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CUSTOMARY INTERNATIONAL LAW IN

NATIONAL COURTS

– A Comparative Analysis –

by Uwe Bottermann

A thesis submitted for the degree of
Master of Laws (LLM)
at the University of Otago, Dunedin,
New Zealand
October 2000
This work is dedicated to the Memory of Dieter Samolarz.
ACKNOWLEDGEMENTS

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Having finished the enterprise of a major research thesis on foreign legal systems in a second language feels relieving and satisfying at the same time.

When I came to New Zealand I had a fair knowledge of International Law and the way German law deals with it. I thought, I might be able to project this to the situation in New Zealand to find and solve some of the difficulties this country seemed to have. However, the coincidental discovery of a dissertation covering too much of my subject had me go back to the drawing board and design a whole new topic without comprising the initial aim to research into the relationship of International Law and municipal law.

Here, the first credits are due to Paul Roth, my initial supervisor, who suggested to pick up on customary law rather than treaties. This, I must confess, sounded ridiculous at first, the matter being so well settled in Germany and continental Europe. However, it turned out to be much more interesting and indeed problematic than I first thought. With Kevin Dawkins – who had previously agreed to supervise the thesis – returning from Europe, I then received competent and experienced guidance through the dogmatic jungle of International Law. Kevin’s boundless knowledge and Paul’s stimulating creativity completed an unbeatable mixture to steer me through the topic. I am greatly indebted to both of my supervisors for their assistance, which continued during times of great distress on their behalf and while I was back home already. Working on the thesis with them made me a more critical person than I was before. Any mistakes and insufficiencies, however, remain entirely my own.

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Definition of Aggression, Annex to GA Res 3314 (XXIX)


Universal Declaration on Human Rights GA Res 217A (III) (10 Dec 1948)
Abstract

The effect of international law (IL) in national legal systems has always been of interest to legal scholars and practitioners as well. In recent times, attention has increased with the growing scope of IL. Accounts of the interrelations of IL and national law, however, more frequently investigate merely the impact of international treaties. On their face, the issues with treaties are most pressing since many treaties now have internal application and provide for sophisticated compliance mechanisms which may include compulsory jurisdiction of international judicial bodies.

As for customary international law (CIL), authors more often merely refer to a "monist" approach which holds that CIL is "part of the law of the land". The issues here are maybe less apparent but perhaps equally pressing. The formula "CIL is part of national law" leaves as many questions as the formula "treaties are not part of national law". These questions include: How does CIL become part of national law? What kind of law is it? Which law is to prevail in cases of conflict between CIL and national law? Moreover, and most importantly, CIL is unwritten law whose content has to be established before it can have effect. Here, questions of jurisdiction and methods to ascertain rules of CIL arise.

This thesis attempts to evaluate the effect of CIL in various common law systems. It therefore investigates and compares judicial practice in Australia, Canada, New Zealand and the United Kingdom to find the most appropriate solution.

Chapter one provides an introduction to the setting of the problem: the relation between IL and national law. It introduces the major theories and argues that neither of the theories is apt to explain all the issues that practically arise.

The remainder of the thesis will be organised in three parts.
The first part, comprising chapters two and three, investigates and evaluates various mechanisms to validate CIL nationally. Starting with a historical account of the English doctrine, possible points of departure in the other jurisdictions are identified.

The second part is occupied with the identification of rules of CIL in national courts. Chapter four shows that national courts are fit to ascertain rules of CIL and investigates which kinds of material should be used. Chapter five explores various mechanisms of national procedure available to obtain such material.

The third part deals with the application of CIL in national law. Here, chapter six identifies two ways in which CIL can be indirectly relevant for national law, that is by way of interpretation of pre-existing law or by reference from national law to rules of IL. Chapter seven investigates the rules that apply when CIL is in conflict with national statute or common law and links these rules to the validation mechanisms identified earlier. Finally, chapter eight provides a case study for the application of international criminal law in national legal systems.

In the concluding chapter, the above formula is found viable but merely explaining the basis of a comprehensive reference norm that allows for significant influence of CIL in national law.
"International law is the body of rules which are legally binding on states in their intercourse with each other."¹ Even considering modern developments in IL like human rights and international organisations, this classical definition is still the conceptual pillar on which the international legal order rests.² The adherence to human rights treaties is conceptually an obligation between states rather than states and individuals. International organisations obtain personality under IL only insofar as the member states allow it. The concept of IL as the system of rules regulating the conduct among states therefore remains.

National law, on the other hand, is the body of rules binding on private entities and state organs in their intercourse between and with each other within the jurisdiction of one state. Here, there is always involved a national element. Disputes are between national persons, whether private or public. If foreigners are involved another national element needs to be given. This may be that the dispute occurred in the forum state’s territory or otherwise within its jurisdiction – for example on one of its ships.

There exists no third body of rules.³ Law is either national or international. Where these two bodies of rules meet, the rules governing the interrelation must lie either in the international or the national body of law. Then, there exists the question from where this interrelation is to be seen. Is it to be looked at from an international or a national

¹ Jennings and Watts (eds) Oppenheim’s International Law (9th ed, 1992) at § 1 (p 4) (footnote omitted).
² “[S]tates are not the only subjects of international law. … [T]o some extent, also individuals may be subject to rights conferred and duties imposed by international law”, Jennings and Watts (eds) ibid at § 1 (p 4) (footnote omitted).
perspective? But, maybe, the two bodies do not overlap. In the first place, it is not obvious how the law between states can influence the law between individuals in the state.

Nevertheless, questions of the two bodies' interrelation frequently do arise in national courts. Traditionally, these situations occurred when there was contact between two (or more) states within one state's jurisdiction. Immunities of foreign states' representatives in the host state are but one example. Here, a state would fail to respect the equality of another state by treating its representatives just as it would any other individuals within its national body of rules. Such conduct would impede communication between states, since no state would voluntarily send envoys or its sovereign leaders to visit other countries. Only the grant of immunities from process to these representatives can provide the necessary safeguard for permanent and effective diplomatic intercourse. Such immunity stems from IL but needs implementation in national law to be effective. A second example concerns the boundaries of a state. National law generally operates within the territory of the state. On the other hand, IL provides for the recognition of what may be regarded as this territory. To know whether national law can be applied in the coastal sea, one would at least partly have to look at international rules. The final classical situation involves international territories. Here the question arises if and under what circumstances a state may exercise jurisdiction in an area where it normally is not allowed to do so but neither is another state. Cases in national courts here most frequently involve the admissibility of evidence based on material seized on the high seas.

In addition to these traditional cases, the scope of IL has grown and is thus now concerned with matters within the body of national law. Hence, the two bodies may meet increasingly. Perhaps it is possible to say that the two bodies do not only meet more frequently but also melt into one all-embracing body of rules governing all the affairs hitherto distributed between international and national law. The answer to the question whether this is true or whether one should stick with the concept of two bodies

3 Two exceptions could be argued: Private international law and European Community law. Both, however, are conceptually national law (private international law – unless regulated in an international treaty) and international law (EC law – unless national law founded on an EC directive) respectively.
of rules is subject of one of the most well-known arguments in international legal theory.

1) Theories

The two major theories, which have traditionally served as starting points for a discussion of the interrelations between international and national law, are seemingly incompatible views. One claims that IL and national law are entirely distinct systems; the other holds that only one all-embracing legal order exists.

Theories established in jurisprudence (and elsewhere) do not have any reason for existence on their own. They serve as basis or guidance to solving particular problems. This is possible because they may provide insight from a higher level of abstraction into the practical question. Sometimes, however, the complexity of questions involved makes explanation by one comprehensive theory impossible. In the case of the interrelation of international and national law, the theories were therefore not established to show the unity or plurality of these two bodies but to explain how they work together. This involves questions, concerning the validity of rules of one system in the other. Moreover, questions of hierarchy arise when rules of the two bodies collide.

a) Dualism

Dualism maintains that IL and domestic law are two distinct legal systems, operating separately. The advocates of dualism reach their results from empirical surveys based on their notion of state sovereignty. Hence, a study by Triepel⁴ at the turn of the twentieth century concluded that IL was fundamentally different from municipal law in three ways:⁵ (1) the subjects of IL were solely sovereign states, while in municipal law individuals and the state were regarded as enjoying legal personality;⁶ (2) the sources of IL were entirely founded by the consent of its subjects as equal persons, whereas the sources of domestic law derived from the sovereign authority of the state;⁷ and (3) the

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⁴ Triepel, Völkerrecht und Landesrecht (1899).
⁵ Cf also Oppenheim, International Law Vol 1 Peace (1905) in §20 (pp 25-6).
⁷ Triepel, ibid at 82-3.
inter-state structure of IL was different from the intra-state relations governed by national law. On this view, the international legal order was based only on the state’s will and was therefore inferior to national law. Consequently, when an international rule is to be applied at the national level, this is regarded as possible only due to an act modifying the international rule into a municipal one, thereby making it applicable domestically. In this way, national law prevailed over IL.

b) Monism

Monism, on the other hand, is based on the conception of a single legal order, unitarily comprising international and municipal law. Monism can be based on two forms of argument. The first, based purely on logic, is illustrated by Kelsen who argued that if two complexes of norms were to be arranged, two possible methods of integration existed. They would either form one system, giving one complex supremacy over the other, or they could be co-ordinated. Either way, the basis for the governing complex would also form the highest reason for the validity of all norms in the governed complex. All those rules had to be built on one basic norm (Grundnorm) and it would therefore be impossible for two norms with separate bases to be valid at the same time over the same territory. After applying the principle of effectiveness to deny that this basic norm could be found at the national plane of each state, Kelsen declared that “it is the basic norm of the international legal order, which is the ultimate reason of validity of the national legal order, too”. Secondly, as most convincingly argued by Hersch Lauterpacht, the monist view can be based on the view that IL employs domestic law to govern human affairs. After describing the state purely as a vehicle used by

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8 Triepel, ibid at 80-1.
9 Oppenheim, International Law Vol 1 Peace (1905) in §21 (pp26-7); Triepel, “Les Rapports Entre Le Droit Interne Et Le Droit International” (1923) 1 RdC 77 at 92-105.
10 The latter option, however, suggests that a third complex governing the co-ordination exists, which again would embrace the two governed complexes.
13 Kelsen, ibid at 556-62. The view that held possible that municipal prevails international Law (Wenzel), this view was abandoned. See Partsch, “International Law and Municipal Law” in (1995) II EPIL 1183 at 1185.
15 H Lauterpacht, International Law and Human Rights (London 1950) at 120: “[...] the law of nations [...] is], upon final analysis, the universal law of humanity in which the individual human being as the ultimate unit of all law rises sovereign over the limited province of the state”. 
individuals, the original subjects of any law, it is only a short step to asserting the supremacy of IL.\textsuperscript{16} Lauterpacht thus established the dominance of IL on material grounds rather than purely logical construction. He reinforced his claim by showing that a construction featuring the pre-eminence of national law would be impractical since it would be incapable of consolidating a common approach to law.\textsuperscript{17} Under the monist view, there is accordingly no need for an act in municipal law for IL to become valid; IL is \textit{per se} valid at all spheres of law.

c\textit{c) The Inherent Insufficiency of the Theories}

Deciding which theory is the better one is no easy task. It is nevertheless possible to point out the bases of the theories and summarise their flaws.

No theory seems to be supreme from its basis. It is insufficient to state\textsuperscript{18} that dualism is based on positivism and monism on naturalism\textsuperscript{19} and that, since positivism is prevalent, dualism is therefore the preferred view. The distinction is more specific and less polarised. The theories are not based on opposite perceptions of law but on different ideas of the basis of sovereignty.\textsuperscript{20} Dualism emphasises the omnipotence of the state

\begin{footnotesize}
\begin{enumerate}
\item[16] H Lauterpacht, \textit{Oppenheim's International Law} (8\textsuperscript{th} ed, 1958) vol 1, §21a, (p 44): "[...] the obligations of International Law are, in the last resort, addressed to individual human beings. [...] This] serves as yet another explanation of the reason why the general principles of law and morality must also lie at the basis of the rules of International Law".  
\item[17] H Lauterpacht, \textit{ibid} § 21 (p 38): "[... Some] of the fundamental notions of International Law cannot be comprehended without the assumption of a superior legal order from which the various systems of Municipal Law are, in a sense derived by way of delegation. [...It] is only by reference to a higher rule that they [ie the states] are all equal [...] Failing that superior legal order, the science of law would be confronted with the spectacle of some sixty states [as they then were] each claiming to be the absolutely highest and undervided authority." The second sentence is the consequent completion of Wolff's initial idea of equality of nations. Wolff compared the equality of man (as save from being dwarf or giant) with the equality of states (as save from size and population numbers) – \textit{Jus gentium methodo scientifica pertractatum} (1764), Proleg § 16 (Translation by J Drake \textit{The Law of Nations Treated According to a Scientific Method} (Classics of International Law vol 13, 1934) at 15) – without stating the reason for equality of men (which is deemed to be a higher rule). This thought is to be found with Wolff's early interpreter Vattel, \textit{The Law of Nations} (translation 1834), Preliminaries, §18, at lii.  
\item[19] Which is completely untrue for the "master monist" Kelsen himself, who can hardly be called a naturalist.  
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even at international level.\textsuperscript{21} According to it, IL is valid only because the sovereign state voluntarily submits to a legal order under which equal entities are organised. By contrast, because monism holds that sovereignty is a mere competence delegated to the state from IL,\textsuperscript{22} sovereignty becomes a power derived from but not necessarily inferior to IL.\textsuperscript{23}

Neither of these two major theories is able to explain all the issues raised in this area. With its emphasis on sovereignty and consent, dualism cannot easily demonstrate why states cannot disengage from international rules that they previously consented to and how states can be in breach of an international obligation at all.\textsuperscript{24} Furthermore, its very basis is questionable, for the features of the international legal order have changed significantly over the last century. First, the increasing development of international human rights has promoted the individual as a subject of IL. Secondly, due to the growing number of areas controlled by IL and the increasing shift of power to international organisations with majority voting procedures, the domaine reservee admitted to states shrinks every decade. The notion that the systems are entirely separate can thus hardly be upheld. The monist concept has also been proved wrong by state practice. No state at present holds that all IL is directly applicable in its national system without the need for some enabling or interpreting act. Additionally, states do not claim

\textsuperscript{21} It is true that this view can be connected with early – positivist – opinions on state sovereignty, which held the state to be the ultimate abstraction in governing human affairs. Nevertheless, Grotius – not a positivist – states that the law of nations is “that law, which has derived an obligatory force from the will of all nations or of many”, De jure belli ac pacis Book 1 XIV 1, (Whewell’s translation, 1853) at 6. With Hobbes we find that no law can limit nor make the sovereign, see Brierly Law of Nations (6\textsuperscript{th} ed, Waldock 1963) at 12-3.

\textsuperscript{22} It is also true that this idea can be attributed to the early writers on International Law, mostly naturalists, claiming that the jus naturae was supreme even to the sovereign’s will. Additionally, this seems to be the case with Bodin, in stating that the lege imperii, the laws of nature, reason and common to all nations are not made by the sovereign but indeed these rules make the ruler. (see Brierly Law of Nations (6\textsuperscript{th} ed, Waldock, 1963) at 8-9) It is nevertheless also true for modern International Law, which no longer upholds claims for absolute sovereignty; this being based on positive law.

\textsuperscript{23} From the early writers, Vattel is equivocal about the origins of sovereignty: “Every nation that governs itself, under what form so ever, without dependence on any foreign power, is a sovereign state. [...] Such are moral persons who live together in a natural society, subject to the law of nations” (Vattel, The Law of Nations (1834) ch1, §4); he is clear about the way sovereigns bind themselves: “Every sovereign state is free to determine for itself the obligations imposed upon it” (as quoted by Starke, “Monism and Dualism in the Theory of International Law” (1936) 17 BYIL 66 at 68).

\textsuperscript{24} If properly linked to positivism, dualism amounts to denying the legal character of International Law incapable of being law properly so called because it lacks inferiors that are bound by it.
the pre-eminence of IL over municipal law; neither do they consider rules that are inconsistent with IL as automatically null and void.\textsuperscript{25} Instead, states claim the adherence to an international rule in inter-state relation. No particular mechanism to fulfil such an obligation is asked for. On the contrary, the only thing wanted is the result of complying with the international obligation. This distinction makes it difficult to maintain that one uniform overall legal order exists.

Furthermore, states do chose different means of converting IL – explicitly or implicitly – into municipal law by distinguishing between its sources and content. The variety of kinds of international rules and national means of reaction to them makes a single theoretical approach seem unfeasible. The different practices can thus be “ranked” on a monism-dualism scale\textsuperscript{26} by investigating the mechanisms that they apply to implement IL into national law.\textsuperscript{27} States do not adhere to one theory or other; they adhere to international obligations. Neither do they accept any variance of the monist or dualist conception applied by other states as an excuse for non-adherence. The theories in their claim for absolute validity are therefore contradictory to the reality of the law.\textsuperscript{28}

\textbf{2) A More Practical Approach}

No traditional theory is in itself sufficient to explain all questions raised by practice. Hence, monism and dualism are at best mere angles of viewing the problem, none of which is alone able to explain all the issues. Given these flaws, new approaches have emerged.\textsuperscript{29}

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\textsuperscript{25} This is even not the case with EC-Law, which renders inconsistent municipal law inapplicable but not invalid.
\textsuperscript{26} Henkin, \textit{International Law: Politics and Values} (1995) at 67 (for such a ranking of the USA and the UK, see ibid at 68-72).
\textsuperscript{27} This is for itself no substantial explanation, neither does it claim to be one, but this ranking can provide the conceptual background to the factual problems that a particular jurisdiction might face in converting International Law.
\textsuperscript{28} Greig, \textit{International Law} (1976) at 52-3.
\textsuperscript{29} The issue behind this seems to be to promote a practice-orientated view of International Law itself. More generally, the whole traditional view of IL has been questioned over the last few decades by:
\end{footnotesize}
The "harmonisation" view is based on monism in holding that IL is presumably available for application at domestic level but concedes to dualism that municipal courts would have to give priority to national law. In addition, it stresses that a conflict between international and municipal law is unlikely, since the municipal judge would always and by all means try to reconcile the rules. This view may serve well in most cases, but it merely shifts the problem to another stage. It must be borne in mind that rules of law govern situations of conflict. Therefore, if a rule is incapable of solving such conflict, it is insufficient. Here, when the canons of interpretation are insufficient to reconcile truly conflicting rules, the harmonisation view reaches its limits. More extremely, it can hardly be called a theory, but merely a "cherry-picking" approach that fails to provide solutions for the problems it wishes to solve.

The "co-ordination" doctrine is a more radical position. It circumvents the theoretical discussion itself, which is regarded as "artificial and strictly beside the point", and maintains that because IL and municipal law have no common field of application each system is supreme in its own field. Thus, to ask abstractly which of the two systems is supreme would be as artificial as to ask whether English or French law is supreme. In such a case, supremacy does not arise from content but from the field of

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31 O'Connell, *ibid* at 17.
32 A theory requiring to be "a system of ideas ... explaining something ... based on general principles independent from the things to be explained" (*The Shorter Oxford Dictionary of English Language*, sv theory).
operation of the law. Accordingly, French law is supreme not because it is French but because its field of application is France (and vice versa). The same, it is submitted, is true for the relation of IL and national law. A difference to the England-France example is of course that IL and national law operate in the same territory. Here, a conflict is possible. However, so the argument runs, this is not a collision of rules but a collision of obligations which does not affect the validity of the rules in each system.

3) Checkers and Chess – Supremacy Exemplified

The following example might serve to clarify the situation: Let us assume a chess tournament whose rules prohibit playing checkers. Two participants in the tournament play checkers instead of chess. Here, each move one of these players makes is according to the rules of checkers, but because it is not according to the rules of chess, it violates the rules of the tournament. On the other hand, the moves according to the checkers rules are perfectly valid for the particular game that is played. Here, no rules are in conflict, both groups of rules are equally valid in their field of application, the tournament and the single game. What is in conflict are the obligations (albeit not legal) of the single player to play by the rules of his game and at the same time to follow the rules of the tournament. In this example, it is of course impossible to obey both obligations at the same time, as the obedience to one inevitably requires the breach of the other. That, in the end, the rules of the tournament may be stronger than the rules of the single game – the players may be disqualified and hence be deprived of playing at all – does not affect the validity of the rules of the game. Furthermore, the players will rather follow the rules of their game than the rules of the tournament. Even if there were checkers moves that were also allowed in chess, such a move would be regarded as a checkers move rather than a chess move by the players – whereas it would probably be seen as a chess move by the tournament officials.

35 Which is Tammelo’s objection to the view of Fitzmaurice. See Tammelo, “Relations between the International Legal Order and the Municipal Legal Orders – A ‘Perspectivist’ View” (1967) AusYBIL 211 at 215.
36 The example is borrowed from Rogers, International Law and United States Law (1999) at 20, hence the American vocabulary, which I intend to keep throughout this section, for allegiance and linguistic reasons.
In the international-national law question this would mean that where there is a difference between international and national obligation, a national entity (a court) would apply national law and an international entity would apply IL. The validity of the rule in the other system would not be affected. This is so even where IL and national law coincide. The national court would apply the national rule; the international court would apply the international rule. Here, there is no conflict of obligation.

In order to prevent liability under IL, it is probably desirable to find more rather than fewer of such coincidences. In fact, states would do good not to leave it to coincidences for IL and national law to concur. But the systems seem self-contained, as only rules from the individual system are applied. On the other hand, one system could refer to the other. In order to escape the terrible dichotomy of following one obligation and necessarily breaching the other, our checkers players could, perhaps, agree to allow chess moves in their game. The players, not the tournament officials, decide that. In cases of conflict of laws, courts of one state sometimes apply legal rules from other jurisdictions. This happens, however, not *ipso facto* because of the foreign law but *ipso jure* because there is a rule in the forum state’s national law that provides for the application of foreign law in these cases. The reason for the application of foreign rules is therefore found in the system from which the court derives its power. The same could be applicable to the case of IL. National courts can apply IL if and as far as there is, in their national law, a reference to IL. The reference norm must therefore be located in the system governing the national court. If there were a rule of IL requiring national law to comply with it, it would be nothing more than another (basic) obligation under IL and it could not validate itself at national level.

Moreover it needs to be considered how far the reference norm refers to the other system. With rules of one system entering another, one has to be aware that the entered system will not be the same as before. The unconditional entering of rules can have a substantial impact on the entered system. A checkers game that also allows playing according to the rules of chess is, at best, an impure game of checkers; at worst, it is pure chaos. To avoid chaos, three points need to be addressed by the reference norm.

In the first place, the way in which the other system’s rules become valid in the referring system needs to be addressed. This raises two further questions. Firstly,
whether all the referred rules are automatically valid or whether every single rule needs reference in every case; and, secondly, who will be able to decide that. Each chess rule may need the consent of both checkers players or all rules of chess may without further notice be valid rules in the checkers game.

In the second place, the scope and content of the referred rule must be known. Checkers players need to be informed about the precise content of chess rules.

In the third place, it has to be decided which rules apply in certain complicated cases, for example when a conflict between the entering and entered system exists or when the referred rules cannot apply directly but need harmonisation. Other rules may either coincide with existing rules or at least meet no resistance in the referring system. The chess rules that are based on the differences between chess pieces are obviously not as such applicable in checkers; they need further explanation to be applied. Even after such explanation, former chess rules may conflict with original checkers rules. The reference norm should provide solutions for this situation as well.

Given the variance of national legal systems, it is probably also reasonable to believe that the content of the reference norms is variable from state to state. Consequently, it is not theory but an intimate appraisal of practice that can provide insight into the actual position of IL in a particular state system. Nevertheless, the functions of the reference rule will stay the same in every jurisdiction. The functions, as introduced above, are: validating IL at national level; providing a decision on the scope and content of the international rule; and deciding if and how to apply a rule to a particular case. This thesis, in its attempt to describe and analyse the reference norm,

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37 Wildhaber and Breitenmoser, after reviewing the theories state: “In any case, to answer the question whether a country follows the monistic or dualistic conception in one or another moderated way, it will be necessary to examine pragmatically its actual constitutional position, its jurisprudence as well as its doctrine” (“The Relationship between Customary International Law and Municipal Law in Western European Countries” in (1988) 48 ZaoRV, 163-207 at 173). Nevertheless, it can be argued that the co-ordination via reference norm operates under both orthodox theories – dualism and monism. For dualism it is necessary to contemplate that two existing systems can be mutually relevant if and in as far as they decide so. This does not depart from the fact that there remain two systems. In a state wanting to follow the monist view, the authoritative statement of such a policy provides the (necessary) reference norm. The conflict of obligations, under the monist view, would be regarded as a temporary rather than one of conflicting fields. The necessity to follow national law in the face of an international wrong would be a provisional duty rather than a final one, like the obligation to adhere to IL.
will therefore be divided into three parts: part one, the validation function, explaining how CIL becomes or is valid in national law; part two, the determination function, investigating the methods by which national law establishes what the CIL to be applied is; and, part three, the application function, considering whether to grant effect to a rule of CIL in a specific case.
First Part

VALIDATION OF CUSTOMARY INTERNATIONAL LAW IN NATIONAL LAW
- Chapter Two -

The Scope of the Validation Function

This and the following chapter deal with the validation function, the question how IL becomes or is valid in national law. The validation function thus determines what is necessary to make IL a valid factor in the national legal system. As was shown in the introductory chapter, IL does not by its mere existence become valid in national law unless it is allowed to. Therefore, national law decides how to validate IL in its sphere. It is the role of the validation function to make IL a possible factor of decision in national cases.

Most states validate treaties differently from CIL. Since the area here described covers CIL, the emphasis will lie on this source of IL. An account of the validation of treaties in national law will nevertheless serve to illustrate the issues with which the validation function has to cope.

The validation of CIL in the United Kingdom, Canada and Australia seems to be approached differently. However, all these approaches are based on a common heritage from English law. Its history will therefore be used as a basis before describing the differences and similarities between the various approaches and comparing them to the position of New Zealand in the next chapter. Regardless of when the former British colonies and dominions actually became independent states and were hence able to develop separate doctrines as regards the validation of IL in their domestic system, the “historical” account will cover the period until approximately the end of World War Two.

1) Validation of Treaties – The Issues Compared

The provisions of treaties do not become valid in the states under examination simply because the treaty binds the state under IL. To be applicable in domestic law, treaties
need legislative implementation. It is the executive branch of government that conducts the negotiation and ratification of international treaties. To allow for such a treaty to have effect in national law without legislative approval would amount to unwarranted executive law-making. Making national law is, however, a matter for the legislature.

The reasons for this distribution are practical and historical considerations. Moreover, there are doctrinal issues stemming from the separation of powers. The conduct of foreign affairs, of which negotiating and ratifying international treaties is a relevant part, historically has been a matter for the executive branch of government. Therefore, the executive has developed the necessary structures and expertise in this field of state affairs. On the other hand, the executive is not allowed to make or change the law without a grant from the legislative body. Where no such delegation exists, the legislative power rests with the legislature. The power of the executive in the international sphere is therefore not completely mirrored in national law. While the executive can enter into an internationally binding treaty alone, it cannot always convert such obligations domestically. Furthermore, neither branch of government can usurp the power of the other. Just as the legislature cannot negotiate treaties, the executive cannot implement them.

The situation may be different with CIL. While each treaty needs the explicit consent of a state in the form of signature or ratification to create an obligation, CIL binds without any requirement of individual express consent. Provided that the customary rule is generally accepted as such, every state is bound whether or not it has specifically assented to the rule. Moreover, the practical element of CIL, state practice, is not based solely on executive behaviour but may consist of legislative and judicial acts. Furthermore, being bound by CIL does not require the state to engage in relevant practice at all. In the end, the absence of continuous protest to a rule of CIL is sufficient to bind the state.

Consequently, the rationale of supplementing a single voluntary executive act with parliamentary approval does not apply to the case of CIL. The state as a whole has, by virtue of its existence, accepted the process of CIL and each obligation thereunder.
There is, therefore, no issue as to the separation of powers between the legislative and executive branches of government here. This is not to say, however, that legislative intervention is inadmissible. It is only unnecessary as an approval of voluntary executive action. This raises the question of how CIL can become valid in national legal orders.

2) History of CIL in English Courts

The doctrine regarding the validation of CIL in English law has developed over a period of 250-300 years. Despite clear statements from the beginning, a number of cases introduced uncertainty.

An account of the English doctrine usually starts with Lord Talbot’s statement in *Barbuit’s case*\(^{39}\) (1736). However, that was certainly not the first case that touched issues of IL. The record of British International Law Cases goes back to 1615, when in *Palache’s case*\(^ {40}\) the court applied and referred to the law of diplomatic immunity as the law of nations without giving further reason for its validity in England.\(^ {41}\)

A number of Admiralty cases ruled upon IL without giving reasons for its validity in national law.\(^ {42}\) However, there was no reason for Admiralty courts to refer to the validation function since they did not adjudicate matters of national law but cases of IL arising at sea. In other words, Admiralty courts were national courts that administered IL. Here, IL did not become valid in national law but was applied as such between state actors.

\(^{38}\) See below, - Chapter Four -.  
\(^{39}\) *Barbuit’s Case*, (1737) Cases temp Talbot 281.  
\(^{40}\) *Palache’s Case* (1615) 4 Co 152.  
\(^{41}\) “[A]mbassadors ought to be kept from all injuries and wrongs, and by the law of all countries and all nations they ought to be safe and sure in every place...”; *Palache’s Case* (1615) 4 Co 152 at 153.  
One could date the first attempt to justify IL’s validity in England to the 1691 statement that “the law merchant is *jus gentium*, and part of the common law”\(^{43}\). But in saying that perhaps Holt CJ was of the opinion that the merchant law was *jus gentium* as well as\(^{44}\) part of the common law. In addition, the term *jus gentium*, which was said to include the law merchant, may have then been somewhat wider than IL is currently, namely including private IL or conflict of laws and international comity. Since Holt CJ’s statement was the only expression of its kind at the time, the matter may be regarded as undetermined at the end of the 17\(^{\text{th}}\) century.

In the 18\(^{\text{th}}\) century there were several cases concerning the immunities of foreign states’ ambassadors from process in England. The most well-known were *Barbuit’s case*\(^ {45}\) (1736) and *Triquet v Bath*\(^ {46}\) (1764), in both of which it was observed that the English Act 7 Ann c 12, which provided for certain privileges of ambassadors, was only declaratory of the law of nations. Indeed, the Act was enacted to satisfy the fury of the Czar of Russia, whose ambassador had earlier been arrested in England.\(^ {47}\) The Act was not meant to transform the immunities under the law of nations into parallel English

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\(^{43}\) *Meggadow v Holt*, 88 ER 1134. This case is also reported *sub nom Mogadara v Holt* in 1 ShowKB 317 (65 ER 740) and Holt 113 (89 ER 597).

\(^{44}\) I.e., rather than *and thus*.

\(^{45}\) *Barbuit’s Case* (1737) Cases t Talbot 281. The question in the case was whether commercial agent of a foreign sovereign was entitled to diplomatic privileges. Lord Talbot – apparently after having recourse on international rules and writers – decided that this was not the case and the agent was held liable. However, the matter was resolved in the British Government paying his debt. Westlake, “Is International Law Part of the Law of England” (1906) 22 LQR 14 at 17-8.

\(^{46}\) *Triquet v Bath* (1764) 3 Burr 1478.

\(^{47}\) See *Matueof’s Case* (1709) 10 Mod 4; here the Court of Queen’s Bench held that “[b]y the law of nations” an ambassador cannot “be prosecuted ... in the kingdom wherein he is sent to reside”. This case led to the enactment of 7 Ann c 12, as an apology to the Russian Tsar for the arrest of the Russian ambassador and lack of subsequent criminal prosecution of the arresting officers. Due to this act, many subsequent cases did not refer to the law of nations but construed the statute as domestic law; see *Goodwin v Archer*, (1727) 2 P Wms 452; *Evans v Higgs* (1728) 2 Stra 797; *Crutchfield v Lockman* (1734) Cunn 9; *Holmes v Gordon* (1734) Cas t Hard 3. Nevertheless, in 1736, Lord Talbot stated that this Act was “only declaratory of the antient universal Jus Gentium”, *Barbuit’s Case*, (1737) Cas t Talbot 281 at 282. This proposition was followed in *Triquet v Bath*; and in *Hopkins v De Robeck*, (1789) 3 TR 79 at 80, it was held “explanatory of the law of nations”.

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Accordingly, both cases were decided upon the law of nations. In this context, Lord Talbot is reported to have issued the famous statement “the law of nations in its full extent was part of the law of England”, which was supported by Lord Mansfield 30 years later in *Triquet v Bath*.

The first interpretation of those judgments can be found in Blackstone’s *Commentaries* (1765). Blackstone, who was counsel in *Triquet v Bath*, stated that “the law of nations ... is here adopted in its full extent by the common law and held to be part of the law of the land.” By saying that the law of nations was adopted by the common law – whereas the judgments themselves deemed it part of the law of England (which seems to be a broader expression) – Blackstone may have intended to distinguish between statute and common law. The law of nations could not be statute law; therefore it had to be common law. It could not be anything else. Blackstone thus rejected the idea of IL being applicable in England as such. It may well have been because of Blackstone’s statement that Lord Mansfield rephrased his own view two years later by stating that the law of nations was part of the common law.

48 This follows also from interpretation of the act’s preamble, making reference to the specific facts of its occasioning stating that the prosecution and arrest of the Russian ambassador were “contrary to the Law of Nations, and in Prejudice of the Rights and Privileges, which Ambassadors [...] have at all Times been thereby possessed of”. Furthermore, para III of the act “declares” that all further processes against protected persons shall be deemed null and void. Whereas para IV “enacts” that, *inter alia*, suing a diplomat shall be a punishable crime (which maybe it was not before). This distinct usage of terms leads to the conclusion that para III of the act was dictated to satisfy the diplomatic demands of Russia rather than to provide new rules. See also *The Amazone* [1940] PD 40; holding that the Act served as a mere penal statute. But see also Blackstone, *Commentaries on the Laws of England*, book I ch7 at 256-7, holding that it was in consequence of this statute that the international rules concerning diplomatic privileges were now held to be law of the land. This, however, must also be regarded as an observation covering the establishment of offences only (Fawcett, *The British Commonwealth in International Law* (1963), ch6 at 36).

49 Per Lord Mansfield in *Triquet v Bath* (1764) 3 Burr 1478 at 1480-1 (The official report of *Barbuit’s Case* (1734) Cas temp Talbot 281 does not itself contain a trace of this statement).

50 *Triquet v Bath* *ibid* at 1480. And see *Lockwood v Coysgarne* (1765) 3 Burr 1678, 6 BILC 213: “... the law of nations [is] in full force in these kingdoms.” (at BILC 215).


52 Though, on another occasion, Blackstone says that “in consequence of this statute [7 Ann c 12], thus declaring and enforcing the law of nations, these privileges are now held part of the law of the land and constantly allowed in the courts of law”, *ibid*, book I ch 7 at 256. Thus seeming to advocate a legislative transformation of CIL by the Act. However, it has been submitted that this conclusion only refers to para IV of the Act; see Fawcett, *The British Commonwealth in International Law* (1963) at 36.

53 *Heathfield v Chilton*, (1767) 4 Burr 2015 at 2016. His additional words that the law of nations was “carried as far in England as anywhere”, *ibid*, do not resolve the ambiguity as to how these rules are carried out in England.
The accuracy of the statements by Talbot, Mansfield and Blackstone—especially as far as diplomatic immunities were concerned—has been questioned in the 20th century. However, even if these statements only displayed obvious and irrefutable principles rather than an accurate account of the English rule, they went unquestioned in their time and, as will be shown, for the next 150 years. In the late 18th Century, the law of nations was therefore held to be automatically part of the common law. Statutory enactment or judicial transformation was unnecessary.

The validity of IL so established was reinforced and extended to other rules in various cases over the period of the next 100 years. Thus, the immunities of consuls, domestic servants of ambassadors and foreign sovereigns themselves were considered and applied. While these cases extended the application of IL in England, they did not develop the validation norm any further.

Only a few statements could be—with some effort—interpreted as regarding IL per se, that is, as the original international rule, and not common law, applicable in England. However, this interpretation was obviously not shared in the courts, as in 1861 it was held that “a public right recognized and protected by the law of nations, is a legal right; because the law of nations is part of the common law of England”. Here, the character of the applied rule becomes apparent: a right under IL would not in itself be regarded as a legal right; it is only due to the fact of it being part of English common law that it is valid in the Kingdom. Once the recognition of a right at IL would have

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55 Viveash v Becker (1814) 3 M&S 284 at 292 and 258.
56 Novello v Toogood (1823) 1 B&C 554. This case involved a British subject, servant to an ambassador, bringing an action in trespass against tax enforcement, which was eventually denied.
57 De Wütz v Hendricks (1824) 2 Bing 314. Here the rule in question was whether it was contrary to International Law to raise loans for Greek rebels against Turkey; it was held to be. Duke of Brunswick v King of Hanover, (1844) 6 Beav 1 at 52 and Service v Castaneda (1845) 2 Collyer 56; Emperor of Austria v Day (1861) 30 LJ Ch 690 at 702; Suarez v Suarez (1917) [1918] 1 Ch 176; Engelke v Musmann [1928] AC 433, 449; P v AB [1941] 1 KB 454.
58 De Wütz v Hendricks ibid at 315: “[I]nternational law is adopted into the municipal code”. Novello v Toogood (1823) 1 B&C 554 at 564: that “[t]he privilege [ie diplomatic immunity] is conferred by the law of nations […]”
59 Emperor of Austria v Day (1861) 2 Giff 628 at 678; aff’d (1861) 3 DeGF&J 217.
60 The question of recognition here does not refer to the recognition of a right by English law but to the recognition of a right at IL. It therefore concerns the determination function of the reference norm rather than the validation function.
been established, the right would be part of the common law. The doctrine had thus not changed.

A case often referred to as favouring a different and more cautious approach is *R v Keyn*, in which a panel of 14 judges in the Court for Crown Cases Reserved had to consider whether the United Kingdom possessed criminal jurisdiction to try offences committed by a foreigner within waters up to three miles off-shore. In the course of argument, the court had to consider whether IL conferred such jurisdiction on the United Kingdom. A majority of seven judges held that the United Kingdom did not possess the required jurisdiction unless it was established by an Act of Parliament. Although it might be claimed that the decision meant that parliamentary enactment was required for rules of IL to become part of English law, three counter-points can be made. The first concerns a formal question of English law, the second and third concern the international rule that was to be applied. First, a rule requiring parliamentary enactment would have been completely at odds with the doctrine applied for the preceding 100 years. Secondly, the precise content of the international rule to be applied was doubtful. The status of the three-mile belt was unclear. The members of the bench in *Keyn* were not agreed whether the coastal state possessed actual property rights over this strip or whether there existed so many and substantive limits that the power to be exercised was to be described as *sui generis*. Thus, even if incorporated, the rule would not have led to *ipso jure* jurisdiction of the United Kingdom but would have required a parliamentary act to clarify the content of the United Kingdom’s power over the three-mile belt. Thirdly, the international rule that was at stake was a rule conferring the power to exercise jurisdiction in the three-mile belt off the coastal state. There existed no duty to exercise such jurisdiction. Without going further into detail, it can be said

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62 *R v Keyn* (1876) LR 2 ExDiv 63.
63 It was a majority because Archibald J, who would have agreed with the minority, had died between the hearing and the decision, thus leaving a panel of 13.
65 Collier, “Is International Law Really Part of the Law of England?” (1989) 38 ICLQ 924 at 927-8. See also, *ibid* at 934; pointing out that even if the court had erroneously held that a rule conferring jurisdiction over the marginal sea had not existed, the UK would surely not have been in breach of its international obligation *vis-à-vis* Germany.
66 This will be done below,- Chapter Eight -.
that the rule was a permissive rule only. So, even if it had been incorporated, the United Kingdom would not automatically have gained jurisdiction over the respective waters but under the prescriptions of national law, an authoritative (parliamentary) exercise of the permission would have been necessary. Indeed, in the leading judgment Cockburn CJ held that "[...] the established principles of the law of nations [...] have been adopted into our municipal law, and must be taken to form part of it".

That the doctrine of automatic validity was not abandoned is shown in *West Rand Gold Mining Co Ltd v R*, where Lord Alverstone CJ's words — though obiter — require some attention:

"[I]nternational law ... as such will be acknowledged and applied by our tribunals where legitimate occasion arises for these tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations and the international law sought must [be supported by evidence that shows that the rule] has been acted upon by our own country, or that is of such nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized state would repudiate it."

While this view favoured incorporation, it was nevertheless cautious in relation to the extent of applicable IL. Two kinds of international rules were incorporated: those that had the assent of the United Kingdom and rules which today might be called general or

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67 *R v Keyn*, (1876) LR 2 ExDiv 63 at 161 per Cockburn CJ; see also the dissenting judgment of Coleridge CJ, holding that "the English courts give effect as part of English law" to IL, when sufficiently proved, ibid at 154.

68 *West Rand Gold Mining Co Ltd v R* [1905] 2 KB 391.

69 The question to be decided was whether a conquering state (UK) was — as successor — liable for debts of the conquered state (The South African Republic). The question on international rules on this question was only raised by counsel, the court for itself not wanting to rule on the issue. Finally, the court stated that no judicial proceedings were open in the UK at all, due to the fact that the annexation of territory was an act of state which cannot be subject to appraisal in UK courts. For an intimate review of this — doubtful — application of the act of state doctrine see Westlake, "Is International Law a Part of the Law of England?" (1906) 22 LQR 14 at 20-3.

70 *West Rand Gold Mining Co Ltd v R* [1905] 2 KB 391 at 407 (Lord Alverstone CJ).

71 Brownlie, *Principles of Public International Law* (5th ed, 1998) at 45 reaches the same conclusion. However, Brierly, "International Law in England" (1935) 51 LQR 24 at 31 concludes that *West Rand* departs from the old doctrines of Blackstone and Mansfield. Indeed, the rule stated is a rule of evidence and proof of International Law rather than one of adoption. See also Collier, "Is International Law Really Part of the Law of England?" (1989) 38 ICLQ 924 at 929.
even universal IL. The question, which rules satisfy these requirements, is one for the determination function to answer.

After the First World War, however, a less open policy emerged. Lord Atkin, introduced the following qualification into English jurisprudence:

"International law as such can confer no rights cognizable in the municipal courts. It is only in so far as the rules of international law are recognized as included in the rules of municipal law that they are allowed in the municipal courts to give rise to rights and obligations."

And 15 years later, in an appeal to the Privy Council, he emphasised that

"[i]t must always be remembered that, so far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law."

These expressions seemed to require something in addition to the mere finding of a rule at IL. The rules must have been recognised as included in, or been accepted and adopted by, the national law. This recognition is part of the validation of CIL. Probably, Lord Atkin had in mind an act of scrutiny performed by the judges when CIL was to be applied. What was to be examined was whether an international rule existed (determination) and if so, whether its content could be said to be accepted in English national law (validation). However, as the judge continued, the position seemed ambiguous:

"On any judicial issue they [the courts] seek to ascertain what the relevant rule [of IL] is, and, having found it, they will treat it as incorporated into the domestic law ..."

The scrutiny probably did not include a decision whether or not to introduce a rule of IL into English law; the international rule would be treated as incorporated. This ambiguity

72 This category, however, can be interpreted as a subgroup of the first one, given Lord Alverstone's prior statement in the same case that "whatever has received the common consent of civilised nations must have received the assent of our country ..." West Rand Gold Mining Co Ltd v R [1905] 2 KB 391 at 407 (Lord Alverstone CJ).
73 Commercial and Estates Co of Egypt v Board of Trade [1925] 1 KB 271 at 295-6, in considering the right of angry under IL.
74 Chung Chi Cheung v R [1939] AC 160 (PC).
75 Chung Chi Cheung v R ibid at 167-8.
76 Chung Chi Cheung v R ibid at 168.
has led to interpretations for and against incorporation.\textsuperscript{77} The exact mechanism how IL was to be treated as incorporated remains mysterious.

Somewhat clearer is the mode of application as stated in 1946 by Scott LJ:

"... international law is not, as such, binding upon our municipal courts, but only in so far as our courts have made it a part of our municipal law – whether as a result of statutory enactment or because the particular principle of international law which may be in question has been adopted by our courts as one recognised generally by all civilised nations."\textsuperscript{78}

On that view, a rule of CIL became valid only if it was made a valid part of municipal law by the courts or by statutory enactment. Parliamentary intervention was thus not necessarily needed. On the other hand, there was no automatic reference to CIL but every particular principle needed to be "adopted". It is also questionable whether a rule must have been referred to in an earlier case or whether the judge in the instant could validate the relevant rule. The statement referred to prior references only in the context of binding rules, holding that not IL but national recognition of IL was binding on the court. The situation of a rule of CIL not previously validated was not covered by this part of the statement. It therefore seemed that courts might validate rules of CIL when these were applicable. There was no restriction stated as to which rules the courts must or must not validate. But, on the other hand, the courts were bound to apply these rules if they had previously been made part of English law.

3) Options Available

The cases considered so far seem to reveal three options available for the validation of CIL in national law. CIL can either be valid automatically without any need for an enactment at national law. Or there could exist a requirement for recognition of every international rule in national law for it to become valid. The second option is divided into two sub categories one requiring legislative decree, the other judicial recognition. The latter method was established in the first half of the 20\textsuperscript{th} century. It has to be distinguished from the automatic validation, the first option. While neither of the two

\textsuperscript{77} Brownlie, Principles of Public International Law (5\textsuperscript{th} ed, 1998) at 46.

\textsuperscript{78} The Tolten [1946] P 135(CA) at 147 (Scott LJ). Scott LJ here applied what he thought to have found in a case in the House of Lords, British South Africa Co v Companhia de Moçambique [1893] AC 620. However, a statement to this effect cannot be found in that case at 624.
requires legislative intervention, judicial recognition demands an explicit confirmation for the implementation of every single rule in national law. The automatic validity option does not require such confirmation but it holds that every international rule is, once its content is established, valid in national law. A method not expressly mentioned in any case is a combination of automatic validation and legislative enactment to the effect that an Act of Parliament validates CIL as a body of law instead of single rules. Such a method, as a written statement of automatic validation, would be comparable to the provisions of many modern written constitutions under which CIL is automatically validated as part of national law. 79

At least theoretically, each of these options could be split up into two subgroups according to the character of the rule that in the end becomes valid in national law. This could either be the original international rule (direct validity) or a parallel national rule (indirect validity). While some of the earlier cases can be interpreted as endorsing direct validity, the majority of cases support indirect validity as national law.

All these methods combined, one finds that CIL may become valid in national law either as itself or parallel national law by judicial or legislative enactment or by automatic validation.

The identification of various available options necessarily triggers the question of choice. This chapter discusses the application of the options identified in the previous chapter by the courts in the United Kingdom, Canada, Australia and New Zealand.

While the position in the United Kingdom was settled after some uncertainty (section 1 below), in the former colonies, initial obstacles for their own doctrines had to be overcome (section 2 below). These did not prevent the development of distinct mechanisms to validate CIL in Canada (section 3 below) and Australia (section 4 below). The situation in New Zealand is probably closest to the United Kingdom's (section 5 below).

1) Development in the United Kingdom – The Incorporation Doctrine

It was not until the 1980s that the validation rule was authoritatively stated in the United Kingdom. Some implications of the English view are still undetermined because no court has yet pronounced on them.

Despite authoritative statements apparently approving automatic validity, the English Court of Appeal adopted and developed Lord Atkin's judicial recognition view in two cases in the 1970s. In the case of a British subject expelled from Uganda and denied entry into the United Kingdom, Lord Denning MR expressly referred to Chung

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80 In Zoernsch v Waldock, [1964] 2 All ER 256 (HL) it was held that “international law […] forms a part of the law of England administered by the courts” (at 265 H).
Chi Cheung\textsuperscript{82} and said that “... the rules of international law only become part of our law insofar as they are accepted by us”\textsuperscript{83}. The requirement of acceptance “by us” might be read in the same way as the prerequisite of national acceptance in the West Rand\textsuperscript{84} case, thus requiring the assent of the United Kingdom to the rule of CIL. The reference to Chung Chi Cheung, however, implies that Lord Denning referred to the courts of law as “us”.\textsuperscript{85} Similarly, in Thai-Europe Tapioca Service Ltd v Government of Pakistan it was held to be

“important to realise that a rule of international law [the doctrine of sovereign immunity], once incorporated into our municipal law by decision of a competent court [is a rule of law] ... and the rule of stare decisis applies ...”\textsuperscript{86}.

Despite accepting IL as law, under this view every single rule has to be “incorporated”. Consequently, CIL does not become part of English law automatically but by reference through an act of judicial transformation within the bounds of the doctrine of stare decisis. The court here becomes the law-making authority. While courts only generally find and articulate national law, here rules of national law are created by a judicial act. This departure from generally recognised principles of separation of powers between the courts and the legislature alone seems odd enough to reject this mechanism of judicial transformation. Moreover, the introduction of CIL into English law has a static flavour: a change of rules or a newly developed rule is not automatically recognised but needs to be specifically adopted by the courts.

The rule that resulted from these cases held that CIL does not automatically form part of national law, but a court might introduce rules of CIL into English law. No preconditions for this judicial introduction are set. Once this has been done, the rule is treated as national law without regard to its origin. Therefore, national legal principles,

\textsuperscript{82} Chung Chi Cheung v R [1939] AC 160 (PC).
\textsuperscript{83} R v Secretary of State for the Home Department, ex parte Thakrar [1974] 1 QB 694 at 671F.
\textsuperscript{84} West Rand Gold Mining Co Ltd v R [1905] 2 KB 391.
\textsuperscript{85} Akehurst, “Uganda Asians and the Thakrar Case” (1975) 38 ModLRev 72-7 at 73-4. This proposition is buttressed by the words of Lawton LJ that when IL is invoked against the crown, “the courts have to decide what is the nature and extent of the right [...]”, R v Secretary of State for the Home Department ex parte Thakrar [1974] 1 QB 694 at 709E-F (Lawton LJ); in addition we learn that “[I]n this sphere of jurisprudence there has been no Moses to bring the Law of Nations down from Mount Sinai” \textit{ibid} at 709D. This prosaic utterance, however, seems to be directed at the establishment of the content of IL rather than its acceptance at municipal level.
\textsuperscript{86} Thai-Europe Tapioca Service Ltd v Government of Pakistan [1975] 3 AllER 961 (CA) at 969-70 (Scarman LJ).
notably stare decisis, apply. This means that once a rule is introduced into English law, it loses the connection to its international origin. When the international rule changes, the national rule remains unchanged. This alone is not yet a dilemma, but when the doctrine of stare decisis is applied, one finds that there is no possibility for a lower court to introduce the new rule into English law because the court would be bound by the earlier rule as introduced before. Each change of rules would therefore fall for a higher court to recognise and introduce it. In the end, only the House of Lords or the legislature could introduce new rules by overruling either a lower court or itself.

The problem of a change in CIL surfaced in the Court of Appeal two years later. In *Trendtex Trading Co v National Bank of Nigeria*, the court held that after the changes in CIL, the doctrine of restrictive sovereign immunity applied also in England. That was so despite prior cases applying absolute immunity. Lord Denning MR, after reviewing the transformation and incorporation doctrines, held that he would now follow the incorporation approach which corresponds to the notion of automatic validation as described earlier. He found no other way in which the courts could recognise changes in IL. Since “International Law knows no rule of stare decisis”, English courts could give effect to changes in CIL without waiting for the House of Lords to do so: “when the rules of international law change, our English law changes with them”. Shaw LJ provided a slightly different solution: “[w]hat is immutable is the principle that the law of nations (not what was the law of nations) must be applied in the courts of England.” While the rule of stare decisis required the courts to follow earlier decisions on a certain rule, it did not prevent them from applying a rule that did not exist at the time of the precedent. A case applying CIL could therefore not be seen as authority for what the rule would be at a later stage.

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89 The former referring to enactment, the latter to automatic validation.
91 *Trendtex Trading Corp v Central Bank of Nigeria* *ibid* at 554 (Lord Denning MR).
92 The House of Lords was, then, theoretically able to overrule its own decision. See the *Practice Statement* [1966] 1 WLR 1234.
94 *Trendtex Trading Corp v Central Bank of Nigeria* *ibid* at 579 (Shaw LJ), emphasis in original.
These opinions do two things. First, they establish clearly that no precedent is needed in order for CIL to become national law. While Lord Denning’s rule does not necessarily provide an argument for the incorporation doctrine, the judgment of Shaw LJ clearly favours automatic validity. Secondly, both judgments acknowledge the changing structure of CIL and establish an exemption from the stare decisis rule for common law based on CIL. In combination, the abandoning of the necessity of precedent and the automatic acceptance of changes in CIL result in a rejection of the doctrine of transformation.

Shortly after Trendtex was decided, the House of Lords itself decided to apply restricted sovereign immunity. Moreover, the result of Trendtex concerning the restrictive view on foreign sovereign immunity was approved in a line of subsequent cases. This did not mean that the incorporation doctrine as endorsed by Lord Denning and Shaw LJ was now undoubtedly and generally applicable to CIL.

Indeed, in some cases doubts were expressed about the scope of Trendtex. In ex parte Pirbhai, a case concerning claims of British protected persons for diplomatic protection under IL, it was held that although Trendtex was authoritative on the question of sovereign immunity:

“...rules of international law are not so applied. There are rules or principles of international law, for example relating to human rights, which are no part of our

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95 le, why does the incorporation doctrine – a doctrine of English law – follow necessarily when International Law knows no rule of stare decisis?

96 Playa Larga (Owners of Cargo lately laden on Board) v 1st Congreso del Partido (Owners) – "1st Congreso del Partido" [1983] AC 244 (HL). In the divisional court in that case, Goff J found that he was bound by Trendtex, [1978] QB 500, 518. A year after that, Donaldson J rejected to follow Trendtex and applied the rule established in Thai-Europe: Uganda Co (Holdings) Ltd v Government of Uganda [1979] 1 Lloyd'sR 481. This case is now overruled by the HL case.

97 Later cases approving Trendtex include: Planmount Ltd v Republic of Zaire [1981] 1 AllER 1110 at 1112-4 (Lloyd J); Alcom Ltd v Republic of Colombia [1984] AC 580 at 598 (HL, Lord Diplock); R v Inland Revenue Commissioner, ex parte Camacq Corporation [1990] 1 AllER 173 at 179-80 (Kennedy J); Littrell v US [1994] 4 AllER 203 (CA).

98 1st Congreso del Partido [1983] AC 244 at 261-2: “It is perhaps right to avoid commitment to more of the admired judgment of Lord Denning MR than is necessary” (Lord Wilberforce).

99 R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Pirbhai, 7 September 1984 (Woolf J), CO/812/83, CO/813/83, CO/814/83, (LEXIS Transcript: Marten Walsh Cherer). The question was whether judicial review was available for a decision of the Foreign Secretary not to conduct diplomatic protection. In the CA the decision not to grant judicial review was upheld because the situation in Uganda had again changed.
domestic law and the domestic courts cannot apply or interpret them in the same way as they apply and interpret domestic law.\(^{100}\)

*Trendtex* was explicitly mentioned and distinguished in this case. While the implications of this observation are not quite plain, caution needs to be exercised in conferring great significance thereon. Firstly, the statement quoted seems to be *obiter* since the rules governing the exercise of diplomatic protection are generally not concerned with human rights. Secondly, the relationship between the freedom of the state to exercise diplomatic protection and a citizen's human right to claim such protection against her or his home country is one of the most disputed in current IL.\(^ {101}\) Thirdly, neither the factual situation in Uganda nor the existing international rule was clear.\(^ {102}\) Furthermore, *Pirbhai* was not referred to in later cases touching the application of CIL.

Moreover, *Trendtex* was not even referred to in *ex parte Singh*, a case similar to *Thakrar*.\(^ {103}\) Instead the abstract possibility of an incorporation of CIL was mentioned but left for the House of Lords to consider IL.\(^ {104}\)

Still, the incorporation doctrine was accepted with varying emphasis in all phases of the *Tin Council* litigation.\(^ {105}\) There the rule in question concerned the secondary liability of states members of an international organisation for its debts under CIL. In the Court of Appeal, Nourse LJ held that “the rules of international law from time to

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\(^{100}\) *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Pirbhai* ibid.

\(^{101}\) The issue of diplomatic protection is again currently under consideration in the International Law Commission, see *Report of the International Law Commission on the Work of its 49th Session 1997* chapter VIII and *Report of the International Law Commission on the Work of its 50th Session 1998* chapter V.

\(^{102}\) It was doubtful how the situation in Uganda would develop and – as then seen in the CA – it did indeed change again. As to IL, the statement attacked noted the requirement of exhaustion of local remedies by the claimants before the UK could exercise diplomatic protection. This requirement is, however, subject to exemptions, see art 22 of the Draft Articles on State Responsibility:

“Article 22 - Exhaustion of local remedies
When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.” (my emphasis). Thus, only where there are effective remedies available and the situation can be remedied subsequently, a requirement as to the exhaustion of these remedies applies.

\(^{103}\) *R v Chief Immigration Officer, Gatwick Airport, ex parte Singh* [1987] ImmAR 346.

\(^{104}\) *R v Chief Immigration Officer, Gatwick Airport, ex parte Singh* ibid at 356 (Nolan J).
time in force are automatically incorporated into the common law...". 106 A statement more clearly in favour of automatic validity cannot be imagined. It moreover recognises the dynamic nature of IL. Furthermore, although the House of Lords refused to apply the alleged CIL, this was only due to the lack of evidence of the claimed rule in IL. The House nevertheless assumed the power and duty to apply an international rule if any could be established. 107 Despite the actual failure to apply CIL in this case, the Tin Council litigation therefore is evidence that CIL generally, and not only the rules concerning immunity, is automatically valid in the United Kingdom.

More recently, the House of Lords has had to consider the status of the crime of torture in English law in the proceedings concerning the extradition of Augusto Pinochet of Chile to Spain. 108 While all the Law Lords referred to the Torture Convention, the majority also held torture to be crime under CIL. However, only Lord Millett drew the conclusion that torture must therefore have also been a crime under English law. This does not imply that the other Law Lords were reluctant to follow the incorporation doctrine; rather, the content of the international rule was again in doubt. The majority of the Lords held that the necessary jurisdiction of the United Kingdom over crimes of torture committed by and against foreigners abroad was established only by the Torture Convention. In the majority view, this meant that acts of torture before the Torture Convention, if committed abroad by and against foreigners even if in breach of IL, did not attract jurisdiction of the United Kingdom but were left for an international tribunal to punish. Lord Millett, in dissent, thought that an international crime under CIL – as torture was even before the Torture Convention – ipso jure attracted universal jurisdiction, that is the right and duty to try and punish perpetrators.

105 For a succinct review of this proceeding see Greenwood “Decisions of British Courts During 1989 Involving Questions of Public or Private International Law” (1989) 60 BYBIL 461 at 461-75.

106 JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1989] Ch 72 (CA) at 207 (Nourse LJ).

107 JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 1 AC 418 at 512 (Lord Oliver).

108 R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147 (HL). The politically more important question was of course whether a former head of state enjoyed immunity for official torture committed during his time in office. This question was governed by the Foreign Immunities Act 1978 (UK). Implications of IL on this question therefore turned on statutory interpretation according to IL rather than incorporation. However, all Law Lords expressed sophisticated and well-researched opinions on the content of the immunities of a former head of state under IL. For a discussion of the two preceding hearings, see below - Chapter Eight –.
regardless of the place of commission. Thus the House consequently did not question the validity of a rule of CIL; it merely stopped short of finding a rule that would have required the prosecution of Pinochet for acts committed before the Torture Convention.

Reviewing these cases, three conclusions may be drawn. Firstly, as to the necessity of a validating act, there has never been an authoritative statement of the transformation doctrine as requiring either prior statutory enactment or judicial recognition in English law. The cases evidencing a reluctance to apply CIL can be explained on grounds other than favouring transformation. They either concern permissive rules of CIL (Keyn) or rules of CIL with uncertain or disputable content (West Rand, Thakrar, Tin Council, and Pinochet). Uncertain or non-existing law could not be applied even if CIL had automatic validity in English law. Thus, even under the incorporation doctrine, these cases would not have been decided any differently. Given the consistency of all other cases, the incorporation doctrine has never really been in doubt. Secondly, the character of the rules resulting from this doctrine needs to be discussed. The very early cases (Barbuit, Triquet v Bath and Lockwood v Dr Coysgarne) seem to suggest that CIL has a kind of “direct effect” in English law, by being applicable as such. The idea of IL as part of the law of the land can be interpreted as meaning that the national legal order opens for CIL rules and thus gives effect to these rules as such without changing their character. Blackstone’s Commentaries seemed to deny this possibility as they held that IL was part of the common law. That view was later widely accepted judicially. Hence, CIL is not applied as such but as parallel common law. Therefore, the reference rule confers on CIL the status of English common law and a change in CIL automatically results in a change in the common law. English common law thus contains a dynamic reference to CIL. The validity of a rule of CIL in English law does not depend on the recognition by a

109 See especially the words of Lord Denning in Trendtex Trading Corp v Central Bank of Nigeria [1977] 1 QB 529 (CA) at 573 and Nourse LJ in JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1989] Ch 72 (CA) at 207.

110 However, the possibility of direct validation of foreign rules is a known procedure in English law at least since the UK’s accession to the EC. Cf the European Communities Act 1972 (UK) providing in s2, inter alia, (1) that rights under the EC Treaty and acts properly issued thereunder “shall be recognised and available in law, and be enforced, allowed and followed accordingly”. There is no word on EC law being part of the law of the land; it is applicable as such.
municipal judge. New CIL thus becomes valid by the time it comes into existence, and not only when questions as to its validity occur in English courts for the first time.

2) Room for Separate Doctrines in the Former Colonies

If one accepts that the doctrine of incorporation prevailed in the United Kingdom before the colonies' independence, it would be possible to argue that this should also be true in the colonies. They would have automatically received the United Kingdom's common law, of which the alleged incorporation doctrine would have been part. Consequently, whatever the rule for application of CIL was in the United Kingdom before independence, it would have also been the rule in the colonies.

However, two objections arise. Firstly, as was shown, the incorporation doctrine was far from settled during the first half of the 20th century. The most disputed cases occurred about this time. Thus, if anything was inherited, it was an ambiguous rule. Secondly, like United Kingdom statutes, British common law could have been altered by local colonial rules. Then, the validation rule, as a rule of common law could also be subject to alteration. Against this proposition, two points can be made. In the first place, as concerns the common law in general, this is understood to be based on immemorial custom or principle. Theoretically, therefore, rules of the common law cannot vary in different jurisdictions. In practice, the harmony of common law was secured through the compulsory jurisdiction of the judicial committee of the Privy Council as final appellate court for all colonies and dominions. Moreover, even if one might argue that the common law was alterable in the colonies, this freedom to change the English rules may be doubtful for the rule of incorporation. At least as far as legislation is concerned, the colonies were unable to legislate with extraterritorial

111 This is now so deeply accepted that even a reference to authorities seems unnecessary. See, eg, Rayner v Republic of Brazil [1999] 2 Lloyd's R 750 (CA): “Customary international law also forms a part of English law…” (at 759).

112 To this effect see The Brig "Dart", Stewart's Vice Admiralty Reports (Nova Scotia) 1812, digested in Castel, International Law Chiefly as interpreted in Canada (1965), 1119 at 1120; and The "Zodiac", Stewart's Vice Admiralty Reports (Nova Scotia) 1812, digested in Castel, ibid 1126 at 1127.

113 R v Keyn, (1876) LR 2 ExDiv 63; West Rand Gold Mining Co Ltd v R [1905] 2 KB 391; Chung Chi Cheung v R [1939] AC 160 (PC).

effect.\textsuperscript{116} While the validation rule was neither statutory nor strictly extraterritorial in its effect, the rationale of the limitation could still apply here. The doctrine of extraterritoriality was established to ensure that the Empire spoke with one voice externally so as not to embarrass the imperial government in its external relations. Such a rationale is transferable to the common law if this is capable of affecting the Empire’s reputation in the international community. Although the validation of IL in national law does not have extraterritorial effect, it concerns the position of the state in matters concerning IL. As long as, under IL, the Empire was considered one state with a single responsibility to adhere to its obligations in IL, the rationale of the doctrine of extraterritoriality applied to the validation rule as well.

For the two reasons outlined, there is a strong argument for the absence of power of the colonies to vary the validation rule established in the United Kingdom before their independence. Yet, however one sees this issue, it is of only historic value since the former colonies have now gained full independent statehood and are recognised members of the international community. Therefore, their approach to validating CIL in their national law may well differ from the United Kingdom’s view. Whether they have done so will be discussed below.

3) The Canadian Rule—Adoption of CIL

The use of CIL in Canada has wider variety than that in the United Kingdom. As well as referring to CIL in situations similar to those that arose in English courts, thus directly addressing the question as between incorporation and transformation, Canadian courts have also frequently used CIL to determine the distribution of jurisdiction as between the provinces and the federation.

a) The Validation Rule

Early cases in Canada were mostly concerned with maritime law. Thus, the right of hot pursuit and seizure beyond the three-mile limit of the territorial sea as recognised in CIL

\footnotesize{\textsuperscript{115} Hogg, ibid at 32-3.\textsuperscript{116} See Wheare, The Constitutional Structure of the Commonwealth (1960) at 24, 43-4, 47.}
were applied,\textsuperscript{117} even if not provided for in the relevant statute.\textsuperscript{118} In contrast, a seizure of a ship on the high seas was held unlawful and the officer liable for the resulting damage, where not acting under hot pursuit or constructive presence as the only justifications to exercise Canadian jurisdiction on the high seas.\textsuperscript{119} Moreover, IL was used to uphold the validity of a dominion statute conferring jurisdiction over the territorial sea because it had no extraterritorial application.\textsuperscript{120} None of these cases made any mention of doctrines of either incorporation or transformation. They merely applied what they considered IL.

The earliest case which addressed the mode of application of IL in Canada was the \textit{Foreign Legations} reference,\textsuperscript{121} in which the Canadian Supreme Court was asked to determine the power of municipalities to subject foreign legations to taxation. The majority of the court answered this question in the negative by reference to international rules of immunity. These rules were said to “have been accepted and adopted by the law of England (which, except as modified by statute, is the law of Ontario)...”\textsuperscript{122} This statement left (at least) three questions unanswered. First, could more recent rules of IL become part of Canadian law if not accepted by the law of England? Secondly, if so, what was meant by acceptance? And thirdly, did IL become a part of provincial law only, or was it federal law or both?

\textsuperscript{117} \textit{The Ship “North” v The King} (1906) 37 SCR 385.

\textsuperscript{118} An Act respecting Fishing by Foreign Vessels, RSC ch 94. Girouard J dissented on this point, held that the statute was compelling and the only authority on the matter. This view, however, does not result in a violation of IL; it only limits the exercise of a right existing under IL.

\textsuperscript{119} \textit{Mason v Coffin}, [1928] 2 DLR 263 (Nova Scotia SC).

The significance of this case may be that here IL was applied to purely national facts. The ship was registered in Canada and the master was a Canadian citizen. This was subject to criticism in later cases. See \textit{R v Mason} [1935] 2 DLR 161; aff’d [1935] SCR 513; deciding not to follow the IL argument in a case of national facts (at 166-7).

\textsuperscript{120} \textit{R v Boutelier}, (1929) 51 CCC 314 at 315, aff’d (1929) 51 CCC 314, 326. The Supreme Court was, however, cautious to hold that the three-mile jurisdiction applied for revenue matters, expressly reserving the question of proprietary rights. This may be due to the fact that Armstrong CoCJ in the court below had not made clear whether he thought of inland bays or the three mile belt of the territorial sea to justify the exercise of jurisdiction in Margaret’s Bay.

\textsuperscript{121} \textit{Reference Re Powers of Ottawa (City) and Rockcliffe Park (Municipality) to Levy Rates on Foreign Legations And High Commissioner’s Residences} [1943] SCR 208 (SCC). Hereinafter: \textit{Re Foreign Legations}.

\textsuperscript{122} \textit{Re Foreign Legations} [1943] SCR 208 (SCC) at 214 (Duff CJ).
Clarification can be obtained from the same case. Firstly, the Chief Justice quoted with approval leading cases on the incorporation doctrine,\(^\text{123}\) thus implicitly accepting it as “good law”.\(^\text{124}\) Moreover, the other judges more clearly\(^\text{125}\) accepted the direct validity of CIL in Canada.\(^\text{126}\) This may provide an affirmative answer to the first question.\(^\text{127}\)

The other members of the bench did not consider a need for “acceptance” of the rule. An ultimate answer cannot be obtained from this case. As to the federal question, the other judges added little since both possibilities were covered in their judgments.\(^\text{128}\)

Despite frequent citation of the *Foreign Legations* reference as establishing the doctrine of incorporation for Canada, the case may not be a valid precedent for this proposition. The case can be seen as merely using international standards to interpret a provincial statute,\(^\text{129}\) and thus falling short of actually applying rules of IL.\(^\text{130}\) While, the difference may have been marginal in the case itself other cases have depended on the distinction between interpretation of existing domestic law and application of IL establishing new rules, rights and duties.

\(^\text{123}\) Re *Foreign Legations* *ibid* at 213, 214, citing *Chung Chi Cheung v R* [1939] AC 160 (PC) and *Heathfield v Chilton* (1767) 4 Burr 2015.

\(^\text{124}\) Woloshyn “To What Extent Can Canadian Courts Be Expected to Enforce International Human Rights Law in Civil Litigation?” (1985/86) 50 SaskatchewanLR 1-12 at 8.

\(^\text{125}\) Remarkably, the dissenters stated the incorporation doctrine clearer than the majority judges did. Contrast the statements of Kerwin and Hudson JJ (at 238 and 241) with Rinfret J’s more ambiguous remark: “... the principles of international law which have acquired validity in the domestic law of England and, therefore, in the domestic law of Canada ...” *Re Foreign Legations* [1943] SCR 208 (SCC) at 232 (my emphasis).

\(^\text{126}\) “When these questions arise they must be decided under those rules of international law that have become part of the domestic law of this country.” *Re Foreign Legations ibid* at 238 per Kerwin J. “[P]rivileges or immunities in respect of such legations, ... if any exist, it must be by virtue of some general principle of international law ... having the force of law in Ontario”, *ibid* at 241 (Hudson J).

\(^\text{127}\) Later, in 1980, the Alberta Court of Queen’s Bench held that the incorporation doctrine has its own operation in Canada; *Reference Re Alberta Union of Provincial Employees*, 120 DLR ((3d)) 590; aff’d 130 DLR ((3d)) 191.

\(^\text{128}\) *Reference Re Alberta Union of Provincial Employees ibid*, per Rinfret J (at 232); per Kerwin J (at 238) and per Hudson J (at 241).

\(^\text{129}\) The *Assessment* Act of Ontario. It is submitted that the significance of *Re Foreign Legations* lies in the denial by the majority, of provincial power to legislate contrary to IL.

\(^\text{130}\) *Re Foreign Legations* [1943] SCR 208 (SCC) “The general language of the enactments imposing the taxation in question must be construed as saving to the privileges of foreign states.” at 231 (Duff CJ); and “It is with this in mind that must be read the *Assessment Act of Ontario*.” at 249 (Taschereau J). As to this interpretation of the case see *Municipality of Saint John v Fraser-Brace Overseas Corp* [1958] SCR 263 at 267 (Rand J) (hereinafter *Saint John v Fraser-Brace*).
This was so in the *Immunities of Members of US Forces* reference, where the Supreme Court was asked, firstly, whether in the absence of a statute members of United States forces invited to Canada by the government were exempt from criminal proceedings, and secondly, if that were not the case, whether the Dominion Parliament had jurisdiction to provide for such exemptions. While the answer to the second question was unanimously in the affirmative, the answers to the first question varied greatly. For the present purpose of investigating the mode of validation of CIL it should suffice to state that all members of the court were prepared to apply a rule of IL on the matter if such existed. In the absence of a prior enactment, this must be seen as favouring the incorporation approach. Moreover, the judgment of Duff CJ clarified the matter of acceptance. In this judgment it becomes evident that the requirement of acceptance refers to the establishment of a rule of CIL. No judicial acceptance is required for the validation of the rule in Canada.

On close examination, later cases did not depart from that position. The terms of application of CIL were most clearly stated by Rand J in *Saint John v Fraser-Brace*:

"If in 1767 Lord Mansfield, as in *Heathfield v. Chilton*, could say, 'The law of nations will be carried as far in England, as anywhere', in this country, in the 20th century, in the presence of the United Nations and the multiplicity of impacts with which

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131 Reference as to whether Members of the Military or Naval Forces of the United States of America Are Exempt from Criminal Proceedings in Canadian Courts [1943] SCR 483 (SCC) (Hereinafter Re Immunities of US Armed Forces).

132 Re Immunities of US Armed Forces ibid at 501 (Duff CJ, Hudson J concurring); at 509 (Kerwin J); at 519 (Taschereau J); 527 (Rand J).

133 Re Immunities of US Armed Forces ibid at 490 per Duff CJ, Hudson J concurring; at 502 per Kerwin J; at 517 (Taschereau J); 520 (Rand J).

134 Re Immunities of US Armed Forces ibid at 490: "If there is such a rule in force in this country in the sense contended for, it derives its validity solely from alleged principles of international law to which the nations, including the United Kingdom and Canada, are supposed to have agreed." (Duff CJ, Hudson J concurring). "If not accepted in this country, international law would not be binding, but would merely be a code of unenforceable abstract rules of international morals." at 517 (Taschereau J).

135 "These exemptions are grounded on reason and are recognized by civilized countries as being rules of international law which will be followed in the absence of any domestic law to the contrary." Re Immunities of US Armed Forces ibid at 502 (Kerwin J).

136 This has been done by Macdonald, "The Relationship between International Law and Domestic Law in Canada", in Macdonald et al (eds) *Canadian Perspectives on International Law and Organization* (1974), 88-136 at 104-5.

technical developments have entwined the entire globe, we cannot say any thing less."\textsuperscript{138}

As to the necessity of prior acceptance he added:

"... to say that precedent is now required for every proposed application to matter which differs only in accidentals, that new concrete instances must be left to legislation or convention, would be a virtual repudiation of the concept of inherent adaptability which has maintained the life of the common law, and a retrograde step in evolving the rules of international intercourse."\textsuperscript{139}

These statements seemed to establish a viable doctrine for Canada. Canadian scholars term the prevalent doctrine "adoption".\textsuperscript{140} Remarkably, however, none of these cases approved or even mentioned Blackstone's statement that IL is part of the common law. The early, as well as the more recent cases, hold that CIL is in one way or other part of domestic law without specifying the character of the resulting rule. It therefore seems that Canadian courts do not necessarily attribute the characteristics of the common law to CIL. Furthermore, they reveal that CIL is applied as it changes, that is, a new rule is applied even in the face of inconsistent prior cases.\textsuperscript{141} That this was recognised before Trendtex and without need for an argument about it, is a strong indication that CIL is part of Canadian law but different from common law. If this is to mean something materially different from the incorporation doctrine, it must provide different mechanisms of applying CIL. The only difference could be that adoption means application of CIL (that binds Canada) as such, that is, an international rule, while incorporation means automatic transposition of the international rule into a domestic rule of the same content. Whether there is merit in this distinction for the validation function is doubtful, given the incorporation doctrine's exception from stare decisis. An advantage for applying the international rule directly seems to be that no such exception needed to be established. Moreover, this may lead to a clearer

\textsuperscript{138} Saint John v Fraser-Brace [1958] SCR 263 at 268-9 (Rand J) (footnote omitted).

\textsuperscript{139} Saint John v Fraser-Brace \textit{ibid} at 269 (Rand J). Both statements are, however subject to the doubts expressed above, ie the question whether genuine application or mere interpretation of existing municipal law was indicated.

understanding of the rule's origin. If CIL is valid as something distinct from common law, then the common law remained unchanged. The question then to be asked would be which of the two – CIL or common law – should prevail in cases of conflict. The answer,\(^\text{142}\) however, relates to the application function and has no influence on the validity of CIL in Canada.

It cannot conclusively be said whether this mode of validating CIL applies in Canada. Many cases now refer to a settled practice,\(^\text{143}\) or well-known principles, when it comes to the application of CIL.\(^\text{144}\) They are thus of little help. It may be sufficient to point out, as has been done, the possibility of applying CIL directly.

\(b\) Application of CIL and the Relationship Between the Dominion and the Provinces

A second series of cases in which CIL is referred to in Canada are cases concerning the relationship among the provinces and between the provinces and the federation. The Foreign Legations reference was the first example of such a dispute concerning IL. The major issues later concerned territorial claims of the provinces in the maritime sector. Most recently, the question of a unilateral right to secession of Quebec has arisen. Here, although no direct claims of foreign states were involved, CIL played a decisive role in deciding these cases. The Canadian Supreme Court directly utilised CIL in these cases without referring to any doctrine of relationship.

(i) Maritime Jurisdiction

It was the Nova Scotia Supreme Court that had to decide the first in a line of maritime cases.\(^\text{145}\) The question was whether under the Nova Scotia Assessment Act submarine mine workings were taxable assets. The majority of the court held that the Assessment


\(^{142}\) For which see below, Third Part- Chapter Seven -2.

\(^{143}\) Jose Pereira v Canada (Attorney General) File No. T-1602-95, 1996 ACWSJ LEXIS 93143.

\(^{144}\) R v Rumbaut, (1998) 127 CCC (3d) 128, refers to “... existing customary international law which is part of the Canadian domestic law.” (at 140).

\(^{145}\) Dominion Coal Co v County of Cape Breton (1963) 40 DLR (2d) 593.
Act did not apply under the territorial sea. While two judges of the majority did not refer to IL, the other two held that, notwithstanding principles of IL, under the common law the realm ended at the low water mark, thus following the path that the majority in *R v Keyn* had set 100 years before. The exercise of jurisdiction in the territorial waters therefore needed parliamentary sanction. In a dissenting opinion, Currie J held that IL automatically extended the effect of statutes to the territorial sea. It is suggested that neither view departed from the doctrine of adoption but both rather affirm it. The difference of opinion in this case was only as to the content of the international rule. While the two judges in the majority took the view that IL merely permitted national legislation to extend jurisdiction, Currie J thought that this effect could be obtained from IL alone.

In 1967 the Governor-General referred to the Supreme Court the question whether Canada or the province of British Columbia had jurisdiction and property rights over the territorial seas and the continental shelf. While the court again adopted the view from *Keyn*, it emphasised here that under CIL Canada as an independent state could exercise sovereignty over the territorial sea and could thus pass legislation with effect in these waters. With respect to the continental shelf, the Supreme Court said that given the recent developments in the area, it could not be that British Columbia held property and sovereign rights here. Under IL, it was solely the nation state that held these rights; in this case, it was only Canada. Although both questions were thus answered by extensive reference to IL, the Supreme Court stopped short of holding that CIL governed the case. Rather, it stressed that the realm of Canada extended only to the low water mark. IL merely made the exercise of jurisdiction available and hence conferred on Canada the capacity to legislate for the territorial sea. Still, the case provides an example of judicial consideration of recent customary international rules without their prior enactment.

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146 Patterson and Bisset JJ.
147 Ilsey CJ and MacDonald J (concurring).
148 *R v Keyn* (1876) LR 2 ExDiv 63.
150 *Reference Re Offshore Mineral Rights* ibid at 815-7.
151 *Reference Re Offshore Mineral Rights* ibid at 821.
152 *Reference Re Offshore Mineral Rights* ibid at 821.
Similar questions occurred 17 years later in a dispute between Canada and Newfoundland.\textsuperscript{153} Eventually, only the questions concerning the continental shelf reached the Supreme Court.\textsuperscript{154} Despite various efforts by Newfoundland to distinguish the 1967 Reference, the Court held that the rights as to the continental shelf belonged to Canada, not to Newfoundland. In order to reach that conclusion, the Court had to deal with three questions that touched issues of IL. Firstly, the Court held that in 1949,\textsuperscript{155} rights as to the continental shelf might have existed but that these were in an embryonic stage of development.\textsuperscript{156} In such a case, it was necessary for a state claiming these rights to proclaim the assertion of those rights.\textsuperscript{157} Second, while the current rights to exploit the continental shelf existed \textit{ipso jure}, they did not have retroactive effect.\textsuperscript{158} Moreover, even if one were to accept the retroactive effect of such rights, it would not be Newfoundland but Canada that held these rights.\textsuperscript{159} Thus, Newfoundland could not claim to have inherited them. Third, even if all these findings were wrong, Newfoundland would have lost these rights to Canada by the terms of the Union of 1949.\textsuperscript{160}

These two cases were distinguished in a dispute about the Straight of Georgia,\textsuperscript{161} where the Supreme Court held that the seabed of the strait was property of the province of British Columbia because it could prove that these waters belonged to the colony of British Columbia prior to the Union.

\textsuperscript{153} Reference Re Seabed and Subsoil of the Continental Shelf Offshore Newfoundland [1984] 1 SCR 86 [hereinafter \textit{Re Newfoundland Continental Shelf}].

\textsuperscript{154} The question as to the territorial sea was settled in the Newfoundland Court of Appeal Reference \textit{Re Mineral and other Natural Resources of the Continental Shelf} (1983) 145 DLR (3d) 9 in favour of Newfoundland.

\textsuperscript{155} The time of Newfoundland’s accession to Canada and hence the relevant point in time to consider international rights of Newfoundland as a separate entity.

\textsuperscript{156} \textit{Re Newfoundland Continental Shelf} [1984] 1 SCR 86 at 122-4.

\textsuperscript{157} In other words, while a rule is in the process of development, a right under the rule does not exist \textit{ipso jure} but only by explicit assertion of the state: \textit{Re Newfoundland Continental Shelf} \textit{ibid} at 124.

\textsuperscript{158} \textit{Re Newfoundland Continental Shelf} \textit{ibid} at 125-6. The Newfoundland Court of Appeal ((1983) 145 DLR (3d) 9 at 39) had accepted this by reference to a passage in the ICJ \textit{North Sea Continental Shelf Cases} [1969] ICJRep 3. This was rejected in the Supreme Court since the cited passage did not support such a contention.

\textsuperscript{159} \textit{Re Newfoundland Continental Shelf} \textit{ibid} at 126-7.

\textsuperscript{160} \textit{Re Newfoundland Continental Shelf} \textit{ibid} at 116.

\textsuperscript{161} \textit{Canada (Attorney General) v British Columbia (Attorney General)} [1984] 1 SCR 388.
The wish of Quebecois separatists to secede from the confederation has been repeatedly considered before the Quebec and federal courts. Most of these cases dealt with a right to unilateral secession under CIL.

In the Quebecois courts, a private party brought actions against the planned secession Bill, claiming that it infringed his rights under the Canadian Charter of Rights and Freedoms and seeking a declaration of the illegality of a unilateral secession under IL. The Cour Supérieur (Quebec) had to pronounce twice in preliminary matters whether to strike out certain claims of the action and whether to consider motions for dismissal. The first proceeding categorically struck out the requests for a declaration based on IL but held that the Bill threatened the plaintiff’s Charter rights. A second action and counter-claim were brought after a referendum which, by a slight majority, denied the purported secession. The claim was that the secessionists continued to violate Charter rights and IL. Here, the international questions were considered. It was held to be unclear if under IL there existed a right to unilateral secession for Quebec.

Eventually, when the questions reached the Supreme Court on a reference from the Governor General, three questions were in issue: (a) whether a unilateral secession of Quebec was lawful under Canadian constitutional law; (b) whether a secession was lawful under IL; and (c) which of these regimes prevailed in case of conflict. The Court held that neither constitutional nor IL recognised a right of unilateral

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164 Bertrand v Quebec I ibid at 412.
165 Bertrand v Quebec I ibid at 432.
166 Bertrand v Quebec II (1996) 138 DLR (4th) 481.
167 Bertrand v Quebec II ibid at 504-5.
secession in the circumstances of the case and hence held the third question unnecessary to answer.\textsuperscript{169}

Several arguments were raised trying to establish a unilateral right to secession. Firstly, counsel for Quebec relied on the right of a people to self-determination. The Court found that even if the population of Quebec constituted a people in the sense contemplated by the right to self-determination, the right was to be exercised only within the existing national state.\textsuperscript{170} In cases of colonial rule or oppression or alien subjugation, or perhaps other exceptional circumstances, it could be exercised externally in the form of secession.\textsuperscript{171} Secondly, it was claimed that once Quebec had become an independent state, other members of the international community would thus recognise it. It was maintained that Quebec would obtain a right to be so recognised. For such a future right to be effective, so the argument ran, there must be a present right to secede. While the contentions as to recognition might have been right, of course, that in itself could not determine the availability of a right to secede.\textsuperscript{172} Thus, neither international nor constitutional law allowed for a unilateral secession of Quebec, which made an answer to the question of conflict unnecessary.

c) Conclusions

While these constitutional cases neither apply CIL nor treat it as incorporated, they show the importance of IL in determining issues between the provinces and the federation. Furthermore, state and federal courts seem ready, with the exception of the Quebec Superior Court in \textit{Bertrand v Quebec I},\textsuperscript{173} to consider CIL arguments where appropriate. The maritime cases also show that CIL is indeed a determinative factor when territorial questions arise. Since CIL is in these cases referred to in addition to the common law, it is valid individually and not as part of the common law.

\textsuperscript{169} \textit{Reference Re Secession of Quebec} ibid at paras 147, 155.
\textsuperscript{170} \textit{Reference Re Secession of Quebec} ibid at paras 123-5, 126-30.
\textsuperscript{171} \textit{Reference Re Secession of Quebec} ibid at paras 131-9.
\textsuperscript{172} \textit{Reference Re Secession of Quebec} ibid at para 146.
\textsuperscript{173} \textit{Bertrand v Quebec I} (1995) 127 DLR (4th) 408 at 412: "While customary international law may be pleaded, it has no operative legal force unless it is incorporated in the domestic law."
However, these cases are unique to federal questions. They concerned disputes between different jurisdictions within the state. It is therefore perhaps wrong to find that CIL has direct validity also in the situations referred to above (a). Nevertheless, CIL is in these cases valid automatically, that is, no judicial recognition is required.

4) The Australian Doctrine – the Source-View

The cases in which CIL is and was relevant in Australia resemble those in the United Kingdom. Whereas questions of foreign representatives’ immunities were mainly at stake in the beginning, human rights and criminal law issues have arisen more recently.

Early instances of the application of CIL in Australian courts seemed to show a more cautious view than in the United Kingdom. For example, in considering whether visiting armed forces were immune from Australian jurisdiction, the Supreme Court of New South Wales stated that IL was recognised as part of municipal law as far as it was not inconsistent with that law.174 This seems an entirely dualist conception. Therefore, a conflict between international and municipal law could not occur since IL that was inconsistent with national law was not part of Australian law. Nevertheless, it is also possible to argue that this was a rule of conflict rather than validation of CIL. Under this approach CIL may be automatically valid but would yield to any national law, in a case of conflict. The requirements of validation were not conclusively settled here. The rule was affirmed and acted upon in the Polites case,175 though this case also hardly addressed the mode of validation176 of IL, as the main issue was to reconcile international rules with those of municipal law.

174 Wright v Cantrell (1943) 44 SRNSW 45 at 46-7.
175 Polites v Commonwealth (1945) 70 CLR 60 (HCA).
176 In Polites it is solely Williams J’s statement (ibid at 80-1) that attempts to clarify why International Law plays a role in the case, whereas the rest of the bench argues on the interpretation of the municipal statute, thereby applying what they apparently consider a domestic rule of construction.
A reluctance to apply CIL became evident in *Chow Hung Ching v R*, another case dealing with immunities of foreign troops, where Dixon J adopted the view introduced by contemporary writers on IL:

“The theory of Blackstone [ie that the law of nations is part of the law of the land] is now regarded as without foundation. The true view, it is held, is ‘that international law is not a part, but is one of the sources, of English law’. … ‘In each case in which the question arises the court must consider whether the particular rule of international law has been received into, and so become a source of, [Australian] law’…”.

Accordingly, Dixon J proceeded to find that a rule conferring immunity upon foreign troops had been received by virtue of *Chung Chi Cheung v R* and the *Schooner Exchange* case. In addition, in *Chow Hung Ching* Latham CJ ambiguously ruled that IL was not in itself part of Australian law but that the courts would apply its generally accepted principles. These statements are not satisfactory and comprehensive rules. They do not state what the particular character of a source of the law is. If a source of the law is to be something essentially different from a part of the law – as the British rule provides – then a source must be less important than a part of national law. Nevertheless, Lauterpacht has pointed out that sources of the law are more than potential parts of the law. As he argued, a statute is both part and source of the law. However, if this had been the view of Dixon J in *Chow Hung Ching* there would

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177 *Chow Hung Ching v R* (1948) 77 CLR 449 (HCA). Cf Starke J, *ibid* at 471, referring to *Chung Chi Cheung v R* (1939) AC 160. The reason for the frequent reference to this case it is submitted, is the compelling power of the Judicial Committee of the Privy Council to which the Australian Judges might have felt bound rather than other (more unequivocal) judgements from UK courts.

178 There was indeed no reference to any cases; and the two articles referred to were much disputed, as noted by Donaghue, “Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia” (1995) 17 AdelRev 213 at 264.


180 *Chung Chi Cheung v R* (1939) AC 160.


182 "The existence of the immunity [in Australian law] ought in my opinion to be no longer denied." *Chow Hung Ching v R* (1948) 77 CLR 449 at 481. Curiously, the two cases referred to were not Australian cases. How then, could these have held immunities to be part of Australian law?

183 *Chow Hung Ching v R* *ibid* at 462, at the same time referring to *Chung Chi Cheung v R* (1939) AC 160, and *West Rand*, [1905] 2 KB 391, two cases hitherto regarded as contradictory.


have been no point in contradicting Blackstone's view.\textsuperscript{186} The insight that a source as used by Dixon J is different from, and probably less than, a part of the law of the land as understood in the United Kingdom, still does not clarify what the characteristics of a source are.\textsuperscript{187} Clearly, however, no parliamentary action is required before CIL is applied – rather, the judges can apply the rules. Apparently, this works even where the rule has not been previously recognised in Australia. But if the courts can apply those rules without prior mandate, what is the rule that allows them to do so? Commentators have suggested that Australian courts assert a discretion whether or not to apply a rule of CIL.\textsuperscript{188} The scope and limits of such a discretion are, however, not defined.

In many recent cases judges were not willing,\textsuperscript{189} not in the position,\textsuperscript{190} or found it unnecessary,\textsuperscript{191} to spell out the rule for application.\textsuperscript{192} However, the judgment of Gaudron J in Teoh's case\textsuperscript{193} may have reactivated the discussion about the incorporation doctrine.\textsuperscript{194}

"The significance of the Convention, in my view, is that it gives expression to a fundamental human right which is taken for granted by Australian society, in the sense that it is valued and respected here as in other civilised countries."\textsuperscript{195}


\textsuperscript{187} To complicate the point even further, Mason now distinguishes direct and indirect "sources" of Australian law (Mason, “International Law as a Source of Domestic Law” in Opeskin and Rothwell (eds) International Law and Australian Federalism (1997) 210-231). There is, however no merit in following this distinction as it probably is the distinction between “source” and “part” of national law as suggested here.

\textsuperscript{188} Sawer, “Australian Constitutional Law in Relation to International Relations” in KW Ryan (ed) International Law in Australia (2\textsuperscript{nd} edn, 1984), chapter 2 at 50.

\textsuperscript{189} Jago v Judges of the District Court of NSW (1988) 12 NSWLR 558 (CA NSW), in which the matter of incorporation is left to be settled in the future (at 569). And see In re a Teenager, (1989/90) 13 FamLR 85, where to rule on the question of incorporation “would not be of advantage in the present case” (at 123).

\textsuperscript{190} Koowarta v Bjalke Petersen (1982) 153 CLR 168 (HCA) at 220-1 (Stephen J), at 203-4 (Gibbs CJ).

\textsuperscript{191} Eg, because the claimed rule did not exist in CIL, see Limbo v Little, 65 NTR 19 (NTCA) at 45 (Martin J); because the claimed rule did not exist at the time the alleged actions occurred, see Coe v Commonwealth (1993) 118 ALR 193 at 205 (Mason CJ).

\textsuperscript{192} A misinterpretation has lead to the conclusion that Polyukovich v Commonwealth ((1991) 172 CLR 501) now accepts the UK doctrine of incorporation, see Starke “Current Topics” (1991) 65 AusLJ 695 at 701-2. None of the seven judges addressed the topic of incorporation of CIL; all judgments were confined to the question of constitutional validity of Commonwealth legislation.

\textsuperscript{193} Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 at 303-5 (Gaudron J).

\textsuperscript{194} Allars, “International Law and Administrative Discretion” in Opeskin and Rothwell (eds), International Law and Australian Federalism (1997), 232-70 at 264-5.

\textsuperscript{195} Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 at 304 (Gaudron J).
Here, the fundamental human right is taken as valid without any need for judicial recognition. Nevertheless, this judicial pronouncement seems to rest on a kind of general principle of IL rather than CIL, since it refers to fundamental values commonly recognised by all civilised states. By definition, general principles are, different from CIL. Gaudron J's judgment therefore canno: shed further light on the relationship of CIL to Australian law.

Most recently, the Federal Court of Appeal has had to consider the question whether the prohibition of genocide is a rule of Australian national law. In the absence of a legislative enactment, the 1949 Genocide Convention could not have been applicable in Australia. Thus, the question was whether customary rules prohibiting genocide were applicable in Australia. The majority held that parliamentary action was required to introduce CIL into Australian criminal law, primarily because section 1.1 of the Criminal Code (Cth) prohibited the establishment of crimes other than by statute. The judges thus did not see how they could apply a crime of genocide when it had not yet been enacted by Australian legislation. The argument here is one of conflict between a provision in national criminal law and an international obligation of Australia. It is therefore a question for the application function rather than for the validation function of the reference norm to decide. Criminal CIL cannot become part of Australian law without legislative intervention because a statute prescribes so. The restriction is therefore limited to the cases under this statute. There is no issue here of the general validity of CIL in Australia.

196 See Art 38 (1) (c) of the ICJ Statute: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: ... the general principles of law recognized by civilized nations; ...”. Generally as to general principles see Mosler, “General Principles of Law” in (1995) 2 EPIL 511 at 515-25 and Bin Cheng, General Principles of Law as applied by International Courts and Tribunals (1987).

197 Nulyarimma v Thompson (1999) 165 ALR 621. The plaintiff had requested a magistrate to issue warrants for arrest of three members of the Commonwealth government, alleging they had committed genocide in connection with the formulation of recent Australian legislation (The “Ten Point Plan” to enact the Native Title Amendment Act 1998 (Cth)). This request was refused and the proceedings eventually reached the FCA.


In his dissenting opinion in *Nulyarimma*, Merkel J held that the reasons for the prohibition of new common law crimes did not apply to genocide and thus considered the mode of application of CIL and the doctrines at length. He identified three ways to apply CIL in domestic courts: automatic incorporation, legislative adoption and common law adoption. After reviewing the Australian case law, he concluded that, as a result of Dixon J’s statement in 1948, the source-view prevailed in Australia. This, it was said, approximated to the common law adoption. Merkel J summarised the merits of this doctrine in six points. First, the rule needs to be sufficiently clearly established at IL. Secondly, investigation must follow whether the respective rule “is to be treated as having been adopted or ‘received into, and so become a source of [Australian] law’”. Thirdly, this will be the case if the customary rule is not inconsistent with (any) Australian law. Fourthly, if the CIL conflicts with either statute or common law, it cannot be adopted or acted upon because this would subordinate Australian Law to IL. Fifthly, once the adoption is completed, the rule of CIL will have the force of law in Australia as being part of the common law. Finally, since CIL changes from time to time, the adoption will be valid only from the date of the rule’s establishment in Australia.

The first and fourth points are within the ambit of the determination and application functions. The second, fifth and sixth points are part of the validation function. The third point connects determination, validation and application. The result is a comprehensive statement of the reference norm rather than a purely validating rule.

Under this approach, a clearly established rule of CIL can become part of Australian common law if it is not in conflict with any pre-existing Australian law. Whether this is so has to be investigated in every case. Here, the existence and content of Australian common law determine whether CIL is going to be valid. There are,

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200 As to the inapplicability of the prohibition of common law crimes, see *Nulyarimma v Thompson* *ibid* at 666-7 [177-82] (Merkel J). He reviewed the English, Canadian and New Zealand practice at 642-51 [83-122].

201 *Nulyarimma v Thompson* *ibid* at 651-3, [123-9] (Merkel J).

202 *Nulyarimma v Thompson* *ibid* at 653-5 [132] (Merkel J).


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however, two situations in which CIL will *prima facie* be treated as incorporated: first, when Australian law conforms to IL or, secondly, when there exists no rule on the subject matter in Australian law. In the first case, CIL would have no significance because the case would be decided on the parallel national rule only. The second option apparently contradicts the source-view since it does not require any active conduct on behalf of the Australian courts. If one were to accept the second option, then the source-view would be no different from the incorporation doctrine. Merkel J and many contemporary commentators on Australian law, however, reject this doctrine. Additionally, Merkel J’s second point requires investigation of whether a rule has become a source of Australian law. Sources of law are not themselves applicable; rather, sources produce applicable rules of law.

Thus, something is needed to produce a valid rule. In the case of the prohibition of genocide, Merkel J considered this additional requirement to be fulfilled as a result of Australia’s ratification of the 1949 Genocide Convention. Merkel J reached this conclusion by applying the first part of the *West Rand* test and holding that by ratifying the convention, Australia had assented to and acted upon the rule. This seems to suggest that there exists no discretion for the court whether or not to apply rules of CIL that are also embodied in a convention to which Australia is a party. Such a rule would be part of Australian law without further requirements. The test here resembles the criteria set by the High Court in *Teoh* for the creation of a “legitimate expectation” of the applicant that an administrative discretion will be exercised in accordance with Australia’s treaty obligations. Moreover, Merkel J held that the prohibition of genocide constituted a rule so widely accepted that no civilised state could repudiate it. This would create a *prima facie* assumption that Australia had also assented and acted upon the rule. This is, in fact, the second part of the *West Rand* test.

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204 *Nulyarimma v Thompson* ibid at 655 [134] (Merkel J).
205 *It will be remembered that this test was employed to find whether a rule was binding on the state in IL; which was held to be the case when the state had either assented to the rule or if the rule was of such character that no civilised nation could repudiate it. See West Rand Gold Mining Co Ltd v R [1905] 2 KB 391.*
The *West Rand* test deals with whether there exists an obligation on the state under IL. Thus, to hold that a state's assenting to and acting upon a rule in IL is evidence that the rule has been received into national law, is to confuse two things, the international obligation and the national validity. The *West Rand* test cannot fulfil the validation function. On the other hand, CIL is not supposed to be automatically valid in Australia. The two criteria employed by Merkel J therefore do not clarify the situation.

It is an unfortunate situation that the six-point test combines all functions of the reference norm without keeping these distinct. While it may provide a practicable approach giving effect to CIL and at the same time valuing Australian national legal interests, it is obscure whether the requirement for judicial recognition concerns validation, determination or application of the customary rule.

As a conclusion from this and the older cases, it can be stated that CIL may in circumstances give rise to national rules. What these circumstances are seems to fall to be determined by the judge in every case. Thus, the judge determines rules of national Australian law with or without reference to CIL applicable to the facts. It is only in this manner that CIL is valid in Australian law. A customary rule therefore becomes valid in Australia only from the date of its recognition in the court. The further implications of the source-view are, however, still undetermined. In particular, a clear criterion for the exercise of discretion whether or not to apply CIL is missing. In any case, “... principles of [customary] international law ... are not, as such part, of Australian domestic law ... [but the] ... use that may be made of international law in Australian domestic law is much more indirect, subtle and controversial.”

5) Summary of Positions
The options available to validate CIL in national law were identified as automatic validation or specific judicial or legislative enactment of either parallel national or direct IL.

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The cases show that parliamentary intervention is generally not needed. Legislation was required in two kinds of cases. These were the cases concerning permissive rules of CIL and the Australian genocide case, concerning criminal CIL. The requirement of legislative intervention in both cases followed from the content of the international rule. For the permissive rule, it was argued that this rule did indeed become valid in national law; it was only the exercise of the permission that was conferred on Parliament for reasons of rational separation of powers. The requirement of a legislative enactment here was therefore a requirement of the application function. In the criminal case, a statute existed in national law, prohibiting the creation of new crimes in national law without statutory enactment. The international rule was not enacted by statute. The question to be decided was one of ranking of CIL in national law, that is whether it superseded statute or not. It was therefore also for the application function to answer, the result being that the statute prevailed.

Considering the remaining cases, the course followed in the United Kingdom is the clearest example of using the incorporation doctrine to validate CIL automatically as parallel common law. While automatic validation also prevails in Canada, there is a tendency to adopt CIL directly rather than as parallel national law. For the purposes of validation, the possible differences between the incorporation and adoption have been limited to the question of stare decisis. Here, the incorporation doctrine has had to establish an exemption from a well-founded rule of national law in order to effectively validate CIL whereas the adoption principle took the easier path by not including the international rules into national law but validating them as a distinct body of law. With the exemption established by the incorporation doctrine, both mechanisms reach the same results for the purposes of validation. The most ambiguous, however, is the situation in Australia. It seems that there exists a requirement of judicial action for CIL to become valid. On the other hand, an ambiguous concept of acceptance on behalf of the state seems to limit the exercise of judicial discretion of whether or not to validate
CIL. Moreover, a prior judicial enactment is not required.\textsuperscript{209} Thus, the judge in every case can validate CIL.

The general reluctance to validate CIL automatically might be grounded in a concern about validating the uncertain and ambiguous elements of alleged CIL into applicable national law. However, this concern can be countered by holding uncertain CIL inapplicable without statutory clarification and by providing effective mechanisms to determine the content of CIL. The doctrine in Australia, however, tries to solve these problems within the validation function. As has been shown, this leads to ambiguities as to the necessary requirements for validation itself. Without solving its initial aim to provide answers to the uncertainty of CIL, the Australian doctrine has thus added another ambiguity to the reference norm. Therefore the Australian doctrine as to validation is unnecessarily restrictive and unclear.

6) New Zealand\textquotesingle s Position

Which of these options New Zealand chose has not been expressly stated.\textsuperscript{210} Of the various cases to which CIL is relevant only those involving foreign sovereign immunity give an indication of how CIL is valid in New Zealand.\textsuperscript{211}

The first of these cases was \textit{Marine Steel v Government of the Marshall Island.}\textsuperscript{212} The Marshall Islands claimed sovereign immunity from suit brought by a ship repairer

\textsuperscript{209} To hold necessary the recognition of a rule before it could be applied would indeed be essentially flawed. Courts sit in judgment over cases and determine the rules that govern the case at hand. Rules are therefore only found when they need to be applied. Consequently, there is no possibility for finding and recognising a rule before it has to be applied. On the other hand, under the requirement of prior recognition, there is no possibility for the court to apply the rule before it has been recognised.

\textsuperscript{210} Though, writing extra-judicially, Kenneth Keith thought CIL to be part of New Zealand Law (Keith, \textquotedblleft The Impact of International Law on New Zealand Law\textquotedblright (1999) 7 WaikatoLR 1-36 at 19). And see, most recently, Dunworth \textquotedblleft Public International Law\textquotedblright [2000] NZLR 217-231 at 227. Others were more cautious, Hunt and Bedggood \textquotedblleft The International Law Dimension of Human Rights in New Zealand\textquotedblright in Huscroft and Rishworth (eds) \textit{Rights and Freedoms} (1995) 49-63 at 57: \textquotedblleft Although the position is not certain, it appears that a rule of customary law forms part of New Zealand law …\textquotedblright (my emphasis).

\textsuperscript{211} There is, until today, no legislation covering the subject of sovereign immunity in New Zealand although it has been recommended some ten years ago (see Hastings \textquoteleft Sovereign Immunity in New Zealand\textquoteright [1990] NZLJ 214-219). This situation is, however, advantageous for the present purpose of researching the validity of CIL in New Zealand.

\textsuperscript{212} \textit{Marine Steel Ltd v Government of the Marshall Islands} [1981] 2 NZLR 1 (HC).
resident in Auckland to recover a sum owed pursuant to a contract for repair work on a motor vessel owned by the Marshall Islands government. Although it was unnecessary for him to do so, Barker J in the High Court considered the Privy Council decision in the *Philippine Admiral*\(^{213}\) and also noted the subsequent development in English and United States courts on the restriction of the doctrine of sovereign immunity. He found that the later cases were at odds with the Privy Council decision. He was attracted to the “common sense approach” in the newer cases,\(^{214}\) and he attempted to distinguish the *Philippine Admiral*, which would have otherwise bound him.\(^{215}\) Although he found that there was “scope for holding that [he was] not obliged to follow the *Philippine Admiral*”, he preferred to rest his judgment on the ground that the doctrine of sovereign immunity did not apply to the Marshall Islands because they had not yet acquired the necessary status of an independent state under IL.\(^ {216}\) Thus, despite making extensive reference to *Trendtex* and *Iº Congreso*,\(^ {217}\) Barker J stopped short of holding the incorporation doctrine valid in New Zealand. However, he implicitly approved it by preferring the approach of *Trendtex* and *Iº Congreso* to that of *The Philippine Admiral*.

The next case, *Buckingham v Hughes Helicopter*,\(^ {218}\) did not add much clarification on the validation function. There, it was held that the execution of a warrant for arrest of a helicopter carried on a United States military ship would interfere with arrangements *jure imperii* of the United States government. While the judgment applied the doctrine of sovereign immunity, it neither stated its origin nor indicated whether it would follow the recently accepted changes in IL which would indirectly affirm the incorporation approach.

Five years later, the High Court in Auckland affirmed what was said in *Marine Steel*. Thus, Smellie J held that “the restrictive theory of sovereign immunity should apply in New Zealand”.\(^ {219}\) In his analysis of the development of that doctrine, Smellie J

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215 *Marine Steel Ltd v Government of the Marshall Islands* ibid at 6-8.
218 *Buckingham v Hughes Helicopter* [1982] 2 NZLR 738 (HC).
relied on what was said in *Trendtex* and *I° Congreso* and quoted passages from the judgments in these cases passages that outlined the international development of the doctrine.\(^{220}\) Therefore, the international origin of the doctrine was established.

Doubts could arise when looking at *Governor of Pitcairn v Sutton*, as here a basis for the application of the doctrine of sovereign immunity was that the common law of New Zealand should not differ from the common law in England.\(^{221}\) However, the same case clarified that the doctrine applied as “common law, reflecting international law”.\(^{222}\) There showed a clear preference for the English doctrine of incorporation.

The last in the line of cases applying sovereign immunity are the cases involving the “wine box affair”.\(^{223}\) These were three proceedings brought against the Commissioner of Inquiry in cases of income tax evasion by the use of the Cook Islands as a tax haven. The applicants claimed that the actions taken by the Commissioner were illegal because they infringed, *inter alia*, the sovereign immunity of the Cook Islands. While the judgment of Cooke P in this case can be read as requiring judicial transformation in stating that “[s]overeign immunity is of course accepted by the New Zealand Courts”,\(^{224}\) Richardson J, with whom McKay J agreed, applied the doctrine without any such requirement. Even more clearly Henry J held that “... it is common ground [that the restrictive theory] forms part of the law of New Zealand ...”,\(^{225}\) and in doing so he did not refer to New Zealand but to British cases. In addition, the judgment of Thomas J considered international references only without looking at specific acceptance by New Zealand courts.\(^{226}\) Given these clear indications towards automatic validation, the reference to “acceptance” in Cooke P’s judgment must not be seen as prescriptive but descriptive of the fact that New Zealand courts had earlier accepted the doctrine.

\(^{220}\) *Reef Shipping v The ship “Fua Kavenga”* *ibid* at 570.

\(^{221}\) *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 (CA) at 436 (Richardson J).

\(^{222}\) *Governor of Pitcairn and Associated Islands v Sutton* *ibid* at 428 (Cooke P).

\(^{223}\) *Controller and Auditor-General v Davison* [1996] 2 NZLR 278 (CA) (hereinafter: *Wine Box Cases*).

\(^{224}\) *Wine Box Cases* [1996] 2 NZLR 278 (CA) at 288 (Cooke P), referring to *Governor of Pitcairn v Sutton*.

\(^{225}\) *Wine Box Cases* *ibid* at 308 (Henry J).

\(^{226}\) *Wine Box Cases ibid* at 310-3 (Thomas J).
Significantly, the New Zealand cases have not referred to Australian cases involving the validation of CIL. The cases concerning sovereign immunity thus mirror a clear adoption of the English rule of incorporation whereby CIL is automatically valid as parallel national common law and there exists an exemption from the doctrine of stare decisis when international rules have changed. The sovereign immunity cases are the sole reference to the mechanisms of validation. Nevertheless, a recent case in the Court of Appeal could be taken as evidence that the doctrine applies beyond sovereign immunity. In *Sellers v Maritime Safety Inspector*, the extraterritorial operation of the Maritime Transport Act was under consideration. While this case did not directly involve the application of a rule of CIL in New Zealand but concerned the application of a statute in harmony with international standards, Keith J, writing for the Court of Appeal, nevertheless referred to *Trendtex*. The approving use of this leading case on the incorporation doctrine indicates that the position taken in New Zealand is most likely to resemble the United Kingdom's approach. There seems therefore no reason to doubt that the incorporation doctrine should not apply to rules other than sovereign immunity.

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227 *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44.
228 The case will be examined in more detail below, Third Part- Chapter Seven -1)
| Second Part | DETERMINATION OF CUSTOMARY INTERNATIONAL LAW IN NATIONAL LAW |
As well as identifying the mechanisms by which CIL is made valid in national law, it is of course necessary to establish what the relevant international rule is. Unlike a treaty rule, the content of a customary rule is inherently problematic because custom is unwritten law. A customary rule always bears the problem of its existence as well. Whether a rule of CIL can be given effect therefore depends on a determination of its existence and content.

The existence of a customary rule could fall to be determined in international courts. But in the absence of a general compulsory international procedure, the question arises whether national courts have the power to determine the content of CIL. When national courts do so, they must defer to the basis of CIL, state practice and opinio juris. Here, different approaches to these elements have been established in various national courts. In addition, the value of the material relevant to the elements is manifold and needs to be assessed. Finally, the problem of uncertain content of a rule of CIL needs to be addressed.

1) Scope for an International Procedure

In contrast to EC law, in general IL there is no reference procedure to verify what the content of an international rule is. The ICJ and numerous other permanent and ad hoc arbitral tribunals sit in judgment over disputes between states. While these provide authoritative statements on international rules, their extent is limited and incidental as these bodies do not exercise a general compulsory jurisdiction but are called upon when the state parties refer their disputes to them. They cannot be called upon by national entities when questions of IL arise in national litigation. The advisory jurisdiction of the
ICJ, allowing the posing of questions as to the content of IL, is open only to bodies and specialised agencies of the UN. The jurisdiction of the new International Tribunal for the Law of the Sea (ITLOS) concerning advisory opinions is also limited to matters under the UN Convention on the Law of the Sea (UNCLOS) and only applications from the International Seabed Authority or Council may be heard. Individual complaint mechanisms and reporting procedures exist under a considerable number of conventions. Such procedures allow verification as to whether national law is in harmony with the state’s international obligations. These mechanisms are, however, limited to their respective instruments. In short, there is no international body to which states could refer questions concerning the content of general CIL.

Whether such an international procedure is de lege ferenda, is doubtful. There have been suggestions to either establish a permanent panel of experts with reference jurisdiction over difficult questions of CIL or to extend the International Court’s advisory jurisdiction to allow states to present questions. However, apart from any other reason, such suggestions are unrealistic on financial grounds. Moreover, as far as the ICJ is concerned, to establish jurisdiction would involve amending the ICJ Statute, which is a difficult procedure. The caseload of the Court is also now such that it would not allow for the timely answer required for the resolving of a pending national case.

So for the present and probably the nearer future national courts must establish in national cases what the rules of CIL are.

2) National Courts are Empowered to Ascertaint CIL

However the development in the international sphere might continue, at present the scope and content questions need to be resolved by national bodies, probably the courts. This raises the further question of whether national courts have the power to ascertain

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229 See article 234 of the EC Treaty (Amsterdam 1998, formerly article 177).
230 See articles 63-68 of the ICJ Statute.
231 See article 131 of the ITLOS Rules of Procedure.
the content of rules of CIL. This act of determination is a complicated exercise of finding clues for CIL and then weighing this material in order to establish whether and what the international rule is.\textsuperscript{234} Historically, because international legal materials have not been readily available to national courts, the ascertaining of CIL was even more complicated.\textsuperscript{235}

There have indeed been suggestions that national courts should limit themselves to applying rules noted in the most recent editions of authoritative textbooks. Municipal tribunals, it is said, are unsuitable to weigh up state practice and \textit{opinio juris}.\textsuperscript{236} In effect, however, this amounts to authors writing the judgments of national courts.\textsuperscript{237} On the other hand, art 38(1)(d) of the ICJ Statute refers to judicial decisions as supplementary means to determine rules of IL.\textsuperscript{238} This reference is not limited to international tribunals or even the ICJ itself.\textsuperscript{239} In fact, as was pointed out by another commentator, when tracing an international customary rule, national courts are faced with the same problems and issues as an international tribunal.\textsuperscript{240} There is thus no reason why they should not proceed to look for the constituent elements of a customary rule in the same way. There exists considerable scope for the value of national decisions on rules of IL. In national litigation, especially where no international jurisdiction exists, matters of IL must be decided if IL is to be given legal effect at all. National courts must therefore have the power to determine the content of these rules without

\textsuperscript{233} See articles 69-70 of the ICJ Statute.
\textsuperscript{234} This "evidence" is, for CIL, of course state practice and \textit{opinio juris}. See sections 4 and 5 below for a discussion on which material is to be regarded in establishing CIL.
\textsuperscript{235} As to the problems of obtaining material and information on CIL in national courts see below, - Chapter Five -.\textsuperscript{236} Shearer, "The Relationship between International Law and Domestic Law" in Opeskin and Rothwell (eds) \textit{International Law and Australian Federalism} (1997) 34 at 60.
\textsuperscript{237} The use and misuse of authors on IL in determining the content of an international rule will be discussed below, Second Part- Chapter Four -5)a).
\textsuperscript{238} Article 38(1) of the ICJ Statute in the relevant parts reads: "The Court, whose function is to decide in accordance with IL such disputes as are submitted to it, shall apply: ... (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."
\textsuperscript{239} Article 59, referred to in this provision, reads: "The decision of the Court has no binding force except between the parties and in respect of that particular case." It thus establishes that the ICJ is bound not by its prior decisions and other international tribunals are equally free.
\textsuperscript{240} Brownlie, \textit{Principles of Public International Law} (5th ed 1998) at 23.
being limited to apply what learned writers have said. This proposition is supported by
the argument that writers are also mentioned in art 38(1)(d) of the ICJ Statute and are
thus not deemed to have any greater influence on rules of IL than national courts. It
would therefore be wrong to limit judicial ability to ascertain rules of CIL to rules that
have been stated in textbooks.\(^{241}\) As a conclusion, it may be said that IL does not limit
the power of national courts to determine the content of international rules.

Most importantly, courts in national jurisdiction have never limited themselves in
sitting in judgment and determining international rules. Historically, there existed no
permanent judicial body, such as the PCIJ or ICJ, to adjudicate international disputes.
These were therefore left to be decided in ad-hoc tribunals settled by way of diplomatic
negotiation. The first courts that developed IL, however, were national courts. From a
very early stage, Admiralty and common law courts were extremely influential in
determining the content of the law of nations.\(^{242}\) Their impact on the formation of
clearer rules of IL was much greater than the use of non-judicial procedures and the
occasional international arbitral award. With the existence of permanent judicial bodies,
this function has not diminished. While international jurisdictions overlap with the
national courts, they do not limit the latters' powers. Thus, as long as there exists no
compulsory international jurisdiction to determine the content of CIL, national courts
have the power to ascertain these rules.

National law may, of course, limit this result. If there existed national rules
preventing the courts from ascertaining rules of IL, these limitations would be
conclusive. But no such general restrictions exist. The determination of rules of law is
an inherently judicial function. The only limiting rules seem to be the rules that prohibit
courts from sitting in judgment over acts of state and political questions that are not


\(^{241}\) Moreover, it will be argued that national judicial decisions have in fact greater value than authors because these constitute more direct evidence of state practice. See below Second Part- Chapter Four - (5)h).

\(^{242}\) See the cases referred to in Erades, Interactions between International and Municipal Law (1993) sections 1.1.3 and 4.2.39.
justiciable. Nevertheless, there may be rules in national law providing that special, perhaps binding, attention needs to be paid to certain materials on the content of IL, for example a statement on the facts issued by the executive branch of government. While such may limit the court’s freedom in a particular case, its general power to determine the content of CIL remains untouched.

IL allows that national bodies ascertain rules of CIL while national law puts no general limits on the courts in doing so. National courts are therefore the appropriate institutions to ascertain CIL where no general compulsory international jurisdiction exists.

3) How to Find CIL

To decide what a rule of CIL contains, it is necessary for the decision maker to be fairly clear about where and what to look for.

In finding the common law, for example, a judge would look at earlier cases decided by national courts and try to either apply or distinguish these. If cases do not provide conclusive arguments, courts will look for persuasive sources such as policy considerations or cases from other jurisdictions. Rules of the common law are based on principles or established by immemorial custom. The procedure outlined helps to find new rules by referring to their origins.

Basically the same approach should apply to ascertaining of an international customary rule. To adopt the above method would, however, not provide a connection between the particular rule and its basis. The basis of CIL is quite different from the basis of national common law.

Firstly, CIL exists on the international level and its basis must therefore be therein. So the international rule cannot exclusively be deduced from national principles.

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244 For the use of executive certification in national courts see below.
or precedents. Due to its international origin, it must be verifiable objectively so that its content remains the same, no matter where ascertained. Evidence from cases decided under one national jurisdiction is therefore, in case of doubt, not sufficient.

Secondly, one has to consider the basis of CIL. It is not immemorial custom, like in common law. The exact basis of CIL as binding upon states is still disputed in international legal scholarship. However, despite it being regarded as “confusing” by some, art 38(1)(b) of the ICJ Statute, as the only existing legal text prescribing the elements of CIL, is probably the most appropriate starting point for the consideration. It provides that the “... Court ... shall apply: ... international custom, as evidence of a general practice accepted as law ...”. The puzzling aspect of this provision stems from the order of terms used. Indeed, the provision seems to reverse the natural order of establishing a customary rule. It is not that an international custom is evidence of a practice accepted as law but the other way round. In order to provide a statement of how CIL is established, the provision therefore needs to be turned inside out. The general practice of states accepted as law is evidence of CIL.

From this definition emerge two elements necessary for the formation CIL: general practice and acceptance as law. Thus what must be established, is the objective presence of a practice among or between states accompanied by a sense that the maintenance of this practice is legally required or allowed.

There have been attempts to limit each of these elements. On one view, the acceptance requirement is so ambiguous that the existence of rules of CIL becomes largely a matter of judicial discretion. Thus, the only truly verifiable element was state practice. On the other hand, it has been pointed out that the necessity of a long

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246 See Wolke, *Custom in Present International Law* (2nd ed 1993) at 8 with further references at 5-8.
established practice makes it virtually impossible to recognise the rapid emergence of CIL in response to modern developments.\textsuperscript{251} As absolute objections, however, both views must be rejected. Firstly, acceptance is necessary to distinguish state practice that is relevant for CIL from usage which is carried out on grounds of mere tradition, courtesy, convenience, expediency or morality.\textsuperscript{252} Secondly, to infer a legal rule from the opinion of states alone would amount to ascribing conclusive effect to the wishes of states without any manifestation of such will. Moreover, without a manifestation of such wishes in practice, it would be impossible for other states to know what the one state's opinion is. Both elements thus remain necessary to find a rule of CIL. The objections may have nevertheless shed some light on the requirements and extent of "proof" of these elements. There is neither necessary a positive consent of each state to each rule in every case nor an extensive and long established practice supporting the rule. Rather, on the subjective side, the consent of states in the process of CIL is sufficient for a generally accepted rule to bind even if the state itself has not specifically accepted it.\textsuperscript{253} So far as the objective element is concerned, it is sufficient that there is a representative uniform practice, and this does not necessarily require long duration or repetition.\textsuperscript{254}

Thus, the basis of CIL comprises both elements of practice and acceptance. The process of establishing the content of rules of CIL must therefore have regard to both of these elements. With that in mind, the approaches of national courts to this task will now be examined.

4) National Law Approaches

Some of the early cases in the United Kingdom applied IL without making any reference to authorities.\textsuperscript{255} This however, remained the exception. Virtually all later judgments made reference to the source of the international rule and how it was to be

\textsuperscript{250} Kelsen, \textit{Principles of International Law} (2\textsuperscript{nd} ed 1966) at 450-1.
\textsuperscript{252} Brownlie, \textit{Principles of Public International Law} (5\textsuperscript{th} ed 1998) at 7.
\textsuperscript{254} Eg, the creation of "instant" CIL concerning outer space, on which see, Cheng, op cit n 251.
obtained. The first pronouncement on such method was in Barbuit’s Case where Lord Talbot said that “[t]he law of nations was to be collected from the practice of different nations and the authority of writers”\textsuperscript{256}. Other cases followed this proposition,\textsuperscript{257} though later judgments sharpened the criteria and added new sources. Thus Sir Robert Phillimore said in The Charkie that questions of IL must be answered “by reference to usage, authority and, the reason of the thing”\textsuperscript{258}. It was, however, not until 60 years later that the judicial board of the Privy Council indicated how to obtain this information:

> “In considering such question [that is, of IL], the Board is permitted to consult and act upon a wider range of authority than that which it examines when the question for determination is one of municipal law only. The sources from which IL is derived include treaties between various states, state papers, municipal Acts of Parliament and the decisions of municipal courts and last, but not least, opinions of jurisconsults or text-book writers.”\textsuperscript{259}

By itself, this catalogue was insufficient since it did not state the connection between the material sources and the reason for examining them. However, it was pointed out earlier that “[t]he law of nations includes all regulations which have been adopted by the common consent of nations, in cases where such consent is evidenced by usage and custom”.\textsuperscript{260} Thus, the reference to the material element of CIL was regarded as a vehicle to prove acceptance. Under this approach, acceptance is the basis of every international obligation. Rules are only binding if they are supported by the consent of the states.

The first and only judgment that includes a complete enumeration of sources and links them to the consent of states, is Lord Macmillan’s speech in The Cristina:

> “It is a recognised prerequisite of the adoption in our municipal law of a doctrine of IL that it shall have attained the position of general acceptance by civilised nations as a rule of international conduct, evidenced by treaties and conventions, authoritative textbooks, practice and judicial decisions. It is manifestly of the highest importance that the courts of this country, before they give the force of law within this realm to

\textsuperscript{255} Eg Mattoe’s Case (1709) 19 ModRep 4. But see Palache’s Case (1615) Co 152 at 153 (PC), summarising the terminology used for diplomatic purposes in historical context and referring to “the laws of all countries and nations”.
\textsuperscript{256} Talbot in Barbuit’s Case (1737) Cases t Talbot 281, as quoted by Lord Mansfield in Triquet v Bath (1764) 3 Burr 1478 at 1481.
\textsuperscript{257} Heathfield v Chilton (1767) 4 Burr 2015; Viveash v Becker (1814) 3 M&S 284.
\textsuperscript{258} The Charkie (1873) LR 4 A&E 59 at 77.
\textsuperscript{259} Piracy Jure Gentium [1934] AC 586 at 588 (PC).
\textsuperscript{260} Duke of Brunswick v King of Hanover (1844) 6 Beav 1 (Ch) at 45.
any doctrine of IL, should be satisfied that it has the hall-marks of general assent and reciprocity.\textsuperscript{261}

The purpose of this approach is to prove the general acceptance of states. This acceptance is, in turn, capable of "proof by evidence of usage to be obtained from actions of nations in similar cases".\textsuperscript{262} Therefore, the main objective in assessing state practice is to determine whether states have consented to a rule of IL. However, showing that some or even many states have assented to a rule may be insufficient on this view. Since the international rule here falls to be applied in a state's national law, it is therefore sensible to consider whether the state itself accepts the claimed rule. Thus, it is a prerequisite of national application that,

"... any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must shew either that the particular proposition has been recognised and acted upon by our own country, or that it is of such nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised state would repudiate it."\textsuperscript{263}

Two ways of establishing the acceptance of the United Kingdom to a rule of CIL emerge from this statement. Firstly, a rule may have been recognised or disapproved by the United Kingdom. In such a case it would be necessary to investigate and evaluate the practice specifically of the United Kingdom towards the alleged rule. This was done, for example, in \textit{The Charkie}, where England's practice towards Egypt was specifically analysed to determine whether the Khedive of Egypt was entitled to sovereign immunity in England.\textsuperscript{264} However, as has been shown above, a state can be bound by a rule of CIL despite not specifically assenting to the rule. Thus, the second possibility of the \textit{West Rand} test is to show that the concerned rule is of a generally accepted and unqualified character. If this is established, it would seem to lead to a \textit{prima facie} assumption that the United Kingdom has assented to the rule along with the other states, in spite of the lack of a specific act of consent. This method was employed in \textit{Trendtex} in order to establish the rule of restrictive sovereign immunity even without specific recognition by

\textsuperscript{261} \textit{The Cristina} [1938] AC 485 at 497 (Lord Macmillan).
\textsuperscript{262} \textit{West Rand Central Goldmining Co Ltd v R} [1905] 2 KB 391 at 401 (Lord Alverstone CJ).
\textsuperscript{263} \textit{West Rand Central Goldmining Co Ltd v R} \textit{ibid} at 407 (Lord Alverstone CJ). It is in this context, ie as a matter of approaching the proof of CIL, that Lord Alverstone's statement makes sense; it should not be understood as stating a requirement for the validation of CIL in English law.
\textsuperscript{264} \textit{The Charkie} (1873) LR 4 A&E 59 at 80-6.
the United Kingdom. This way of proving assent is, however, restricted to rules that are widely accepted. The *West Rand* test referred to a rule that no "civilised" state would repudiate. Rules of regional customary law would therefore need proof by the first method. Additionally, the second option establishes an assumption only. If the dissent of the United Kingdom could be shown, it would be evidence that the rule is not generally recognised, as required. Lord Denning used this method in *Thakrar* when he denied that a rule to receive nationals in the country existed in respect to the United Kingdom. However, this method – especially when coupled with references to international instruments – provides a practical option to prove an international rule notwithstanding the absence of British practice. Both methods are therefore equally capable of establishing a rule of IL for the purpose of application in British law.

By contrast, the approach of Australian courts seems to require positive proof of both elements, practice and acceptance. However, the specific assent of Australia is apparently never required. Perhaps the best example of how Australian courts deal with the difficulties of ascertaining rules of CIL is *Polyukhovich v Commonwealth*. In that case, the issue was whether the new Commonwealth war crimes legislation was a valid exercise of the foreign affairs power under section 51 (xxix.) of the Constitution. The majority of the High Court held that the Act was valid because it referred to acts of foreigners abroad and hence matters geographically outside Australia. However, two members of the bench, Brennan and Toohey JJ, also explored the content of the CIL of war crimes and crimes against humanity in order to judge the validity of the statute. Significantly, they reached opposite conclusions. Brennan J applied a rigorously formal approach in claiming that the existence of a customary rule needed to be supported by extensive and virtually uniform state practice that was carried out on the basis of a claim of right and submitted to as a matter of obligation. Consequently, he found no

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266 *R v Secretary of State for the Home Department, ex p Thakrar* [1974] 1 QB 684 (CA) at 701-2 (Lord Denning MR).
268 For a more detailed discussion of the foreign affairs power see below Third Part- Chapter Six -3)
269 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (HCA) at 559-60 (Brennan J). Reference was made to art 38(1)(b) of the ICJ Statute, the *North Sea Continental Shelf* cases [1969] ICJRep 1 at 43, the *Military and Paramilitary Activities In and Against Nicaragua* case [1986] ICJRep 14 at 98 and various writers on CIL.
widespread practice supporting an obligation to seek out and try war criminals.\textsuperscript{270} On the other hand, Toohey J agreed on this point, but indicated that the two elements may well influence each other. This meant that a clear statement of one element would lower the threshold for the other.\textsuperscript{271} Thus, virtually uniform and exemplary state practice would constitute a \textit{prima facie} assumption that this practice was carried out on the basis of a legal obligation or permission. Moreover, a clearly and widely accepted practice need not be widespread or long established to produce a rule of CIL.

However, the two judges differed in their view of the state of the CIL of crimes against humanity in 1942. Brennan J tried to deduce the rule from systematic interpretation of the jurisprudence and Statute of the Nuremberg Tribunal. He established a sharp distinction between crimes against humanity and war crimes. The former, he concluded, were not recognised as international crimes any earlier than 1945. For this reason, Australian legislation conferring jurisdiction on Australian courts over crimes against humanity before that date amounted to retrospective criminal law, which offended IL and Australian law. The Act therefore fell outside the external affairs power. Toohey J, on the other hand, declined to apply an excessively technical approach.\textsuperscript{272} He held that, although the sources of IL were not then fixed, there existed "before 1939 ... a consciousness of acts which offend fundamental human rights; these may be called crimes against humanity."\textsuperscript{273} In reaching this conclusion, he also had regard to post-war legislation and cases in other states,\textsuperscript{274} which he considered evidence of \textit{opinio juris} for the existence of crimes against humanity during the war. Toohey J also thought that the tension in this case, between principles of sovereignty and the protection of human rights, could not be settled by employing a rigidly technical approach.\textsuperscript{275}

\textsuperscript{270} Polyukhovich v Commonwealth \textit{ibid} at 560 (Brennan J).
\textsuperscript{271} Polyukhovich v Commonwealth \textit{ibid} at 657 (Toohey J).
\textsuperscript{272} Polyukhovich v Commonwealth \textit{ibid} at 674 (Toohey J).
\textsuperscript{273} Polyukhovich v Commonwealth \textit{ibid} at 675 (Toohey J).
\textsuperscript{274} Specifically, his Honour referred to Israeli and Canadian legislation and cases.
\textsuperscript{275} Polyukhovich v Commonwealth (1991) 172 CLR 501 (HCA) at 674 (Toohey J). Perhaps, the question is not between sovereignty and human rights but between different human rights – the rights of the victims and the rights of the perpetrator not to be subjected to retroactive criminal laws. This tension was indeed avoided (and indeed solved) by Brennan J’s technical approach.
Despite departing from the same point, the judges reached opposite results. This alone seems to be a forceful argument against the approach itself as it demonstrates the difficulties and uncertainties with ascertaining CIL. However, a few remarks to counter this analysis may provide a clearer view. Firstly, as already noted, the problems faced in national courts are likely to arise in international courts as well. These problems are essentially juridical in nature, since they concern the content of rules of law. There is therefore no reason for national courts to limit themselves, even given the problems that they are likely to face. In fact, the approach in Polyukhovich resembles the method of ascertaining CIL employed by the ICJ. Secondly, and more specifically for the case of Polyukovich, the rules concerned required a historical investigation in the face of a currently established rule that concerns human rights and indeed a fundamental norm of international conduct. On the other hand, basic principles of criminal justice were also at stake. Such concerns are likely to overlap with the right methodological approach and, depending on the attitude of the judge, lead to different conclusions. Thirdly, in Polyukhovich, only two out of seven judges addressed the matter at all. Had the whole bench considered the content of CIL, there would have probably been a (clear) majority for one or the other solution. Disagreement between judges, however, does not negate the rule. The ICJ itself frequently produces dissenting opinions on the content of CIL. Still, the majority’s view would be regarded as a valid statement of the law. This should be no different in national law. The fact that Polyukhovich produced a drawn decision between two judges is therefore only unfortunate but not fatal. Moreover, by providing an appropriate approach, Brennan and Toohey JJ established an example for subsequent judges to tackle the problem and seek the content of CIL.\textsuperscript{276} Their propositions can therefore be regarded as an authoritative statement for determining CIL rules in Australia.

In the recent human rights cases, Australian courts have more frequently referred to multilateral conventions that contain the respective rights and noted that these rights also form a part of CIL. While these contentions may be true, in itself it is not enough when a judge is prepared to “accept”\textsuperscript{277} that treaty provisions constitute CIL. CIL is

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established by its constituent elements, namely state practice and *opinio juris*, and is not determined by the acceptance of a municipal judge. It is suggested that the approach provided in *Polyukhovich* should be followed and, where necessary, spelled out for rules that cannot be established by regard to the traditional sources of CIL only.

With these approaches in mind, we now turn to the materials that may be considered.

5) Where to Find CIL

The approaches outlined above (section 4) merely enumerate various materials to be considered in ascertaining rules of CIL. They do not provide a hierarchy of how important one source of information is against another. Some materials provide more authoritative statements of IL than others do. This section considers the authority of various sources for the existence of a rule of CIL. National courts consider the works of authors on IL, treaties and conventions, other international documents, state papers, foreign and international judicial decisions, executive statements and cases decided in courts of the forum.

a) Writers on IL

Learned authors often provide well-researched views on the content of CIL in their textbooks, articles or reports on IL. In the main, those works consist of a collection of state practice that support the author's conclusion as to what, in his or her opinion, is the rule of CIL. Since these works are mentioned as a subsidiary means of determining the rules of IL in art 38(1)(d) of the ICJ Statute, national courts may very well make use of them in ascertaining the content of CIL. However, some caution needs to be exercised so as not to substitute completely material sources of CIL with supplementary evidence.

In the early cases judges collected the law of nations exclusively from the authority of writers on the subject. Thus, those judgments quoted from the works of
Grotius, Vattel\textsuperscript{278} and Bynkershoek\textsuperscript{279} and other contemporary writers.\textsuperscript{280} References to actual instances of state practice were the exception.\textsuperscript{281} That such references remained so scarce might follow from the fact that practice of foreign states was simply unavailable to judges in those days, thus making textbooks the only available source. Inquiries into state practice were impracticable because they took too long. Moreover, courtesy to other sovereigns would have inhibited the courts seeking such information “first hand” from other states, especially given that the rules at issue in national courts in the 18\textsuperscript{th} and 19\textsuperscript{th} centuries concerned mostly personal immunities from jurisdiction. Furthermore, because these rules were intended to enable international relations between equal sovereigns, they were discoverable by the application of reason alone.\textsuperscript{282}

As mentioned above, some courts seem to have preferred not to refer to any source of IL. Whether they did so due to a reluctance to employ writers as evidence or because they considered the rule to be obvious and thus not needing any further reference, remains unclear.\textsuperscript{283}

Later cases reveal that the trend was to take a more cautious approach when referring to writers. The value of writers as authorities was said to be affected by, for example, the time of writing, their reputation and the grade of acceptance from states.\textsuperscript{284} There was evidence of a first step away from the slavish acceptance of everything written. However, writers still had their place in determining IL:

“To ascertain that law [IL] it is most important in this and all other cases to consult the published opinions of eminent jurists of different countries, for although, as has been

\textsuperscript{278} Viveash v Becker (1814) 3 M&S 284 at 292-6; in this case, the section on consuls in Vattel’s Law of Nations (book II, chapter 3, § 34) is discussed extensively and compared to the general works of Wicefort and Barbeyrac (at 296).

\textsuperscript{279} Lockwood v Coysgarne (1765) 3 Burr 1676 at 1677.

\textsuperscript{280} In the case of Emperor of Austria v Day (1861) 3 DeGF&J 217 (CA), the court referred to virtually all writers on the subject of sovereignty. It thus held that the right to coin monies was a right of the sovereign (at 251).

\textsuperscript{281} But in Viveash v Becker (1814) 3 M&S 284, the court, in deciding whether consuls should also enjoy diplomatic privileges, referred to a dispute between the Pope and the city of Venice (at 297).

\textsuperscript{282} See, eg, the speech in DeWütz v Hendricks (1824) 2 Bing 314 at 315-6: “It occurred to me that it was contrary to the law of nations [to raise monies for foreign revolutionary movements in other countries].” (My emphasis).

\textsuperscript{283} See, eg, Novello v Toogood (1823) 1 B&C 554 (KB). The court here sharpened the interpretation of 7 Ann c 2 by interpreting it according to the law of nations. In spite of counsel for both sides relying strongly on writers (at 556-7, 559-60), no reference to the sources of such were made in the judgment (at 562-3).

\textsuperscript{284} R v Keyn (1876) LR 2 ExDiv 63 at 70 (Phillimore B).
justly said, those writers cannot make the law, still if there is found a practical unanimity or great preponderance of opinion among them, it would afford weighty, and in many cases conclusive evidence that their statement of the law had been received with the general consent of civilised nations of the world."

Writers' opinions were thus to be considered in the absence of state practice to prove the assent of states to the rule. It is questionable how such opinions in themselves could produce conclusive evidence of the states' consent. Indeed, writers have a tendency to state what they think ought to be a rule rather than what is the law. As individual persons, authors cannot replace states, which are the subjects of IL. They do not participate in the process of making IL as states do. Thus, to refer to Lord Alverstone in the West Rand case:

"[t]he mere opinions of jurists, however eminent or learned, that it [a rule of IL] ought to be so recognised, are not in themselves sufficient. They must have grown to be part of IL by their frequent practical recognition in dealings between various nations."

From the beginning of the 20th century writers were regarded with caution as evidence of IL. This has continued until very recently although no statement reached the clarity of Lord Alverstone's. However, the opinions of writers continued to be part of judgments and pleadings. A few still rested upon such writings. One case that arguably applied the wrong rule because the only materials considered were the opinions of authors was Polites v Commonwealth. There, the High Court of Australia had found a rule of CIL exempting aliens from conscription to military service in times

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285 R v Keyn ibid at 122 (Amphlett JA). Amphlett JA however, refrains from making reference to such authorities, since the other members of the bench had already evaluated them.

286 R v Keyn ibid at 127-30 and 132 (Brett JA).

287 West Rand Central Goldmining Co Ltd v R [1905] 2 KB 391 at 402 (Lord Alverstone CJ).

288 West Rand Central Goldmining Co Ltd v R ibid at 407 (Lord Alverstone CJ).

289 That is still so in very recent cases, see, eg, R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147 (HL) where all judgments conferred great weight on Watts' article on immunity of foreign heads of states Watts, "Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" (1994-III) 247 RdC 9-130.

290 Piracy Jure Gentium [1934] AC 586, Chung Chi Cheung v R [1939] AC 160 (PC). The Piracy case, however, was a reference question to the PC which asked for the status and content of the crime of piracy in IL. A thorough and comprehensive answer necessarily comprised opinions of authors.

291 Polites v Commonwealth (1945) 70 CLR 60 at 70 (Latham CJ), at 75-6 (Starke J), at 77 (Dixon J), at 79 (McTiernann J), however, Williams J referred to foreign cases and the report of an international commission of jurists (at 80). Another Australian case, Chow Hung Ching v R (1948) 77 CLR 449, also put great reliance on authors, see at 462-3 (Latham CJ), at 483 (Dixon J), Starke J referred to textbooks at 472 but did not decide the matter (at 473). However, all members of the bench also referred to the leading cases in the US.
of war. As to this rule, it has been argued that the actual state practice had changed by
the outbreak of the Second World War so as to allow for such conscription.\textsuperscript{292} While
this case provides an example of the unquestioning use of authors in the face of
differing state practice, the result would have remained the same since an Australian
statute, which prevailed over CIL,\textsuperscript{293} allowed for aliens to be called upon.

An exceptional case was Bertrand v Quebec,\textsuperscript{294} where the report of a group of
experts, which was asked for an opinion on the admissibility of a unilateral secession
under IL by a committee of the Quebec National Assembly, was considered and
contrasted with opinions of other writers. As the panel was fairly representative of
views on the question, its report was probably less pre-occupied with one author's view
of the international rule. However, despite the possible variety of opinions represented
on such a panel, it cannot by itself be a substitute for the original evidence on CIL. In
this sense, the opinions of panels share the weakness of the writings of single authors in
proving CIL. However, the findings of the panel of experts in the Canadian case were
apparently not attributed any greater value than that of the other authors. The court thus
concluded that there was no consensus on whether the accession of Quebec to
sovereignty would be recognised in IL.\textsuperscript{295}

The best view of the use of authors might be that their works fit into the chain of
evidence. The main objective of a court concerned with IL is to establish the consent of
states. State practice is said to prove this consent. But state practice is difficult to prove.
Even nowadays, the right material might not be readily available to a judge unfamiliar
with the subject. In such a case, the writings of authors, provided they are experts on the
matter, can supply insights into the required state practice. This conforms to article
38(1)(d) of the ICJ Statute, which provides that the opinions of scholars can be used as a

\textsuperscript{292} "International Law Association Committee on International Law in National Courts – Report of the
Australian Branch" (1994) 15 AusYBIL 231 at 260-1. See also Jennings and Watts (eds)
\textit{Oppenheim's International Law} (9\textsuperscript{th} ed 1992) at p907, n12.

\textsuperscript{293} For the rules of conflict, see below - Chapter Seven -.

\textsuperscript{294} Bertrand v Quebec (Proc Gen) (1996) 138 DLR 4th 481.

\textsuperscript{295} Bertrand v Quebec (Proc Gen) \textit{ibid} at 504-5.
secondary means to determine rules of IL. Thus used as "witnesses" of state practice rather than as primary authorities on the existence of a rule, writings on IL have their role in the process of determining a rule of IL. Still, caution should be exercised whenever considering authors in ascertaining a rule of IL.

b) Treaties and Conventions

The role of treaties in the formation of CIL is controversial. While the practice of states under treaties certainly constitutes behaviour relevant to IL, it is often far from clear whether such behaviour is carried out in a sense of legal obligation other than under the treaty itself. Treaties and conventions use carefully phrased written provisions. CIL, on the other hand, is unwritten and thus inherently ambiguous law. It is therefore tempting to look at the provisions of treaties in search for CIL. However, the traditional dichotomy of treaty and custom must not be forgotten.

This is particularly so when the treaties concerned are bilateral treaties which may as well be evidence that the parties thought it necessary to provide for a certain rule. This weakens the proposition of a pre-existing right. It is therefore probably dangerous to deduce a general rule from bilateral treaties. Some bilateral treaties, however, contain standard provisions that can be found in virtually every treaty on the subject matter. The most conspicuous example is the political offence exception which is found in almost every extradition treaty in fairly similar terms. A substantial number of bilateral treaties of similar content concluded by one state with many others could nevertheless provide an indication that the state considers the rules there provided as good law. However, to prove the consent of that, and indeed any other, state to such a rule as general IL, provisions in bilateral treaties must be of virtually universal application vis-à-vis all other states. Thus, in extradition cases, national courts are

296 Cases that refer to writers as collectors of state practice include R v Keyn (1876) LR 2 ExDiv 63 at 74 (Phillimore) finding US practice in the works of Kent; The Cristina [1938] AC 485 at 522 (Lord Maughan), referring to Oppenheim's IL to find the practice of various states; see also Lord Denning MR in Trendtex Trading Corp v Central Bank of Nigeria [1977] 1 QB 529 (CA) at 555-6, who found recent practice on sovereign immunity in an article of Lauterpacht.

297 R v Keyn ibid at 204-5 (Cockburn CJ).

298 West Rand Central Goldmining Co Ltd v R [1905] 2 KB 391 at 402-6 (Lord Alverstone CJ); who was reluctant to find a general rule on succession into deeds from various cases of cession that was also applicable to a conquest.
careful to point out that the law to be applied is treaty law transformed into national law, not CIL.  

The case may be different with multilateral treaties or conventions. On the one hand, they may purport to codify pre-existing CIL, or, on the other, they may contribute to the formation of CIL.

Multilateral conventions do not generally purport to codify CIL; rather, they can constitute a progressive development of IL. However, conventions that bear such an intention usually state this in preambles or other provisions of a general nature. As opposed to statutes that codify rules of the common law, international conventions do not override the pre-existing CIL. Rather, CIL often continues to exist alongside to conventions. For example, the Vienna Convention on the Law of Treaties is often invoked as parallel CIL when one state involved in the case is not a party to this convention. However, CIL also develops separate from treaty law, therefore attention must be paid whether states have in their conduct departed from the provisions of a treaty.

The notion that multilateral conventions can generate rules of CIL is relatively new and has been referred to by courts only in more recent cases. In this respect three ways of finding a customary rule can be distinguished. By virtue of practice after their entry into force, conventions can generate CIL. In such a case, it is necessary that the practice is not only attributable to the convention but the states' general opinio juris. Thus, the convention itself is of limited assistance in proving a rule of CIL because both

304 Thiel v FCT (1990) 171 CLR 338.
306 Villiger, ibid chapter 6.
the elements of practice and acceptance still need to be shown. The only benefit to be gained in such cases is that the terminology of the convention might be adopted once the elements have been shown. The second way in which conventions can contribute to the formation of CIL is by “crystallising” a rule of customary law. As argued in the *North Sea Continental Shelf* cases, this can occur when a rule of CIL is formed by and during the process of treaty-making.  

However, such a conclusion is not to be presumed lightly. There has to be a distinct parallel development of state practice which, together with *opinio juris*, can be consolidated by the treaty making process and thus transformed into law. Thus, the convention itself cannot substitute for practice and *opinio juris*, but its process can help to clarify these elements. Thirdly, provisions in treaties might themselves be able to form CIL. Such a possibility seems odd, given that states usually enter into treaties only for the purpose of being bound by the treaty, not also by CIL. While the ICJ in the *North Sea Continental Shelf* cases seems to have accepted this possibility, it is not clear under which circumstances it would accept that a convention has actually created CIL. Although there have been attempts to clarify these requirements by legal scholars, they have not yet been judicially verified. It is therefore highly unlikely that a national court would accept a submission that a convention has created CIL of its own impact.

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309 While the ICJ accepted that a CIL could be crystallised from the process of the Geneva Convention on the Continental Shelf, this was held not to have occurred with the crucial provision in art 6 of the convention, which enacted the equidistance principle for the delimitation of continental shelf rights *North Sea Continental Shelf* cases *ibid* at 38.

310 See North Sea Continental Shelf cases *ibid* at 41-3 considering a submission that the Geneva Convention on the Continental Shelf gave rise to CIL “of its own impact”. In other works this phenomenon is referred to as one possibility of the formation of “instant” CIL, see, Scott and Carr “Multilateral Treaties and the Formation of Customary International Law” (1996) 25 DenvJILP 71 and, by the same authors, “Multilateral Treaties and the Environment: A Case Study for the Formation of Customary International Law” (1999) 27 DenvJILP 313.

311 The differences of being bound by treaty only as opposed to both, treaty and CIL are manifold: eg, treaties bind only states parties, CIL on the other hand binds every state, provided it has not persistently objected to the formation of the rule; treaties allow for reservations to be placed at the time of their ratification, no such mechanism is known for CIL.
The formation of CIL by virtue of international conventions has rarely been addressed in national courts. The argument that a right of employees to strike exists under CIL and not only under ILO Conventions was rejected in the Alberta Court of Queen’s Bench.312 Such a right existed only under the convention and no separate state practice could be found to support the contention that a right to strike also formed part of CIL. Furthermore, in the Tin Council Appeals, the Court of Appeal and the House of Lords were reluctant to find a general (customary) rule that imposes secondary liability on states members of an international organisation for its debts.313 In these cases it was argued that since many treaties establishing international organisations contained a non-liability clause for the member states, the absence of such a clause would lead to direct liability of the states as a rule of CIL. However, in the Court of Appeal, Ralph Gibson LJ found himself unable to follow this submission because it did not prove the acceptance of direct liability.314 Lord Oliver in the House of Lords agreed.315 Later cases did not explore the question whether conventions alone actually generated a customary rule.316

While treaties may clarify CIL by codifying their unwritten rules or provide some historical insight into the formation of CIL in the “crystallisation” cases, a cautious approach is essential. Treaties should therefore never alone serve as evidence of CIL. As such they cannot prove the acceptance of a customary rule.

c) Non-Binding International Documents

The practice at international conferences and organisations has become very important for the determination of rules of IL. Declarations and resolutions from international bodies are often helpful in providing insights about the attitude of states towards a matter of international concern. This is especially so in human rights matters, where UN

312 Reference Re Alberta Union of Provincial Employees (1980) 120 DLR 3d 590 (AltaQB); aff’d 130 DLR 3d 191.
313 Macauley Watson & Co Ltd v Department of Trade and Industry [1989] 1 Ch 72 (CA); [1990] 2 AC 418 (HL).
315 Macauley Watson & Co Ltd v Department of Trade and Industry [1990] 2 AC 418 at 513.
316 Thus, in R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte [2000] 1 AC 61 (HL), [1998] 4 AllER 897, after referring to various international instruments, Lord Slynn mentioned the absence of state practice on the matter of universal jurisdiction (at 913).
General Assembly documents show that the voting states believe in the existence of basic rights. However, as in the case of treaties, the value of documents that purport to codify pre-existing law has to be distinguished from the use of documents as evidence of a new rule's formation. It is suggested that the same cautious approach as applicable to treaties is equally apposite when non-binding documents are claimed to establish a rule of CIL.

National courts have not been blind to this development and have followed the instructive example of the ICJ in the Nicaragua case where the Friendly Relations Declaration\(^ {317} \) and Definition of Aggression\(^ {318} \) were, among a range of other evidence, used to establish a customary prohibition of the use of force.\(^ {319} \) In considering whether the rules on prohibition of torture constitute an international crime, national courts have invoked GA Resolutions and other international instruments such as the Statute of the ICTY as evidencing the attitude of states towards the subject.\(^ {320} \) Moreover, when the right of indigenous peoples to progressive development was under consideration, reference has also been made to the Declaration on the Right to Development.\(^ {321} \)

It seems that, together with treaties, these international documents do not only supplement but have increasingly replaced “traditional” state practice as evidence of CIL. Although these principles are theoretically adaptable to resolutions or declarations of other international bodies as well, practice here is too rare to provide conclusive rules.\(^ {322} \)

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317 Declaration on Principles of International Law concerning Friendly Relations, GArEs 2625 (XXV).
318 Definition of Aggression, Annex to GArEs 3314 (XXIX).
320 R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147 (HL); Van Gorkom v Attorney-General [1977] 1 NZLR 535 (SC); Ashby v Minister of Immigration [1981] 1 NZLR 222 (CA).
321 GArEs 41/128 referred to in Taranaki Fish and Game Council v McRitchie [1997] DCR 446 (DC) at 470. This consideration was, however, not pursued — indeed reversed — in HC and CA (McRitchie v Taranaki Fish and Game Council [1999] 2 NZLR 139 (CA)).
322 One case referring to the Rio Declaration as introducing the “precautionary principle” but expressly not deciding the case upon this reference is Shirley Primary School v Telecom Mobile Communications Ltd [1999] NZRMA 66.
Moreover, the draft articles and reports of the ILC can also be considered in this category since these are sometimes a source of reference. Apart from their non-binding character, these documents also share the objections mentioned above in relation to writers. The ILC is composed of international legal scholars and is, moreover, not a body representative of the opinion of states. Thus the general assent of states to ILC materials can be safely inferred only to the extent that such materials have been adopted or approved by the General Assembly. All the same, it must be remembered that the GA is not the world's legislative body and the ILC not its drafting committee.

\[d)\textbf{ State Papers}\]

Probably one of the most valuable materials on CIL are state papers. This is at least the case with papers concerning foreign policy. However, judicial reference to such papers of other states is scarce. The two most common instances where national policy papers have been considered in national courts concern, first, sovereign immunity, where the “Tate Letter”, from the Attorney General’s legal adviser to the United States State Department, was frequently used to establish the United States’ assent to the doctrine of limited sovereign immunity, and, secondly, the development of sovereignty claims over the continental shelf, where unilateral claims of coastal states were often mentioned in order to find the appropriate rule. In both instances, the documents were widely publicised and known, and it may be that national courts are simply unaware of other documents that do not enjoy such publicity. However, with many states now

\[\text{323}\text{ See, eg, } R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147 (HL) at 211 and 215 (Lord Goff of Chieveley), at 248 (Lord Hope of Craighead), at 258 and 264 (Lord Hutton) and at 272 (Lord Millett); Pushpanathan v Canada (Minister of Citizenship and Immigration) [1998] 1 SCR 982 at 1036; Governor of Pitcairn and Associated Islands v Sutton [1995] 1 NZLR 426 (CA) at 433-4 (Richardson J); Limbo v Little (1989) 65 NTR 19 at 43-4 (Martin J).}\]

\[\text{324 Tate Letter (1952) 26 DeptStateBull 984.}\]

\[\text{325 Trendtex Trading Corp v Central Bank of Nigeria [1977] 1 QB 529 (CA) at 555 (Lord Denning MR); Playa Larga (Owners of Cargo) v 1º Congreso del Partido [1983] 1 AC 244 (HL) at 265 (Lord Wilberforce); The Philippine Admiral (PC) [1977] AC 373 at 398;}\]

\[\text{326 Reference was made to the Truman Proclamation (Re Offshore Mineral Rights of British Columbia [1967] SCR 792 at 818-9) and legislation in various jurisdictions (Re Offshore Mineral Rights of British Columbia ibid at 820-1).}\]
publishing records of their international practice, this explanation seems less convincing than formerly. Nevertheless, smaller or developing states do not or cannot publish their foreign policy papers so as to make them available to foreign courts.

An alternative explanation for the scant reference to state papers may be that the growth of practice at international conferences and international organisations provides a more convenient source of information about collected state practice. This practice can be a substitute for the reference to national policy papers.

e) Executive Statements

Statements of the forum state’s executive branch of government could provide conclusive evidence of a rule of CIL from that state’s point of view. For the courts to consider these statements as conclusive is desirable because this would allow the state to speak with one voice in matters of CIL. The acceptance of or dissent from a rule by the forum state would be positively shown and therefore not require consideration of other states’ practice.

However, caution needs to be exercised for two reasons. Firstly, while an executive statement may indicate the attitude of the government towards a rule, by itself it cannot provide conclusive evidence on whether the forum state is bound by such a rule or not. The rule may either not be in existence because it has only scant support from other states or, on the other hand, the state may be bound by a rule despite a failure to accept it, because it had not persistently objected to the formation of this rule. Secondly, under the prevailing doctrine, the determination of questions of law is for the courts to make. Executive statements may therefore be taken as conclusive only so far as they provide information on facts, not law.

Perhaps as a consequence of these arguments, in Australia no certification practice exists for matters of IL.

327 For the states here under consideration, see Australian Yearbook of International Law (since 1966), British Yearbook of International Law (since 1921), Canadian Yearbook of International Law (since 1963) and New Zealand Foreign Affairs Record (under various titles since 1951).
English courts, however, seem to consider executive statements as conclusive and binding on themselves. Thus, a letter from the Secretary of State informing the court about the sovereignty of a foreign state is conclusive, even despite treaties and other documents that may cause doubts. Similarly, a statement from the Secretary of State for Foreign Affairs declaring that the state of war continued between the United Kingdom and a foreign state, is conclusive and binding even if the hostilities have long ceased. These cases, however, concerned statements within the prerogative of the Crown in foreign affairs; they were specifically requested for the purpose of proof in those cases; and these statements were concerned with facts rather than rules of law. The scope of sovereign immunity and the effects of a state of war with a foreign state therefore still had to be determined in these cases. Executive statements therefore are conclusive statements on certain facts, though they cannot provide binding authority on a rule.

Practice in the United States is quite different: here the notion of "executive suggestion" provides that mandatory, perhaps conclusive, attention has to be paid to statements of the executive branch of government considering international facts and legal conclusions. While this practice allows for a state to speak with one voice, it is subject to the objections outlined above as it deprives the courts of their judicial function in leaving the determination of legal rules to the executive branch of government.

f) Judgments of International Courts and Tribunals

By operation of article 59 of the ICJ Statute, judgments of the ICJ are binding only on the parties of a dispute. They nevertheless have considerable authority to subsequent

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328 "IL Association Committee on IL in National Courts – Report of the Australian Branch" (1994) 15 AusYBIL 231 at 259-60 (Question 10(f)).
331 Mann, Foreign Affairs in English Courts (1986) at 51-3.
332 Restatement of the Law – Third, Foreign Relations of the United States (1987) §§ 1 (note 4) and 112 (comment (c)).
cases.\textsuperscript{333} Thus, earlier cases are often referred to, not only in pleadings and argument but also in the Court's later decisions.

The authority of ICJ judgments in English law is unclear because reference to ICJ decisions is too infrequent to make out a general rule. Indeed, reference so far has only been made to advisory opinions, not to judgments. It seems, however, that English courts attribute substantial authority to the ICJ, for example, the House of Lords adopted without further argument the views expressed in \textit{Reparations for Injuries Suffered in the Service of the United Nations}.\textsuperscript{334} This is in marked contrast to the approach to foreign national cases, where the arguments and results are extensively evaluated.\textsuperscript{335} Another sign of the great weight attached to the ICJ has occurred where, in considering an award made by a multinational arbitrary panel, national courts have buttressed that award by mentioning that the ICJ would have taken the same approach to the problem.\textsuperscript{336} These instances are nevertheless not sufficient to safely reach any general conclusion about the value of ICJ decisions at English law.

Australian courts have considered judgments and opinions of the ICJ as authoritative statements of IL more frequently than British courts.\textsuperscript{337} A striking example of the authority attributed to the ICJ was \textit{Lindon v Commonwealth},\textsuperscript{338} a case involving the legality of the use of nuclear weapons. There the court proposed that the hearing be adjourned until the ICJ handed down its opinion in the pending case involving the same question.\textsuperscript{339} However, the applicant declined that.

\textsuperscript{333} Wolfke, \textit{Custom in Present International Law} (2\textsuperscript{nd} ed 1993) at 137-8 and 144-7.
\textsuperscript{335} For the use of foreign judgments see below subsection h).
\textsuperscript{336} \textit{Maclaine Watson & Co Ltd v Department of Trade and Industry} [1989] 1 Ch 72 (CA), [1990] 2 AC 418 (HL). Another reference conferring great authority on an international arbitration can be found in the Canadian reference \textit{Re Offshore Mineral Rights of British Columbia} [1967] SCR 792 at 817 (referring to the \textit{Abu Dhabi Arbitration} (1952) 1 ICLQ 247).
\textsuperscript{338} \textit{Lindon v Commonwealth} (No 2) (1996) 136 ALR 257.
\textsuperscript{339} See now: \textit{Legality of Threat or Use of Nuclear Weapons} (Adv Op) [1996] ICJRep 66.
Despite the authority of the ICJ in IL and national law, it must be remembered that the Court’s judgments are not substitutes for the primary sources of CIL, state practice and opinio juris. It might be suggested that the ICJ’s authority stems from the jurisdiction conferred on it by the states parties to the ICJ Statute and that therefore its judgments could be regarded as delegated state practice. This view, however, fails to account for the fact that the ICJ is an independent judicial organ. Moreover, the value of judgments in IL is mentioned in article 38(1)(d) of the Statute as a subsidiary means to determine rules of IL. To confer greater authority than that by the backdoor of delegated state practice would thus be contrary to the provision.

g) Cases Decided in the Forum State’s Courts

While in national law precedents of higher courts play a significant, even conclusive, role in determining legal rules, this may not be so when international rules are in question. As was explained above, rules need to be connected to their basis, and, since international rules have their basis in the consent of states, a particular international rule also needs to be supported by such consent. National precedent from one jurisdiction, however, is not enough to establish such a connection. Although early Australian cases on immunity from suit did not consider IL at all but followed national precedent, such an approach does not prevail today. This is now quite clear in the United Kingdom, where the principle of stare decisis does not apply when rules of CIL are concerned. The same is true in Canadian courts, which recognised even earlier that that IL could not rest solely on national precedent. These cases, however, concerned rules of CIL that had changed recently so it would have been simply wrong to follow the existing precedents. In those situations it was therefore necessary to investigate the sources of IL to find whether and how the international rule had

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341 See above, section Second Part- Chapter Four -3).
342 See the cases named in “International Law Association Committee on IL in National Courts – Report of the Australian Branch” (1994) 15 AusYBIL 231 at 262-3 (Question 16).
changed. However, in other cases, where the rule has not changed, it may be helpful to refer to national cases, especially where these contain a thorough analysis of state practice and authoritative conclusions as to the content of the international rule. Nonetheless, it must be remembered that earlier judicial statements cannot be substituted for the consent of states to a rule. National cases can therefore at least be taken as subsidiary means to determine the content of CIL, in accordance with article 38(1)(d) of the ICJ Statute. To that extent, national authorities can be taken as persuasive authority for the content of a rule if and as far as there are no indications that the rule has changed since the case referred to was decided.

**h) Foreign Judicial Decisions – State Practice or Persuasive Authority**

Under article 38(1)(d) of the ICJ Statute, national judicial decisions are also subsidiary means to determine rules of IL. They may thus provide arguments for and against the judicial application of an international rule. However, judicial decisions, at least those from higher courts, are also incidents of state practice. So, a national case, while surely not itself constituting an international rule, can be more than mere subsidiary authority; it may amount to evidence of an element of CIL. As such, a national judgment may provide greater authority on a rule of CIL than a judgment of the ICJ, which, as will be remembered, does not constitute indirect state practice. On the other hand, cases from one jurisdiction cannot produce CIL since a number of cases in an at least representative number (if not the majority) of states would be necessary. However, reference to national cases may be an appropriate means of gauging the national state’s opinion about a claimed rule of CIL.

Following the common law tradition, courts refer to authoritative decisions of courts from other jurisdictions also in determining rules of CIL. But whether they do so

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344 Flota Maritima Browning de Cuba v SS "Canadian Conqueror" (1961) 30 DLR (2d) 172: “Since the whole theory of Sovereign Immunity is based on ‘comity of nations’, our Courts are compelled to inquire into the laws of other nations and to ensure that any immunity granted to foreign sovereigns would be of a type universally (or almost universally) recognized in foreign Courts. ... I do not think the 'Frank Dale' case [White v The Ship 'Frank Dale', [1946] ExCR 555] is binding upon me in view of my belief in what is really the law today.” (at 182, 190).

345 National cases were used, eg, in The SS "Lotus" case (1928) PCIJ Ser A No 10 at 23, 26, 28-9.

346 This was pointed out, eg, by Doehring, “The Participation of International and National Courts in the Law-Creating Process” (1991/2) 17 SAYBIL 1-11 at 6-7.
as persuasive authority in the reasoning process or as actual incidents of state practice is sometimes uncertain.

When English courts refer to foreign judgments, they mostly assess and adopt or reject the reasoning in those cases. As proof of state practice this would not be necessary. The argumentation of a court is not a part of the state practice. Seen strictly, the only part of judgments that can constitute state practice are the results. Thus, when English courts were willing to show that Germany had departed from the doctrine of absolute sovereign immunity from suit, it would have been necessary only to refer to the fact that the Federal Constitutional Court had not granted immunity for *acta jure gestiones* in the *Claim against the Empire of Iran* Case. The special reference and evaluation of the reasons why it had done so were beyond the scope of proving state practice as much as an evaluation of reasons for certain foreign legislation would have been out of place here.

Here, the distinction between judgments as incidents of state practice and as subsidiary means to find CIL is blurred. The reference to the reasons and arguments of foreign cases is nevertheless justified since the task is to establish an international rule, which cannot be done by reference to one state’s judiciary only. On the other hand, material on the judicial practice of all or even many other states is scarcely available to national judges. Therefore, the decisions available can be used as persuasive authority and their reasoning process and legal argument assessed to find the proper international rule.

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347 *Playa Larga (Owners of Cargo) v 1º Congreso del Partido* [1983] 1 AC 244 (HL) at 266 (Lord Wilberforce) referring to the *Claim against the Empire of Iran Case*, judgment of 30 April 1963, Entscheidungen des Bundesverfassungsgerichts [BVerfGE] (1964) 16, 27, translation in (1963) 45 ILR 57 (German Federal Constitutional Court).

348 *Playa Larga (Owners of Cargo) v 1º Congreso del Partido* [1983] 1 AC 244 (HL) at 263-5 (Lord Wilberforce).

349 A valuable exception from this general statement are collections like the *International Law Reports* which list cases from virtually all jurisdictions of the world. Their scope is, however, naturally limited.
6) The Uncertainty Principle – Undetermined Rules are No Rules

Sometimes, all the sources of information evaluated above (section 5) do not provide conclusive material to determine the content of a rule of CIL. Then the question arises how to proceed. The court could either proceed to find a rule of CIL by reference to other arguments, or it could decline to find an international rule and resolve the case under national law only.

The first option was available in the early cases. Thus, in *Duke of Brunswick v King of Hanover* it was said

“In cases where no usage or custom can be found, we are compelled amidst doubts and difficulties of every kind, to decide in particular cases, according to such light as may be afforded to us by natural reason, or the dictates of that which is thought to be the policy of the law.”

Here, one could go so far and argue that to deduce such rules from reason and policy was compulsory for the court. However, this case dealt with immunities of a foreign sovereign. Whereas a foreign sovereign had never before been taken to court, the rules concerning immunities of foreign diplomats were fairly well established. So the rules applicable to the sovereign could indeed be deduced from reason and legal policy. The immunities of diplomats followed from them representing these sovereigns. Therefore, all the more, the sovereign had to enjoy immunity.

Similarly, the Privy Council in *Piracy Jure Gentium* found that

“[I]n embarking upon international law, their Lordships are to a great extent in the realm of opinion, and in estimating the value of opinion it is permissible not only to seek a consensus of the view, but to select what appear to be the better views upon the question.”

While this statement may be taken as an invitation to select what the international rule should be, it is necessary to remember that the Council here considered the abstract question of the status of piracy under IL. There was but little state practice on the matter so that the decision rested mainly with the opinions of writers. When writers become the main evidence of CIL, it is indeed permissible not only to seek a consensus among these opinions but to find the view best reasoned and supported by the authorities. The Privy

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350 *Duke of Brunswick v King of Hanover* (1844) 6 Beav 1 at 45 (My emphasis).
351 *Piracy Jure Gentium* [1934] AC 586 at 589.
Council's statement therefore has little to offer as help to establish a general procedure in cases where the international rule is uncertain.

The leading case concerning complications when ascertaining rules of CIL is the *International Tin Council Litigation*.\(^{352}\) It will be remembered that the question at stake was whether the member states of an international organisation could be liable as secondary debtors after the organisation was insolvent. Such liability did not follow from the treaty establishing the ITC and the authorities on whether there existed a customary rule were ambiguous. Whether secondary liability could be imposed therefore depended on the determination of CIL in doubtful cases. In his dissenting opinion in the Court of Appeal, Nourse LJ referred to the above cases and a statement of Lord Denning in *Trendtex*\(^{353}\) before observing:

"An uncertain question of international law is one which cannot be settled by reference either to an opinion of the International Court of Justice or some usage, custom or general principle of law recognised by civilised nations. The authorities show that where it is necessary for an English court to decide such a question ... it can and must do so; being guided ... [by various sources of information]; and, where no consensus is there found, by those opinions which are the most nearly consistent with reason and justice."\(^{354}\)

Although no other member of the Court of Appeal had considered this point, in the House of Lords Lord Oliver was not prepared to accept this view:

"A rule of international law becomes a rule, whether accepted into domestic law or not, only when it is certain and is accepted generally by the body of civilised nations ... It is certainly not for a domestic tribunal in effect to legislate a rule into existence for the purposes of domestic law and on the basis of material that is wholly indeterminate."\(^{355}\)

On this view, there is no place for argumentative considerations of a better view. Moreover, rules cannot be found by reference to reason alone, as was possible in the immunity case. Lord Oliver's view on the uncertainty issue is consistent with the approach to be taken in ascertaining rules of CIL. State acceptance of a practice as law

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\(^{352}\) *Maclaine Watson & Co Ltd v Department of Trade and Industry* [1989] 1 Ch 72 (CA); [1990] 2 AC 418 (HL).

\(^{353}\) *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 QB 529 (CA) at 552-3 (Lord Denning MR).

\(^{354}\) *Maclaine Watson & Co Ltd v Department of Trade and Industry* [1989] 1 Ch 72 (CA) at 209-10 (Nourse LJ (diss)).

\(^{355}\) *Maclaine Watson & Co Ltd v Department of Trade and Industry* [1990] 2 AC 418 (HL) at 513 (Lord Oliver). He thus explicitly overruled Nourse LJ.
cannot be assumed by a ruling of a national court. Such a view serves considerations of certainty and caution. Thus, where no consistent practice or no *opinio juris* exist, there also exists no rule.

It could perhaps be argued that, since IL is a complete system of rules in which no *non liquet* exists, there should always be an international rule available to govern a situation. This is not, however, contradicted by Lord Oliver's view. That the rule relied upon does not exist does not mean that there exists no rule at all. Rather, in the *Tin Council* case, the lack of a rule imposing secondary liability on states members under CIL itself provided the existing rule – that no such liability existed.

However, other factors need attention. On the international plane, the denial by a court of an emergent rule of CIL can easily lead to a vicious circle. Such a decision could be considered as state practice against the rule itself. It would therefore weaken whatever state practice existed. In subsequent cases it will therefore be even more problematic to have recourse to the new rule. In such cases it would perhaps be advantageous to point out, as exactly as possible, what else would be needed for the rule to be applicable and to what extent it does already apply.

This was done in Cockburn CJ's leading judgment in *R v Keyn*.356 In that case the Chief Justice claimed that criminal jurisdiction over the seas three miles from the low water mark could only be exercised under an authorising Act of Parliament. This provoked the enactment of the Territorial Waters Jurisdiction Act 1878 (UK) which proclaimed English jurisdiction over these waters. Thus, the judgment prompted state practice on the part of England to extend its jurisdiction to the three-mile belt and so helped to harden a new rule in CIL. Similarly, the recent judgment of Lord Browne Wilkinson in *Pinochet* concerning the connection between international crimes and universal jurisdiction explicitly mentioned that universal jurisdiction may exist but its exercise is not compulsory under CIL.357 While this did not (yet) trigger any "answers" in state practice, it was critically considered in the dissenting judgment of Lord Millett, who considered the United Kingdom to have possessed universal jurisdiction over

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356 *R v Keyn* (1876) LR 2 ExDiv 63.
crimes of torture committed abroad even before entering into the Torture Convention.\textsuperscript{358} Both judgments are likely to receive extensive consideration in courts of other jurisdictions.\textsuperscript{359} So in keeping the discussion over a rule alive and causing state practice to occur rather than suffocating an embryonic rule, municipal judges can contribute to the further development of IL.

7) Summary

While there exists no international procedure to ascertain rules of CIL, national courts are empowered to determine the content of these rules. In doing so, national courts will have to find information on the sources of CIL, state practice and \textit{opinio juris}. This information can be gathered from a number of international and national sources of various value. If no conclusive evidence on the content of a rule of CIL can be found, it is necessary to conclude that no rule exists under IL.

\textsuperscript{357} \textit{R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)} [2000] 1 AC 147 (HL) at 197-9 (Lord Browne-Wilkinson).

\textsuperscript{358} \textit{R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte ibid} at 276-7 (Lord Millett).

\textsuperscript{359} Probably only the first example is \textit{Nulyerimma v Thompson} [1999] FCA 1192, (1999) 165 ALR 621. A more intensive consideration of the \textit{Pinochet} cases will be given below Third Part-Chapter Eight-2).
Having had regard to the value of the materials which are to be considered in establishing a rule of CIL, it is now necessary to examine how the courts obtain such information in the cases that they have to adjudicate. A court could use various procedural mechanisms to inform itself. Which of these are appropriate for information on CIL, depends on the status of rules of CIL in the national procedural framework. This turns on whether CIL has the status of law in national procedure, as opposed to facts. Additionally, the question arises whether a court can look for such information on its own initiative (proprio motu). Finally, national law sometimes contains special procedures, which could be used to find rules of CIL more easily than through adversarial process in the general run of cases.

1) Laws, Facts, Knowledge and Information

In courts of law, apart from exceptional circumstances, facts need to be proved. On the other hand, law is supposed to be within the court's knowledge. Thus, there is no need to establish a rule of law by evidence.

However, where foreign law is involved, the common law regards this as a matter of fact which must be proved before a national court in order for it to be cognisable by the court. Such facts are proved by affidavits of experts on the foreign law or sometimes experts are called as witnesses. One would consider experts in this sense, those who are allowed to practise law in the foreign state. CIL, on the other hand, is

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360 Fentman, Foreign Law in English Courts: pleading, proof and choice of law (1998) at 173-202 with suggestions to improve this practice.

considered to be law and therefore does not need to be proved in national courts. Rather, courts take judicial notice of the law. This means that, in theory at least, judges know the content of CIL regardless of what information they are provided with in a particular case. This notion can be developed as far as holding that "when counsel argue a point of IL before a judge they are ... merely 'refreshing his memory'". For CIL, this approach is grounded in the notion of it being part of the law of the land. Nevertheless, despite the reluctance to treat CIL as law of the land, Australian courts recognise IL as law and do not require strict proof of CIL.

Notwithstanding these differences, the issues when CIL needs to be determined are likely to resemble the application of foreign law. Information on that law is not as easy to obtain as national law and hence judges might be unaware of the relevance or the content of CIL. In these situations the international rule, although not legally subject to proof, needs to be discovered in order to be applied. This means that the court has somehow to be alerted to the material that establishes the rule, state practice and opinio juris. State practice is a fact and so is the material that provides insight into whether there exists opinio juris. The need to refer the court to this material could therefore lead to evidence, usually only admissible for proof of facts, being allowed to provide insights to the court.

2) The Adversarial System and The Objectivity of Rules

It is a principle of the adversarial system that the parties determine the dispute and the judge determines the outcome. This has led to a degree of judicial passivity, with

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362 Lauterpacht, H. "Is International Law a Part of the Law of England?" (1940) 25 TransGrotSoc 51 at 59; Mann, Foreign Affairs in English Courts (1986) at 125-6; Macdonald, "The Relationship between International Law and Domestic Law in Canada" ibid at 112. All these authors note that the case law on this point is scant but the principle undoubted.


judges hearing the arguments of counsel and adjudicating which is to prevail. The bench
would rarely pronounce upon questions not raised in argument.

For the purpose of finding an international customary rule, this system may be
insufficient, as it does not provide for a way for courts to obtain all necessary
information on the content of a rule. While it may provide a workable basis for
adjudicating on national rules, this technique is not appropriate for the establishment of
CIL which does not depend on the strength of competing arguments. It can, moreover,
not be established by having regard to pre-existing rules or principles of either national
or IL. It exists by virtue of state practice and opinio juris. These factors exist objectively
and independently from legal argument and rules of CIL come into existence by virtue
of these factors alone, whether or not the new rule is consistent with existing rules. 366

A court relying solely on the pleadings of counsel risks applying the wrong rule.
Diligent counsel hopefully put all possible effort into finding the relevant rule of CIL.
Nonetheless, the particular interest of one party may perhaps colour the information it
presents. Moreover, the adversarial system lets counsel take strategic positions in view
of the opponent’s case. Counsel are thus not “... directing much of their effort to
making the ‘best case’, but the ‘best case given the other side’s case’”. 367 While this is
always the case in any litigation, it is of particular concern where a rule of CIL is to be
determined. Here, it is unlikely for the court to obtain an impartial and exhaustive
statement on IL from counsel’s pleadings alone. A court would nevertheless need such a
complete view of the material in order to ascertain the correct rule. However, in practice
the pleadings usually alert the hitherto unacquainted judge to the relevance of CIL.
Consequently, counsel’s arguments precipitate further inquiry into IL. In this way it is
possible to conclude that the pleadings are an essential part of ascertaining an
international rule.

366 This is limited to rules of simple CIL. Where rules of jus cogens are concerned, new rules could
apparently not be established if in conflict with such a mandatory rule.
367 Robertson, “The House of Lords as a Political and Constitutional Court: Lessons from The
3) Suggested Options

Given the court’s assumed knowledge of CIL, it is appropriate for the court to raise questions of IL during the pleadings and to discuss these with counsel. Problems arise when neither bench nor bar has sufficient information at hand to determine the content of the international rule. To meet this difficulty, the court might consider various procedural mechanisms to be informed about an international rule applicable in the case at hand.

a) Additional Submissions

It has been suggested that the easiest solution is for the courts to invite further submissions on a point of CIL, perhaps in written form. Written submissions could contain references to information on state practice. Nevertheless, the additional submissions share the partisan character of oral pleadings by counsel. They can thus only be of assistance where the material is conclusive or there are other restraints on the parties to limit their possible partiality.

b) Expert Evidence

Occasionally, counsel seek to establish the existence of a rule by affidavits of experts on IL. Yet, even these have to be looked at with some caution. Expert evidence is usually employed to provide information on facts rather than law. The only evidence affidavits can provide thus relates to facts hitherto unknown to the court. However, apparently in the United States, experts can give evidence on the existence of a customary rule. The same seems occasionally to be true in Canada. In R v Bonadie, for instance, expert testimony led by both parties was heard on the content of diplomatic immunities at CIL and the application of CIL in Canada.

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369 Such was done in Sellers v Maritime Safety Inspector ibid (referred to at 64).
370 See recently, Rayner v Republic of Brazil [1999] 2 Lloyd’s Rep 750 at 759.
371 The same is valid for witnesses giving oral evidence directly to the court. However, apparently no counsel has yet tried to call a witness to prove an international rule.
372 Restatement of the Law – Third, Foreign Relations of the United States (1987) § 113 states that “courts may consider … expert testimony in resolving questions of international law”.
There are also other reasons for taking a cautious approach to such evidence. Typically, counsel will only submit expert affidavits that draw conclusions favouring the respective party. By being called into the proceedings by the parties, the expert evidence thus becomes part of the dialectic process of litigation. Without questioning the impartiality of such learned deponents, it is submitted that they might state a rule of IL in the way that they perceive it ought to be rather than as it is. This situation resembles the problem with opinions of publicists in proving CIL. An opinion remains an opinion; it does not become a fact or the law simply by being admitted into proceedings by affidavit. In addition, if the parties call experts, the other party may doubt the value of the information. This could tend to “invite invidious comparison of the qualifications of various … [authorities] to speak authoritatively.”

However, there may be two exceptions at hand. Firstly, expert evidence may be used in the same manner as writers on IL, that is, as documenting state practice. In not admitting legal conclusions, the court would confine the information to facts, thus making it evidence in the technical sense. Nevertheless, care needs to be exercised in considering whether an expert account is representative and exhaustive of the relevant practice. In the second place, experts could be invited to give evidence upon the court’s own motion. This would reduce the appearance of partiality for one side. Both exceptions combined, there would seem to be no strong objection to an expert providing information on facts, namely state practice in IL, upon the court’s invitation.

c) Curial Knowledge and Research

Under the adversarial system, curial research into authorities above and beyond counsels’ submissions is generally mistrusted for two reasons. Firstly, it would be contrary to natural justice not to refer new authority to counsel for comment. Secondly,

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375 Indeed, these are likely to be the same persons.
377 Thus it is used, eg, in Ireland, see International Law Association Committee on International Law in Municipal Courts, Questionnaire Response by the National Rapporteur for Ireland (John D Cooke SC) Dec 31 1993 at 24-5.
without the assistance of counsel, and in the absence of any other assistance, the court may fall into error.378

Where CIL is in issue, however, the situation is different. Firstly, the research to be conducted is not supposed to raise new issues but to provide a more comprehensive insight into the content of a claimed rule of CIL. The objection that counsel needs to be heard therefore does not apply here. Secondly, because the court has already had the benefit of counsel’s submissions on the matter, it is less likely that it will fall into error. Further research merely provides deeper insight into the material proving the existence and content of a rule. It is therefore possible for a court to conduct its own research into matters of state practice and opinio juris.379

However, several courts have found it prudent not to research these matters any further, restricting themselves to an assessment of the material submitted by counsel. In Victoria v Commonwealth (Industrial Relations Case), the joint judgment of five members of the High Court of Australia noted that because there was no evidence as to the rule before the court, it could not find such a rule.380 Similarly, in Limbo v Little, Martin J was “on the material available to [him]” not prepared to find the rule relied on by counsel.381 In R v Rumbaut, in considering the law of hot pursuit under CIL, it was claimed that counsel should have submitted state practice after the entry into force of the 1958 Geneva Convention on the High Seas,382 thus indicating that the court itself was not prepared to find this more recent practice upon its own motion.

Curial research is particularly well developed in the United States where appellate judges employ law clerks for this purpose.383 On the other hand, this is not so in the United Kingdom. Here the reliance on the arguments of counsel is most apparent. It may indeed be pushing the judicial capacity of an appellate court to the limit if it was

378 Both points are spelled out by Andrews, Principles of Civil Procedure (1994) at 47-8.
381 Limbo v Little (1990) 65 NTR 19 (NTCA) at 45 (Martin J).
suggested that judges were under an obligation to investigate state practice without such assistance.

d) Amici Curiae

Expert information on points of IL other than through expert evidence called by counsel or curial research can be obtained by appointing an amicus curiae.384 This will not necessarily be a scholar but may be an independent member of the bar385 or the Attorney General.386 The amicus will inform the court on matters of IL applicable in the case. Traditionally, the amicus provides impartial advice to the court in referring to material not cited by counsel. Moreover, the amicus is called upon to represent a public interest.387 While this is essentially a reflection on weaknesses of the adversarial approach to litigation prevalent in common law jurisdictions,388 the appointment of an amicus has several advantages over the other methods outlined above.389

In contrast to affidavits and additional party submissions, the court appoints the amicus and the arguments raised are independent from those of the parties and therefore are truly impartial. This account is no less so even if, in conclusion, the amicus supports the views of one of the parties. In addition, reliance on an amicus does not involve the obstacle of using a method designed to give evidence of facts for proving a rule of law. In comparison with curial research, with or without law clerks, using an amicus has the advantage of relieving the court of some work. Judges are thus allowed to concentrate on weighing the arguments without needing to cope with finding the rules they need to apply. Moreover, by contrast to curial research, statements of amici are written or oral

384 Zoernsch v Waldock [1964] 1 WLR 675 (CA); Uganda Co (Holdings) Ltd v Government of Uganda [1979] 1 Lloyd'sLR 481 (referred to at 488); R v Bow Street Magistrates ex parte Pinochet Ugarte [1998] 4 AllER 897. The opinion of the amicus is referred to in the judgment of Lord Lloyd at 930.
385 R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147 (HL) where David Lloyd Jones appeared as amicus.
386 As was done in Zoernsch v Waldock [1964] 1 WLR 675 (CA) at 691.
387 Other roles of amici include representation of parties not allowed counsel and prevention of substantial miscarriage of justice. See Muldoon, Law of Intervention Status and Practice (1989) at 113-4.
388 Muldoon, ibid at 113.
389 One disadvantage is referred to by Andrews, Principles of Civil Procedure (1994) at 49: "There is a small risk that a dispassionate barrister ... might not be as diligent as counsel in arguing a point, since he would not be representing a client with a financial stake in the matter."
pleadings and thus a formal part of the proceedings which are readily available to
counsel as well. The use of amici thus overcomes both objections against curial research
mentioned above. Consequently, when doubts as to the content of an international rule
arise, appointing an amicus curiae to present information on the rule seems to be the
best option.

However, courts in the common law world obviously do not share this preference,
as they tend to keep on relying on the parties' submissions. If additional argument is
allowed, it is usually by way of intervention.390 Intervention allows for an affected
interest to be pleaded. For example, in Pinochet various human rights activist groups
and the Republic of Chile were allowed to intervene in the proceedings.391 Similarly,
various institutions have a statutory right to intervene in Australia.392 These
interventions may extend the range of argument and material heard by the court. Still,
the arguments provided by interveners are arguments in their own interest. They thus
add another view on the issue which is itself partisan. Moreover, where a right to
intervene is not granted by statute, it sometimes depends on the assent of the original
parties or the discretion of the court.393 Such a procedure therefore does not necessarily
share the advantages of employing an amicus. Perhaps, if interveners were used to the
degree which occurs in the United States,394 it would be fair to argue that even with
partisan submissions the whole range of arguments would be advanced. But at the same
time such an increase in intervention could well result in an unnecessary "paper-war"
which would be impossible for a court to handle. The sheer amount of submissions in
American appellate courts can only be dealt with because law clerks are employed to

390 See, eg, Pushpanathan v Canada (Minister of Citizenship and Immigration) [1998] 1 SCR 982; R v
391 Amnesty International was allowed to be represented at trial and Human Rights Watch filed written
arguments.
392 International Law Association – Committee on International Law in National Courts, Third Report
393 As in the R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)
[2000] 1 AC 147 (HL), see Robertson, "The House of Lords as a Political and Constitutional
Court: Lessons from The Pinochet Case" in Woodhouse (ed), The Pinochet Case, (2000) 17-40 at
33.
394 For example in University of California Regent v Bakke (1978) 438 US 265 the not unusual number
of 53 amicus briefs were filed, see Robertson, "The House of Lords as a Political and
Constitutional Court: Lessons from The Pinochet Case" ibid at 31-3.
digest the information.\textsuperscript{395} No judge or bench alone could handle these. However, this would be avoided if greater use were made in common law courts of the \textit{amicus} procedure.

4) Special Procedures

Cases before national courts are generally contentious cases in which the specific claims of one party against another party are granted or denied by the court. The court function in such cases is essentially dispute resolution. Courts do not generally explore and explain rules or principles of law not relevant to resolving a dispute. Only the rules applicable to the contentious issues are ascertained and pronounced in the court. Thus, a court can only pronounce an opinion on rules of CIL when and as far as these are made issues in a contentious case by the parties.

Given the problems with establishing the content of rules of CIL, it is probably advantageous to provide some means for such questions to be considered in superior courts.\textsuperscript{396} This would provide an authoritative statement of the rule in the forum state and thus help to keep the law clear and certain. Nevertheless, if the parties are satisfied with the outcome of their dispute, the main function of dispute resolution is fulfilled and the matter would normally not reach a higher court. However, in view of the general tension between dispute resolution and certainty of the law, some states have established special procedures that allow a superior court to consider relevant questions of law detached from an actual dispute.

Of the jurisdictions under consideration here, only Canada has established such a procedure that is relevant to IL.\textsuperscript{397} Section 53 of the Supreme Court Act\textsuperscript{398} allows the

\textsuperscript{395} However, even in the US, the addition to the courts’ usual workload by \textit{amicus} briefs is tremendous. For an appraisal see O’Connor and Epstein “Court Rules and Workload: A Case Study of the Rules Governing Amicus Curiae Participation” in (1983) 8 The Justice System Journal 35-45.


\textsuperscript{397} A reference jurisdiction also exists in Australia. However, cases here have to date not concerned matters of CIL. See “International Law Association Committee on International Law in National Courts – Report of the Australian Branch” (1994) 15 AusYBIL 231 at 244 (Question 1).
Supreme Court, upon request from the Governor General, to pronounce upon important questions of law. Under this jurisdiction, the Supreme Court of Canada has heard many cases touching upon issues of CIL, the most recent one being the *Quebec Secession* reference. There, the power of the Supreme Court to pronounce upon matters of CIL was disputed, the argument being that since the Court would, in declaring the content of IL, purport to act as an international tribunal it would thereby exceed its territorial jurisdiction. Furthermore, it was argued that the Court had no subject matter jurisdiction to look at questions of “pure international law.” The Court’s answer to the first question was technical but compelling. The opinion of the Court would not bind any foreign state but (merely) provide an opinion of the Court as the national institution of authority for the Governor in Council. But answering the second question was not so easy. The Court referred to earlier cases where it had looked at IL and held that the question at stake was not one of “pure” IL but concerned the power of the Quebec National Assembly which was an institution under Canadian law. The Court thus circumvented answering the question concerning its subject matter jurisdiction over matters of “pure” IL. It is thus doubtful whether the Supreme Court may under the reference jurisdiction pronounce on matters of “pure” CIL. However, the reference

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398 An Act respecting the Supreme Court of Canada, RSC S-19. Section 53 (in its relevant parts) provides:

“53. (1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning
    (a) the interpretation of the Constitution Acts;
    (b) the constitutionality or interpretation of any federal or provincial legislation; ... or
    (d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.

Other questions
(2) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court *ejusdem generis* with the enumerations contained in subsection (1), with reference to which the Governor in Council sees fit to submit any such question.

Questions deemed important
(3) Any question concerning any of the matters mentioned in subsections (1) and (2), and referred to the Court by the Governor in Council, shall be conclusively deemed to be an important question.

Opinion of Court
(4) Where a reference is made to the Court under subsection (1) or (2), it is the duty of the Court to hear and consider it and to answer each question so referred, ... and the opinion shall be pronounced in like manner as in the case of a judgment on an appeal to the Court ....”

399 See the cases referred to above First Part- Chapter Three -3(b(i).

400 *Reference Re Secession of Quebec* [1998] 2 SCR 217.

401 *Reference Re Secession of Quebec* ibid at 234 (para 20), 235 (para 21).

402 *Reference Re Secession of Quebec* ibid at 234 (para 20).

403 *Reference Re Secession of Quebec* ibid at 235 (paras 22-3).
jurisdiction of the Supreme Court in section 53(2) allows for any important question of law to be considered. Since IL is law materially as well as for the purposes of national procedure, there exists no reason why this law should not be considered under the reference jurisdiction. Questions concerning this part of the law should be regarded as *per se* important questions because they require uniform application in Canada. Therefore the reference jurisdiction of the Supreme Court extends to matters of CIL. The reference jurisdiction of the Supreme Court could thus provide authoritative settlement in Canada of CIL issues in advance and detached from actual contentious cases.

This jurisdiction could face possible difficulties: where there is a reference by state authorities, while their submissions will be heard, there remains the question of possible opposing views. To counter this, subsections (6) and (7) of section 53 provide that notice be given to interested persons and these persons or their counsel be heard in reference cases. This allows various interests to be pleaded for any reference question. Even if there is no other particular interest affected, it is up to the Court to appoint *amici* to argue a different case than state counsel. The Court can thus be informed comprehensively. However, the posing of the questions and therefore their framing rests with the executive branch of government. This allows the state not to ask such questions at all or at least to frame these in a way so as to minimise the risk of getting answers it does not like. In this way, a supposedly neutral procedure can be defeated by the conduct of one party. While the reference jurisdiction has the

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404 These provide: "Notice to interested persons
(6) The Court has power to direct that any person interested ... shall be notified of the hearing on any reference under this section, and those persons are entitled to be heard thereon.
Appointment of counsel by Court
(7) The Court may, in its discretion, request any counsel to argue the case with respect to any interest that is affected and with respect to which counsel does not appear ...."

405 Eg, in *Reference Re Secession of Quebec* [1998] 2 SCR 217, there were nine interveners beside the Attorney General (arguing Canada's case) and the representatives of the provinces and territories.


407 This is different in Germany, where a similar reference jurisdiction exists under article 100(1) of the *Grundgesetz* (Basic Law). Here, questions on the content of CIL shall be referred to the Federal Constitutional Court by the trial or appellate court whenever uncertainties arise in a litigious case. It is therefore a judicial rather than an executive reference; the question is therefore likely to be framed more objectively.
advantage of enabling the Supreme Court to provide an authoritative settlement on the content of rules of CIL, its scope is therefore limited by its initialisation procedure.

5) Conclusion

Despite the theoretical notion of jura novit curia, national judges need all available assistance in finding rules of CIL. For this special undertaking, the traditional means of pleading and argument are perhaps insufficient. Other means to obtain information on state practice and opinio juris need to be employed. Of the various procedural means available, it has been shown that probably the most appropriate of these is the increased use of amici curiae who provide an impartial insight on matters of law.408 Nevertheless, when admitting the opinions of amici, a balance needs to be exercised between the necessary amount of information to allow a complete view of the rule and a restriction of submissions so as not to burden the court with an unnecessary paper load.

The reference jurisdiction of the Supreme Court of Canada provides a possible special procedure that allows a superior court to determine rules of CIL detached from contentious cases. Its advantage is that the content of CIL could be established before it arises in an actual case. None of the other states examined here has yet established such a procedure. However, the mechanisms referred to above, if duly applied, seem to provide a sufficient procedural basis to decide questions of CIL when they arise in contentious proceedings.

408 Mann, “Foreign Policy and Judicial Discretion” (1978) 27 ICLQ 446 at 449-50.
| Third Part | APPLICATION OF CUSTOMARY INTERNATIONAL LAW IN NATIONAL LAW |
Chapter Six - Indirect Application of CIL

Once the content of a rule of CIL has been established, a national court could apply it in a national case. This, however, is not always possible. Rules of IL are not always phrased so as to allow their application in national cases. They are mostly directed at inter-state conduct only, making national application inappropriate or unnecessary. Moreover, their requirements are sometimes expressed rather broadly so that applying them without more is impossible. These rules can only be applied if their relevance or content is clarified in national law. When national law refers to these rules, they have an indirect effect, although they cannot be applied directly.

On the other hand, there will often be applicable national law and, when this is contained in a statute, it will have to be applied. However, national law may need to be read in conjunction with IL. While in such a case national law will be applied, its content will be partly determined by IL, so that IL will have indirect rather than direct effect.

To be effective, CIL therefore sometimes requires an explanation in national law but it may also help to explain national law. The following sections will explore the indirect effect of CIL in more detail. First, the influence of the structure of international obligations on the national effect of CIL will be investigated. This will be followed by an examination of CIL's effect in statutory and constitutional interpretation. Finally, the relevance of CIL in forming rules of the common law will be explained.

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409 See Third Part- Chapter Seven -1).
1) The Structure of International Obligations and Their Application in National Law

Not all rules of CIL are capable of being applied directly in national law. In fact, considering the whole body of IL, very few rules are of such character. Most rules are obligations solely between states and regulate outward state conduct. To say that these rules are also part of the national law does not then necessarily mean that they can be applied in national courts. It would, for example, make little sense to invoke the international principle of non-intervention in a national law case concerning trespass between neighbours. This applies even where the rules might have a similar content. Consider the application of the rules governing the interpretation of treaties to a case involving unclear terms under a contract. The content of other international rules may be too vague to generate rules applicable to national litigation. Even if concerned with individuals rather than states, some rules may be drafted so as to give the state a wide margin in implementing the rules. All this does not mean, however, that these rules are entirely irrelevant. There is just needed an explanation of the international rule in national law, so that it can be given effect there. National courts deal with disputes within the state. In order to consider the rules of IL that bind the state externally alone, the courts need a “tag” in national law. This would usually be a statute enacted by the national legislative body. Here, the courts apply national law but, in finding whether its requirements are met, they can, and sometimes must, have regard to CIL.

There are rules which can be applied without any national explanation. Under IL there exist rules that create rights and duties for individuals directly, without the detour via the state. Such rules are mostly concerned with human rights and international crimes. While containing an obligation vis-à-vis other states, these rules also contain a requirement to provide rights and duties internally, that is, within the forum state’s jurisdiction, usually by enacting or adopting laws protecting human rights or penalising certain conduct. Nevertheless, it is now generally accepted that international human rights and crimes confer rights and duties directly on individuals. If these rules are sufficiently clearly established, they can be applied directly. In more technical terms,

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410 The impact of customary international criminal law will be dealt with below Third Part- Chapter Eight -.
these rules are self-executing.\textsuperscript{411} A rule is self-executing when its requirements and legal consequences are readable from the rule itself and these consequences determine rights or duties that can be invoked in national legal proceedings. Thus, no explanation of the rule is needed for it to be complete. Indeed, the only requirement at national law for the application of a self-executing rule, is validity; once valid, it will execute itself (hence the description).

However, while such rules are capable of being applied in national courts, they will not be so applied when there exists national law governing the case. All the same, they can influence the application of national law by way of interpretation.

Other rules of CIL, while being directed at individuals, may be ambiguous in their requirements or legal consequences and hence non self-executing. As with outward-looking CIL, non self-executing inward-looking rules need to be clarified before being applied, so that their requirements and results are sufficiently precise.

CIL therefore has indirect effect in two situations: (1) where a non self-executing rule of CIL is referred to in national law, and (2) where CIL has an influence on the application of national law by way of interpretation.\textsuperscript{412}

2) Statutory Interpretation And CIL

IL can have a substantive influence on the content of national law by way of interpretation. The rules of statutory interpretation in light of CIL follow some basic rules and presumptions. Where statutes refer to international treaties, these rules are modified and are relaxed even further when domestic human rights law is to be interpreted.

\textsuperscript{411} This term should not be confused with the domestic US legal term of self-executing treaties. There, self-executing means that treaties have automatic effect in US law regardless of the content. This does not mean that their provisions are necessarily applicable in the sense that the term self-executing is used here, and in IL in general; it only means that treaties are without an Act of Congress valid federal law. See Restatement of the Law – Third, Foreign Relations of the United States (1987) §111 (1) and (4) and commentator’s notes g and h.

a) The Basic Rules

The basic rule when a statute is applicable to the case is that the statute has to be applied. This is so even where the statutory provision is inconsistent with IL. 413 In order to prevent the collision of statutory provisions and international obligations, the courts have developed various rules of interpretation. While these have been established in relation to treaties, there is room for the assumption that these principles should also apply where CIL is at stake. 414

Statutes do not often refer to CIL, even when they incorporate it. 415 This practice differs significantly when treaties are implemented. Here, many statutes contain at least some reference to their international origin. 416

Nevertheless, CIL may help to identify statutory requirements or legal consequences.

The classical approach requires an ambiguous statutory provision, allowing at least two interpretations: one in favour of and one denying the international rule. In such a case the interpretation in favour of CIL should be given effect. 417 When a statutory provision is not ambiguous, it has to be applied as it stands without regard to CIL. 418 This does not mean that it necessarily disregards CIL. The statutory and customary rules

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413 For an elaboration on these rules see below Third Part- Chapter Seven -1).
414 See Alcom v Republic of Columbia [1984] AC 580 (CA) at 588 (Sir John Donaldson MR): "[I]f the Act is ambiguous, a court is entitled to have regard to the general principles of international law and to resolve that ambiguity in the way most consistent with those principles."
415 Eg, the only Australian statute that does so is the Industrial Relations Reform Act 1993 (Cth) – section 170PA (1) (e) referring to CIL relating to freedom of association and right to strike (the existence of this right under CIL is itself doubtful).
Other Australian Acts that effectively implement CIL but do not mention it include the Defence (Visiting Forces) Act 1963 (Cth), the War Crimes Act 1945 (Cth) and the Foreign States Immunities Act 1985 (Cth).
416 The methods here include the adoption of the treaty wording as sections of a statute or as a schedule to an Act; mostly, the treaty is referred to in the purpose of the Act. See for the different methods the NZLC Report 45 The Treaty Making Process Reform and the Role of Parliament section 6, especially para 125.
417 R v Fineberg (No 2) [1968] NZLR 443 (CA).
418 Polites (1945) 70 CLR 60 (HCA) and below Third Part- Chapter Seven -1).
may coincide so that the statute does not conflict with CIL. However, ambiguities in national statutes may arise in different ways, as the following examples will show.

The New Zealand Court of Appeal in *Levave v Immigration Department*\(^{419}\) considered the status of Samoan born persons under the British Nationality and Status of Aliens Act 1923 (NZ). The "absence of unequivocal language" to the contrary here required the Act to be read as in agreement with international principles governing the relationship between inhabitants of mandated territories and the mandate power.\(^{420}\) It seems that the conditions for interpretation were turned inside out: an ambiguity was not positively to be established, but IL had an influence as long as it had not been specifically excluded. This case was subject to review two years later in *Lesa v Attorney-General*.\(^ {421}\) Although the Court of Appeal followed its earlier decision, the Privy Council overruled it on appeal.\(^ {422}\) Notwithstanding the fact that the second case dealt with a subsequent Act of 1928 which was similar but not identical to the 1923 Act, the Court of Appeal affirmed the earlier decision. The Privy Council, on the other hand, construed the 1928 Act alone and was unable to find an ambiguity in the statutory language that would justify an interpretation using IL. Although the relevance of CIL to statutory interpretation was recognised, the Privy Council was "unable ... to discern any ambiguity or lack of clarity in ... the Act of 1928".\(^ {423}\) Thus, while the Court of Appeal required a clear intention to derogate from international principles, the Privy Council held that an actual ambiguity in the statutory provision was necessary to interpret it according to IL. Indeed, the Privy Council only referred to IL after construing the 1928 Act.

The basis for the interpretation favouring IL is that the legislative body does not, except where clearly intended, want to violate IL. In the *Levave* and *Lesa* cases, neither the Court of Appeal’s nor the Privy Council’s views would have actually led to a violation of New Zealand's or Britain's international obligations. IL did not require the mandatory power to provide for automatic citizenship but neither did it require the

\(^{419}\) *Levave v Immigration Department* [1979] 2 NZLR 74 (CA).

\(^{420}\) *Levave v Immigration Department* ibid at 78.

\(^{421}\) *Lesa v Attorney General for New Zealand* [1982] 1 NZLR 165.


\(^{423}\) *Lesa v Attorney General for New Zealand* ibid at 176-7.
mandatory power to abstain from conferring citizenship on all people living within a mandated territory. The two cases themselves, however, reveal uncertainties in the requirement of ambiguity for the interpretation favouring IL.

Moreover, in *Levave* strong reliance was placed on the fact that the Act had been discussed and passed after the international declaration was issued. Whether this means that only pre-existing IL can influence the interpretation of subsequent national law is questionable. At least for the construction of statutory provisions according to treaties, such a requirement seems now abandoned.

In 1981, a second possibility of CIL influencing national statutes emerged in New Zealand in a case where the Court of Appeal had to consider whether the Springbok rugby team had wrongfully been granted entry visas to tour the country. The Immigration Act 1964 did not refer to IL nor was section 14(1) of that Act ambiguous. It was thus impossible for the court to construe the Act in the light of New Zealand's international commitment under the 1965 Convention on the Elimination of All Forms of Racial Discrimination and parallel CIL. Although the requirements of the statutory provision were unequivocal, it was argued that the court could refer to IL because the minister, in exercising his discretion under section 14(1), would have to take IL into account. If he failed to do so, this would constitute a ground for judicial review. The court held that, given the clear language of the Act, no such limitation of

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424 It is particularly questionable for an interpretation favouring CIL since an exact date of entry into force of CIL can never be determined. Such a principle would, however, work under a limited scope because it could retrospectively be said if an international customary rule was in force by the time an Act had been passed.


426 *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA).


428 Aside the Convention, the CA considered *inter alia*, the Gleneagles Agreement (the Commonwealth Statement on Apartheid in Sport of June 1977, Cmd 6889) and various UN Declarations and Resolutions, such as the *Declaration against Apartheid in Sports*. These arguably mirrored CIL. See especially the judgment of Richardson J in *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) at 227-31.
ministerial discretion could be implied.\textsuperscript{429} Moreover, the court considered the content of IL on the condemnation of apartheid. In doing so, the judgment of Richardson J referred not only to the Convention but also to various Declarations and the practice of states under and after the Convention’s entry into force.\textsuperscript{430} Despite the relatively clear practice of the states members to the Convention after the passing of the Declaration against Apartheid in Sports, the court failed to find an international rule that would prohibit the issuing of visas to South African sportsmen and women. Thus the minister had not wrongly exercised his discretion nor, even if there were a duty to take IL into account, would the decision have been any different.

What was at issue in \textit{Ashby} was not the construction of an ambiguous requirement of a statutory provision but the interpretation and limitation of the legal consequence of such a provision. The legislature uses terms that are interpreted and clarified by application in the courts, no third power is involved. When the legal consequences of statutory provisions are to be determined the executive branch of government is an additional actor. Where these consequences provide for executive discretion, the court cannot substitute this with its own discretion. The result in \textit{Ashby} was criticised later in \textit{Tavita v Minister of Immigration}, where the argument that the minister was allowed to ignore unimplemented international treaties was rejected as unattractive.\textsuperscript{431} Whether there is now a ground for judicial review in place when a decision maker fails to consider IL is, however, unclear because post-\textit{Tavita} cases did not clarify the matter.\textsuperscript{432} In practice, decision makers now apparently try to consider relevant IL. This has, so far, only been considered for international treaties, but it is likely to apply also where (clearly established) rules of CIL are relevant.\textsuperscript{433} Moreover, where CIL is at stake, there may be a ground for judicial review; for, if CIL is part of the common law and common law rules constitute mandatory relevant considerations, then so does CIL.

\textsuperscript{429} \textit{Ashby v Minister of Immigration} ibid at 224 (Cooke J), 229-31 (Richardson J), 232-3 (Somers J).
\textsuperscript{430} \textit{Ashby v Minister of Immigration} ibid at 227-8 (Richardson J) and the documents mentioned in note 428.
\textsuperscript{431} \textit{Tavita v Minister of Immigration} [1994] 2 NZLR 257 (CA).
\textsuperscript{432} For a review of these cases, see Joseph “Constitutional Law” [1997] NZLR 209 at 227-232.
\textsuperscript{433} Where a treaty is at stake, the executive branch creates an “estoppel-flavour” if it on the one hand ratified an international convention but did not have regard to that obligation when making decisions. This does not necessarily apply to CIL, where there is no necessity of any active international conduct which could create such a situation. However, regard to an international obligation should be sufficient for the creation of a relevant consideration.
b) Statutes that Implement International Treaties

The most consistent examples of statutory interpretation according to CIL arise where national courts construe statutes implementing international treaties. Two categories of interpretation can be distinguished. Firstly, the provisions of the treaty can in one way or another be part of the statute. In this case, when the treaty provisions themselves need interpretation, they are construed in accordance with international rules. Secondly, the implementation of international treaties more often requires national courts to look at non self-executing IL to determine whether certain conditions of the implementing statute are met.

When a statute implements an international treaty, its provisions retain their international character.434 Therefore, although a national statute, the implementing legislation should be construed according to international principles and not the common law canons of construction.435 The most significant difference between the two is that the international rules allow resort to the travaux préparatoires and require a dynamic interpretation in the light of subsequent practice.436 In addition, there are


But see Pearce and Geddes, Statutory Interpretation in Australia (4th ed, 1996) at 45-7 questioning this, given ss15AA and 15AB of the Acts Interpretation Act 1909 (Cth).

436 1969 Vienna Convention on the Law of Treaties (VCLT), arts 31-2:

"Article 31 General rule of interpretation
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:....
(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties....

Article 32 Supplementary means of interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
specific rules for multilingual treaties. \(^{437}\) The interpretation rules as to treaties are codified in the 1969 Vienna Convention on the Law of Treaties (VCLT) which either declared pre-existing CIL \(^{438}\) or progressively developed new CIL. \(^{439}\) The sum of its international interpretation canons therefore now represents CIL. \(^{440}\) Thus, in construing legislation giving effect to treaties with states which are not parties to the 1969 VCLT, the courts use the international canons of interpretation as CIL. \(^{441}\)

A similar principle applies when a statute implements an international treaty whose provisions are supplemented or superseded by CIL. For example, the Canadian Foreign Missions and International Organizations Act 1991 refers to diplomatic missions of foreign states and international organisations. This statute does not expressly incorporate CIL but provides for immunities to be granted \(^{442}\) pursuant to the Vienna Conventions on Diplomatic Relations and Consular Relations and the Convention on the Privileges and Immunities of the United Nations. \(^{443}\) Nonetheless, these immunities have made it necessary to look closely at the relation of the Conventions and the Act to CIL. According to the Conventions, CIL is deemed to

\[(a) \text{ leaves the meaning ambiguous or obscure; or} \]
\[(b) \text{ leads to a result which is manifestly absurd or unreasonable.} \]

\(^{437}\) VCLT, article 33: “Interpretation of treaties authenticated in two or more languages
1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”

\(^{438}\) Thiel v FCT (1990) 171 CLR 338 at 348-50 (Dawson J), at 356-7 (McHugh J) (94 ALR 647);
Applicant “A” v Minister of Immigration (1997) 190 CLR 225 at 294 (Kirby J) (142 ALR 331).
\(^{439}\) Brownlie, Principles of Public International Law (5th ed, 1998) at 608.
\(^{440}\) Applicant “A” v Minister of Immigration (1997) 190 CLR 225 (HCA) at 277, n 189 (Gummow J) (142 ALR 331).
\(^{441}\) See, eg, McHugh J in Thiel v FCT (1990) 171 CLR 338, interpreting a bilateral treaty between Australia and Switzerland according to the rules of 1969 VCLT, although Switzerland is not a party to that Convention, “because the interpretation provisions of the Vienna Convention reflect the customary rules for the interpretation […]” (at 356).
\(^{442}\) Foreign Missions and International Organizations Act 1991, ss 3, 5(1b). As a corollary, the Access to Information Act, RSC 1985, c. A-1 contains exemptions from the freedom to information when diplomatic notes and communications are concerned, section 15 (1) (h); as to this section see Do-Ky v Canada (Minister of Foreign Affairs and International Trade) (1997) 143 DLR (4th) 746.
continue to govern diplomatic and consular relations. Thus, under IL, there is no strict hierarchy between the two sources. CIL is well able to amend, supplement and even repeal treaty rules. Under Canadian law, however, this does not seem to be the case because the rules that have been implemented and given the force of law in a statute prevail over customary rules. Nevertheless, they have to be construed according to international rules of interpretation and thus in accordance with CIL. Where the treaty provision is or has become ambiguous in the light of subsequent state practice, the implementing statute also needs to be interpreted according to these changes. CIL also retains legal effect where certain provisions of the convention are not implemented in Canadian law.

Apart from its relevance in clarifying national statutes, CIL is often referred to in determining whether a treaty provision is applicable to the case at hand. National courts have often had opportunities to refer to and explore non self-executing CIL and principles outside the convention. For example, parts of the Canadian Immigration Act 1976-77 transform provisions of the UN Convention on Refugees into Canadian federal law. In considering a case under that Act, the Federal Court of Appeal found that there existed a prohibition of the use of chemical weapons under CIL. On another occasion, the Supreme Court of Canada was asked to determine whether international drug trafficking was an act “contrary to [the] purposes and principles of the UN” pursuant to article 1F(c) of the Refugee Convention. The majority held that although drug trafficking was a serious problem and the UN had taken extraordinary prevention

443 Foreign Missions and International Organizations Act 1991, Schedule III; as to immunities of a specialised agency of the UN see AG for Canada v Lavigne, 145 DLR (4th) 252.
444 Cf the Preambles of the respective conventions.
445 Re R v Palacios (1984) 45 OR (2d) 269 (OntCA) at 276; (1984) 7 DLR (4th) 112.
446 Re R v Palacios ibid at 277-8.
448 Zolfgharkhani v Canada (Minister for Employment and Immigration) [1993] 3 FCR 540 (CFCA). It was necessary to consider the legality of the use of chemical weapons because punishment for desertion (which the applicant had to fear) could be regarded as persecution (article 1F of the Convention) when “the type of military action with which an individual does not wish to be associated is condemned by the international legal community as contrary to basic rules of human conduct” (UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1988) para 171). In this case, the applicant objected to the use of chemical weapons.
449 Pushpanathan v Canada (Minister of Citizenship and Immigration) [1998] 1 SCR 982.
450 L'Heureux-Dubé, Gonthier, McLachlin and Bastarche JJ; Cory and Major JJ dissenting. Sopinka J did not take part in the judgment.
measures, in the absence of a general agreement as to the consequences, it had not yet achieved the necessary standard to meet the requirement of article 1F(c) of the Refugee Convention. Most recently, the Federal Court of Appeal ruled that the international rules on the prohibition of torture could not produce a non-derogable right against refoulement.\textsuperscript{451} Thus, when interpreting the Immigration Act, Canadian courts have been prepared to consider modern rules of IL without direct mandate. It must nevertheless be emphasised that they will only do so where such rules do not contravene the statute.\textsuperscript{452}

On the other hand, English courts seem more reluctant, taking the view that the Immigration Act 1971 (UK) is a comprehensive piece of legislation which makes CIL incapable of having any influence on its provisions.\textsuperscript{453}

c) Bills of Rights and CIL

Human rights are now often subject to constitutionally entrenched or general bills of rights in national law. Under IL, human rights form part of multilateral treaties and conventions. Many rights guaranteed under these conventions are now also regarded part of CIL. How these international rules affect the interpretation of the national instruments is the subject of this section. Canadian and New Zealand practice will be considered before referring to the Australian and English approach.

(i) Canada

The Canadian Charter of Rights and Freedoms was enacted as part I of the Constitution Act 1982. The Charter therefore shares the character of supreme law in Canada, so that inconsistent statutes can be held invalid.

The Charter makes explicit reference to IL only in section 11(g). This section allows for prosecution of acts that are criminal under IL even if these were not crimes in

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\textsuperscript{451} Suresh v Canada (CFCA), 18.01.2000, File No A-415-99 (LEXIS Transcript).

\textsuperscript{452} Suresh v Canada, \textit{ibid.}

Limits of international conventions in the exercise of administrative discretion under the Immigration Act are emphasised and distinguished from cases under the Charter in Baker v Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817 at paras 80-1 (Cory and Iacobucci JJ, dissenting in part).

\textsuperscript{453} R v Immigration Office, ex parte Thakrar [1974] 1 QB 684 at 692 (Lord Widgery CJ).
Canadian law at the time of commission.\textsuperscript{454} This clarification of the prohibition of retroactive criminal laws is a necessary civil rights corollary to the jurisdictional provisions of the Criminal Code.\textsuperscript{455} Section 11(g) has been interpreted as incorporating CIL into the "fabric of [the] Constitution".\textsuperscript{456}

Aside from this specific provision, the Charter does not make any other and more general reference to IL. However, to conclude that the Charter is blind to IL would be fatal. A theoretical point of departure might be section 26 of the Charter, granting Charter-interpretation in favour of pre-existing rights.\textsuperscript{457} If one accepts the proposition that human rights norms of CIL were part of Canadian law prior to the Charter, these would indeed fall within the scope of section 26. Consequently they could play a significant role in interpreting the Charter rights though until now no court has adopted this approach.

IL nevertheless appears relevant in construing the Charter.\textsuperscript{458} Furthermore, administrative discretion is to be exercised in accordance with international human rights norms, when Charter rights are concerned.\textsuperscript{459}

Specifically, customary international human rights law has been used to define the scope of the presumption of innocence in criminal law\textsuperscript{460} and the right to security of the person\textsuperscript{461}. It can also be used to limit the right to freedom of expression where it

\textsuperscript{454} Section 11 (g) of the Canadian Charter of Rights and Freedoms reads:

"Any person charged with an offence has the right ...

g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations ... ."

\textsuperscript{455} See below Third Part- Chapter Eight -1).

\textsuperscript{456} Rudolph v Canada (Minister of Employment and Immigration) (1992) 91 DLR (4th) 686 at 689 (CFCA), (leave to appeal to SCC refused 93 DLR (4th) viii).

\textsuperscript{457} Section 26: "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."


\textsuperscript{459} Slaiht Communications \textit{v} Davidson [1989] 1 SCR 1038 at 1056-7 (Dickson CJ for the majority).

\textsuperscript{460} \textit{R v Oakes} [1986] 1 SCR 103.

\textsuperscript{461} Suresh \textit{v} Canada (CFCA) 18.01.2000, File No A-415-99 (LEXIS Transcript).
infringes fundamental rights and principles recognised at IL, though caution is necessary when IL is employed to limit Charter guarantees. More generally, CIL has been used to interpret section 32 of the Charter in cases of extraterritorial application. The Charter does not apply to actions of foreign officials, but its guarantees extend to conduct of Canadian officials that occur abroad.

While here the cases mainly invoke treaty law, they also make reference to other instruments of IL such as the Universal Declaration of Human Rights (UDHR). This may be because in the area of international human rights, CIL has developed parallel to the various conventions. In such cases, the conventions provide clearer guidelines as to the content of a right at IL than an unwritten CIL. It seems, therefore, that in construing the material rights of the Charter, international standards can be employed, without distinction as to their sources. Indeed, reference is frequently made to international standards to which Canada neither is nor ever will be bound, notably the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights. Although the use of non-binding international norms and standards has been criticised as impeding the establishment of clear concepts concerning the interpretative relevance of CIL, these objections are possibly misleading. No court would put the state in the position of violating binding IL. In any event, the interpretation of Charter rights is still bound to the text of the Charter provisions, so that an interpretation contrary to the terms of the Charter is most unlikely. Moreover, reliance on international

463 Section 32 of the Charter provides: “(1)This Charter applies a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province....”
464 Schreiber v Canada (Attorney General) 144 DLR (4th) 711.
465 R v Cook [1998] 2 SCR 597
466 Universal Declaration on Human Rights GARes 217 A (III) (10 Dec 1948)
467 While it may be debatable whether or not the European Convention is also binding as CIL, this contention would only be viable as local (European) CIL. The Convention could, due to lack of widespread state practice not be regarded as universal CIL. A reference in Canada to the Convention does not therefore necessarily mean a reference to a rule internationally binding on Canada. Rather, it is a persuasive source of interpretation of human rights originating from IL.
recommendations on human rights is based on a different notion than fear of breaching an international obligation. It is part of the rights-centred approach to the interpretation of human rights legislation. However, without further indication, cases using non-binding international texts should not be taken as applying parallel CIL but rather as using a persuasive authority from IL.

The approach to Charter interpretation does not seem to require an ambiguity in national law. IL is an important factor to Charter interpretation, whether the Charter right is phrased in ambiguous terms or not. In Re Public Service Employees, Dixon CJ said that the Charter should "generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified". Hence, the Charter guarantee in question needed not to be ambiguous since the Charter was to be interpreted against its background in IL.

Moreover, the effective date of the international text does not seem to play a major role. It had been suggested that, since the Charter was drafted with strong reference to international standards and conventions, only the standards then effective should have a strong impact on Charter interpretation. This view, however, did not seem to recognise the dynamic development of international human rights law. It would perhaps have tempted the judges to regard only the state of IL at the date of enactment of the Charter. However, rather than following this static approach, the Supreme Court has favoured dynamic contextual interpretation. This means that the international origin of Charter rights is recognised and taken as a reference to contemporary human rights standards under IL rather than an implementation of human rights standards of 1982.

Charter guarantees can be interpreted alongside international principles, whether binding or not, without regard to the effective date of the international rule and without

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469 Reference Re Public Service Employee Relations Act [1987] 1 SCR 313 at 349 (Dickson CJ). One problem with this rule is one of civil rights principles, regardless of whether international or national: A protection of rights can never be "at least as great"; it can either be the same or different. For, if the protection of one right is greater in one instrument, it will necessarily involve a lesser protection of another right (or another one's right). Thus, if the Canadian Charter offers greater protection for, say, the freedom of speech, it may provide lesser protection for the freedom from discrimination on hate speech and vice versa.

any need for ambiguity in the Charter. Thus, although no general incorporating rule exists in the Charter, the courts are prepared to invoke CIL. In this way, there is both a theoretical basis and a practical approach conferring indirect constitutional value on important concepts of IL.

(ii) New Zealand Bill of Rights and CIL

Unlike the Canadian Charter, New Zealand’s Bill of Rights Act 1990 is not an entrenched catalogue of rights and can thus not be used to invalidate Acts of Parliament. As stated in its long title its aim is to implement the international human rights provided for in the International Covenant on Civil and Political Rights (ICCPR).\(^{472}\) However, since none of the substantive provisions refer to IL, one might therefore think that CIL does not play any role in the application of the Act.

Despite these possible limitations, New Zealand’s courts have been extraordinarily receptive to international principles and sometimes even so creative as to give the Act an effect that is hardly consistent with its wording or history.\(^{473}\) Judicial references to IL, however, have been mostly limited to international treaties, particularly the ICCPR and occasionally the UDHR.\(^{474}\) Whether the latter reflects a sense of legal obligation under CIL or a persuasive source of interpretation cannot readily be said. But decisions of the European Court of Human Rights\(^{475}\) are definitely no more than persuasive, since they do not bind New Zealand.

International rules other than treaties may play a role in determining the appropriate remedy for an infringement of the Act. A recent case on the matter, *Magna*
v Attorney General, was concerned with a claim for damages for false imprisonment.\textsuperscript{476} The High Court was invited to consider a further award, apart from the tortious damages already granted, for a breach of the Bill of Rights. In the course of argument, the court was referred to the Permanent Court of International Justice’s Chorzow Factory case, which set out the standard and kind of compensation to be granted for breaches of IL.\textsuperscript{477} Without rejecting the argument, the court found that the damages that actually occurred were sufficiently covered by the tortious award and the appropriate remedy for the Bill of Rights infringement here was a declaration.

This case is in line with a prior decision under the Domestic Violence Act 1995 where the defendant’s continuous violent actions against his wife were held to exceed “a physical and emotional assault, they were a classic manifestation of the way in which he chose to breach her human rights …”.\textsuperscript{478} The defendant’s conduct was thus held to be condemned by the approach taken in international society.\textsuperscript{479} As to the appropriate remedy, it was held that “[w]hile that will not necessarily increase the award, the consequences for her are more intense and therefore to be denounced as a human rights violation.”\textsuperscript{480}

New Zealand courts have adopted a wide purposive approach to interpreting the Bill of Rights Act 1990. However, CIL has not had separate significance here, since treaty provisions and the jurisprudence of foreign and international courts provide much greater assistance to the courts. Nevertheless, there exists no objection to the use of CIL. Indeed, where only CIL exists, this should be used to interpret the Bill’s guarantees.

(iii) United Kingdom and Australia

The purpose of the Human Rights Act 1998 in the United Kingdom is to implement the United Kingdom’s obligations under the European Convention on Human Rights And Fundamental Freedoms. As such, the Act’s interpretation will undoubtedly be

\textsuperscript{476} Manga v Attorney-General (No 2) [1999] NZAR 506 (HC).
\textsuperscript{477} Chorzow Factory Case, (Germany v Poland) (1928) PCIJR SerA no 17 p 4.
\textsuperscript{478} G v G [1997] NZFLR 49 at 64.
\textsuperscript{479} Reference was made to the Universal Declaration on Human Rights, the Declaration on the Elimination of Violence Against Women and various treaties to which New Zealand is a party.
\textsuperscript{480} G v G [1997] NZFLR 49 at 64.
influenced by the jurisprudence of the European Court of Human Rights. The approach taken so far by British courts has been to interpret as far as possible common law rights in accordance with the provisions of the convention. Given the detailed provisions of the European Convention and the case law of the Court, there will at least practically be little room for the separate use of CIL in interpreting the new Act.

In Australia, where there is no bill of rights, the approach so far taken by the British courts also prevails. So far as possible, both common law and statutes are considered to mirror Australia's international obligations under human rights treaties and CIL.\textsuperscript{481} Australian courts are nevertheless particularly strict in requiring an ambiguity or a gap in the national provision for IL to have any effect.

(iv) Conclusions

The human rights cases provide a good insight into what is possible in statutory interpretation. The requirement for an initial ambiguity in statutory language is nearly always abandoned in favour of the contextual approach in interpreting bills of rights against their international background. However, the use of CIL as an interpretative aid is somewhat reduced by this liberal approach. It is apparently no longer necessary to find an international obligation legally binding the states by which national law must be interpreted and non-binding international documents\textsuperscript{482} or decisions will suffice as persuasive sources of interpretation. There is no objection to the use of such non-binding sources as long as the interpretation respects the actual obligations imposed on the state. It is unlikely, however, that the principles set out in non-binding instruments conflict with pre-existing obligations of the state.\textsuperscript{483}

\textsuperscript{481} See, eg, Dietrich v R (1992) 177 CLR 292 (HCA) considering a right to free counsel in criminal proceedings with references to international human rights instruments binding (ICCPR) and non-binding (ECHR) on Australia.

\textsuperscript{482} Whether inherently non-binding (declarations, recommendations) or treaties that the state cannot become a party to (ECHR).

\textsuperscript{483} Indeed, most new resolutions in the GA are considered clarifications of the International Covenants and the ECHR also relevantly parallels them.
3) Constitutional Interpretation and CIL

The most significant instance of interpretation of a national legal text with reference to IL in Australia is the construction of constitutional provisions, particularly the external affairs power.

The Australian Constitution makes only scant reference to matters relating to IL, the most noteworthy instance being the legislative power of the Commonwealth. The distribution of legislative power in Australia is based on the enumerated powers doctrine. Only powers specifically conferred on the Federal Parliament are within Commonwealth jurisdiction while all other power rests with the states.\textsuperscript{484} Section 51 of the Constitution establishes the Commonwealth Parliament's power to legislate in foreign relations' matters. In addition to the external affairs power in section 51(xxix.),\textsuperscript{485} section 51 gives the Commonwealth Parliament power to legislate in respect of a couple of matters of special international concern.\textsuperscript{486}

In a second reference to IL, the Constitution confers onto the High Court of Australia original jurisdiction over matters arising under treaties\textsuperscript{487}, but not CIL. This should mean that state courts as well as lower federal courts are also entitled to hear and adjudicate matters of CIL.

\textsuperscript{484} Lane, \textit{A Manual of Australian Constitutional Law} (6\textsuperscript{th} ed, 1995) at 8.
\textsuperscript{485} Constitution, section 51: "Parliament shall ... have the power to make laws ... with respect to: ...

\textsuperscript{486} (xxix) External affairs:"

\textsuperscript{487} See Constitution section 51: "...

\textsuperscript{487} (i.) Trade and commerce with other countries, and among the States: ...

\textsuperscript{487} (vi.) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth: ...

\textsuperscript{487} (x.) Fisheries in Australian waters beyond territorial limits: [See, eg, \textit{Chiou Yaou Fa v Morris} 46 NTR 1 (SCNT) at 24, using the customary 200 mile Exclusive Economic Zone to justify fishing regulations under the fisheries power] ...

\textsuperscript{487} (xix.) Naturalisation and aliens:

\textsuperscript{487} (xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth: ...

\textsuperscript{487} (xxvii.) Immigration and emigration: ...

\textsuperscript{487} (xxix.) External Affairs:

\textsuperscript{487} (xxx.) The relations of the Commonwealth with the islands of the Pacific: ...”.

\textsuperscript{487} Constitution section 75: "In all matters--

\textsuperscript{487} (i.) Arising under any treaty:

\textsuperscript{487} (ii.) Affecting consuls or other representatives of other countries: ...

the High Court shall have original jurisdiction.”
Despite the general doctrine of enumerated powers, the Commonwealth power to legislate for external affairs had been interpreted as being wide rather than narrow. This jurisdiction can be split up into sub-categories. The external affairs power covers matters physically external to Australia, laws giving effect to treaties, laws incorporating rules of CIL, international recommendations and other matters of international concern. These categories have no sharp boundaries but they are overlapping, so that sometimes statutes fall within two or more of them. On the other hand, satisfying one of the categories is sufficient to establish Commonwealth power.

Under the High Court's interpretation of section 51 (xxix.), the Commonwealth possesses legislative power over all matters physically external to Australia. The scope of this power is virtually unlimited. A statute implementing a treaty on matters external to Australia is valid under the foreign affairs power even if the treaty itself is in breach of IL.

With respect to treaties, the fact that the Australian federal government has entered into a treaty is sufficient to effect federal legislative power. Thus, by entering into a treaty and without expressly and formally changing the Constitution, the

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488 "It is frequently used to denote the whole series of relationships which may exist between states in times of war and peace." R v Burgess ex parte Henry (1936) 55 CLR 608 at 684 (Evatt and McTiernan JJ). And see now Polyukhovich v Commonwealth (1991) 172 CLR 501 (HCA) at 528 (Mason CJ), at 599 (Deane J), but more cautiously Brennan J at 549-50, 552.


490 New South Wales v Commonwealth, the Seas and Submerged Lands case (1975) 135 CLR 337 holding that the Seas and Submerged Lands Act 1973 (Cth) was a valid exercise of, inter alia, the Commonwealth's power to legislate for matters geographically outside Australia (at 360, 471, 504). See also Robinson v Western Australia Museum (1977) 138 CLR 283 at 335, 342 (holding the Navigation Act 1912 (Cth) valid under the external affairs power). See also Polyukhovich v Commonwealth (1991) 172 CLR 501 at 530-1 (Mason CJ), 603 (Dawson J), 653 (Toohey J), 696 (Gaudron J), 714 (McHugh J) holding valid Australian war crimes legislation because the acts to be tried had occurred abroad.. Brennan J, in dissention, required a connexion between Australia and the external matter (at 552).

491 Horta v Commonwealth (1994) 181 CLR 133.

492 No other requirements as to the subject matter or importance of the treaty need to be satisfied. A necessity of showing an "international concern" was discussed in the High Court but was rejected by the majority in Commonwealth v Tasmania (The Tasmanian Dam Case) (1983) 158 CLR 1.
Commonwealth government can gain legislative power over a subject matter contained in a treaty.\textsuperscript{493}

The principles governing the power to implement and give effect to treaties seem equally applicable to CIL\textsuperscript{494} though the few cases referring to CIL leave some doubt as to the exact scope of the power. According to one judge in the High Court, external affairs include “matters which are not consensual in character”,\textsuperscript{495} thus exceeding treaties and comprising CIL.\textsuperscript{496} This view was approved in establishing universal jurisdiction to try war crimes and crimes against humanity in Australia.\textsuperscript{497} However, to be a valid exercise of the external affairs power, the legislation must be an effective exercise of the right granted in CIL.\textsuperscript{498} That is not to say that the Commonwealth lacks the power to legislate in violation of CIL, as the Constitution does not include such a limitation. Legislation inconsistent with IL, if it is not a valid exercise of some other Commonwealth power, is invalid because it infringes the states’ rights to legislate under the Constitution, not because it violates IL.

The foreign affairs power is also effective when federal statutes give the force of law to recommendations of international organisations that are not binding under IL.\textsuperscript{499}

In view of the preceding paragraphs, the Commonwealth of Australia possesses comprehensive power to legislate in external matters including CIL. Statutes passed under section 51 of the Constitution will invalidate inconsistent state legislation.\textsuperscript{500} The High Court in pronouncing upon the external affairs power does not rule on the merits of statutes passed but compares the power exercised in passing a statute with the power

\textsuperscript{493} However, the treaty must be a “bona fide” treaty, meaning that a treaty entered into for the mere end of clothing the Commonwealth with an additional legislative power does not have this effect, Commonwealth v Tasmania (The Tasmanian Dam Case) ibid at 219 (Brennan J), at 259 (Deane J), at 122 (Mason J).
\textsuperscript{494} Zines, The High Court and the Constitution (4th ed, 1997) at 286.
\textsuperscript{495} New South Wales v Commonwealth (1975) 135 CLR 337 at 450 (Stephen J).
\textsuperscript{496} Koowarta v Bjelke Petersen (1982) 153 CLR 168 at 220 (Stephen J).
\textsuperscript{497} Polyukhovich v Commonwealth (1992) 172 CLR 501 at 562-3 (Brennan J, diss) and at 661 (Toohey J).
\textsuperscript{498} Polyukhovich v Commonwealth ibid at 576 (Brennan J) and at 677 (Toohey J).
\textsuperscript{499} Commonwealth v Tasmania (The Tasmanian Dam Case) (1983) 158 CLR 1 (HCA). It has also been used to justify legislation as to racial discrimination: Koowarta v Bjelke Petersen (1982) 153 CLR 168.
conferred on the Commonwealth by section 51(xxix.). The provision is therefore one that merely regulates the distribution of legislative power within the Commonwealth. The only significance of IL at large, and thus also CIL, is that its growing scope has increased and continues to increase the scope of federal legislative power at the expense of the states.

In more recent judgments, notably by Kirby J, CIL has been admitted as an aid to interpreting further heads of federal power under section 51(xxxi. & xxiv.) of the Constitution. In this way, the indirect effect of CIL in statutory interpretation generally has been extended to constitutional interpretation. Thus, CIL is capable of influencing the application of the Australian Constitution though only where there is an ambiguity in national law. Furthermore, it does not result in the recognition of substantive rights and duties but merely defines the Commonwealth’s legislative power as opposed to that of the states.

4) CIL and the Development of the Australian Common Law – a Legitimate Influence

Although, under the prevailing Australian view, CIL is not a part of Australia’s common law, judges look at CIL for guidance in finding common law principles. In particular, it has been held “desirable” that the Australian “common law should, so far as possible, be in harmony with [international human rights law]”. However, the common law does not automatically conform to CIL, but IL is said to be of “legitimate and important influence in the development of the common law”. Moreover, in determining common law rights, regard should be had to contemporary IL rather than to ancient British precedent.

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500 Constitution, section 109.
501 Newcrest Mining (WA) Ltd and Another v Commonwealth of Australia and Another, (1997) 147 ALR 42 at 147-51 (Kirby J), for section 51 (xxxi. ); Kartinyeri and Another v Commonwealth of Australia, (1998) 152 ALR 540 at 599-600 (Kirby J), for section 51 (xxiv. )
503 Mabo and others v Queensland (No 2) (1992) 175 CLR 1 (HCA), 41-2 (Brennan J).
504 See Jago v Judges of the District Court of NSW (1988) 12 NSWLR 558 (CA NSW), where IL was found “at least as relevant to search for the common law […] with the guidance of a relevant instrument of international law to which this country has recently subscribed, as by reference to disputable antiquarian research concerning the procedures […] in parts of England in the reign of King Henry II” (Kirby P at 569).
It has been submitted that the relevance of CIL in determining common law rights is indeed mandatory so that an application of CIL can only be denied where it contravenes a statute. If this were the consequence of the "legitimate influence principle", the distinction between a source of the law and an automatic part of the law would be increasingly blurred. For what would be the difference between a mandatory influence that effects automatic changes in the common law and an automatic incorporation of a rule into the common law? Whether termed mandatory or legitimate, any influence so characterised would lead to a quasi-incorporation of CIL where no statutory rule to the contrary exists.

Before jumping to conclusions, one has to investigate further the origins of the concept of legitimate influence. The principle was introduced in the Mabo case partly because Australia had acceded to the First Additional Protocol to the ICCPR. Through this accession, Australia accepted the jurisdiction of the UN Human Rights Committee though Australia had not implemented the ICCPR rights in its national legislation. To prevent embarrassment to Australia, should the UN Committee on Human Rights find that Australia was in violation of the ICCPR, the High Court established the legitimate influence principle. Thus, common law rights parallel to the ICCPR guarantees could be established. However, it needs to be remembered that this doctrine must not lead to a back-door incorporation of conventional rules that have not been implemented by statute.

The legitimate influence principle is therefore only a common law correlate to the statutory interpretation principles described earlier. It can only be employed where the common law is ambiguous or if there exists a lacuna in the common law. The

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505 Donaghue, "Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia" (1995) 17 AdelRev 213-67 at 265-6, referring to Brennan J in Mabo ((1992) 175 CLR 1) using mandatory language such as that the common law doctrine of terra nullius "can hardly be retained" in the face of the abandonment of the international rule (Brennan J in Mabo at 41) and that a common law doctrine based on discrimination "demands reconsideration" due to international civil and political rights (Brennan J in Mabo at 42).

506 Thus termed by Allars, "International Law and Administrative Discretion" in Opeskin and Rothwell (eds) International Law and Australian Federalism (1997) at 245.

507 As described above First Part- Chapter Three -.

508 Mabo v Queensland (No 2) (1992) 175 CLR 1 (HCA).

legitimate influence principle therefore does not depart from the necessity of transformation\(^{510}\) and changes in the common law do not occur only “when the judge thinks a change desirable”. \(^{511}\)

Indeed, all the cases mentioned above deal with international treaty law rather than with CIL. This may be explained on the basis that in human rights matters, treaties provide much greater and clearer assistance than CIL, because at least the existence of an international rule here is undoubted. In human rights cases, courts seem not to draw a sharp distinction between unincorporated treaties and CIL rules.\(^{512}\)

The use of CIL is therefore limited to cases where the common law allows the use of the international rule. Where the common law is ambiguous or there exists a lacuna, it may indeed be mandatory for a judge to look at and give effect to CIL. In sum, the legitimate influence principle therefore resembles the statutory interpretation principle in its presumption that national law does not tend to be in conflict with IL. Where, however, it is in conflict, the rules that govern this conflict are to be consulted.\(^{513}\)

While the legitimate influence principle has been developed in Australia, perhaps as a cautious substitute for direct application of CIL rules, it is certainly not limited to that state. Although in states following automatic validation doctrines in one form or another, CIL is also automatically applicable if self-executing, non-self-executing rules of CIL may have an impact of their own on the common law. Such an impact is likely to resemble the legitimate influence principle.

5) Conclusions

Even in states adhering to doctrines of automatic validity, not all rules of CIL are also ipso jure applicable in national courts. These non-self-executing rules need a “hook”

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\(^{510}\) Allars, “International Law and Administrative Discretion” in Opeskin and Rothwell (eds) *International Law and Australian Federalism* (1997) at 245. And see already Cachia v Hanes and another (1991) 23 NSWLR 304, noting that this view “does not involve the error of incorporating [IL as such but uses it] as a source of filling a lacuna in the common law of Australia”, (Kirby P at 313).

\(^{511}\) *Dietrich v R* (1992) 177 CLR 292 at 320 (Brennan J).

provision in national law to be cognisable in the courts. Moreover, when national law needs to be applied, national courts are still receptive of IL. The courts ensure that the state is not in violation of its international obligations by interpreting national law as in accordance with IL. This is equally true where the exercise of executive discretion needs to take into account IL. The precondition of an initial ambiguity for interpretation of national law according to IL seems to have been abandoned.\textsuperscript{514} Without this requirement, national statutes implementing international treaties can be construed against the background of the treaty and subsequent developments in CIL. Where national human rights instruments need to be applied, the requirement of ambiguity is abandoned in favour of a contextual approach that allows reference to IL because national law and IL regulate the same rights. This also applies in Australia, where human rights protection is still a matter mainly for the common law. Moreover, CIL plays a significant role in the distribution of legislative power between the Commonwealth and the States.

\textsuperscript{513} See below, Third Part- Chapter Seven -.  
\textsuperscript{514} See also Keith "The Impact of International Law on New Zealand Law" (1999) 7 WaikatoLR 1-36 at 23, stating that "... ambiguity does not appear as a necessary prerequisite in the run of judgments."
Chapter Seven - The rules of conflict

When a judge has ascertained the rules of CIL applicable to a case at hand, an additional determination has to be made. This decision concerns the status which the CIL rule will be granted in national law. The decision is usually not made at all when there exists no national law applicable to the facts. However, a determination of status has to be made when national law governing the facts exists. This determination then consists of a rule for resolving conflict, that is, whether national or international law shall prevail and given sole effect, or whether there is an intermediate solution to be found. The rule of CIL could be in conflict with either statute or common law rules.

1) Conflicting Statutes

When a rule of CIL is in conflict with a statute, the question arises which should prevail.

An early case dealing with this question was Mortensen v Peters,\(^{515}\) where Lord Dunedin in the High Court of Justiciary held that, given the Sea Fisheries Acts, Herring Fisheries (Scotland) Acts and bye-laws, a Danish sailor on a Norwegian fishing vessel was rightfully indicted with wrongful fishing in the Moray Firth, despite the fact the events occurred, from the international point of view, on the high seas. The primacy of a national statute has been most definitively stated in the Polites case,\(^{516}\) where, the High Court of Australia had ascertained a rule of CIL prohibiting the conscription of foreigners to military service.\(^{517}\) It could not, however, give effect to this rule in Australia because the clear and unambiguous language of the National Security Act 1939-43 (Cth) provided that foreigners could be called upon. The principle thus

\(^{515}\) Mortensen v Peters (1906) 8 F 93 (Scot HCJ).
\(^{516}\) Polites v Commonwealth (1945) 70 CLR 60 (HCA).
established was that in a case of conflict between a domestic statute and IL, the national court was bound to apply the domestic statute. This principle is not unique to Australia. It is common to all states that follow the Diceyan tradition of parliamentary sovereignty. Only in Canada has it been claimed that the federal parliament did not have the power to legislate contrary to CIL, thus resolving the question of conflict in favour of CIL. The arguments were based on colonial history and formalist interpretations of the Statute of Westminster 1931. Without deciding the validity of these arguments in their time, it is sufficient to state that Canada, along with most former colonies, has now attained sovereign independence from any other state. It is therefore free to decide whether or not to allow its parliament to legislate contrary to CIL. Indeed, Canada now affirms the principle from Polites.

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517 Polites v Commonwealth ibid at 70 (Latham CJ), at 76 (Starke J), at 79 (McTiernan J), at 80 (Williams J).
519 The argument develops as follows: The Act confers legislative power on the Canadian Parliament. This Act is an Act of the British Parliament. Acts of the British Parliament are — by a well-established rule — presumed to be in accordance with international law. General phrasing should be interpreted as favouring international law rather than conflicting with it. Only in cases of plain language shall such Acts be interpreted as abandoning opposing international law. No Act conferring legislative power to Canada clearly opposes international law. Nor does any of those Acts expressly confer the authority to legislate contrary to international law. Thus, interpreted according to the principles just stated, these Acts do not confer upon Canada the power to legislate contrary to IL. Therefore, Canada does not possess such power.
520 One problem with this argument is the uncertainty of timing. When exactly did Canada advance to statehood? The Encyclopædia Britannica fixes the independence date to the Statute of Westminster 1931. The SCC dates it sometime between 1919 (separate signing of the Treaty of Versailles) and the Statute of Westminster 1931, Re Offshore Mineral Rights, [1967] SCR 792, 816. However, then Canada seems not to have had the power to legislate contrary to IL, see Croft v Dunphy [1933] AC 156, 164. Under IL, an entity is regarded as a state, when three essential elements are fulfilled — population, territory and government, see 1933 Montevideo Convention on Rights and Duties of States, art 1. While territory and population were doubtless in the case of Canada any time after 1867, the requirement as to government can be questioned. Essential for government is that it is capable of acting independently from foreign governments, Doehring, “State” in 10 EPIL 423, 426. This is, however, turns into a circular definition, because it defines the independent state by its independence. Without going into further detail, it should suffice to state that Canada has advanced to statehood and the exact date of such instance left to historic research into its behaviour around the 1930’s.
While this rule is firmly grounded on constitutional principles, it should be remembered that the state breaches CIL when this rule is applied. Indeed, as the New Zealand Court of Appeal put it, upon its plain wording “almost any general statute would displace well-settled doctrines accepted by New Zealand in its international relations”.

For that reason, the state should establish mechanisms to prevent a conflict between CIL and statutes. The question therefore shifts from the rules governing the conflict to the rules establishing a conflict.

The main premise is that a domestic statute is to be interpreted as in conformity with IL. This has been achieved through the presumption that, unless its intent is clearly expressed, the legislative body does not intend to abrogate or violate principles of IL. There is thus a prima facie assumption against a conflict between statute and CIL. The courts in New Zealand have been extraordinarily receptive to this principle and, where the language permits, have traditionally interpreted statutes as only operating within the limits prescribed by CIL.

In an early New Zealand case on that matter, a subdelegated power under the Education Act 1964 (NZ) was held not to cover regulations that discriminated against married women because the regulation’s “somewhat general terms... should not without compelling reason be taken to allow the introduction of a policy conflicting with the spirit of international standards...” The power to enact regulations was therefore limited by prescriptions from IL.

In Governor of Pitcairn v Sutton the New Zealand Court of Appeal held that the Employment Contracts Act 1991 (NZ) did not supersede the doctrine of foreign sovereign immunity. The court held that while the terms of the Act were capable of

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522 New Zealand Airline Pilots’ Association Inc v Attorney-General [1997] 3 NZLR 269 (CA) at 289 (Keith J for the Court).
523 Bloxam v Favre (1883) 8 PD 101 at 107 (Hannen P). In Australia, this rule was pronounced in the High Court of Australia even prior to Polites: Barcelo v Electrolytic Zinc Company of Australia Ltd (1932) 48 CLR 391 (HCA) (Dixon J) affirming Forster v Forster (1907) VLR 160 (Cussen J at 164).
525 Governor of Pitcairn and Associated Islands v Sutton [1995] 1 NZLR 426 (CA). A NZ citizen formerly employed with the office of the Governor of Pitcairn brought a personal grievance action under the Employment Contracts Act 1991 (NZ), the Governor pleaded sovereign immunity.
overriding the doctrine of sovereign immunity, it should not be read that way. It was equally capable of being read as not to apply extra-territorially or to override sovereign immunity and that reading was to be preferred. The general wording of the Act had to be construed so as not to abrogate this well established principle.

The more recent case of Sellers v Maritime Safety Inspector\textsuperscript{526} concerned the application of section 21 of the Maritime Transport Act 1994. This section imposes a duty on ships' masters leaving a NZ port to give notice of the voyage to the Director and to comply with certain security provisions. Sellers did not comply and was prosecuted and convicted under the Act. On appeal he claimed the freedom of the high seas as a defence.\textsuperscript{527} Delivering the judgment of the Court of Appeal, Keith J held that the legal situation under IL should form the background of the case and the requirements set under the section were to be exercised in accordance with IL. This, it was said, was a long established principle of construction in Commonwealth courts and meant that the scope of the section would change when IL changes, without the necessity of formally changing national law.\textsuperscript{528}

The situation in Sellers differs from the "standard" case of statutory interpretation according to IL, involving the construction of ambiguous terms to conform to international rules.\textsuperscript{529} The view advanced here expressly allows IL to limit the operation of national law rather than merely clarifying its terms. Here, there is no requirement for ambiguity or gaps in national legislation. Indeed, the provisions of section 21(1) of the Act are comprehensive and quite clear. Yet, the significance of Sellers for the present investigation may be considered as limited. Firstly, the case was primarily concerned

\hspace{1cm}\hspace{1cm}\hspace{1cm}\hspace{1cm}526\textit{Sellers v Maritime Safety Inspector\textsuperscript{[1999]} 2 NZLR 44 (CA)}.

\hspace{1cm}\hspace{1cm}\hspace{1cm}\hspace{1cm}527 Whether this defence was also argued in the instances before cannot conclusively be said. Morris J in the HC quoted from Sellers' argument: "I am protesting on religious grounds to attempts to restrict the free and private movement on the open sea" (\textit{William Rodman Sellars v Inspector of Maritime Safety}, unreported, HC Whangarei AP16/97 16.02.1998 (Morris J) at 6) and referred to "lengthy submissions" (ibid) but unfortunately did not set out all of the arguments in the judgment. It is therefore difficult to say whether the HC in fact denied the interpretation now prevalent or whether Morris J did not rule upon the international issue at all.

\hspace{1cm}\hspace{1cm}\hspace{1cm}\hspace{1cm}528 "... for centuries national law in this area has been essentially governed by and derived from international law with the consequence that national law is to be read, if at all possible, consistently with the related international law. That will sometimes mean that the day-to-day (or at least year-to-year) meaning of national law may vary without formal change." \textit{Sellers v Maritime Safety Inspector\textsuperscript{[1999]} 2 NZLR 44 (CA)} at 62.

\hspace{1cm}\hspace{1cm}\hspace{1cm}\hspace{1cm}529 For the interpretation rules see aboveThird Part-Chapter Six -.
with IL under UNCLOS\textsuperscript{530} and declarations under this convention. On the other hand, the court considered UNCLOS as codifying CIL, which existed prior to the convention, and CIL was specifically argued to allow the exercise of the powers conferred in section 21(1) of the Act. Secondly, Keith J made it clear that the established rules apply only in the subject area of maritime jurisdiction. However, maritime matters are only the most frequent issues to arise when it comes to limiting a state’s jurisdiction. This should not be taken to mean that the principles established in Sellers are \textit{per se} inapplicable to other areas of IL. Indeed, the earlier cases of van Gorkom and Sutton give examples of reading down a statute under rules of CIL in matters other than maritime law.

CIL thus becomes an important consideration in establishing the scope of application of national statutes. The rule from Polites is therefore a last resort only, where statutes are in clear conflict with IL and cannot be construed otherwise. It appears that the Polites rule, though reaffirmed in various dicta,\textsuperscript{531} has found no further application because the interpretation presumption has prevented it.

\section*{2) Conflict with common law}

Rules of CIL may also conflict with rules of common law. The statutory conflict principles are based on the doctrine of parliamentary sovereignty. While the principles for conflict of CIL with statute are well-settled, the conflict rules for common law seem ambiguous and doubtful.

CIL is applied nationally as such or as part of the common law. There could be a rule of conflict in force, resembling the one for the conflict between statutes and CIL. A part of the judgment of Lord Atkin in \textit{Chung Chi Cheung} provides the point of departure, stating that the courts will treat an ascertained rule of CIL as incorporated and hence apply it “so long as it is not inconsistent with rules ... finally declared by their tribunals”\textsuperscript{532} This would mean that CIL is not applicable when it is in conflict with established rules of the common law. No CIL could ever become part of the common

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  \item \textsuperscript{531} \textit{Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs} (1992) 176 CLR 1 (FCA)
  \item \textsuperscript{532} \textit{Chung Chi Cheung v R} [1939] AC 160 at 168 (Lord Atkin).
\end{itemize}
law because every rule incorporated or transformed would inevitably alter the common
law. It could thus be said to be inconsistent with common law. Only in cases where the
common law already parallels CIL, could the international rule be applied. In such a
case the courts will apply the national rather than the international rule. Consequently,
CIL would have no effect at all in national law. This view is therefore untenable and
needs to be modified. The “rules finally declared by the tribunals” must be something
less than the whole body of the common law. Further judicial practice must be taken
into account to establish what these rules might be. The practice varies significantly
between the different jurisdictions.

a) The Source View and the Prevalence of Common Law

In Australia, it is well established that national law is not subordinate to IL. The
common law does not necessarily conform to IL and the legitimate influence principle
requires a gap or ambiguity in national common law for CIL to have an influential
effect.\(^{533}\) This would mean that where there exists a clear common law rule, it would
prevail over CIL. The test is therefore not between the common law as a body and CIL
but between the particular rules. However, not every single rule of the common law
precludes regard to CIL. Rather, the fundamental “skeleton of principles that gives the
body of ... law its shape and internal consistency”\(^{534}\) must be upheld.

This rule of conflict may be linked to the rules of validation under the Australian
source view whereby CIL is not automatically valid in national law but the judge
pronounces a national common law rule by reference to CIL. The relevance of CIL is
therefore subject to the general rules that limit judicial law-making. These prohibit the
pronunciation of new rules or for existing rules to be influenced by factors that would
infringe basic principles of the system. Consequently, CIL yields not only to statute but
also to judicial restraints in law making. The need for judicial pronouncement thus adds
another weakness to the use of CIL in Australia. On the other hand, in this way
Australian judges establish themselves as watchdogs over whether and to what extent an
international rule should have influence on Australian law when fundamental common

\(^{533}\) See above Third Part- Chapter Six -4).
\(^{534}\) Mabo v Queensland (1992) 175 CLR 1 at 29 (Brennan J).
law policies are thought to be endangered. As such, Australian courts can safeguard the national interest of legal integrity against the intrusion of possibly dubious international principles.

\[\text{b) Trendtex and the Scope of Stare Decisis}\]

In the United Kingdom, as common law, CIL would usually share the fate of common law as established by precedent. This is true for its subordination to statutes. Moreover, common law rules cannot come into existence when they conflict with other common law rules recognised beforehand.

The judgment of Lord Denning MR in *Trendtex*\(^{535}\) is relevant at this point. It will be remembered that in order to be able to apply the doctrine of restricted immunity in English law, Lord Denning MR held that the doctrine of stare decisis does not apply when CIL rules are incorporated. Two interpretations of the rule in *Trendtex* seem possible. Firstly, the exception could be limited to cases of changing international law. Thus, when an international rule had been applied in an English court and changed subsequently, it would still be possible for a later court to apply the new rule without infringing stare decisis. Thus understood, the exception would be limited to earlier cases based on the international rule. This would have been sufficient to decide *Trendtex* and indeed, in his concurring judgment Shaw LJ hesitated here as he held:

> "The rule of stare decisis operates to preclude a court from overriding a decision which binds it in regard to a particular rule of (international) law, it does not prevent a court from applying a rule which did not exist when the earlier decision was made if the new rule has had the effect in international law of extinguishing the old rule."\(^{536}\)

This passage relates only to changes in IL and the exemption from stare decisis only operates where the precedent stemmed from IL and had then been abandoned.

Still, one passage of Lord Denning's judgment leaves open another interpretation: "... when rules of international law change, our English law changes with them."\(^{537}\) Thus, the exception from stare decisis could reach over all common law, covering also

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536 *ibid* at 579 (Shaw LJ).  
537 *Trendtex Trading Corporation v Central Bank of Nigeria* ibid at 553.
precedents which do not rest on CIL. In this way CIL would be superior to common
law. A newly established rule of CIL would change the common law of England
without regard to what that law provided beforehand. A similar view was expressed by
Nourse LJ in the Tin Council case where he said: “the rules of international law from
time to time in force ..., subject always to statute, are supreme”.538 Thus, both the views
of Lord Denning and Nourse LJ reject Lord Atkin’s rule in Chung Chi Cheung, which
was taken as point of departure above. However, this rule was declared in the Judicial
Committee of the Privy Council, a judicial body whose precedents are not binding on
English courts. Thus, the Trendtex rule can be read in its wide meaning without
violating binding law. In fact, no English court had ever held such a rule to be in
existence. Moreover, Lord Atkin’s test as to the inconsistency with national precedent is
not quite clear. Technically, at least the House of Lords would not be bound by its own
prior decisions in deciding whether or not to incorporate a rule of CIL. Furthermore, all
cases involving CIL can be distinguished from prior purely national cases because their
facts (now) include an internationally relevant element. Therefore, the prior rule would
not be applicable. The prior rule would be superseded by a change in IL, which in the
later case contains a rule that did not exist in the earlier case. Similarly, the Atkin rule
provides further temporal difficulties that render a conflict between CIL and common
law impossible. Fawcett made the first point: “if the courts treat the relevant rule as
incorporated, how can they decide inconsistently with it?”539 On that view, national
common law comes into effect from the moment of declaration by the court. If there
existed a customary international rule by that time, it had to be incorporated, thus
depriving the court of deciding inconsistently with it. Since CIL would effectively be
part of the common law, a conflict between the two would be unthinkable. Another
view would see common law as pre-existing law established from principle and
immemorial custom discovered by the courts. This would mean that all common law
existed prior to all CIL. Aside from the fact that this static notion of the common law is
strictly beside the point from the practical perspective (the common law indeed
changes), it would seem possible even to consolidate this view with the primacy of CIL
over common law. For, if common law is based on immemorial custom and the

538 Maclaine Watson & Co Ltd v Department of Trade and Industry [1989] 1 Ch 72 (CA) at 207 (Nourse LJ)
reference norm is a rule of common law then the reference norm would also be a rule established from immemorial custom. This means that all common law is established only subject to the reference norm which provides for CIL to be part of common law. Thus, inherently all rules of common law would be consistent with rules of CIL and a conflict therefore could not occur.

In the end, this would result in CIL overriding common law because whenever there exists CIL, it must be applied. The effect is a rule of common law with the same content as the international rule. Thus, the stare decisis exception applies globally and not only to cases whose reasons rest upon CIL. The question remains whether this results from Trendtex or whether it follows from the logic of the incorporation doctrine. In view of the difficulties of Lord Atkin’s rule, the objections made above were valid before Trendtex was decided as they are essentially precursors of the incorporation doctrine and CIL’s automatic applicability as common law. The same is true for the option to distinguish cases relevant to CIL from earlier cases decided purely on national law. The earlier case could be decided that way because there existed no conflicting rule of CIL. After the “birth”, as it were, of the international rule, this became automatically part of the common law and, as the later and the more specific rule,540 prevailed over the older common law. The rules applicable in cases of conflict between CIL and common law thus follow from the nature of the incorporation doctrine which therefore provides a reference rule as follows: “The common law of England automatically conforms with the rules of CIL”.

c) Canada, Direct Validation and Conflict with Common Law

If it is accepted that CIL has direct validity of itself and not as parallel common law in Canada, then a further question of its ranking arises. As discussed above, the Australian doctrine has held CIL inferior while in the United Kingdom it is superior to the common

539 Fawcett, “The Judicial Committee of the Privy Council and International Law” (1967) 42 BYIL 229 at 234.

540 If common law is seen as pre-existing from ancient custom or principle, it is inherent that all CIL is younger than all common law. CIL is also “special” compared to national law because it is applicable only to cases involving some kind of international relevance. The fact that IL is more and more seen to also apply in situations earlier thought to be covered by national law only, does not change this principle, it merely increases its scope. The rule lex specialis derogat lege generali is therefore in principle applicable.
law. That was linked to the mechanism of validation. In Canada, such a link does not clarify the situation because if CIL is valid as itself, this says nothing about the ranking of international rules in the national legal system. Since Canadian law confers on CIL a status outside the national sources of law, the status of CIL is not entirely determined by the mode of validation. CIL could prevail over common law or it could be inferior.

One Canadian case, already referred to, is also significant in this context. In the *Immunities of Members of US Forces* reference,\(^{541}\) where the Supreme Court had to consider whether visiting United States military troops were, in the absence of a statute, immune from process in Canada, the majority held that even if a rule to that effect existed under CIL, it could not be applied in Canada because of a constitutional principle to the contrary:

"[t]he fundamental constitutional principle with which it [the CIL rule of immunity of visiting armed forces] is inconsistent is a part of the law of every province of Canada ... Nothing short of legislative enactment, or its equivalent, can change this principle."\(^{542}\)

While CIL was thus considered to be subordinate to national law, priority is nevertheless limited to constitutional principles. Whether the proposition is still valid in Canada and what exactly are constitutional principles is doubtful. With the introduction of the Constitution Act 1982, the legal setting has changed significantly. Surely, CIL is inferior to the Constitution,\(^{543}\) but constitutional principles respected in the United Kingdom are not now automatically part of Canadian constitutional law. In fact, it could be argued that the only principles with constitutional force are now numbered in section

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\(^{541}\) *Re Immunities of US Forces* [1943] SCR 483 (SCC).

\(^{542}\) *Ibid* at 496-7 (Duff CJ, Hudson J concurring). Otherwise, the paragraph from which this quote is taken could be interpreted as requiring a specific recognition of the rule to be valid in national law or as reluctant to find a rule of IL. The (somewhat cryptic) paragraph reads:

"I find it impossible to escape the conclusion that the United Kingdom has never assented to any rule of international law by which British courts are restricted in their jurisdiction in respect of visiting armies or members of them. In other words, no such rule as that now insisted upon has ever been a part of the law of England; and this applies equally to Canada. The fundamental constitutional principle with which it is inconsistent is a part of the law of every province of Canada, the constitutional principle by which, that is to say, a soldier does not, in virtue of his military character, escape the jurisdiction of the civil courts of this country. Nothing short of legislative enactment, or its equivalent, can change this principle."

\(^{543}\) See the Constitution Act 1982 section 53 (1) "... any law that is inconsistent with the provisions of the constitution is ... of no force or effect." (my emphasis). It is submitted that the use of "any law" is plain wording as to include international law. It is therefore clear that IL would yield to constitutional provisions.
52(2) of the Constitution Act 1982. This means that the “fundamental constitutional principles”, to which CIL is said to be inferior, are now limited to principles enshrined in the (written) Constitution of Canada. This, however, already follows from the supremacy clause of the Constitution. There are thus now no more constitutional principles superior to CIL other than those provided for in the Constitution 1982.

CIL is therefore applied in Canada if not in conflict with the Constitution Act or a statute but it supersedes common law.

There are therefore differences between the various mechanisms of validation. The Australian doctrine requires judicial enactment and thus allows the common law to prevail over CIL. The English incorporation doctrine abstains from a specific enactment and holds CIL automatically valid as common law. So the rules of CIL, if in conflict with common law found earlier, prevail over national common law. The Canadian doctrine holds CIL valid as such, though no mandatory rules governing a conflict follow from the mechanism of validation. While no clear-cut decision on the conflict between common law and CIL has yet been made, Canadian courts so far have denied the application of CIL only where it was in conflict with constitutional principles.

3) Conclusions

While all these jurisdictions insist upon the primacy of statute over IL, the only case in which this principle led to an actual conflict of national and international law was Polites. Other cases have avoided a conflict by application of a purposive approach to the interpretation and operation of national statutes.

In the case of conflicting common law rules the situation is less clear and more complex. In the United Kingdom, a conflict between CIL and common law cannot occur because CIL is part of the common law. The Canadian approach of direct validation does not ipso jure contain a rule governing the conflict of CIL and national common law but it seems that common law is not superior to CIL. By contrast, the position is quite different in Australia. There, the “source” view demands that judges
validate CIL by an act of judicial discretion, which cannot be exercised in favour of the international rule where a national rule to the contrary exists. CIL can therefore only be made part of Australian law so far as it is not in conflict with that law. No court in New Zealand has yet had to consider a situation of conflict between CIL and common law. However, it is likely that the courts would follow the British, rather than the Australian approach.
Special attention must be paid to cases involving individual criminal responsibility under IL. In these cases, two issues regularly need to be determined. First, the conduct condemned by the international crime must also be prohibited under national law. Secondly, the national court needs to determine whether it can exercise criminal jurisdiction over acts committed by foreigners abroad. While no case involving international crimes has yet been decided in New Zealand’s courts, a review of cases in other jurisdictions will provide an insight into how these questions are best resolved.

1) Jurisdictional Provisions in the Canadian Criminal Code – the Finta Case

In the mid 1980s, rumours surfaced that a number of perpetrators of war crimes in World War II had found refuge in Canada. After a commission of inquiry was established to investigate these allegations, it turned out that the number of war criminals believed to be in Canada exceeded their actual number greatly. Nonetheless, the commission suggested legislative changes to provide for jurisdiction to try those war criminals. This proposal resulted in an amendment of the Criminal Code whereby subsections 3.71-3.77 were added to section 7.

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545 As to the background setting of the Canadian cases see Williams, “Laudable Principles Lacking Application: The Prosecution of War Criminals on Canada” in McCormack and Simpson (eds), The Law of War Crimes (1997), 151-170.


547 An Act Respecting the Criminal Law (1985-III) RSC ch 46. The subsections – in their relevant parts – provide:

"Jurisdiction: war crimes and crimes against humanity
Only one of the few cases prosecuted under this amendment reached the Supreme Court of Canada,\(^\text{548}\) and even then it did not result in a conviction. Nevertheless, this case\(^\text{549}\) raised several issues as to the relationship between IL and Canadian domestic law. The questions raised included whether the legislation had retroactive effect and was therefore unlawful, and which requirement of mens rea existed when war crimes were concerned. The majority of the Supreme Court held that while subsections 3.71-3.77 of section 7 of the Criminal Code introduced new crimes into Canada’s legal system, they did not violate the prohibition of *ex post facto* criminal laws. The dissenters held that the amendment merely conferred jurisdiction on Canada to try acts that occurred abroad and constituted war crimes or crimes against humanity, and to

(3.71) Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if, ... 
(b) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person’s presence in Canada and, subsequent to the time of the act or omission, the person is present in Canada. ... 
(3.73) In any proceedings with respect to an act or omission referred to in subsection (3.71), notwithstanding that the act or omission is an offence under the laws of Canada in force at the time of the act or omission, the accused may, subject to subsection 607(6), rely on any justification, excuse or defence available under the laws of Canada or under international law at that time or at the time of the proceedings. ... 
\[\text{Definitions}\]
(3.76) For the purposes of this section, ... 
“crime against humanity” «crime contre l’humanité»
“crime against humanity” means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations; 
“war crime” «crime de guerre»
“war crime” means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.”

\(^{548}\) *R v Finta* [1994] 1 SCR 701. The other cases under this provision of the Act were *R v Pawlowski* (1992) 13 CR 2d 228, which was stayed because key witnesses were unable or unwilling to travel to Canada and *R v Reisetter* (unreported, OntGenDiv, mentioned in Williams, as referred to below) where important witnesses died before the commencement of the trial and the case was dismissed, see Williams, “Laudable Principles Lacking Application: The Prosecution of War Criminals on Canada” in McCormack and Simpson (eds), *The Law of War Crimes* (1997), 151-170 at 169.

\(^{549}\) *R v Finta ibid.* The accused was the officer in charge of a deportation station in Hungary. In this position, he was said to have committed various acts amounting to crimes against humanity. He claimed that he had acted pursuant to a decree of the Hungarian ministry of interior, the “Baky-Order” that was part of the Nazi’s “Final Solution”.

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adjudicate them according to Canadian domestic criminal law. Under this view, the problem of retroactivity did not arise, because the alleged crimes (unlawful confinement, robbery, kidnapping and manslaughter) were crimes under the Criminal Code at the time the acts had been committed. From these different starting points, the majority and minority judges reached different conclusions as to the requirement of mens rea for the crimes committed. Under the majority view, the prosecution had to prove that the accused knew his acts constituted war crimes or crimes against humanity thus imposing a high requirement as to mens rea. On the other hand, the dissenters held that since the effect of the newly introduced subsections was merely jurisdictional, the standard of mens rea remained the same as in a domestic case.

On the majority view, the amendment to the Criminal Code had the effect of implementing, *inter alia*, the CIL relating to crimes against humanity. Whether this means that despite the adoption doctrine there existed no such crimes in Canadian law before that enactment is unclear. The legislation could also be viewed as having enacted a parallel statutory provision to an existing crime under the common law.

The dissenters seemed even more reluctant to apply CIL. In their view, the crimes named in section 7(3.71) of the Criminal Code had no application in Canada and their definitions merely served to establish jurisdiction over acts committed abroad. From the criminal point of view this approach had the advantage that the domestic judge has to apply familiar domestic criminal law and its requirements. Moreover, the amendment was made to the general part of the Code which does not define crimes but, *inter alia*, generally defines the jurisdiction of Canada.550

Further, the majority's view did not provide safeguards from the defendant's perspective. On their view, conventional or customary international crimes became part of Canadian statute law without adopting the wording of the international provisions. By entering into a treaty, the executive branch of government could change the criminal law of Canada without legislative assent. Under the prevailing doctrine, this is not

permitted even for treaties on matters other than criminal law. Secondly, the criminal law principle of *nulla poena sine lege* (that is, *sine lege scripta*) would be compromised. A subject of the law would perhaps not know which conduct was actually prohibited. The legal situation would change through executive acts, such as signature, ratification or accession, which are unknown to the individual. At times, this could even happen by acts of foreign states – for example when Canada has already ratified a convention but further ratifications are necessary for its entry into force. While the first objection arises only under treaty law, the second is applicable to CIL crimes as well. Even more than with treaties, the scope, content and process of development of customary international crimes are beyond the knowledge of the individual and if these principles are referred to directly then the integrity of criminal law is no longer guaranteed.

On the other hand, the dissenting view encounters problems when Canadian criminal law does not provide for certain acts to be criminal while these are international crimes. This situation is, however, the general dilemma when IL is not adopted in its terms.

Which approach actually prevails in Canada is uncertain, as is the question as to how the case would have been decided had the Criminal Code not been amended. Since no indictment had been issued before the amendment was in effect, it is probable that international crimes were not part of national law and no jurisdiction over such crimes existed in Canada.

2) The *Pinochet* Cases and international criminal law

A recent case in the United Kingdom has concerned the possibility of an extradition to Spain of Senator Augusto Pinochet Ugarte, former head of state of Chile and alleged perpetrator of numerous atrocities against the Chilean population during the years of 1973 to 1988. Following an extradition request from Spain, two different magistrates issued two warrants for arrest and Pinochet was arrested. In the first proceeding for judicial review, the divisional court quashed the warrants because Pinochet enjoyed immunity from jurisdiction under the State Immunity Act 1978, but the quashing was

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551 See above First Part- Chapter Two -1).
stayed pending an appeal to the House of Lords. The first hearing in the House lead to
the restoration of the second warrant.552 Three of the five Law Lords held that Pinochet
did not enjoy immunity from suit in the United Kingdom because the acts alleged
amounted to torture as mentioned in the UN Torture Convention, for which no
immunity could be granted under IL and the absolute immunity granted under the State
Immunity Act 1978 did not apply to criminal and extradition proceedings. However, a
rehearing of the case was ordered when it became known that Lord Hoffman had links
with Amnesty International, one of the interveners in the case – a relationship which
gave the first decision the appearance of being biased.553 In the second hearing, a panel
of seven Law Lords decided that only acts committed after 1988 were extradition
crimes for which no immunity would be granted.554

The majority, lead by Lord Browne-Wilkinson, found that no immunity was to be
granted to former heads of state for acts of official torture. However, in order to be
extradition crimes, the alleged acts had to be crimes under English law at the time of
commission. While this could be established for acts of torture committed after 29
September 1988 when section 134 of the Criminal Justice Act 1988 came into force,
torture committed by foreigners abroad was not a crime under English law prior to that
date. Lord Goff dissented and held that immunity was available even after that date.
Lord Millett, on the other hand, followed the majority, as he found no immunity for
former heads of state for acts of torture, though he dissented as to the question of
extradition crimes. He held that while the crime had to be a crime under English law at
the time of commission, this was the case for torture committed by foreigners abroad
well before 1973 because the crime had not only been codified in the Torture
Convention but was also recognised under CIL.

The majority view of Lord Browne-Wilkinson and the opinion of Lord Millett
require closer examination as the majority required statutory enactment for torture
committed by foreigners abroad to be a crime in English law, whereas Lord Millett did

552 R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte [2000] 1 AC 61
(HL).
553 R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2) [2000] 1 AC
119 (HL).
not. To analyse the results under both views as to the requirements of national law, it is necessary to outline the conclusions both Law Lords reached as to the state of IL.

Lord Browne-Wilkinson distinguished between the concept of personal liability for a crime of torture under IL and the jurisdiction of a state to sit in judgment over such crimes. Torture, in his view, was an act that had attracted personal responsibility since at least 1946 and was in the course of time detached from its initial linkage to war or other international hostilities. Even later, the prohibition of torture became international *jus cogens*, "an absolute value from which nobody must deviate".\(^{555}\) Thus, there existed inescapable individual liability for acts of torture under IL. The question then was whether and which courts could and would exercise jurisdiction to enforce such liability. On that matter, Lord Browne-Wilkinson said:

"The *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences *jus cogens* may be punished by any state because the offenders are ‘common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution’."\(^ {556}\)

Thus, at CIL states are entitled to exercise jurisdiction over acts of foreigners committed abroad given these acts constitute an offence *jus cogens*. However, the development did not stop there:

"the objective was to ensure a general jurisdiction so that the torturer was not safe wherever he went. ... What was needed therefore was an international system which could punish those who were guilty of torture and which did not permit the evasion of punishment by the torturer moving from one state to another."\(^ {557}\)

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\(^ {554}\) *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147 (HL).*

\(^ {555}\) *Prosecutor v Furundzija* (unreported), International Criminal Tribunal for the Former Yugoslavia, Case No IT-95-17/1-T 10 (10 December 1998), at para 154, URL: <http://www.un.org/icty/furundzija/trialc2/judgment/main.htm>, as referred to in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147 (HL)* at 198 (Lord Browne-Wilkinson). Note the language used: “nobody” must deviate from torture; this clearly establishes a duty of individuals rather than states.

\(^ {556}\) *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147 (HL)* at 198 (Lord Browne-Wilkinson). The quote stems from *Demjanjuk v Petrovsky* (1985) 603 FSupp 1468.

\(^ {557}\) *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3) ibid* at 198-9 (Lord Browne-Wilkinson), my emphasis.
A system of the kind described by Lord Browne-Wilkinson had been established by the Torture Convention when it introduced the principle aut dedere aut judicare\textsuperscript{558} into the international jurisdiction over crimes of torture.\textsuperscript{559} Therefore, before the Torture Convention was negotiated, there existed a right for every state to exercise jurisdiction over acts of torture committed abroad, while after a state became a party to the convention, it was under a positive duty to exercise jurisdiction in either adjudicating the matter or extraditing the alleged offender to another state that would try the case. However, Lord Browne-Wilkinson’s judgment becomes somewhat contradictory when, in considering whether state immunity \textit{ratione materiae} should be granted for official acts of torture, he held that before the coming into force of the Torture Convention,

"... there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. ... But ... the Torture Convention did provide what was missing: a worldwide universal jurisdiction."\textsuperscript{560}

Obviously, what is meant here is that the convention provided a \textit{compulsory} universal jurisdiction. How that is relevant to the claim of state immunity \textit{ratione materiae} is unclear. In Lord Browne-Wilkinson’s view, the Torture Convention had not introduced a new crime into IL. Thus, the content of the international crime of torture remained the same as it had been previously under CIL. Therefore, the reasoning\textsuperscript{561} with which Lord Browne-Wilkinson rightly rejected the application of the doctrine of state immunity \textit{ratione materiae} to torture under the convention must also have applied before the Torture Convention was enacted.

\textsuperscript{558} This is the forum state’s duty to either try or to extradite alleged perpetrators of crimes which attract such a duty. This expression, as opposed to the traditional term \textit{aut dedere aut punire} (either extradite or punish) reflects better the modern view and respects the principle \textit{ne bis in idem}. The modern notion obliges the state to exercise jurisdiction rather than to impose a penalty on alleged offenders. It therefore recognises that a person charged with international crimes may well be held not guilty. Where such result occurs, the state has still exercised its duty to try (\textit{judicare}). Under the traditional notion such a result would still have subjected the state to an obligation to extradite because the forum state had not punished (\textit{punire}). Then, the alleged perpetrator would be subject to, at least, two processes for the same act, which opposes \textit{ne bis in idem} (double jeopardy).

\textsuperscript{559} \textit{R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)} [2000] 1 AC 147 (HL) at 200-1 (Lord Browne-Wilkinson).

\textsuperscript{560} \textit{R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)} \textit{ibid} at 204-5 (Lord Browne-Wilkinson).

\textsuperscript{561} \textit{R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)} \textit{ibid} at 205 (Lord Browne-Wilkinson): “How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?”
Lord Millett also considered the prohibition of torture as a rule of international *jus cogens*. As to the matter of jurisdiction over this crime when committed abroad, he held that the *Eichmann* case in the Israeli Supreme Court was extremely significant.\(^5\) While in that case a national statute conferred extraterritorial jurisdiction on Israeli courts, the court also held that the statute did not violate principles of IL. Further, Lord Millett held that, since the court in *Eichmann* approved the general consensus of writers that war crimes attracted universal jurisdiction, it seems to have recognised "an independent source of jurisdiction derived from customary international law, which formed part of the unwritten law of Israel, and which did not depend on the statute."\(^6\) With respect, the Supreme Court's decision does not support this conclusion. The decision in *Eichmann* upheld the statute only as in accordance with a permission under IL. In addition, the academic sources referred to only mentioned a recognised principle of IL without stating its implications for national law. Although offering sound reasons for the existence of a right to exercise jurisdiction under CIL, later American\(^7\) and international\(^8\) cases are also of no assistance. However, Lord Millett concluded that torture was a crime over which extraterritorial jurisdiction could be exercised by courts in the United Kingdom even before the Criminal Justice Act 1984:

> "Every state has jurisdiction under customary international law to exercise extra-territorial jurisdiction in respect of international crimes which satisfy the relevant criteria. Whether its courts have extra-territorial jurisdiction under its internal domestic law depends, of course, on its constitutional arrangements and the relationship between customary international law and the jurisdiction of its criminal courts. The jurisdiction of the English criminal courts is usually statutory, but it is supplemented by the common law. Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had

\(^{5}\) *Attorney-General of Israel v Eichmann* (1962) 36 ILR 5 as referred to in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 3) ibid at 273 (Lord Millett).

\(^{6}\) *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 3) ibid at 274 (Lord Millett).

\(^{7}\) *Demjanjuk v Petrovsky* (1985) 603 FSupp 1468 (aff'd 776 F 2d 571) at 1472: "International law provides that certain offences may be punished by any state because the offenders are enemies of all mankind and all nations have an equal interest in their apprehension and punishment." (emphasis added).

\(^{8}\) *Prosecutor v Furundzija* (unreported), International Criminal Tribunal for the Former Yugoslavia, Case No IT-95-17/1-T 10 (10 December 1998): "At the individual level, that is, of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute, and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction." (emphasis added).
extra-territorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law.\textsuperscript{566}

The crux of the rule under CIL, as distinct from the provision of the Torture Convention, was that "[w]hereas previously states were entitled to take jurisdiction in respect of the offence wherever it was committed, they were now placed under an obligation to do so."\textsuperscript{567} Therefore, if anything was part of the common law, it was an entitlement to exercise jurisdiction over foreign acts of torture. As Lord Millett – rightly – said, whether this means the English courts exercise extraterritorial jurisdiction under English law, is a matter for English law to regulate.

The answer therefore lies in national, not in international law. The Extradition Act 1989 required an extradition crime, which means that an act needs to be a crime under the law of the requesting state as well as under United Kingdom law. The acts alleged were acts that amounted to torture as defined under the Torture Convention. These were, certainly, crimes under United Kingdom law before the enactment of the Criminal Justice Act 1988 if committed in British territory. However, what was at stake in \textit{Pinochet} were crimes of torture committed by a foreigner in foreign territory. While these crimes became statutory crimes in the United Kingdom in 1988, under CIL the United Kingdom was entitled to exercise jurisdiction over such crimes before that date and even before the Torture Convention. Thus there existed a permission to exercise universal jurisdiction over crimes of torture committed abroad. Although such a rule would have become part of English law under the incorporation doctrine, it would nevertheless still be a permissive rule only and the exercise of a permission under IL is a matter for the legislature, not for the courts to resolve. Therefore, an Act of Parliament was necessary to confer on English criminal courts universal jurisdiction over crimes of torture committed by a foreigner abroad. On the other hand, a duty to exercise extraterritorial jurisdiction over acts of torture was clearly introduced by the Torture Convention, which, being an international treaty, required legislative enactment to take effect in national law. So here again, an Act of Parliament was necessary to invest English courts with universal jurisdiction over torture.

\textsuperscript{566} \textit{R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)} [2000] 1 AC 147 (HL) at 276 (Lord Millett).

\textsuperscript{567} \textit{R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)} \textit{ibid} at 277 (Lord Millett).
3) The Australian War Crimes and Genocide Cases

The Australian cases need to be distinguished into two groups. Firstly, as in Canada, the Commonwealth enacted war crimes legislation to try and punish crimes by foreigners committed abroad. The second group of cases concerns Aboriginal claims that raise the issue of whether genocide had been or continued to be committed against Aboriginal peoples within Australia.

a) The War Crimes Legislation in Australia

As in Canada, the Australian Commonwealth felt it necessary to enact the War Crimes Amendment Act 1988 (Cth) which almost entirely repealed and replaced the old War Crimes Act 1945 (Cth). Instead of providing for jurisdiction of Australian courts over acts committed abroad, the amendment enacted complete definitions of crimes and limitations as to time and place of application. The High Court had to determine whether this statute was a valid exercise of the constitutional power of the Commonwealth. None of the Justices thought it necessary that Australia was under an obligation to enact the legislation - it was enough that it concerned criminal conduct external to Australia. Rather pragmatically, the majority of the High Court held that since the Act covered conduct abroad, it was within the foreign affairs power of the Commonwealth Parliament. Brennan J, dissenting on other grounds, held that “a

569 The War Crimes Act 1945 (Cth) after this amendment has a confusing structure which is not easily accessible.
Section 9 of the Act provides:
“(1) A person who:
(a) on or after 1 September 1939 and on or before 8 May 1945; ... committed a war crime is guilty of an indictable offence against this Act. ...”
Section 7 provides:
“(1) A serious crime is a war crime if it was committed:
(a) in the course of hostilities in a war; ...”
Section 6 defines what, according to the Act, serious crimes are. These include murder, manslaughter, rape and similar offences but the section makes no reference to IL.
Section 5 provides a “war” for the purpose of the Act to be events that “occurred in Europe in the period beginning on 1 September 1939 and ending on 8 May 1945.” For an appraisal of the Act see Triggs, “Australia’s War Crimes Trials: All Pity Choked” in McCormack and Simpson (eds), The Law of War Crimes (1997) 123-49 at 134-44.
570 Polyukhovich v the Commonwealth (1991) 172 CLR 501 at 530-531 (Mason CJ), at 599-604 (Deane J), at 632-638 (Dawson J), at 652-656 (Toohey J), at 695-696 (Gaudron J) and at 712-714 (McHugh J).
statutory vesting of the [universal] jurisdiction would be essential for its exercise by an Australian court".\textsuperscript{571}

Since the case was concerned with the validity of the Act under the constitutional heads of power, the latter statement must be considered \textit{obiter}. However, Brennan J’s statement is quite clear and as yet unquestioned in Australia. Moreover, as in Canada, one could assume that the statute was necessary for the courts to assert jurisdiction because no indictment had been issued before the amendment.

\textbf{b) The Genocide Cases}

That conclusion is verified by the various cases involving Aboriginal claims against the Commonwealth government for alleged acts of genocide committed from 1788 until the 20\textsuperscript{th} Century. On their face these cases did not trigger the question of universal jurisdiction because the alleged acts occurred in Australian territory and were committed by Australians.

The first of these cases, \textit{Kruger v Commonwealth},\textsuperscript{572} concerned Aboriginal peoples who were removed from their families and detained under the authority of the 1918 (NT) Aboriginals Ordinance. The plaintiffs claimed that the Ordinance was invalid by reason of \textit{ultra vires}. As far as the international crime of genocide was concerned, the case was confined to two issues: (1) when genocide became a crime recognised under IL and (2) the requirement of intent to destroy a people. Both questions were resolved against the applicant’s claim. It was held that there neither existed a crime of genocide under IL in 1918, the time the alleged acts took place, nor was there a trace of intent in the alleged acts. The argument put before the court therefore failed on these grounds and the case did not address the necessity of a statutory enactment for international crimes.

Given the problems with proving the existence of a crime of genocide in the past, the plaintiffs in \textit{Re Thompson} alleged that the current Australian government

\textsuperscript{571}Polyukhovich \textit{v the Commonwealth} \textit{ibid} at 576 (Brennan J).
\textsuperscript{572}Kruger \textit{v Commonwealth} (1997) 190 CLR 1.

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continuously committed genocide against the Aboriginal people. Specifically, the Native Title Amendment Bill 1998 was attacked as an act of genocide. The proceeding was an application for mandamus against an ACT Magistrates’ Court to issue warrants for the arrest of members of the federal government and Parliament. While this case did not consider the necessity of statutory implementation of universal jurisdiction, since genocide was a crime recognised under international treaty and customary law, it was necessary to decide whether this crime was also a crime under Australian law. Firstly, following Kruger, the court held that although the Genocide Convention Act 1949 (Cth) ratified the Genocide Convention, it did not introduce a crime of genocide into Australian law. Since an incorporation other than by statute of the convention was not permissible, the matter turned on the question whether the customary international crime of genocide had been received in Australian common law. Crispin J distinguished what the High Court had said in Mabo when he ruled:

“It is one thing to suggest that international standards might have some influence on a decision as to whether the common law should continue to recognise a discriminatory rule of that kind and another to suggest that the international standard ... should give birth to a common law offence not previously recognised.”

Even though at IL it might be peremptory for states to possess such rules, Australian common law did not recognise an offence of genocide. Since “it is a mistake to confuse the aspirations of a people with the means by which those aspirations can be legally discharged”, genocide was held not to be necessarily a crime under Australian law. In considering how the “aspirations” of Australia concerning genocide could be “discharged” Crispin J referred to an earlier case decided in the High Court in which McHugh J held that it was no longer possible for the courts to create common law crimes. Given that the Genocide Convention Act did not create a statutory offence of genocide, Crispin J thought it was the legislature’s view that acts falling within the definition of genocide were already adequately punishable under existing criminal provisions, for example homicide. While the common law did not recognise a crime of genocide and such a crime could not be newly established, Australian criminal law

573 Re Thompson 136 ACTR 9(ACTSC).
574 Re Thompson ibid at 29.
575 In the Matter of Citizen Limbo (1990) 92 ALR 81 (HCA) at 83 (Brennan J).
576 R v Rogerson (1992) 174 CLR 268 at 304 (McHugh J diss) referred to in Re Thompson 136 ACTR 9(ACTSC) at 29 (Crispin J).
was nevertheless deemed to be in accordance with the obligations imposed by IL to provide effective penalties for acts of genocide. However, in any case, acts of genocide had not been committed because of a lack of “intent”. Thus, even if genocide as defined in IL had been a crime under Australian law, the alleged acts did not constitute such a crime so that the warrants for arrest were rightly refused.

This decision was affirmed on appeal to the Federal Court where, in *Nulyarimma v Thompson*, the majority held that while certain rules of CIL could become part of Australian law without parliamentary intervention, legislation was required to introduce criminal CIL into Australian law.\(^{578}\) As well as the reasons given in the lower court, there were further arguments concerning the exercise of extraterritorial jurisdiction over international crimes before the Federal Court.

Wilcox J held that although CIL imposed a duty to try or extradite perpetrators of international crimes including genocide on Australia, this did not mean that Australian courts had jurisdiction to try and punish such offenders. A conferral of criminal jurisdiction needed statutory enactment. If that were not so, it would lead to the “curious” result that an obligation under CIL had greater effect in Australia than an obligation under a treaty.\(^{579}\)

Whitlam J took another view of the content of CIL:

> “Even if it be accepted that customary international law is part of the common law, no one has identified a rule of customary international law to this effect: that courts in common law countries have jurisdiction in respect of those international crimes over which States may exercise universal jurisdiction. That is hardly surprising. Universal jurisdiction conferred by the principles of international law is a component of sovereignty ... and the way in which sovereignty is exercised will depend on each common law country’s peculiar constitutional arrangements.”\(^{580}\)

While this view endorses universal jurisdiction under CIL as a permissive rule, the exercise of that permission is left to the national law of the states. In considering how

\(^{577}\) *Re Thompson* 136 ACTR 9(ACTSC) at 30.


\(^{579}\) *Nulyarimma v Thompson* ibid at 628, para [20] (Wilcox J).

\(^{580}\) *Nulyarimma v Thompson* ibid at 637, para [52] (Whitlam J) reference omitted.
the permission was to be exercised in Australia, Whitlam J also referred to Toohey and Brennan JJ’s remarks in *Polyukhovich* and concluded that statutory enactment was necessary.

In his dissenting judgment, Merkel J agreed with Wilcox J as to the scope of the CIL rule conferring jurisdiction over international crimes on states:

“[I]t is significant that under international law the duties in respect of universal crimes arise as non-derogable obligations of all states. Thus, save as to the question of prosecution or extradition there is no discretion as to whether to fulfil the obligation. Therefore a vesting under the common law, rather than by a discretionary exercise of legislative power, is consistent with the principles of international law.”

He nevertheless disagreed on the point that statutory enactment was necessary in Australia to exercise jurisdiction:

“It is clear that under customary international law the jurisdiction to prosecute in respect of universal crimes vests in nation states, it being a matter for the legal system of the particular state how the jurisdiction is to be exercised. The significance of *Eichmann* for present purposes is that the Court, in a carefully reasoned decision, concluded that under customary international law jurisdiction vested in Israel as a common law state directly or by municipal statute. The same conclusion was also arrived at by Lord Millett in *Pinochet*.”

Thus, Australian courts could follow the approach of the court in *Eichmann* and Lord Millett in *Pinochet* and assert common law jurisdiction over crimes that attract universal jurisdiction under CIL.

However, the case did not turn on universal jurisdiction since the alleged acts had occurred in Australian territory. The question was whether Australian law recognised a crime of genocide when committed within its territory. Whitlam J relied on section 1.1 of the Criminal Code (Cth), in operation since 1997, which abolished common law crimes under Commonwealth law. Thus, since 1997 genocide could not be regarded as an offence under Commonwealth law. Because the states exercise separate criminal jurisdiction in Australia, the further question was whether genocide then was a crime.
under Capital Territory law. Although common law crimes were still available in state and territorial law, Whitlam J ruled that the only common law crimes in the Capital Territory were probably those which had been crimes under New South Wales common law prior to the Seat of Government Acceptance Act 1909 (Cth). At that time, no international crime of genocide existed and thus could not have become part of Capital Territory criminal law. In any case, given its international roots, genocide was to be punished by the Commonwealth rather than state or territory law. But since the Criminal Code prohibited the reception of international crimes other than by statute, no crime of genocide was part of Australian law.

On the other hand, Merkel J held that there was no reason in principle to treat criminal CIL any differently from civil CIL. This view would allow the courts to adopt the customary international crime of genocide without legislation if the requirements for judicial adoption were met. Despite the obstacle of section 1.1 of the Criminal Code (Cth), Merkel J held that genocide was received into Australian law even without statute, for four reasons. Firstly, the crime would not be received as Commonwealth common law but as "common law generally", thus rendering section 1.1 of the Criminal Code inapplicable. Secondly, the definition of genocide was sufficient to meet the common law requirements of a crime. Thirdly, the contention that courts are no longer able to create common law offences was overcome because what the courts actually did was to determine whether or not to adopt a crime recognised under CIL rather than to establish a whole new national crime. Fourthly, even if the adoption of genocide amounted to a newly established crime in Australia, this did not infringe the principles of criminal law making. There was no uncertainty or value judgment involved in deciding whether or not to adopt the international crime of genocide. In doing so, the courts did not exercise legislative competencies. The scope and content of genocide under IL as well as the principles for adoption of CIL were clearly established.

4) Conclusions for the Criminal Cases

While an individual has the non-derogable duty under CIL not to perpetrate international crimes, each state has a right thereunder to prosecute or extradite such
perpetrators. The right of the state is also non-derogable, that is, no duty to exercise or abstain from its jurisdiction can be imposed on the state. In various conventions and treaties, this CIL right is now a duty to either try or extradite an alleged perpetrator of international crimes. There nevertheless remains a common view that CIL merely confers a right to exercise jurisdiction and there is no way of arguing from principle that there is an obligation to extradite or prosecute in CIL. Neither obligations *erga omnes* nor the *jus cogens* character of a right can justify such result. The obligations concerned when international crimes are at stake are obligations of the individual not to perpetrate these crimes. Such obligations indeed exist *erga omnes*, against all states, and are also non-derogable obligations and thus *jus cogens*. However, these obligations are not concerned with the exercise of jurisdiction to adjudicate international crimes. States are allowed to exercise such jurisdiction over crimes that are outlawed internationally. The exercise of universal jurisdiction, however, is a complex and technical undertaking. Questions of priority must be regulated for, including which state is to have a primary right to exercise jurisdiction and how far considerations of possible capital punishment have to be taken into account in extradition proceedings. Such technical matters are not to be found in CIL but are regulated in the treaties that impose the duty to try or extradite. 586

The rules of CIL outlined above raise two questions about their application in national law. Firstly, can international crimes become part of national criminal law without statutory enactment? Secondly, can a court exercise a permission from IL as to universal jurisdiction to try international crimes or must there be legislation?

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586 See, eg, art 5(2) of the Torture Convention:

"1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
   (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
   (b) When the alleged offender is a national of that State;
   (c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law."
It is suggested that both questions are to be answered in favour of statutory enactment. The establishment of new crimes should, in the interest of certainty of criminal law, yield to statute. Moreover, the exercise of a permissive rule of CIL should be conferred on Parliament rather than on the courts. The exercise of a permission actively forms national law and, as such, should rest with Parliament rather than with the courts. It is, however, within the power of the courts to determine whether there exists an international rule with permissive effect.

When there exists a statute conferring jurisdiction on the national courts over international crimes regardless of the place of commission, this is a valid exercise of the permissive rule of CIL or an implementation of a duty existing under a treaty. Conferring on the courts jurisdiction over "crimes recognised in international law" is a sufficient exercise of the permission under CIL as it leaves the law-making task with Parliament and allows the courts to discharge their judicial function to ascertain what crimes exist under CIL.

When a statute provides for certain crimes to be punished under national law, caution needs to be exercised in ensuring that its provisions are true to their international roots and conform with principle \textit{nulla poena sine lege}. If such precaution is not taken, the risk is that the statute might either exceed or fall short of the international crime. Given that national provisions cover most international crimes, an adherence to the latter principle by specific enactment is probably not necessary.

Finally, no determination as to the question of extraterritorial jurisdiction needs to be made when the alleged acts occurred within territory over which there exists jurisdiction in any case. In cases such as the Australian genocide cases, the question is whether the national criminal legal order conforms to international crimes. Where there exists no crime under national law that covers the acts, it is necessary to determine whether a crime recognised under CIL has application in national law without statutory enactment. This would at least be necessary when there exists a statutory provision prohibiting the establishment of common law crimes. Finally the principle \textit{nulla poena sine lege} plays a significant role. Without an explicit reference to CIL and without national law penalising certain acts, the individual does not know what conduct is criminal and what is legally allowed. Such a situation is undesirable in criminal law. For
these reasons there should therefore be specific statutory intervention if the conduct is to be penalised under national law.

The preferable option is a general conferral of jurisdiction over international crimes on national criminal courts. This not only allows for an up to date interpretation of international criminal law but also respects the interest of legal certainty. Furthermore, under this option judges are essentially dealing with national crimes, with which they are familiar, which may be more conducive to certainty and justice.
Conclusions

In its attempt to verify the formula “CIL is part of national law” this thesis has found various situations in which CIL became relevant in national courts. The traditional cases always involved either another state or an extraterritorial situation. In these situations, the feasibility of international conduct made necessary the application of CIL in national law without more. Without such frank application, no diplomatic relations between states would have been possible and the establishment of globally valid regimes, such as the rules governing the high seas, would have been complicated. More recently, IL has become more occupied with matters hitherto thought as within the jurisdiction of the national states. At first sight, there is no inter-state conduct here to be facilitated. The cases deal with human rights and criminal matters and involve individuals who have traditionally no personality under IL. In these situations, the interests of other states are not as apparent as in the traditional cases involving foreign immunities from process. However, as with the regime of the law of the sea, in human rights and criminal matters, the establishment and maintenance of a universal system of rules is at stake. It is important therefore to realise that all states are entitled at IL to claim the application of a rule even if they are not parties to the national proceedings or otherwise involved. Thus, while the application of CIL in human rights and criminal cases might lack the specific interest of one other state, there is a general interest of all states and the international community in CIL’s effect here. If national courts traditionally felt the application of CIL was an act of respect towards another state or government, so should they now apply new CIL as an international obligation towards all states.

Investigating how CIL is given effect, three tasks that national law has to fulfil were found: validation, determination and application.

Three mechanisms to validate CIL can be distinguished in judicial practice. While the direct application of treaties raises problems with executive law-making, the
automatic validation of CIL does not pose these questions. Acts of all branches of
government count as state practice or *opinio juris*. No single governmental branch
therefore has absolute control over what CIL becomes binding on the state. Therefore,
no internal arguments from the doctrine of separation of powers pose a threat to
mechanisms of automatic validity.

Australia was identified as the sole jurisdiction not promoting automatic validity
but adhering to the "source" view which requires judicial recognition of every single
rule of CIL. The requirements for recognition are, however, not yet conclusively settled.
The justification for this discretionary validation of CIL seems to stem from the
uncertain scope and content of CIL which, when applied automatically, would also
cause uncertainties in national law.

The concerns with ascertaining rules of CIL in national courts are properly made.
The effect of a customary rule depends primarily on the correct determination of its
content in a national court. While it is within the power of a national court to investigate
and ascertain rules of CIL, it is beyond its power to hold valid rules as IL that have no
support in state practice and *opinio juris*. In order to ascertain the correct rule of CIL, it
will sometimes be necessary to depart from orthodox procedures employed to find rules
of national law so that the appropriate information can reach the court. These problems
have, however, no bearing on the validity or application of CIL in national law but they
concern the validity and application of CIL in IL. Thus, uncertain or non-existing rules
are invalid in national law because they are not valid in IL either. This result also
follows from an analysis of the methods employed in national courts to establish the
content of CIL. This task is approached essentially the same in all states, despite their
adhering to different modes of validation. The determination of CIL's content should
therefore be seen as governed by IL not national law. The problems faced when it
comes to ascertaining rules of CIL are therefore no arguments against the automatic
validity of CIL.

Beside the application of rules of CIL as decisive rules for the dispute, the impact
of CIL on national law is in large areas indirect. Here, two situations can be
distinguished. National law can refer to otherwise inapplicable CIL or CIL can
influence the application of national law. The former is not lightly to be presumed and
should therefore only be taken to apply where national law specifically refers to an international principle. The second situation, however, occurs more frequently. It is grounded in the notion that national law should as far as possible be read in the context of international legal obligations. While this notion traditionally required an ambiguity or gap in national law, it is now recognised that such is not necessary but general legal language should always be read in context with relevant IL. This contextual approach allows for a dynamic interpretation of national law in the face of the swiftly changing international legal order. On the other hand, these principles allow for the guarding of national interests of certainty and caution since statutory language that plainly conflicts with IL must be given effect in national courts.

While these rules are clearly established for international treaties as a means of interpretation, CIL plays a less significant role here. Nonetheless, CIL, if regarded automatically as national law, is by this character alone a relevant factor for the interpretation of other national law. Furthermore, CIL has the same binding force at IL as treaties have. There is therefore no reason why it should not have a similar influence on national law. However, treaties and other international documents may be of greater assistance because they provide authoritative textual points of reference.

The question whether CIL supersedes national common law has not yet conclusively been conclusively settled. However, the incorporation doctrine with its exception to stare decisis arguably leads to the superiority of CIL over common law. This also seems to be true for the adoption principle as applied in Canada. Although no abstract arguments advocate this solution, Canadian courts seem to have chosen this alternative. While in the United Kingdom the common law automatically changes with CIL, in Australia this is only possible by virtue of a judicial act of recognition. Such an act, however, would have to reckon with the doctrine of separation of powers and therefore yield to restraints in judicial law making. Thus, judges can only recognise and make part of Australian law rules of CIL where there exists a gap or an ambiguity in Australian law. In this way, CIL is a source of inspiration and interpretation which, in cases of conflict, yields to any Australian law.

Criminal law is particularly vulnerable to collisions between IL and national law. Further, various principles of criminal law need to be respected. In cases involving
international criminal law, national courts seem rather reluctant to employ the principle of automatic validity. The line of cases starting with *R v Keyn* and probably not ended with *Nulyarimma v Thompson* constantly denied the application of CIL without an Act of the legislature. However, it has been shown that the cases merely identified permissive rules of CIL, allowing the exercise of jurisdiction over the coastal sea or internationally condemned crimes respectively. It is submitted that in fact an automatic validity of the rules so ascertained would not have changed the necessity for an Act of the legislature as a creative exercise of a permission from IL. Lest the international legal situation changes and a general customary rule requiring states to either try or extradite perpetrators of international crimes, this result is easy to harmonise with automatic validity. Nevertheless, it needs to be noted that the legal situation at IL now shows a disparity between absolute individual duties not to commit international crimes and the mere permission allowing states to try and punish perpetrators. This situation can, however, only be remedied at the international level and not nationally.

This thesis has verified that the formula "CIL is part of national law" is to be regarded as a viable doctrine for the application of CIL in national courts. Moreover, the formula has been verified from a theoretical starting point which is dualist rather than monist in stating that a reference in national law is needed for IL to become valid. The formula is therefore valid independently from a theoretical concept. It is, however, merely an introduction to a number of further questions that equally need attention. The problems with ascertaining CIL and dealing with possibly conflicting rules of national law seem not appropriately addressed in the formula. But ascertaining CIL was described as a task covered by IL. This means that it is probably not an aspect of the formula which requires established CIL. The conflict rules, however, need to be settled in accordance with the reference norm. Here, many questions remain as to the interpretation of national law in line with CIL and the conflict of CIL with common law. It is suggested that statutes should, even without reference to CIL, always be read in the context of CIL and only be taken to conflict with it when they specifically deny the latter's application. As for conflict with the common law, the superiority of CIL over national common law should be sustained.
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