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SHORTER ARTICLE

Using International Law in UK Courts

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Abstract

International law has become a fixture before the courts of the United Kingdom (UK). But how is it actually used and how does this use relate to its means of reception into domestic law? Scholarship has tended to focus on how judges interpret and apply international law, to the exclusion of how it is deployed by litigants. In doing so, it also overlooks the relationship between the way an international norm is received into domestic law and its use in court. This article asks whether there are differences in the kinds of international law readily available to different litigants and how this plays out in the cut and thrust of domestic litigation—whether it is used as a sword or a shield, on the basis of domestic statute or the common law and what kinds of arguments are run in the absence of domestic footholds. This raises a broader point about the politics of statutory transposition, the practice of argument and the difficulties of litigating unincorporated international law.

Keywords: public international law; UK courts; litigation; politics of transposition; incorporation of custom

1. Introduction

International law has become a firm fixture in domestic litigation in the United Kingdom (UK). But how is it actually used in court and how does this use relate to the means of its reception into domestic law? Scholarship looking at the growing prominence of international law in UK domestic litigation has tended to focus on how judges interpret and apply international law,[1] or why it has gained prominence in recent decades.[2] What emerges is the story of a gradual but seismic shift from the overly deferential benches of the 1970s and 1980s,[3] to a confident judiciary well-versed in

[1] R Higgins, 'International Law' in L Blom-Cooper et al (eds), *The Judicial House of Lords: 1876–2009* (OUP 2009) 457; P Sales and J Clement, 'International Law in Domestic Courts: The Developing Framework' (2008) 124 LQR 388; KR Thomas, 'The Changing Status of International Law in English Domestic Law' (2006) 53 NILR 371.

[2] Lord Lloyd-Jones, 'International Law before United Kingdom Courts: A Quiet Revolution' (2022) 71 ICLQ 503.

[3] See, e.g. Lord Templeman in *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368, 431, cited in Lloyd-Jones (n 2) 518.

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international law and comfortable applying it. This is set within a broader story about the gradual humanisation of international law,[4] with the entry into force of the Human Rights Act 1998 (HRA) as a constitutional moment in the development of domestic law alongside the internationalisation of the bar in general.[5] This literature provides a nuanced account of judicial practice,[6] such as the courts' increased willingness to decide on the international legality of foreign acts of State,[7] or the broad adherence to the doctrine of non-justiciability of UK Government actions or omissions,[8] unless review is expressly provided for by statute.[9] The picture that emerges is fine-grained and detailed.

But this scholarship has been relatively uncritical of the different means by which international law becomes English law and the consequences this might have for argument in practice. Are there patterns in the types of international law incorporated and the types of litigant that this benefits? Does international law tend to be used as the grounds for a claim, or as a defence? Is it argued on the basis of domestic statute or the common law, and does that matter? How is international law argued where there are no domestic footholds available, and do these arguments succeed? To ask these questions is to go beyond the doctrinal status of international law in English law and probe the bounds of what it is actually doing for whom in court as a matter of legal argument. The aim here is not to provide a full taxonomy of international law in domestic argument. It is to sketch in the view from the other side of the bench, complementing the existing picture of how judges interpret and apply international law with an initial outline of how different litigants seek to make use of it. Drawn against the backdrop of international law's incorporation into English law, the aim here is to point towards a new line of inquiry that pays closer attention to the relationship between incorporation and the practice of argument in court.

[4] For the argument that international human rights law has had a distinct, if uneven, effect in shifting general international law's focus from State-centred to human-centred, see T Meron, *The Humanization of International Law* (Martinus Nijhoff 2006); for a thematic collection of judicial writings, see AA Cançado Trindade, *The Construction of a Humanized International Law: A Collection of Individual Opinions (1991–2013)* (Brill Nijhoff 2015); as well as AA Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (Martinus Nijhoff 2010).

[5] See, e.g. the emphasis on 'international objectives' and the 'work with multi-national judicial training networks such as the International Organisation for Judicial Training and the European Judicial Training Network' in Judicial College, 'Judicial College Strategy 2021–2025' (2021) 10, 21 <https://www.judiciary.uk/wp-content/uploads/2022/07/Judicial_College_Strategy_2021-2025_WEB.pdf>.

[6] See, e.g. Thomas's review (n 1) of a spate of cases in the 2000s prompted by the Iraq war and the entry into force of the Human Rights Act 1998 (HRA).

[7] *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19; *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; *R (on the application of Al Rawi) v Secretary of State Foreign and Commonwealth Affairs and the Secretary of State for the Home Department* [2006] EWHC 972.

[8] *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin); *R v Lyons (Applicants) (on Appeal from the Court of Appeal (Criminal Division))* [2002] UKHL 44; *R (on the application of Marchiori) v Environment Agency* [2002] EWCA Civ 3; *R v Jones (Margaret)* [2006] UKHL 16.

[9] *European Roma Rights Centre v Immigration Officer at Prague Airport* [2004] UKHL 55; *A v Secretary of State for the Home Department* [2005] UKHL 71; *R (on the application of Al Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327.

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When returning to the recent leading cases with these questions in mind,[10] a clearer sense of the place of international law in the thrust and parry of domestic litigation emerges. The use of international law in UK courts plays out in a statutory landscape in which certain types of international law have tended to be incorporated and others have not (Section 2). This has consequences for legal argument in court. As a shield, international law is readily available to States or their representatives on the directly arguable basis of domestic statute. This is the expression of a deep-rooted and much older body of norms developed to protect sovereignty and diplomatic relations that long pre-date current notions of a human-centred international law. Claimants have sought to counter these defences with a variety of interpretative arguments, relying on both the domestic canon and international developments, but to varying degrees of success (Section 3).

By contrast, as the grounds for a claim, international law emerges as a rather cumbersome sword. In the absence of statutory incorporation, litigants must find alternative, often more circuitous argumentative routes onto English soil. Where claimants invoke international custom, they have proven reluctant to argue the detail of its reception into domestic law, even where this would be relevant to the outcome of the case. Claimants seeking to rely on unincorporated treaties have advanced sophisticated interpretation arguments in the attempt to fit unincorporated norms into existing domestic footholds, but with little success. Both examples challenge the notion that it matters little whether international law is incorporated by statute or not (Section 4). These findings point to a number of conclusions: that there is a discrepancy in the types of international law domesticated through statute; that this discrepancy benefits certain types of litigant (defendant States and their representatives) over others (claimants invoking rights); that there is a dynamic relationship between this incorporation and the kinds of arguments that litigants run; and that litigants nevertheless formulate creative and sophisticated arguments in the absence of firm domestic footholds, though to varying degrees of success (Section 5).

2. Distribution of arms: the statutory incorporation of international law

How litigants use international law in practice is necessarily tied up with the related question of what litigants can do as a matter of law. Scholarship that starts with judges and judgments gives an account of the latter. But in doing so it tends to pay less attention to which international norms are readily available to which types of domestic litigant. Treaty obligations do not form part of English law unless expressly incorporated and cannot set justiciable limits on executive action taken under statute.[11] In a dualist system such as the UK, incorporation has significant consequences for litigants. Before turning

[10] The starting point is the cases compiled for the Supreme Court's tenth anniversary in Lady Arden and Lord Lloyd-Jones, 'Public International Law in the Supreme Court of the United Kingdom: A Selection of Cases from the Court's First Ten Years' (2019) <https://supremecourt.uk/uploads/public_international_law_in_the_supreme_court_of_the_united_kingdom_a09b51d021.pdf>.

[11] *Mortensen v Peters* (1906) 14 SLT 227; *Cheney v Conn* (1968) 1 ER 779; this is axiomatic as a matter of English constitutional law, because treaties are concluded by the Crown in the exercise of the prerogative and the Crown cannot alter the law of the land through the exercise of its prerogative: *The Parlement Belge* (1879) 4 PD 129; see also JG Collier, 'Is International Law Really Part of the Law of England?' (1989) 38 ICLQ 924, 926.

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to look in detail at how litigants use international law, it is important to form a picture of the distribution of arms. A full survey of the statutory reception of international law in the UK is not feasible here,[12] but an overview of the major fields of international law in domestic legislation is sufficient to give an initial impression of the lay of the land.[13] To look at these patterns of statutory incorporation is to see a landscape in which successive parliaments have shown a tendency to transpose certain types of international law and not others.

In certain areas, international treaty law has readily been received into domestic law. A classic area is State immunity and diplomatic protection, discussed in detail in Section 3.[14] Another area is private international law, which concerns the formulation of universal standards to facilitate the conduct of international commerce,[15] the protection of intellectual property,[16] the recognition and enforcement of foreign arbitral awards[17] and the litigation of civil and commercial matters across borders.[18] A related area concerns what might broadly be termed 'international logistics'. This is a set of treaties directed at regulating the carriage of goods by road,[19] air[20]

[12] The House of Commons Library does not keep a register of statutes incorporating international law and it is doubtful whether this would even be practicable.

[13] For a rare and extremely useful survey of international law in domestic practice areas, see S Fatima, *Using International Law in Domestic Courts* (Hart 2005) 5–26.

[14] European Convention on State Immunity (adopted 16 May 1972, entered into force 11 June 1976) 1495 UNTS 181, incorporated by the State Immunity Act 1978; Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 June 1964) 500 UNTS 95 (VCDR), incorporated by section 2 (1) of the Diplomatic Privileges Act 1964.

[15] Convention relating to a Uniform Law on the International Sale of Goods (adopted 1 July 1964, entered into force 18 August 1972) 834 UNTS 107, incorporated by section 1(2) of the Uniform Law on International Sales Act 1967; Convention on the Law Applicable to Contractual Obligations (adopted 19 June 1980, entered into force 1 January 1991) [1980] OJ L266/1 and its subsequent Accession Conventions, given domestic effect by section 2 of the Contracts (Applicable Law) Act 1990.

[16] Paris Convention for the Protection of Industrial Property, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14 1967 (adopted 14 July 1967, entered into force 26 April 1970) 828 UNTS 305, partially incorporated by the Trade Marks Act 1994; Berne Convention for the Protection of Literary and Artistic Works, of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967 (with Protocol regarding developing countries) (adopted 14 July 1967, entered into force 29 January 1970) 828 UNTS 221, as revised by the Paris Act in 1971 and 1979 and given domestic effect by the Copyright, Designs and Patents Act 1988; the Patent Co-operation Treaty (1970) UKTS 78 (1978), incorporated through the Patents Act 1977.

[17] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3, given domestic effect by sections 100–101 of the Arbitration Act 1996.

[18] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (adopted 15 November 1965, entered into force 10 February 1969) 658 UNTS 163; Convention on Choice of Court Agreements (adopted 30 June 2005, entered into force 1 October 2015) 44 ILM 1294; Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (adopted 2 July 2019, entered into force 1 September 2023) OXIO 569; all incorporated by the Civil Jurisdiction and Judgments Act 1982.

[19] Convention on the Contract for the International Carriage of Goods by Road (adopted 19 May 1956, entered into force 2 July 1961) 399 UNTS 189, incorporated by section 1 of the Carriage of Goods by Road Act 1965.

[20] Convention for the Unification of Certain Rules for International Carriage by Air (adopted 28 May 1999, entered into force 4 November 2003), given domestic effect by the Carriage by Air Act 1961.

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and sea,[21] as well as formulating rules for commercial travel.[22] Some international environmental law instruments have also been received into UK statutory law, primarily in the areas of conservation[23] and pollution,[24] though transposition of international environmental law in general remains highly selective. The landscape that comes into view from this perspective is one of deep-rooted diplomatic immunities and privileges standing alongside a range of well-grounded private international law norms, as well as a handful of relatively newly-seeded environmental protection norms.

By contrast, in other areas of international law, statutory transposition has been sparse to say the least. This is true in particular of those fields that seek to create universal rights regimes or establish international protections for particular classes of vulnerable individuals. As a regional human rights regime, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does not fall into these categories.[25] Its territorial scope is clearly defined by the jurisdiction of its contracting parties (Article 1), and while it has been extended in certain situations of effective control,[26] its extraterritorial application remains an exception,[27] and has consistently been denied, for example, in colonial situations where there was no express extension.[28] In the field of international human rights law, limited domestic effect has been given to the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[29] but little else beyond this. The Universal Declaration of Human

[21] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (adopted 25 August 1924, entered into force 2 June 1931) UNTC No 23643, amended by Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (adopted 23 February 1968, entered into force 23 June 1977) 1412 UNTS 128 (Hague-Visby Rules), incorporated by the Carriage of Goods by Sea Act 1924 and the Carriage of Goods by Sea Act 1971, respectively.

[22] International Convention for the Unification of Certain Rules relating to International Carriage by Air (adopted 12 October 1929, entered into force 13 February 1933) 137 UNTS 11, incorporated by the Carriage by Air Act 1961.

[23] Convention on Wetlands of International Importance Especially as Waterfowl Habitat (adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245, Convention on the Conservation of Migratory Species of Wild Animal (adopted 23 June 1979, entered into force 1 November 1983) 1651 UNTS 333, Convention on the Conservation of European Wildlife and Natural Habitats (adopted 19 November 1979, entered into force 1 June 1982) ETS 104, all given effect by the Wildlife and Countryside Act 1981.

[24] International Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969, entered into force 19 June 1975) 973 UNTS 3, incorporated by ch III of the Merchant Shipping Act 1995; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (adopted 29 December 1972, entered into force 20 August 1975) 1046 UNTS 120, implemented by pt II of the Food and Environment Protection Act 1985.

[25] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR), incorporated into UK law by the HRA (n 6).

[26] See *Al-Skeini v UK* [2011] 53 EHRR 18; *Al-Saadoon and Mufdhi v UK* (dec) App No 61498/08 (ECtHR, 2010); and most recently *Ukraine and the Netherlands v Russia* (dec) App Nos 8019/16, 43800/14, 28525/20 and 11055/22 (ECtHR, 2025).

[27] *Bankovic v Belgium* (dec) App No 52207/99 (ECtHR, 2001).

[28] *Bui van Thanh v UK* App No 16137/90 (ECtHR, 1990); *Yonghong v Portugal* (dec) App No 50887/99 (ECtHR, 1999); *Chagos Islanders v UK* (dec) App No 35622/04 (ECtHR, 2012).

[29] By sections 133 and 134, respectively, of the Criminal Justice Act 1988.

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Rights,[30] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[31] the International Convention for the Suppression of Traffic in Women and Children,[32] the Convention on the Political Rights of Women[33] and the Convention against Discrimination in Education,[34] to name but a few, all lack formal reception into domestic law. The same is true of the related field of international immigration and asylum law. The Convention on the Status of Refugees has an ambivalent status in domestic law,[35] despite its indirect transposition through statute,[36] while treaties on statelessness have remained entirely unincorporated.[37] These instruments point to the gaps in the statutory landscape of international law in the UK. While large parts of private international law are firmly rooted in domestic soil, public international law treaties seeking to establish universal rights for individuals have little if any domestic purchase by comparison. This tendency, across decades, to transpose certain types of international law (diplomacy, commerce, pollution and conservation) and not others (international human rights, migration and the protection of vulnerable individuals) points towards a politics of transposition in the UK. As will be seen in the following sections, this has consequences for the kinds of international arguments that different types of litigants run.

3. A ready shield: State immunity and diplomatic privileges

A large portion of international law points raised in the leading cases are brought by States or their representatives on the basis of domestic statutes. These cases fall broadly into two sets. One concerns foreign diplomats invoking the Vienna Convention on Diplomatic Relations (VCDR) to strike out allegations of human trafficking and serious violations of employment rights made by their domestic staff.[38] These arguments are raised on the basis of section 2(1) of the Diplomatic Privileges Act 1964 (DPA), which gives effect to certain provisions of the VCDR in domestic law. The other set of cases concerns State immunity. Typical cases involve foreign States invoking State immunity as a basis to dismiss proceedings brought against them, with less usual cases arising in a

[30] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

[31] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[32] International Convention for the Suppression of Traffic in Women and Children (adopted 30 September 1921, entered into force 15 June 1922) 9 UNTS 415.

[33] Convention on the Political Rights of Women (adopted 31 March 1953, entered into force 7 July 1954) 193 UNTS 135.

[34] Convention against Discrimination in Education (adopted 15 December 1960, entered into force 22 May 1962) 429 UNTS 93.

[35] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267; see *R (Tag Eldin Ramadan Bashir and others) v Secretary of State for the Home Department* [2018] UKSC 45, para 114.

[36] Section 2 of the Asylum and Immigration Appeals Act 1993: 'Nothing in the immigration rules (within the meaning of the [Immigration Act 1971]) shall lay down any practice which would be contrary to the Convention'.

[37] See, e.g. Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117, or Convention for the Reduction of Statelessness (adopted 20 August 1961, entered into force 13 December 1975) 989 UNTS 175.

[38] *Basfar v Wong* [2022] UKSC 20; *Reyes v Al-Malki and another* [2017] UKSC 61.

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range of situations, from foreign States seeking to strike out claims enforcing foreign judgments,[39] to the British Government moving to preclude review of its complicity in the torts of unlawful detention, rendition and torture committed by foreign States.[40] These arguments are raised on the basis of various provisions of the State Immunity Act 1978 (SIA), which was passed to give effect to the restrictive rule of State immunity in the European Convention on State Immunity and thereby bring domestic law in line with international practice.[41] In all these cases, international law arguments serve as a shield introduced into the armoury of domestic litigation by the express will of Parliament.

The obvious point is that, as a matter of legal argument, this shield is easy to raise. A litigant seeking to rely on State immunity need only cite the relevant provision of the statute before embarking on the questions of interpretation and application that will decide the substance of the case. In *Reyes v Al-Malki* and *Basfar v Wong*, for example, the defendants needed only to invoke section 2(1) of the DPA.[42] The same holds for litigants relying on the SIA.[43] This is pedestrian as a matter of UK constitutional law. But that is the point. The all-important question of a foothold in domestic law requires no argument. It is provided for by Parliament. This is in notable contrast to States' attempts to rely on unincorporated international law as a shield. The difficulty of working with unincorporated norms, even of a jus cogens nature, is exemplified in *Debenture Trust v Ukraine*.[44] Ukraine sought to defend a claim for payment of sums due under certain notes by arguing that these notes were procured under duress. Among other grounds, Ukraine argued that certain Russian actions constituted a breach of Article 2(4) UN Charter or the customary norms of non-intervention and the prohibition of the threat or use of force.[45] It is telling that in the course of proceedings Ukraine changed strategic tack, dropping its submissions on custom. In argument, counsel for Ukraine clarified that it was now making its case for duress on the fact of the threats under domestic law, not their treatment under international law as had originally been pleaded.[46]

One way in which claimants have tried to overcome the protections of the DPA and SIA is by using recent international developments to warp the outer edge of these shields. *Reyes* and *Basfar* concerned claims brought by domestic staff against the diplomats employing them under alleged conditions of trafficking. One of the central questions was whether the employment of domestic staff was a 'commercial activity' exercised by the diplomats 'outside [their] official functions' and therefore excluded from immunity by Article 31(1)(c) VCDR. The defendants sought to uphold immunity

[39] *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31; *SerVaas Inc v Rafidain Bank* [2012] UKSC 40; *General Dynamics United Kingdom Ltd v State of Libya* [2021] UKSC 22.

[40] *Belhaj v Straw, Rahmatullah v Ministry of Defence* [2017] UKSC 3.

[41] H Fox and P Webb, *The Law of State Immunity* (3rd edn, OUP 2015) 167; for a review of its interpretation and application by the courts, see Lord Lloyd-Jones, 'Forty Years On: State Immunity and the State Immunity Act 1978' (2019) 68 ICLQ 247.

[42] *Reyes* (n 38) para 9; *Basfar* (n 38) para 11.

[43] See, e.g. *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62; *NML Capital Ltd v Republic of Argentina* (n 39); *SerVaas Inc v Rafidain Bank* (n 39).

[44] *Debenture Trust v Ukraine* [2023] UKSC 11.

[45] ibid para 122.

[46] ibid para 147.

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on the basis of long-standing authorities supporting a restrictive interpretation of 'commercial activity'.[47] The claimants in both cases, represented in part by the same counsel, sought to counter this interpretation by reference to developments in international law. Invoking the prohibition of human trafficking enshrined in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol), they sought to enlarge the meaning of 'commercial activity', thereby restricting the scope of diplomatic immunity.[48] In *Reyes*, the claimants cited the 'high status' and 'gravity' accorded to human trafficking in international law,[49] and its wide recognition as contemporary slavery,[50] to argue that the words 'commercial activity' were to be interpreted in the light of this growing concern of international law.[51] In *Basfar*, the claimants likewise 'relied heavily' on the allegation of trafficking to make similar arguments.[52] In effect, the litigants in *Basfar* and *Reyes* sought to deploy developments in international law to inflect the meaning of domestic provisions. In *Reyes*, the majority of the UK Supreme Court was unconvinced.[53] But in *Basfar*, the general thrust of the argument prevailed: while the employment of domestic staff was not a 'commercial activity',[54] employment under conditions of coercion and personal profit could be, if it amounted to human trafficking.[55]

Another way that claimants have sought to overcome these shields is traditional statutory interpretation. This can be seen in the arguments advanced in *Al-Masarir v Kingdom of Saudi Arabia*.[56] The case concerned a claim for misuse of private information, harassment, trespass to goods and assault brought by a critic of the Saudi Government against the Kingdom of Saudi Arabia. The claimant alleged that individuals acting on behalf of the Saudi Government had hacked his phone and attacked him in London. A central point of contention was whether section 5 SIA applied. This provision provides an exception from State immunity in proceedings concerning personal injury or damage to tangible property. The defendant argued that the exception did not apply to acts done jure imperii and, as such, did not cover allegations of spying or State attacks on political opponents; these were inherently sovereign in nature.[57] The claimant submitted that section 5 drew no distinction between sovereign and private acts. This was clear from the plain meaning, read in conjunction with other provisions in the statute that do make such a distinction

[47] See the discussion of authorities in *Reyes* (n 38) paras 22–25.

[48] Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000 (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319.

[49] *Reyes v Al-Malki* [2015] EWCA Civ 32, para 35.

[50] ibid, citing the report of the Office of the United Nations Commissioner for Human Rights, 'Abolishing Slavery and Its Contemporary Forms' (2002) UN Doc HR/PUB/02/4, and Charter of Fundamental Rights of the European Union [2012] OJ L326/391, art 5(3).

[51] *Reyes* (n 38) paras 41–42.

[52] *Basfar* (n 38) para 19.

[53] *Reyes* (n 38) paras 39–40, 42–45, 51.

[54] *Basfar* (n 38) paras 28–29, 32–34, 37.

[55] ibid paras 43–52, 64–67, 72–82, 97, 107.

[56] *Al-Masarir v Kingdom of Saudi Arabia* [2022] EWHC 2199 (QB).

[57] ibid paras 40–41.

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explicitly.[58] In setting out their arguments, the parties took the court to a 'large body' of international law, and submissions involved 'extensive and impressive citation of public international law materials'.[59] Yet at their core, these arguments concern statutory construction, not international law. As is noted by Knowles J: while international law obligations may be relevant in resolving ambiguities of meaning in statutory language, section 5 was 'not a complicated provision', the starting point was 'to apply the ordinary canons of statutory interpretation'.[60] While dealing with international subject-matter, the argument here is, in structure and authority, essentially domestic. It prevails in favour of the claimant, but on domestic rather than international grounds.

Behind the arguments in *Basfar* and *Reyes* sits a deeper contest between two different versions of international law and its relationship to domestic law: one traditionalist, the other 'evolutionary'.[61] This contest tells its own story about the kinds of international law readily arguable before UK courts and the types of litigants who benefit from it. The international norms transposed by the SIA and the DPA are based on a State-centric understanding of international law far removed from the humanisation often cited in scholarship to explain the increase in international legal argument before domestic courts. The purpose of these norms is not straightforwardly to furnish individual litigants with rights against the State. The provision of protections for foreign diplomats in the UK may effectively grant rights to foreign individuals, but it is guided primarily by pragmatic considerations of reciprocity.[62] The UK protects foreign diplomats on its territory to ensure that other States will do the same for UK diplomats on theirs.[63] The provision of State immunity in the SIA has even less to do with the rights of individuals and gives domestic expression to the fundamental principle of the sovereign equality of States.[64] The norms transformed by these statutes are much older than the modern era of international law litigation in domestic courts, based as they are on diplomatic practices that reach back centuries.[65] They have a rich and long-standing pedigree and were received into the

[58] ibid paras 27–29.

[59] ibid paras 10, 114.

[60] ibid paras 59, 60, 63.

[61] *Basfar* (n 38) paras 64–65.

[62] See VCDR (n 14) art 47(2): 'However, discrimination shall not be regarded as taking place: (a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State; …'; E Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th edn, OUP 2016) 2: 'For the most part, failure to accord privileges or immunities to diplomatic missions or to their members is immediately apparent and is likely to be met by appropriate countermeasures'.

[63] It was this point that the Secretary of State for Foreign and Commonwealth Affairs raised when intervening in *Reyes* (n 38), prompting Lord Sumption to conclude (para 12): 'It may fairly be said that from the United Kingdom's point of view, a significant purpose of conferring diplomatic immunity of foreign diplomatic personnel in Britain is to ensure that British diplomatic personnel enjoy corresponding immunities elsewhere'. Though this argument was not accepted in *Basfar*, and the Secretary of State did not intervene before the Supreme Court: *Basfar* (n 38) para 106.

[64] For the role of independence and equality in State immunity, see the discussion in Fox and Webb (n 41) 25–26.

[65] For a sweeping and well-received history, see LS Frey and ML Frey, *The History of Diplomatic Immunity* (Ohio State University Press 1999).

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common law long before the passage of the DPA or the SIA.[66] In this regard, to discuss cases like *Basfar* or *Reyes* as part of a new trend of international law in domestic courts is only partially accurate. The willingness of courts, at times, to read down 'commercial activity' may reflect a modern human rights sensibility, but diplomatic and State immunities are international creatures that have stalked the corridors of English courts for centuries. Noteworthy is the attempt by litigants to invoke international law to change the shape of these older protections. By contrast, in *Al-Masarir*, the litigants succeeded on straightforward statutory interpretation, regardless of extensive but ultimately unnecessary argument on international law.

4. A cumbersome sword? International rights outside the Human Rights Act

Unlike States or diplomatic officials seeking to defend themselves against claims, individuals seeking to invoke international rights will find few footholds in domestic statute. Instead, they face the difficult task of arguing custom and its reception into the common law or finding creative ways of bringing unincorporated treaties to bear on English law.

Before proceeding, there is an important distinction to be made here between rights under the HRA and rights enshrined in general international law that was already touched on above. The literature on the place of international law in the UK tends to include cases under the HRA to make its case for the shift that has taken place in the litigation of international law before domestic courts.[67] This inclusion is debatable. The ECHR, which the HRA implements, is a regional human rights instrument. While international in the sense that it is 'non-English' law, its protections are not universal and apply only within the territorial limits of Article 1 ECHR.[68] This regionalism is evident in the careful drafting of Article 56 ECHR which facilitated the exclusion of the overseas territories of the High Contracting Parties;[69] the European Court of Human Rights' consequent and consistent rejection of applications from these territories;[70] and the limited extension of extraterritorial application to situations of effective control.[71] Unlike ICESCR and the International Covenant on Civil and Political Rights,[72] or the

[66] For the immunity of foreign sovereigns, see *Duke of Brunswick v King of Hanover* [1844] 6 Beav 1; *De Haber v Queen of Portugal* [1851] 17 QB 196; *Mighell v Sultan of Johore* [1894] 1 QB 149; for the immunity of a foreign State, its officials and property, see *The Parlement Belge* (1879) 4 PD 129; *The Cristina* [1938] AC 485; *United States of America and Republic of France v Dollfus Mieg et Cie SA and Bank of England* (1952) 1 AC 582, cited in R O'Keefe, 'The Doctrine of Incorporation Revisited' (2009) 79 BYIL 7, 23–24.

[67] Thomas (n 1); Lloyd-Jones (n 2).

[68] ECHR (n 25) art 1: 'High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.

[69] ibid art 5: '(1) Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible …'. For an account of the drafting history, see L Moor and AWB Simpson, 'Ghosts of Colonialism in the European Convention on Human Rights' (2005) 76 BYIL 121.

[70] See, e.g. *Bui van Thanh v United Kingdom* (n 28); *Yonghong v Portugal* (n 28); *Quark Fishing Ltd v United Kingdom* (dec) App No 15305/06 (ECtHR, 2006).

[71] *Al-Skeini v United Kingdom* [GC] App No 55721/07 (ECtHR, 2011) para 138; *Loizidou v Turkey* (Preliminary Objections) [GC] App No 15318/89 (ECtHR, 1995) para 62; *Banković v Belgium* (n 27) para 59.

[72] ICESCR (n 31); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

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Universal Declaration of Human Rights, the ECHR does not apply universally. Its inclusion in most analyses of international law before UK courts alongside rules like State immunity or diplomatic privileges sets up a false comparison between a regional rights regime and universally applicable norms of general international law. To avoid this confusion, the following subsections look only to the litigation of rights under general international law and not under the ECHR. Outside the HRA, the invocation of international rights poses a considerable challenge. As outlined in Section 2, international rights instruments have had little to no transposition into domestic statute.

4.1. Using international custom

One tactic pursued by litigants has been to invoke rules of custom: their applicability on the domestic plane and, where necessary, their recognition on the international plane. The place of customary international norms in UK domestic law is less settled than it might seem. The earlier consensus that international custom forms part of the law of the land[73] is no longer tenable. It is doubtful if it ever truly captured the position in the UK, either from a domestic[74] or an international perspective.[75] Lord Lloyd-Jones has pointed to recent case law to suggest that the relationship between customary international law and the common law is more complex, arguing that courts will have to consider restrictions imposed by domestic constitutional principles, the nature of the rule in question and the context in which an issue arises when deciding whether to recognise and enforce a rule of customary international law.[76] In the words of Lord Mance in *Keyu*, rather than being incorporated, customary international law will 'shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules'.[77]

This shift away from automatic incorporation towards a more refined conception of custom as a 'source' that 'shapes' the common law is already well established. Less often noted is that it has been accompanied by an initial tendency to downplay the practical significance of the difference between statutory transformation and reception into the common law. Lord Lloyd-Jones suggests that the shift away from automatic incorporation is 'simply a more sophisticated and realistic view' of how custom is applied in the UK and 'not inconsistent with a greater willingness of our courts to apply

[73] Higgins (n 1) 458: 'Today it is generally uncontroversial that customary international law is simply the law of the land'; though see R O'Keefe, who proposed on the basis of *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 that international custom is part of English law as 'an autonomous non-statutory strand of English law, alongside common law' which should be understood to mean 'part of that body of English law not made by Parliament': R O'Keefe, 'Customary International Crimes in English Courts' (2002) 72 BYIL 293, 301–302.

[74] See O'Keefe (n 66) 23–43 for a careful and incisive review of the doctrine of incorporation in practice.

[75] See, e.g. J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 68: 'The position in England is not that custom forms part of the common law (how can foreign states of whatever legal tradition make the common law?) but that it is a source of English law that the courts may draw upon as required'.

[76] Lloyd-Jones (n 2) 524–28 and the cases cited therein.

[77] *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, para 150 (Lord Mance).

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customary international law'.[78] Expressing a similar sentiment, Lord Mance noted in *Keyu* that:

> in an era where precedent is unlikely to be seen as so great an obstacle to reconsideration of domestic law in the light of international developments, the difference in effect of the two doctrines is unlikely to be as significant as it may have seemed [to Lord Denning in *Trendtex*] in 1977.[79]

Yet this is not borne out entirely when examining how claimants have sought to argue on the basis of international custom. In fact, recent litigation would suggest that litigants are uncomfortable running detailed arguments on the incorporation of customary international law, even though the point might have significant consequences for the outcome of a case. A clear example can be found in *Keyu* itself. This case before the Supreme Court marked the culmination of a decades-long struggle in and outside court to hold the UK Government accountable for colonial crimes committed in Malaya. Between 11 and 12 December 1948, twenty-four unarmed civilians were killed by a Scots Guard patrol in the village of Batang Kali in the British protectorate of Selangor.[80] The victims' relatives sought to obtain a full inquiry into the deaths of their fathers, husbands and brothers. In the alternative to a remarkably ambitious argument on the basis of Article 2 ECHR,[81] the appellants sought to argue that an obligation to conduct an inquiry had crystallised as a rule of customary international law. However, in raising this argument they appear to have avoided detailed submissions on exactly how such an obligation, if it existed, had become incorporated into domestic law.[82]

Both sides referred to Lord Denning MR's much cited dictum in *Trendtex* that 'the rules of international law are incorporated into English law automatically and considered to be part of the English law unless they are in conflict with an Act of Parliament'.[83] The appellants also described obligations on the UK under customary international law as 'a source of domestic law',[84] and recognised the principle in *R v Jones (Margaret)* that the incorporation into common law must not abrogate a constitutional or common law value.[85] But beyond this, the point does not seem to have been greatly exercised in argument. The fact that the appellants cited both Lord Denning's dictum in *Trendtex* that custom is automatically incorporated and the contradictory position that it represents a source of the common law would suggest

[78] Lloyd-Jones (n 2) 526.

[79] *Keyu* (n 77) para 148.

[80] For an attempt to create an oral history from statements by survivors made to journalists, documentary filmmakers and researchers, see L Kar Yen, 'Memory, Trauma, and Nation: Contestation over the Batang Kali Massacre in Malaysia' in K Seng Loh et al (eds), *Oral History in Southeast Asia: Memories and Fragments* (Palgrave Macmillan 2013).

[81] The killings in question took place before the ECHR was adopted in 1950, before it was ratified by the UK in 1951, before it entered into force in 1953, before the UK accepted the right of individuals to petition in 1966 and before it was given effect in domestic law by the HRA (n 6). As Lady Hale noted in her dissent, 'It is a tribute to the skill of the claimants' legal team that these arguments have to be taken seriously': *Keyu* (n 77).

[82] ibid para 144 (Lord Mance): 'The basis and extent to which customary international law … is received into common law was not examined in great detail in the parties' submissions before us'.

[83] ibid; see *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 553.

[84] *Keyu* (n 77) para 144 (Lord Mance).

[85] ibid para 145 (Lord Mance); see *R v Jones (Margaret)* (n 8).

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either a degree of conceptual confusion in the submissions or simply a wariness to engage in detail with the actual mechanics by which international custom 'becomes' common law. Given the calibre of the applicants' counsel and the exceeding sophistication of the arguments submitted in support of the ECHR limb, it is unlikely that conceptual confusion was the problem.

The incorporation point is important, because it ends up forming a central part of the reasoning in dismissing the appeal.[86] The appellants' argument on customary international law failed on two counts: first, because no such rule had become established in international law at the relevant time;[87] and, second, because Parliament had expressly and exhaustively provided for investigations into deaths through the Coroners and Justices Act 2009 and the Inquiries Act 2005.[88] Importantly, the second reason holds true even if there had been a rule of international law at the relevant time. If the appellants had succeeded in bringing home their argument that there was a relevant rule of custom, their case would have turned on the incorporation point. The fact that their Lordships were not entirely in agreement on this point would suggest that it could rear its head again in future litigation and may have merited further argument in *Keyu*. Lord Kerr, for example, is 'less sanguine' about accepting Lord Neuberger's reasoning 'in its entirety',[89] positing a hypothetical situation in which there would be 'a strong argument that [a duty to conduct an inquiry] should find expression in the common law'.[90] As the claimants' arguments in *Keyu* show, litigants appear hesitant to run forceful arguments on the knotty question of customary law's reception into domestic law.

In this regard, it is telling that one of the strongest examples of litigants arguing custom successfully was a case concerning immunities, where custom was deployed as a shield. *Freedom & Justice Party* concerned the UK authorities' decision not to arrest Lieutenant General Hegazy, former director of the Egyptian Military Intelligence Service, on allegations of torture committed during the violent government overthrow of 2013.[91] Hegazy was visiting the UK as a member of an Egyptian special mission. The case turned on whether members of a special mission enjoyed immunity under international law. The Secretary of State argued that while the VCDR did not cover special missions, there was a rule of custom guaranteeing core jurisdictional immunities for members of special missions that formed part of the common law. Among the cases discussed here, this is the most straightforward example of international legal argument. The Government took the court to various classical sources to establish State practice and opinio iuris: the practice of various States, the

[86] Cf *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10, paras 148–151 (Lord Kerr), where the question of incorporation did not arise, as there was insufficient evidence for a rule of custom.

[87] *Keyu* (n 77) paras 113–116 (Lord Neuberger).

[88] ibid paras 117–122 (Lord Neuberger).

[89] ibid para 269.

[90] ibid para 270: positing a situation where deaths occur in an overseas territory over which the UK has jurisdiction at a time when there is no duty to investigate under the ECHR and that an inquest is subsequently sought at a time when there is no longer a statutory requirement to investigate the deaths because the UK has by then relinquished jurisdiction over the country in which the deaths occurred.

[91] *R (Freedom & Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719.

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work of the International Law Commission, treaties and the views of highly qualified publicists.[92] The parties exchanged blows on the kinds of issues one might expect to arise when seeking to establish a rule of custom, such as insufficient evidence of opinio iuris, or an over-reliance on European State practice that was not sufficiently widespread and representative.[93]

More novel was the argument on whether this rule was reflected in the common law. Lord Mance's dictum in *Keyu* sent the appellants on a hunt for constitutional principles that would take the question beyond judicial adaptation and into the province of Parliament. The appellants raised a number of arguments to this effect: that the creation of a new immunity from criminal process was a matter for Parliament, just like the creation of a new criminal offence would be; that the creation of an immunity required judgements about its scope, which were legislative in nature; and that the common law should not be adapted to create what would in effect be a non-reviewable executive discretion to confer immunity, thereby infringing the rule of law.[94] These arguments failed. Given the firm domestic footing of other diplomatic immunities, it is unsurprising that the court was willing to find the existence and incorporation of a rule of custom protecting special missions. This is important. If international custom will 'shape the common law' where it is consistent with 'statutory law', then international norms that have already been incorporated through statute will in turn affect the types of custom that are deemed to be sufficiently consistent. Statutory incorporation prepares the ground for the subsequent reception of related customary rules. This would seem to be the case with diplomatic immunities and the related customary protection for special missions. While *Keyu* and *Bashir* point towards the difficulty of arguing custom without a domestic footing, *Freedom & Justice Party* points to a different phenomenon: the relatively easier argument on custom where related international norms have already been incorporated through statute.

4.2. Using unincorporated treaties

Rather than run arguments on custom, some claimants have sought to fold unincorporated treaties into sophisticated interpretation arguments made on the basis of incorporated treaties. This is exemplified by the attempts of litigants to bring the UN Convention on the Rights of the Child (UNCRC)[95] to bear on domestic litigation. These cases involve reductions in welfare benefits and the question of whether and how provisions of the UNCRC should be taken into account when assessing if alleged differences in treatment of welfare recipients are justified. In *SC*, the claimants argued that even though the UNCRC had no direct application as an unincorporated treaty, it could nevertheless be relevant in determining whether there had been a breach of rights under the ECHR.[96] Whether the welfare reductions in

[92] ibid paras 62–67, 52–60.
[93] ibid paras 45, 69–70.
[94] ibid para 122.
[95] UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[96] *R (SC) v Secretary of State for Work and Pensions* [2019] EWCA Civ 615, para 96.

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question were compatible with the UK's obligations under the UNCRC should be treated as a 'significant factor' in deciding whether the differences in treatment were justified.[97] The point gave rise to 'much argument'.[98] By comparison to the direct footholds provided for protections such as State and diplomatic immunities, the route into English law for international protections of the child is circuitous to say the least. The argument is built on an indirect application of the provisions of the UNCRC folded into an evaluation of the justification required under Article 14 ECHR as incorporated into English law by the HRA. The same argument is raised in a number of other cases,[99] led in part by the same counsel. Though this argument appeared to find favour in some obiter comments,[100] the Supreme Court ultimately held in *SC* that it did not fall to domestic courts to decide whether a right in an unincorporated treaty had been breached.[101]

In both the trafficking and the welfare cases, litigants have tried to use unincorporated international law to inflect the meaning of incorporated norms. In the trafficking cases, litigants deployed the Palermo Protocol to shape the meaning of 'commercial activity' in the VCDR, incorporated through the DPA. In the welfare cases, litigants attempted to use the UNCRC to develop the application of Article 14 ECHR, incorporated through the HRA. By comparison with the types of international law arguments available to State and diplomatic litigants, there are two points to make. First, litigants relying on incorporated international law can invoke it directly through the operation of domestic statute. Litigants invoking unincorporated international law must do so indirectly, exploiting existing but potentially unsuited routes to effectively squeeze the wrong foot onto the only available foothold. Second, litigants arguing the older bodies of law guaranteeing State and diplomatic immunities will tend to be able to argue with what the law *is*. Litigants working with unincorporated international rights more often than not find themselves making a more challenging normative claim for what the law *should be* in light of recent international developments. This is the natural consequence of a dualist system that does not automatically and unconditionally receive international law into domestic law. But it also demonstrates how the UK's constitutional arrangements combine with the politics of incorporation sketched above to set very different argumentative challenges for different classes of litigant—challenges that go beyond accounts of international law as straightforwardly 'beneficent', or those that suggest that the means by which an international norm is received has little effect on its efficacy in domestic law.

The broader significance of the argument about using international law in UK courts advanced thus far is captured by *Bancoult (No 3)*. Often cited as an example of international law argument before UK courts, it also provides a stark illustration of the dynamic between individual and State litigants, the kinds of international law norms

[97] ibid.

[98] ibid para 94.

[99] *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, para 78; *Mathieson v Secretary of State for Work and Pensions* (2015) UKSC 47, paras 38–39; *R (DA) v Secretary of State for Work and Pensions* [2018] EWCA Civ 504, paras 5, 24.

[100] *DA* (n 99) paras 71–78; *Mathieson* (n 99) paras 42–44; *SG* (n 99) para 137.

[101] *SC* (n 96) paras 76–96.

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that they can invoke and the effects that this can have on the course of litigation. In 1965, the UK separated the Chagos Archipelago from the territory of Mauritius in violation of the right to self-determination to facilitate the creation of a United States (US) navy base.[102] In doing so, the UK entirely depopulated the Chagos Archipelago, forcibly removing the Chagossians who had lived and worked on the islands for centuries to Mauritius and the Seychelles.[103] Over the past two decades, the Chagossians have brought a number of cases in UK courts. *Bancoult (No 3)* concerned the Chagossians' challenge to the UK Government's declaration of a Marine Protected Area around the Chagos Archipelago on the grounds that it was made for the improper purpose of preventing their resettlement.

However the international law point that made it up to the Supreme Court was not one raised by the Chagossians. It was raised by the UK Government. Mr Bancoult's lawyers had, rather unusually, obtained permission to cross-examine Government officials on the basis of a cable, purported to have been sent from the US Embassy in London to departments of the US Federal Government in Washington, and subsequently published by Wikileaks.[104] The cross-examination was in full swing when the UK Government raised an objection on a point of international law—that the use of the cable would be contrary to the principle of inviolability of the US mission's diplomatic archive in breach of Articles 24 and 27(2) VCDR.[105] It is this point that took the case up to the Supreme Court. It was one of the ironies of the Chagossian litigation that, in a campaign arising out of a violation of international law that touches on questions of self-determination[106] and the UK's duties under Article 73 UN Charter,[107] the only point of international law that got a real foothold was introduced not by the Chagossians but by the UK Government. The consequence for the Chagossian litigation was considerable. They came to court wanting to talk about how the Marine Protected Area was unlawfully made for the improper purpose of scuppering Chagossian resettlement. They ended up talking about the kinds of uses to which diplomatic archives can be put. Even though they ultimately won the point, it was a hollow victory. The Supreme Court held that while the inclusion of the document would not have infringed the VCDR, it also would not have affected the outcome of the cross-examination and, therefore, there were no grounds for a retrial.[108]

[102] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 534.

[103] For a detailed account, see D Vine, *Island of Shame: The Secret History of the US Military Base on Diego Garcia* (Princeton University Press 2010).

[104] *R (Bancoult No 3) v Secretary of State for Foreign & Commonwealth Affairs* [2012] EWHC 2115 (Admin).

[105] *R (Bancoult No 3) v Secretary of State for Foreign & Commonwealth Affairs* [2018] UKSC 3, para 8.

[106] See, e.g. Sir Sidney Kentridge's irrationality argument brought on the basis of rights enshrined in international treaties and the right to self-determination in *R (Bancoult No 2) v Secretary of State for Foreign & Commonwealth Affairs* [2006] EWHC 1038 (Admin), para 103, or the international law arguments ceded to a further hearing (para 106).

[107] In argument, 'great weight' was placed on art 73 of the Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI in *Chagos Islanders v Attorney General and Her Majesty's British Indian Ocean Territory Commissioner* [2003] EWHC 2222 (QB), para 6, that ultimately failed to convince the court (para 341).

[108] *Bancoult (No 3)* UKSC (n 105) paras 38–42 (Lord Mance; Lords Neuberger, Clarke and Reed agreeing).

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5. Conclusions

Analysing the types of litigant able to invoke international law before UK courts, the kinds of argument they can and cannot make on this basis and how they seek to argue in practice brings to the fore new elements in the understanding of the place of international law in UK courts. It shows that a large proportion of leading cases concern the litigation of international law brought on the basis of domestic statute. In doing so, it draws attention to the kinds of international law that tend to be transposed into domestic statute and the kinds of litigants that benefit from this transposition: the much older creatures of State immunity and privilege that long pre-date the modern era of international law domestic litigation, rooted in State-centric conceptions of international law and benefiting States rather than individuals. Where litigants have sought to counter these shields, they have sought to use more recent bodies of unincorporated international law to inflect the meaning of individual provisions in incorporating statutes and thereby restrict their scope, as in *Basfar* and *Reyes*. Where claimants have been most successful is on the firm English soil of traditional statutory interpretation, as in *Al-Masarir*.

By contrast, international rights outside the scope of the ECHR have tended not to be transposed into domestic law. Litigants have shown a reluctance to run detailed international custom arguments on the basis of incorporation, raising a question mark over the initial tendency in scholarship and case law to dismiss the practical difference between reception through statute or common law. While a new consensus on custom as a source of the common law is clearly emerging in the case law, close attention to the arguments raised in court shows that it remains a difficult point to argue in practice. It is revealing that the clearest example of a successful custom argument was one made on the basis of an analogy with diplomatic immunities. This suggests that the incorporation of one international norm by statute can prepare the ground for the reception of another related norm into the common law as custom. Other litigants have sought to bring international norms to bear on domestic litigation with sophisticated interpretation arguments, drawing on unincorporated treaties to inflect the provisions of incorporated treaties.

Taken together, these elements unsettle a number of the assumptions that sit behind much of the literature on international law in the UK: that international law is straightforwardly beneficent, that its gradual humanisation has furnished individuals with further legal means of challenge and defence against States and that it matters little for its efficacy whether it is transformed through statute or reflected in the common law. The cases studied in this article are not comprehensive, but they demonstrate the need for a closer appreciation of the dynamic relationship between the types of arguments made available to different types of litigants through incorporation, and what is actually argued in court. It is not possible to form a picture of the use of international law in UK courts without an understanding of the politics of statutory transposition that determine on what basis international norms can be invoked. Nor is it possible to fully evaluate the picture of statutory transformation without understanding the reality of how domestic litigants use international law in practice.

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