

The Indian Supreme Court has decided numerous cases in which it has invoked international law in support of a constitutional holding and then “legislated from the bench” to remedy the constitutional violation. For example, in *Basu v. State of West Bengal*,¹⁵⁶ a case involving deaths in police custody, the Court invoked the ICCPR in support of its constitutional holding.¹⁵⁷ It also issued a set of “eleven requirements to be followed in all cases of arrest or detention,” and ordered those requirements to be disseminated to every police station throughout the country.¹⁵⁸ In *Vishaka and Others v. State of Rajasthan*,¹⁵⁹ the Court invoked CEDAW in support of its constitutional holding.¹⁶⁰ “The Court noted the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment . . . at workplaces. Accordingly, the Court proceeded to lay down guidelines and norms for due observance at all workplaces and other institutions, until legislation is enacted for the purpose.”¹⁶¹

The Indian Supreme Court has also adopted procedural innovations so that public interest litigation “can now be initiated not only by filing formal petitions in Court but also by writing letters and telegrams or through the Court taking notice of articles in newspapers.”¹⁶² The Court has “evolved the practice of appointing commissioners for the purpose of gathering facts and data in regard to a complaint of breach of a fundamental right made on behalf of the weaker sections of society.”¹⁶³ The Court has explained its rationale as follows:

¹⁵¹ Id., para. 135(2).

¹⁵² Id., para. 135(3).

¹⁵³ 2001 (1) SALR 46 (CC).

¹⁵⁴ Id., para. 95.

¹⁵⁵ Id., para. 96.

¹⁵⁶ [1997] 2 LRC 1.

¹⁵⁷ See India Chapter, text at notes 67-70.

¹⁵⁸ Id., text at notes 92-93.

¹⁵⁹ [1997] 3 LRC 361.

¹⁶⁰ See India Chapter, text at notes 51-56.

¹⁶¹ India Chapter, text at note 99.

¹⁶² India Chapter, text at note 100.

¹⁶³ Id., text at note 102 (quoting *Bandhua Mukti Morcha v. Union of India*, [1984] 2 SCR 67, at 111-12).

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[W]here a person or class of persons to whom legal injury is caused by reason of violation of a fundamental right is unable to approach the court for judicial redress on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting *bona fide* can move the court for relief . . . so that the fundamental rights may become meaningful not only for the rich and well-to-do who have the means to approach the Court but also for large masses of people who are living a life of want and destitution and who are by reason of lack of awareness, assertiveness and resources unable to seek judicial redress.¹⁶⁴

4. *Statutory Interpretation and Other Matters:* The aggressive use of international law in constitutional adjudication is perhaps the most unique feature of the Indian and South African systems. However, courts in those countries also utilize international law in statutory interpretation and common law adjudication to promote compliance with treaty-based norms and provide remedies to private parties who are harmed by a violation of their treaty-based primary rights.

As noted above, sec. 233 of the South African Constitution obligates courts, when interpreting legislation, to “prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”¹⁶⁵ Accordingly, South African courts apply a strong “presumption that the legislature, in enacting a law, did not intend to violate South Africa’s international obligations.”¹⁶⁶ Consistent with this principle, South Africa’s legislature has enacted numerous statutes in which the law states explicitly that “the statute is to be interpreted to accord with international law.”¹⁶⁷ This principle applies equally to incorporated and unincorporated treaties. Thus, South African courts refer to unincorporated treaties “in order to interpret an ambiguous statute” and in the context of adjudicating “a challenge to the validity of delegated legislation on the grounds of unreasonableness.”¹⁶⁸

The courts in India apply similar principles. “If two constructions of municipal law are possible, the court will lean in favour of adopting such construction as will bring the provisions of municipal law into harmony with international law or treaty obligations.”¹⁶⁹ “This is because Parliament, *prima facie*, intends to give effect to India’s obligations under international law.”¹⁷⁰ The Indian Supreme Court applies these principles not only in cases involving statutory interpretation, but also in the context of judicial review of discretionary decisions by state officers. For example, in a case where a public interest group challenged a governmental decision to permit a mining company to engage in mining activity in a national park, the Court cited the 1992 Convention on Biological Diversity, a treaty to which India is a party, and stated that it is “necessary for the Government to keep in view the international obligations while exercising discretionary powers under the Conservation Act unless there are compelling reasons

¹⁶⁴ India Chapter, text at note 101 (quoting *Bandhua Mukti Morcha*, [1984] 2 SCR 67 at 105).

¹⁶⁵ South African Constitution, sec. 233 (quoted in South Africa Chapter, text after note 41).

¹⁶⁶ South Africa Chapter, text after note 50.

¹⁶⁷ *Id.*, text before note 62. See *id.*, text at notes 62-69 (citing examples).

¹⁶⁸ *Id.*, text at notes 48-49.

¹⁶⁹ India Chapter, text before note 21.

¹⁷⁰ *Id.*, text at note 29.

to depart therefrom.”¹⁷¹ The Indian Supreme Court has also utilized its judicial power to create common law rules incorporating treaty norms codified in treaties that the Indian government has not ratified.¹⁷²

D. Israel and the United States

As a formal matter, there are sharp differences between Israel and the United States with respect to the status of treaties in domestic law. Israel is a traditional dualist state; a treaty has no domestic legal force until the legislature enacts a statute to incorporate the treaty. The United States is a hybrid monist state; many treaties are automatically incorporated into the corpus of domestic law at the time of ratification. Despite these formal differences, there are striking similarities in judicial practice. In both states, the courts routinely apply doctrines that are designed to harmonize domestic law with the state’s international treaty obligations. However, the courts also apply other doctrines that have the opposite effect: they shield government actors from judicial review of governmental compliance with treaty-based norms, thereby creating a “free space” in which executive officers can violate treaty obligations, if they so choose, without fear of judicial sanction.

The trends in Israel and the United States appear to be moving in different directions. Except for cases involving the Occupied Territories, Israeli courts are generally quite receptive to applying international law as a constraint on executive action. In contrast, U.S. courts have recently created new doctrines that effectively shield government actors from accountability for treaty violations. This section analyzes the application of treaties by domestic courts in Israel and the United States. The analysis is divided into three sub-sections. The first sub-section discusses the formal status of treaties within the domestic legal systems of Israel and the United States. The next sub-section analyzes the tools that courts employ to promote the domestic application of treaties. The final sub-section examines the strategies that courts utilize to insulate government actors from judicial review of governmental compliance with treaty-based norms.

1. *The Status of Treaties in Domestic Law:* Israel does not have a single written constitution. The Israeli constitution consists of a set of “Basic Laws” enacted by the Knesset between 1958 and 1992, supplemented by judge-made common law. Initially, the Israeli Supreme Court held that most of the Basic Laws had the same status as ordinary legislation. However, after adoption of two Basic Laws in 1992, including one on “Human Dignity and Liberty,” the Supreme Court reversed course and “held that all Basic Laws have constitutional status and may not be amended by ordinary legislation.”¹⁷³

The status of international law within the Israeli legal system is governed entirely by judge-made law because there are no statutes or Basic Laws that address the issue. The Israeli Supreme Court has endorsed three key principles, which are derived primarily from British law. First, legislation adopted by the Knesset takes precedence over international law; in the event of a conflict, the will of the legislature prevails.¹⁷⁴ Second, customary international law has the

¹⁷¹ Chinnappa et al v. Union of India, Judgment of Oct. 30, 2002 (quoted in India Chapter, text at note 36).

¹⁷² See India Chapter, text at notes 44-50.

¹⁷³ Israel Chapter, text at notes 2-5.

¹⁷⁴ *Id.*, text at notes 11-14.

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force of law within the domestic legal system, provided that it does not conflict with a valid statute.¹⁷⁵ Third, a treaty that is binding on Israel as a matter of international law lacks the force of law within the domestic legal system unless and until the Knesset enacts legislation to incorporate the treaty.¹⁷⁶ As in other traditional dualist states, the legislature employs a variety of techniques for incorporating treaties into domestic law.¹⁷⁷

The U.S. Constitution states expressly that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”¹⁷⁸ On its face, this language suggests that the United States is a purely monist system with respect to treaties; the text seems to say that all treaties have the force of law within the domestic legal system. However, judicial decisions distinguish between “self-executing” and “non-self-executing” treaties.¹⁷⁹ There is no generally agreed definition of these terms, but one version of the doctrine holds that non-self-executing treaties lack the force of law within the domestic legal system in the absence of implementing legislation.¹⁸⁰ The U.S. system is properly characterized as a hybrid monist system because some (but not all) treaties are automatically incorporated into domestic law at the time of ratification.

In the United States, a self-executing treaty has the same status as a federal statute. In the event of a conflict between a federal statute and a self-executing treaty, the last-in-time prevails.¹⁸¹ Self-executing treaties take precedence over state laws because federal law generally trumps conflicting state law.¹⁸² However, any conflict between a treaty and the Constitution will be resolved in favor of the Constitution, which is higher law.¹⁸³

2. *Harmonizing Domestic Law with Treaty Obligations:* Courts and legislatures in Israel and the United States employ a variety of tools to harmonize domestic law with the state’s international treaty obligations. These tools are similar to the techniques applied in the eight other countries discussed above. The primary tools are: incorporation of a treaty into domestic law (either by pre-existing legislation, by new legislation, or by self-execution); a judicially created presumption that domestic statutory and constitutional provisions should be interpreted in a manner that is consistent with the state’s treaty obligations; and other interpretive strategies that promote harmony between the domestic and international interpretations of a particular treaty provision.

¹⁷⁵ *Id.*, text at notes 17-20. It is unclear whether customary international law takes precedence over delegated legislation promulgated by an administrative body. See *id.*, text at notes 15-16.

¹⁷⁶ *Id.*, text at notes 29-34.

¹⁷⁷ See *id.*, text at notes 47-51 (identifying five different techniques for treaty incorporation). Compare U.K. Chapter, text at notes 18-30 (discussing various methods for incorporating a treaty into domestic law); Canada Chapter, text at notes 11-14 (same).

¹⁷⁸ U.S. Const. art. VI, cl. 2.

¹⁷⁹ See U.S. Chapter, text at notes 24-42.

¹⁸⁰ See *id.*, text at notes 25-31.

¹⁸¹ *Id.*, text at notes 21-22.

¹⁸² *Id.*, text at note 20.

¹⁸³ *Id.*, text at note 19.

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There are numerous treaties that have been incorporated into domestic law in both Israel and the United States. For example, Israel has enacted legislation¹⁸⁴ to incorporate the Warsaw Convention,¹⁸⁵ the CISG,¹⁸⁶ and the Hague Convention on Child Abduction.¹⁸⁷ The United States has also incorporated all three treaties into its domestic legal system. In the U.S., the Warsaw Convention and the CISG are considered self-executing treaties.¹⁸⁸ Accordingly, they are incorporated into U.S. law by virtue of treaty ratification, without any separate legislative action. In contrast, Congress enacted a statute to regulate domestic implementation of the Hague Convention in the United States.¹⁸⁹

Inasmuch as Israel is a traditional dualist state, legislative action is the sole means for domestic incorporation. Since the United States is a hybrid monist state, incorporation can be accomplished either by legislation or by self-execution. Regardless of whether a state incorporates a treaty by means of self-execution or by legislative action, the practical result is essentially the same. In either case, courts apply the treaty in roughly same way that they apply domestic statutes.

Both U.S. and Israeli courts apply a presumption that domestic statutes should be construed in a manner that is compatible with the state's treaty obligations. In the United States, this principle is known as "the *Charming Betsy* canon."¹⁹⁰ In Israel, courts refer to the "presumption of compatibility."¹⁹¹ Although the label differs, the underlying concept is the same. If the text of a statute is open to two plausible interpretations, but one interpretation is inconsistent with the state's treaty obligations, courts prefer the interpretation that is consistent with the state's treaty obligations.

Israeli courts routinely apply the presumption of compatibility to harmonize domestic law with international obligations embodied in customary international law and unincorporated treaties. The presumption applies to judicial interpretation of "Basic Laws and ordinary legislation, as well as in discussing principles of Israel's common law."¹⁹² Judicial application of the *Charming Betsy* canon in U.S. courts is generally similar, but there is one key difference. In the United States, the use of international law in constitutional interpretation is quite controversial: critics contend that it is illegitimate for courts to consult international and foreign law as an aid to constitutional interpretation.¹⁹³ In contrast, there appears to be a broad

¹⁸⁴ Israel Chapter, text at notes 48-51.

¹⁸⁵ Warsaw Convention, *supra* note 9.

¹⁸⁶ United Nations Convention on Contracts for the International Sale of Goods, 1489 U.N.T.S. 3, U.N. Registration No. I-25567.

¹⁸⁷ Hague Convention on the Civil Aspects of International Child Abduction, 1343 U.N.T.S. 49, U.N. Registration No. I-22514.

¹⁸⁸ *See, e.g.,* *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (stating that the Warsaw Convention is self-executing); *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894, 897 (7th Cir. 2005) (stating that the CISG is a self-executing treaty).

¹⁸⁹ International Child Abduction Remedies Act, 42 U.S.C. § 11601 et seq. (first adopted in 1988).

¹⁹⁰ *See* U.S. Chapter, text at note 90.

¹⁹¹ *See* Israel Chapter, text at notes 59-66.

¹⁹² Israel Chapter, text before note 102.

¹⁹³ *See, e.g.,* *Roper v. Simmons*, 543 U.S. 551, 575-78 (citing international and foreign law in support of the Court's holding that the Eighth Amendment prohibits capital punishment for individuals who were under 18 years

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consensus in Israel that it is entirely legitimate for courts to consult international and foreign sources for guidance in interpreting Israel's "common law material constitution."¹⁹⁴

In practice, judicial application of the *Charming Betsy* canon and the presumption of compatibility is uneven. In the United States, "there are numerous cases . . . where a court could have invoked the *Charming Betsy* canon but did not reference the canon explicitly."¹⁹⁵ In at least some of these cases, the courts reached results that appear to be inconsistent with the canon.¹⁹⁶ Similarly, Israeli courts periodically issue rulings that appear to deviate from the presumption of compatibility.¹⁹⁷ In sum, the evidence suggests that courts apply the presumption of compatibility (and the *Charming Betsy* canon) in many cases, but they conveniently ignore the presumption when they want to reach a result that is inconsistent with the presumption.

The same could be said with respect to the canon of good faith, which holds that courts should interpret treaties in accordance with the internationally agreed understanding of their terms.¹⁹⁸ The U.S. Supreme Court has repeatedly endorsed the principle that courts should construe treaties "in a manner consistent with the shared expectations of the contracting parties."¹⁹⁹ U.S. courts regularly consult international and foreign sources to help shed light on the shared understanding of the parties. Similarly, "[i]n interpreting a convention that has been incorporated into Israeli law, the courts refer extensively to decisions of courts in other jurisdictions relating to the convention."²⁰⁰ The goal is "to achieve conformity with the interpretation adopted internationally."²⁰¹ While this principle is firmly established, courts in Israel and the United States disregard the canon of good faith when they want to adopt a treaty interpretation that deviates from the internationally agreed understanding.

The presumption of compatibility, the *Charming Betsy* canon, and the canon of good faith are "transnationalist" tools: they facilitate the domestic application of a treaty in accordance with the internationally agreed understanding of its terms. But domestic courts in Israel and the United States sometimes employ "nationalist" strategies that tend to inhibit the domestic application of treaties, or to promote adoption of treaty interpretations that deviate from the international understanding. Moreover, the circumstances in which courts apply nationalist strategies are fairly predictable. The Supreme Court of Israel frequently applies nationalist strategies in cases involving the Occupied Territories (OT).²⁰² U.S. courts commonly apply transnationalist tools in treaty cases involving disputes between private parties; they are much

old when they committed their crimes); *id.* at 622-28 (Scalia, J., dissenting) (criticizing the Court's reliance on international and foreign law).

¹⁹⁴ See Israel Chapter, text at notes 121-28.

¹⁹⁵ U.S. Chapter, text at note 91.

¹⁹⁶ See *id.*, note 91 (citing *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415 (1999); *In re Automotive Refinishing Paint Antitrust Lit.*, 358 F.3d 288 (3rd Cir. 2004)).

¹⁹⁷ See Israel Chapter, text at notes 67-72.

¹⁹⁸ See U.S. Chapter, text at notes 73-77.

¹⁹⁹ U.S. Chapter, text at note 76.

²⁰⁰ Israel Chapter, text after note 76.

²⁰¹ *Id.*, text before note 75.

²⁰² See Israel Chapter, text at note 174 ("For a long time it seemed that the main function of the Court in petitions relating to the OT, including those in which issues of international law arose, had been to legitimize almost everything that the authorities wished to do.")

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more likely to apply nationalist strategies in treaty cases involving vertical relations between the government and private actors.²⁰³ The following section examines the use of nationalist tools that tend to limit the domestic effects of treaties.

3. *Limiting the Domestic Effects of Treaties:* Domestic courts in Israel and the United States apply two different types of nationalist strategies to insulate government actors from judicial review of executive compliance with treaty-based norms. First, they sometimes adopt an interpretive approach that favors the government's preferred interpretation of a treaty. Second, they apply a variety of judicial avoidance strategies to avoid ruling on the merits of treaty-based claims.

In the United States, there is a well established canon of deference to executive branch treaty interpretations.²⁰⁴ The canon states that "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."²⁰⁵ In theory, the canon applies in every case that presents a question of treaty interpretation. In practice, though, courts apply the canon primarily in cases where the U.S. government is a party or an amicus.²⁰⁶ Whereas the canon of good faith encourages courts to adopt a treaty interpretation that is consistent with the internationally agreed meaning of the treaty, the canon of deference nudges courts in the direction of an interpretation that promotes unilateral U.S. policy interests.²⁰⁷ When courts apply the canon of deference, the government almost always wins.²⁰⁸

The Israeli Supreme Court "has never officially subscribed to the view that it must accept the executive branch of government's interpretation of a treaty."²⁰⁹ "Nevertheless, in cases relating to the [Occupied Territories], for a long time the Supreme Court in fact adopted the interpretation of [Geneva Convention IV] favoured by the authorities, even when this meant changing the theory of interpretation from case to case."²¹⁰ At one point, the Court even suggested "that if there were two possible interpretations of a convention, the Court should adopt that interpretation which is least restrictive of state sovereignty."²¹¹

The Israeli Supreme Court has also employed judicial avoidance strategies to avoid ruling on the merits of claims involving the Occupied Territories.

[In cases] relating to the legality of Israeli settlements, the Court has leaned over backwards to avoid having to rule on the issue. It has managed to do this by regarding the provision in article 49, paragraph 6, of GC IV, as an innovative provision which has not achieved the status of customary international law; by

²⁰³ See U.S. Chapter, Table II.

²⁰⁴ *Id.*, text at notes 78-81.

²⁰⁵ *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982)).

²⁰⁶ See U.S. Chapter, Table II.A.

²⁰⁷ See U.S. Chapter, text after note 81.

²⁰⁸ See U.S. Chapter, Tables IV.C and IV.D.

²⁰⁹ Israel Chapter, text before note 80.

²¹⁰ *Id.*, text at note 80.

²¹¹ *Id.*, text at note 81.

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denying the standing of individual Palestinians to challenge the use of public land for settlements; by holding that a petition against the settlements submitted by an NGO was non-justiciable; and by ruling that whether the settlements are lawful or not under international law is irrelevant in examining segments of the separation barrier whose object is to provide protection for settlers.²¹²

Similarly, U.S. courts have developed two treaty-specific doctrines whose primary function is to “shield government actors from judicial review of government compliance with treaty-based norms.”²¹³ First, U.S. courts sometimes apply a presumption that treaties do not create individually enforceable rights.²¹⁴ Second, U.S. courts sometimes hold that a treaty is not self-executing. Although the doctrine of non-self-execution has roots in the 19th century, the version of non-self-execution doctrine that emerged in the latter half of the 20th century bears very little resemblance to its 19th century predecessor.²¹⁵ In practice, courts apply the doctrine of non-self-execution and the presumption against individually enforceable rights almost exclusively in circumstances where individuals seek to hold government actors accountable for treaty violations. By applying these doctrines, courts avoid ruling on the merits of treaty-based claims, thereby enabling government actors to escape accountability for treaty violations.²¹⁶

Recent trends in judicial decision-making in Israel and the United States appear to be moving in opposite directions: while U.S. courts are becoming increasingly nationalist, Israeli courts are becoming increasingly transnationalist. According to Professor Kretzmer: “In recent years . . . there has been a change in the [Israeli Supreme] Court’s approach; it has made a sincere effort to interpret international law in a more credible fashion” in cases involving the Occupied Territories.²¹⁷ In contrast, the U.S. Supreme Court’s recent decision in *Medellin v. Texas*²¹⁸ is indicative of a disturbing trend in which U.S. courts increasingly regard international treaties with barely disguised contempt.²¹⁹

E. China and Russia

In the past two decades, both China and Russia have taken significant steps to incorporate treaty norms into their domestic legal systems. The 1993 Russian Constitution specifies that “international treaties of the Russian Federation shall be an integral part of its legal system.”²²⁰ Although the Chinese Constitution does not explicitly address the domestic legal status of treaties, China has adopted “approximately 70 domestic laws with explicit provisions touching upon treaty obligations . . . [that] constitute the legal basis for the application of international

²¹² *Id.*, text at notes 170-73.

²¹³ U.S. Chapter, text after note 120.

²¹⁴ *Id.*, text at notes 87-89.

²¹⁵ See David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. Davis L. Rev. 1 (2002).

²¹⁶ See U.S. Chapter, text at notes 114-20.

²¹⁷ Israel Chapter, text after note 174.

²¹⁸ 128 S. Ct. 1346 (2008).

²¹⁹ See David Sloss, *Schizophrenic Treaty Law* 43 Tex. Int. L. J. 15 (2007) (providing a brief survey of the historical rise of nationalist doctrines and the concomitant decline of transnationalist doctrines).

²²⁰ 1993 Russian Constitution, Art. 15(4) (quoted in Russia Chapter, text at note 2).

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treaties in the Chinese domestic legal system.”²²¹ Thus, on paper at least, both Chinese and Russian law give substantial weight to treaties within their domestic legal systems. However, the reality of law in action does not necessarily correspond to the law on paper. In China and Russia, private parties generally have access to the judicial system to enforce transnational treaty provisions in litigation against other private parties. However, in China, and to a lesser extent in Russia, there are significant constraints on the ability of individuals to utilize the judicial system to enforce vertical treaty provisions that regulate relationships between government actors and private parties.

The analysis in this section provides a brief snapshot of both the law on paper and the law in action. The first sub-section summarizes the legal rules that govern the formal status of treaties in the domestic legal systems of China and Russia. The next sub-section discusses the application of treaties by domestic courts to resolve disputes among private parties. The final sub-section addresses constraints that limit judicial application of vertical treaty provisions in disputes involving government actors.

1. *The Domestic Legal Status of Treaties:* As noted above, the 1993 Russian Constitution specifies that treaties are “an integral part” of the Russian legal system. The Constitution also states: “If other rules have been established by an international treaty of the Russian Federation than provided for by a law, the rules of the international treaty shall apply.”²²² In other words, a conflict between a law and a treaty should be resolved in favor of the treaty. Russian law recognizes an important distinction among three types of treaties: inter-state, inter-governmental and inter-departmental.²²³ Inter-state treaties require legislative approval in the form of a federal law. In contrast, the government can make a legally binding international commitment in the form of an inter-governmental or inter-departmental treaty without obtaining prior legislative approval.²²⁴

The Russian Supreme Court has held that “not all treaties are of equal stature within the Russian legal system.”²²⁵ In particular, a treaty takes precedence over a law “only if consent to the treaty being binding upon Russia was given in the form of a federal law.”²²⁶ Thus, inter-state treaties rank higher than federal laws, but inter-governmental and inter-departmental treaties rank lower than federal laws, since they are adopted without legislative approval. Certain commentators have criticized the Supreme Court’s view that only inter-state treaties outrank federal laws.²²⁷ The Russian Constitutional Court has not ruled on this matter.

In China, as in Russia, some treaties take precedence over ordinary laws. However, in contrast to Russia, the Chinese Constitution does not address the relationship between laws and treaties. Instead, the Chinese legal system gives precedence to treaties by specifying in particular laws that treaties prevail over conflicting laws.²²⁸ For example, the Civil Procedure Law states:

²²¹ China Chapter, text at note 7.

²²² 1993 Russian Constitution, Art. 15(4) (quoted in Russia Chapter, text at note 2).

²²³ Russia Chapter, page 6.

²²⁴ *Id.*, page 16.

²²⁵ *Id.*, page 9.

²²⁶ *Id.*

²²⁷ *See id.*, pages 14-16.

²²⁸ *See* China Chapter, pgs. 7-12.

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“If an international treaty concluded or acceded to by the People’s Republic of China contains provisions that differ from provisions of this Law, the provisions of the international treaty shall apply, except for those on which China has made reservations.”²²⁹

Similar rules are also provided for in dozens of laws dealing with particular subject matters, including, for example, the Law of Succession of 1985; the Postal Law of 1987; the Environmental Protection Law of 1989; the Trademark Law adopted in 1982 and amended in 1993; the Patent Law adopted in 1984 and amended in 1992; the Maritime Code of 1992; and the Negotiable Instruments Law of 1995. By virtue of these provisions in domestic laws, international treaties obtain domestic legal effect and prevail over conflicting internal laws.²³⁰

However, in China, “treaties acquire prevailing force over domestic law only when the relevant domestic law includes an explicit stipulation to that effect.”²³¹ In general, the laws that give precedence to treaties apply to three types of cases. These are “cases in which (a) one party or both parties to the dispute are foreign nationals, stateless persons, foreign enterprises or organizations, (b) the legal facts that establish, modify or terminate the civil legal relations between parties arise in foreign territories, or (c) the disputed object of the lawsuit is located in a foreign country.”²³²

2. *Judicial Application of Treaties:* In both Russia and China, judicial application of a treaty depends upon some prior action that accords domestic legal effect to a treaty. In Russia, the prior action takes the form of a federal law approving ratification (for an inter-state treaty), or a government decree confirming the treaty (for inter-governmental and inter-departmental treaties). “[T]here are thousands of laws of ratification or decrees of confirmation with respect to individual treaties.”²³³ These laws and decrees provide the foundation for judicial application of treaties in Russia. In China, the most important treaties are approved by laws enacted by the Standing Committee of the National Peoples’ Congress (NPC).²³⁴ Laws incorporating treaties into the domestic legal system generally fall into two categories. If “the pertinent subject matter is not covered by pre-existing domestic laws,” China will enact special legislation to incorporate a treaty into domestic law.²³⁵ For treaties whose subject matter overlaps with pre-existing laws, China will usually “amend or revise pre-existing laws to harmonize them with treaty provisions. This practice has become the most common way for China to implement its treaty obligations.”²³⁶

In both Russia and China, higher courts have issued judicial directives to guide the application of treaties by lower courts. In Russia, the Plenum of the Supreme Court adopted Decree No. 5 to guide the application of treaties by courts of general jurisdiction.²³⁷ Similarly,

²²⁹ *Id.*, pg. 8 (quoting Civil Procedure Law).

²³⁰ *Id.*, pg. 9-10.

²³¹ *Id.*, pg. 11.

²³² *Id.*, pg. 9 (citing a judicial directive issued by the Supreme People’s Court).

²³³ Russia Chapter, page 3.

²³⁴ China Chapter, page 5-6.

²³⁵ *See id.* at 14-17.

²³⁶ *Id.*, pg. 17.

²³⁷ *See* Russia Chapter, pages 5-8.

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the Plenum of the Supreme Arbitrazh Court issued Decree No. 8 to guide the application of treaties by Russian arbitrazh courts (which have jurisdiction over specific types of economic disputes).²³⁸ In China, the Supreme People's Court has issued several directives to govern the judicial application of particular treaties (or categories of treaties) by the lower courts.²³⁹ Additionally, the Supreme People's Court sometimes issues directives "jointly with the competent authorities of governmental departments to provide guidance for lower courts on treaty implementation."²⁴⁰ These judicial directives are not intended to resolve a particular dispute between named parties. Rather, the directives, which are binding on the lower courts, provide general regulatory guidance for the application of treaties by lower courts.

Domestic courts in both Russia and China apply treaties directly in appropriate cases to resolve legal disputes involving private parties. In Russia,

Few areas of law are untouched by treaties. Of those areas regulated by treaty, fewer still have not been affected by treaty enforcement in the Russian judicial and arbitral systems. . . . Individuals and juridical persons may invoke treaty rights directly in Russian courts pursuant to Article 15(4) of the Russian Constitution. . . . Published decisions of Russian courts include a significant number that cite treaties and other international acts. The Russian judicial system has become a central arena in which issues involving the application and enforcement of treaty rules are resolved.²⁴¹

Similarly, domestic courts in China routinely apply treaties to help resolve disputes involving private parties. "For example, Chinese courts have directly applied: the 1980 United Nations Convention on Contracts for the International Sale of Goods; the 1929 Warsaw Convention on the Unification of Certain Rules Relating to International Carriage by Air; . . . the 1951 Agreement Concerning International Carriage of Goods by Rail; and the 1974 United Nations Convention on a Code of Conduct for Liner Conferences."²⁴² The China Chapter discusses cases where domestic courts applied treaties to resolve disputes involving international air cargo, airline transportation of passengers, collisions of ships at sea, and copyright protection.²⁴³ These examples illustrate the point that domestic courts in both Russia and China have applied treaties to resolve a wide variety of disputes among private parties.

In both Russia and China, private disputes that the parties have referred to arbitration frequently involve the domestic application of treaties. "There are hundreds of arbitration courts established in the Russian Federation."²⁴⁴ The two most important are the International Court of Commercial Arbitration (MKAC) and the Maritime Arbitration Commission (MAK). The MKAC and MAK publish annual summaries of their decisions. Those summaries demonstrate that the MKAC and MAK routinely apply the U.N. Convention on Contracts for the International

²³⁸ See *id.*, pages 10-12.

²³⁹ See China Chapter, pages 31-32.

²⁴⁰ *Id.* at 33.

²⁴¹ Russia Chapter, pg. 1-2.

²⁴² China Chapter, pg. 22.

²⁴³ See *id.*, pages 22-29.

²⁴⁴ Russia Chapter, pg. 23.

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Sale of Goods, the New York Convention on the Recognition and Enforcement of Arbitration Awards, the European Convention on Foreign Trade Arbitration, and other relevant treaties.²⁴⁵

Chinese courts have jurisdiction to review international commercial arbitral awards.²⁴⁶ The courts “have rarely refused an application for enforcement” of such an award.²⁴⁷ In 1995, the Supreme People’s Court issued a Circular that “established a special reporting mechanism . . . for the purpose of supervising the enforcement of arbitral awards with foreign elements and the recognition and enforcement of foreign arbitral awards in the lower courts.”²⁴⁸ The Circular makes clear that a lower court decision refusing enforcement of such an arbitral award “can be effective only after confirmation by the Supreme People’s Court.”²⁴⁹ This insistence on appellate review by a higher court “has served to prevent local protectionism and ensure that legal rules are applied uniformly and consistently throughout the country.”²⁵⁰

3. *Treaty-Based Constraints on Government Action:* The chapters in this volume on China and Russia give the reader the impression that domestic courts in those countries enforce treaties quite vigorously. Other sources, however, give rise to some doubts on this matter, especially insofar as private parties might seek to invoke treaties in litigation as a constraint on government action.

The U.S. Department of State publishes annual human rights reports on countries around the world.²⁵¹ The 2007 report on China states unequivocally that “[t]he People’s Republic of China (PRC) is an authoritarian state.”²⁵² The Polity IV Project is a sophisticated scholarly endeavor that rates 162 countries on a scale from 10 (fully democratic) to -10 (wholly autocratic).²⁵³ In the 2006 Polity IV ratings, China received a polity score of -7, making it one of the most autocratic states in the world.²⁵⁴ The authoritarian nature of the Chinese state invariably influences the judicial enforcement of treaties.

The State Department notes: “The law states that the courts shall exercise judicial power independently . . . However, in practice the judiciary was not independent. . . . At both the central and local levels, the government and CCP frequently interfered in the judicial system and dictated court decisions.”²⁵⁵ Similarly, the U.N. Committee Against Torture, in its most recent report on China, expressed concern about the “reported harassment of lawyers . . . who have tried to offer their services to petitioners, human rights defenders and other dissidents, and reports that this harassment was conducted by unaccountable personnel alleged to be hired by State

²⁴⁵ See *id.*, pages 23-24.

²⁴⁶ See China Chapter, at 37-41.

²⁴⁷ *Id.*, pg. 38.

²⁴⁸ *Id.*, pg. 40.

²⁴⁹ *Id.*, pg. 41.

²⁵⁰ *Id.*

²⁵¹ See Country Reports on Human Rights Practices, 2007, available at <http://www.state.gov/g/drl/rls/hrrpt/>.

²⁵² Country Report on Human Rights Practices in China, 2007.

²⁵³ Polity IV Country Reports 2006, available at <http://www.systemicpeace.org/polity/polity4.htm>.

²⁵⁴ Only 10 out of 162 states were rated as more autocratic than China: Bhutan, Myanmar, North Korea, Oman, Qatar, Saudi Arabia, Swaziland, Turkmenistan, United Arab Emirates and Uzbekistan. See *id.*

²⁵⁵ Country Report on Human Rights Practices in China, 2007.

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authorities.”²⁵⁶ In this type of environment, it is difficult for individuals to advance legal claims in judicial proceedings alleging treaty violations by government actors. Even if private actors could raise such claims, it is doubtful whether Chinese courts provide a neutral forum in which to evaluate allegations against government and Communist Party officials. Thus, not surprisingly, although the China chapter in this volume cites numerous cases involving judicial enforcement of treaties, it does not cite a single case in which a Chinese court applied a treaty as a legal constraint on action by a government or Communist Party official.

The situation in Russia requires a more nuanced assessment. In contrast to China, Russia is no longer an authoritarian state. But Russia is not fully democratic either. In the 2006 Polity IV ratings, Russia received a polity score of 7.²⁵⁷ This places Russia in the mid-range of the spectrum from democratic to autocratic, with 69 states rated as more democratic, and 81 states rated as more autocratic.²⁵⁸ Professor Kahn notes that the new Russian Criminal Code “works a 180 degree turnaround from Soviet practice.”²⁵⁹ This is undoubtedly a positive development. However, he cautions “that what is required by law does not always reflect what transpires on the ground.”²⁶⁰ He concludes that the state is willing “to ignore Code provisions in political cases. . . . Every time the system is abused in that way, the system corrodes and respect for the rule of law weakens.”²⁶¹ Similarly, the U.S. State Department reports: “The law provides for an independent judiciary; however the judicial branch did not consistently act as an effective counterweight to other branches of the government. . . . Judges allegedly remained subject to influence from the executive, military, and security forces, particularly in high profile or politically sensitive cases.”²⁶²

The Russia chapter in this volume provides summaries of two cases where a Russian court ruled against the government on the basis of a treaty. In one case, the Supreme Arbitrazh Court ruled in favor of a “British juridical person [who] alleged that a tax had been levied in contravention of a bilateral tax treaty.”²⁶³ In another case, the Supreme Arbitrazh Court ruled against a customs collector who had imposed an import duty in violation of a free trade agreement between Russia and Moldova.²⁶⁴ These examples demonstrate that Russian courts do apply treaties as a constraint on government action in some cases.

However, the available evidence suggests that Russian courts do not regularly apply human rights or humanitarian treaties as a constraint on government action. The war in Chechnya created a “legal blackhole” in which Russian military officers have violated international humanitarian law with impunity, and the courts have done little or nothing to address this problem.²⁶⁵ In the field of human rights, although there are 47 states subject to the

²⁵⁶ Concluding Observations of the Committee Against Torture, China, CAT/C/CHN/CO/4 (Nov. 21, 2008), para. 15(C).

²⁵⁷ Polity IV Country Reports 2006, available at <http://www.systemicpeace.org/polity/polity4.htm>.

²⁵⁸ *See id.*

²⁵⁹ Jeffrey Kahn, *Vladimir Putin and the Rule of Law in Russia*, 36 Ga. J. Int'l & Comp. L. 511, 546 (2008).

²⁶⁰ *Id.*, at 547.

²⁶¹ *Id.*, at 548.

²⁶² Country Report on Human Rights Practices in Russia, 2007.

²⁶³ *See* Russia Chapter, pg. 10-11.

²⁶⁴ *See id.*, pg. 21-22.

²⁶⁵ *See* Kahn, *supra* note 259, at 526-28.

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jurisdiction of the European Court of Human Rights, cases from Russia account for roughly one-fourth of the Court's docket. In 2007, the Court received more than 10,000 cases from Russia.²⁶⁶ When the Court decides cases from Russia, it almost always rules that Russia has violated its treaty obligations under the European Convention.²⁶⁷ On the positive side, "Russia has paid every, single judgment assessed against it, without exception."²⁶⁸ However, if domestic courts in Russia consistently enforced the Convention in cases where private parties alleged human rights violations by the government, there would not be so many cases against Russia in the European Court, and Russia would have a better won-loss record in those cases. Therefore, Russia's record before the European Court demonstrates that Russian courts have not been enforcing treaty-based human rights constraints on government actors.

III.

The Customary International Law of Remedies

In Chapter Two of this volume, Professor Murphy presents a detailed analysis of the question whether international law obligates "a state to open its courts for private persons to vindicate rights or benefits that a treaty accords to them."²⁶⁹ He concludes that the answer is generally "no," except insofar as a specific treaty creates an explicit or implicit obligation to do so. Professor Murphy's analysis is extremely thorough and very insightful. However, I submit, by framing the question in slightly different terms, it is possible to gain a somewhat different perspective on the issues presented.

Part Three considers the question whether customary international law obligates states to provide remedies to private parties who are harmed by a violation of their treaty-based primary rights.²⁷⁰ This question differs from the question posed by Professor Murphy in two significant respects. First, Professor Murphy highlights the distinction between "obligations of result" and "obligations of conduct."²⁷¹ He correctly notes that customary international law generally creates obligations of result, not obligations of conduct. He conceives of the obligation to allow "individuals to invoke [a] treaty in the state's judicial system" as an obligation of conduct, not an obligation of result, and he argues that there is no such obligation of conduct under customary international law.²⁷² This argument is persuasive on its own terms, but it does not address the question whether states have an "obligation of result" to provide remedies for private parties who are harmed by a violation of their treaty-based rights.

Second, Professor Murphy argues that there is no general principle of law "that individuals are entitled to invoke treaties before national courts."²⁷³ In this portion of his

²⁶⁶ *Id.* at 536.

²⁶⁷ *See id.* at 537.

²⁶⁸ *Id.* at 540.

²⁶⁹ *See* Murphy Chapter, pg. 1.

²⁷⁰ As noted above, I use the term "remedies" in a broad sense to include a judicial order designed to prevent an incipient treaty violation or to halt an ongoing violation, as well as orders designed to compensate victims for past harms.

²⁷¹ *See* Murphy Chapter, pgs. 23-32.

²⁷² *See id.*, pgs. 31-32.

²⁷³ *Id.* at 33.

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argument, he relies heavily on the distinction between monism and dualism. He claims that “[t]he existence of a significant number of countries that generally fall into the ‘dualist’ camp makes it quite difficult to establish the existence of a general principle of international law that individuals may invoke treaty norms before national courts.”²⁷⁴ As Part Two of this Introduction demonstrates, there are several “dualist” countries where domestic courts consistently provide remedies to individuals who are harmed by a violation of their treaty-based rights. Individual victims do not care whether, as a formal matter, the court applies a statute rather than a treaty; they care whether they can obtain a remedy. Similarly, from the standpoint of international law, the critical question is whether the domestic court issues a ruling that promotes treaty compliance, not whether the court applies the treaty directly or indirectly. Hence, Part Three focuses on the question whether states are obligated to provide remedies to private parties who are harmed by a violation of their treaty-based primary rights, rather than the (somewhat different) question whether states are obligated to permit private parties to invoke treaties before domestic courts.

Part Three is divided into three sections. The first section contends that International Court of Justice decisions and International Law Commission documents provide substantial support for the proposition that customary international law obligates states to provide remedies for private parties who are harmed by a violation of their treaty-based primary rights. The second section shows that, at the present time, there is insufficient evidence of state practice or *opinio juris* to establish such a rule of customary international law. The final section endorses Professor Murphy’s suggestion that there may be an emerging rule of customary law along these lines.²⁷⁵ I contend that the emergence of such a rule is generally a positive development, but I recommend certain limitations on the emerging rule.

A. Views of International Judges and Experts

This section focuses on what Professor David Caron has called “trans-substantive rules”: i.e., “a set of rules present in [the law of] state responsibility independently of the particular substantive obligation in question.”²⁷⁶ The international legal system is decentralized; there are multiple institutions that issue pronouncements about the content of international law. However, there are very few international institutions that have articulated trans-substantive rules of state responsibility. The two most important such institutions are the International Court of Justice (ICJ) and the International Law Commission (ILC).²⁷⁷ This section shows that ILC documents and ICJ decisions support the proposition that customary international law obligates states to provide remedies for private parties who are harmed by a violation of their treaty-based primary rights.

²⁷⁴ *Id.* at 35.

²⁷⁵ *See id.*, pg. 88-99.

²⁷⁶ David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 Am. J. Int’l L. 857, 871 (2002).

²⁷⁷ The ICJ is “the principal judicial organ of the United Nations.” U.N. Charter, article 92. The ILC is a body of independent experts, initially created by the U.N. General Assembly in 1947, whose mandate is to promote “the progressive development of international law and its codification.” Statute of the International Law Commission, art. 1, para. 1., available at http://untreaty.un.org/ilc/texts/instruments/english/statute/statute_e.pdf.

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This section is divided into four sub-sections. The first sub-section explains the conceptual distinction between primary and secondary rules, a distinction that is “the central organizing idea”²⁷⁸ of the ILC’s Articles on State Responsibility.²⁷⁹ Next, I provide a brief overview of articles 28-41 of the ILC Articles; these articles provide a concise summary of what I will call “the customary international law of remedies.” Then I show that the customary international law of remedies, as articulated by the ICJ and ILC, obligates state S to make reparation to private party P in any case where P has a primary right under a treaty, S violates that right, and P is injured as a result of that violation.²⁸⁰ The final sub-section shows that, under the ICJ decision in *Avena*,²⁸¹ there are some cases in which customary law also obligates state S to grant P access to a domestic court to assert his entitlement to a remedy. However, the ICJ decision in *Avena* leaves unanswered many questions about the scope of the customary legal rule requiring access to domestic courts.

1. Primary and Secondary Rules

Various scholars have offered different formulations for explaining the distinction between primary and secondary rules.²⁸² The distinction between primary and secondary rules that is reflected in the ILC Articles is largely the work of Roberto Ago, who served as the ILC Special Rapporteur for State Responsibility from 1963-1979. According to Ago, primary rules “place obligations on States, the violation of which may generate responsibility.” In contrast, secondary rules, among other things, “determine whether that [primary] obligation has been violated and what should be the consequences of the violation.”²⁸³ The ILC Articles are concerned exclusively with secondary rules, not primary rules. Of particular importance for the present discussion, Part Two of the ILC Articles (articles 28-41) addresses the legal consequences of an internationally wrongful act.²⁸⁴ The secondary rules governing the legal consequences of an internationally wrongful act comprise the customary international law of remedies.

The question whether a private party has a primary right under a treaty is a question about primary rules, not secondary rules. In any particular case, the answer to this question is a matter of treaty interpretation. For example, in the *LaGrand Case*,²⁸⁵ the ICJ analyzed Article 36 of the

²⁷⁸ James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, pg. 15 (2002).

²⁷⁹ Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), *available at* <http://www.un.org/law/ilc/index.htm> [hereinafter, ILC Articles].

²⁸⁰ Although the final document produced by the ILC is labeled “Draft Articles,” the ILC Articles effectively became final when the General Assembly adopted a resolution “taking note” of the Articles. GA Res. 56/83 (Dec. 12, 2001). There continues to be substantial debate about whether the ILC Articles represent a genuine codification of customary international law. *See* Caron, *supra* note 276, at 861-68. Here, I do not express a view on that question, although my argument does suggest that certain portions of the Articles lend support for a rule that is not firmly rooted in state practice or *opinio juris*.

²⁸¹ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004.

²⁸² *See, e.g.*, H.L.A. Hart, *The Concept of Law* (1961); Hans Kelsen, *General Theory of Law and State* (1945).

²⁸³ Responsibility of States for Internationally Wrongful Acts, Official ILC Commentaries, para. 2 (reproduced in Crawford, *supra* note 278, at 74) (quoting Yearbook of the International Law Commission, 1970).

²⁸⁴ See ILC Articles, art. 28 (“The international responsibility of a State which is entailed by an internationally wrongful act . . . involves legal consequences as set out in this Part.”)

²⁸⁵ *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 466.

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Vienna Convention on Consular Relations and concluded, as a matter of treaty interpretation, “that Article 36, paragraph 1, creates individual rights.”²⁸⁶ Horizontal treaty provisions create obligations that a state party owes to another state or group of states; such treaty provisions do not create primary rights for private parties. However, vertical treaty provisions create obligations that a state party owes to private persons; such treaty provisions create primary rights for the class of persons to whom the obligation is owed.²⁸⁷ Thus, to ascertain whether a particular treaty provision creates primary rights for private parties, a court or other tribunal must interpret the treaty provision to determine whether the primary obligation is owed to states, to private parties, or both. A private party has a primary right under a treaty if the treaty imposes a duty on a state party to refrain from action that would burden that private party, or to engage in affirmative action to benefit that private party.²⁸⁸ As used in this Introduction, the statement that a treaty “protects private rights” means that a private party has a primary right under the treaty.

Assume that a tribunal concludes that a particular treaty provision creates primary rights for private party P, state S has violated those rights,²⁸⁹ and P has been injured by that violation.²⁹⁰ Is P entitled to a remedy for that violation? This is a question about secondary rules, not primary rules: it is a question about the legal consequences of a treaty violation. One could examine those legal consequences from the perspective of either domestic law or international law, because every domestic legal system, like the international legal system, has a set of secondary rules governing the availability of remedies. If P has brought his claim before a domestic court, the domestic court would presumably want to examine the relevant domestic secondary rules to determine whether P is entitled to a remedy as a matter of domestic law. If P is clearly entitled to a remedy as a matter of domestic law, the domestic court might not care whether international law obligates state S to provide a remedy for P. Similarly, if domestic law clearly prohibits the domestic court from granting a remedy to P, the domestic court would be unable to grant P a remedy, even if international law obligated S to provide a remedy.²⁹¹

Suppose, though, that the relevant secondary rules of domestic law are open to different interpretations. In these circumstances, the domestic court might wish to know whether international law obligates state S to provide a remedy for P. The court could examine the treaty that S violated to determine whether that particular treaty obligates states to provide domestic

²⁸⁶ *Id.*, paras. 75-77.

²⁸⁷ *See id.*, para. 77 (“The Court notes that Article 36, paragraph 1(b), spells out the obligations the receiving State has toward the detained person” and therefore creates individual rights for the detained person).

²⁸⁸ One could also add a third category, if a treaty obligates a state to do something “if at all only in a prescribed way.” *See Sloss, supra* note 3, at 29 (quoting Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 122 (1994)). *See also* Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 *Colum. L. Rev.* 1082 (1992).

²⁸⁹ To answer the question whether state S violated P’s rights, a tribunal would have to determine whether there was a violation, and if so, whether S was responsible for that violation. The question whether S is responsible for a particular treaty violation implicates a different branch of the law of state responsibility, which is addressed in Part One of the ILC Articles.

²⁹⁰ Whether P has been injured is essentially a factual question, but the question whether there is a sufficient causal link between the violation and the injury to say that the violation “caused” the injury is, at least partially, a question of law.

²⁹¹ Even in cases where a treaty expressly obligates a state party (as a matter of international law) to grant P a private right of action in its domestic courts, P will not actually have a private right of action (as a matter of domestic law) unless the state party has incorporated that treaty obligation into its domestic law.

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legal remedies for private parties whose treaty-based primary rights are violated. Some treaties do contain secondary rules of this type.²⁹² However, most treaties that spell out primary rules governing the conduct of states say nothing about the secondary rules that determine the consequences that follow from a violation of those primary rules. If such a treaty becomes the subject of domestic litigation, and a domestic court wants to know whether international law obligates State S to provide a remedy for P, a knowledgeable court would look to the customary law of state responsibility for an answer.

In sum, it is important to bear in mind the conceptual distinction among three discrete issues: 1) whether P has a primary right under treaty T (a question about primary international rules whose answer depends on treaty interpretation); 2) whether P is entitled to enforce that primary right in a domestic court (a question about secondary domestic rules that is governed by domestic law); and 3) whether international law obligates state S to grant P a remedy when he is harmed by a violation of his treaty-based primary rights. The third issue involves a question about secondary international rules. Specific treaty provisions may answer this question in some cases. However, where a treaty is silent on this question (as is usually the case), the customary international law of remedies provides background rules that determine the remedial consequences of a treaty violation. The next section addresses the customary international law of remedies that applies between states. The following section addresses the application of those rules in cases where a state has allegedly violated the treaty-based primary rights of a private party.

2. The Customary International Law of Remedies

More than eighty years ago, in the *Chorzow Factory* case, the Permanent Court of International Justice affirmed the principle that a breach of an international legal obligation gives rise to an additional “obligation to make reparation in an adequate form.”²⁹³ The Court added:

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”²⁹⁴

In short, when a state violates an international legal obligation – for example, by breaching a treaty – the state is obligated to “wipe out all the consequences of the illegal act,” insofar as possible, and to restore the *status quo ante*.

The PCIJ decision in *Chorzow Factory* is the cornerstone of the customary international law of remedies. The ILC Articles build on that foundation (and on subsequent decisions) to provide a more systematic presentation of the customary international law of remedies.

²⁹² See Murphy Chapter (citing examples of treaties that require access to domestic courts). If a particular treaty explicitly addresses the domestic remedial consequences of a treaty violation, such *lex specialis* rules supplant the ILC Articles in cases arising under that treaty.

²⁹³ Factory at Chorzow, Jurisdiction, 1927, PCIJ, Series A, No. 9, p. 21.

²⁹⁴ Factory at Chorzow, Merits, 1928, PCIJ, Series A, No. 17, p. 47.

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According to the ILC Articles, when a state breaches an international legal obligation, there are three key principles that come into play. First, the responsible state has a “continued duty . . . to perform the obligation breached.”²⁹⁵ Second, if the violation is ongoing, the responsible state “is under an obligation to cease that act” and “to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.”²⁹⁶ Third, “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”²⁹⁷

Under the ILC Articles, there are three main forms of reparation: “restitution, compensation and satisfaction.”²⁹⁸ Restitution involves restoring the *status quo ante*.²⁹⁹ Restitution is the preferred form of reparation: it is required in every case unless it is “materially impossible” or involves “a burden out of all proportion to the benefit.”³⁰⁰ In cases where restitution is impossible, or would impose a disproportionate burden, the responsible state “is under an obligation to compensate for the damage caused” by the violation. “The compensation shall cover any financially assessable damage.”³⁰¹ Satisfaction is the least favored form of reparation. The state responsible for a violation is obligated to provide satisfaction only if “the injury caused by that act . . . cannot be made good by restitution or compensation.”³⁰² “Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.”³⁰³

The secondary rules summarized above apply to all breaches of primary international obligations, regardless of whether those obligations are derived from a treaty or from customary international law. The ILC Articles are chiefly concerned with secondary rules that apply when a state breaches a horizontal legal obligation owed to another state or group of states. The principles summarized above are not controversial, insofar as they apply to horizontal relations between states. However, there is disagreement about whether the same rules apply when a state breaches an international legal duty owed to a private party -- i.e., when a state violates a primary right of a private party that is protected by international law. The next section addresses that issue.

3. The Duty to Make Reparations to Private Parties

To begin this analysis, it is helpful to distinguish between two discrete issues. The first issue concerns the scope of a state’s duty to make reparations for an injury to a private party caused by that state’s violation of a primary international legal obligation. The second issue concerns the scope of a state’s duty to grant private persons access to domestic tribunals to pursue a claim for reparations. This section addresses the first issue. The next section addresses the second issue.

²⁹⁵ ILC Articles, *supra* note 279, art. 29.

²⁹⁶ *Id.*, art. 30.

²⁹⁷ *Id.*, art. 31.

²⁹⁸ *Id.*, art. 34.

²⁹⁹ *Id.*, art. 35 (“A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed.”).

³⁰⁰ *Id.*

³⁰¹ *Id.*, art. 36.

³⁰² *Id.*, art. 37, para. 1.

³⁰³ *Id.*, art. 37, para. 2.

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As noted above, the fundamental principle of the customary international law of remedies is the principle articulated by the PCIJ in the *Chorzow Factory* case: the responsible state has an obligation to “wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”³⁰⁴ As a matter of simple logic, it is difficult to limit this principle exclusively to inter-state injuries. If state S violates an international legal obligation, and private party P suffers an injury as a result of that violation, S’s secondary obligation to “wipe out the consequences” of the violation would seemingly entail an obligation to remedy the harm caused to P. If State S does not remedy the harm caused to P, it has arguably failed to “wipe out all the consequences of the illegal act.”³⁰⁵

In *Chorzow Factory* itself, Poland breached a treaty obligation by seizing property owned by two private companies; the private companies sustained monetary damage as a result of Poland’s treaty violation. Consequently, the court held, the Polish Government was “under an obligation to pay, as reparation . . . compensation corresponding to the damage sustained by the said Companies as a result of” the treaty violation.³⁰⁶ As a formal matter, Poland owed compensation to the German Government, not to the private companies directly. Nevertheless, the amount of compensation was measured by the harm sustained by the private companies and the goal of the court’s remedial order was to compensate the private companies for the injury they suffered.

In subsequent decisions, the ICJ has tacitly assumed that the fundamental remedial principle articulated in *Chorzow Factory* also applies to cases where international law creates vertical obligations that a state or international organization owes to private parties. For example, in an advisory opinion concerning the rights of a disgruntled former employee who had lost his job with the United Nations, the ICJ quoted *Chorzow Factory* in support of the principle “that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”³⁰⁷ In this advisory opinion, as Professor Shelton has noted, the ICJ thought it was axiomatic “that the basic principle of reparation articulated in the *Chorzow Factory* case applies to reparation for injury to individuals.”³⁰⁸

Similarly, in the process of drafting the Articles on State Responsibility, the ILC assumed that the basic remedial principle articulated in *Chorzow Factory* also applies in cases where the right-holder is a private party, rather than a state. Hence, although the ILC Articles focus primarily on inter-state responsibility, Article 33(2) stipulates: “This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to

³⁰⁴ Factory at Chorzow, Merits, 1928, PCIJ, Series A, No. 17, p. 47.

³⁰⁵ *Accord*, Andre Nollkaemper, Internationally Wrongful Acts in Domestic Courts, 101 AJIL 760, 782 (2007) (“The general principle that the breach of a right entails the obligation to provide reparation is irrefutable and as such appears applicable to the legal relationship between states and individuals.”)

³⁰⁶ Factory at Chorzow, Merits, pg. 63.

³⁰⁷ Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, 1973 ICJ Rep. 166, 197 (July 12).

³⁰⁸ Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AJIL 833, 834 n.8 (2002).

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any person or entity other than a State.”³⁰⁹ James Crawford, the Special Rapporteur on State Responsibility who supervised the final stages of drafting the ILC Articles, explains that this provision is “a saving clause” designed to avoid the implication “that all secondary obligations were owed to states or collectives of states.”³¹⁰ Moreover, he adds, Article 33(2) “clearly envisages that some ‘person or entity other than a State’ may be directly entitled to claim reparation arising from an internationally wrongful act of a state.”³¹¹

The official ILC Commentary explains that it is “a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account.”³¹² In other words, if a treaty creates a primary obligation that state S owes to private party P, and S violates that primary obligation, thereby violating P’s primary right, the violation by S triggers a secondary obligation for S to make reparation to P for any material injury caused by the violation. This follows from the fact that the treaty creates a primary obligation that S owes to P. As noted above, this conclusion is somewhat controversial. Regardless, the ILC Articles and *Chorzow Factory* do support such a secondary rule of international law. Moreover, as discussed below, the ICJ analysis in *Avena* assumes the validity of such a secondary rule.

4. *The Duty to Grant Private Parties Access to Domestic Tribunals*

The preceding section suggests that, in cases where private party P has a primary right under a treaty, and state S violates P’s primary right, the customary international law of remedies may obligate state S to make reparations to P for any material injury caused by the violation. This conclusion raises a further question. Does the alleged obligation to make reparations entail a further obligation to provide a domestic legal mechanism to enable P to bring a claim before a domestic tribunal to assert his entitlement to reparations? I contend that the best explanation of the ICJ decision in *Avena* is that the Court thought there are some cases in which customary international law obligates state S to provide a domestic judicial forum to adjudicate P’s claim for reparation.

In the *Avena* case,³¹³ the ICJ applied the customary international law of remedies to determine the nature and scope of the secondary obligations resulting from the United States’ violation of Article 36 of the VCCR. The Court first held that the United States had violated the rights of 51 Mexican nationals, under Article 36(1)(b), to be informed about their right to obtain assistance from the Mexican consulate.³¹⁴ It then held “that the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals’ cases by the United States courts.”³¹⁵

³⁰⁹ ILC Articles, *supra* note 279, art. 33, para. 2.

³¹⁰ James Crawford, *The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AJIL 874, 887 (2002).

³¹¹ *Id.*

³¹² Official Commentary to Art. 33 (*reprinted in* Crawford, *supra* note 278, at 210).

³¹³ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004,

pg. 12.

³¹⁴ *Id.*, para. 106.

³¹⁵ *Id.*, para. 121.

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The ICJ had previously held in the *LaGrand* case that the U.S. was obligated to provide “review and reconsideration” for German nationals whose rights under Article 36(1) of the VCCR had been violated.³¹⁶ The ICJ decision in *LaGrand* could plausibly be interpreted to say that the obligation to provide “review and reconsideration” is itself rooted in Article 36(2) of the VCCR.³¹⁷ However, the logic and structure of the ICJ’s decision in *Avena* makes clear that the U.S. obligation “to permit review and reconsideration” of the Mexican nationals’ criminal convictions and sentences is not derived from Article 36(2). Rather, that obligation is derived from the customary international law of remedies.

In *Avena*, the ICJ divided its analysis of the merits into three main parts. First, the ICJ addressed allegations that the United States had violated Article 36, paragraph 1; it concluded that the U.S. had violated this provision with respect to 51 Mexican nationals.³¹⁸ Second, the ICJ addressed allegations that the U.S. violated Article 36(2); it concluded that the U.S. breached this provision with respect to only three Mexican nationals.³¹⁹ In the final major section of its opinion, the ICJ concluded that the U.S. was obligated to provide “review and reconsideration” of the convictions and sentences of all 51 Mexican nationals whose rights under Article 36(1)(b) had been violated.³²⁰

It is obvious that the obligation to provide “review and reconsideration” for 51 Mexican nationals cannot be derived from Article 36(2) because the ICJ said that the U.S. breached Article 36(2) with respect to only three of those 51 individuals. The headings that the ICJ used to organize its analysis reinforce this point. The heading “Article 36, Paragraph 1” introduces the analysis in paragraphs 49 to 106. The heading “Article 36, Paragraph 2” introduces the analysis in paragraphs 107 to 114. The heading “Legal Consequences of the Breach” introduces the analysis in paragraphs 115 to 150. This heading, when compared to the other two headings, makes clear that the analysis in this section is not based on a specific treaty provision. Moreover, the phrase “legal consequences of the breach” is almost identical to the phrase used in Article 28 of the ILC Articles.³²¹ Article 28 is the first article in Part Two of the ILC Articles: it is the opening provision for that portion of the Articles that addresses the customary international law of remedies. Thus, the ICJ’s choice of terminology reinforces the point that the analysis in paragraphs 115 to 150 of the *Avena* judgment is based on the customary international law of remedies, not Article 36(2).

To clarify the underlying rationale in *Avena*, it is worth quoting one passage at length:

³¹⁶ See *LaGrand*, *supra* note 285.

³¹⁷ Some passages in the ICJ decisions in *LaGrand* and *Avena* suggest that, in certain circumstances, the obligation to provide review and reconsideration is linked to art. 36(2) of the VCCR. See, e.g., *LaGrand*, *supra* note 285, para. 128(4); *Avena*, *supra* note 313, para. 153(8). As explained below, though, this rationale does not apply to the 48 Mexican nationals in *Avena* whose rights under article 36(1) were violated, but whose rights under article 36(2) were not violated.

³¹⁸ *Avena*, *supra* note 313, paras. 49-106.

³¹⁹ *Id.*, paras. 107-114.

³²⁰ *Id.*, paras. 115-150.

³²¹ Article 28 is entitled “Legal consequences of an internationally wrongful act.” ILC Articles, *supra* note 279, art. 28.

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[T]he Court’s task is to determine what would be adequate reparation for the violations of Article 36. It should be clear from what has been observed above that the internationally wrongful acts committed by the United States were the failure of its competent authorities to inform the Mexican nationals concerned, to notify Mexican consular posts and to enable Mexico to provide consular assistance. It follows that the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals’ cases by the United States courts . . . with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.³²²

Several points merit comment here. First, the second sentence of the passage quoted above refers to three distinct U.S. violations: the failure to inform Mexican nationals, to notify Mexican consulates, and to enable Mexico to provide consular assistance. All three violations relate to Article 36(1), not Article 36(2).³²³

Second, the Court states explicitly that its “task is to determine what would be adequate reparation for” these violations. This statement follows shortly after a paragraph in which the ICJ quotes *Chorzow Factory* for the proposition “that reparation must, as far as possible, wipe out all the consequences of the illegal act.”³²⁴ Thus, it is clear that the ICJ’s analysis of reparation is guided by the principles articulated in *Chorzow Factory* – i.e., the customary international law of remedies.

Third, the passage quoted above makes clear that the purpose of “review and reconsideration” is to ascertain “whether in each case the violation of Article 36 . . . caused actual prejudice to the defendant.” The underlying logic involves a straightforward application of *Chorzow Factory*. In order to identify the steps required to “wipe out all the consequences of the illegal act,” it is first necessary to determine what those consequences were. Specifically, it is necessary to determine whether the illegal act “caused actual prejudice to the defendant.”³²⁵ If the violation of Article 36 did not cause any actual prejudice to defendant A, then no further action is necessary to wipe out the consequences of that violation. However, if the violation of Article 36 did cause actual prejudice to defendant B, the U.S. would be obligated to remedy that injury. In sum, the ICJ ordered the U.S. to provide “review and reconsideration” to determine the consequences of the Article 36 violations for each individual defendant. Only after determining those consequences could the U.S. take steps to “wipe out” those consequences, in accordance with its secondary obligations under the customary international law of remedies.

Finally, in the above-quoted passage, the ICJ stated explicitly that “United States courts” must provide review and reconsideration. In its submissions to the Court, Mexico argued

³²² *Avena*, *supra* note 313, para. 121.

³²³ *See id.*, para 106.

³²⁴ *Id.*, para. 119 (quoting *Chorzow Factory*).

³²⁵ Subsequent portions of the opinion make clear that the Court is concerned with prejudice caused by the Article 36 violation, not prejudice caused by anything else. *See id.*, paras. 131-34. This reinforces the point that the whole purpose is to “wipe out the consequences” of the violation, not to remedy some other harm.

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explicitly that the obligation to provide review and reconsideration “cannot be satisfied by means of clemency proceedings.”³²⁶ The ICJ specifically rejected U.S. arguments to the contrary. It held that “the clemency process” is “not sufficient,”³²⁷ and that “it is the judicial process that is suited to this task” of providing review and reconsideration.³²⁸ This makes perfect sense, because the goal of “review and reconsideration” is to ascertain whether a particular defendant was prejudiced by the violation of his Article 36 rights, and the clemency process is not designed to accomplish this task. Thus, assuming that the ICJ was correct, *Avena* demonstrates that there are some cases in which customary international law obligates states to grant private parties access to domestic tribunals to seek reparations for treaty violations. Unfortunately, *Avena* tells us very little about how to distinguish between cases where states are obligated to grant access to domestic tribunals and cases where states are not so obligated.

In sum, *Avena* is a case where individual Mexican nationals had primary rights under a treaty, the U.S. violated those rights, but the relevant treaty said nothing about the secondary obligations that arose as a consequence of the U.S. violations of its primary obligations. Accordingly, the ICJ applied the customary international law of remedies to determine the nature and scope of those secondary obligations. The Court decided that the U.S. had a duty under customary international law: 1) to make reparations to individual Mexican nationals who were prejudiced by the treaty violations; and 2) to grant individual Mexican nationals access to U.S. courts so that they would have an opportunity to demonstrate that they were prejudiced by the violation of their treaty-based primary rights.

B. State Practice and *Opinio Juris*

To prove the existence of a rule of customary international law, it is necessary to establish two points: a) that state conduct generally conforms to the asserted rule; and b) that states follow the rule because they believe they are legally obligated to do so (*opinio juris*).³²⁹ The preceding section showed that ILC documents and ICJ decisions support the claim that customary international law obligates state S to make reparations to private party P in cases where P has a primary right under a treaty, S violates P’s primary right, and P suffers a material injury as a result of that violation. Part Two showed that eight of the twelve states surveyed in this volume generally behave in accordance with this rule. Even so, at the present time, there is not sufficient evidence of state practice or *opinio juris* to prove the existence of the asserted rule.

First, consider *opinio juris*. The ILC Articles and the ICJ decisions summarized above provide evidence that international judges and international law experts believe that states are obligated to conform their conduct to the asserted rule. The critical question, though, is whether states believe that they are bound by that obligation. Most states would probably acknowledge that they have a duty under international law to prevent incipient treaty violations and to halt ongoing violations. This much is implicit in the *pacta sunt servanda* principle.³³⁰ However, international law does not obligate states to organize their domestic legal systems in a manner

³²⁶ *Avena*, *supra* note 313, para. 135.

³²⁷ *Id.*, para. 143.

³²⁸ *Id.*, para. 140.

³²⁹ See Brownlie, *supra* note 13, at 7-10.

³³⁰ See Vienna Convention on the Law of Treaties, art. 26 (obligating states to perform treaties in good faith).

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that empowers domestic courts to prevent or halt treaty violations affecting private rights. Moreover, there is scant evidence that states construe the *pacta sunt servanda* principle to include a duty to compensate individual victims of treaty violations.

The country chapters in this volume -- even the chapters on “international-law-friendly” states -- do not maintain that domestic courts provide remedies to individual victims of treaty violations because international law obligates them to do so. It is possible that domestic courts provide remedies to private parties who have suffered legally cognizable harms because domestic law requires (or, perhaps, empowers) them to do so. Alternatively, domestic courts may provide remedies for treaty violations because they believe that it is in the national interest to comply with treaty obligations, or because they believe that the political branches value compliance with treaty obligations. To present a rigorous proof of *opinio juris*, one would have to exclude these alternative explanations of judicial behavior.

The U.N. Guidelines on the Right to a Remedy,³³¹ adopted by the U.N. General Assembly in 2005, provide some evidence of *opinio juris*. That document specifies that states are obligated to provide “equal and effective access to justice” and “effective remedies” for individuals who have suffered “substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.”³³² However, there is an ongoing debate about how much weight to attribute to General Assembly resolutions in evaluating evidence of *opinio juris*. Moreover, the Guidelines on the Right to a Remedy is merely a single resolution. At best, it shows that states acknowledge a duty to provide remedies for a certain narrow class of treaty violations.

The evidence of state practice is equally thin. To evaluate state practice, it is helpful to draw upon the Polity IV Country Reports.³³³ The Polity IV Project rates 162 countries on a scale from 10 (fully democratic) to -10 (a pure autocracy). To simplify the analysis, we can classify these 162 countries into three groups: democracies (with a polity score of 8, 9, or 10); autocracies (with a negative polity score) and mixed systems (with a score between zero and seven, inclusive). Using this rubric, the 162 states rated by the Polity IV Project include 69 democracies, 53 autocracies and 40 mixed systems.

China is the only autocratic country surveyed in this volume.³³⁴ As discussed in Part II above, the courts in China do not consistently provide remedies to private parties for treaty violations committed by government actors. The underlying problem is that China does not have a strong, independent judiciary staffed by professional judges who think they have an institutional duty to protect the rights of private parties from government infringement. In this respect, China is probably typical of the 53 autocratic countries. Thus, it is reasonable to assume that domestic courts in those 53 states play a fairly limited role in enforcing treaty-based constraints on government action. The fact that there are 53 autocratic states in the world whose

³³¹ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 2005).

³³² *See id.*, paras. 3(c), 3(d), and 8.

³³³ Polity IV Country Reports 2006, available at <http://www.systemicpeace.org/polity/polity4.htm>.

³³⁴ China has a polity score of -7. *See id.*

behavior probably does not conform to the asserted rule arguably demonstrates that there is insufficient evidence of state practice to prove the asserted rule.

C. Is There an Emerging Rule?

In Chapter Fourteen, Professor Murphy says that “[t]he ‘arc’ of the development of international law may point in the direction of a more general obligation to allow invocation of treaty norms by individuals in national courts in situations where the treaty contains provisions that are protective of individuals.”³³⁵ He provides an excellent summary of the current trends that support this emerging rule.³³⁶ There is no value in repeating his argument here, but it is worthwhile to add two points that reinforce his analysis.

First, the information in this volume demonstrates that there is a clear trend towards greater use of domestic courts to enforce treaty-based private rights. That trend is present in nine of the twelve states discussed in this volume: Australia, Canada, China, India, Israel, Poland, Russia, South Africa and the United Kingdom. Germany and the Netherlands are excluded from this list because both countries have a longstanding tradition of openness to international law that for many years has facilitated domestic judicial enforcement of treaties. The United States is the only country featured in this volume where the trend is moving in the opposite direction. Thus, the country chapters in this volume support Professor Murphy’s claim that there may be an emerging rule of customary international law along the lines suggested above.³³⁷

Second, in recent years, there has been a rapid growth in the number of states that have voluntarily subjected themselves to the jurisdiction of regional courts. At present, there are 27 EU member states that are subject to the jurisdiction of the European Court of Justice;³³⁸ 47 Council of Europe member states that are subject to the jurisdiction of the European Court of Human Rights;³³⁹ and 22 states subject to the jurisdiction of the Inter-American Court of Human Rights.³⁴⁰ African states recently adopted a Protocol creating the African Court of Justice and Human Rights.³⁴¹ The chapters in this volume on Germany, Poland and the Netherlands show that a state’s membership in the European Union and the Council of Europe tends to induce domestic courts in that state to be more receptive to domestic adjudication of claims based on bilateral and global treaties.³⁴² If states subject to the jurisdiction of regional courts in Africa and the Americas follow a similar pattern of development, one can expect that domestic courts in those states will become increasingly receptive to domestic adjudication of treaty-based claims.

Professor Murphy expresses concern that that there may be some unwanted negative consequences if the aforementioned emerging rule crystallizes into an established rule of

³³⁵ Murphy Chapter, pg. 88.

³³⁶ *Id.* at 88-99

³³⁷ Professor Murphy makes a similar point. See Murphy Chapter, text at notes 159-82.

³³⁸ See http://europa.eu/abc/european_countries/index_en.htm.

³³⁹ See http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp. (listing Member States of Council of Europe).

³⁴⁰ See <http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>.

³⁴¹ Text available at http://www.hurisa.org.za/Advocacy/AfricanCourt/Single_Legal_Instrument.pdf

³⁴² See *supra* notes 60-74 and accompanying text (in this Introduction).

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international law.³⁴³ Those concerns are not unwarranted. Even so, for the reasons articulated in Part I.A of this Introduction, I believe that the trend toward greater use of domestic courts to enforce treaty-based private rights is generally a positive development. In closing, though, it may be helpful to identify appropriate limits on the emerging rule. In my view, the emerging rule should be subject to five key limitations.³⁴⁴ First, horizontal treaty provisions are excluded from the scope of the rule because they do not protect primary private rights. Second, a treaty provision must be “formulated in sufficiently specific terms [that] it can be invoked by private persons.”³⁴⁵ If “the treaty expresses a benefit or protection for individuals that is highly inchoate or aspirational in nature,” judicial application may be inappropriate.³⁴⁶ Third, the right to a private remedy does not necessarily imply a right of access to domestic courts; states could fulfill the purposes of the emerging rule by creating administrative tribunals that have the authority to adjudicate claims within the scope of the rule.

Fourth, domestic courts should not enforce a treaty that expressly precludes domestic judicial enforcement. Similarly, if a treaty creates an alternative mechanism for private parties to vindicate their treaty-based primary rights, a court might reasonably conclude that the treaty drafters implicitly precluded domestic judicial enforcement.³⁴⁷ (However, courts should not infer an implied limitation on domestic judicial enforcement if the alternative mechanism is accessible only to states, not private parties.) Finally, the right to a remedy for treaty violations is subject to limitations in cases where the private party waits too long to seek a remedy,³⁴⁸ or fails to follow the prescribed procedure,³⁴⁹ or is otherwise at fault for the failure to obtain a remedy that the legal system made available to him.

³⁴³ See Murphy Chapter, at pgs. 99-104.

³⁴⁴ There is some overlap between my list of five limitations and Professor Murphy’s discussion of situations where, in his view, it would be inappropriate for a domestic court to conclude that there is an implied right for individuals to invoke a treaty in national courts. See *id.*, pgs. 81-88.

³⁴⁵ Netherlands Chapter, text before note 78.

³⁴⁶ Murphy Chapter, text before note 148. See also Poland Chapter, text at note 129 (stating that a treaty provision is not judicially enforceable unless it “has been drafted in a complete manner”).

³⁴⁷ *Accord*, Murphy Chapter, text at notes 153-56.

³⁴⁸ Virtually all domestic legal systems include statutes of limitations to address this type of problem. Similarly, the ILC Articles provide that a state loses its right to bring a claim if it “validly acquiesced in the lapse of the claim.” ILC Articles, *supra* note 279, art. 45(b).

³⁴⁹ See ILC Articles, *supra* note 279, art. 44.