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# CAN UNINCORPORATED TREATY OBLIGATIONS BE PART OF ENGLISH LAW?

## *The orthodox point of departure*

The argument of this article is that there is reason to question the article of faith of English constitutional law according to which an international treaty obligation is not a part of English law unless it has been incorporated through an Act of Parliament.<sup>1</sup> On the authority of this firmly held belief, the courts cannot consider as part of English law an obligation contained in an unincorporated treaty, since if they were able to do so the executive could, by way of treaty-making-as-legislation, effectively abrogate the law of the land. By operation of this rule, continues the orthodoxy, it does not matter whether the unincorporated treaty obligation adds to or takes away from the rights of the subject.

Under the new constitutional settlement emerging after 1688 the Crown lost many of the far-reaching powers that it had until then enjoyed. The Bill of Rights 1688 confirmed that “the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegal” and that “the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of late is illegal”.<sup>2</sup> The rule that an unincorporated treaty obligation cannot override the common law is, we are told, based directly on the settlement of the Civil War and the Glorious Revolution.<sup>3</sup> Thus, in *Tin Council*, a case concerning the question of whether a Minister was liable under English law for the debts of an international organization which had been established by a treaty to which the United Kingdom was a party, Lord Oliver observed against the backdrop of earlier cases that,

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<sup>1</sup> See e.g. F. Maitland, *The Constitutional History of England* (C.U.P. 1908) 424; W. Holdsworth, “Treaty-making Power of the Crown” (1942) 58 L.Q.R. 175; F. Vallat, *International Law and the Practitioner* (Manchester University Press 1966) 7–8; H.W.R. Wade & C.F. Forsyth, *Administrative Law* (11th edn., O.U.P. 2014) 289.

<sup>2</sup> 1 Will. & Mary, sess.2, c.2.

<sup>3</sup> See e.g. *John Junior Higgs v Minister of National Security* [2000] 2 A.C. 228 (P.C.), 241 (Lord Hoffmann).

“[q]uite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation.”<sup>4</sup>

The judgment of the House of Lords in *Tin Council* has been considered the leading authority on unincorporated treaties and English law. It is routinely relied on by the courts, most recently by the Supreme Court in *Miller*, concerning the United Kingdom’s withdrawal from the EU treaties.<sup>5</sup> In setting out the constitutional background against which the questions before the court fell to be settled, the Supreme Court in *Miller* observed that, although unincorporated treaties “are binding on the United Kingdom in international law, [they] are not part of UK law and give rise to no legal rights or obligations in domestic law”.<sup>6</sup> The *Tin Council* approach was also echoed by Lord Sumption in *Belhaj*. Although this case concerned the so-called foreign act of state doctrine and not the effect of treaties on English law, his Lordship observed, in relation to treaty based obligations, that:

judges applying the common law are not at liberty to create, abrogate or modify municipal law rights or obligations in accordance with unincorporated norms derived from international law.<sup>7</sup>

Although the cases just mentioned are weighty authorities of English constitutional law, in none of them was it strictly speaking necessary for the court to settle the question with which this article is concerned: are there situations in which the courts can rely directly on unincorporated treaty obligations?

It is well-known that “the only part of a previous case which is binding is the *ratio decidendi*”.<sup>8</sup> As Sir Frederick Pollock once observed, in a passage that received the imprimatur of Sir William Holdsworth<sup>9</sup> and the House of Lords:<sup>10</sup>

Judicial authority belongs not to the exact words used in this or that

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<sup>4</sup> *J.H. Rayner (Mincing Lane) Ltd. v Department of Trade and Industry* [1990] 2 A.C. 418, 500.

<sup>5</sup> *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583 at [56].

<sup>6</sup> *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583 at [55].

<sup>7</sup> *Belhaj v Straw and Others and Rahmatullah (No. 1) v Ministry of Defence and Another* [2017] UKSC 3; [2017] 2 W.L.R. at [252].

<sup>8</sup> R. Cross & J.W. Harris, *Precedent in English Law* (4th edn., O.U.P 1991) 39.

<sup>9</sup> Sir William Holdsworth, *Essays in Law and History* (Clarendon Press 1946) 158.

<sup>10</sup> *Close v Steel Company of Wales Ltd.* [1962] A.C. 367, 388–89 (Lord Denning).

judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision.<sup>11</sup>

Furthermore, the Earl of Halsbury L.C. observed in *Quinn v Leatham* that “a case is only an authority for what it actually decides”.<sup>12</sup> A question as important as whether there are circumstances in which unincorporated treaty obligations can be part of English law will not be decided by a side-wind. According to the tradition of the common law, it is a question that needs to be confronted foursquare before it can be taken to have been definitively settled.

It is against that background, then, that the present article asks the heretical question, was Lord Oliver’s conclusion in *Tin Council* correct, and is it supported by the high authorities which it purports—and is generally assumed—to encapsulate? Is it, in other words, right to say that “[q]uite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation”?<sup>13</sup>

In order to come to grips with that question, it will be necessary to go back to the judgment that is by common acclamation the *fons et origo* of the law governing the relationship between English law and international treaties—the judgment in *The Parlement Belge*,<sup>14</sup> where on the facts of the case the question of unincorporated treaties was squarely at issue before the court. *The Parlement Belge* is generally considered to be the authority from which the rule on English law and unincorporated treaties flow.<sup>15</sup> The case was decided by Sir Robert Phillimore, perhaps the most distinguished authority on international law in the English judiciary of his day.<sup>16</sup> In addition to what the judgment said about treaties, it also developed certain aspects of the law of state immunity; these latter aspects

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<sup>11</sup> F. Pollock, “Introduction” in J. Drake and others (eds.), *The Progress of Continental Law in the Nineteenth Century* (Little, Brown & Co. 1918) xliv.

<sup>12</sup> *Quinn v Leatham* [1901] A.C. 495, 506.

<sup>13</sup> *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 A.C. 418, 500.

<sup>14</sup> *The Parlement Belge* (1879) 4 P.D. 129.

<sup>15</sup> This seems to be universally accepted: e.g. H.W.R. Wade & C.F. Forsyth, *Administrative Law* (11th edn., O.U.P. 2014) 289; R. Jennings & A. Watts (eds.), *Oppenheim’s International Law* (Longman 1992) 58–59; G. Marston, “Unincorporated Treaties and Colonial Law” (1990) 20 *Hong Kong Law Journal* 178; F. Vallat, *International Law and the Practitioner* (Manchester University Press 1966) 7–8; W. Holdsworth, *A History of English Law Vol XIV* (Methuen & Co. 1964) 73; W.R. Anson, *Law and Custom of the Constitution Vol. II* (O.U.P. 1911) 109–10.

<sup>16</sup> See e.g. Lord McNair, “The Debt of International Law in Britain to The Civil Law and the Civilians” (1953) 39 *Transactions of the Grotius Society* 183, 198. Phillimore’s *Commentaries upon International Law* (Butterworths, 1854–61) ran to three editions.

were overturned on appeal,<sup>17</sup> in a judgment where the Court of Appeal expressed no opinion upon Sir Robert Phillimore’s judgment on the treaty point. As Lord McNair put it in 1928, the judgment at first instance “has since been regarded as the authoritative statement” of the relationship between international treaties and English law.<sup>18</sup> Thus the Privy Council observed in *John Junior Higgs* that “unincorporated treaties cannot change the law of the land”; “[t]hey have no effect upon the rights and duties of citizens in common or statute law: see the classic judgment of Sir Robert Phillimore in *The Parlement Belge*”.<sup>19</sup>

This article will seek to demonstrate that the broad assertion advanced in *Tin Council*, and restated in *Miller*, is too bald to give a convincing representation of the correct position. *The Parlement Belge* and contemporary (as well as both earlier and later) constitutional and judicial authorities recognize that there are in fact situations in which the courts may give effect to obligations contained in unincorporated treaties. As will also be shown, these authorities are more than just a Tennysonian “wilderness of single instances”:<sup>20</sup> they follow a pattern which is based on a discernible and attractive rule. But the aim of this article is not to turn on its head the main tenets of English constitutional law governing the treaty making power of the Crown:<sup>21</sup> it is rather to look more closely at what happens in the penumbras and emanations of these foundational rules of the English constitution. Four preliminary points should be made in that regard.

First, this article is not concerned with the rule of statutory construction that ambiguous provisions will be construed so as not to place the United Kingdom in breach of its international obligations, as set out in *Lyons*<sup>22</sup> and *Assange*.<sup>23</sup>

Secondly, the article does not deal with the generally recognized proposition that prerogative powers can be exercised to change the facts to which

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<sup>17</sup> (1880) P.D. 197.

<sup>18</sup> Lord McNair, “When Do British Treaties Involve Legislation?” (1928) 9 B.Y.I.L. 59, 60–61. Also: E.C.S. Wade, “Act of State in English Law: Its Relations with International Law” (1934) 15 B.Y.I.L. 98, 98; G. Marston, “Unincorporated Treaties and Colonial Law” (1990) 20 Hong Kong Law Journal 178, 178–80; P. Sales & J. Clement, “International Law in Domestic Courts: The Developing Framework” (2008) 124 L.Q.R. 388, 395 n.27.

<sup>19</sup> *John Junior Higgs v Minister of National Security* [2000] 2 A.C. 228 (P.C.), 241 (Lord Hoffmann).

<sup>20</sup> Alfred, Lord Tennyson, “Aylmer’s Field” (1793).

<sup>21</sup> cf. B. Malkani, “Human Rights Treaties in the English Legal System” [2011] P.L. 554.

<sup>22</sup> *R. v Lyons* [2002] UKHL; [2003] 1 A.C. 976 at [27] (Lord Hoffmann).

<sup>23</sup> *Assange v The Swedish Prosecutor* [2012] UKSC 22; [2012] 2 A.C. 471 at [122] (Lord Dyson).

the law applies, so that the exercise of the prerogative to declare war will have certain legal consequences, e.g. that certain individuals become enemy aliens, or the prerogative to extend UK territorial waters may have certain legal consequences, e.g. the criminalization of broadcasts from ships in the extended area, where broadcasts had previously been lawful. As the Supreme Court observed in *Miller*, in such cases “the exercise has not created or changed the law, merely the extent of its application”.<sup>24</sup>

Thirdly, this essay does not make claims about whole categories of treaty, such as human rights treaties or peace treaties. It cannot legitimately be said that whole categories of treaty can generally be held to be part of English law without incorporation. This is, in part, because treaties contain many different types of provision. For example, the more than 400 articles of the Treaty of Versailles of 1919<sup>25</sup> regulated matters as variegated as constitutive charters of international organizations, questions of territorial status, minority rights as well as several other types of issue.<sup>26</sup> Similarly, a human rights treaty is likely to contain a wide variety provisions from, in the case of the Convention on the Rights of the Child,<sup>27</sup> substantive provisions such as art.3 on the best interests of the child to the rather different art.43 on the establishment of a Committee on the Rights of the Child. Rather, the approach must be, as the Supreme Court has said in different but related connection, a “much more fine-grained approach—disaggregating the general category in order to achieve the specialization of the principle in its application to particular classes of case”.<sup>28</sup> Indeed, such a disaggregated approach is often taken when treaties are incorporated through legislation. Thus the United Nations Act 1946<sup>29</sup> incorporated only the part of the UN Charter that was felt to be suitable for incorporation—i.e. art.41.<sup>30</sup>

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<sup>24</sup> *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583 at [53].

<sup>25</sup> June 28, 1919, 225 C.T.S. 189.

<sup>26</sup> P. Reuter, *Introduction to the Law of Treaties* (Paul Kegan International 1995) 25–30; E. Bjorge, *The Evolutionary Interpretation of Treaties* (O.U.P. 2014) 34–35.

<sup>27</sup> November 20, 1989, 1577 U.N.T.S. 3.

<sup>28</sup> *Belhaj v Straw and Others and Rahmatullah (No. 1) v Ministry of Defence and Another* [2017] UKSC 3; [2017] 2 W.L.R. 456 at [33] (Lord Mance), citing C. McLachlan, *Foreign Relations Law* (C.U.P. 2014) 524–25 (inverted commas removed).

<sup>29</sup> 9 & 10 Geo. 6, c.45.

<sup>30</sup> Art.41 provides: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of

Thirdly, owing to exigencies of space this article will not enter into a discussion of who exactly is a “subject” (and the extent to which “subject” and “citizen” are precisely overlapping categories). It will simply follow the House of Lords and Supreme Court in taking the broad view that, so far as constitutional rights are concerned, an individual resident in the United Kingdom is “a subject by local allegiance even with a subject’s rights and obligations”.<sup>31</sup>

*The orthodoxy as recently questioned*

Whilst the question of whether certain unincorporated treaty obligations can be a part of English law has not in recent times come squarely before the courts, it has gained topicality through certain recent judicial dicta. Thus Lord Kerr in *J.S.* held that the courts can rely on the whole category of unincorporated human rights treaties: “the time has come for the exception to the dualist theory”, according to which unincorporated treaties cannot have any incidence on domestic law, “in human rights conventions to be openly recognised”.<sup>32</sup> As Lord Kerr explained, the Privy Council in *Lewis* had acknowledged the argument that an exception might be read into the traditional rules when the convention under advisement was a human rights convention.<sup>33</sup> Lord Kerr also noted the doubt cast by Lord Steyn in *McKerr* on the applicability of the rules of non-justiciability so far as they governed the position in connection with human rights conventions. Lord Steyn had held that the rationale of the so-called dualist theory was that “any inroad on it would risk abuses by the executive to the detriment of citizens”, adding that it was “difficult to see what relevance this has to international human rights treaties which create fundamental rights for individuals against the state and its agencies”.<sup>34</sup> Lord Steyn in *McKerr* concluded by observing that a critical re-examination of this branch of the law may become necessary in the future.

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economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communications, and the severance of diplomatic relations.”

<sup>31</sup> *Rahmatullah (No. 2) v Ministry of Defence and Another & Mohammed and Others v Ministry of Defence and Another* [2017] UKSC 1; [2017] 2 W.L.R. 287 at [5] (Lady Hale), citing *Johnstone v Pedlar* [1921] 2 A.C. 262, 276; (1921) 1 I.L.R. 231 (Viscount Cave).

<sup>32</sup> *R. (J.S.) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [254] (Lord Kerr).

<sup>33</sup> *Lewis v Attorney General of Jamaica* [2001] 2 A.C. 50 (P.C.), 84 (Lord Slynn).

<sup>34</sup> *McKerr* [2004] UKHL 12; [2004] 1 W.L.R. 807 at [52] (Lord Steyn).

Sales and Clement have delivered a sustained and powerful critique of Lord Steyn's dictum.<sup>35</sup> A particularly interesting point they make is that it is incorrect, as a matter of constitutional principle, to say that the underlying principle on which the general rule is based is to guard against "abuses by the executive to the detriment of citizens".<sup>36</sup> They argue that this is *not* the rationale for the general rule:

The true rationale is that the Crown cannot change domestic law by the exercise of its powers under the prerogative, which is a rule reflecting and supporting the sovereignty of Parliament and its primacy as the domestic law-making institution in our constitution.<sup>37</sup>

Against this background, it seems useful to re-examine the age-old authorities on which the competing formulations of the guiding principles are said to rest. Such a re-examination seems particularly topical as the Supreme Court has recently signalled that the "interesting question" of whether some unincorporated treaty obligations, such as art.3 of the Convention on the Rights of the Child, could be relied on by the courts should be examined by it in a proper case.<sup>38</sup>

#### *Historical antecedents*

As parsed above, the judgment by Sir Robert Phillimore in *The Parlement Belge*<sup>39</sup> is taken to be the source and origin of how English law views the question of whether an unincorporated treaty obligation is or is not domestically operative.<sup>40</sup> The judgment merits scrutiny. It concerned a collision at sea between a Belgian mail packet and the vessel of a British subject. The Crown had, based on the unincorporated Belgium–Great Britain Postal Convention, entered into in 1876,<sup>41</sup> purported to confer immunity on the Belgian vessel, thus effectively depriving the British subject of the right to bring proceedings against the vessel for damage sustained in the collision. Sir Robert Phillimore determined in the judgment that

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<sup>35</sup> P. Sales & J. Clement, "International Law in Domestic Courts: The Developing Framework" (2008) 124 L.Q.R. 388, 398–400.

<sup>36</sup> *McKerr* [2004] UKHL 12; [2004] 1 W.L.R. 807 at [50] (Lord Steyn).

<sup>37</sup> P. Sales & J. Clement, "International Law in Domestic Courts: The Developing Framework" (2008) 124 L.Q.R. 388, 399.

<sup>38</sup> *Nzolameso v City of Westminster* [2015] UKSC 22; [2015] W.L.R. 165 at [29] (Lady Hale).

<sup>39</sup> *The Parlement Belge* (1879) 4 P.D. 129.

<sup>40</sup> e.g. *John Junior Higgs v Minister of National Security* [2000] 2 A.C. 228 (P.C.), 241 (Lord Hoffmann).

<sup>41</sup> February 17, 1876, 160 C.T.S. 99.



there could in principle exist treaties which operated domestically without the confirmation of the legislature. There was “a class of treaties the provisions of which were inoperative without the confirmation of the legislature; *while there were others which operated without such confirmation*”.<sup>42</sup> Pausing there, that statement is noteworthy in so far as it plainly goes against the grain of the idea that no unincorporated treaty obligation can be part of English law. Phillimore went on to observe that one example in this regard was:

the Declaration of Paris in 1856, by which the Crown in the exercise of its prerogative deprived this country of belligerent rights, which very high authorities in the state and in the law had considered to be of vital importance to it. But this declaration did not affect the private rights of the subject; and *the question before me is whether this treaty does affect private rights, and therefore required the sanction of the legislature. . . .* If the Crown had power without the authority of parliament by this treaty to order that the *Parlement Belge* should be entitled to all the privileges of a ship of war, then the warrant, which is prayed for against her as wrong-doer on account of the collision, cannot issue, and the right of the subject, but for this order unquestionable, to recover damages for the injuries done to him by her is extinguished.<sup>43</sup>

The test for whether the court could base its judgment on the treaty provisions at issue was not whether the treaty had been incorporated or not: it was whether the treaty affected or extinguished the private rights of the subject. Given that the British–Belgian postal treaty in *The Parlement Belge* would deprive the British subject of his rights, by taking away his right to sue the Belgian mail packet following the collision, the treaty must be inoperative without the confirmation of the legislature. According to *The Parlement Belge*, then, the pertinent question is not simply whether the treaty had been incorporated or not; it was “whether this treaty does affect private rights, and therefore required the sanction of the legislature”.<sup>44</sup>

Several examples could be given which combine to bear out that that was in principle the correct test to be applied—four will be given here. These instances go back as far as to the first year of the new constitutional dispensation ushered in

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<sup>42</sup> *The Parlement Belge* (1879) 4 P.D. 129, 150 (emphasis added).

<sup>43</sup> *The Parlement Belge* (1879) 4 P.D. 129, 150 (emphasis added).

<sup>44</sup> *The Parlement Belge* (1879) 4 P.D. 129, 150.

by the Glorious Revolution and continue up to and beyond the period when *The Parlement Belge* was decided. As will be shown, when cases emerged, in the period after *The Parlement Belge*, where that test was put to the test, the judges were prepared to give individuals rights on the basis of unincorporated treaty provisions.

A word should be said about the nature of certain of these examples, as some of them are court judgments; others, examples of constitutional practice or advice rendered to the government by senior Law Officers of the Crown, such as the Attorney General and the Solicitor General. In *Rahmatullah (No. 2)* it was plainly accepted that one such opinion, by Sir William Murray from 1753,<sup>45</sup> advising the Crown that a belligerent power was entitled in international law to seize not only enemy property but the property of neutrals destined for an enemy, enjoyed high authority.<sup>46</sup> *Nissan* the House of Lords relied on opinions of the Law Officers as a source of municipal law, particular reliance being placed on advice<sup>47</sup> given in 1728 by, “eminent counsel who ultimately became Lord Hardwicke and Lord Talbot”,<sup>48</sup> that is, Attorney General Sir Philip Yorke and Solicitor General Sir Charles Talbot, relating to the seizure of British ships in British Plantations.<sup>49</sup> More generally, it is not at all unusual for the courts to take account of constitutional practice or tradition in the ascertainment of the rules of the English constitution.<sup>50</sup>

First, the analysis of *The Parlement Belge* set out above finds support in an opinion by, amongst others, the Chief Justices of the King’s Bench (Sir John Holt) and Common Pleas (Sir Henry Pollexfen), and the Judge of the High Court of Admiralty (Sir Charles Hedges), in response to a question regarding English goods in foreign prize referred to it by the Crown in 1689,<sup>51</sup> hot on the heels of the Glorious Revolution. The title of the report was *Opinion of the judges as to the power of the crown to affect by treaty the right of English subjects to arrest and*

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<sup>45</sup> (1836) 20 B.F.S.P. 889.

<sup>46</sup> *Rahmatullah (No. 2) v Ministry of Defence and Another & Mohammed and Others v Ministry of Defence and Another* [2017] UKSC 1; [2017] 2 W.L.R. 287 at [59] (Lord Mance), [82] (Lord Sumption).

<sup>47</sup> G. Chalmers (ed), *Opinions of Eminent Lawyers Vol. II* (C. Goodrich & Co. 1858) 339.

<sup>48</sup> *Attorney General v Nissan* [1970] A.C. 179, 209 (Lord Reid).

<sup>49</sup> *Attorney General v Nissan* [1970] A.C. 179, 209 (Lord Reid); 234 (Lord Wilberforce).

<sup>50</sup> See e.g. *Nairn v University of St Andrews* [1909] A.C. 147, 162–63 (Lord Ashbourne); *R. v Halliday* [1917] A.C. 260, 300–305 (Lord Shaw); *Hanratty v Lord Butler* (1971) 115 S.J. 386; Sir Philip Sales, “Rights and Fundamental Rights in English Law” (2016) 75 C.L.J. 86, 97.

<sup>51</sup> R.G. Marsden (ed.), *Documents relating to Law and Custom of the Sea Vol. II* (Navy Records Society 1916) 124.

*claim their goods in prizes brought to England by a foreign captor*, and it held that it was:

not consistent with the laws of England to make it an article of treaty with another Kingdome or state that in case prizes be taken by the privateers of the one Kingdome or state, and brought into the ports of the other, they shall in all cases be judged by the respective Admiraltys of that Kingdom or state to which the privateers belong, and shall be permitted to go thether from out of those ports for that purpose. For if any ship or goods be taken by a forreign privateer, and brought into any port of this kingdome, and such ship or goods shall be here claimed by your Majesty's subjects as belonging to them, they have *a right by law* to have a warrant out of your Majesty's court of Admiralty to arrest the same, in order to try their claimes; and *no article in any treaty can exclude them from such their right*.<sup>52</sup>

By way of background, in authorities predating the Glorious Revolution, it had been held that an unincorporated treaty could indeed apply as the law of the land even though it detrimentally altered the rights of English subjects.<sup>53</sup> After 1688 that was no longer possible, and the 1689 opinion of the Chief Justices is early and clear proof that English constitutional law, after the Glorious Revolution, did not accept as operative unincorporated treaties which deprived the subject of existing legal rights. But this authority falls short of proving the *negative*, in the sense that it does not show that, had the treaty provisions *not* excluded the individuals in question from their right but instead strengthened their rights or created new rights for them, then the treaty obligations would have been operative. For that, the second exemplar, it is necessary to spool a few decades forward, to the opinion that the House of Lords treated as a source of domestic law in *Nissan*.

In 1728 Attorney General Sir Philip Yorke and Solicitor General Sir Charles Talbot<sup>54</sup> had been asked to advise on the legality of a provision in his majesty's general instructions to his several governors in America, which contained a

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<sup>52</sup> R.G. Marsden (ed.), *Documents relating to Law and Custom of the Sea Vol. II* (Navy Records Society 1916) 125–26 (original spelling kept; emphases added).

<sup>53</sup> See e.g. the 1665 judgment by Sir Leoline Jenkins, sitting in the Admiralty Court, determining that certain goods of Englishmen ought to be restored to their English owners, but only “if the league between England and Portugal did not hinder” such restoral: R.G. Marsden (ed), *Documents relating to Law and Custom of the Sea Vol II* (Navy Records Society 1916) 59–61 & W. Wynne, *Life of Leoline Jenkins Vol. II* (1724) 732–33.

<sup>54</sup> G. Chalmers (ed), *Opinions of Eminent Lawyers Vol. II* (C. Goodrich & Co. 1858) 339.

reference to arts.5 and 6 of the unincorporated Anglo–French Treaty of Peace for a Neutrality in America,<sup>55</sup> according to which:

the subjects, inhabitants, &c. of each kingdom are prohibited to trade and fish, in all places possessed, or which shall be possessed, by them, or either of them, in America; and that if any ships shall be found trading contrary to the said treaty, upon due proof, the said ships shall be confiscated; but in case the subjects of either king shall be forced, by stress or weather, enemies, or other necessity, into the ports of the other, in America, they shall be treated with humanity and kindness, and may provide themselves with victuals, and other things necessary for their sustenance, and reparation of their ships, at reasonable rates, provided they do not break bulk, nor carry any goods out of their ships, exposing them to sale, nor receive any merchandize on board, under penalty of confiscation of ship and goods.

In spite of the injunctions of the treaty—“provided they do not ... carry any goods out of their ships, exposing them to sale”—trade had been carried on between the British and French settlements in America, “on pretence that there is no law in force against such trade”.<sup>56</sup> In the view of Yorke and Talbot this pretence was incorrect: their advice to the commissioners for trade and plantations was that:

you signify to our subjects, under your government, the purport and intent of the abovesaid two articles, and that you take particular care that the same be punctually observed and put in execution, and that no illegal trade be carried on

between the British and French subjects in the settlements.<sup>57</sup> In other words, Yorke and Talbot took arts.5 and 6 to have overridden the law of the land in the colonies in question. But they went on to say that it was not the intent of the treaty to provide that either Britain or France “should seize and confiscate the ships or goods of their own subjects, for contravening the said articles”.<sup>58</sup> Had that been the case, such an intention “could not have had its effect with respect to his majesty’s subjects, unless the said articles had been confirmed either by the act of Parliament of Great Britain, or by acts of assembly, within the respective plantations”.<sup>59</sup> That is significant. What Yorke and Talbot’s opinion shows is that, whereas the

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<sup>55</sup> November 16, 1686, 18 C.T.S. 83.

<sup>56</sup> G. Chalmers (ed.), *Opinions of Eminent Lawyers Vol. II* (C. Goodrich & Co. 1858) 340.

<sup>57</sup> G. Chalmers (ed.), *Opinions of Eminent Lawyers Vol. II* (C. Goodrich & Co. 1858) 340–41.

<sup>58</sup> G. Chalmers (ed.), *Opinions of Eminent Lawyers Vol. II* (C. Goodrich & Co. 1858) 342.

<sup>59</sup> G. Chalmers (ed.), *Opinions of Eminent Lawyers Vol. II* (C. Goodrich & Co. 1858) 342.

provisions which were thought not to affect the rights of his majesty's subjects were held to be operative without incorporation, those concerning seizure and confiscation of the ships and goods of British subjects could not be operative. The latter—and only the latter—would have required legislation.

Thirdly, in connection with collisions between English and foreign ships in the 1860–80s there is ample constitutional practice bearing out the reading made above of Phillimore's judgment in *The Parlement Belge*.<sup>60</sup> In respect of a collision in the English Channel of the Jersey vessel *Antagonist* and the Belgian mail packet *Rubis*, the owners of the former obtained a warrant from the Admiralty Court to arrest the latter. Belgium, through its Minister in London, observed that the vessel enjoyed immunity by reason of the 1844 Anglo–Belgian Postal Convention.<sup>62</sup> On April 12, 1861 the Foreign Office was advised by the Attorney General, Sir Richard Bethell, that:

The words of the Treaty are so large that they must have been understood as containing an engagement that a vessel “freighted” that is, taken up, by the Belgian Government for the postal service should be free from every Civil process when in an English harbour. *But unless there is an Act of Parliament expressly authorizing this Government to enter into such a stipulation, it would have no effect on the rights of individuals.*<sup>63</sup>

Furthermore, in a letter to the Spanish Minister in London of 20 July 1887 (and in similar letters to the Belgian,<sup>64</sup> German,<sup>65</sup> and Italian<sup>66</sup> representatives in London from the same period) the Foreign Secretary, the Marquess of Salisbury, made reference to the judgment of Sir Robert Phillimore in *The Parlement Belge* and went on to say:

The Courts held that it was not competent to the Crown, without the authority of Parliament, to clothe these subsidized vessels with the

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<sup>60</sup> See generally G. Marston, “Unincorporated Treaties and Colonial Law” (1990) 20 Hong Kong Law Journal 178.

<sup>62</sup> 1844, 19 C.T.S. 345.

<sup>63</sup> Foreign Office Confidential Print No. 1123 (F.O. 881/1123) 62 (emphasis added).

<sup>64</sup> Foreign Office Confidential Print No. 5475 (F.O. 881/1123) 43 (November 1, 1886).

<sup>65</sup> Foreign Office Confidential Print No. 5475 (F.O. 881/1123) 24–25 (April 26, 1886)

<sup>66</sup> Foreign Office Confidential Print No. 5475 (F.O. 881/1123) 34–35 (November 29, 1887)

immunities of foreign ships of war, so as to *deprive British subjects of their right to proceed against them for the enforcement of their legal rights.*<sup>67</sup>

Fourthly, the reading made above of *The Parlement Belge* is reinforced by the language adopted by the Judicial Board of the Privy Council in *Walker v Baird*.<sup>68</sup> There a lobster factory on the coast of Newfoundland was shut down by a government officer charged with the enforcement of a British–French treaty regulating lobster fisheries,<sup>69</sup> and the owner brought an action against the Crown. The Attorney General assumed in argument that the mere allegation that the acts were done in pursuance of a treaty took the matter out of the cognizance of the court. He argued that, as the Crown had unfettered powers to enter into a treaty designed to put an end to or prevent war, there was incidental to that power also a right on the part of the Crown to make any orders and carry out any acts necessary to implement such a treaty, even if the acts would encroach on the legal rights of private persons. Lord Herschell L.C., delivering judgment, did not share this view. He observed that the Crown could not sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the terms of the treaty; this was a question of whether “interference with private rights can be authorized otherwise than by the Legislature”.<sup>70</sup> *Walker v Baird* seems therefore to be valuable Privy Council authority for the proposition that the real question that needs asking in connection with an unincorporated treaty obligation is whether or not it interferes with private rights. As Lord Reid held in *Nissan*:

It is sometimes said, or at least suggested, that an act of the executive obtains some additional protection if it is done in execution or furtherance of some treaty. I do not see why that should be so. ... There is no doubt that it is within the prerogative right of the Crown to make treaties and no subject, whether within or outside the realm, can object on the ground that the making of the treaty has caused him loss. ... *But it would be quite another matter if the Crown infringed his ordinary legal rights and*

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<sup>67</sup> Foreign Office Confidential Print No. 5475 (F.O. 881/1123) 22 (emphasis added).

<sup>68</sup> *Walker v Baird* [1892] A.C. 491 (P.C.), 496–97 (Lord Herschell L.C.).

<sup>69</sup> It is not clear from the judgment exactly what was the treaty in question.

<sup>70</sup> *Walker v Baird* [1892] A.C. 491 (P.C.), 497.

*founded on its obligations under a treaty as a defence.* That was made clear by the decision in *Walker v Baird*.<sup>71</sup>

Similarly, Lawton L.J. in *Laker Airways* observed in connection with the treaty making powers of the Crown that: “the Secretary of State cannot use the Crown’s powers in this sphere in such a way as to take away the rights of citizens: see *Walker v Baird*”.<sup>72</sup>

It can be concluded that whether an unincorporated treaty could operate in domestic law depended on whether it deprived the citizen of existing legal rights or interfered with those rights. The protection of the rights of the citizen seems to have been at the heart of the rule applied in the constitutional practice referred from the period from the 1680s up until the 1880s, in *The Parlement Belge* and up until *Walker v Baird*. It was only later, however, that the test set out in *The Parlement Belge* and the other authorities analysed above was actually put to the test in court cases that showed that the judges were actually prepared to treat certain unincorporated treaty obligations as being a part of the law of the land.

*The test put to the test:*

*Porter v Freudenberg and Imperial Japanese*

In particular, two judicial authorities—one decided by a full Court of Appeal, the other by the Judicial Board of the Privy Council—have led to a measure of confusion on account of the fact that both courts were prepared to give effect to unincorporated treaties. In both cases was the court prepared to rely on an unincorporated treaty provision with a view either to improving the position of the subject as against the state, or as between private parties.

*Porter v Freudenberg*,<sup>85</sup> decided by a unanimous Court of Appeal sitting as seven judges, concerned various individuals who during the First World War had connections with Germany. The court was prepared to rely on the unincorporated art.23(h) of the Hague Convention of 1907 which, it was argued in the case, would give a person voluntarily resident or carrying on business in Germany in wartime

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<sup>71</sup> *Attorney General v Nissan* [1970] A.C. 179, 211 (Lord Reid) (emphasis added).

<sup>72</sup> *Laker Airways Ltd. v Department of Trade* [1977] Q.B. 643, 728 (Lawton L.J.).

<sup>85</sup> *Porter v Freudenberg* [1915] 1 KB 857.

and who, even if British, would thus be an “enemy alien” in the so-called territorial sense of the term, the right to sue in the British courts in time of war. The court explained that “[f]or the purpose of determining civil rights a British subject or the subject of a neutral State, who is voluntarily resident or who is carrying on business in hostile territory, is to be regarded and treated as an alien enemy and is in the same position as a subject of hostile nationality resident in hostile territory.”<sup>86</sup> According to the common law such a person could not sue in the King’s courts.

The ratified but unincorporated art.23(h) made it unlawful “[t]o declare abolished, suspended or inadmissible the right of the subjects of the hostile party to institute legal proceedings”. The Court of Appeal found that the intention of the provision was not to regulate the question at issue in the case before it but rather to forbid declarations by a military commander of a belligerent force in the occupation of the enemy’s territory which would prevent the inhabitants of that territory from using their courts of law in order to protect their civil rights. The question was:

whether the operation of this paragraph is or is not to abrogate the old rule [...] that an enemy alien’s rights of action are suspended during war, jurists of eminence have expressed widely divergent views upon the point, and this Court has given to those views its very careful consideration. We are all clearly of the opinion that the paragraph in question cannot be treated as effecting any such abrogation.<sup>87</sup>

The Court of Appeal concluded that “the paragraph has not the extended meaning claimed for it and does not affect the ancient rule of the English common law that an alien enemy, unless with special licence or authorization of the Crown, has no right to sue in our Courts during the war”.<sup>88</sup> As will have become clear, the reason the case is of interest in the present connection was that the matter had been argued on the assumption that the unincorporated art. 23(h) bound the court; even the intervening Attorney General had taken that view. If, therefore, the court had pronounced in favour of the meaning contended for, alien enemies in the territorial

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<sup>86</sup> *Porter v Freudenberg* [1915] 1 KB 857, 869.

<sup>87</sup> *Porter v Freudenberg* [1915] 1 KB 857, 877.

<sup>88</sup> *Porter v Freudenberg* [1915] 1 KB 857, 880.



sense would have been allowed to sue in the King's courts in time of war, and, as it was put by, Lord McNair, "an ancient rule of the common law would have been abrogated by a prerogative act without any statutory sanction".<sup>89</sup> This led McNair to take the view that the judgment could not easily be explained away, adding that it was a case which, 'it must be confessed, causes some heart-searching'.<sup>90</sup>

F.A. Mann agreed with McNair's characterization,<sup>91</sup> and for his own part referred to "the puzzling features of the great case of *Porter v Freudenberg*".<sup>92</sup> Against that background Mann went on to ask, "How could Art. 23(h) override the common law in the absence of incorporation into English law?" His answer was that the provision became material only because regulations concerning the conduct of war come within the purview of the prerogative and can therefore change English law.<sup>93</sup>

Yet another commentator, Sir Hersch Lauterpacht, took the view of the judgment that "it apparently assumed that Article 23(h) of Hague Convention no. IV respecting the Laws and Customs of War on Land was enforceable by British courts although that Convention had never received express legislative assent",<sup>94</sup> adding that the case could be understood only as a function of whether "the private rights of the subject" had been affected.<sup>95</sup> As will become clear below, this article seeks to show that that view is the correct one: but first it is necessary to consider the second exemplar that has foxed the literature.

*Imperial Japanese Government v P. & O. Steam Navigation Company*,<sup>97</sup> sometimes referred to as the case of the *Ravenna* and the *Chishima*,<sup>98</sup> concerned the unincorporated British–Japanese Treaty of Peace, Friendship, and

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<sup>89</sup> Lord McNair, 'When do British Treaties Involve Legislation?' (1928) 9 BYIL 59, 65.

<sup>90</sup> Lord McNair, 'When do British Treaties Involve Legislation?' (1928) 9 BYIL 59, 65; Lord McNair & AD Watts, *The Legal Effects of War* (4th edn, CUP 1966) 371.

<sup>91</sup> F.A. Mann, "The Enforcement of Treaties by English Courts" (1958–59) 44 Transactions of the Grotius Society 29, 37.

<sup>92</sup> F.A. Mann, *Foreign Affairs in English Courts* (Clarendon Press, 1986) 85.

<sup>93</sup> F.A. Mann, *Foreign Affairs in English Courts* (Clarendon Press, 1986) 85.

<sup>94</sup> H. Lauterpacht, *International Law: Collected Papers Vol. II* (C.U.P. 1975) 558.

<sup>95</sup> H. Lauterpacht, *International Law: Collected Papers Vol. II* (C.U.P. 1975) 558.

<sup>97</sup> *Imperial Japanese Government v P. & O. Steam Navigation Company* [1895] A.C. 644.

<sup>98</sup> e.g. F.A. Mann, *Foreign Affairs in English Courts* (Clarendon Press 1985) 86–87; G. Marston, "British Extra-Territorial Jurisdiction in Japan: The case of the *Ravenna* and the *Chishima*" (1997) 68 B.Y.I.L. 219, esp. 242–43.

Commerce,<sup>99</sup> which gave British subjects rights to preferential treatment, through a so-called “most favoured nation” clause, that is, a treaty provision that operates to ensure that the relevant parties treat each other in a manner at least as favourable as they treat third parties.<sup>100</sup> In 1892 the *Ravenna*, a British merchant vessel, collided with the Japanese imperial cruiser the *Chishima*. A number of proceedings were instituted. In one of them the Japanese government had sued in the British consular court for damages before R.A. Mowat, Judge in the British Court for Japan, from which the case was appealed to the Supreme Court for China and Japan at Shanghai, it too a consular court, and then to the Judicial Committee of the Privy Council. One of the central questions was whether, contrary to the argument put by counsel for the Imperial Japanese Government, a British subject had a right to require that when a Japanese claimant had a complaint or grievance against him the case should be decided not by the local courts of Japan, but by British curial authorities exercising extraterritorial jurisdiction. The respondent claimed to have this right on the basis of the unincorporated treaty and certain other treaties against the background of which the treaty was to be interpreted.

Thus the Privy Council was seized of the question of whether, by reason of the unincorporated British–Japanese treaty, British subjects enjoyed all the privileges and immunities secured to the United States and Austro-Hungary under a similar US–Japanese treaty<sup>102</sup> and Austro-Hungarian–Japanese treaty,<sup>103</sup> both of which were also, self-evidently, unincorporated as a matter of English law. The applicable law was English law: the case was an appeal from a consular court, whose jurisdiction was, according to the Order in Council setting it up, to “be exercised upon the principles of and in conformity with the Common Law, the rules of Equity, the Statute Law and other Law for the time being in force in and for England”.<sup>105</sup>

The Privy Council determined that, owing to the most favoured nation clause in the British–Japanese Treaty, all the privileges enjoyed by US American

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<sup>99</sup> Treaty of Peace, Friendship, and Commerce, 1858, 119 C.T.S. 401.

<sup>100</sup> See R. Dolzer & C Schreuer, *Principles of International Investment Law* (2nd edn., O.U.P. 2012) 206.

<sup>102</sup> 1858, 119 C.T.S. 253.

<sup>103</sup> 1859, 140 C.T.S. 53.

<sup>105</sup> Art.5, Order in Council for the Exercise of Jurisdiction in China and Japan, March 9, 1865, London Gazette, April 28, 1865, p. 2241.

and Austro-Hungarian subjects were also enjoyed by British subjects. It concluded that it was:

clear that art. 23 of the treaty of August, 1858, which accorded to Great Britain “most favoured nation” treatment, conferred upon this country and its subjects all the privileges and immunities secured to the United States and Austro-Hungary and their respective subjects, by the treaties to which reference has been made. There cannot, therefore, be any doubt that a British subject has a right to require that when a Japanese has a complaint or grievance against him, it shall be decided, not by the Local Courts of Japan, but by the British authorities exercising in that country extraterritorial jurisdiction.<sup>106</sup>

The basis was the treaty: “The defendant has obtained, *by virtue of a treaty made with his Sovereign*, complete immunity from process in the territorial Courts which would otherwise be open to the plaintiff.”<sup>107</sup> The treaty was not applied by a side-wind: “Their Lordships have dwelt at length upon the effect of the treaty provisions, because they regard these as determining the question in controversy between the parties.”<sup>108</sup> One contemporary commentator, Sir Francis Piggott, took the view that the effect of the ruling was “to establish the paramount importance of recognising the terms of the treaty”.<sup>109</sup> The case seems to constitute a clear example of an unincorporated treaty being operative before the courts, and it is submitted that the only reason this was the case was that the treaty did not infringe the existing legal rights of the citizen but rather added to them.

Two modern commentators, F.A. Mann and Geoffrey Marston, both considered the judgment to be puzzling on account of the fact that the Privy Council relied on a treaty that plainly had not been incorporated.<sup>110</sup>

In Mann’s view it was likely that, in exercising jurisdiction in foreign territories, the Crown was free from the shackles imposed by English

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<sup>106</sup> *Imperial Japanese Government v P. & O. Steam Navigation Company* [1895] A.C. 644, 654.

<sup>107</sup> *Imperial Japanese Government v P. & O. Steam Navigation Company* [1895] A.C. 644, 656 (emphasis added).

<sup>108</sup> *Imperial Japanese Government v P. & O. Steam Navigation Company* [1895] A.C. 644, 658.

<sup>109</sup> Sir Francis Piggott, *Extraterritoriality: the Law Relating to Consular Jurisdiction and to Residence in Oriental Countries* (2nd edn., Butterworth’s 1907) 184.

<sup>110</sup> F.A. Mann, *Foreign Affairs in English Courts* (Clarendon Press 1985) 86; G. Marston, “British Extra-Territorial Jurisdiction in Japan: The case of the *Ravenna* and the *Chishima*” (1997) 68 B.Y.I.L. 219, 242.

constitutional law. On his reading, s.3 of the Foreign Jurisdiction Act 1890<sup>111</sup> in fact provided just that.<sup>112</sup> It is, however, difficult to accede to this theory: and for two connected reasons.

First, the judgment explicitly refers to the China and Japan Order in Council of 1865 which established the court, and, as mentioned above, that instrument directed that English law was the applicable law. Secondly, s.3 of the Foreign Jurisdiction Act 1890 did not concern the question of the applicable law. It provided that: “Every Act and thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be valid as if it had been done according to the law then in force in that country”. The very wording makes it clear that the provision concerned the validity of acts done in pursuance of jurisdiction. The side-note to s.3, “Validity of acts done in pursuance of jurisdiction”, points away from a conclusion that s.3 was meant to concern anything other than the validity of what had been done in pursuance of jurisdiction. The provision says nothing whatever of what was to be the applicable law of the court but, for present purposes, that a judgment, once rendered, was to be valid as if it were a judgment done according to local law.

Marston’s analysis begins from the premise that, although the Crown had power under the prerogative to conclude treaties, a treaty could not directly change the law to be applied to British subjects even in foreign countries.<sup>118</sup> In his view the answer to why the Privy Council could nevertheless have relied on the treaty provisions may lie in the extraterritorial regime itself, which was thought by the opposing sides in the case either to depend on concessions made by the Emperor of Japan or to be a system imposed on Japan by force.<sup>119</sup> This led Marston to conclude that “[a]lthough the Judicial Committee did not refer directly to the above controversy, the terms of the ruling indicate that the treaty regime was regarded as paramount”,<sup>120</sup> adding that in the subsequent case of *Charlesworth, Pilling & Co.* the Privy Council had, in relation to consular courts at Zanzibar,

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<sup>111</sup> 53 & 54 Vict. Ch 37.

<sup>112</sup> F.A. Mann, *Foreign Affairs in English Courts* (Clarendon Press 1985) 86–87.

<sup>118</sup> G. Marston, “British Extra-Territorial Jurisdiction in Japan: The case of the *Ravenna* and the *Chishima*” (1997) 68 B.Y.I.L. 219, 221.

<sup>119</sup> G. Marston, “British Extra-Territorial Jurisdiction in Japan: The case of the *Ravenna* and the *Chishima*” (1997) 68 B.Y.I.L. 219, 242–43.

<sup>120</sup> G. Marston, “British Extra-Territorial Jurisdiction in Japan: The case of the *Ravenna* and the *Chishima*” (1997) 68 B.Y.I.L. 219, 243.

determined that “[t]he root of the jurisdiction is the treaty grant or other matter by which the Queen has power and jurisdiction in Zanzibar”.<sup>121</sup> This focus on the treaty regime, and the rights flowing from it, must be correct.

The judgment seems to be an example of a situation where a court, relying on English law, gave effect to an unincorporated treaty in a situation where British subjects were accorded rights directly by reason of the treaty regime in question, none of their already existing rights being infringed by the operation of that regime. Although it may have been underpinned in reality by an imperial impetus, rather than consideration for the fundamental rights of the subject, the judgment seems to be suffused with a wish to strengthen the position and the rights of the British subject, though admittedly at the expense of a foreign government, and to do so on the basis of unincorporated treaty rights. It may also be that, in treating the unincorporated treaty provisions as being operative, the Privy Council took heart from the fact that the treaty concerned commerce, which, although it is now largely forgotten, was at least historically an activity falling under the prerogative.<sup>122</sup>

At all events, the fact that it was the treaty itself that immunized British subjects from suit in the local courts seems to be clear from the language adopted in the judgment: “[b]ut for the treaty, they would be liable to process in the Courts of Japan”.<sup>123</sup> Sir Francis Piggott concluded in his contemporary work *Extraterritoriality: the Law Relating to Consular Jurisdiction and to Residence in Oriental Countries* that it was apparent from the judgment that the case of actions by or against natives in the British Courts “rest[ed] entirely on the treaty”.<sup>124</sup> The Privy Council spoke in terms of the “right” a British subject had “to require that when a Japanese has a complaint or grievance against him it shall be decided, not

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<sup>121</sup> *Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co.* [1901] A.C. 373, 385.

<sup>122</sup> *East India Company v Sandys* (1683) Skinner 223; “Opinion of the Attorney General, Sir Philip Yorke, relating to English Subjects being engaged in the East India Company of Sweden (1731)” in W. Forsyth, *Cases and Opinions on Constitutional Law* (Stevens & Haynes 1869) 427–29; T. Poole, *Reason of State: Law Prerogative and Empire* (C.U.P. 2015) 135–36.

<sup>123</sup> *Imperial Japanese Government v P. & O. Steam Navigation Company* [1895] A.C. 644, 657 (emphasis added).

<sup>124</sup> Sir Francis Piggott, *Extraterritoriality: the Law Relating to Consular Jurisdiction and to Residence in Oriental Countries* (2nd edn., Butterworth’s 1907) 187.

by the local Courts of Japan, but by the British authorities”;<sup>125</sup> the outcome must not be inconsistent with the “*treaty rights*” at issue.<sup>126</sup>

*The Parlement Belge* concerned a case where the respondent could not be said to have immunity from suit, as the unincorporated treaty which was claimed to clothe it with immunity could not be allowed to affect the private rights of the subject, the British claimant. *Porter v Freudenberg* and *Imperial Japanese* are particularly pertinent because the individual whose rights were at issue in those two cases claimed positively to have certain rights on the basis of a treaty: the individual did not, as in *The Parlement Belge*, claim that a treaty could not operate as it interfered with that individual’s rights. In *Porter v Freudenberg* the Court of Appeal was quite prepared to rely on unincorporated treaty rights enuring to a person residing or carrying on business in enemy territory so as potentially to override the common law by giving him or her rights to sue in the King’s courts in wartime: but, although the court was clear that the treaty operated in principle, it found that the right did not go as far as the respondent had argued. In *Imperial Japanese* the individual whose rights were at issue was again the respondent and, since the unincorporated treaty operated only to strengthen his rights, by making him immune from suit by the Imperial Japanese Government in the territorial courts of Japan, the Privy Council was prepared to give effect directly to the unincorporated treaty rights in issue.

#### *The separation of powers*

*Tin Council* was handed down in 1989, three centuries after the beginnings of a new constitutional order was heralded in 1689. The principle on which the case is taken to be authority is one which has a long back-story. We should, putting the point at its lowest, be open to the possibility that the hinterland of constitutional authority which lies between 1689 and 1989 can complement our understanding of the treaty making power of the Crown and whether unincorporated treaty obligations can in some cases be operative domestically. Academic argument must, as Craig recently observed in the context of historical perspectives on questions of public law, be grounded in some knowledge of what came before the

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<sup>125</sup> *Imperial Japanese Government v P. & O. Steam Navigation Company* [1895] A.C. 644, 654 (emphasized here).

<sup>126</sup> *Imperial Japanese Government v P. & O. Steam Navigation Company* [1895] A.C. 644, 656 (emphasized here).

here and now: “[i]nsofar as this knowledge is exiguous it thereby diminishes the value of academic judgement”.<sup>127</sup>

In that regard the discussion has shown that authorities such as the 1728 Opinion of Attorney General Sir Philip Yorke and Solicitor General Sir Charles Talbot held that an unincorporated treaty could regulate certain aspects of life in British settlements in America. Crucially, however, it could not direct the seizure and confiscation of the property of British subjects, as that, and only that, would necessitate legislation incorporating the treaty obligations.<sup>129</sup> The judgments in *The Parlement Belge*, *Walker v Baird*, *Porter v Freudenberg*, and *Imperial Japanese* are high judicial authorities for the proposition that an unincorporated treaty can be operative so long as it does not deprive British citizens of rights which they would otherwise have had.

Dicey—perhaps the foremost authority on the “sovereignty of Parliament and its primacy as the domestic law-making institution in our constitution”<sup>130</sup>—understood this. He was alive to the importance of judgments such as *The Parlement Belge* and *Walker v Baird*, to which he explicitly referred in his *Law of the Constitution*, observing that it was “open to question whether the treaty-making power of the executive might not in some cases override the law of the land”.<sup>131</sup> It is significant that perhaps the strongest and most authoritative proponent of Parliamentary sovereignty should have taken this position.

More generally the thrust of the authorities makes it possible to question statements such as Sales and Clement’s averment that the true rationale for the rule governing the operation in domestic law of unincorporated treaties “is that the Crown cannot change domestic law by the exercise of its powers under the prerogative”.<sup>132</sup> The authorities are instead on all fours with what Lord Steyn held in *McKerr*, that is, that the underlying principle on which the general rule is based is to guard against “abuses by the executive to the detriment of citizens”.<sup>133</sup>

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<sup>127</sup> P. Craig, “Proportionality and Judicial Review: A UK Historical Perspective” in S. Vogenauer & S. Weatherill (eds), *General Principles of Law* (Hart 2017) 145, 145.

<sup>129</sup> G Chalmers (ed.), *Opinions of Eminent Lawyers Vol. II* (C. Goodrich & Co. 1858) 339, 340–42.

<sup>130</sup> P. Sales & J. Clement, “International Law in Domestic Courts: The Developing Framework” (2008) 124 L.Q.R. 388, 399.

<sup>131</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn., Macmillan & Co., 1915) 460–61.

<sup>132</sup> P. Sales & J. Clement, “International Law in Domestic Courts: The Developing Framework” (2008) 124 L.Q.R. 388, 399.

<sup>133</sup> *McKerr* [2004] UKHL 12; [2004] 1 W.L.R. 807 at [50].

A broader question of constitutional law arises, however. The question of whether a treaty can be part of English law unless and until it has been incorporated into the law by legislation has rightly been conceived of as having a bearing on what the Supreme Court in *Moohan* called “the fundamental separation of powers in our constitution”.<sup>134</sup>

The principle of the separation of powers can no doubt be defined in different ways, and may be thought to be a difficult concept.<sup>135</sup> Emanations of it is increasingly relied on directly by the courts, especially in what is becoming known as structural constitutional review, the demarcation of the respective ambit of legislative and executive power.<sup>136</sup> If we try to operationalize it for the present purposes, it can be pointed out that there is strong authority to suggest that the principle has at its core the protection of individual liberty and individual rights. “If”, observed Sir William Holdsworth in his *History of English Law*, “a lawyer, a statesman, or a political philosopher of the eighteenth century had been asked what was, in his opinion, the most distinctive feature of the British constitution, he would have replied that its most distinctive feature was the separation of powers of the different organs of government”.<sup>137</sup> Throughout the eighteenth century the fact that the powers of the state were divided between separate organs of government, which checked and balanced one another, “was regarded by men of all parties, by peers as well as commoners, and by statement as well as by publicists, as its most salient characteristic”.<sup>138</sup> The protection of the rights of the individual was at the core of the principle of separation of powers already in the eighteenth century. Blackstone in 1765 observed that fundamental rights were secured through the operation, first, of the “constitution, powers, and privileges of parliament”; secondly, of “[t]he limitation of the king’s prerogative by bounds so certain and notorious, that it is impossible he should exceed them without the consent of the people”; and, thirdly, [s]ince the law is in England the supreme arbiter of every man’s life, liberty, and property, courts of justice must at all times be open to the

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<sup>134</sup> *Moohan v The Lord Advocate* [2014] UKSC 67; [2014] W.L.R. 544 at [29] (Lord Hodge).

<sup>135</sup> e.g. R. Masterman & S. Wheatle, “Unpacking Separation of Powers: Judicial Independence, Sovereignty and Conceptual Flexibility in the United Kingdom Constitution” [2017] P.L. forthcoming; N. Barber, “Self-Defence for Institutions” [2013] C.L.J. 558; E. Barendt, “Separation of Powers and Constitutional Government” [1995] P.L. 599.

<sup>136</sup> P. Craig, “*Miller*, Structural Constitutional Review and the Limits of Prerogative Power”, forthcoming.

<sup>137</sup> W. Holdsworth, *A History of English Law Vol. X* (Methuen & Co. 1938) 713.

<sup>138</sup> W. Holdsworth, *A History of English Law Vol. X* (Methuen & Co. 1938) 715.



subject, and the law be duly administred therein”.<sup>139</sup> Of the two first limbs, the power of Parliament and those of the Crown, he observed that:

The former of these keeps the legislative power in due health and vigour, so as to make it improbable that laws should be enacted destructive of general liberty: the latter is a guard upon executive power, by restraining it from acting either beyond or in contradiction to the laws, that are framed and established by the other.<sup>140</sup>

Blackstone said specifically of the Crown that “one of the principal bulwarks of civil liberty, or (in other words) of the British constitution, was the limitation of the king’s prerogative by bounds so certain and notorious that it is impossible he should ever exceed them”.<sup>141</sup> Blackstone was not alone among prominent British commentators to form the view that the core of the principle of the separation of powers was the protection of individual liberty: Sir Philip Yorke,<sup>142</sup> Paley,<sup>143</sup> and Hume<sup>144</sup> took the same view. Indeed, Holdsworth concluded that, in the view of the eighteenth century writers, the separation of powers was the “main guarantee for the preservation of liberty”, indeed the “most essential safeguard of constitutional liberty”.<sup>145</sup>

As a matter of English constitutional law the courts are right to have stressed the principle of the separation of powers, as they began to do in the postwar period.<sup>146</sup> In this connection the focus has, as Craig has pointed out, “shifted towards the direct protection of the individual”.<sup>147</sup> As Lord Mustill classically observed in *ex p Fire Brigades Union*, the application of the principle of the separation of powers operates to avoid a situation in which “the citizen would be left without protection against a misuse of executive powers”.<sup>148</sup> The

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<sup>139</sup> W. Blackstone, *Commentaries on the Laws of England Book I* (Clarendon Press 1765) 136–37.

<sup>140</sup> W. Blackstone, *Commentaries on the Laws of England Book I* (Clarendon Press 1765) 137.

<sup>141</sup> W. Blackstone, *Commentaries on the Laws of England Book I* (Clarendon Press 1765) 230.

<sup>142</sup> P.C. Yorke, *The Life and Correspondence of Phillip Yorke, Earl of Hardwicke Vol. III* (C.U.P 1913) 15.

<sup>143</sup> W. Paley, *The Principles of Moral and Political Philosophy* (2nd edn., 1786) 478.

<sup>144</sup> D. Hume, *Essays, Moral, Political, and Literary* (1777, reprinted 1987) 41.

<sup>145</sup> W. Holdsworth, *A History of English Law Vol. X* (Methuen & Co. 1938) 715–16.

<sup>146</sup> e.g. *Attorney General for Australia v The Queen* [1957] A.C. 288 (P.C.), 315 (Viscount Simonds); *Hinds v The Queen* [1977] A.C. 195 (P.C.); *Duport Steels Ltd v Sirs* [1980] 1 W.L.R. 142, 157 (Lord Diplock).

<sup>147</sup> P. Craig, “Prerogative, Precedent and Power” in C. Forsyth & I. Hare (eds.), *The Golden Metwand and the Crooked Cord* (Clarendon Press 1998) 66.

<sup>148</sup> *R. v Secretary of State for the Home Department, ex p. Fire Brigades Union* [1995] UKHL 3; [1995] 2 A.C. 513, 567 (Lord Mustill, diss.).

principle, Lord Mance pointed out in *Khoyratty*, operates “as a primary protection of individual liberty”.<sup>149</sup> That seems to accord with the approach taken by the authorities analysed in this essay.

The courts have, in keeping with the core of the principle of the separation of powers, acted on the rule according to which the executive cannot override the common law if, to use the language of Lord Reid in *Nissan*,<sup>150</sup> that change of the law infringed ordinary legal rights of citizens. It has been seen that unincorporated treaty obligations have been allowed in certain circumstances to override domestic law, as even Dicey countenanced.<sup>151</sup> The constitutional long stop has been whether the treaty obligation at issue infringed the citizen’s existing legal rights. As the Privy Council expressed it recently in *Thomas v Baptiste*, the test is whether the treaty obligations would “deprive the subject of existing legal rights”.<sup>152</sup> Had such a deprivation been in issue in the cases analysed above, the courts would no doubt have taken the view that the principle of the separation of powers was breached. The conclusion would, in that situation, have had to have been the same as in *The Parlement Belge*. There Sir Robert Phillimore concluded that the treaty obligations in question were such that they would extinguish existing legal rights of the citizen: for an English court to rely on them would then be “without precedent, and in principle contrary to the laws of the constitution”.<sup>153</sup>

Nevertheless, it seems contrary to principle to hold that all provisions of ratified but unincorporated human rights treaties should *ipso facto* be a part of the law of the land. As the authorities analysed in this essay show, the approach taken by the courts is a disaggregated one. The question becomes not whether the treaty as such but the particular provisions at issue in the case before the court can be held to be operative. Any other approach would be extravagant: the courts can decide only on the operationability of the treaty provision before them, not on a treaty as a whole.

It might be said, however, that such a solution falls far short of the clarity that is needed in this field: Lord Oliver’s approach is neat and tidy in that it says that *no* unincorporated treaty can ever be part of English law; the approach of Lord

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<sup>149</sup> *The State v Khoyratty* [2006] UKPC 13; [2007] 1 A.C. 80 at [36] (Lord Mance).

<sup>150</sup> *Attorney General v Nissan* [1970] A.C. 179, 211 (Lord Reid) (emphasis added).

<sup>151</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn., Macmillan & Co., 1915) 460–61.

<sup>152</sup> *Thomas v Baptiste* [2000] 2 A.C. 1 (P.C.), 23; (1999) 123 I.L.R. 508, 518 (Lord Millett).

<sup>153</sup> *The Parlement Belge* (1879) 4 P.D. 129, 154.

Steyn and Lord Kerr, too, has the benefit of neatness and tidiness in that it says that *all* ratified human rights treaties are operative as the law of the land. But, as the historian Tony Judt once observed, it is the job of the historian—and much the same might go for the legal academic—to take “tidy nonsense and make a mess of it”; “[a]n accurate mess is far truer to life than elegant untruths”.<sup>155</sup>

Quite apart from that, like should be compared with like, and the position for which this essay argues is no more unclear than what is at present the case in connection with *incorporated* treaty obligations. As was said above, incorporating legislation such as the United Nations Act 1946, the long title of which is *An Act to enable effect to be given to certain provisions of the Charter of the United Nations*,<sup>156</sup> incorporated into English law only art.41 of the Charter. Similarly, the Bretton Woods Agreement Act 1945<sup>157</sup> gave effect only to certain particular provisions of the Bretton Woods Agreement. Although its long title was *An Act to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, the Arbitration Act 1975<sup>158</sup> incorporated only certain of the provisions of the New York Convention of 1958, omitting for example to incorporate the provisions dealing with recognition.<sup>159</sup> Partial incorporation, in other words, is nothing new.

The analogy does not stop there. Not only is it often the case that Parliament elects to incorporate only certain parts of a treaty: it happens from time to time that, owing to partial incorporation that is somehow ambiguous, the courts are unclear as to which parts of a treaty can be relied on. This is similar to the problem one might envisage in connection with the argument put forward in this article in respect of wholly unincorporated treaties.

Lord Denning in *Wilson Smithett* interpreted the Bretton Woods Agreement Act 1945 to mean that the Act gave effect to all of the Bretton Woods Agreement;<sup>160</sup> similarly F.A. Mann concluded that even “the very limited terms of the Act of 1945 are sufficient to incorporate the Articles of Agreement as a whole into English law”.<sup>161</sup> Furthermore, in spite of the fact that, as seen above, the

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<sup>155</sup> T. Judt (with T. Snyder), *Thinking the Twentieth Century* (Heinemann 2012) 270.

<sup>156</sup> 9 & 10 Geo. 6, c.45.

<sup>157</sup> 9 & 10 Geo. 6, c.19.

<sup>158</sup> Elizabeth II, c.3.

<sup>159</sup> cf. the Arbitration Act 1996.

<sup>160</sup> *Wilson Smithett & Cope Ltd v Terruzzi* [1976] 1 Q.B. 683, 711.

<sup>161</sup> F.A. Mann, *Foreign Affairs in English Courts* (Clarendon Press 1986) 98–99.

United Nations Act 1946 incorporates only art.41, the courts have nevertheless relied on and given effect to other provisions of the UN Charter. In *Kuwait Airways* a critical feature of the House of Lords' decision were a number of provisions of the UN Charter other than art.41. The submission by Iraqi Airways that, because these provisions were unincorporated, they must be disregarded was brusquely rejected as “marching logic to its ultimate unreality”.<sup>164</sup> The solution offered in this article in respect of unincorporated treaties, therefore, is no more uncertain than the one with which we live in respect of incorporated treaties.

It is worth remembering, too, that *customary* international law, defined in international law as “a general practice accepted as law”,<sup>165</sup> is considered to be one of the sources of the common law—it can be relied on without any “incorporation”.<sup>166</sup> In *Keyu* the Supreme Court observed that customary international law:

once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration.<sup>167</sup>

Why not then, in certain circumstances, also treaty based international law? It might well be thought that customary international law and treaty based international law are in a similar position. As Lord Bingham recognized in *Jones*, customary international law “remains very much the consequence of international behaviour by the Executive, in which neither the Legislature nor the Courts, nor any other branch of the constitution, need have played any part”.<sup>168</sup> It follows clearly from *Jones*, however, that a norm of customary international law cannot be relied on as a source of the common law when it detrimentally affects “the liberty of the individual and rights of personal property”, such as when it purports to

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<sup>164</sup> *Kuwait Airways Corporation v Iraqi Airways Co. (Nos. 4 & 5)* [2002] UKHL 19; [2002] 2 A.C. 883 at [114] (Lord Steyn).

<sup>165</sup> Art. 38(1)(b), Statute of the International Court of Justice, June 26, 1946; 892 U.N.T.S. 119.

<sup>166</sup> *Belhaj v Straw and Others and Rahmatullah (No. 1) v Ministry of Defence and Another* [2017] UKSC 3; [2017] 2 W.L.R. at [252] (Lord Sumption).

<sup>167</sup> *Keyu v Secretary of State for Foreign and Commonwealth Affairs and Another* [2015] UKSC 69; [2015] 3 W.L.R. 1665 at [150] (Lord Mance).

<sup>168</sup> *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 A.C. 136 at [23] (Lord Bingham), citing Sir Frank Berman, “Jurisdiction: The State” in P. Capps and others (eds.), *Asserting Jurisdiction: International and European Perspectives* (Hart 2003) 3, 11.

create new offences of criminal law (which only Parliament can do).<sup>169</sup> There is no reason why customary international law norms to the benefit of the liberty of the individual and rights of personal property, created by the executive in cooperation with other states, should be able to be a source of the common law but that treaty based international law, created by the executive in cooperation with other states, should not in certain circumstances be able to play the same role. If the creation by the executive of norms of customary international law is allowed, as it is, to have domestic effect without that being thought to fall foul of Article 1 of the Bill of Rights, then why should the creation by the executive of treaty norms be any different?

### *Conclusion*

The answer to the question of whether unincorporated treaty obligations can be a part of English law is Yes. The courts have allowed treaty rights to override the common law in certain situations where the rule in *Tin Council* would, were it entirely valid, not have allowed such an application. But this has been done only on the narrow grounds spelled out during the course of this essay. An attempt has been made to show that this state of affairs is attractive in that it coheres well with the core of the principle of the separation of powers, which operates as a primary protection of individual liberty.<sup>170</sup> It would be extravagant to say that whole categories of treaty are part of English law without incorporation simply because they are classified as, for example, human rights treaties. A disaggregated approach is what is called for. But, as it must be incorrect and extravagant to say that whole classes of treaty are operative because of the way in which they are classified, so it is also, in light of strong constitutional authority, incorrect and extravagant to say that, quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. The question the courts should ask in each case is this—does the obligation effect a change of the law that infringes the existing legal rights of the subject? If it does not, then the court can

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<sup>169</sup> *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 A.C. 136 at [23]–[29] (Lord Bingham).

<sup>170</sup> *The State v Khoyratty* [2006] UKPC 13; [2007] 1 A.C. 80 at [36] (Lord Mance).

hold that the treaty right may, to use Dicey's phrase, "override the law of the land".<sup>172</sup>

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<sup>172</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn., Macmillan & Co., 1915) 460–61.