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MEMORANDUM

March 12, 2013

To: Gail Davidson

From: Lisa Jorgensen
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RE: Enforceability of treaty obligations

You have asked me to prepare a memorandum on the extent to which ratification and accession of human rights treaties obliges a state to comply with all treaty obligations including those not incorporated into domestic laws. This memorandum is designed to provide a practical and theoretical guide for those writing letters to state parties demanding adherence to human rights obligations.

This memorandum will address this issue in three parts:

1) **Vienna Convention on the Law of Treaties** – an overview of key articles of the Vienna Convention which pertain to obligations resulting from treaty ratification and accession

2) **Important clauses in key international agreements** – a survey of language pertaining to obligations and enforcement across several key international human rights agreements

3) **Role of customary international law** – a brief summary of key human rights concepts in customary international law and examples of ways in which they have been recognized by national legislatures and courts

1. Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties is leading international agreement on the legal relationships and obligations created by treaties between states.[1] Most of **the principles espoused within the articles of the Vienna Convention have been found to be part of customary international law**; accordingly, they apply to all states, not just signatories and parties.[2] I highlight the articles of the Vienna Convention that are most relevant to the enforcement of international human rights treaties.

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[1] *Vienna Convention on the Law of Treaties*, UN Doc. A/Conf39/27; 63 AJIL 875 (1969) ["Vienna Convention"].
[2] See, for example: U.S. Department of State, Statement on the Vienna Convention on the Law of Treaties. Available http://www.state.gov/s/l/treaty/faqs/70139.htm; Frederic L. Kirigs, "Reservations to Treaties and United States Practice", American Society of International Law – ASIL Insights, May 2003. <Available: http://www.asil.org/insigh105.cfm> ; Oliver Dorr, Kristen Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary (*Berlin: Springer-Verlag, 2012), p 415. ["Dorr"]

Article 2

Article 2(1)(b) establishes that the key requirement for the establishment of a legal obligation under international law is the **"intent to establish a legal relationship"**. For a treaty or agreement to be binding on a state party, the agreement itself must have intended to create an obligation. The existence of a ratification clause is generally taken to meet the threshold for demonstration of an intention to create a legal obligation.[3] Article 2(1)(b) notes that "ratification", "acceptance", "approval" and "accession" are all ways that state parties express consent to be bound by a treaty at the international level.

Not all agreements are designed to be binding. Typically, such agreements will explicitly state that no legal obligation is to be created. Language such as "statement", "guideline", "recommendation" and "declaration" in the name of the agreement may often indicate the absence of intent to create an obligation, though the name is not determinative.[4]

Even where agreements are not found to be legally binding, courts may still look to principles – known as "soft law" – to interpret domestic statute or to support findings of customary international law.

While it is a fundamental rule of treaties that obligations are created only with consent (also see Article 34), a treaty may codify pre-existing customary international law or develop into new customary international law.

Article 14

Article 14 states that the consent to be bound by a treaty is expressed by ratification (or acceptance or approval) if the treaty allows ratification to serve as consent or if the negotiating states agreed that ratification should be required. Article 14(1) stands for the general principle that ratification expresses the consent of a state to be bound by the terms of the treaty. When a state ratifies a treaty it has made a legally significant commitment under international law.[5] As the International Court of Justice ("ICJ") states in the *Ambatielos Case*, **"…ratification is not mere formalism."[6]**

From an international law perspective, the domestic requirements that may precede or result from ratification are irrelevant. So long as a valid[7] representative of the state has ratified the treaty, in the eyes of international law, that state is bound by the rights and obligations of the treaty. **Failure to abide by domestic processes is not a sufficient reason to invalidate the obligations created under international law** if the ratification was made by a "competent representative with the full powers to effect ratification".[8] As the ICJ noted in the *Certain Questions of Mutual Assistance* case, "[T]hat France has ratified the Treaty without finding it necessary to submit it for parliamentary approval does not alter the fact that the Treaty creates legal obligations…"[9]

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[3] *Cf* JES Fawcett, "The Legal Character of International Agreements (1953) 30 BYIL 381, 388.
[4] *Cf* International Agreement Regulations of the US State Department, 22 CFR 181 (A5).
[5] *Ambatielos Case (Greece v United Kingdom)* (Preliminary Objections) [1952] ICJ Rep 28, 43.
[6] *Ibid*.
[7] Has full powers to ratify and bind the state.
[8] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177, para 104.
[9] *Ibid*.

From the perspective of national law, the power to ratify a treaty and the obligations created by ratification are less certain. From the perspective of enforcement, the power to ratify may not seem important but it is important to understand the domestic context from which legal obligations are created in order to understand how enforcement and recognition manifests.

In some countries, particularly Britain and its former colonies, the national executive has the power to conclude treaties under royal prerogative.[10] In many European countries and the United States, treaties must gain parliamentary approval before a state representative is empowered to ratify the treaty.[11] In some countries (e.g., Macedonia, Mexico, the Netherlands, Switzerland, Turkey and the US), parliamentary approval is required but parliament may never ratify a treaty that would violate the constitution.[12] In other countries, the executive has the power to ratify but parliamentary approval is required in certain circumstances (e.g., Austria, Denmark, Russia, Slovakia, Spain, Sweden, Ukraine). In some countries, the executive must consult with a non-parliamentary organ or agency to be empowered to ratify a treaty (e.g., Brazil, Argentina, China).[13]

Given the difficulty and time required to gain US Senate approval, the US executive has created a new kind of treaty approval it terms “acceptance”. From the perspective of the US, “acceptance” indicates an agreement in principle to the terms of the treaty but does not give rise to formal obligations.[14] Despite the entrenchment of “acceptance” into US practice, there is not international legal support for such a position. Under Article 14, para 2 of the Vienna Convention, acceptance and ratification are synonyms, both of which give rise to international obligations. Moreover, “acceptance” has been used to indicate consent to be bound in other international agreements.[15]

Despite the above, where a treaty requires signature followed by ratification, non-ratifying signatories, despite their initial expression of intent to abide by the treaty, may not be bound by the treaty. As was the case in the *North Sea Continental Shelf* case, the decision not to ratify may be given weight in assessing whether obligations were intended to be established.[16]

Article 17

Paragraph 1 of Article 17 states “Without prejudice to articles 19 to 23, the consent of a State to be bound by part of a treaty only if the treaty so permits or the other contracting States so agree.” In other words, where a state ratifies a treaty, it is bound by the whole contents of the treaty unless the treaty explicitly allows (or consent is given by the negotiating states) for partial ratification. Accordingly, aside from certain

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[10] Dorr, *supra* note 2, p 186.
[11] *Ibid*.
[12] *Ibid*.
[13] *Ibid*
[14] *Ibid*, p 188.
[15] See, for example: *WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization*, Apr. 15, 1994, 1867 UNTS 154, 33 ILM 1144 (1994), Art XIV.
[16] ICJ*, Analysis of North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*, 20 February 1969 <Available: http://www.unhcr.org/refworld/docid/4023a4c04.html>

explicit exceptions, states cannot pick and choose which parts of a treaty it wishes to follow; treaty ratification is to the whole of the treaty.

Article 18

Article 18 is a very important clause for those who seek to hold states to their international obligations. Article 18 **obliges states not to take actions that contradict the object of the treaty after signature or ratification but before its entry into force**.[17] Article 18 addresses the uncertainty that could result from the complex treaty-making process by unequivocally establishing that signatories have a good faith obligation to uphold the object of the treaty even before it has become legally binding. Article 18 extends this good faith obligation to all states which have expressed consent to be bound through any of the processes discussed above. States may only 'opt out' of their Article 18 obligation by explicitly stating their intention not to become a party to the treaty. Article 18 is a longstanding rule of customary international law, which has been affirmed by multiple courts and international bodies.[18]

Article 24

Paragraph 1 of Article 24 states that a treaty enters into force in the manner/time specified in the agreement. Where nothing is specified, the treaty enters into force once consent to be bound is established for all negotiating states. **Once a treaty enters into force it is fully binding on the parties under international law.** Some treaties, most frequently of a humanitarian nature, do not require a substantial percentage of parties to ratify for the treaty to come into effect (e.g., the treaty modifying the European Court of Human Rights), whereas some treaties set a high threshold for ratification to come into force.[19]

Article 26

Article 26 establishes that **every treaty in force is binding upon the parties to it and must be performed by them in good faith.** This principle, known as *pact sun servanda*, is a fundamental principle of customary international law.[20] The obligations are predicated in consent at the time of ratification. A state cannot excuse a breach of its obligations by a change in government or domestic policy.

Article 27

Building on Article 26, Article 27 explicitly states that "[a] party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty." **States are responsible for their international obligations irrespective of any conflict with domestic law or policy.**[21] This principle of "state

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[17] For greater discussion, see the aptly named: W Morvay, "The Obligation of a State Not to Frustrate the Object of a Treaty Prior to its Entry into Force (1967) 27 ZaoRV 454.

[18] See, for a recent example*:* *"*Mossville Environmental Action Now" case, Inter-American Commission on Human Rights, Report 43/10, Petition 242-05, March 17, 2010, para 22.

[19] A Mowbray, "Crisis Measures of Institutional Reform for the European Court of Human Rights (2009) 9 HRLR 647, 651.

[20] ECJ (CJ) *Racke* C-162/96 [1998] ECR I-3655, para 49.

[21] This principle is fun

responsibility" is fundamental in international law because it speaks to the reciprocity on which all international law is predicated.[22]

Fault and intention are irrelevant to breaches of Article 27. Where a state party fails to meet its treaty obligations, it is in breach of international law.[23] The only exception to this definitive rule is the ability of states to make reservations based on international law.[24] These reservations must be made in advance, with the approval of the negotiating parties. Some reservations will be too broad to merit recognition, such as those that reserve the right to breach any obligation that is "incompatible with internal laws".[25]

In summary, it is **unequivocal under international law that states are legally bound by treaties they have ratified or otherwise acceded**. The treatment of Article 27 under national law is less certain. National courts interpret issues through the lens of national law. States fall into two rough camps in terms of how they interpret international law obligations domestic – monists and dualists. Monist states view international and domestic law as part of single legal order. For monists, such as Switzerland, international treaties are binding without any domestic action.[26] Where international law and domestic law come into conflict, Parliament or courts must determine which trumps the other.[27]

Domestic treatment of Article 27

Dualists view international law as distinct from national law entirely. As such, international law cannot be directly invoked before national courts for any purpose, let alone to invalidate national law. For international law to have domestic force, treaties must be "transformed" to national law. The treaty may be given Parliamentary approval in full (adopted word for word) or have its content rearranged in one or more statutes.[28] In some countries, for example Chile, transformation is affected by publication of the treaty in a national gazette.[29] Countries where some combination of publication and approval are sufficient to effect transformation are considered "moderate" monists, while countries where a separate statute must be enacted are considered strict dualists.[30]

In the United States, treaties are categorized as "self-executing" or "non-self-executing". With self-executing treaties, once the treaty is ratified it is binding in domestic law. However, the US requires legislative approval before a treaty may be ratified so the system is not as 'monist' as it may seem. With non-self-executing treaties (generally of a contractual nature), post-ratification the executive must explicitly execute the treaty for it to be binding.[31] Since the 1970s, the US has maintained that all human rights treaties are

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[22] Numerous agreements have recognized this "state responsibility". See, for example: ILC Articles on State Responsibility, UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83, Art. 32.
[23] Art 2 articles on State Responsibility [2001-II/2] YbILC 36, para 10.
[24] See, for example the US reservation in the Genocide Convention in which the US notes that it will not perform any obligations that would breach the US Constitution.
[25] As discussed in Dorr, *supra* note 2.
[26] *Frigerio v EVED* ATF 94 I 669 (1968) 97 I BGE 669 (Switzerland Federal Court).
[27] K Strupp, "Les règles generals du droit de la paix" (1934) 47 RdC 263, 389, 404 as cited in Dorr, *supra* note 2.
[28] Dorr, *supra* note 2, p 485.
[29] *Fallo del Mes* No 24128-311 (1984) (Chile Supreme Court).
[30] Dorr, *supra* note 2, p 467.
[31] *Foster & Elam v Neilson* (1829) 27 US 253 (US Supreme Court).

non-self-executing (i.e. are not binding domestically upon ratification until the executive takes further action), though it is not clear that this position holds any weight in international practice.[32]

Where the Vienna Convention as a whole, or Article 27 in particular, has been domestically transformed), national courts have clear legal authority to give effect to Article 27 as they would any other national law. **Some countries, like Spain, have gone so far as to incorporate Article 27 into their national constitution.[33]**

Where states have not domesticated the Vienna Convention, Article 27 has been treated very differently across jurisdictions. **In Argentina, the Supreme Court relied on Article 27 to establish the supremacy of international human rights treaties over national law.[34]** A similar conclusion on the hierarchy of laws was made in Peru.[35] In Russia and Belgium, ratified treaties have supremacy over national law and may be used to invalidate domestic statutes.[36] In the *Le Ski*, decision the Belgian Supreme Court stated that **"…the rule established by the treaty must prevail; the supremacy of the latter is attributable to the very nature of international conventional law."[37]**

Conversely, the UK High Court of Justice concluded that Article 27 does not mandate judges to prefer international obligations over domestic law.[38]

In Canada, the Supreme Court has held that it is a principle of statutory interpretation that legislation will conform to international law.[39] Accordingly, **judges should "ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a meaning.**"[40] However, the Court also held that parliamentary sovereignty entitles Parliament to enact laws that put it in breach of international obligations where it does so clearly and explicitly.[41] In *Baker v Canada*[42] and *Suresh v Canada*, the Court held that international agreements are not binding unless transformed but the **"court may be informed by international law"**.[43]

Canada's "soft" approach to ratified, but non-transformed, international agreements are common in dualist systems. In South Africa, the constitution explicitly states that "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation consistent with international law over any

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[3232] M Waters, "Creeping Monism: the Judicial Trend Towards Interpretive Incorporation of Human Rights Treaties" (2007) 107 CLR 629, p 639.
[33] Article 96 of the Spanish Constitution. Affirmed in: *Guatemalan Genocide Case* 42 ILM 686 (1999), 699.
[34] *Ekmekdjian v Sofovich* No E 64 XXIII, 7 July 1992 (Argentina Supreme Court).
[35] *Barrios* No 292-V-94, 4 June 2001 (Peru Supreme Council of Military Justice).
[36] Constitution of the Russia Federation (1993), Article 15; *Le Ski* [1971] Paicrisie belge I-886 (Belgium Supreme Court), p 919.
[37] *Ibid* (*Le Ski*).
[38] *NEC SemiConductors Ltd et al v Inland Revenue Commissioners* [2003] EWHC 2813 (UK HCJ), para 50.
[39] *R v Hape*, 2007 SCC 26, ("*Hape*"), 3-4.
[40] *Ibid.*
[41] *Ibid*.
[42] *Baker v Canada* [1999] 2 SCR 817
[43] *Suresh v Canada* [2002] 1 SCR 3, para 60.

alternative that is inconsistent with international law."[44] In Australia, the High Court held that **by ratifying (but not transforming) the Convention on the Rights of the Child, Australia had created a legitimate expectation that an immigration tribunal would use a "best interests of the child" approach to interpreting domestic statute** as is required by Article 3 of the Convention.[45] In Germany, international agreements may assist domestic courts to determine the scope and content of domestic rights. As the German Federal Constitutional Court stated with reference to the ECHR, "The guarantees of the [ECHR] influence the interpretation of the fundamental rights and constitutional principles of the [German] Basic Law."[46]

However, the Supreme Court of Canada has also held that parliamentary sovereignty entitles Parliament to enact laws that put it in breach of international obligations where it does so clearly and explicitly.[47] A similar principle has been identified in the United States: **"[o]nly where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence."[48]**

However…

In the eyes of international law, ratified obligations are binding and non-compliance may give rise to a duty to compensate injured parties. Domestic procedures and interpretation are not a defence.[49]

Article 94 of the UN Charter requires all members to comply with decisions of the ICJ. Paragraph 2 of Article 94 establishes that where a state fails to perform obligations set out by a judgment of the ICJ, the **other party may take the matter to the Security Council, which is empowered to use its enforcement powers to give effect to the judgment.**[50] Although international law is often characterized as toothless, if states take states that breach treaty obligations to the ICJ, real penalties and consequences may result.

2. Important clauses in key international agreements

In addition to the general principles and obligations set out in the Vienna Convention and related jurisprudence, many treaties include language that specifically creates an obligation to abide by its terms.

The International Covenant on Civil and Political Rights[51]

Most major states have signed and ratified (an exception being China, which has signed but not ratified) the ICCPR. Accordingly, per the Vienna Convention, most states are bound under international law to abide by the terms of the ICCPR.

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[44] *Constitution of the Republic of South Africa*, 1996, Article 233 ["South Africa Constitution"].
[45] *Minister for Immigration and Ethnic Affairs v Teoh* 183 CLR 273 (1995) (Australia High Court).
[46] *Görgülü* 111 BVerfGE 307 (2004) (German Federal Constitutional Court).
[47] *Hape*, *supra* note 39.
[48] *United States v PLO* 695 FSupp 1456 (US District Court for the Southern District of New York) (1988), 1459.
[49] ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, Merits, Judgment, ICJ Reports 2010, ("*Ahmadou Sadio Diallo*"), p 639.
[50] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 94.
[51] UN GA res. 2200A (XXI), Doc. A/6316 (1966) ["ICCPR"].

Article 2, para 1 of the ICCPR is an undertaking by all parties to respect and ensure to all individuals within its territories and subject to its jurisdiction the rights recognized in the Covenant. States are additionally required to submit progress reports.

Article 2, paragraph 2 requires State parties to "adopt such legislative or other measures as may be necessary to give effect" to the Covenant rights. This Article reflects the general principle on treaty ratification expressed in the Vienna Convention – states are obligated to comply with the Covenant. How they elect to do this is up to them.

The **Inter-American Court of Human Rights, in an advisory opinion requested by Costa Rica, held that there is an internationally enforceable duty to comply with the ICCPR.** Each state is obligated under international law to ensure that rights of the Covenant are given effect in domestic law.[52] Accordingly, while treaties "cannot, as such, create direct rights and obligations for private individuals"[53], treaties may create an enforceable duty to make access to such 'rights and obligations' available domestically.

The ICCPR can be invoked directly before the courts in certain states such as France,[54] Finland,[55] and the Czech Republic.[56]

In states where the ICCPR is not directly available before national courts, the issue of competing international and national law once again arises. Several bodies and courts have held that **domestic law must be compatible with obligations under the Covenant**. In *Tae Hoon Park v Republic of Korea*, the Human Rights Committee held that it is "incompatible with the Covenant that the States party has given priority to the application of its national law over its obligations under the Covenant."[57] The Human Rights Committee reached a similar decision in its Comments on Ireland, holding that domestic law must be applied in a manner consistent with the ICCPR. Going a step further, in Comments on Estonia, the Human Rights Committee held that **the ICCPR requires "effective precedence over any inconsistent legislative act**."[58]

The Human Rights Committee has stated that all national constitutions must comply with the ICCPR to be valid.[59] The Committee went on to state that "[t]he inconsistency of domestic law with the provisions of the Covenant not only engenders legal insecurity but it likely to lead to violations of rights protected under the Covenant."[60] It is clear that in the eyes of international law, there is an obligation for states to abide by the substantive rules of the ICCPR and a procedural obligation to ensure that domestic law is maximally

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[52] Advisory Opinion OC-7/86, Inter-American Court of Human Rights, Sr. A, Judgments and Opinions, No. 7, 1986, para 14, 35.
[53] Advisory Opinion on the Jurisdiction of the Courts of Danzig, PCIJ Ser. B No 15 (1928), para 3-18
[54] French Constitution of 4 June 1958, Article 55.
[55] *Sara et al v Finland*, Comm. No. 431/1990 (1994), Doc. CCPR/C/50/D/431/1990, para 4-7
[56] Constitution of the Czech Republic, Article 10.
[57] Comm. No. 628/1995 (1998), Doc. CCPR/C/64/D/628/1995, para 10.4
[58] CCPR/C/79/Add.21, para 9, 18
[59] Concluding Observations on Armenia, Doc. CCPR/C/79/Add.100, para 7.
[60] *Ibid.*

protective of Covenant rights.[61] The Human Rights Committee has openly criticized states that have failed to be sufficiently protective of Covenant rights under their constitutions and/or domestic law.[62]

The ICJ has also held (though in a non-binding advisory opinion) that the ICCPR and other human rights agreements such as the ICESR and the Convention on the Rights of the Child, are still applicable in times of internal struggle or armed conflict. Moreover, the ICJ held that where Israel elects to delegate authority to the Palestinian Authorities, it is obligated not to impede the exercise of ICCPR rights.[63]

UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[64]

Article 2(1) of the Convention states that “[e]ach state party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory.”

Article 4(1) goes on to specify that each state “shall ensure that all acts of torture are offences under its criminal law.”

These Articles, in tandem with Article 18 of the Vienna Convention, oblige a signatory or ratified state to take legislative action to ensure the prohibition of torture, or at least, not to take legislative action that would frustrate the object of the Convention. In other words, regardless of the source of the obligation (the Torture Convention or the Vienna Convention), **states in any stage of Convention accession are legally obligated under international law not to pursue domestic policies that would allow torture**. Given the *jus cogens* nature of the prohibition on torture, states may not defend a breach on the grounds that they explicitly refused to ratify the Convention or that they have ‘persistently objected’ to the principles espoused in the Convention.

European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 1 of the ECPHR mandates that parties “shall secure to everyone within their jurisdiction the rights and freedoms” of the Convention. In *Ireland v United Kingdom*, the European Court of Human Rights held that Convention rights were to be “directly secured to anyone within the jurisdiction of the Contracting States”.[65] Accordingly, while the Convention is silent on the means necessary to give effect to the rights of the Convention, it is clear that **states parties are obligated to make the Convention rights available under domestic law.**[66]

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[61] For greater discussion, see: Anja Seibert-Fohr, “Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its article 2, para 2”, Max Plancy Yearbook of United Nations Law, 5 2001 399, 441 [“Seibert-Fohr”]

[62] See, for example: Concluding Observations on Nigeria, Doc. CCPR/C/79/Add.65, para 14.

[63] *Legal Consequences of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports, 2004, p 136.

[64] GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984).

[65] 25 European Court of Human Rights, Ser. 5 (1978), p 421-422.

[66] Seibert-Fohr, *supra* note 60.

United Nations Convention on the Rights of the Child[67]

The Convention on the Rights of the Child sets out many specific domestic actions that state parties must fulfill. State parties "shall take all appropriate measures to ensure that the child is protected against all forms of discrimination…"[68] and "shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention."[69]

A lengthy quotation from the Supreme Court of Canada summarizes a dualist interpretation of the legal weight to be afforded to ratified, un-transformed treaties such as the Convention on the Rights of the Child:

> *Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the Convention on the Rights of the Child, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. [….] Its provisions therefore have no direct application within Canadian law. … Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. […] The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the Universal Declaration of Human Rights, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations Declaration of the Rights of the Child (1959), in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.*[70]

Convention on the Prevention and Punishment of the Crime of Genocide

The prohibition on genocide is widely considered a principle of *jus cogens* in customary international law – a principle from which derogation is never permissible. In addition to being a *jus cogens* norm, in the *Barcelona Traction Case*, the ICJ stated that the prohibition against genocide is an "obligation erga omnes", in other words, a duty that all states owe to the international community of nations.[72]

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[67] 20 November 1989, United Nations, Treaty Series, vol. 1577
[68] Article 2(1)
[69] Article 4
[70] *Baker v Canada(Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, p 861-862.
[72] *Barcelona Traction, Light and Power Co. Ltd (Belgium v Spain)* (1970) ICJ 3, 32

Accordingly, irrespective of the status of a state's accession and/or transformation of the Genocide Convention, it is bound unequivocally by an obligation to prohibit and prosecute acts of genocide under international law. Similar principles apply to the prohibition on torture noted in the section above.

International criminal courts and tribunals, such as the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, and the Special Court for Sierra Leone are tasked which trying alleged perpetrators of genocide, crimes against humanity, war crimes and crimes of aggression where domestic courts are unwilling or unable to assume jurisdiction.[73]

While decisions of these bodies are not binding on domestic courts in most states, as the Supreme Court of Canada noted in *Mugasera v Canada*, "[t]he importance of interpreting domestic law in a manner that accords with the principles of customary international law and with Canada's treaty obligation was emphasized in *Baker…*. In this context, international sources like recent jurisprudence of international criminal courts are highly relevant…"[74]

3. Role of customary international law

This section is not a comprehensive treatment of human rights in customary international law. I have included this last section to provide a brief overview of some of the ways that customary international law may oblige a state to uphold international human rights norms even where not bound by a treaty.

The general rule in international law is that treaties are only binding on states that have ratified or acceded to their terms. The exception to this rule is the application of customary international law. Customary international law is "the behaviour of states that they regard as binding."[75] Norms of customary international law are sufficiently entrenched and accepted in international practice such that so long as a state has not persistently objected, **rules of customary international law are binding on all states.** Customary international law is identified as a source of international law distinct from treaty-based law by Article 38 of the Statute of the Permanent Court of International Justice, confirmed by the ICJ in *Nicaragua v USA.*[76] Custom has two essential elements – *usus* (evidence of general practice) and *opinion juris* (accepted by law). For a principle to meet the threshold of custom, states must generally abide by it and understand compliance to be required.

Customary international law may originate in, be shaped by, or be codified in treaties and non-treaty instruments such as declarations and resolutions. Examples of declarations that are considered to espouse principles of customary international law in whole or in part are the Universal Declaration of Human Rights,[77]

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[73] See: Rome Statute of the International Criminal Court, Article 5.
[74] *Mugasera v Canada (Minister of Citizenship and Immigration)* 2005 SCC 40, para 82.
[75] David Matas, "Litigating International Human Rights", Remarks prepared for a Law Society of Zimbabwe workshop, May 14, 2004 <Available: http://www.lrwc.org/litigating-international-human-rights/>
[76] League of Nations, *Statute of the Permanent Court of International Justice*, 16 December 1920, Article 38.2; *Nicarague v USA* (Merits), ICJ Reports (1986) 14, 97.
[77] UN General Assembly, 10 December 1948.

Basic Principles on the Independence of the Judiciary,[78] the Principles relating to the Status of National Institutes (The Paris Principles)[79] and the Declaration on the Rights of Indigenous Peoples.[80]

Of particular importance to international human rights, **certain rights and principles are considered *jus cogens* – peremptory norms "accepted and recognized by the international community of States as norm[s] from which no derogation is permitted and which can be modified only be a subsequent norm of general international law having the same character".**[81] The prohibitions on torture and genocide have been widely accepted as *jus cogens*. Other examples of *jus* cogens norms include prohibitions on: slavery, piracy, wars of aggression, crimes against humanity, war crimes and apartheid.[82] Jus *cogens* norms elevate customary international law even further. **While norms of customary international law bind all states except persistent objectors, *jus cogens* norms bind all states without exception.**

As with principles set out in treaties that have been ratified but not domestically transformed, courts may look to rules of customary international law to guide interpretation of domestic law. In monist states where international law can be part of domestic law without additional action, rules of customary international law may be upheld by domestic courts. In South Africa, for example, the constitution explicitly recognizes the binding force of customary international law where not explicitly contradicted by statute. Article 232 states that "[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."[83] Even in dualist states where international law requires domestic implementation to have binding effect, such as Canada, courts may look to principles of customary international law as "soft" sources to guide interpretation. The Supreme Court of Canada noted that there is a **general presumption that legislation will comply with international legal obligations, which includes treaties and customary international law**.[84]

I trust the above is of assistance. Please contact me if you have any questions or require additional information.

[78] Endorsed by the UN General Assembly Res 40/32, 29 November 1985; 40/146, 13 December 1985.
[79] UN General Assembly, 20 December 1993.
[80] UN General Assembly, 13 September 2007.
[81] Vienna Convention, *supra* note 1, Article 53.
[82] M Cherif Bassiouni, "International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes'", 59 Law and Contemporary Problems 4, p 68.
[83] South Africa Constituon, *supra* note 45, Article 232.
[84] *Hape*, *supra* note 39.