

# INTERNATIONAL LAW IN HKSAR COURTS

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The transfer of sovereignty over Hong Kong notwithstanding, courts in the Hong Kong Special Administrative Region (HKSAR) will continue to face questions about the application and enforcement of international law in the Territory in a wide range of areas, including human rights, treatment of aliens, diplomatic/consular immunities, protection and preservation of the natural environment, jurisdiction over crime/extradition, maritime law, commercial transactions, and transportation. This Article will review<sup>1</sup> local judicial approaches in light of available international practice<sup>2</sup> with the aim of extrapolating the relevant principles that will govern the relationship between international law and the domestic law in post-1997 Hong Kong.

## I. COMPETENCE OF THE LOCAL COURTS TO DECIDE QUESTIONS OF INTERNATIONAL LAW

Like their counterparts in other countries, Hong Kong courts are not constitutionally or legally impeded in the application of international law to issues arising in the course of proceedings over which they exercise jurisdiction in accordance with the domestic legal system. Nonetheless, in common with their British counterparts, local judges have displayed some reluctance to rule on questions of international law<sup>3</sup> because of the wrong

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1. This Article is partially based on the author's own study in *ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES* ch. 6 (Hong Kong: HKU Press 1997).

2. This stems primarily from the INTERNATIONAL LAW ASSOCIATION COMMITTEE, 1996 REPORT ON INTERNATIONAL LAW IN NATIONAL COURTS (submitted to the 67th Conference of the International Law Association, held in Helsinki, Aug. 12-17, 1996) [hereinafter *ILA REPORT*], which in turn is grounded in replies to an information-gathering questionnaire received from ILA national branches in Australia, Austria, Belgium, Brazil, Canada, Chile, Croatia, France, Germany, Ireland, Israel, Japan, the Philippines, Poland, Russia, Switzerland, Taiwan, the United Kingdom of Great Britain & Northern Ireland, and the United States of America.

3. Note, however, the exceptional lack of timidity displayed in earlier days by a Hong Kong court in *In the Matter of an Arbitration Between the Osaka Shosen Kaisha & the Owners of the Steamship "Prometheus"* (1906-08) 2 H.K.L.R. 207 (applying customary international law in the interpretation of the term "contraband of war," in a contract between private parties).

assumption that international law is more like foreign affairs than law, thereby precluding their involvement.<sup>4</sup> Particular inhibition is evident when matters of State, including either acts of State or facts of State, seem to be involved. As traditionally perceived, municipal courts will accept acts of "high" policy that the Executive performs in the course of its relations with another State (such as a declaration of war, an annexation of territory, or an act of reprisal) and will not question their validity despite an apparent breach of international law. The courts also consider binding the Executive's affirmation of certain legal situations in the international sphere (for example, recognition of foreign States or governments, territorial sovereignty, existence of a state of war, or entitlement to diplomatic status), irrespective of whether the certificate that the Executive issues accurately reflects the international legal stance.

Still, the respective domains of the executive and judicial branches of government are by no means rigidly defined. As illustrated in a recent case, a United Kingdom court is willing and able to determine on its own a matter previously regarded as "peculiarly within the cognisance of the Executive," namely the status of an alleged foreign government.<sup>5</sup> By the same token, as a general rule in common law countries, the courts decide what constitutes an "act of State," interpret the relevant certification, and rule on its legal consequences.

Similarly, while the courts acknowledge that all States are sovereign equals, thereby requiring that each State respect the public acts of every other State it recognizes,<sup>6</sup> such domestic courts are not necessarily precluded

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4. See Colin Warbrick, *International Law and Domestic Law: Ministerial Power*, 38 INT'L & COMP. L.Q. 965, 968 (1989) (referring to Judge Henry's statement in the "Cambodian Embassy Case" that "courts should not engage themselves in cases involving questions of international law between States because of the risk of conflict with the Executive, even if this excluded the courts from cases that only affect the rights of individuals in exceptional cases . . . or by a sidewind"). See also ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 206-07 (Oxford: Clarendon Press 1994) (for the suggestion that such an attitude stems from a distinct "legal culture"—characterized by a lack of background in international law among judges—which manifests itself in ways varying from contempt for everything to do with international law to strenuous efforts "not to decide points of international law but to locate the *ratio decidendi* of the judgment on more familiar ground").

5. See *Somalia (Republic) v. Woodhouse Drake & Carey (Suisse) S.A.* [1993] 1 All. E.R. 371 (H.C.) (outlining the criteria that a court should apply in assessing the status of the entity claiming to be a foreign sovereign government—i.e., legality, effectiveness, and in marginal cases, international recognition—independently of, and not bound by, the U.K. government view; "dealings by the British government" are considered merely another factor that is taken into account). It has been suggested that the case "opens up the possibility that a U.K. court will accept the sovereignty of a foreign government even if the U.K. government would, as a matter of policy, be opposed to such a move" (in contrast to the previously expressed belief that in matters concerning foreign relations the State "cannot speak with two voices"). See MARTIN DIXON & ROBERT MCCORQUODALE, *CASES & MATERIALS ON INTERNATIONAL LAW* 186 (London: Blackstone Press Limited 2d ed. 1995).

6. See *locus classicus* decision *Underhill v. Hernandez*, 168 U.S. 250, 252 (1887):

from determining whether and to what extent effect should be given to such acts of the foreign government<sup>7</sup>—particularly where such acts manifestly violate international law.<sup>8</sup>

Clearly, a complete judicial abstention over transactions of sovereign States finds little support among international jurists and commentators.<sup>9</sup> Held as particularly flawed is the premise that courts should refrain from rendering a judgment that would offend a foreign State, so as to avoid retaliation by the foreign State against the national interests of the forum State or embarrassment to the national Executive.<sup>10</sup> Not surprisingly, a 1993 resolution adopted by the Institut de Droit International recommends that national courts assert their competence to examine the congruity of foreign laws with international law and “decline to give effect to foreign public acts that violate international law.”<sup>11</sup>

Nor for that matter can justification be adduced for any “avoidance doctrine” grounded in a purportedly “general principle . . . inherent in the

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances, by reason of such acts, must be obtained through the means open to be availed of by sovereign powers as between themselves.

7. The acts in question are mostly those by the foreign government against its own subjects with respect to property situated in its own territory.

8. Although judging the acts of another State by the forum’s national laws may be an abuse of the other’s sovereignty, no such infringement occurs if the validity of those acts is determined by international law. Note the flexible, case-by-case approach encouraged in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). Note also that, in what is known as the “Hickenlooper Amendment,” 22 U.S.C. § 2370 (the Foreign Assistance Act of 1961), the U.S. Congress directed the courts not to give effect to foreign acts of State that violated international law by taking without compensation the property of U.S. nationals. In the U.K., a court held that Iranian legislative acts of nationalization were contrary to international law. *Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary)* [1953] 1 W.L.R. 246 (Aden Sup. Ct.). In *Oppenheimer v. Cattermole* [1976] App. Cas. 249, 277-78, Lord Cross, speaking for the majority, said the following:

A judge should, of course, be very slow to refuse to give effect to the legislation of a foreign State in any sphere in which, according to accepted principles of international law, the foreign State has jurisdiction . . . But I think . . . that it is part of the public policy of this country that our courts should give effect to clearly established rules of international law.

9. See Benedetto Conforti (Rapporteur), *The Activities of National Judges and the International Relations of their State, Preliminary Report*, 65 Y.B. INST. INT’L L. 371, 393-406 (1993) (cited in *Judges and Foreign Affairs: A Comment on the Institut de Droit International’s Resolution on the Activities of National Courts and the International Relations of Their State*, 5 EUR. J. INT’L L. 423, 430 n.35 (1993)).

10. See, for example, the observation that the risk of the forum State being embarrassed by a decision is negligible, and that the Executive actually may prefer judicial intervention that relieves it of the necessity to make a politically difficult choice. *Id.* at 437 n.77.

11. *Id.* at 437 (citing Resolution on the Activities of National Courts and the International Relations of Their State, art. 3 (Milan: Sept. 7, 1993) [hereinafter 1993 Resolution]).

very nature of the judicial process” or a “lack of judicial or manageable standards.”<sup>12</sup> Similar reservations may be expressed for an embedded reluctance by judges to review governmental and legislative action in the light of international legal norms,<sup>13</sup> which is frequently subsumed under the doctrine of “non-justiciability of political questions.”<sup>14</sup> Indeed, judges may incur international responsibility if they fail to scrutinize the legality of Executive acts with reference to binding legal obligations.<sup>15</sup>

HKSAR judges, therefore, should adhere to prevailing international judicial norms and not “decline competence on the basis of the political nature of the question.”<sup>16</sup> Although constrained from exercising jurisdiction over “defence and foreign affairs,” while also being required to obtain an Executive certificate on “questions of fact concerning acts of State whenever such questions arise in the adjudication of cases,”<sup>17</sup> HKSAR judges must preserve the judicial independence bestowed upon them in both the Sino-British Joint Declaration<sup>18</sup> and the Region’s Basic Law<sup>19</sup> against attempts to usurp court authority.<sup>20</sup>

12. *Buttes Gas & Oil Co. v. Hammer & Occidental Petroleum Corp.* [1981] 3 All. E.R. 616, 628, 633 (H.L.).

13. See Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT’L L. 159 (1993).

14. For a forceful attack on the doctrine, see THOMAS FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (Princeton: Princeton University Press 1992).

15. Note that “[t]he Judiciary and the courts are organs of the State and they generate responsibility in the same way as other categories of officials . . . Like the executive organs and the legislature, the courts may be instrumental in the misapplication of treaty standards [and international law in general].” IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS—STATE RESPONSIBILITY (PART I)* 144 (Oxford: Clarendon Press 1983).

16. 1993 Resolution, *supra* note 11, art. 2.

17. See Hong Kong Court of Final Appeal Ordinance, cap. 484, § 4. Note that a potential reference, for interpretation purposes, to the Standing Committee of the National People’s Congress, Basic Law, *infra* note 19, art. 158, is confined to provisions of the Basic Law “concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region”—and does not inhibit the courts’ general power of application or interpretation of international law.

18. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland & the Government of the People’s Republic of China on the Question of Hong Kong, Dec. 19, 1984, 23 I.L.M. 1366 (1984) [hereinafter Sino-British Joint Declaration].

19. Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (1990), 29 I.L.M. 1519 (1990) [hereinafter Basic Law].

20. Note, however, the rather self-restrictive approach adopted by HKSAR judges with respect to the jurisdictional competence of the HKSAR courts in a recent decision on the legality of the Provisional Legislature and the integrity of the Common Law following the change of sovereignty: *HKSAR v. Ma Wai-Kwan, David & others* [1997] H.K.L.R.D. 761, 780, 781 (C.A.) (Reservation of Question of Law No. 1 of 1997) (per Patrick Chan, C.J.: “[R]egional courts have no jurisdiction to query the validity of any legislation or acts passed by the Sovereign” [although] “courts do have the jurisdiction to examine the existence (as opposed to the validity) of the acts of the Sovereign or its delegate.”). While these dicta might have been generated by the special political circumstances surrounding the

## II. STATUS OF INTERNATIONAL LAW IN THE LOCAL LEGAL SYSTEM

In line with common law tradition, which derives from separation of powers constraints,<sup>21</sup> a distinction has been drawn in Hong Kong's judicial practice between treaty-based law and customary international law with respect to their role and rank in the domestic legal system. Accordingly, conventional international law (consisting of treaties, conventions, and other international agreements) requires formal incorporation. By contrast, customary international law forms part of the law of the land and is, therefore, binding without the need for legislative transformation.<sup>22</sup> Once incorporated, treaties become legislation like any other and may be trumped only by subsequent contrary statutes. Similarly, customary international law as part of the law of the land enjoys no special rank under the local hierarchy of legal norms and would, therefore, give way in the face of a later conflicting law.

Given that the Territory's legal system is to be maintained generally in accordance with the "one country, two systems" framework,<sup>23</sup> the above international/domestic law interrelationship should be perpetuated even after the 1997 transfer of sovereignty. However, if Chinese conceptions in this

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Provisional Legislature, and hence stem from an isolated case, concerns have been raised regarding the precedential implications for the SAR's high degree of autonomy. See Editorial, *Provisional Verdict*, S. CHINA MORNING POST, July 30, 1997, at 16; Yash Ghai, *Dark Days for Our Rights*, S. CHINA MORNING POST, July 30, 1997, at 17; Linda Choy, *Self-Imposed Limits Could Sacrifice Autonomy, Law Academic Warns*, S. CHINA MORNING POST, July 30, 1997, at 6; Linda Choy & Genevieve Ku, *Fears as "Bulwark of Basic Law Falls"*, S. CHINA MORNING POST, July 30, 1997, at 7; and Angela Li, *Bar Chief Hits at "Backward-Looking" Example in Provisional Legislature Case*, S. CHINA MORNING POST, Sept. 13, 1997, at 6. For a sustained critical analysis of the judgment, see Johannes Chan, *The Jurisdiction and Legality of the Provisional Legislative Council*, 27 H.K.L.J. 374 (1997).

21. Under the constitutional law and practice of several common law countries, treaty-making power is vested with the executive branch of the government, with no formal sanctioning required by the legislature. Consequently, it is thought that direct applicability of treaties would allow government to introduce norms into the domestic legal system, thereby usurping the legislative function. Arguably, however, the separation of powers principle need not be compromised, since the legislature may still exercise a supervisory or supervening power. Note that, in the U.S. (a common law country), international agreements entered into under the President's power to conclude Executive agreements—which do not require the advice and consent of the U.S. Senate—are declared under the U.S. Constitution to be part of the supreme law of the land.

22. This is so, in so far as reception would require a change in the law, a levy on public funds, or an addition to powers of the Executive not already possessed by it. Possible exceptions are treaties of cession, treaties affecting belligerent rights, and declaratory treaties, which merely restate customary international law. Note, however, that by virtue of the "act of State" doctrine, "even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to these inhabitants to enforce these stipulations in the municipal courts. The right to enforce remains only with the high contracting parties." *Vajesingji Joravarsingji v. Secretary of State for India* (Ind. App) L.R. 51, 360 (P.C. 1924).

23. This framework was laid down under the Sino-British Joint Declaration, *supra* note 18, and elaborated in Basic Law, *supra* note 19.

regard were to prevail in the HKSAR,<sup>24</sup> a more "incorporationist attitude towards international law"<sup>25</sup> could arguably be expected. Upon becoming effective, treaties under such a framework<sup>26</sup> would have direct internal application (imposing respective obligations on all "government organs, including the executive and the judiciary")<sup>27</sup> "without the need for any additional enactments to transform them to domestic law."<sup>28</sup> Based on a considerable number of Chinese legislative illustrations,<sup>29</sup> the likely outcome in case of a

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24. Such a reason would not be grounded in the postulated framework of "one country, two systems."

25. Ivan Shearer, *Finding and Applying International Law by National Courts*, Paper Presented at the Conference on Constitutions in an Interdependent World: The Impact of Internationalization on Governance in the Asia-Pacific Region, held in Macau, Nov. 18-20, 1996, at 4. Shearer uses the expression to describe the position of countries belonging to the Civil Law tradition, whereby "conventional international law is [directly] applicable provided the relevant treaty or convention has been promulgated in the manner required by the constitution." *Id.* He cites the regional examples of Cambodia, Indonesia, Japan, Korea, Macao, People's Republic of China, Philippines, Thailand, and Vietnam.

26. It should be emphasized that, under the Sino-British Joint Declaration (annex I, art XI), *supra* note 18, "[t]he application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or become a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Hong Kong Special Administrative Region, and after seeking the views of the Hong Kong Special Administrative Region Government" (emphasis added).

27. Wang Tieya, *The Status of Treaties in the Chinese Legal System*, 1 J. CHINESE & COMP. L. 1, 5-6 (1995). Examples relied upon include a Notice on the Accession by China to the Hague Convention and Montreal Convention issued by the State Council in 1980, stating that "[i]t is hoped that every region and every relevant department will conscientiously implement the relevant provisions of the aforesaid international conventions"; and a Notice on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by Chinese Issued by the Supreme People's Court in 1987, requiring people's courts at various levels to "earnestly follow and implement" this Convention.

28. Tieya, *supra* note 27, at 16 n.16 (citing Li Haopei, *A General Treatise on the Law of Treaties*). Note, however, that Regulations have been enacted to implement the 1961 Vienna Convention on Consular Relations and the 1963 Vienna Convention on Consular Relations [Regulations on Diplomatic Privileges and Immunities 1986 and Regulations on Consular Privileges and Immunities 1990]. In addition, the Basic Law of the H.K.S.A.R. has presumably been promulgated to give effect to the Sino-British Joint Declaration.

29. Several laws passed since the early 1980s contain provisions that affirm the superior status of treaties. Most notably, article 189 of the 1982 Civil Procedure Law ("[W]here an international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those found in this Law, the provisions of the international treaty shall apply, unless the provisions are ones on which China has announced reservations."); 1986 General Principles of Civil Law, art. 142 (covering "all civil laws") ("[W]here an international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, with the exception of those on which the People's Republic of China has declared reservations."); 1985 Foreign Economic Contract, art. 6 ("[W]here an international treaty which is relevant to a contract, and which the People's Republic of China has concluded or joined, has provisions different from the law of the People's Republic of China, the provisions of the international treaty shall prevail, with the exception of those on which the People's Republic of China has declared reservations."). For these and other similar provisions in other laws covering a wide range of sub-

conflict between treaties and domestic law is that the former would be given priority.

The adoption of assumed Chinese practices might also give rise to the claim of an elevated status for customary international law in light of the People's Republic of China (PRC) Principles of Civil Law, which include in Article 142(1) the stipulation that "[i]nternational practice may be applied to matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions."<sup>30</sup> "International practice" is nowhere defined, however. When read in conjunction with another provision (Article 150), which conditions its application upon conformity with the "public interest of the PRC," the term appears to differ significantly from customary international law as commonly understood.<sup>31</sup>

It is difficult to speculate on the possible legal outcome if a situation were to arise where PRC national laws applicable to the HKSAR were inconsistent with China's treaty obligations; however, it is clear that no shelter can be sought in the municipal order to evade the legal consequences that follow from the basic subordination of domestic law to public international law on the interstate level.<sup>32</sup> Indeed, as declared in the Rules on Certain Questions in the Handling of Foreign-Related Cases, issued by the Ministry of Foreign Affairs in the PRC,

[w]here a conflict arises between domestic law and certain internal rules on the one hand and treaty obligations which China has undertaken on the other, relevant provisions of the international treaties shall apply. According to general principles of international law, China should not refuse to perform obligations undertaken under the provisions of international treaties on the ground of [different] provisions in domestic law.

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ject matters (civil law, civil procedure law, administrative litigation law, fisheries law, postal affairs, trade marks, foreign economic contracts, entry and exit of aliens, frontier health regulation, transport on inland rivers, taxation, environmental protection, and protection of wild animals), see Tieya, *supra* note 27, at 8-10. See also Li Zhaojie, *The Effect of Treaties in the Municipal Law of the People's Republic of China: Practice and Problems*, ASIAN Y.B. INT'L L. 185, 217-19 (1994).

30. 2 THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA COMPILED BY THE LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS 225, 248 (Beijing: Foreign Language Press 1983-1986).

31. For the view that customary international law in the Western sense (which is still embedded in colonialism and capitalism and is too vague) is *not* part of Chinese domestic law, see Chinese writings cited in HUNGDAH CHIU, CHINESE ATTITUDES TOWARD INTERNATIONAL LAW IN THE POST-MAO ERA, 1978-1987, at 24 n.87 (Baltimore: University of Maryland School of Law, Contemporary Asian Studies Series 1988).

32. See generally 1969 Convention on the Law of Treaties, art. 27, U.N. Doc. A/CONF.39/27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."); see also 1949 Declaration on the Rights and Duties of States, art. 13, Y.B. INT'L L. COMM'N 286, 288 (1949). ("[Every State] has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.")

This is good both for the maintenance of China's prestige and for the protection of lawful rights and interests of Chinese nationals abroad.<sup>33</sup>

### III. APPLICATION OF INTERNATIONAL LAW BY THE LOCAL COURTS

#### A. Customary International Law

Under the legal system prior to July 1, 1997, customary international law could be adopted into Hong Kong law via the Application of English Law Ordinance 1966, which provided that "the common law and rules of equity shall be in force in Hong Kong, so far as they may be applicable to the circumstances of Hong Kong or its inhabitants and subject to such modifications thereto as circumstances may require."<sup>34</sup> As a consequence, English law received by the Territory included the common law doctrine described by Blackstone in the often-quoted passage from his *Commentaries on the Laws of England*, that "the law of nations, in its fullest extent, was part of the law of the land."<sup>35</sup> Coterminous with this doctrine, rules of international law are incorporated into English law automatically and are considered to be part of English law unless they conflict with an Act of Parliament. Indeed, such an "incorporation doctrine" has been acted upon by the courts repeatedly, thereby creating an established rule of English law. Hence, as a common law derivative, customary international law would continue to apply in the HKSAR according to the prescription that "the laws previously in force in Hong Kong [i.e., the common law, rules of equity, ordinances, subordinate legislation, and customary law] shall be maintained."<sup>36</sup>

Were the reception of customary international law to stem exclusively from the common law, local courts might feel bound to espouse the definitions and interpretations that English judges have given to international customs.<sup>37</sup> Under such a framework, local courts would also be precluded

33. Tiewa, *supra* note 27, at 10-11.

34. 9 LAWS OF HONG KONG, ch. 88, § 3.

35. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND bk. IV, ch. 5, at 67 (15th ed. 1809).

36. Sino-British Joint Declaration, *supra* note 18, annex I, art II; Basic Law, *supra* note 19, art. 8. For a judicial confirmation of the continuity of the common law in the HKSAR, see *HKSAR v. Ma Wai-Kwan, David & others* [1997] H.K.L.R.D. 761, 774-75, 789, 790 (C.A.). Note that the expression, "previously in force in Hong Kong," should not be construed to exclude post-1997 developments in customary international law, given the progressive nature of the incorporation rule, which is received into the local system through the application of the common law. Accordingly, where under the common law a question is governed by international law, one must resort to customary international law as existing at the time the court renders its judgment. Support for such a construction of the incorporation rule can be drawn from the case of *Standard Chartered Bank v. Int'l Tin Council* [1987] 1 W.L.R. 641, 648 (referring to the "duty of English courts so far as possible to keep in step with the settled practice of other nations").

37. It is a moot question whether local judges will follow the emphatic statement of Lord Denning that "[i]nternational law knows no rule of *stare decisis*," and, therefore, the



from applying customary rules rejected by English courts because they contradict English legislation. A constrictive approach along these lines, however, would not seem compatible with the dynamic nature of international law and the Territory's obligation to observe international law. Although international law does not demand automatic incorporation of custom by municipal law, a noted international jurist has observed that, subject to differing *internal* constitutional or statutory provisions regarding priority, international law is "everywhere part of the law of the land" and "there is not a legal system in the world where international law is treated as a foreign law."<sup>38</sup>

Regardless of its mode or route of reception—and whether it is an integral part of the law of the land—customary international law is doubtless one of the *sources* of the Territory's law. Thus, local judges should draw upon such laws in exercising their duty to interpret and apply the law and to fill any gaps in that law. In adopting such a "moderate"<sup>39</sup> approach, the local judiciary may rely on support from their Australian counterparts, who have reaffirmed in numerous decisions that customary international law is an important source of the domestic law<sup>40</sup> and "a legitimate influence on the development of the common law by the courts."<sup>41</sup>

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courts "must discover what the prevailing international rule is and apply that rule," implementing any changes in international law "without waiting for the House of Lords to do it." See *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 2 W.L.R. 356, 365-66. Note in this connection the section introduced in the Constitution of the Republic of South Africa 1996, eliminating qualification on incorporation by reason of judicial precedent: "32. Customary international law is the law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

38. See Rosalyn Higgins, *The Relationship Between International and Regional Human Rights Norms and Domestic Law*, 1992 COMMONWEALTH L. BULL. 1268.

39. See Shearer, *supra* note 25, at 15, for the view that such an approach is

more in keeping with the harmonisation approach to the incorporation of international law into domestic law than an unqualified automatic incorporation doctrine. For it allows the judges, within the leeway of judicial choice allowed to them, to fill gaps and adapt the existing law in harmony with international law in a way that is adapted to the particular circumstances.

40. Sir Owen Dixon originally expressed this proposition in *Chow Hung Ching v. The King* (1948) 15 I.L.R. 147, 169, and is widely accepted among the Australian judiciary. See *Report of the Australian Branch to the International Law Association Committee on International Law in National Courts*, reprinted in AUSTL. Y.B. INT'L L. 231, 234-37 (1994).

41. See Shearer, *supra* note 25, at 14 (citing Sir Anthony Mason [former Chief Justice of Australia], *The Influence of International and Transnational Law on Australian Domestic Law*, 7 PUB. L. REV. 20 (1996)). See also recent cases in the High Court of Australia: *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501 (involving war crimes), *Mabo v. Queensland* (1992) 175 C.L.R. 1 (involving rights of indigenous people), and *Capital Television Party Ltd. v. Commonwealth* (1992) 177 C.L.R. 106 (involving political advertising). But see a concluding observation that a local expert made with regard to the "watering down" by Hong Kong courts of the international and comparative materials to "fit into the more conservative common law framework," rather than "widening the frontiers of the common law," Johannes M.M. Chan, *The Influence of International and Comparative Jurisprudence on the Interpretation of the Hong Kong Bill of Rights*, Paper Presented at the

By the same token, a successful incorporation of customary international law into the local law hinges to a large extent on the courts effectively ascertaining the relevant rules. Such a task is by no means easy, given the problems intrinsic to customary international law, including (1) the difficulties encountered in determining the existence of rules of customary international law,<sup>42</sup> (2) their commonly vague formulation (often taking the form of permissions rather than mandatory rules), and (3) their occasional inappropriateness to cases involving individuals (as distinct from those involving States).<sup>43</sup>

Specifically, the dispute often surrounding international customary rules tends to reinforce parochial tendencies and deter exploration of unfamiliar territory. Whether by misplaced emphasis on the doctrine of precedent or by virtue of judges' legitimate device of classification,<sup>44</sup> artificially constructed decisions that fail to give proper recognition to the applicable international rule may follow.<sup>45</sup>

In principle, however, all national courts are "competent to decide questions of customary international law . . . having regard, in addition to their inherent knowledge of international law (*jura novit curia*),<sup>46</sup> to the ju-

Conference on Constitutions in an Interdependent World: The Impact of Internationalization on Governance in the Asia-Pacific Region, held in Macau, Nov. 18-20, 1996, at 29.

42. Particularly cumbersome is the requirement for evidence of "general practice accepted as law" (*opinio juris*), set forth in article 38 of the Statute of the International Court of Justice (involving a subjective element of belief that there exists a legal obligation to act).

43. As may be inferred from *J.H. Rayner Ltd. v. Dep't of Trade & Indus. (International Tin Council Case)* [1990] 2 App. Cas. 418, 500 (Eng. H.L.), incorporation of customary international law does not necessarily mean that rights granted under such law can be enforced directly in municipal courts. Rather, enforcement will occur only if specifically provided for under the rule in question. See also the observation that "customary international law confers none or only the rarest of rights on individuals; accordingly, individuals will seldom, if ever, be in a position to rely on customary law in an English court." Colin Warbrick, *The Theory of International Law: Is there an English Contribution?*, in PERESTROIKA & INT'L L. 49 (W.E. Butler ed., Netherlands: Kluwer Academic Publications 1990).

44. See, for example, Lord Templeman's characterization in the *International Tin Council Case*, 2 App. Cas. at 513, "a short question of construction of the plain words of a statutory instrument," contrasted with Judge Kerr's classification in the Court of Appeal of the case as one about the status and powers of an international organization, so that "the logical starting point must be international law." [1988] 3 All. E.R. 257, 275 (C.A.).

45. See *Arab Monetary Fund v. Hashim (No. 3)* [1991] 1 All. E.R. 871 (H.L.) (ruling that, although the Arab Monetary Fund, as an international organization created under international law, could not be accorded legal status in the U.K., it may be recognized as a legal person [in line with domestic conflict of law rules] by virtue of its status under the domestic law of another State [UAE]).

46. As noted earlier, international law is not regarded as "foreign law"; hence, no proof or expert evidence is normally required. Nonetheless, doubts have been raised as to "whether the maxim *jura novit curia* is in fact justified or sufficient in practice." Specifically, "[a]re there circumstances in which national courts should be encouraged to seek expert opinions on international law *ex proprio motu*, to request amicus curiae briefs, or to ask for (binding or non-binding) advisory opinions from international bodies?" See ILA

risprudence of international courts and tribunals, of national courts in other States, and to the writings of scholars, as contained in textbooks, commentaries, digests, and articles in learned journals."<sup>47</sup> Needless to say, a legal profession versed in international law<sup>48</sup> and the availability of relevant international materials would greatly assist judges.

### B. Conventional International Law

Hong Kong's judicial practice in applying treaties in the Territory has followed the basic premise of British constitutional law that treaties are incapable of constituting a rule of law for the courts in the absence of legislative implementation.<sup>49</sup> As early as 1880, the Supreme Court of Hong Kong, sitting as a full court in the *Status of the French Mail Steamers* case,<sup>50</sup> rejected an attempt to distinguish the position of Hong Kong with respect to the domestic application of treaties because of its status as a Crown Colony. The Court relied on the *Parliament Belge* case to affirm that "no treaty by the Queen with a foreign Power can affect the rights and privileges of the Queen's subjects within Hong Kong except under the sanction of an Act of Parliament or of a local ordinance or probably an order of the Queen in Council."<sup>51</sup>

More recently, the rule that domestic courts will not enforce obligations and rights under international treaties unless incorporated into the local law was restated by the Privy Council in the celebrated case of *Winfat Enterprises (HK) Co. Ltd. v. Attorney General of Hong Kong*.<sup>52</sup> The appellants in that case challenged the Hong Kong government's refusal to issue a building permit as contrary to the terms of the Peking Convention of 1898. Their appeal was dismissed by the Privy Council, which held that the stipulation against expropriation contained in a bilateral treaty such as the 1898 Peking Convention could not create rights enforceable by individuals in municipal courts. Equally unsuccessful were bids to rely on the 1898 Convention to

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REPORT, *supra* note 2, at 23.

47. *See id.* at 14-15.

48. Chan, *supra* note 41, at 4 n.13 (citing [H.K.] LAW REFORM COMMISSION'S CONSULTATION PAPER ON EXTRINSIC MATERIALS AS AN AID TO STATUTORY INTERPRETATION para. 10.22 (1996) ("[W]hile practitioners and judges had adapted relatively quickly to accessing and understanding international materials, 'it would seem that only a small number of lawyers have familiarised themselves adequately with the materials.'")).

49. As emphatically restated by Lord Oliver in *International Tin Council Case*, 2 App. Cas. at 500, "[a] treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subject to obligations."

50. Geoffrey Marston, *Unincorporated Treaties and Colonial Law—Hong Kong's "Parliament Belge"*, 20 H.K. L.J. 178, 187-90 (1990) (citing THE DAILY PRESS, Jan. 12, 1880).

51. *Id.* at 189 (per Smale L.J.) (citing *The Parliament Belge*, 4 P.D. 129 (C.A. 1879)).

52. [1985] 1 App. Cas. 733 (1988) 77 INT'L L.R. 376.

grant mainland Chinese a right of way or a license to enter Hong Kong<sup>53</sup> and to oust jurisdiction of local courts over an area in the City of Kowloon.<sup>54</sup>

Also regarded as "not justiciable" is the 1984 Sino-British Joint Declaration (and its Annexes), which the High Court held not to have been incorporated into the local law.<sup>55</sup> The Court held that neither the Hong Kong Act 1985 nor the Application of English Law Ordinance bestowed upon the Joint Declaration the force of law in Hong Kong. In a similar case involving a claim based on a provision in Annex II of the Joint Declaration, the Court ruled that the government's announced intention to implement the Accord had not given rise to a justiciable legitimate expectation. Specifically, the Court held that the applicant's Crown lease would be renewed in accordance with the relevant provision.<sup>56</sup> Arguably, however, the Sino-British Joint Declaration *is* incorporated into the local law by the Basic Law of the HKSAR. As set forth in the Joint Declaration,<sup>57</sup> this Law gives domestic legal effect to the PRC's policies on Hong Kong in accordance with statements and elaborations made under the Sino-British agreement.<sup>58</sup>

Indeed, the incorporation of a treaty may take a variety of forms. Most commonly, a direct mode is employed, whereby a treaty becomes an integral part of the legislation itself (for example, by inclusion in a schedule attached to the statute).<sup>59</sup> A treaty may also be incorporated indirectly or by reference either by mention in the statute<sup>60</sup> or by adducing extrinsic evidence to show

53. See decision by Magistrate D'Almada Remedies in *Lau Hong-chung & others*, in Cynthia Chan, *Entry Right Ruled Out for Illegals*, S.C.M.P., Sept. 20, 1990.

54. See *Fung Yuen Mui v. Chan Kam Yee* (H.C.) [1991] 1 H.K.C. 462 (courts generally take no notice of treaties until they are embodied in domestic law).

55. *Tang Ping-hoi v. Attorney Gen.* [1987] H.K.L.R. 324, 329.

56. See *The Home Restaurant Ltd. v. Attorney Gen.* [1987] H.K.L.R. 237, 247. Contrast with the decision of the High Court of Australia in *Minister for Immigration v. Teoh* (1994-95) 183 C.L.R. 273, that a ratified but unincorporated treaty raised a "legitimate expectation" in Australian citizens and residents that its provisions would be taken into account by decision-makers in exercising their powers.

57. Sino-British Joint Declaration, art. 3(12), *supra* note 18.

58. Note the recent judicial pronouncements in *HKSAR v. Ma Wai-Kwan, David & others* [1997] H.K.L.R.D. 761, 775, 803-04 (C.A.) (respectively) by Chief Judge Chan (that the Joint Declaration is to be used as an "aid to the interpretation of the Basic Law") and by Vice-President Mortimer (that in the construction of the Basic Law, assistance should be sought from the Joint Declaration in cases of real ambiguity, given that the Joint Declaration was the Basic Law's genesis).

59. See, for example, the Carriage By Air (Overseas Territories) Order No. 809 LAWS OF HONG KONG, app. III (1967), setting forth in Schedule 1 the 1929 Warsaw Convention and Additional Protocol on Unification of Certain Rules Relative to International Carriage by Air.

60. See, for example, the Internationally Protected Persons and Taking of Hostages Ordinance (No. 20 of 1995), 34 LAWS OF HONG KONG, cap. 468, which states the following in the preamble: "An Ordinance to provide for the implementation of both the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents and the International Convention against the Taking of Hostages." See also the "long title" of the Hong Kong Bill of Rights Ordinance, 30 LAWS OF HONG KONG, cap. 383 ("An Ordinance to provide for the incorporation into the law of Hong

that the statute was designed to incorporate the treaty.<sup>61</sup> While all treaties that have been incorporated become part of the law of the land, and hence justiciable in the courts of the land, "those that are incorporated in terms—by being appended to a Statute, and forming the substantive part of the Statute—have the most unequivocal status in domestic law."<sup>62</sup> Still, in the English legal system, and in its Hong Kong counterpart, even fully incorporated treaties have no special position and enjoy no higher status than other legislation.<sup>63</sup> Hence, in line with the *lex posterior* rule of construction, a later statute on the same subject matter may prevail over an earlier one incorporating an international treaty.

By the same token, local judges should not completely eschew reference to "unincorporated" treaties. As asserted by a renowned commentator, F.A. Mann, either because there can be no fear of conflict with the Executive ("speaking with two voices") or because the ultimate aim is to reach "a decision which protects this country against a possible breach of its international duties," the principle that unincorporated treaties are not justiciable in English courts is no longer tenable.<sup>64</sup> In fact, a substantial body of case law<sup>65</sup> is available to reinforce Mann's observation that, when the occasion or necessity arises, English courts are "in principle neither unable nor unwilling to look at, construe, and give effect to treaties which have not been adopted by Parliament."<sup>66</sup>

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Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong; and for ancillary and connected matters.").

61. See, for example, Nuclear Material (Liability for Carriage) Ordinance (No. 45 of 1995) 36 LAWS OF HONG KONG, cap. 479, which contains reference to agreements concerning "third-party liability in the field of nuclear energy" applicable to Hong Kong (such as the 1960 Convention and 1964 Additional Protocol on Third Party Liability in the Field of Nuclear Energy).

62. Rosalyn Higgins, *United Kingdom*, in *THE EFFECT OF TREATIES IN DOMESTIC LAW* 129 (Francis G. Jacobs & Shelly Roberts eds., London: Sweet & Maxwell 1987).

63. It is commonly perceived that under British constitutional doctrines no "entrenchment" of laws is possible. It may be pointed out, however, that the U.K. Parliament had legislated in the past to divest itself of sovereignty (e.g., Statute of Westminster 1931, § 4, 22d23 Geo. 5c.4., 7 HALSBURY'S STATUTES (4th ed.); European Communities Act 1972, §§ 2(1), 2(4), 1972 c.68, 17 HALSBURY'S STATUTES (4th ed.); and, as observed by Lord Denning, has not subsequently endeavored to reclaim it ("freedom once conferred cannot be revoked") *Blackburn v. Attorney Gen.* [1971] 1 W.L.R. 1037, 1040).

64. See F.A. MANN, *FOREIGN AFFAIRS IN ENGLISH COURTS* 94-104 (Oxford: Clarendon Press 1986). See also Higgins, *supra* note 62, at 127, for the view that "[a]n unincorporated treaty can *always* be looked at, so long as rights of individuals are not founded upon it alone and so long as it is not suggested that it takes away rights existing under common law."

65. For an account of recent cases, see Christopher Staker, *Decisions of British Courts During 1993*, *BRITISH Y.B. INT'L L.* 455-63 (1993).

66. MANN, *supra* note 64, at 87. See also Robert Y. Jennings, *An International Lawyer Takes Stock*, 39 *INT'L & COMP. L.Q.* 513, 525 (1990) (criticizing the rigidity reflected in Lord Oliver's speech in *J.H. Rayner Ltd. v. Dep't of Trade & Indus.* (*International Tin Council Case*) [1990] 2 App. Cas. 418 (Eng. H.L.) and repudiating any assumed "doctrine of unjusticiability of unincorporated treaties" as "contrary to precedent, to reason and to

Clearly, in relation to civil liberties, English judges have demonstrated a willingness to consider and be influenced by unincorporated international treaties, especially the European Convention on Human Rights.<sup>67</sup> Admittedly, approaches vary from judge to judge, and no consistent judicial view has emerged. Concurrent with similar trends in other jurisdictions, however, English judges will likely continue to resort to unincorporated international human rights treaties as an aid to statutory interpretation or when deciding uncertain points of common law.<sup>68</sup> Reference to such treaties would presumably increase when such judges become aware of potential engagement of State responsibility.<sup>69</sup>

Hong Kong's rather barren jurisprudential scene with respect to unincorporated treaties renders it somewhat difficult to draw solid conclusions. Attitudes displayed by the local courts range from wholesale rejection,<sup>70</sup> to reserved acceptance,<sup>71</sup> to susceptibility to the Territory's treaty obligations.<sup>72</sup>

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common sense").

67. See, for example, cases concerned with freedom of expression, cited in *Staker, supra* note 65, at 455: *Attorney Gen. v. Guardian Newspapers Ltd.* (Nos. 1 & 2) [1987] 3 All. E.R. 316, [1990] 1 App. Cas. 109 (C.A.); *Derbyshire County Council v. Times Newspapers Ltd.* [1992] 3 W.L.R. 28; [1993] 2 W.L.R. 449 (H.L.); *Rantzen v. Mirror Group Newspapers Ltd.* [1993] 3 W.L.R. 953 (C.A.); *Attorney Gen. v. Associated Newspapers Ltd.* [1993] 3 W.L.R. 74 (Q.B.D.); see also *R. v. Secretary of State for the Home Dep't, ex parte Wynne* [1993] 1 W.L.R. 11 (H.L.) (right to a fair and public hearing); and *R. v. Brown* [1993] 2 W.L.R. 556 (H.L.) (right to respect for private and family life).

68. See *infra* note 95.

69. See, e.g., *R. v. Secretary of State for the Home Dep't ex parte Phansopkar* [1976] 1 Q.B. 606 (suggesting that it was the duty of U.K. courts to have regard to the unincorporated European Convention on Human Rights when interpreting and applying statute and common law); *Attorney Gen. v. Guardian Newspapers Ltd.* (No. 2) [1990] 1 App. Cas. 109, 283-84 (per Lord Goff: "I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under this treaty [the European Convention on Human Rights]"); *Derbyshire County Council v. Times Newspapers Ltd.* [1992] 3 W.L.R. 28 (The court is under a duty to decide uncertain questions of common law in a manner consistent with the European Convention.).

70. See *R. v. Director of Immigration, ex parte Li Jin-fei & others* (1993) H.K.P.L.R. 565, 575 ("[I]t is axiomatic that the municipal courts of the territory do not exist for the enforcement of international obligations incurred by the United Kingdom Government on behalf of Hong Kong.").

71. See readiness exhibited by Mayo, J. in *R. v. Director of Immigration, ex parte Li Jin-fei & others* (1993) 3 H.K.P.L.R. 552, to consider the "issue of Statelessness" under the unincorporated 1954 360 U.N.T.S. 117 Convention Relating to the Status of Stateless Persons (subsequently rebuked in the Court of Appeal, *id.* at 576, 578, as "misplaced"; note, in particular, the observation by Litton, J.A. that "the [H.C.] judge was lured into a blind alley in which the issue of Statelessness became, in effect, litigated"). See also *Tang Ping-hoi v. Attorney Gen.* [1987] H.K.L.R. 324. It may be inferred (upon a most liberal construction of the judgment) that, had evidence of "intention to give the Joint Declaration the force of law" been more convincing, a claim based on "legitimate expectations" would have received a more favorable consideration.

72. See *R. v. Director of Immigration, ex parte Simon Yin Xiang-jiang* (1994) 4 H.K.P.L.R. 265, 273 (per Bokhary J.A.):

Naturally, it is not to be assumed that Hong Kong has no respect at all for its

On occasion, judges have even relied on treaties that have not been extended to Hong Kong,<sup>73</sup> without offering any epistemological illumination, such as the declaratory nature of the treaty. A reasonable conclusion is that Hong Kong's judiciary has yet (1) to overcome its cultural resistance to international law in general and (2) to adopt the declared principle of commonwealth law that "[i]t is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law."<sup>74</sup>

Should the need arise to construe the terms of a treaty that is binding on the Territory,<sup>75</sup> Hong Kong judges clearly are expected to apply international rules of treaty interpretation, as codified in Articles 31 to 33 of the 1969 Vi-

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treaty obligations, especially those pertaining to fundamental human rights of an international dimension. It is at least potentially arguable, therefore, that where Hong Kong has a treaty obligation not to expel Stateless persons except on grounds of national security or public order, then, even though that obligation has not been incorporated into our domestic law, it is nevertheless a factor which our immigration authorities ought to take into account when exercising a discretion whether or not, in all the circumstances, to insist upon the departure from this territory of any Stateless person even though his departure is not required by national security or public order.

*See also* Cheung Ng Sheong v. Eastweek Publishers Ltd. (1995) 5 H.K.P.L.R. 428, 437 (per Nazareth V.P.: "I can see no reason, nor has any been brought to the attention of this Court, why we should not be free to interpret the law in accordance with treaty obligations applying to Hong Kong.").

73. See, for example, references to "refugees" in the 1951 Convention and 1967 Protocol Relating to the Status of Refugees in *R. v. Director of Immigration and the Refugee Status Review Board, ex parte Do Giau & others* [1992] H.K.L.R. 287, *R. v. Director of Immigration, ex parte Le Tu Phuong & others* (1993) 3 H.K.P.L.R. 641. Note, however, that under a Statement of Understanding reached between the Hong Kong Government and U.N.H.C.R. Concerning the Treatment of Asylum Seekers Arriving from Vietnam in Hong Kong (Sept. 1988), the Hong Kong Government "further reaffirms its undertaking that the determination of refugee status will be in accordance with the 1951 Convention and 1967 Protocol Relating to the Status of Refugees and U.N.H.C.R. guidelines." See also dictum in *Nguyen Tuan Cuong & others v. Director of Immigration & others* (P.C.) (1996) 7 H.K.P.L.R. 19, 32, that the partial acceptance of the Refugee Convention underlies the relevant statutory provisions (in the Immigration Ordinance) and "makes it necessary to examine their background in international law."

74. Bangalore Principles, prin. 4, *reprinted in* 14 COMMONWEALTH L. BULL. 1196 (1988). The Bangalore Principles have been reaffirmed successively by the Harare Declaration of Human Rights (1989), *reprinted in* COMMONWEALTH SECRETARIAT, DEVELOPING HUMAN RIGHTS JURISPRUDENCE (London: Interights 1992); The Banjul Affirmation (1990), *reprinted in* COMMONWEALTH SECRETARIAT, DEVELOPING HUMAN RIGHTS JURISPRUDENCE (London: Interights 1992), and The Abuja Confirmation (1991), *reprinted in* COMMONWEALTH SECRETARIAT, DEVELOPING HUMAN RIGHTS JURISPRUDENCE (London: Interights 1992).

75. Arguably, no distinction should be drawn between interpretation of incorporated and unincorporated treaties since, as instruments created within the system of public international law, *all* treaties should be interpreted in accordance with the rules of that system.

enna Convention on the Law of Treaties.<sup>76</sup> In embracing such an international legal approach, local courts would be supported by a considerable number of authoritative English decisions and by the jurisprudence of courts in many other States.<sup>77</sup> The courts should garner particular reinforcement from the House of Lords' landmark judgments in *James Buchanan v. Babco Forwarding*<sup>78</sup> and *Fothergill v. Monarch Airlines*,<sup>79</sup> subsequently endorsed in several cases.<sup>80</sup> As reasoned by Lord Diplock,

[t]he language of an international convention has not been chosen by an English Parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament . . . It should be interpreted as Lord Wilberforce put it . . . "unconstrained by technical rules of English law, or by English precedent, but on broad principles of general acceptance."<sup>81</sup>

Thus, since international courts and tribunals refer to *travaux preparatoires* as an aid to interpretation and

this practice as regards national courts has not been confirmed by the Vienna Convention on the Law of Treaties<sup>82</sup> . . . where the text is ambigu-

76. Note that, although the 1969 Convention has not been incorporated into the domestic legislation, its status as customary international law renders it part of Hong Kong law.

77. See, e.g., *Shipping Corp. of India Ltd. v. Gamlen Chem. Co. (Australia) Pty Ltd.* (1980) 147 C.L.R. 142, 159 (H.C.) (laying down the rule that when Australian courts are applying the text of a treaty, incorporated by statute into national law, the courts must apply international law rules of interpretation, not municipal rules of statutory interpretation), and *Commonwealth of Australia v. Tasmania* (H.C.) (1983) 68 I.L.R. 266, 303 (having accepted that the 1969 Convention on the Law of Treaties was declaratory of customary international law, the court applied the Convention to ascertain the meaning of provisions in the Treaty of World Heritage); in Canada, *In re Regina & Palacios* (Ont. C.A.) (1984) 45 O.R.2d 269 (cited in HUGH M. KINDRED ET AL., *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA* 183-84 (Toronto: Edmond Montgomery Publications 5th ed. 1993)) (holding that the rules of public international law, not domestic law, govern the interpretation of a statute incorporating a treaty, and hence the court is not bound by the common law canon of literal construction); in Israel, *Attorney Gen. of the Government of Israel v. Eichmann* (Jeru. D.C. 1961) 36 INT'L L.R. 5 (applying international rules to the interpretation of a domestic law which did not incorporate an international treaty but was inspired by it).

78. [1978] App. Cas. 141.

79. *Fothergill v. Monarch Airlines Ltd.* [1981] App. Cas. 251.

80. See, e.g., *R. v. Home Secretary, ex parte Read* [1989] 1 App. Cas. 1014; *IRC v. Commerzbank* [1990] S.T.C. 285; *Hiscox v. Outhwaite* [1992] 1 App. Cas. 562; *Antwerp United Diamond v. Air Eur.* [1993] 4 All. E.R. 469; *Abnett v. British Airways, T.L.R.*, June 22, 1995.

81. *Fothergill*, App. Cas. at 281-82 (quoting *Buchanan v. Babco Forwarding* [1978] App. Cas. 141, 152).

82. While noting that the Vienna Convention applies only to treaties concluded after it came into force, Lord Diplock reaffirmed that "what it says in Articles 31 and 32 about in-



ous or obscure, an English court should have regard to any material which the delegates themselves had thought would be available to clear up any possible ambiguities or obscurities. Indeed, in the case of Acts of Parliament giving effect to international conventions concluded after the coming into force of [the Vienna Convention], I think an English court might well be under a constitutional obligation to do so.<sup>83</sup>

Notwithstanding (1) the lack of explicit and systematic application of the "Vienna rules" by English courts and (2) the emergence of no categorical prescription of reference to international rules of treaty interpretation,<sup>84</sup> the international approach appears to be the most appropriate. The application of international norms and practices assumes added pertinence when a treaty that requires interpretation aims at achieving international legislative uniformity.<sup>85</sup> As cogently expressed in the judgment of the *Cor de Cassation of Belgium*,

[t]he interpretation of an international convention, the purpose of which is the unification of law, cannot be done by reference to the domestic law of one of the contracting States. If the treaty text calls for interpretation, this ought to be done on the basis of elements that actually pertain to the treaty, notably its object, its purpose, and its context, as well as its preparatory work and genesis. The purpose of drawing up an international convention, designed to become a species of international legislation, will be wholly frustrated if the courts of each State were to interpret it in accordance with concepts that are specific to their own legal system.<sup>86</sup>

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terpretation of treaties . . . does not more than codify already-existing public international law." *Id.* at 283.

83. *Id.* It may be pointed out that, at the time the Lords pronounced upon the permissibility of using the *travaux préparatoires* of a treaty as an aid to interpretation, a U.K. court could not have had regard for the legislative history of "ordinary" acts of Parliament when interpreting their terms. *But see* *Pepper (Inspector of Taxes) v. Hart* [1992] 3 W.L.R. 1033 (allowing relaxation of the rule excluding reference to Parliamentary material as an aid to statutory construction).

84. For an analysis and criticism of the "lack of intellectual coherence" and the "cherry-picking" nature of references to isolated elements of the Vienna rules, see Richard Gardinar, *Treaty Interpretation in the English Courts Since Fothergill v. Monarch Airlines* (1980), 44 INT'L & COMP. L.Q. 620, 628 (1995).

85. Notable examples include the 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air L.N.T.S., vol. 137, at 11 [U.S.T.S. 876], as amended by the 1955 Hague Protocol. See strong reaffirmation by the House of Lords in *Sidhu & others v. British Airways plc; Abnett (known as Skyes) v. Same*, Times L. Rep., Dec. 13, 1996 (per Lord Hope: "[T]he language used [in the Warsaw Convention] and the subject matter with which it dealt demonstrated that what was sought to be achieved was a uniform international code, which could be applied by the courts of the contracting parties without reference to the rules of their own domestic law." The court concluded that, where the Convention as a "set of uniform rules" did not provide a remedy, no remedy was available.).

86. *Tondriau v. Air India* (1977) (cited in *S.S. Pharmaceutical Co. Ltd. v. Quantas Airways* (N.S.W. C.A.) [1991] 1 LLOYD'S REP. 288 (affirming the importance of approaching construction of international instruments attached to a statute while keeping in mind their international character and the desirability so far as possible that they should be

By the same token, where treaties are not concerned with promoting uniform legislation, their uniform interpretation is not an end in itself. Ultimately, the treaty (and the statute designed to implement it) should be interpreted in "good faith . . . in light of its object and purpose."<sup>87</sup> Thus, for example, international human rights treaties should be given a generous and purposive construction compatible with their aim to protect fundamental rights and freedoms. Generally, judges should "avoid parochial constructions which are uninformed (or ill-informed) about the jurisprudence that has gathered around [the relevant international instruments]."<sup>88</sup> In addition, judges should have regard for judicial decisions of international courts and courts in other countries and to the respective "teachings of highly qualified publicists."<sup>89</sup>

Still, local judges have been slow to shake off parochial tendencies, even when faced with the need to construe uniform treaties<sup>90</sup> and notwithstanding specific encouragement by the legislature to explore international sources.<sup>91</sup> In particular, expectations—arising from the "growing tendency for national courts to have regard for [international norms of human rights]"<sup>92</sup> and the relevant international jurisprudence<sup>93</sup>—have not been fully

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given a consistent construction by the courts of the several contracting States)).

87. 1969 Convention on the Law of Treaties, art. 31, May 23, 1969, U.N. Doc.A/CONF.39/27.

88. S.S. Pharmaceutical, 1 LLOYD'S REP. 88. In that case, judges consulted (in aid of interpreting disputed provisions of the Warsaw Convention) decisions of courts from Argentina, Austria, Belgium, France, Greece, India, Italy, Korea, the Netherlands, Switzerland, the United Kingdom, and the United States. The courts referred to manuals of authority on international air law and articles in international legal journals.

89. Note that, under article 38(1)(d) of the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993 (the "sources of international law"), "judicial decisions and the teachings of the most highly qualified publicists of the various nations" are to be applied as "subsidiary means for the determination of rules of law."

90. See, e.g., *Ka Da Watch Co. Ltd. v. Skyworld Air Express Ltd.* (C.A.) [1991] H.K.C. 184 (adopting interpretation of the Warsaw Convention set out in Schedule 1 to the Carriage By Air (Overseas Territories) Order 1967, LAWS OF HONG KONG, *supra* note 59, as provided in an English case without undertaking an independent interpretation nor displaying awareness that international rules of interpretation should apply); *Manohar t/a Vinamito Trading House v. Hill & Delamain* (H.K.) Ltd. (C.A.) [1993] 2 H.K.C. 342 (alluding to the Warsaw Convention but proceeding to interpret the term "carriage by air" without any reference to the Vienna rules or to the need to apply international rules to maintain uniformity).

91. See Arbitration Ordinance (Cap. 341) 25 LAWS OF HONG KONG, which, apart from reproducing the UNCITRAL Model Law in Schedule 5, provides in Section 2(3) the following: "In interpreting and applying the provisions of the UNCITRAL Model Law, regard should be had to its *international origin* and to the *need for uniformity* in its interpretation, and regard may be had to the documents specified in the Sixth Schedule." Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Sixth Schedule, Report of the Secretary General, Mar. 25, 1985, U.N. Doc A/C N9; Report of the U.N. Commission on International Trade Law on the Work of its 18th Session (emphasis added). To allow reference to case law of other States, a list of signatories is also annexed to the Ordinance.

92. Bangalore Principles, prin. 4, *supra* note 74.

substantiated. Commentators have observed that the initial “enthusiasm” and “receptiveness to international standards” have “flowed and ebbed.”<sup>94</sup> The “high water mark” is invariably traced to the forceful pronouncement by Silke, V.P. in *R. v. Sin Yau-ming*:<sup>95</sup>

In my judgment, the glass through which we view the interpretation of the Hong Kong Bill is a glass provided by the Covenant. We are no longer guided by the ordinary canons of constructions of statutes nor with the dicta of the common law inherent in our training. We must look in our interpretation of the Hong Kong Bill, at the aims of the Covenant and give “full recognition and effect” to the statement which commences that Covenant. From this stems the entirely new jurisprudential approach to which I have already referred . . . While this court is, in effect, required to make new Hong Kong law relating to the manner of interpretation of the Hong Kong Bill and consequentially the tests to be applied to those laws now existing and, when asked, those laws yet to be enacted, we are not without guidance in our task. This can be derived from decisions taken in common law jurisdictions which contain a constitutionally entrenched Bill of Rights. We can also be guided by decisions of the European Court and the European Human Rights Commission—“the Commission.” Further, we can bear in mind the comments and decisions of the United Nations Human Rights Committee—“the Committee.” I would hold none of these to be binding upon us though in so far as they reflect the interpretation of articles in the Covenant, and are directly related to Hong Kong legislation, I would consider them as of the greatest

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93. See, e.g., Michael Kirby, J. [former President of the New South Wales Court of Appeal, currently of the Australian High Court], *The Australian Use of International Human Rights Norms from Bangalore to Balliol—A View from the Antipodes*, 1992 COMMONWEALTH L. BULL. 1306, 1322 (highlighting the “rapid progress” and “firm footing” of the “Bangalore ideas” in Australia’s appellate courts, notwithstanding the strength of earlier legal authority; the high conservatism of the judiciary in matters of basic principle; the features of provincialism, which are almost inescapable in a legal system now largely isolated from its original sources; the absence of an indigenous Bill of Rights to provide a vehicle for international developments; and the special problems of a Federal State where many matters relevant to fundamental rights still rest within the legislative powers of the States). For numerous references to international conventions and comparative jurisprudence by Canadian courts, see ANN F. BAYEFSKY, *INTERNATIONAL HUMAN RIGHTS LAW: USE IN CANADIAN CHARTER OF RIGHTS AND FREEDOMS LITIGATION* (Butterworths 1992). For examples of an increased judicial reference to international standards following the enactment of the New Zealand Bill of Rights Act of 1990, see *Parkhill v. Ministry of Transport* [1992] 1 N.Z.L.R. 555 (C.A.); *Noort v. Ministry of Transport* [1992] 1 N.Z.L.R. 743 (C.A.); *R. v. Goodwin* [1993] 2 N.Z.L.R. 153 (C.A.); *TV3 Network Ltd. v. Eveready N.Z. Ltd.* [1993] 3 N.Z.L.R. 435 (C.A.). See also citations from court practices in Namibia South Africa and Zimbabwe in John Dugard, *The Role of International Law in Interpreting the Bill of Rights*, 10 S. AFR. J. HUM. RTS. 208, 211-12 (1994).

94. See Andrew Byrnes, *Killing It Softly? The Hong Kong Courts and the Slow Demise of the Hong Kong Bill of Rights*, in HONG KONG AND THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL & POLITICAL RIGHTS 33-43 (proceedings of a seminar organized by the Centre for Comparative and Public Law Faculty of Law, University of Hong Kong Sept. 30, 1995). For a more recent assessment, see Chan, *supra* note 41, concluding that “[o]n the whole, international and comparative materials have only had limited impact on the interpretation of the Hong Kong Bill of Rights.”

95. *R. v. Sin Yau-ming* [1992] 1 H.K.C.L.R. 127, 141.

assistance and give to them considerable weight.

Setting forth a more specific approach to the interpretation of the Bill of Rights Ordinance, Justice Silke cited Lord Wilberforce's famous dictum in *Ministry of Home Affairs v. Fisher*.<sup>96</sup> Specifically, he cited the proposition that a constitutional document like the Bill of Rights Ordinance (BORO) calls for a "generous interpretation, avoiding what has been called the 'austerity of legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms" contained therein. The justice has also echoed (without explicit mention of the Vienna Convention) the international rules of treaty interpretation, highlighting the necessity to regard the "context of the Covenant and its aims and objects, with a bias towards the interests of the individual."<sup>97</sup>

One commentator has, nonetheless, suggested that Silke's determined "internationalist" approach was somewhat tempered by concern for local practical feasibility, and that the judgment was a "creative blend of international human rights law and common law pragmatism."<sup>98</sup> Indeed, whether because of "common law chauvinism"<sup>99</sup> or a perception of the BORO as mere statutory reaffirmation of fundamental rights long recognized under the common law,<sup>100</sup> Hong Kong's judges have been keen to "stress the compatibility of their decisions with the common law as it existed prior to the passage of [the BORO]."<sup>101</sup> Evidently, to the extent that the common law re-

96. [1980] App. Cas. 319 (P.C.) (concerning the Constitution of Bermuda, which, as emphasized by Lord Wilberforce, had been influenced by the European Convention on Human Rights and the Universal Declaration of Human Rights). Canadian and South African courts cited the dictum with approval. See Dugard, *supra* note 93, at 212 n.27. See also *R. v. Town Planning Board, ex parte Auburtnown Ltd.* (1994) 4 H.K.P.L.R. 194, 229 (H.C.).

97. *Sin Yau-ming*, 1 H.K.C.L.R. at 145.

98. Richard Swede, *One Territory—Three Systems? The Hong Kong Bill of Rights*, 44 INT'L & COMP. L.Q. 358, 367 (1995).

99. This is a term used by Byrnes, *supra* note 94. See also Chan's discussion of the "common law superiority syndrome," *supra* note 41, at 6-9.

100. See, e.g., *Chim Shing Chung v. Commissioner of Correctional Servs.* (1996) 6 H.K.P.L.R. 313, 322 (per Litton V.P.: "It rarely happens that the Bill of Rights operates in an area of human activities not already covered by the laws of Hong Kong [that is, the common law, the rules of equity, and statute law]").

101. See Swede, *supra* note 98, at 368 (citing as examples the following cases: *R. v. Sin Yau-ming* [1992] 1 H.K.C. 127, 141; *R. v. William Hung* [1992] H.K.P.L.R. 49, *R. v. Wong Cheung-bun* [1992] H.K.C.L.R. 240; *R. v. Kevin Barry Egan* [1991] 1 H.K.C. 284); and, the more recent case, *R. v. Town Planning Board, ex parte The Real Estate Developers Association of H.K.* (1996) 6 H.K.P.L.R. 179, 214 (per Leonard J.):

The fact is that the common law affords ample protection for citizens . . . the most important effect . . . of the BORO Ordinance is that it puts an obstacle, even if it be not insurmountable in the way of any legislature which seeks to remove those rights protected both by the Common Law and the BORO Ordinance. An argument based on the rules of natural justice which will not succeed on the basis of the Common Law is unlikely to be improved by the invocation of the Bill of Rights Ordinance.

flects universal notions of justice and rule of law, conclusions reached in the light of principles of domestic case law often coincide with international standards. However, where incongruous with international law and jurisprudence, when lagging behind international legal developments,<sup>102</sup> or in the absence of well-settled principles,<sup>103</sup> the common law approach may thwart the BORO's stated objective of implementing the International Covenant on Civil and Political Rights.<sup>104</sup>

Unfortunately, local provincial tendencies seem to have been reinforced following the Privy Council decision in *Attorney General v. Lee Kwong-ku/Attorney General v. Lo Chak-man*.<sup>105</sup> The Council reaffirmed the principle that the BORO should be given a "generous and purposive construction" and acknowledged the "valuable guidance as to the proper approach to the interpretation of the Hong Kong Bill" provided by "decisions in other common law jurisdictions, including the United States and Canada, and of the European Court of Human Rights." Their Lordships then reminded the Territory's courts that "decisions in other jurisdictions are persuasive and not binding authority and that the situation in those jurisdictions may not necessarily be identical to that in Hong Kong."<sup>106</sup> The Council sounded a further general caution that

[w]hile the Hong Kong judiciary should be zealous in upholding an individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public. In order to maintain the balance be-

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102. For example, such lagging occurs in the areas of substantive guarantees of equal protection of the law, right to a speedy trial, and the guarantee of an independent and impartial trial. See Andrew Byrnes, *And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights*, in *PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES* (Philip Alston ed., Oxford: Clarendon Press, forthcoming 1998).

103. Arguably, where the common law is unsettled, the courts are required to decide cases in a manner consistent with the Convention as an international legal instrument (namely as an international court would have done). See *Derbyshire County Council v. Times Newspapers Ltd. & Rantzen v. Mirror Group Newspapers Ltd.* [1993] 3 W.L.R. 953 (C.A.).

104. See Byrnes, *supra* note 94, for an account of "cases in which the Bill of Rights/Letters Patent have been given an interpretation that is inconsistent with the international jurisprudence." Cf. *Mabo v. Queensland* (1992) 175 C.L.R. 1, 42 (per Brennan, J.):

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.

105. (1993) 3 H.K.P.L.R. 72.

106. *Id.* at 90-91 (per Lord Woolf).

tween the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime. It must be remembered that questions of policy remain primarily the responsibility of the legislature.<sup>107</sup>

Lord Woolf's observations have been respectfully endorsed in several cases,<sup>108</sup> and appear to have given rise to a resurgence of the "domestic approach" to statutory interpretation, which pays insufficient regard to the international origin of the BORO and its incorporating purpose. Thus, the Court of Appeal held that the BORO's provisions should be construed by the "well-known rules that apply to the interpretation of statutes" and that, "[i]n the absence of ambiguity or obscurity, it is neither necessary nor permissible to refer to matters *extraneous* to the Ordinance, like the terms of the Covenant or the *Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR*."<sup>109</sup> In the appeal case of *R v. Director of Immigration, ex parte Le Tu Phuong and another*, the lower court judge was rebuked for determining standards of fairness without considering "what fairness required in the context of the Hong Kong statutory scheme and local conditions."<sup>110</sup> Appropriately depicted as the low tide in the receptiveness of Hong Kong courts to international standards, *R v. Town Planning Board, ex parte Kwan Kong Co. Ltd.*<sup>111</sup> gives expression to the limited (and incorrect) view that

[t]he court should interpret [the BORO] in the same way as it interprets any other ordinance of Hong Kong, namely, with established rules of interpretation of the common law. The proper and primary judicial interpretation of the Ordinance is by concentrating on the text of the Ordinance and the language of the text.<sup>112</sup> Even if the court should have resort to foreign jurisprudence, the court would not be justified in importing foreign autonomous meaning interpretation so as to contradict or arrive at an interpretation substantially different from the normal common law interpretation.<sup>113</sup> . . . therefore, unless something overwhelming and compelling can be shown in any particular European authority, the Hong Kong court should very wisely decline to be seduced by the seemingly

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107. *Id.* at 100.

108. *See R. v. Director of Immigration, ex parte Wong King-lung & others/R v. Director of Immigration, ex parte So Kam-cheung & others/R. v. Director of Immigration, ex parte Lau Shek-to & others* (1993) 3 H.K.P.L.R. 253, 275 (H.C.); *R. v. Director of Immigration, ex parte Hai Ho-tak/R v. Director of Immigration, ex parte Wong Chung-hing & others* (1994) 4 H.K.P.L.R. 324, 336 (C.A.); *R. v. To Kwan-hang and Tsoi Yiu-cheung* (1994) 4 H.K.P.L.R. 356, 363 (C.A.).

109. *R. v. Director of Immigration, ex parte Hai Ho-tak, id.* at 333-34 (per Nazareth J.A.) (emphasis added).

110. [1994] 4 H.K.P.L.R. 339, 352.

111. (1995) 5 H.K.P.L.R. 261.

112. *Id.* at 300.

113. *Id.* at 301.

inexhaustible literature from the European Court of Human Rights.<sup>114</sup>

The local courts' narrowness of approach in interpreting the BORO also arises in (1) decisions regarding its applicability to the issues adjudicated<sup>115</sup> and (2) the inadequate acknowledgment of the Covenant on Civil and Political Rights' (CCPR's) effect as a normative source of public policy (by virtue of the well-established "compatibility rule"<sup>116</sup> or the "harmonization approach").<sup>117</sup> Anxious not to encroach on the "province of the legislature" by addressing policy questions, Hong Kong judges have declined to consider the binding nature of treaty commitments as a legally relevant component in the Territory's public policy.<sup>118</sup>

Notwithstanding the *lex specialis* status of the BORO, and the CCPR standards imported through it, the customary international law of human rights has not been made redundant. Indeed, since most fundamental human rights antedate conventional instruments and are deemed general international law,<sup>119</sup> they form the *ipso facto* part of Hong Kong law.<sup>120</sup> Conse-

114. *Id.* at 316. See also the support expressed by Leonard J. of Waung J.'s "reluctance . . . to indulge in 'judicial activism' which is apparent in several European decisions [non-binding upon the H.K. court]." *R. v. Town Planning Board, ex parte The Real Estate Developers Association* (1996) 6 H.K.P.L.R. 179, 214.

115. See, for example, determinations that the entitlements in the BORO are inapplicable to extradition proceedings in *Ng Hung-yiu v. Government of the United States of America* [1992] 2 H.K.L.R. 383 and *Re Suthipong Smittachartch* [1993] 1 H.K.L.R. 93.

116. This is a rule of construction that the legislature is presumed not to have derogated from the State's international obligations. Courts in both common law and civil law jurisdictions apply the "compatibility rule." See *THE EFFECT OF TREATIES IN DOMESTIC LAW* 129 (Francis G. Jacobs & Shelly Roberts eds., London: Sweet & Maxwell 1987). For a discussion of the implication of this rule for the Executive and the courts, see Andrew J. Cunningham, *The European Convention on Human Rights, Customary International Law and the Constitution* 43 INT'L & COMP. L.Q. 537, 553ff (1994).

117. See Shearer, *supra* note 25, at 10, for the view that such an approach impacts on all organs of the State (requiring the "passage of legislation to give effect to international law and to override inconsistent law, proper instructions to the executive arm of government to be aware of the State's international obligations (e.g., in handling refugees), and efforts by the courts to interpret domestic law, whether statutory or unwritten, so far as possible in accordance with international law").

118. See *R. v. Director of Immigration, ex parte Hai Ho-tak* (1994) 4 H.K.P.L.R. 324, 336 (C.A.) (expressing concern as to the consequences of the Hong Kong Government's immigration policy and urging legislative reform); see also *R. v. Director of Immigration, ex parte Wong King-lung & others* (1993) 3 H.K.P.L.R. 253, 276 (H.C.) (per Jones, J. quoting the Privy Council's edict [in *Lee Kwong-kut*] that "questions of policy remain primarily the responsibility of the legislature" but opining that "all right-thinking members of society will regard a policy that requires the removal of [young children] decidedly unattractive and unworthy of a government that professes to support human rights"). Note that—following the Privy Council decision in *Ming Pao Newspapers Limited v. The Attorney Gen. of H.K.* (1996) 6 H.K.P.L.R. 103, 105—Hong Kong judges may be encouraged to defer to local government's policies (e.g., with respect to the "pressing social need to stamp out the evil of corruption in Hong Kong"). See also critical commentary on "excessive deference to Executive acts" by Chan, *supra* note 41, at 12-14.

119. See *Interim Report on the Status of the Universal Declaration of Human Rights in National and International Law*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE

quently, reference to pertinent international documents and jurisprudence should not be viewed as extraneous, nor should it be contingent on the ambiguity or obscurity of domestic legislation.

#### IV. CONCLUSION

In exploring the possible pattern of the international/domestic law relationship in the HKSAR, the following may be concluded. Subject to the overarching limitation resulting from the exclusion of foreign and defense affairs from the Territory's control, the courts in the HKSAR are fully competent to decide questions of international law that arise in the course of legal proceedings. By virtue of the authority vested in them under the Sino-British Joint Declaration and the Basic Law, the local courts are required to "adjudicate cases in accordance with the laws applicable in the Region,"<sup>121</sup> including, when applicable, international law. Indeed, not only are judges authorized to apply international law, but they may also incur international responsibility for its misapplication. The duty thus imposed extends to judicially reviewing Executive acts for conformity with the Territory's international legal obligations and to interpreting HKSAR law consistent with international law.

Despite the superior ranking of the Basic Law within the domestic legal order—and regardless of whether an incorporationist attitude is adopted in relation to the status of international law in that order—the underlying principles, widely shared among members of the international community, are those of compatibility and constitutionality. Thus, notwithstanding the absence of "international-law-friendliness"<sup>122</sup> in the HKSAR Basic Law, when caught between the Scylla of domestic law (the Constitution) and the Charybdis of international law (*pacta sunt servanda*),<sup>123</sup> HKSAR judges

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SIXTY-FIFTH CONFERENCE 446-59 (Cairo 1993), and references therein to State practice and scholarly writings.

120. Note that, although the Universal Declaration of Human Rights was held not to have the force of law in Hong Kong for the purpose of judicial review based on its provisions, no consideration was given to the relevance of international norms embedded in the Declaration for purposes of statutory interpretation. See *In re an Application by Wong Chun-Sing & Ng Fook-yin for Judicial Review* [1984] H.K.L.R. 71.

121. Basic Law, *supra* note 19, art. 84.

122. Dermott J. Devine borrowed the concept from G. Erasmus to describe provisions in the South African Constitution that require judges to regard the applicable international law (e.g., in the areas of human rights observance, humanitarian law, and the use of force by States). See Dermott J. Devine, *The Relationship Between International Law and Municipal Law in the Light of the Interim South African Constitution 1993*, 44 INT'L & COMP. L.Q. 1, 17 (1995). Note The Constitution of the Republic of South Africa 1996, § 233, Act No. 108 of 1996, reprinted in *THE CONSTITUTIONS OF THE WORLD* (Gisbet H. Flanz ed., Dobbs Ferry, N.Y. 1997), which stipulates that "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

123. Devine, *supra* note 122, at 11 (citing C.R. Symmons, *International Treaty Obli-*



should act upon the strong presumption that neither the Basic Law nor the legislature intends to violate international law.

Judges applying international legal norms in the HKSAR courts are expected to follow patterns set by their local predecessors. Given the global trend of increased references to international law before national courts, however, the courts should adopt a more internationalist attitude, leading to the enrichment and the “internationalisation of the domestic law through the impact of international treaties, conventions, and standard-setting by international institutions.”<sup>124</sup>

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*gations and the Irish Constitution: The McGimpsey Case*, 41 INT'L & COMP. L.Q. 310, 339 (1992)).

124. See Shearer, *supra* note 25, at 18.