WHAT IF ANYTHING IS THE RELEVANCE OF UNINCORPORATED TREATIES, INTERNATIONAL AGREEMENTS AND CONVENTIONS IN ENGLISH LAW?

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Introduction

'Treaty' as a Contract

In the Vienna Convention on the Law of Treaties, a treaty is defined as 'an international agreement concluded between States in written form and governed by international law'.[1] Other names for treaties include Convention and Agreement.[2] In this essay, they are collectively and interchangeably referred to as unincorporated 'treaties', 'obligations', or 'instruments'. Like a contract, a treaty is a voluntary agreement, with terms and potential remedies for breaches,[3] between parties that have privity with each other.[4] Both treaties and contracts give rise to obligations that are recognised and enforceable by law. For instance, a ratified international treaty binds a signatory nation-state on the international plane.[5] However, in the case of a treaty, international recognition does not automatically translate into domestic recognition.

Ratified, but Unincorporated – A Tale of Two Planes

In 'monist' countries like The Netherlands and Germany, treaties that are ratified by their Governments on the international plane are automatically recognised on the domestic plane.[6] In contrast, the UK takes a 'dualist' approach, which is seen as the 'necessary corollary of Parliamentary sovereignty'.[7] As a result, every time an international treaty requires domestic recognition, the treaty-making Executive must seek legislative confirmation.[8]

Relevance by Implication – From an Interpretative Aid to a 'Relevant Consideration'

Nonetheless, some unincorporated treaties, although non-binding, have borne persuasive *relevance* in domestic courts adjudicating on the *process* of justiciable government decision-making. However, determining that an obligation may/must be taken into consideration in the

[1] Vienna Convention on the Law of Treaties (published 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 2(1)(a).
[2] House of Commons Information Office, *Procedure Series: Treaties* (Factsheet No. P14 Ed 3.6, August 2010) < www.parliament.uk/globalassets/documents/commons-information- office/p14.pdf > accessed 30 August 2020.
[3] Curtis J Mahoney, 'Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties' (2007) 116 Yale LJ 824.
[4] Michael Waibel, 'The Principle of Privity' in Michael J Bowman (ed), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018).
[5] Lord Mance, 'International Law in the UK Supreme Court' (King's College, London, 13 February 2017) < www.supremecourt.uk/docs/speech-170213.pdf > accessed 14 September 2020.
[6] Mario Mendez, 'The Legal Effects of Treaties in Domestic Legal Orders and the Role of Domestic Courts' in *The Legal Effects of EU Agreements* (Oxford University Press 2013) <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199606610.001.0001/acprof-9780199606610-chapter-2> accessed 14 September 2020.
[7] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017]UKSC 5 [57].
[8] Ibid.

process of decision-making risks involving the court in the non-justiciable task of interpreting the *substance* of the obligation.[9] This will be referred to as the *process-substance* issue. Notably, this issue points to the fact that, because *process* sometimes acquires a *substantive* significance, certain unincorporated treaties discussed in this essay have meaningfully shaped the development of the common law.

This essay traces how unincorporated treaties have acquired *relevance* in English common law from (1) the use of unincorporated instruments as interpretative aids in the construction of rights enshrined in the European Convention on Human Rights (ECHR)[10] to (2) the nascent emergence of certain unincorporated treaties as mandatory (not merely discretionary) 'relevant considerations' for policy decisions.[11]

Furthermore, there is an important difference between the use of unincorporated instruments as (1) interpretative aids for the clarification and construction of incorporated ECHR rights and (2) mandatory 'relevant considerations' *in their own right*. Although not perfectly parallel, this difference is coterminous with the difference in contract law between two types of implied terms: (a) the use of a pertinent trade custom/usage to clarify or supplement the meaning of an express obligation,[12] and (b) the act of discovering a new implicit obligation.[13]

No *Relevance* without Compatibility

In light of 'dualism', both types of *relevance* by implication naturally have normative limits. Parliamentary supremacy is the rationale behind the 'dualist' approach. According to the principle of legality, only parliament (an elected body) can override fundamental rights of individual citizens in a democratic polity, through express legislative words.[14] Hence, unincorporated obligations are *relevant* to the extent that they pose no issue of incompatibility with extant rights.

I. Interpretative Relevance – The Construction of ECHR Rights

Reception by Parliament is the main way that international treaties enter English law. In a sense, there are two contracts (and contractual contexts): (i) the international treaty and (ii) the domestic law. Hence, a right or obligation from a ratified international instrument is not transposed from international to domestic law, 'unless and until it has been incorporated into the law by legislation'.[15]

Reception by the judiciary through the common law is the second possible domestic point of

[9] In *R (on the application of SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16 [90], it was held that 'UK courts have no jurisdiction to interpret or apply unincorporated treaties'.
[10] Interpretative aids are analysed in part II of this essay.
[11] 'Relevant considerations' are analysed in part III of this essay in relation to the case of *Plan B Earth (and others) v Secretary of State for Business, Energy, and Industrial Strategy* [2018] EWCA Civ 214.
[12] *Hutton v Warren* [1836] EWHC J 61, (1836) 1 Meeson and Welsby 466, 150 ER 517.
[13] *Marks and Spencer plc v BNP Paribas Securities Services* Trust [2015] UKSC 72.
[14] *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 [131] (Lord Hoffman); *R (Morgan Grenfell) v Special Commissioner of Income Tax* [2003] 1 AC 563 [45]; *R (Black) v Secretary ofState for Justice* [2017] UKSC 81; *R (Lumba) v Secretary of State for the Home* [2011] UKSC 12.
[15] *JH Rayner (Mincing Lane) v Department of Trade* [1990] 2 AC 418 [500].

entry for international instruments, referred to in this essay as *relevance* byimplication. However, as the judiciary is entrusted to interpret and enact laws made by Parliament, a treaty without parliamentary confirmation is non-justiciable and without direct effect.[16] With this in mind, it is now important to turn to a Convention that went unincorporated for almost half a century, the ECHR.

In 1951, the UK ratified the ECHR.[17] In the intervening period between ratification and incorporation via the Human Rights Act 1998 (HRA), ECHR claims by British citizens were only justiciable in the Strasbourg Court.[18] Following incorporation of the ECHR into municipal law, those ECHR claims became justiciable in domestic courts.[19] A special class of unincorporated instruments – *inter alia* the United Nations Convention on the Rights of a Child (UNCRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) – have been used as interpretative aids for the construction of incorporated ECHR rights in domestic courts.

The International Context of Domestic Law

In the introduction of this essay, it is recognised that the relevance of unwritten words in the interpretation of written instruments is not foreign to English legal custom. By way of implied terms, context has supplied cogent meaning to contracts. Unincorporated words can be implied into a written instrument because no agreement is a space-time capsule inhabiting a vacuum. It would be prohibitively time-consuming and costly (if not impossible) for a written instrument to expressly encompass every contextually relevant eventuality or reference that may arise in the course of a long-term agreement.[20]

As an international treaty, the ECHR must be interpreted in accordance with the Vienna Convention, which states that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties.'[21] As a result, it is not highly disputed that Convention rights protected in English law by the HRA can also be interpreted in light of international treaties, such as the UNCRC and CEDAW, that apply in a particular sphere.[22]

In *Demir v Turkey*,[23] the European Court of Human Rights (ECtHR) re-emphasised the importance of interpreting the ECHR and constructing Convention rights, in the particular circumstances of a given case, within its expansive International context:

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[16] *Miller* (n 7) [159].
[17] Council of Europe, 'Chart of Signatures and Ratifications of Treaty 005: Convention for the Protection of Human Rights and Fundamental Freedoms' <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures> accessed 21 September 2020.
[18] Alice Donald, James Gordon, and Philip Leach, *The UK and the European Court of Human Rights* (Equality and Human Rights Commission, Research Report 83, 2012) <www.equalityhumanrights.com/sites/default/files/83._european_court_of_human_rights.pdf> accessed 12 September 2020; UK Supreme Court, 'The Supreme Court and Europe: What is the Relationship between the UK Supreme Court, the European Court of Human Rights, and the Court of Justice of the European Union?' < www.supremecourt.uk/about/the-supreme-court-and-europe.html> accessed 30 September 2020.
[19] Ibid.
[20] *Globe Motors v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 [64]-[68].
[21] Vienna Convention (n 1) art 31(3).
[22] *R (SG and Others)* (n 9).
[23] (2009) 48 EHRR 54 [85] (emphasis added).

> The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European states reflecting their common values. The consensus emerging from specialised international instruments and from thepractice of contracting states may constitute a *relevant consideration* for the Court when it interprets the provisions of the Convention in specific cases.

Furthermore, in line with this very principle, the UK Supreme Court has confirmed the *relevance* of specialised international treaties when interpreting Convention rights protected in domestic law. In *ZH (Tanzania) v Secretary of State for the Home Department*, Baroness Hale quoted another Grand Chamber (ECtHR) case, *Neulinger v Switzerland*,[24] that the Convention 'cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law'.[25]

An Umpire of Statutory Meaning – 'Best Interests' Cases

In English common law, there is a 'strong presumption in favour of interpreting an English statute in a way which does not place the United Kingdom in breach of its international obligations'.[26] This is where the 'persuasive' nature of the *relevance* of unincorporated instruments comes into play and has been seen in particular in cases relating to the UNCRC.

In *Smith v Smith*, Baroness Hale stated that, when 'two interpretations of [certain] regulations are possible, the interpretation chosen should be that which better complies with the commitment to the welfare of children with which this country has made by ratifying the United Nations Convention'.[27] In so doing, Baroness Hale was referring to the 'best interests' principle of the UNCRC. Essentially, in actions concerning children, across public/private social welfare institutions, courts, administrative, and legislative bodies, the best interests of the child shall be a primary consideration.[28] This has been an influential consideration as it has given rise to a category of 'best interest' cases.

'Best Interests' as *Process* and *Substance*

Not only is the 'best interests' principle taken into consideration, but even General Comments from the Committee on the Rights of Children are considered when construing the 'best interests' principle. In *SG*, Lord Carnwath described General Comment No. 14 as 'authoritative guidance to the meaning of Article 3.1'.[29] This drives home the essence of '*relevance* by implication'; it would be an artifice to divorce domestic terms and obligations from the implications and analogues of their context.

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[24] (2010) 54 EHRR 1087.
[25] [2011] UKSC 4 [21].
[26] *Assange v Swedish Prosecution Authority* [2012] UKSC 22 [122] (Lord Dyson).
[27] [2006] UKHL 35 [78].
[28] United Nations Convention on the Rights of the Child (Resolution 44/25, adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 3.
[29] Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1), CRC/C/GC/14, 29 May 2013.

General Comment No. 14 describes the 'best interests' principle as a threefold concept whereby (1) a substantive right, (2) a fundamental interpretative legal principle, and (3) a rule of procedure.[30] This conceptualisation in a way highlights the difficulty of the universal *process-substance* issue. The 'best interest' principle is not just procedural, but also a substantive right. This means that '*relevance* by implication' risks the courts interpreting the meaning of a non-justiciable obligation. In this essay, it is suggested that, despite this, the absolute limiting factor is that the construed obligation must not be incompatible with extant fundamental rights (see part III).

More importantly though, the domestic context matters just as much as the international context. Domestic statutory guidance such as the *Framework for the Assessment of Children and Families* explicitly refers to UNCRC principles in guidance for the assessment of Article 17 of the Children Act 1989. Domestic legislation also embodies various principles in the UNCRC. For instance, section 11 of the Children Act 2004 imposes a duty on government bodies to promote and safeguard the welfare of children. This reinforces the compatibility principle discussed in part 4 in that, usually, unincorporated principles possess a degree of ubiquity, which justifies their '*relevance* by implication'.

However, ubiquity does not mean that everything is compatible. The courts assess the quality of authority as has been suggested in cases relating to the United Nations Convention on the Rights of Persons with Disability. In *R (Davey) v Oxfordshire* [31] and *R (Leighton) v the Lord Chancellor*,[32] the Articles of the UNCPRD relied upon, were deemed to be broad and aspirational statement. As a result, it was held that the UNCRPD articles were not of much assistance when seeking to interpret Article 14 of the ECHR.

Article 14 has been carefully considered and explained on numerous occasions by the appellate courts in this jurisdiction and by the ECtHR. Those were considered to be much more fruitful sources of guidance than the general terms of the UNCRPD. In contrast to the UNCPRD, English courts have not hesitated to accord reverence to the CEDAW, which is seen to provide more specific and vivid statements of principle.[33]

II. 'Relevant Consideration' – Towards a Domestic Ground for Judicial Review

More recently (albeit tentatively), an unincorporated instrument may be emerging as something akin to a 'relevant consideration.' This marks a movement closer to a much more proximate domestic ground for judicial review, rather than an interpretative aidthat serves as a proxy for an ether of contextual references. In *Plan B Earth v Secretary of State of Transport*, the Court of Appeal found that a government decision regarding the expansion of Heathrow International Airport was unlawful because it failed to 'take into account' the Paris Agreement, an unincorporated instrument.[34]

[30] Ibid.
[31] [2017] EWCA Civ 1308 [62].
[32] [2020] EWHC 336 [220].
[33] See the 'abortion cases': *R (A and B) v Secretary of State for Health* [2017] UKSC 41 and *Re: Northern Ireland Human Rights Commission v Attorney General of Northern Ireland & Department forJustice* [2018] UKSC 27.
[34] *Plan B* (n 11) [184].

Notably, the *Plan B Earth* Court does not discover an implicit obligation to comply with the terms of the Paris Agreement. Rather, the implicit obligation is to consider the Paris Agreement and demonstrate that consideration as a part of the decision-making process.[35] Hence, the Paris Agreement (and unincorporated instruments like it) do not constitute incorporation through 'the back door'.[36]

Nonetheless, *process*-oriented or *substantive*, the Paris Agreement has meaningfully shaped the development of the common law. Specifically, *Plan B Earth* marks (1) the recognition of the Paris Agreement as 'government policy'[37] and (2) a delay of the Heathrow expansion until the Government revisits the Airport National Policy Statement (ANPS) in accordance with the Planning Act 2008, i.e., by taking the Paris Agreement into consideration.[38] Of course, this is subject to the Supreme Court's further consideration.[39] To understand the question that will come before the Supreme Court, the story behind the Paris Agreement must now be considered.

In November 2016, the United Kingdom ratified the Paris Agreement.[40] The Agreement enshrines a firm commitment to restricting the increase in the global average temperature to 'well below 2°C above pre-industrial levels and [to pursue] efforts to limit the temperature increase to 1.5°C above pre-industrial levels' (article 2(1)(a)). It also includes an aspiration to achieve net zero greenhouse gas emissions during the second half of the 21st century – a 'balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century' (article 4(1)).[41]

These unincorporated obligations are not themselves binding in English law. And each party to the Paris Agreement is able to decide how it will domestically implement these obligations. However, these obligations must be 'taken into consideration'. The reason for this lies in domestic legislation and statutory guidance.

The Statutory Framework

The Planning Act 2008 (PA) replaced the Town Country Planning Act 1980 as the new procedure for the development of nationally significant infrastructure projects.[42] Concurrently, the Climate Change Act 2008 (CCA) was passed, which established the Committee on Climate Change (CCC), an independent public body to advise the Government on matters related to statutory

[35] Ibid [38].
[36] Ibid [226].
[37] Ibid [224].
[38] Ibid [285].
[39] Catherine Howard, Helena Mouratov, 'Heathrow Airport – Plan B Earth case given permission to appeal to Supreme Court' (*Herbert Smith Freehills*, 19 May 2020) <https://hsfnotes.com/realestatedevelopment/2020/05/19/heathrow-airport-plan-b-earth- case-given-permission-to-appeal-to-supreme-court/> accessed 21 September 2020.
[40] Arthur Nelsen, 'UK ratifies Paris Climate Agreement' (The Guardian, 17 November 2016) <https://www.theguardian.com/environment/2016/nov/17/uk-boris-johnson-ratifies-paris- climate-agreement> accessed 21 September 2020.
[41] Department for Business, Energy and Industrial Strategy, *Explanatory Memorandum on the Paris Agreement* (Cm 9338, 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/558185/EM_Paris_Ag.pdf > accessed 21 September 2020.
[42] Planning Act 2008, Introductory text.

carbon reduction targets and greenhouse gases.[43]

Section 5 of the Planning Act 2008 governs the Secretary of State's power to designate national policy statements (NPS) and its content. Section 5(7) requires that a NPS 'must give reasons for the policy set out in the statement'. Section 5(8) stipulates that the 'reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change'. In June 2018, the Secretary of State designated the ANPS without taking the Paris Agreement into consideration.[44]

'Government Policy' – Statutory Interpretation

For it to be unlawful not to take the Paris Agreement into account, firstly, it must be established that the Paris Agreement is 'government policy' pursuant to s5(8), Planning Act 2008. While the Divisional Court held that the UK's climate change policy arises from the Climate Change Act 2008 (not the Paris Agreement),[45] the Court of Appeal disagreed because 'Government policy' does 'not have any specific technical meaning' and 'should be applied in their ordinary sense to the facts of a given situation'.[46]

As a result, the Court concluded that government policy is not limited to the Climate Change Act 2008. This 'government policy' was constructed from the reports and ministerial statements in the lead-up to and aftermath of ratification that indicated the need to include the Paris Goals into English law and re-iterated commitment to its goals. The Government's 2017 *Clean Growth Strategy* stated that the Paris commitments meant that the shift to clean growth 'will be at the forefront of policy and economic decisions by the government'.[47]

In the cases discussed in part I with reference to the unincorporated obligation as an interpretative aid, the path of *relevance* between the international and domestic plane is primarily paved by international sources such as the Vienna Convention and Strasbourg case law that are then received through common law. Statutory confirmations of those obligations only secondarily and indirectly influence their construction in English common law.

However, in *Plan B Earth*, the path is paved, not by an international source, but primarily and directly by domestic statutory guidance and/or ministerial documents that mention the Paris Goals. This more proximate route of *relevance* marks the emergence of an unincorporated obligation as the basis of a domestic justiciable ground for judicial review, namely 'relevant consideration'.[48]

The Width of the Secretary of State's Discretion and 'Obvious Materiality'

The decision-maker has an 'obligation to take reasonable steps to obtain information which is legally relevant but one which he is not required (e.g. by legislation) to take into account'.[49] At

[43] Climate Change Act 2008, Introductory text.
[44] *Plan B* (n 11) [3].
[45] Ibid [194].
[46] Ibid [224].
[47] Ibid [209].
[48] *Roberts v Hopwood* [1925] AC 578.
[49] *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977]

face value, it would seem that a relevant consideration is just that: relevant, but not *mandatory*. However, that is not the case in *Plan B Earth* where it has been held that, despite the fact that the Secretary of State has a 'discretion' in these matters, it was mandatory for it to take the Paris Agreement into consideration. Once the Paris Agreement is deemed 'government policy', and hence a *potential* relevant consideration, it must be clarified how it emerges as a *mandatory* relevant consideration.

The 'established principle is that the decision-maker's judgement in such circumstances can only be challenged on the grounds of irrationality'.[50] By a rule of law, it is held that it is irrational to not take the Paris Agreement into account. This is the basis for the 'obvious materiality' test:

> It is well established in public law that there are some considerations that must be taken into account, some considerations that must not be taken into account and a third category, considerations that may be taken into account in the discretion of the decision-maker … [In] the third category … there can be some unincorporated international obligations that are 'so obviously material' that they must be taken into account. The Paris Agreement fell into this category.[51]

Following this, it is stipulated that, if the Secretary of State would have appreciated that he had any discretion, the only reasonable view open to him was that the Paris Agreement was so obviously material that it had to be taken into account.[52]

It seems that an approach that mandates that a decision-maker have regard to the Paris Agreement potentially involves correctly interpreting it or at least its importance (by analogy with the interpretation of policy *Tesco Stores v Dundee City Council*).[53] In another context, even the judgement that the UNCPRD is less relevant than other authorities involved some sort of judgement of its contents being generic.

In *R (Corner House and Others) v Director of the Serious Fraud Office*,[54] it was suggested that the act of the court interpreting an unincorporated provision is questionable. Not only this, but it was also suggested that it would be unfortunate if decision-makers would, as a result, be deterred from giving effect to their understanding of international obligations by fearing that their decisions would be 'vitiated by an incorrect understanding'.[55]

The *process-substance* issue remains an open issue. The only saving grace here may be that any interpretation of meaning must be grounded in domestic statutory guidance and policy. While the issue of the United Kingdom's compliance with a treaty is very much a matter of government policy and practice,[56] if it is the government's policy to give effect to a particular treaty, it would

AC 1014 [1065B].
[50] *R (on the application of Khatun) v Newham London Borough Council* [2004] EWCA Civ 55 [35]; R *(on the application of France) v Royal London Borough of Kensington and Chelsea* 2017 EWCA Civ 429 [103]; *Flintshire County Council v Jeyes* [2018] EWCA Civ 1089 [14].
[51] *Plan B* (n 11) [237].
[52] Ibid.
[53] [2012] UKSC 13.
[54] [2008] UKHL 60.
[55] Ibid [40].
[56] *Ahmed v HM Treasury* [2010] UKSC 2.

be an error of law to not take that treaty into account.[57]

For instance, in two cases, *R v Secretary of State for the Home Department ex parte Launder*[58] and *R v Director of Public Prosecutions ex parte Kebilene*,[59] the court considered the meaning of the state's obligations under the ECHR before it had been incorporated into domestic law. However, incorporation was within a few years' grasp in both cases, and, by that point, there was a general consensus that the ECHR did inform government policy.

III. Compatibility – A Principle-Based Limitation to *Relevance*

One way to prevent any excess of '*relevance* by implication' is to query whether there is a principle-based limitation. Be it contract or public law, the common law strives to develop on the basis of principles in an iterative and piecemeal fashion. Ideally, these principles cohere across disciplines of the law. The fine-grained judicial activity that enables unincorporated words to be read into a contract must not unduly shake the edifice of privity and freedom of contract. In other words, any implied term must not contradict express terms.[60]

Competing Rationales of 'Dualism'

Similarly, recourse to unincorporated treaty obligations must not offend the constitutional principle that underpins the 'dualist' approach, namely parliamentary supremacy. In other words, an unincorporated obligation must be compatible with those fundamental individual rights that can only be overridden by parliament. There can be no *relevance* without compatibility.

Lord Steyn articulated the rationale for the 'dualist' approach to treaty-incorporation 'as a form of protection of the citizen from abuses by the executive'.[61] Sales and Clement have critiqued this formulation and suggested that the 'true' rationale is that 'the Crown cannot change domestic law by the exercise of its powers under the prerogative, which is a rule reflecting and supporting the sovereignty of Parliament and its primacy as the domestic law-making institution in our constitution'.[62]

The *Raison d'Être* of Parliamentary Supremacy and Dualism

Although the two proposed rationales are viewed as discrete, here, it is argued that there is a strong connection between the two rationales. In order to understand this connection, we must ask, after all, why is Parliament meant to be supreme? Parliament is accorded its supreme position because it derives its legitimacy from the fact that it is meant to be the only democratically elected law-making body in the triumvirate of the English Constitution.[63]

Arguably, Sales and Clement's rationale privileges the supremacy of a democratically elected

[57] *AS (Afghanistan) v Secretary of State for Home Department* [2013] EWCA Civ 1469.
[58] [1997] 1 WLR 839.
[59] [2000] 2 AC 326.
[60] *Marks and Spencer plc v BNP Paribas Securities Services Trust [2015] UKSC 72* [28].
[61] *Re McKerr* [2004] UKHL 12 [50].
[62] P Sales & J Clement, 'International Law in Domestic Courts: The Developing Framework' (2008) 124 LQR 388, 398.
[63] A V Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, Macmillan and Co. 1915) xcvii.

parliament *in order to* protect the citizen from potential abuses by a body that has not been democratically elected, the executive. As a result, the *raison d'être* (of the 'dualist' approach) is the protection of existing individual rights at law that are relied upon by citizens of a democratic polity.

On the basis of his analysis of *The Parlement Belge*,[64] *Porter v Freudenberg,*[65] and *Imperial Japanese v P & O Steam Navigation Company*,[66] legal scholar Eirik Bjorge propounded that the 'test for whether the court could base its judgement' on an international instrument is not whether it has 'been incorporated or not'.[67] Instead, 'an unincorporated treaty can be operative so long as it does not deprive British citizens of rights which they would otherwise have had'.[68]

Unincorporated Instruments in the Hierarchy of Direct Effect

This is also in line with the principle of legality, whereby only the use of express words found in legislation can override such fundamental rights, not unincorporated obligations. In fact, when constructing a hierarchy of direct effect, customary international law can be considered as higher than unincorporated obligations (but lower than domestic legislature). Even though customary international law is more readily 'a source of common law rules' than unincorporated treaties, it 'will only be received into the common law if such reception is compatible with general principles of domestic constitutional law'.[69]

As a result, from a normative perspective, any exceptional rule of *relevance* must necessarily mark a line in the sand between, on the one hand, an unincorporated obligation that particularises or clarifies an incorporated right in an *interpretative* manner or even as a 'relevant consideration' in its own right and, on the other hand, one that substantively negates an existing right.

Conclusion

The general 'dualist' rule is that signed and/or ratified international instruments do not enter English law without legislative incorporation. Hence, any such unincorporated instruments are generally non-justiciable in domestic courts and do not have direct effect. Nonetheless, some unincorporated treaties have borne persuasive *relevance* in English law.

More importantly, despite being more relevant to *process* (than *substance*) and more persuasive (than binding), unincorporated treaties have meaningfully shaped the development of the common law.

This is why it becomes important to trace this special '*relevance* by implication' from (1) the use of unincorporated instruments as interpretative aids in the construction of ECHR rights to (2) the nascent emergence of certain unincorporated treaties as mandatory (not merely discretionary) 'relevant considerations' for policy decisions. This essay also identifies an inherent *process-substance* issue whereby, sometimes, it is not possible to adjudicate that an unincorporated

[64] [1879] 4PD 129.
[65] [1915] 1KB 857.
[66] [1895] AC 644.
[67] *The Parlement Belge* (n 64).
[68] Eirik Bjorge 'Can Unincorporated Treaty Obligations Be Part of English law?' [2017] PL 571-591.
[69] *R (Freedom and Justice Party) v Foreign Secretary* [2018] EWCA Civ 1719 [113]-[117].

obligation is *process*-relevant without interpreting its *substantive* meaning. Finally, because the common law progresses on the basis of principle, the normative limit to *relevance* is extrapolated from the *raison d'être* behind the principle of dualism, namely that (3) there is no *relevance* without compatibility.