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How Domestic Courts Use International Law

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ESSAY
HOW DOMESTIC COURTS USE INTERNATIONAL
LAW

*Wayne Sandholtz**

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INTRODUCTION

Judges in virtually every kind of legal system on every continent draw on international legal materials as they explain and rationalize their decisions. Indeed, “international law in domestic courts” has

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become a thriving subfield overlapping comparative and international law.¹ The articulation of domestic with international law is of primary importance from the international law point of view because “international law still relies on domestic legal and political structures for implementation.”² Comparativists search for common patterns or themes in how domestic judges deploy international law in resolving disputes. Scholars have theorized why domestic judges invoke international law and explored the ways in which they use it.³ But previous work tends to focus on treaties, though international law is also to be found in custom, general principles, judicial decisions, and legal scholarship. Existing research also generally bases its findings on relatively small numbers of decisions that cite international law. In this Study, I use a database of approximately 1600 decisions from three national courts spanning up to twenty years to explore the use of multiple sources of international law by domestic courts and to examine the mix of sources that appear in their decisions. The Study aims to contribute to our growing understanding of how international law articulates with domestic law.

Article 38 of the Statute of the International Court of Justice, as well as the innumerable treatises that address sources of international law, emphasize treaties, custom, and general principles as primary sources of international law. Yet among these, treaties are likely to be preferred by domestic judges. For domestic judges not necessarily trained in international law, treaties are more readily accessible and

1. Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 *GEO. WASH. INT'L L. REV.* 555, 555 (2002-2003). See generally David Sloss, *Treaty Enforcement in Domestic Courts: A Comparative Analysis*, in *THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* 1-60 (David Sloss ed., 2009); *OXFORD REPORTS ON INT'L LAW*, *OXFORD REPORTS ON INT'L LAW IN DOMESTIC COURTS* (2014); ANDRÉ NOLLKAEMPER, *NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW* (2011).

2. Paul F. Diehl, Charlotte Ku & Daniel Zamora, *The Dynamics of International Law: The Interaction of Normative and Operating Systems*, 57 *INT'L ORG.* 43, 50 (2003).

3. See generally NIHAL JAYAWICKRAMA, *THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE* (2002); NOLLKAEMPER, *supra* note 1; Bahdi, *supra* note 1; INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION AND PERSUASION (Dinah Shelton ed., 2011); *THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY*, *supra* note 1; Michael P. Van Alstine, *The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions*, in *THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY*, *supra* note 1, at 555; Melissa A. Waters, *Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties*, 107 *COLUM. L. REV.* 628 (2007).

more easily recognizable as law, than are custom and general principles. The baseline expectation is therefore that domestic judges will refer more frequently to treaties than to other sources of international law. A second proposition is that judges will invoke other kinds of international legal materials—customary international law, the decisions of international courts, and various “soft law” materials—to aid them in interpreting and applying treaty norms. One implication is that there should be a “clustering” of international law references, as decisions that cite one kind of international legal material are likely to cite other kinds as well.

The first Sections of the Essay develop the arguments and lead up to the two main propositions. I argue that three factors lead domestic courts to cite international law: the internationalization of human rights law, the expansion of rights review in domestic courts, and underlying incentives of judges. The data show that the largest share of decisions citing international legal materials occur in cases involving disputes about rights. They also show that domestic courts cite treaties more often than the other types of international legal materials—with some intriguing exceptions, but that courts are surprisingly willing to cite the decisions of international courts, customary international law, and soft law. The analysis also reveals that the various types of international legal materials tend to “cluster”—a decision that cites one type is likely to cite at least one other. The findings suggest that we should look more closely at how domestic courts make use of the full range of international legal materials, not just treaties.

I. *INTERNATIONAL LAW IN DOMESTIC COURTS*

A growing body of research in recent years has documented and assessed the phenomenon of “international law in domestic courts.” One striking theme of this work is that courts from every major legal tradition and from every part of the world draw on international legal norms in deciding domestic disputes. For instance, the Oxford electronic database “International Law in Domestic Courts” includes more than 1300 decisions from ninety countries, covering all regions of the world.⁴ Each decision in the database includes at least one reference to international law. The set of cases in the database is not a systematic sample, but the number and diversity of countries included

4. OXFORD REPORTS ON INT’L LAW IN DOMESTIC COURTS, *supra* note 1.

are noteworthy. Other studies have focused on the ways in which domestic courts apply or otherwise make use of international law, again covering a striking variety of legal systems.⁵

With respect to treaty law, the central involvement of courts is not surprising. In most countries, “it has been left up to the courts . . . to identify treaties and determine the rules by which to interpret them.”⁶ Waters offers a typology of principles or doctrines by which domestic courts bring international law to bear on questions of domestic law.⁷ One such important mode is the “presumption of conformity,”⁸ the principle that domestic statutes—and sometimes constitutions—should be interpreted as far as possible in a way that is consistent with treaty commitments.⁹

National courts also invoke treaties and other international legal materials as guides, or aids, in the interpretation of domestic laws; they refer to international legal norms not because they are binding but because they are useful.¹⁰ This mode of interpretation fits with what Bahdi views as “reliance on international law to help uncover values inherent within the domestic regime.”¹¹ Courts in the Netherlands,¹² Australia,¹³ and Canada¹⁴ have employed this

5. See, e.g., JAYAWICKRAMA, *supra* note 3; NOLLKAEMPER, *supra* note 1; Bahdi, *supra* note 1; INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS, *supra* note 3; Sloss, *supra* note 1; Waters, *supra* note 3.

6. Dinah Shelton, *Introduction*, in INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION AND PERSUASION, *supra* note 3, at 10.

7. See Waters, *supra* note 3.

8. See JAYAWICKRAMA, *supra* note 3, at 246–47; NOLLKAEMPER, *supra* note 1, at 145–46, 148, 153; Hans-Peter Folz, *Germany*, in INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS, *supra* note 3 at 240, 245; Van Alstine, *supra* note 3, at 593–94; Erika de Wet, *South Africa*, in INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS, *supra* note 3, at 567, 587. See generally OXFORD REPORTS ON INT’L LAW IN DOMESTIC COURTS, *supra* note 1; INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS, *supra* note 3.

9. This principle is familiar in the US jurisprudence as the “*Charming Betsy*” canon. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

10. H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 263 (1987); Yuval Shany, *How Supreme Is the Supreme Law of the Land? A Comparative Analysis of the Influence of International Human Rights Conventions Upon the Interpretation of Constitutional Texts by Domestic Courts*, 31 BROOK. J. INT’L L. 341, 343 (2006); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 124–25 (1994).

11. Bahdi, *supra* note 1, at 556–57; see also Van Alstine, *supra* note 3, at 608–12.

12. See Evert A. Alkema, *Netherlands*, in INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS, *supra* note 3, at 407, 423.

13. See *Mabo v. Queensland* (No. 2) (1992) 175 CLR 1 (Austl.).

14. See Stéphane Beaulac & John H. Currie, *Canada*, in INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS, *supra* note 3, at 116, 134, 145–47.

approach. In some countries, courts invoke as persuasive authority treaties to which the state is not yet a party, including Venezuela,¹⁵ Austria,¹⁶ the Netherlands,¹⁷ Nigeria,¹⁸ and Poland.¹⁹

In some instances, national courts rely on international treaties as an aid in the interpretation of constitutional rights.²⁰ In 1989, in *Slaight Communications v. Davidson*, the Supreme Court of Canada, invoking the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), declared that it could refer to international law, both treaty and custom, to determine the substance of constitutional rights.²¹ The Supreme Court of India, in *Vishaka v. State of Rajasthan*, stated that it had “no hesitation in placing reliance on [international commitments] for the purpose of construing the nature and ambit of the constitutional guarantee of gender equality in our Constitution.”²² In Bangladesh, treaty law can “be used to interpret fundamental rights in the constitution and to develop common law on the matter.”²³ Fundamental rights expressed in the German *Grundgesetz* must be interpreted in conformity with the European Convention on Human Rights (“ECHR”) if possible, and the ECHR and decisions of the ECHR are used to interpret rights established in the Basic Law.²⁴ Courts in Nigeria, Poland, South Africa, and Venezuela have engaged in similar practices.²⁵ A recent comparative study found that courts in countries from both monist (South Africa, Germany, and Poland) and dualist (India) traditions have been guided by international human rights law in constitutional interpretation.²⁶

15. See Eugenio Hernández-Bretón, *Venezuela*, in *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS*, *supra* note 3, at 660, 660–64.

16. See Elisabeth Handl-Petz, *Austria*, in *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS*, *supra* note 3, at 55, 85.

17. See Alkema, *supra* note 12, at 427.

18. See Babafemi Akrinrinade, *Nigeria*, in *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS*, *supra* note 3, at 448, 460.

19. See Anna Wyrozumska, *Poland*, in *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS*, *supra* note 3, at 468, 478, 494.

20. See, e.g., Bahdi, *supra* note 1, at 586.

21. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (Can.).

22. *Vishaka v. The State of Rajasthan*, A.I.R. 1997 S.C. 3011 para. ¶13 (India).

23. Bianca Karim & Tirza Theunissen, *Bangladesh*, in *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS*, *supra* note 3, at 98, 110.

24. See Folz, *supra* note 8, at 246–48.

25. See, e.g., *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS*, *supra* note 3.

26. See Van Alstine, *supra* note 3, at 595–97.

A. The Arguments

The focus in this Study is on the normative structures that connect international law to domestic legal systems and on the motivations of domestic judges. The discussion focuses on human rights because human rights cases have accounted for the largest share of citations to international legal materials in the set of decisions analyzed here as noted in Figure 1.²⁷ In fact, in the dataset, 114 decisions that cited international law involved disputes over rights. The second most common legal domain, with seventeen cases, was “International” (cases involving international law issues) and the third was “Institutional” (involving relations between branches or levels of government), with sixteen.

For the three national courts examined here, human rights litigation is driving the greatest share of citations to international legal materials in domestic courts. The central argument is that interconnections between domestic and international human rights law make it possible—even likely—that domestic judges will cite international legal materials in the human rights domain. Because domestic rights law is increasingly grounded in international human rights norms, judges in many jurisdictions quite naturally turn to international law in order to interpret and apply domestic rights protections. The following sub-sections assess the interconnected structures of domestic and international human rights law, the motivations and reasons for judges to invoke international norms, and what these arguments imply for the types of international legal materials that judges are likely to cite.

27. *See infra* fig.1.

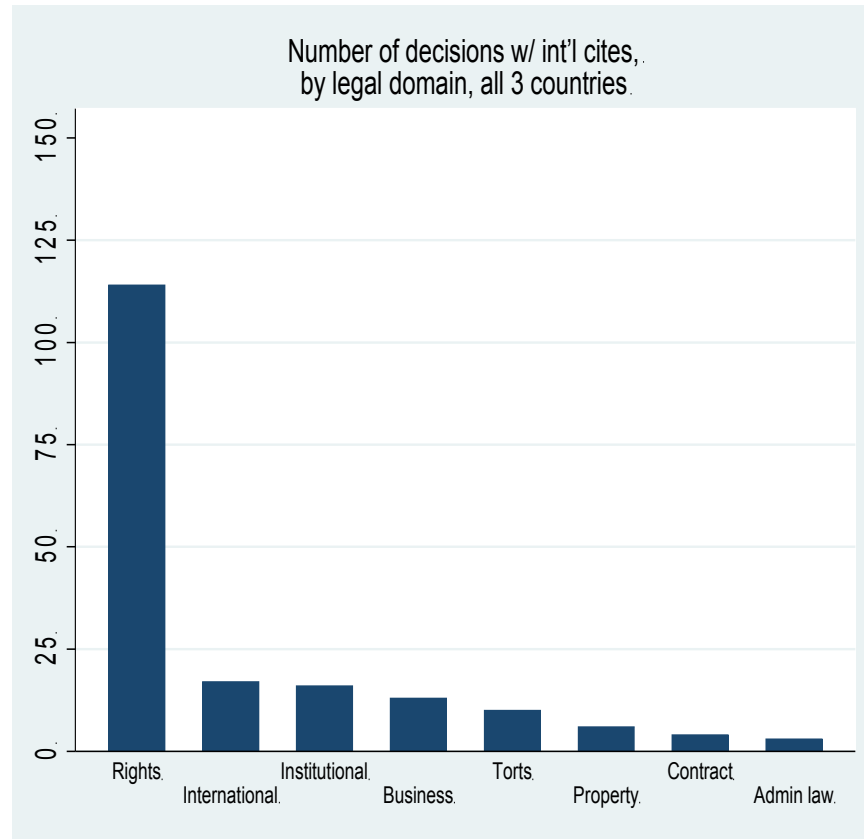


Figure 1

B. *The Internationalization of Human Rights Law*

Domestic constitutional rights and international human rights are parallel but increasingly interlinked norm structures. The “twin systems” of domestic constitutional rights and international human rights emerged after World War II and the “the rights contained in the major international human rights treaties are very broadly similar in substance to the rights contained in most modern constitutions.”²⁸ The

28. Stephen Gardbaum, *Human Rights and International Constitutionalism*, in *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* 233, 235 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

development of the international human rights regime is by now a well-known story,²⁹ as is the expansion of rights protections in national constitutions.³⁰ Every national constitution of the 106 created since 1985 included a charter of rights.³¹

The expansion of constitutional rights has been visible not just in the number of constitutions containing them but in the number of rights covered. In 1946, the typical constitution included nineteen of fifty-six substantive rights as tracked by Law and Versteeg in *The Evolution and Ideology of Global Constitutionalism*; by 2006 that average had risen to thirty-three of fifty-six rights. Equally striking, “most constitutions are indeed gaining additional rights over time, regardless of whether they are starting from a relatively high or low baseline.”³² Law and Versteeg note that the “phenomenon of rights creep at the level of domestic constitutional law parallels the striking growth in the volume and scope of international human rights instruments over the same time period, *which warrants suspicion that the two developments may be interrelated, if not symbiotic.*”³³ Indeed, if constitutions arose strictly out of the specific contexts and characteristics of national histories, cultures, social forces, and politics, we would observe a diversity of constitutional forms. Instead, we observe striking convergence, which implies international or transnational shaping of domestic constitutions.

Countries do appear to emulate or borrow from the constitutions of countries with which they have important ties. Goderis and Versteeg find that “the rights-related content of a country’s constitution is indeed shaped by the constitutional choices of other countries, in particular the former colonizer, countries with the same legal origin, the same dominant religion, the same former

29. See, e.g., JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* (2013); DAVID P. FORSYTHE, *THE INTERNATIONALIZATION OF HUMAN RIGHTS* (1991).

30. See, e.g., HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION* (2000); Philip Alston, *A Framework for the Comparative Analysis of Bills of Rights*, in *PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES* 1 (1999); John Boli, *Human Rights or State Expansion? Cross-National Definitions of Constitutional Rights, 1870-1970*, in *INSTITUTIONAL STRUCTURE* 133 (George Thomas, John Meyer, Francisco Ramirez & John Boli eds., 1987).

31. Alec Stone Sweet, *Constitutional Courts*, in *COMPARATIVE CONSTITUTIONAL LAW* 816, 816 n.2 (Michel Rosenfeld & András Sajó eds., 2012).

32. David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1197 (2011).

33. *Id.* at 1195 (emphasis added).

colonizer, and the same dominant aid donor.”³⁴ But what is most striking is the degree of global convergence, even given the different modes of transnational diffusion. Elkins, Ginsburg, and Simmons track the establishment of specific human rights in international treaties and their appearance in national constitutions. They show that the Universal Declaration of Human Rights (“UDHR”) and the International Covenant on Civil and Political Rights (“ICCPR”) in particular “have played crucial roles in the spread of formal human rights into national constitutions.”³⁵

Even common law countries that have constitutionalized fundamental rights have done so within a framework structured by international human rights. The 1998 Human Rights Act in the United Kingdom was a measure to incorporate the European Convention on Human Rights into British law. Canada’s 1982 Charter of Fundamental Rights and Freedoms does not explicitly ground Canadian rights in international rights, but Canadian courts have “liberally taken account of international human rights obligations when construing the fundamental guarantees set out in the *Charter*.”³⁶ Canadian Supreme Court jurisprudence has established that the *Charter* should be interpreted in light of international human rights law. In *Slaight*, the Court declared 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.”³⁷

In addition to incorporating substantive rights enumerated in treaties, a striking number of national constitutions refer to human rights treaties as points of reference or even mention specific treaties. As of 2006, forty-six constitutions referenced human rights treaties by name, often incorporating them into domestic law, sometimes with supra-statutory status.³⁸

34. Benedikt Goderis & Mila Versteeg, Transnational Constitutions (unpublished work) (Apr. 1, 2013), available at <http://ssrn.com/abstract=2216582>.

35. Zachary Elkins, Tom Ginsburg & Beth A. Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT’L L.J. 61, 63 (2013).

36. Beaulac & Currie, *supra* note 14, at 151.

37. *Slaight Communications, Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1056 (Can.).

38. See *infra* tbl. 1.

Table 1: Treaties named in national constitutions

Country	Constitution year	Treaties named
Afghanistan	2004	UDHR
Albania	1998	ECHR
Andorra	1993	UDHR
Angola	1975	UDHR, ACHPR
Argentina	1983	UDHR, Genocide, CERD, ICCPR, ICESCR, ACHR, CEDAW, CRC
Benin	1990	UDHR, ACHPR
Bolivia	1967	UDHR
Bosnia-Herzegovina	1995	UDHR, Genocide, Geneva, Refugee, ECHR, ICCPR, ICESCR, European Torture Convention, CEDAW, CAT, ICMW, CRC
Burkina Faso	1991	UDHR, ACHPR
Burundi	2004	UDHR, ICCPR, CEDAW, CRC, ACHPR
Cambodia	1993	UDHR, CEDAW, CRC
Cameroon	1972	UDHR, ACHPR
Cape Verde	1980	UDHR
Central African Republic	2004	UDHR, ICCPR, ICESCR, ACHPR
Chad	1996	UDHR, ACHPR
Congo, Democratic Republic of	2005	UDHR, CEDAW, CRC, ACHPR
Cote D'Ivoire	2000	UDHR, ACHPR
Czech Republic	1993	ECHR
East Timor	2002	UDHR
Equatorial Guinea	1991	UDHR
Ethiopia	1994	UDHR, ICCPR, ICESCR
Gabon	1991	UDHR, ACHPR
Germany	1949	ECHR
Guinea	1990	UDHR, ACHPR
Haiti	1987	UDHR
Lebanon	1926	UDHR
Luxembourg	2000	Rome Statute of the ICC

Table 1: Treaties named in national constitutions

Country	Constitution year	Treaties named
Madagascar	1998	UDHR, CEDAW, CRC, ACHPR
Mali	1992	UDHR, ACHPR
Mauritania	1991	UDHR, ACHPR
Moldova	1994	UDHR
Mozambique	2004	UDHR, ACHPR
Nicaragua	1987	UDHR, ICCPR, ICESCR, ACHR
Niger	1999	UDHR, ACHPR
Peru	1993	UDHR
Portugal	1976, 2002	UDHR, Rome Statute of the ICC
Romania	1991	UDHR
Rwanda	2003	UDHR, Genocide, CERD, ICCPR, ICESCR, CEDAW, CRC, ACHPR
Sao Tome And Principe	1975	UDHR
Spain	1978	UDHR
Sweden	1974	ECHR
Tanzania	1985	UDHR
Togo	1992	UDHR, ICCPR, ICESCR, ACHPR
Venezuela	1999	ICCPR, ACHR, CRC
Yemen	1991	UDHR

Source: Elkins, Ginsburg and Melton (2010)

Note: The Universal Declaration of Human Rights is not a treaty but is included in the list because it is almost universally recognized as expressing customary international law.

Figure 2 presents a global view of the cumulative number of references to specific international human rights documents.³⁹ The rise in such references is especially striking after 1989.

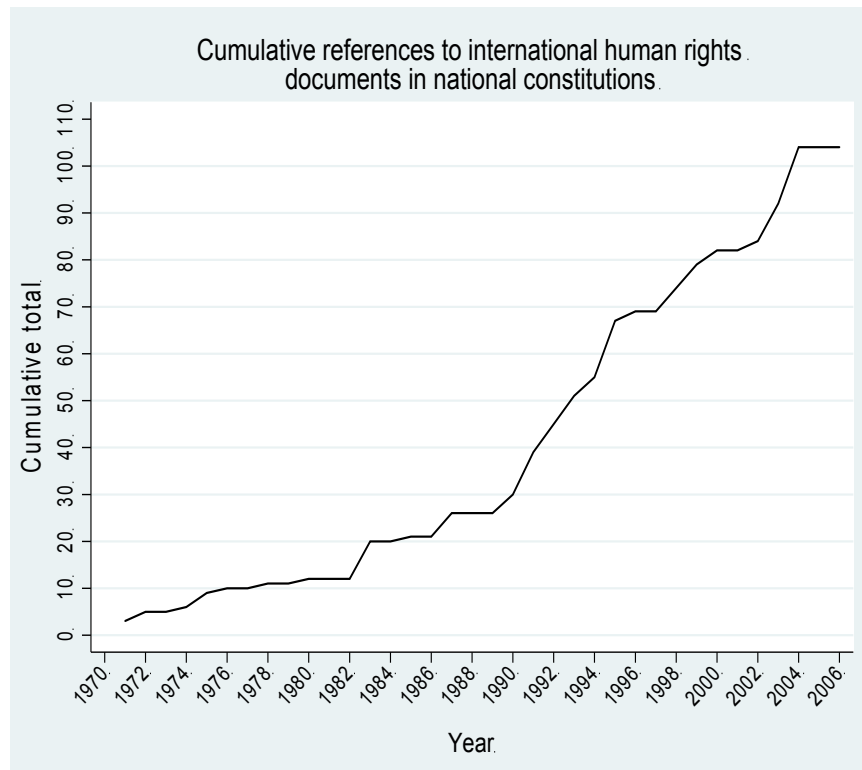


Figure 2

Finally, both international and constitutional rights law now have a “supra-positive” character, in the sense that they are not based only on consensual, positive foundations.⁴⁰ As Neuman puts it, fundamental legal rights are widely seen as having “normative force independent of their embodiment in law, or even superior to the positive legal system (hence the adjective ‘supra-positive’).”⁴¹ The “pervasiveness and prominence of the supra-positive aspect in human

39. Author’s calculations based on data from Elkins, Ginsburg & Melton (2010).

40. See Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 *STAN. L. REV.* 1863, 1868 (2003).

41. *Id.*

rights law affects the international law and politics of the field” and distinguishes, even if not absolutely, international human rights law from other areas of international law.⁴² Among suprapositive human rights norms, a sub-category of rights has even more privileged status in both international and domestic constitutional rights systems. These are rights that are categorical, permitting no exceptions or derogations.⁴³ In international law, these are peremptory or *jus cogens* norms, including the prohibitions on slavery, genocide, and torture.

The interconnectedness of domestic and international human rights law, and their shared suprapositive status, explain in part why domestic courts are a crucial site for the application of international human rights norms. Hathaway notes that “domestic legal enforcement” of human rights treaty obligations is “at least as important as international enforcement.”⁴⁴ Simmons contends that domestic courts are one of two primary mechanisms for inducing states to comply with their human rights treaty commitments.⁴⁵ Indeed, as Nollkaemper has argued, international law has “become . . . dependent” on national courts for the adjudication of human rights claims.⁴⁶ Though international human rights systems—especially the European Court of Human Rights—have developed strikingly in recent decades, they are still a second or, more likely, a last resort after national courts. Only a small fraction of all rights claims being litigated in the world will ever be heard or decided in an international venue. Scholarship on international human rights law suggests, then, that domestic courts are the primary forum for human rights enforcement.

The crucial point is that, because domestic and international rights norms share a common suprapositive status, it can be relatively natural or straightforward for domestic judges to refer to international human rights law in determining the content and meaning of those norms. This argument on the interconnectedness of domestic and international human rights law, then, explains why human rights cases are driving citations to international legal materials. In few, if any, other areas of law do domestic and international law share substantive

42. *Id.* at 1869.

43. See Gardbaum, *supra* note 28, at 236.

44. Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties*, 51 *J. CONFLICT RESOL.* 588, 593 (2007).

45. See BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS*, 112–55 (2009).

46. NOLLKAEMPER, *supra* note 1, at 34.

rules and normative foundations to the degree that they do in human rights. If this is the case, then the interconnectedness of domestic and international human rights law will be recognized in dualist as well as monist countries, in civil law as well as common law systems.

II. *WHY DOMESTIC JUDGES CITE INTERNATIONAL LAW*

The task of this Part is to establish the reasons or motivations for which domestic judges invoke international law. The previous Part explained the broad normative-structural context that permits, and even promotes, citations to international law. This Part explores two factors that lead judges to cite international law, one institutional and one individual: (1) the expansion of judicial constitutional review, and (2) the incentives of judges.

A. *The Expansion of Rights Review*

The idea that judges should pass judgment on the constitutionality—and given the centrality of rights in modern constitutions, the rights-compatibility—of the acts and policies of government has spread through much of the world. That expansion is partly a matter of formal institutional (“*de jure*”) arrangements, and partly a function of judicial culture or attitudes, that is, how judges define their mission and their role vis-à-vis the political branches of government.⁴⁷ The proliferation of substantive human rights was accompanied by the spread of judicial review in national constitutions.

The expansion of constitutional review has been global.⁴⁸ In Law and Versteeg’s analysis, the diffusion of judicial review has been “even more dramatic” than the spread of constitutional rights. Only 25% of constitutions explicitly included judicial review in 1946; 82% did so in 2006.⁴⁹ But the exercise of judicial review does not depend exclusively on *de jure* authority. Courts sometimes carve out that

47. See generally LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* (2007); DIANA KAPISZEWSKI, *HIGH COURTS AND ECONOMIC GOVERNANCE IN ARGENTINA AND BRAZIL* (2012); Ezequiel González Ocantos, *Persuade Them or Oust Them: Crafting Judicial Change and Transitional Justice in Argentina*, 46 J. COMP. POL. 479, 479–98 (2014); Lisa Hilbink, *The Origins of Positive Judicial Independence*, 64 WORLD POL. 587 (2012).

48. Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J.L. ECON. & ORG. (forthcoming 2015).

49. Law & Versteeg, *supra* note 32, at 1199.

authority for themselves, as the US Supreme Court famously did in *Marbury v. Madison*. France's *Conseil constitutionnel* transformed itself in the 1980s from a "passive, even docile body to an assertive and powerful policymaker" that placed all French legislation under the shadow of judicial review, in the absence of any change in the Conseil's formal constitutional competences.⁵⁰ Other countries in which courts exercise judicial review without a constitutional provision for it include Australia, Denmark, Finland, Iceland, Israel, Norway, Singapore, Sweden, and Tonga.⁵¹ Including both *de facto* and *de jure* judicial review, 35% of countries had it in 1946 whereas 87% did in 2006.⁵²

One fundamental purpose of judicial review was to ensure that government acts did not encroach on legally protected rights. In Stone Sweet's account, the new constitutionalism after World War II, partially described above, included three essential features: "(1) an entrenched, written constitution, (2) a charter of fundamental rights, and (3) *a mode of constitutional judicial review to protect those rights*."⁵³ Germany and Italy adopted this constitutional court model; Spain followed them as it democratized in the 1970s. The new constitutionalism informed subsequent rounds of democratization in Central and Eastern Europe and South Africa, and "made in-roads" even in regions strongly influenced by the United States, like Asia and Latin America. Of the 106 national constitutions created since 1985, all but five provided for rights review. The new model originated in Europe but it had spread globally by the 1990s.⁵⁴ In other words, across much of the world, judges have either acquired the constitutional authority to conduct rights review or have developed that authority through jurisprudence. I argue that when judges are in a position to carry out rights review, judicial norms, or the judges' own interests, or both, can motivate them to consult international law.

50. ALEC STONE SWEET, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* 16 (1992).

51. Law & Versteeg, *supra* note 32, at 1199 n.127.

52. *Id.* at 1199.

53. Sweet, *supra* note 31, at 816 (emphasis added).

54. *See id.* at 817–20.

B. Judges' Motivations and Interests

In exercising rights review, judges are typically asked to rule on the compatibility of government acts with legally protected rights. In some countries, courts that engage in rights review are legally authorized to look to international law for guidance. In some countries, the constitution urges or requires judges to consider international law. Perhaps most famously, the Constitution of South Africa requires courts, when interpreting the Bill of Rights, to “consider international law.”⁵⁵ Under reforms that took effect in November 2012, Article 1 of the Mexican Constitution declares that “all persons shall enjoy the human rights recognized in this Constitution and in international treaties to which Mexico is a party.”⁵⁶ Article 1 goes on to require that norms concerning human rights always be interpreted in conformity with the Constitution and with international treaties in the manner that offers the broadest protection. In South Africa and Mexico, in other words, judges are obligated to interpret rights in light of international law.

Similarly, where treaties have direct effect—are automatically incorporated in domestic law, or are self-executing—judges are likely to invoke them as they would any other relevant law. This mechanism operates in monist countries; in dualist countries treaties typically require legislative action to be incorporated into domestic law. In the latter context, judges will frequently refer to the relevant treaties in order to interpret and apply the implementing legislation.

In addition to the domestic legal-structural conditions that might push judges toward citing international law, the expansion of rights review combined with constitutional or doctrinal principles, judges have some internal motivations for drawing on international legal materials. Because decisions that overrule government acts are likely to spur tension, if not conflict, with other branches of government whose acts are being examined, domestic judges who are in a position to conduct rights review will take advantage of any resource that might support and legitimize those decisions. International human rights law, as a complex of suprapositive norms connected to domestic rights law, is particularly well suited to perform that

55. S. AFR. CONST. § 39(1)(b), 1996.

56. Constitución Política de los Estados Unidos Mexicanos (Political Constitution of the United Mexican States) [C.P.], *as amended*, art. 1, Diario Oficial de la Federación [DO], 30 de Noviembre de 2012, (author translation).

function. I suggest that this will be true regardless of the underlying theory of judicial behavior that one might prefer.

The three main strands of theory on judicial decision-making are the legal, the attitudinal (ideological), and the strategic. The legal model is the traditional account of judging in which judges seek to resolve disputes according to the written law and case law. If judges decide as this theory suggests, then international law is a valid and relevant source of legal norms and principles, the more so as it is interconnected with domestic rights law. Judges operating in the “legal decision-making” mode will cite international legal materials because they contain relevant law and interpretive guidelines. The attitudinal model contends that judges decide according to their political or ideological preferences.⁵⁷ In this model, judges will cite international law to reinforce decisions that they have made on underlying ideological grounds. The strategic model holds that judges add to the attitudinal approach the constraints imposed on them by other institutional actors, including other courts, the executive, the legislature, and public opinion.⁵⁸ Judges acting strategically will cite international legal materials to bolster their decisions against resistance or backlash from other actors. The higher the status of international law in the domestic legal system, the greater the value of citing international law in domestic judicial decisions. The status of international law is higher to the extent that: (1) ratified treaties are automatically incorporated in domestic law, (2) treaties are incorporated into domestic law by legislative action, (3) treaties—or custom—are equal in status or superior to ordinary law in the domestic legal order, and (4) the constitution explicitly confers domestic legal status on human rights treaties in general or on specific treaties.

Where treaties are directly incorporated into domestic law and are superior or equal to statute, judges can cite them as binding law. That situation, however, is probably rare. More likely, in any of the three judicial decision-making modes, domestic judges cite international law as “persuasive authority,” which “attracts adherence

57. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002).

58. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 139–62 (1998).

as opposed to obliging it.”⁵⁹ The idea is that where the extent or application of domestic rights is unclear (as it by nature often will be), judges can turn to non-domestic legal materials that might aid in interpreting domestic rights provisions. Given the suprapositive nature of international human rights law, and its dense interconnections with domestic human rights law, international law can be a useful source of ideas and guidance to judges wrestling with the interpretation of domestic rights. And international legal norms offer courts a persuasive resource that they are uniquely positioned to utilize. This will be true whether judges are trying to apply law and precedent, seeking to implement their policy preferences, acting strategically vis-à-vis executives and legislatures, or all three.

C. How Domestic Judges Make Use of International Legal Materials

If national judges follow international law norms regarding sources of law, they will be more likely to invoke treaties than other sources of international law, and they will tend to invoke subsidiary sources of international law as aids to understanding and interpreting the content of treaty rules.

The Statute of the International Court of Justice offers the canonical statement on the sources of international law. Article 38 identifies three primary sources—treaties, customary law, and general principles of law—and two “subsidiary means for the determination of rules of law.”⁶⁰ Of the three primary sources of international law, treaties are by far the easiest for domestic judges—as well as other legal actors—to recognize. Domestic actors recognize treaty law because domestic laws universally do so. At a minimum, constitutions define a process by which the government can enter into treaty obligations; treaties that come into force for a country via the stipulated process express legal rules. For instance, the US Constitution specifies the process by which the United States enters into treaties⁶¹ and further stipulates that, “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”⁶² It is a simple matter, then, for US courts

59. Patrick Glenn, *supra* note 10, at 263. Glenn discusses persuasive authority in the context of citations to foreign courts, but the idea is the same with respect to citing international legal materials. *See id.*; *see also* Slaughter, *supra* note 10, at 124.

60. Statute of the International Court of Justice, art. 38, para 1.

61. *See* U.S. CONST. art. II, § 2.

62. *Id.* art. VI.

to recognize treaty law that applies to the United States—though a much less simple matter to determine how treaties should be applied in domestic courts.

The key point is that national—usually constitutional—law provides rules by which domestic courts—as well as legislatures and executives—can recognize treaty law as embodying legal norms. With respect to the other primary sources of international law—customary international law and general principles—recognition of international legal rules by national courts is almost always more complicated. Determining the content of customary international law (“CIL”) is fraught with challenges, even for international law scholars,⁶³ and some international law scholars question the contemporary relevance of CIL altogether.⁶⁴ “General principles of law” are even more difficult to pin down. Thus, as one prominent textbook puts it, “it is not easy to isolate the emergence of a new rule of customary law and there are immense problems involved in collating all the necessary information.”⁶⁵ And regarding general principles, they are “of fairly limited scope.”⁶⁶ In short, domestic courts are almost certain to have more difficulty in deploying customary international law and general principles than they do in invoking treaty law.

The “subsidiary means for the determination of rules of law” are not sources of international law in themselves but can be used to interpret international legal norms. The subsidiary means include judicial decisions.⁶⁷ The decisions of international courts and tribunals offer authoritative interpretations of international legal rules. Domestic courts can therefore recognize international court decisions as relevant guides for specifying the content and meaning of international legal norms.

A variety of additional texts and documents, though not embodying legal obligations, can serve as aids to interpretation of international legal norms. I group these materials under the rubric “soft law.” For example, resolutions and declarations of the UN General Assembly are not legally binding but courts and other legal

63. See, e.g., MICHAEL BYERS, *CUSTOM, POWER, AND THE POWER OF RULES* (1999); ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971).

64. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

65. MALCOLM N. SHAW, *INTERNATIONAL LAW* 69 (5th ed. 2003).

66. *Id.* at 93–94.

67. Statute of the International Court of Justice, art. 38.

actors sometimes consult them as evidence of the general opinion or understanding of the community of states regarding international norms. The International Law Commission (“ILC”) is a body created by the General Assembly for the “promotion of the progressive development of international law and its codification.”⁶⁸ The ILC’s studies and draft statutes are widely seen as distilling current understandings of international law. Similarly, a variety of human rights treaty bodies produce reports and findings that are generally seen as reliable interpretations of the relevant treaties. For instance, the Committee against Torture is regarded as an authoritative guide—through its “General Comments”—with respect to the Convention against Torture.

Finally, international law itself offers principles for the interpretation of treaties, and these principles are frequently integrated into domestic legal systems. The principles have been codified in the Vienna Convention on the Law of Treaties (“VCLT”).⁶⁹ The first principle is that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning” of its text, “in the light of its object and purpose.”⁷⁰ The norm that laws should be interpreted according to the meaning of their text is fundamental in most legal systems. The VCLT principles also include any subsequent agreement of the parties regarding interpretation of the treaty, subsequent practice by the states parties, and “[a]ny relevant rules of international law applicable in the relations between the parties.”⁷¹ “Supplementary means of interpretation” include the “preparatory work of the treaty” but are otherwise left quite open-ended.⁷²

Courts in many countries rely on the VCLT to resolve questions involving the status or interpretation of treaties.⁷³ This is the practice in Australia when the treaty has been incorporated through legislation.⁷⁴ Czech courts must apply the VCLT in interpreting

68. Statute of the International Law Commission, art. 1, para. 1, G.A. Res. 174 (II), (Nov. 21, 1947) [hereinafter ILC].

69. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

70. *Id.* art. 31, para. 1.

71. *Id.* art. 31 para. 3(c).

72. *Id.* art. 32.

73. Shelton, *supra* note 6, at 10.

74. Alice de Jonge, *Australia*, in *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS*, *supra* note 3 at 23, 40.

treaties; the Convention is part of Czech law.⁷⁵ Courts in Austria, Canada, Germany, Japan, Nigeria, Poland, and Venezuela—even though it is not a state party—refer to the VCLT.⁷⁶ In the United Kingdom, which has not incorporated the VCLT into domestic law, courts interpret treaties that have been incorporated by “scheduling” —appending the text to a piece of legislation—according to international law rules of interpretation as codified in the VCLT.⁷⁷ Even where domestic judges might not be acquainted with the VCLT, judges are still likely to analyze, first, the text of a treaty, followed by related agreements and laws, and finally by the preparatory work and other supplementary aids to interpretation. Waters argues, and provides evidence that, domestic courts tend to look first to treaty law, and that treaties then “bridge” to other kinds of legal materials—judicial decisions and soft law—that can be helpful in interpreting treaties.⁷⁸

III. *THE FOREGOING ARGUMENTS LEAD TO TWO PROPOSITIONS*

Proposition 1: National judges will cite treaties more often than they cite international judicial decisions, soft law, or customary international law.

Proposition 2: Citations to international courts and soft law are more likely to occur when courts cite treaties than when they do not cite treaties.

A. Proposition 1: National Judges Will Cite Treaties More Often Than They Cite International Judicial Decisions, Soft Law, or Customary International Law

The first proposition is that national courts will cite treaties more often than they refer to other types of international legal material. Proving this contention would require comprehensive data on references to international law from a large sample of national jurisdictions. Those data do not yet exist. But initial data from the

75. Alexander J. Bělohávek, *The Czech Republic*, in *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS*, *supra* note 3 at 195, 199–200.

76. See *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS*, *supra* note 3, at 10.

77. Anthony Aust, *United Kingdom*, in *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS*, *supra* note 3, at 476, 483.

78. See Waters, *supra* note 3, at 666–68.

Courts and the Globalization of Law Project provide suggestive evidence from three countries: Australia, Canada, and South Africa. The Courts and the Globalization of Law Project (“CGLP”) codes decisions from the top courts of a set of countries from all regions of the world. “Top courts” are those with constitutional jurisdiction, where such jurisdiction is formally established, or the highest general court of appeal. The three courts included in this study are the High Court of Australia, the Supreme Court of Canada, and the Constitutional Court of South Africa. In addition to coding basic information about the case—subject matter and outcomes, for example—the database records every citation to foreign or international legal materials. Every decision from odd-numbered years from 1991 through 2011 is included. For South Africa, coverage begins in 1995, the year the Constitutional Court came into being. The database excludes brief orders relating to motions or other procedural questions. As of this writing, the database includes approximately 1600 decisions and about 30,000 individual citations.

Though none of the three courts is from a civil law jurisdiction, they do offer important sources of variation. Two of the countries have traditional common law traditions—Australia and Canada—and third, South Africa, has a mixed system—British common law and Dutch-Roman law. The three courts vary quite significantly in the nature of their jurisdiction in cases involving rights review. The High Court of Australia’s (“HCA”) basic jurisdiction does not explicitly include constitutional review, though Parliament can enact laws granting it jurisdiction in matters “[a]rising under this Constitution, or involving its interpretation.”⁷⁹ The HCA decides appeals regarding the rights of Australians, though Australia does not have a formal bill of rights. The Supreme Court of Canada (“SCC”) resolves constitutional questions, including those arising under the 1982 Canadian Charter of Rights and Freedoms.⁸⁰ “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction,”⁸¹ and the Supreme Court is the highest court of appeal in any such cases. The Constitutional Court of South Africa (“CCSA”) has jurisdiction only on constitutional matters and the South African

79. AUSTRALIAN CONSTITUTION ch. III § 76.

80. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.), reprinted in R.S.C. 1985, app. II, no. 44, Pt. I (Can.)

81. *Id.* § 24(1).

Constitution does include a bill of rights. The CCSA is the highest court on constitutional issues and can also exercise original jurisdiction on direct applications. The court itself determines whether cases raise important questions of constitutional interpretation.

Because the three courts analyzed here engage in rights review, and because two of them operate under rules or principles that encourage them to consider international human rights law, if the propositions are not confirmed for this set of courts, they are unlikely to be applicable in other courts. The three courts are, in other words, most likely cases, which are well suited for a plausibility probe of the arguments. By the same token, if the propositions are confirmed for these courts, then additional testing with a broader set of courts is clearly warranted.

The differences among the three courts lead to some initial expectations about their propensity to invoke international legal materials. The CCSA's jurisdiction is limited to cases that raise constitutional questions. Because a large share of such cases involve rights, and—for reasons discussed above—rights cases are probably more likely to produce references to international law, we might expect a higher share of CCSA decisions to cite international legal materials. In addition, international law is more institutionalized in the CCSA than it is in the other two courts. The South African Constitutional Court, “when interpreting the Bill of Rights . . . must consider international law,”⁸² and the Court employs a law clerk specifically to research foreign and international law. The SCC is not required by law to consult international law while engaging in rights review, but it has developed doctrine by which Charter rights should be interpreted with reference to rights embodied in international instruments. The High Court of Australia is under no legal strictures one way or the other with respect to consulting international law. In sum, the Constitutional Court of South Africa should cite international law more frequently than the other two courts. The SCC might more frequently cite international law than the HCA given its jurisprudence on international law and rights interpretation. In fact, the top courts in Australia, Canada, and South Africa display different propensities to invoke international materials, as shown in Figure 2.⁸³

82. S. AFR. CONST. § 39(1), 1996.

83. *See supra* fig.2.

The Canadian Supreme Court is fairly consistent in referring to international legal materials in about 10% of its decisions. The High Court of Australia cites international legal materials in 20% of its decisions during the period 1997 to 2009, but in 10% or less of its decisions outside that timeframe. Australia's high level of citations to international legal materials may appear puzzling because it is not under a constitutional mandate (South Africa) nor jurisprudential principles (Canada) supporting reference to international law. It is worth, at this point, keeping in mind that the propensity of a court to invoke international legal materials depends in part on the specific judges on the court. Some judges' personal judicial philosophies or experiences lead them to be more open to transnational or international judicial dialogue.⁸⁴ Judge Michael Kirby of the High Court of Australia was certainly one such judge. Judge Kirby was an active participant in the Interights conferences that produced the Bangalore Principles. The Bangalore Principles declare that human rights are grounded in international human rights codes and that national judges have a duty to interpret domestic constitutions and legislation in harmony with international human rights law.⁸⁵ Judge Kirby became an active and outspoken advocate of the Bangalore Principles.⁸⁶ Judge Kirby sat on the High Court of Australia from 1996 to 2009, a span that coincides precisely with the years in which the share of the Court's decisions citing international law was high—the 1997–2009 period in Figure 3. Not coincidentally, Judge Kirby, by a considerable margin, cited international law more frequently than any other judge on the court during the 1991–2011 period, as shown in Figure 4.⁸⁷ The graph displays the average number of citations to international legal materials per year, as well as the years each judge sat on the High Court. Similar graphs for the SCC and the Constitutional Court of South Africa are available in the Appendix. In neither of the other two courts is the gap between the judge with the highest average citations to international law and the next judges as great as it is in the HCA. In addition, the highest average for a judge in the SCC—La Forest, nineteen—and for a judge in the CCSA—Chaskalson, twenty-one—is much smaller than Judge Kirby's average of fifty-eight.

84. See Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (1999).

85. See Waters, *supra* note 3, at 646–47.

86. See generally MICHAEL D. KIRBY, *THROUGH THE WORLD'S EYE* (2000).

87. See *infra* fig.4.

The Constitutional Court of South Africa cited international materials at an exceptionally high rate in its first few years, followed by wide fluctuation and then a leveling out at over 20% of decisions. The high early rate may well be attributable to the lack of useable domestic rights-related case law in South Africa in the Court's early years, leading the Court to rely initially on international and foreign sources. As the Court developed its own jurisprudence, its reliance on international law would naturally decline—though to a level that is still high by comparative standards.

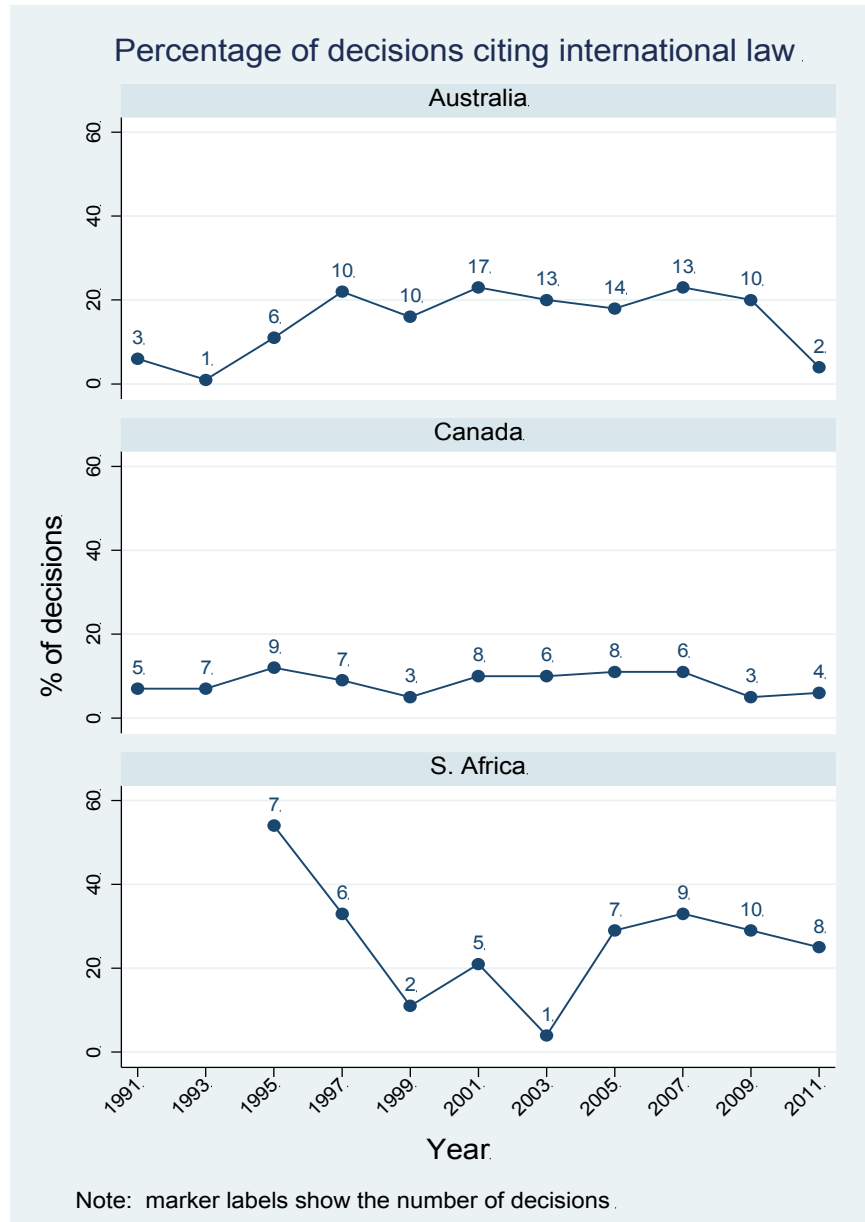


Figure 3

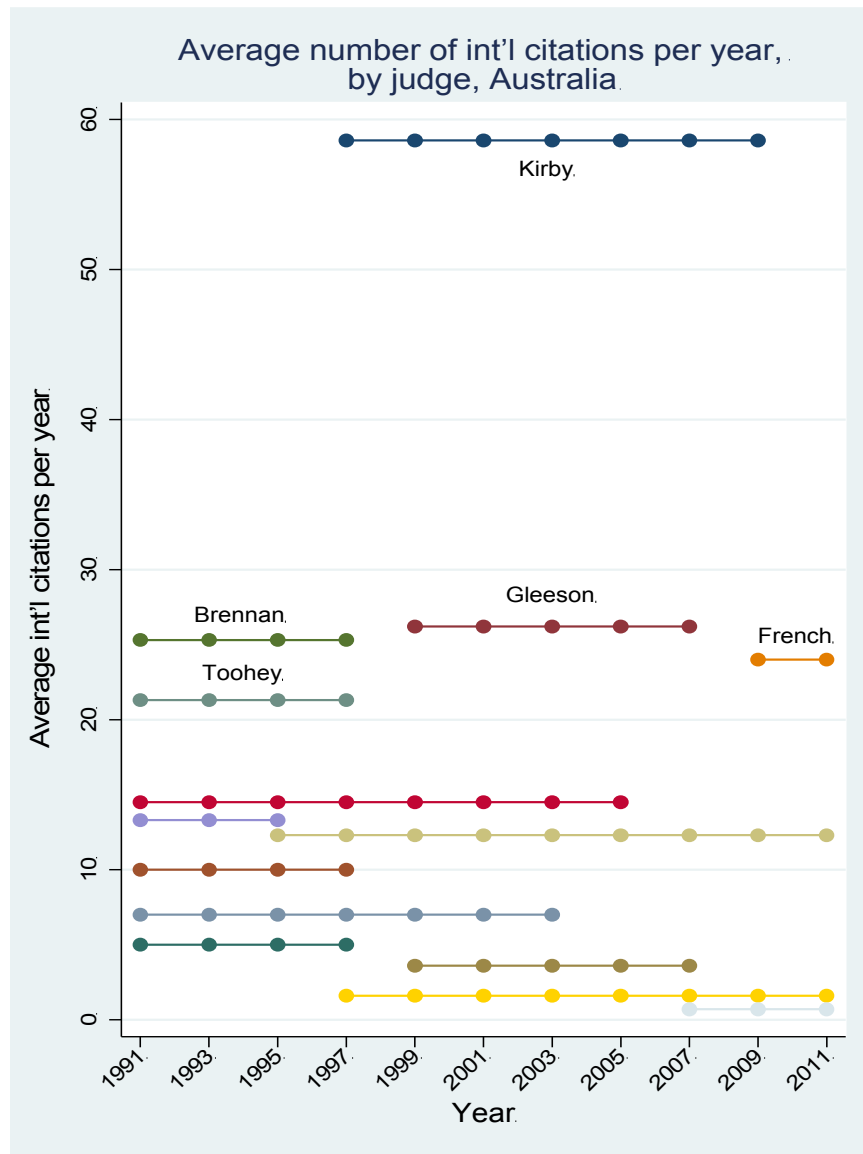


Figure 4

In terms of subject matter, for all three courts, the largest number of decisions and the largest number of decisions invoking international law involve questions of rights, as depicted in Figure 5.⁸⁸

88. See *infra* fig.5.

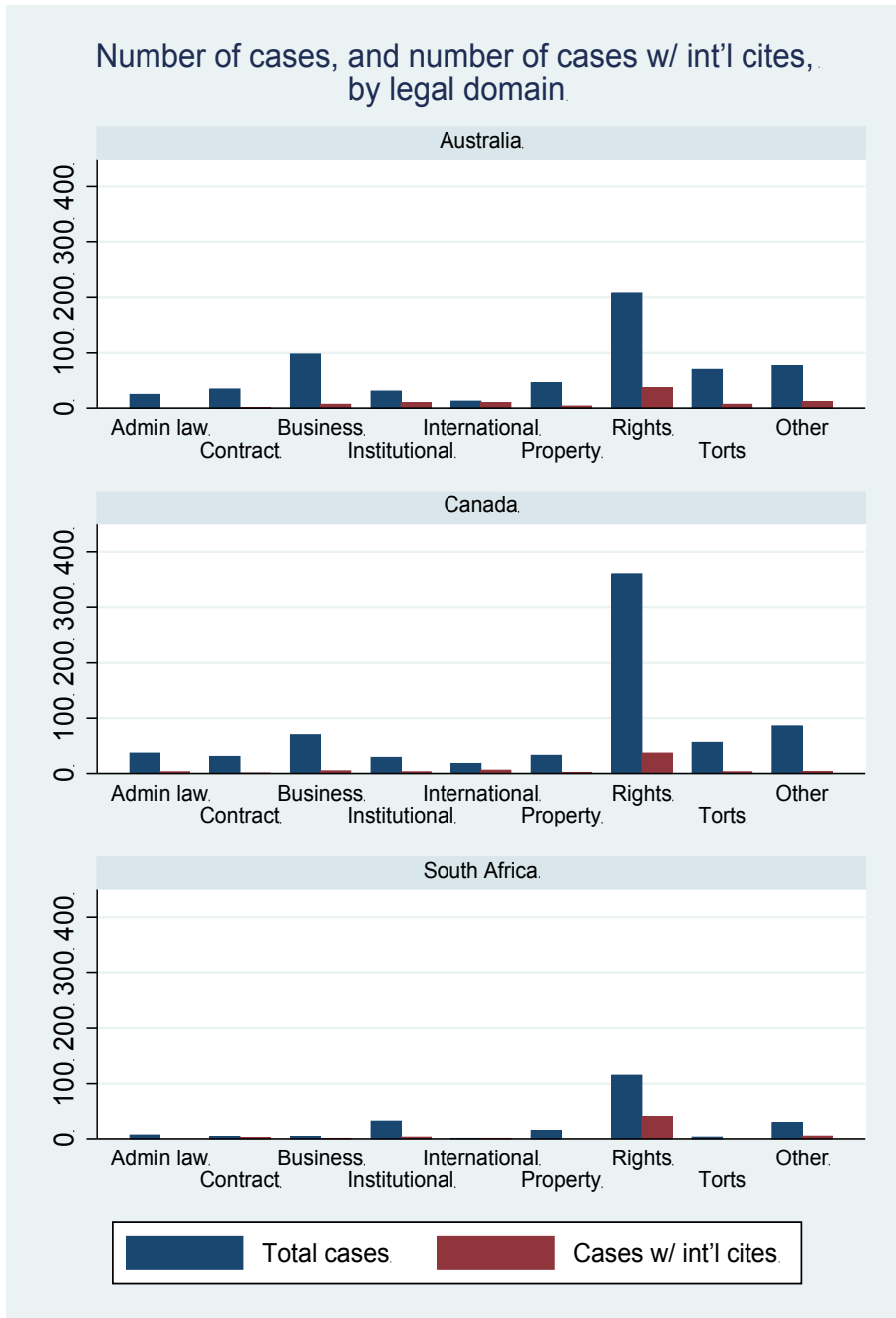


Figure 5

As to whether courts cite treaties more often than they cite other international legal materials, Figure 6 indicates that they do.⁸⁹ The graphs include only decisions that made some reference to international law and report the percentage of decisions invoking specific types of international legal materials. For Australia, treaties were the most commonly cited international material in every year. The percentage of decisions invoking treaties was never lower than 60% and it reached 100% in four of the eleven years for which we have data. The picture is slightly more complex for Canada and South Africa. In Canada's Supreme Court, treaties were the most commonly cited international legal material in eight of the eleven years—tied in one. Treaties were cited in all of the decisions that made reference to international law in 2007, 2009, and 2011. Treaties were the most commonly cited international material in six of nine years in the South African Constitutional Court, tied with other categories in four of the six years.

Of the three courts, the CCSA is the one most likely to cite international legal materials other than treaties and to cite international courts. In 2003, for instance, every decision that cited international legal materials made reference to an international court. An initial speculation might be that the CCSA cites international courts more frequently because South Africa, unlike Australia and Canada, belongs to a regional human rights system, comprised of the African Commission on Human and Peoples' Rights and, since 2006, the African Court of Human and Peoples' Rights ("ACtHPR"). However, in the database analyzed here, none of the CCSA's citations to international courts was to the African Commission or the ACtHPR. The most frequently cited international court was the European Court of Human Rights—112 citations—and the second was the International Court of Justice—14 citations.

89. See *infra* fig.6.

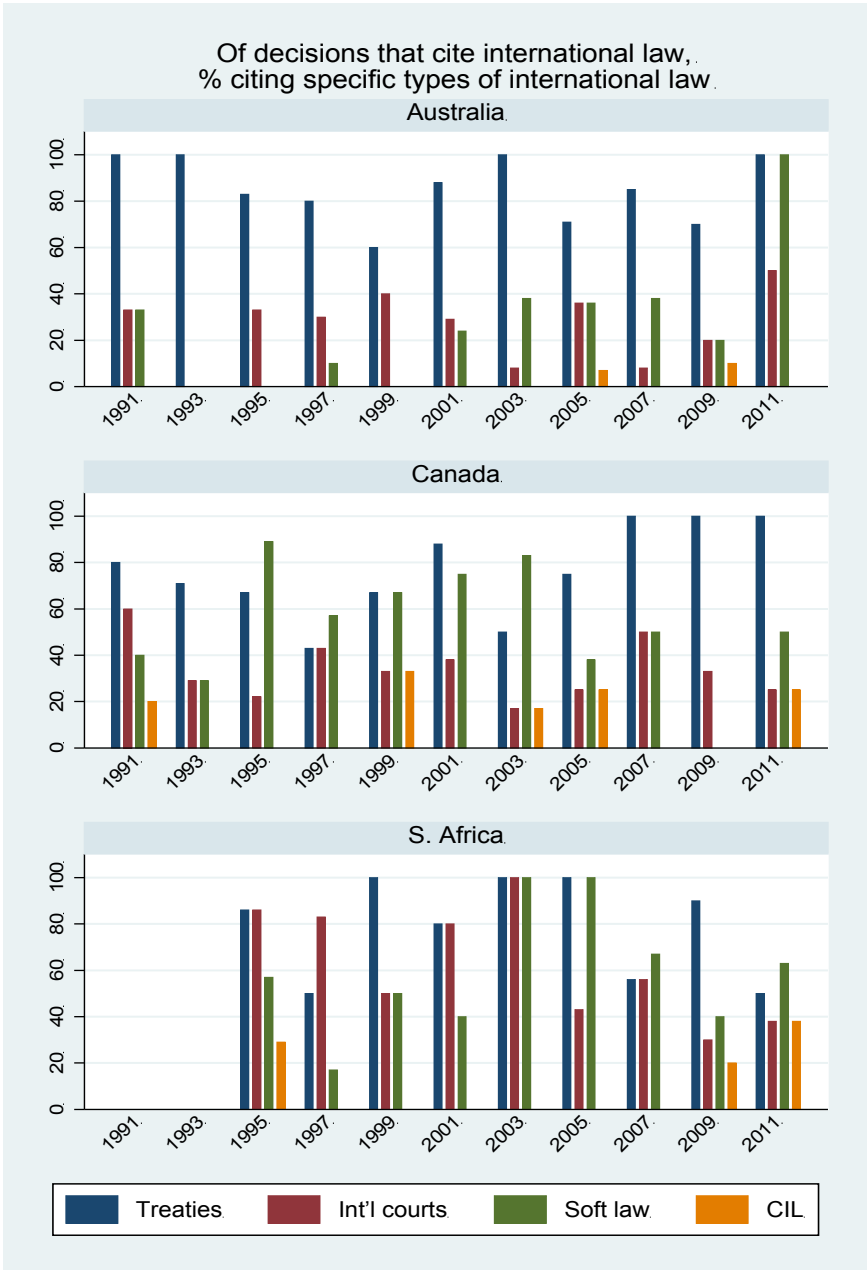


Figure 6

A second way to test the proposition that courts are more likely to cite treaties than other types of international legal materials is to assess decisions that invoke only one type. If the proposition is correct, the greatest percentage of decisions that invoke only one type will refer to treaties, as displayed in the data of Figure 7.⁹⁰ The proposition clearly holds true for the High Court of Australia, though the share of decisions citing only treaties declines quite steadily over the 20 years and the percentage of decisions referring only to other types—international courts, soft law, CIL—becomes notable in three of the later years. The proposition is partially true for the Canadian Supreme Court—in six of the eleven years—and is true of the South African Constitutional Court in three of nine years. The CCSA is particularly unlikely to cite only one type of ILM, as shown by the number of years in which no decisions cited only one type of international legal material. Still, even in South Africa, treaties are the type most commonly cited alone. From this view of the data, the proposition that courts will cite treaties more readily than they invoke other types of international legal materials is generally confirmed, with variation across countries.

Finally, we can test the extent to which courts tend to invoke treaties more readily than they do other types of ILM by calculating the following ratio: the odds that a decision will cite treaties but not international courts or soft law, divided by the odds that a decision will cite international courts—or soft law—but not the other two types. Table 2 reports those ratios.⁹¹ The data confirm that in all three courts, treaty citations are much more likely to occur alone—without citations to international courts or soft law—than are the other two types. The tendency is stronger with respect to soft law than it is regarding international courts.

90. See *infra* fig. 7.

91. See *infra* tbl. 2. This analysis excludes customary international law (“CIL”) because references to CIL are too rare to permit statistically significant cross-tabulations.

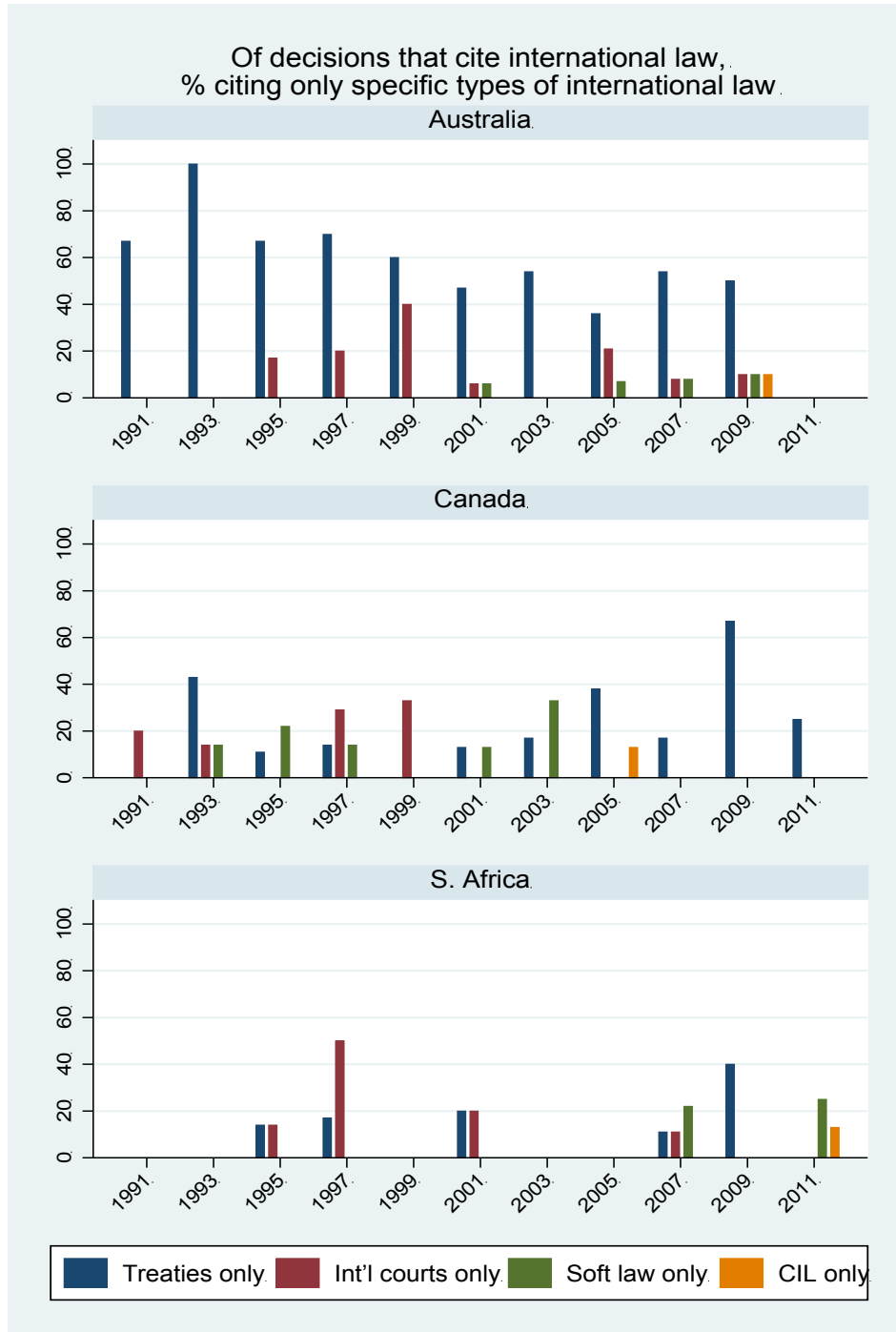


Figure 7

Ratios of odds that cases include one type of int'l citation but not other types

	odds (only treaty) odds (only int'l court)	odds (only treaty) odds (only soft law)
Australia	1.7	9.5
Canada	1.5	1.9
South Africa	1.0	1.9

Note: The table includes decisions that made at least one reference to international legal materials.

"Only treaty" : the case includes citations to treaties but not to international courts or soft law.

"Only int'l court" : the case includes citations to international courts but not to treaties or soft law.

"Only soft law" : the case includes citations to soft law but not to treaties or international courts.

Table 2

B. Proposition 2: Citations to International Courts and Soft Law Are More Likely to Occur When Courts Cite Treaties.

A pair of illustrations illustrate the claim that courts are less likely to invoke international decisions and soft law for their own sake, but rather in conjunction with references to treaty law. In *S. v. Makwanyane*, the Constitutional Court of South Africa ruled that the death penalty violated South Africa's Constitution.⁹² The Court invoked both foreign law and international law as it interpreted rights enshrined in the Bill of Rights. One of the treaties examined by the Court was the International Covenant on Civil and Political Rights. For guidance in interpreting provisions of the ICCPR regarding the right to life and cruel and inhuman punishment, the Court referred to an opinion of the Human Rights Committee.⁹³ The Court also consulted the European Convention on Human Rights with regard to

92. See *S. v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/1995/3.pdf>.

93. See *id.* ¶¶ 63–67.

similar norms and cited decisions of the European Court of Human Rights to aid it in interpreting those norms.⁹⁴

A 2001 case, *R. v. Sharpe*, asked the Supreme Court of Canada to decide whether laws criminalizing the possession of child pornography violated the *Charter* right to free expression under Sec. 2, or whether such laws were justified by limitations permitted by Sec. 1 of the *Charter*.⁹⁵ In an opinion concurring in the outcome but reaching a different conclusion with respect to the constitutionality of one provision of the Criminal Code, Justices L'Heureux-Dubé, Gonthier, and Bastarache turned to international norms to aid in the interpretation of *Charter* rights, noting that “[w]hile this Court has recognized that, generally, international norms are not binding without legislative implementation, they are relevant sources for interpreting rights domestically.”⁹⁶ The opinion then turned first to treaties—Convention on the Rights of the Child, ICCPR—and then to soft law—the General Assembly Declaration of the Rights of the Child and the UN Commission on Human Rights Programme of Action for the Prevention of the Sale of Children, Child Prostitution, and Child Pornography—to establish the weight to be given to norms protective of children. *Charter* provisions and the Criminal Code, the justices argued, should be understood in the context of international norms to which Canada had subscribed.⁹⁷

As illustrated by the *Makwanyane* and *Sharpe* cases, citations to treaties can serve as a “bridge” to other types of legal materials.⁹⁸ International court decisions and soft law documents are not law in themselves but they can help courts to interpret the meaning, scope, and application of treaty provisions. Of course, domestic courts can refer to soft law materials for reasons other than treaty interpretation, for example, for evidence of customary international law. Shelton notes that courts increasingly refer to soft law materials for their persuasive authority with respect to human rights questions.⁹⁹ But much of the usage of soft law is probably driven by the use of treaty law by domestic courts. I suggested, therefore, that references to soft

94. *See id.* ¶¶ 63–67.

95. *R. v. Sharpe*, [2001] 1 S.C.R. 45 (Can.).

96. *Id.* ¶ 175.

97. *See id.* ¶¶ 177–79.

98. *See Waters*, *supra* note 3, at 667 nn.187–90.

99. *See INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS*, *supra* note 3, at 14–15.

law and international courts should tend to occur in decisions in which judges invoke treaties.

As an example, the HCA referred to soft law in order to clarify treaty law in deciding *LK v. Director-General, Department of Community Service*.¹⁰⁰ The Court was asked to resolve a dispute over whether four children living with their mother in Australia should be ordered to return to Israel following a demand from the children's Israeli father. Australia and Israel were both parties to the *Convention on the Civil Aspects of International Child Abduction* ("Abduction Convention").¹⁰¹ Australia's *Family Law Act of 1975* provides for regulations to enable Australia to fulfill its obligations under the *Abduction Convention*. The Regulations created under the Act provide "that they are to be construed having regard to the principles and objects mentioned in the preamble to and Art 1 of the *Abduction Convention*."¹⁰² The key to the dispute was the forum state in which disputes between parents should be resolved, and that issue centered entirely on the determination of the "child's country of habitual residence."¹⁰³ In determining the habitual residence of the children who were the subject of this dispute, the Court referred not only to the *Abduction Convention* but to ten other treaties produced in the framework of the Hague Conference on Private International Law, and then to the soft law *Explanatory Report* published by the Permanent Bureau of the Hague Conference on Private International Law.¹⁰⁴

Similarly, in an appeal over rejected applications for temporary protection visas, the High Court of Australia turned to both treaty and soft law in order to elucidate the requirements of Australia's 1958 *Migration Act*.¹⁰⁵ The Court sought to clarify the obligations Australia held regarding holders of protection visas and the obligations owed by the state to the spouses and dependents of persons in possession of such visas. The Court referred to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of

100. *LK v. Dir.-Gen., Dep't of Cmty. Servs.* (2009) 237 CLR 582 (Austl.).

101. Hague Conference on Private International Law, *Convention on the Civil Aspects of International Child Abduction*, Oct. 25, 1980, Hague XXVIII [hereinafter *Abduction Convention*].

102. *Id.* art. 2 (emphasis added).

103. *LK*, 237 CLR at para. 6.

104. *See id.* ¶¶ 21–29.

105. *See Re Minister for Immigration and Multicultural and Indigenous Affairs*, (2003) 211 CLR 441 (Austl.).

Refugees. In order to interpret the treaties, the Court also quoted from the 1992 version of the *Handbook on Procedures and Criteria for Determining Refugee Status*, issued by the Office of the UN High Commissioner for Refugees.¹⁰⁶

The SCC offers clear examples of citing international courts in connection with references to treaty law. In *Mugesera v. Canada*, the Court noted that “[g]enocide is a crime originating in international law,” and that “[i]nternational law is thus called upon to play a crucial role as an aid in interpreting domestic law, particularly as regards the elements of the crime of incitement to genocide.”¹⁰⁷ The Court pointed out that both Rwanda and Canada were bound by the *Genocide Convention*, then referred to an advisory opinion of the International Court of Justice establishing that the norm against genocide was also part of customary international law.¹⁰⁸ The jurisprudence of the Supreme Court emphasizes “[t]he importance of interpreting domestic law in a manner that accords with the principles of customary international law and with Canada’s treaty obligations,”¹⁰⁹ which meant that “international sources like the recent jurisprudence of international criminal courts are highly relevant to the analysis.”¹¹⁰ International jurisprudence was especially useful because there was no Canadian jurisprudence on the offense of “advocating genocide.” The Court then referred to two cases from the International Criminal Tribunal for Rwanda *Prosecutor v. Akayesu*,¹¹¹ and *Prosecutor v. Nahimana, Barayagwiza and Ngeze*,¹¹² in order to establish the elements of the crime of incitement to genocide.¹¹³

The South African Constitutional Court has engaged in similar practices. In *Masiya v. Director of Public Prosecutions* the CCSA was asked to decide an appeal of a man convicted of rape.¹¹⁴ The

106. *See id.* ¶¶ 19–22.

107. *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 134 (Can.).

108. *See id.* ¶ 82.

109. *Id.* (discussing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (Can.)).

110. *Id.*

111. *See id.* ¶¶ 83–89, 132–55 (citing *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, (Sept. 2, 1998)).

112. *See id.* ¶ 85 (citing *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T, Judgment and Sentence, (Dec. 3, 2003)).

113. *See id.* ¶¶ 83–89.

114. *See Masiya v. Dir. of Pub. Prosecutions* 2007 (5) SA 30 (CC) (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2007/9.pdf>.

Court had to determine whether the common law definition of rape should be extended to include non-consensual anal penetration. If so, could Masiya be convicted of rape “even though the definition of rape did not include non-consensual anal penetration at the time the crime was committed”?¹¹⁵ In deciding whether applying the developed definition of rape to the present case violated the principle of legality, Judge Nkabinde referred to the principle of legality in the European Convention on Human Rights and to various decisions of the European Court of Human Rights interpreting that principle.¹¹⁶ In his separate opinion, Chief Judge Langa argued that the Court should develop the common law of rape even further—to include non-consensual anal penetration of males. Chief Judge Langa invoked the Elements of Crimes of the International Criminal Court as well as decisions of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia in support of an expanded definition.¹¹⁷

Figure 8 shows with broader evidence the degree to which decisions include multiple types of ILM citations.¹¹⁸ Only in Australia does the largest number of decisions invoke only one type, and even there 30% of all decisions that cite international law include citations to more than one type. In Canada and South Africa, 59% and 65%, respectively, of decisions with citations to ILM include more than one type. For the latter two countries, when the court cites any kind of international legal material, it is likely to cite others.

115. *Id.* ¶ 47.

116. *Id.* ¶¶ 52–53.

117. *Id.* ¶¶ 84–87.

118. *See infra* fig.8.

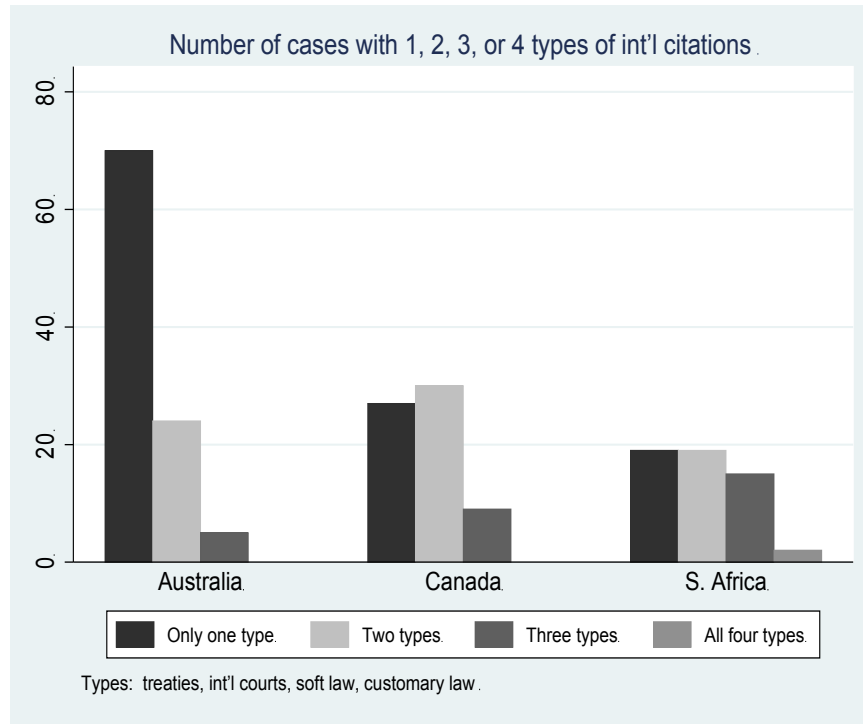


Figure 8

Table 3 offers another perspective on this question.¹¹⁹ Table 3 displays the odds that a decision that cites one type will also include at least one other type of ILM citation. If my argument is correct—that international courts and soft law are more likely to be cited as subsidiary means of identifying international norms—then international court citations and soft law references will tend to be cited in decisions that also cite other types of international legal materials. For any given country, then, the odds reported in Table 3 should be greater for international court and soft law citations than they are for treaty references. The most relevant comparisons are within countries: the values in the second and third rows under a country should be greater than the value in the first. In general, that is the case. Only in decisions from South Africa's Constitutional Court are treaty references about as likely as international court references

119. *See infra* tbl. 3.

to occur along with other types in the same decision. The CCSA, in other words, does not favor treaty citations as strongly as the other two courts do. However, in all three courts, soft law citations are consistently more likely than international court or treaty citations to occur in decisions that include one or more of the other types of citations. It is also worth noting that in 2011, HCA decisions never referred only to one type of material; rather, decisions that cited international law always invoked more than one type. The evidence shows that citations to these three types of international legal materials tend to occur together, but that international courts and soft law are more likely than treaties to be cited in decisions that also make reference to other types of international legal materials.

Odds that types of citations occur in decisions with the other main types

If a decision cites this type of ILM . . . the odds that it also cites at least one of the other two types are:
 . . .

Australia

Treaties	0.5
International courts	0.9
Soft law	5.3

Canada

Treaties	2.3
International courts	3.4
Soft law	4.3

South Africa

Treaties	3.6
International courts	3.4
Soft law	6.8

Note: The odds are the ratio of the probability that a condition holds divided by the probability that it does not. The denominator for all of the odds reported here is the probability that a decision including the indicated type of citation does not also include one of the other two main types.

The table excludes citations to customary international law, which are too rare.

Table 3

CONCLUSION

Domestic courts from diverse legal traditions and in every region of the world invoke international legal materials in resolving disputes brought before them. I argued that references to international legal materials by domestic courts are being driven in large part by the internationalization of human rights law, the expansion of rights review, and the incentives and motivations of judges. I offered two propositions, first, that treaties would be more frequently cited than other ILM, and, second, that references to international judicial decisions and soft law would be more likely in decisions that refer to treaty law. The data showed that by far the largest number of domestic cases citing ILM were in the rights domain. The evidence also demonstrates that domestic courts do cite treaties more often than the other types of international legal materials—with some intriguing exceptions—but also that courts are surprisingly willing to cite the decisions of international courts, customary international law, and soft law. The analysis confirms that the various types of international legal materials tend to “cluster”—a decision that cites one type is likely to cite at least one other.

Clearly, there is a great deal more to learn about how domestic legal systems articulate with international law. This study has raised questions specific to the countries and courts examined: why does the High Court of Australia rely more on treaties and less on international court decisions or soft law when it does invoke ILM? Why are the Supreme Court of Canada and the Constitutional Court of South Africa more inclined to make use of international judicial decisions and soft law, even in the absence of references to treaties? But more broadly, that the propositions offered in this Study find general support suggests that the arguments are plausible and could fruitfully be assessed with respect to a larger set of countries and courts.

Another implication of the analysis is that a system of global and national human rights law is emerging, one that is by no means fully integrated—or monist—but one that is also unlike the separate and parallel legal systems of idealized dualism. What appears to be developing is a network of legal systems that are linked, loosely and unevenly, through a nexus in international law. The linkages among national, regional, and international legal regimes may be creating an “inter-dependent global system of law.”¹²⁰ Whether or not such a

120. Shelton, *supra* note 6, at 22.

system emerges, it is clear that domestic courts are connecting international norms with national law.

APPENDIX

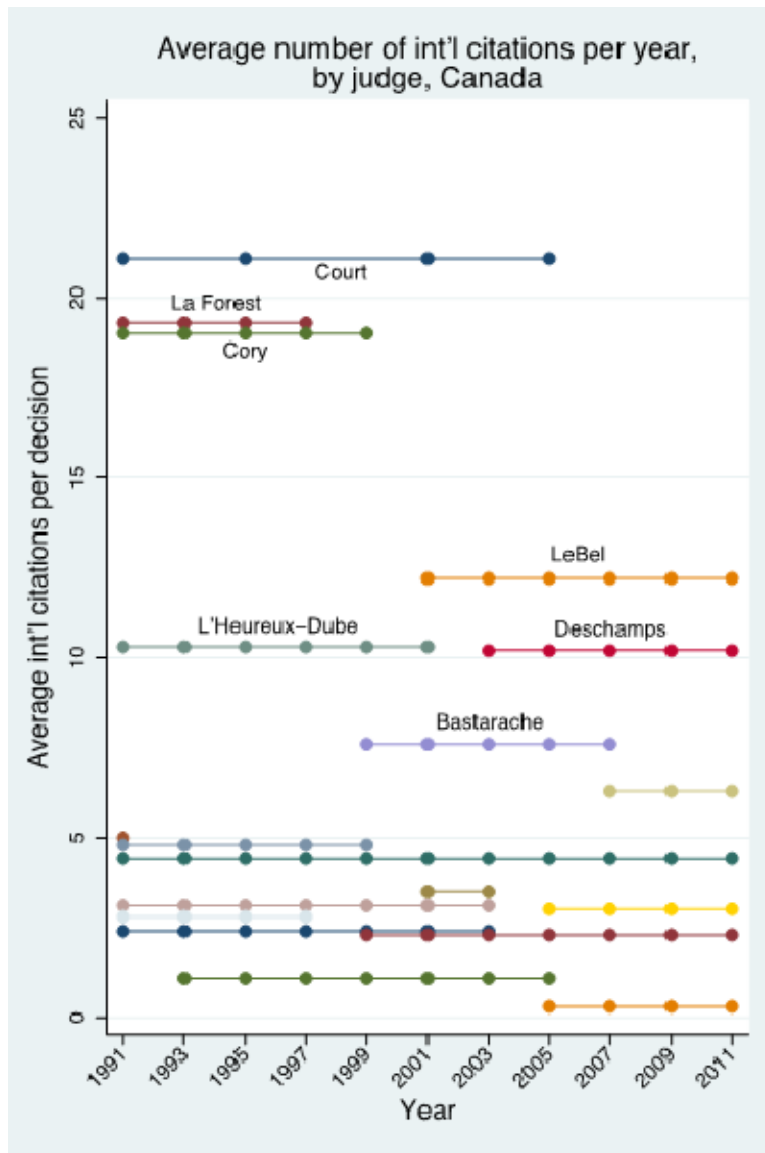


Figure A1

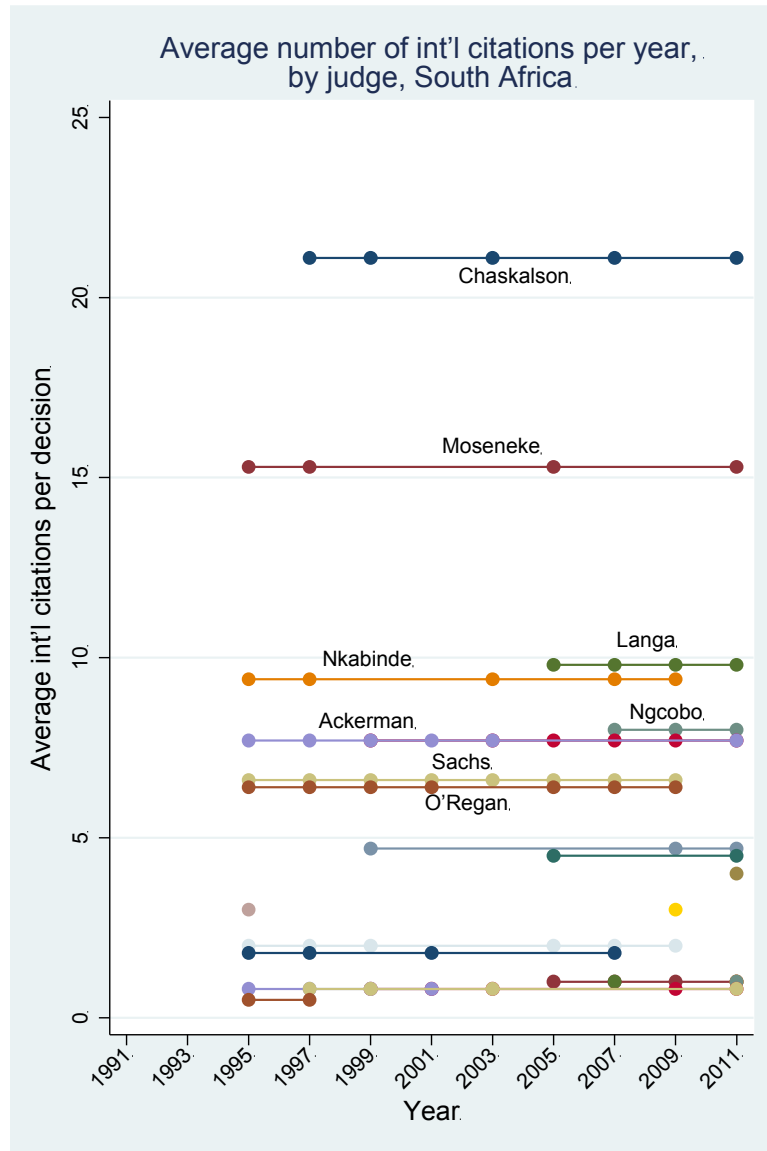


Figure A2