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The Application of International Law in the Municipal Legal System: A Highly Ad Hoc and Ambivalent Approach in Bangladesh Epitomizing a Broader Hermeneutics Trend?

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ABSTRACT

National courts are increasingly, if not routinely, dealing with questions of international law in a myriad of ways. The Supreme Court of Bangladesh (SCB) is no exception to this. However, through an extensive survey of the SCB's judgments, this Article demonstrates when and under what conditions the SCB would apply international law in cases before it. While the legal system of Bangladesh is, in theory, dualist, the practice is not always uniform. This Article argues that this trend emanating from the precedents of the SCB is not by any means unique to Bangladesh. It finds that such an ad hoc approach to the application of international law is not only problematic for the development of the corpus of national law of Bangladesh but also breeds confusion among litigants and professionals dealing with law without any formal training on international law. This Article argues that this is neither monism nor dualism but a form of 'oracle' by invoking (or not invoking) international law on a case-by-case basis.

INTRODUCTION

Due to the expanding embrace of the scope of international law, the use and application of international law, particularly in national courts and tribunals, have become a common phenomenon.[1] Indeed, in some areas of law, the demarcation line between national and international law in the contemporary world seems to be quite blurred. Matters such as extradition, sovereign immunity, international criminal law, and protection of the environment appear to fall into this category. Although the Supreme Court of Bangladesh (SCB) follows a dualist approach to the application of international law in the domestic legal

1 On the other hand, there are also studies on the use of decisions of domestic courts by the international courts and tribunals. For an overview of the scholarly debate, see André Nollkaemper, *The Role of Domestic Courts in the Case Law of the International Court of Justice*, 5 CHINESE J. INT'L L. 301 (2006).

system,[2] that approach has been far from uniform. The approach of the SCB may principally be summarized in three different categories. In the first approach, the SCB has solely relied on the domestic law, read in nearly clinical isolation from international law.[3] In the second approach, the SCB has used international law in conjunction with the domestic law to settle the case at hand.[4] In the third approach to cases, the SCB has resorted to international law to fill any void (although reasonable minds may differ on its existence) in the national law.[5] In other words, the SCB has, on one end of the spectrum, refused to consider international law and, on the other end of the spectrum, invoked international law to direct parliament to pass a law complying with the international legal obligations. Such divergent approaches to the application of international law in the domestic legal system of Bangladesh without any coherent foundation on the lines to be drawn, has arguably rendered the application of international law in the domestic legal system incoherent. This state of affairs is not only at odds with the doctrine of *stare decisis* but would also be unwelcomed by those who want to see more incorporation of international law in the domestic legal system. And those who are skeptical about the direct invocation of international law in the domestic legal system would have little to cheer about either.

This Article does not question the policy wisdom of the application of international law by the national courts and tribunals without an enabling domestic law incorporating international legal obligations in the national legal system. There is an abundance of plausible arguments both for and against applying international law in the national legal system without enabling domestic laws.[6] Nor does this Article seek to explore the question of which organs of the government are best suited to make this choice.[7] It simply seeks to demonstrate that the approach

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2 For an exposition of the meaning of the dualist approach, see *infra* Part I.

3 *See, e.g.*, Saiful Islam Dilder v. Bangladesh, 50 DLR 318 (1998) (Bangl.); (HCD) 324; Bangladesh v. Somboon Asavaham, 32 DLR (AD) 194 (1980) (Bangl.).

4 *See, e.g.*, Z.I. Khan Panna v. Bangladesh, 7 SCOB (2016) HCD 7 (Bangl.); Hussain Mohammad Ershad v. Bangladesh, 21 BLD (AD) 69 (2001), ILDC 476 (BD 2000) (Bangl.); Messrs Haji Azam v. Singleton Binda, ILDC 3085 (BD 1975), 27 DLR (HCD) 583 (Bangl.).

5 *See, e.g.*, Bangladesh National Women Lawyers' Association (BNWLA) v. Bangladesh, No. 5916, ILDC 3088 (BD 1999), (2009) 29 BLD (HCD) 415 (Bangl.).

6 *See* Koh, *infra* note 11; *cf.* Alford, *infra* note 11.

7 In some other areas, this may be a pronounced question in Bangladesh as the SCB has demonstrated a propensity of passing quasi-legislative directives. *See* Md. Rizwanul Islam, *Judges as Legislators: Benevolent Exercise of Powers by the Higher Judiciary in*

of the SCB has been rather ad hoc and convoluted, resulting in incoherent outcomes. In some cases, the Court is overly enthusiastic in embracing international law and has arguably gone well beyond what existing international law dictates. That practice is reminiscent of the idea in scholarly work that there was much more international law "than this world dreams of" and "it is more international law than this world wants."[8] This Article argues that the SCB's existing ad hoc approach to the application of international law is a problem for the doctrine of *stare decisis* as enshrined in Article 111 of the Constitution of Bangladesh. It may even create a mirage on the international plane that ratified treaties would be implemented automatically but may at the same time argue before national courts and tribunals that they do not have any footing in the national legal system unless incorporated by an enabling law.[9]

By deciding whether to apply international law, a national court plays an important role at the intersection of legal orders.[10] Thus, the analysis of this Article could offer some insights on this critical issue

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Bangladesh with Not so Benevolent Consequences, 16 OXFORD UNIV. COMMONWEALTH L.J. 219 (2016); Md. Rizwanul Islam, *Dissecting Quasi-Legislative Judicial Directives of the Supreme Court of Bangladesh*, *in* CONSTITUTIONAL REMEDIES IN ASIA 138–54 (Po Jen Yap ed., 2019); Md. Rizwanul Islam, *Judicial Lawmaking in Bangladesh: Looking Back and Into the Future*, *in* THE CONSTITUTIONAL LAW OF BANGLADESH: PROGRESSION AND TRANSFORMATION AT ITS 50TH ANNIVERSARY 387 (M Rafiqul Islam & Muhammad Ekramul Haque eds., 2023). *See also* Nafiz Ahmed, *Rhetorical Invocation of Constitutional Guardianship as a Justificatory Tool: The Case of Bangladesh* (North South University L., Working Paper Series 1, 2022) (arguing that the SCB has evoked its constitutional guardianship role to engender a version of its desired constitutional balance or political order). However, in some contexts, these broader questions may be pertinent to the core theme of this Article. *See, e.g.*, *Nishat Jute Mills v. Human Rights and Peace for Bangladesh*, C.P.No.3039 of 2019-(SC) AD, ¶ 45 (2020) (Bangl.), where the AD quite strongly castigated the expansive nature of the directives of the HCD by observing:

> [W]e would like to politely point out that the High Court Division, while passing an unnecessary lengthy judgment, has discussed many extraneous matters having no nexus in deciding the merit of the rule. It has also declared a document executed by the Government to be void ab initio without even examining whether by this document the Government has sold any part within the boundary/territory of the river. Moreover, it has also exceeded its jurisdiction relating to *some directions* as discussed (italics added).

8 R.Y. Jennings, *The Judiciary, International, and National, and the Development of International Law*, 45 INT'L & COMPAR. L.Q. 1, 1 (1996).

9 It is not the contention of this Article that the Government has done so in Bangladesh, but such a phenomenon is visible in the context of other countries. *See* Simon Butt, *The Position of International Law Within the Indonesian Legal System*, 28 EMORY INT'L L. REV. 1 (2014).

10 André Nollkaemper, *The Duality of Direct Effect of International Law*, 25 EUR. J. INT'L L. 105 (2014).

and may be relevant for readers with no specific interest in the legal system of Bangladesh but rather a broader interest in foreign or comparative law. It seeks to contribute to the corpus of scholarship on the use of international law in the domestic legal system, particularly from the vantage point of the Global South.[11] Again, while there are

11 There is a rich body of scholarship dwelling on the issue of the application of international law in the national system. *See, e.g.*, Charles G. Fenwick, *The Executive Legislative and Judicial Recognition of International Law in the United States*, 11 MICH. L. REV. 296 (1913); Jonkheer H. F. Van Panhuys, *The Netherlands Constitution and International Law: A Decade of Experience*, 58 AM. J. INT'L L. 88 (1964); Heliliah Bte. Hj Yusof, *Internal Application of International Law in Malaysia and Singapore*, 1 SING. L. REV. 62 (1969); Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277 (1991); Eyal Benvinisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159 (1993); Iwasawa Yuji, *The Relationship Between International Law and National Law: Japanese Experiences*, 63 BRIT. Y.B. INT'L L. 333 (1993); Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions*?, 88 AM. J. INT'L L. 427 (1994); Michele Olivier, *Status of International Law in South African Municipal Law: Section 231 of the 1993 Constitution*, 19 S. AFR. Y.B. INT'L L. 1 (1994); Iwasawa Yuji, *Effectuation of International Law in the Municipal Legal Order of Japan*, 4 ASIAN Y.B. INT'L L. 143 (1995); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); Anne Peters, *Supremacy Lost: International Law Meets Domestic Constitutional Law*, 3 VIENNA ONLINE J. INT'L CONST. L. 170 (2009), https://ssrn.com/abstract=1559002 [https://perma.cc/M4BX-9AAP]; The Hon Michael Kirby AC CMG, *Constitutional Law and International Law: National Exceptionalism and Democratic Deficit?*, 98 GEO. L.J. 433 (2009); Veronika Fikfak, *International Law Before English and Asian Courts: Finding the Judicial Role in the Separation of Powers*, 3 ASIAN J. INT'L L. 271 (2013); Hisashi Owada, *Problems of Interaction Between the International and Domestic Legal Orders*, 5 ASIAN. J. INT'L L. 246 (2015); Lavanya Rajamani, *International Law and the Constitutional Schema*, *in* OXFORD HANDBOOK ON THE INDIAN CONSTITUTION 143 (Sujit Choudhry et al., 2016); Aparna Chandra, *India and International Law: Formal Dualism, Functional Monism*, 57 INDIAN J. INT'L L. 25 (2017); INTERNATIONAL LAW IN DOMESTIC COURTS: A CASEBOOK (André Nollkaemper et al. eds., 2018); Tamar Hostovsky Brandes, *International Law in Domestic Courts in an Era of Populism*, 17 INT'L J. CONST. L. 576 (2019); Ndjodi Ndeunyema, *The Namibian Constitution, International Law and the Courts: A Critique*, 9 GLOB. J. COMP. L. 271 (2020); Prabhash Ranjan, *The Supreme Court of India and International Law: A Topsy-Turvy Journey from Dualism to Monism*, 43 LIVERPOOL L. REV. 571 (2022). Some of this scholarship has focused on the application of specific areas of international law in the national legal system. *See, e.g.*, Edwin D. Dickinson, *International Political Questions in the National Courts*, 19 AM. J. INT'L L. 157 (1925); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999); M. Shah Alam, *Enforcement of International Human Rights Law by Domestic Courts: A Theoretical and Practical Study*, 53 NETH. INT'L L. REV. 399 (2006); Rosalyn Higgins, *The Relationship Between International and Regional Human Rights Norms and Domestic Law*, 18 COMM. L. BULLETIN 1268 (1992); ROSALYN HIGGINS, THEMES AND THEORIES: SELECTED ESSAYS, SPEECHES, AND WRITINGS IN INTERNATIONAL LAW (2009); Luzius Wildhaber, *The European Convention on Human Rights and International Law*, 56 INT'L & COMPAR.

several works dwelling on this issue of application of international law in Bangladesh,[12] this Article is distinct from them in a number of ways. Unlike some of the earlier works, this work has engaged with the development, though selectively, of many other states. It is also comprehensive in the sense that it deals with more precedents in number (many that have not featured in earlier works) and often analyzes them in a more detailed manner. A scholarly work has argued that this kind of analysis may be inchoate in that they cannot capture the underlying constitutional scheme of the state's approach to the application of international law.[13] However, this Article adopts this approach from a conviction that the abstract letters of the Constitution are the bedrock of the interaction; precedents manifest how the words are at play on the ground.[14] It is the Constitution that dictates the mode of interaction between international law and national law on the national plane, but the expressions of the Constitution are enforced and crystallized through precedents. This discourse is relevant not just for

L.Q. 217 (2007); Dia Anagnostou & Alina Mungiu-Pippidi, *Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matters*, 25 EUR. J. INT'L L. 205 (2014). It is quite probable that even this long list is a very truncated one as it only considers works in the English language. While some scholars have put them together, these works are distinct from another line of scholarship on the use of foreign law in domestic legal systems. *See, e.g.*, Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005); Hon. William J. Nardini, Howard & Iris Kaplan Memorial Lecture Series Address at Hofstra University Maurice A. Deane School of Law, Foreign Law in Federal Courts: Challenges for the Twenty-First Century (Mar. 31, 2022).

12 *See* Sheikh Hafizur Rahman Karzon & Abdullah Al-Faruque, *Status of International Law Under the Constitution of Bangladesh: An Appraisal*, 3 BANGL. J. LAW 23 (1999); Dr. Borhan Uddin Khan, *National Implementation of International Humanitarian Law in Bangladesh*, 16 DHAKA UNIV. STUD. PART F 29, 40 (2005); Kamal Hossain & Sharif Bhuiyan, *International Law in Asian and Pacific States, South and Central Asia*, *in* BANGLADESH AND INTERNATIONAL LAW 604 (Simon Chesterman et al. ed., 2019); Md. Johir Uddin Shohag, *A Tale of Two Worlds: Judicial Invocation of International Law in Interpreting Constitutional Rights in the United States of America and Bangladesh*, 19 BANGL. J. LAW 59 (2021); Nakib M Nasruallah, *Constitutional Recognition of Customary International Law in Bangladesh*, *in* PROGRESSION & TRANSFORMATION AT THE CONSTITUTIONAL LAW OF BANGLADESH: PROGRESSION AND TRANSFORMATION AT ITS 50TH ANNIVERSARY 83 (M. Rafiqul Islam & Muhammad Ekramul Haque eds., 2023); Kawser Ahmed, *The Constitution of Bangladesh and International Law*, *in* A HISTORY OF THE CONSTITUTION OF BANGLADESH: THE FOUNDING, DEVELOPMENT, AND WAY AHEAD 44, 49–50 (Ridwanul Hoque & Rokeya Chowdhury eds., 2024). Some of these tend to focus on human rights. *See, e.g.*, Sumaiya Khair, *Bringing International Human Rights Law Home: Trends and Practices of Bangladeshi Courts*, 17 ASIAN Y.B. INT'L L. 47 (2011).

13 *See generally* Ahmed, *supra* note 12.

14 *See generally* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1999).

Bangladesh or its legal system, but also for anyone with interest in international law, as it is well-known among international lawyers that domestic court decisions may provide evidence of state practice.[15]

The first section of this Article presents a brief overview of the three major theories of the application of international law in the national legal system.[16] The second section that follows briefly analyzes the constitutional and statutory framework on the use of international law in Bangladesh. The third section, through its various subsections, demonstrates the divergent use (or nonuse) of international law by the SCB. The fourth section presents some overarching findings from the analysis of the precedents analyzed in the earlier parts of the Article. The Article concludes by summarizing the challenges these practices may pose.

I
THE THEORIES AND APPROACHES TOWARD THE APPLICATION OF INTERNATIONAL LAW IN THE NATIONAL LEGAL SYSTEM

There is an argument that in outright authoritarian regimes or states where democratic institutions are fragile, individuals may resort to international law to circumvent challenges posed by governmental institutions consumed by special interests.[17] Even a casual reader of any casebook or textbook of international law cannot help but notice the ubiquity of national law decisions. And while this may seem to be a phenomenon of the contemporary world in which economic globalization and technology may have increased the interaction between states, it is not a new phenomenon.[18] In many areas (human

15 *See generally* Philip M. Moremen, *National Court Decisions as State Practice: A Transnational Judicial Dialogue*, 32 N.C. J. INT'L L. COM. REGUL. 259 (2006); Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57 (2011).

16 Throughout this Article, the terms "national," "domestic," or "municipal" have been used interchangeably, unless the context clearly implies otherwise.

17 KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2014).

18 *See, e.g.*, the Letter from U.S. Foreign Minster Frank B. Kellogg to Cordenio A. Severance (Sept. 19, 1924), reel 14/frame 61, Frank B. Kellogg Papers, *microformed on* Minn. Hist. Soc'y, stating that "Hughes evidently has the idea that lawyers make the best Ambassadors. Since I have been here [as ambassador to Great Britain] I have been particularly impressed with the advantage of a wide legal experience in the Diplomatic Service. As you know many of the questions which come up involve international law, and many times domestic laws of the countries, especially of one's own country," as quoted in Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J.

rights, labor rights, trade laws, intellectual property, etc.), much of the real application of international law would have to take place on the national plane.[19] However, the cases that this Article analyzes do not seem to conform to any particular pattern. Traditionally, the national courts decisions have given rise to the corpus of international law, especially in areas such as sovereign immunity and the exercise of jurisdiction by states and diplomatic immunities,[20] but that is not the case with Bangladesh.

There are three theoretical approaches for adopting international law within domestic law—monism, dualism, and incorporation. According to the monists, both national law and international law are just two faces of the same field that is law. They argue that both of these strands of law essentially serve the same purpose: welfare of individuals. In other words, they dismiss any strict division between national and international law and seek a common ground between them. According to the monists, since they embrace the same humanistic goals, there would not generally be any conflict between national and international law. However, if there is any conflict between national law and international law, the latter would normally prevail over the former. States such as Argentina, Belgium, Brazil, the Dominican Republic, France, and the Netherlands broadly follow this model.[21] However, in practice the actual application is not always so straightforward. The

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INT'L L. 64, 69 (2006). And parallel to the increasing recourse to international law, there is also a trend of increasing access to a greater number of international courts and tribunals by a greater array of actors, including private citizens and also NGOs. *See generally* METTE EILSTRUP-SANGIOVANNI & J.C. SHARMAN, VIGILANTES BEYOND BORDERS: NGOS AS ENFORCERS OF INTERNATIONAL LAW (2022) (demonstrating the role played by NGOs in enforcing three areas of international law—human rights, environment protection, and fight against corruption).

19 Iwasawa, *supra* note 11, at 333. However, it would be wrong to assume that the areas are limited to these few or that the trend is recent. Even core matters of international law, such as whether a state violated international law by bombing another state, were not litigated in domestic law until the middle of the last century (e.g., some Japanese citizens sued their government for recovering damages allegedly sustained as a consequence of the atomic bombings of Hiroshima and Nagasaki during World War II and a matter at issue was whether the United States dropping the atomic bomb amounted to a violation of international law). Although the claim for compensation failed, the Japanese court decided that the United States' attacks were in breach of international law. For a detailed account of the claim and judgment, see Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759 (1965).

20 Jennings, *supra* note 8, at 2; Symposium, *Teaching and Researching International Law by Resource-Constrained Academics*, AFRONOMICS L. (2020), https://www.afronomicslaw.org/2020/09/21/teaching-and-researching-international-law-by-resource-constrained-academics/ [https://perma.cc/C944-G48R].

21 Nollkaempar, *supra* note 10, at 107.

application of international law to a national legal system may rely on other factors such as whether the international law contradicts a domestic law or precedent or by some other tool of avoidance (such as the doctrine of separation of powers showing deference to the executive's discretion in matters of foreign relations).[22]

Dualists, on the other hand, argue that international law and national law operate on different planes and that they are independent of each other. Thus, according to the dualists, national law and international law cannot affect each other. It naturally follows that in their view, national courts will not be bound to follow international law unless it is incorporated into national law by an enabling national legislation. Thus, the dualists' view is predicated on the notion of supremacy of sovereign states within the boundaries of the state.

The third theory, incorporation, is basically a middle ground between the above two. According to this theory, national laws of one country cannot be subservient or superior to national laws of another, but each would operate with supreme authority within its national sphere. In the same way, there can be no hierarchical relation between national and international law. Thus, according to this theory, if a state within its domestic sphere violates any norm of international law, the remedy would lie on the international plane either by some form of diplomatic protest or judicial action. However, the pragmatic middle ground does not squarely address the central question of this Article—how national courts should deal with international legal issues. Thus, this Article focuses on the binary theories of monism and dualism predicated on an assumption that, often, incorporation is a form of dualism. This is because incorporation theory is essentially premised on the notion that within the national legal system, national law would apply.

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22 *See, e.g.,* Association of Lawyers for Peace (Vereniging van Juristenvoor de Vrede) v. Netherlands, C02/217HR, LJN: AN8071, NJ 2004/329, ILDC 152 (2004) (Neth.) (when the Association for Peace and some other organizations sought injunctive relief that the Dutch government would not engage in any use of force in cooperation with the United States in the 9/11 context without authorization from a U.N. Security Council, the Dutch Supreme Court demurred holding that these powers fall exclusively within the political functions and the Court does not possess the power to act about it. Another reason the Court acted as such may be to respect the act of state doctrine, that is as the U.S. Supreme Court stated in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), 416, "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."

II
THE CONSTITUTIONAL AND STATUTORY FRAMEWORK IN BANGLADESH ON THE APPLICATION OF INTERNATIONAL LAW

While in several provisions of the Constitution of Bangladesh, unlike the United States and some other countries,[23] there are clear expressions to abide by the provisions of international law, there is no explicit or tacit pronouncement on the authority of international law in Bangladesh.[24] The Proclamation of Independence, which had the status of the Interim Constitution of Bangladesh, stated, "We further resolve that we undertake to observe and give effect to all duties and obligations that devolve upon us as a member of the family of nations and under the Charter of United Nations."[25] The extensive definition of "law" as available in Article 152 of the Bangladesh Constitution does not include any reference to international law—treaty or customary.[26] The General Clauses Act, 1897 is silent on this. Article 145A of the

23 U.S. CONST. art. VI provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The Constitution of the Republic of South Africa states that "[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament." S. Afr. Const. 14 § 232, 1996. The same Constitution also requires the Court to interpret national law in a way which is harmonious to international law. It states, "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." *Id.* § 233. In case of Russia, it is even more emphatically stated in Конституция Российской Федерации [Constitution of the Russian Federation], art. 15 ("the universally recognized principles and norms of international law as well as the international agreements of the Russian Federation . . ."). Gennady M. Danilenko, *International Law in the Russian Legal System*, 91 AM. SOC'Y INT'L L. PROC. 295, 296–97 (1997). This work also asserts that Russian courts rely not just on treaties, but generally recognized principles and norms of international law in cases pertaining to human rights, giving priority to them over contrary domestic law. *Id.* at 297–301. In case of Canada, in a broad manner, the Constitution of Canada, § 132 states that "[t]he Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries." Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), *reprinted in* R.S.C. 1985, app II, no. 5 (Can.).

24 For a normative discussion on Bangladesh's engagement with international law, see Farhaan Uddin Ahmed, *Framework of Engagement with International Law*, *in* BANGLADESH AND INTERNATIONAL LAW 26 (Mohammad Shahabuddin ed., 2021).

25 The Proclamation of Independence of Bangladesh of 10 April 1971 is considered as the Provisional Constitution of Bangladesh.

26 According to this Article, "'law' means any Act, ordinance, order, rule, regulation, bylaw, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh."

Bangladesh Constitution provides that "[a]ll treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament: Provided that any such treaty connected with national security shall be laid in a secret session of Parliament."

Indeed, the constitutional pronouncement could, on a cursory look, imply that Bangladesh would follow monism. This is quite different from a common law state like the United States where Article VI of the U.S. Constitution clearly states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[27] Article 25 of the Bangladesh Constitution proclaims that Bangladesh "shall base its international relations on the principles of respect for national sovereignty and equality, noninterference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the United Nations Charter. . . ."[28] Although the Constitution of Bangladesh affirms Bangladesh's commitment to international law, a close reading would indicate that the principles are, at best, some form of affirmation of some well-accepted general obligations of international law, not necessarily a commitment to any international law, treaty, or custom.

Another crucial and noticeable aspect of the Bangladesh Constitution is that it does not appear to embrace customary international law, as the typical scope of international law is much broader than the few subjects discussed in Article 25. Article 8(2) informs Article 25, declaring that, though the Article will guide the state in law and policy making, it is not legally enforceable by the judiciary. Thus, it would not appear to make any pronouncement on

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27 The Constitutional pronouncement may connote that an international treaty would prevail over a provision of an Act of the U.S. Congress when the latter contradicts the former, but that clearly is not the case. An Act of the U.S. Congress is considered to be on full parity with a treaty, and thus, a later statute would render a treaty inoperative when it conflicts with a part of the statute. *See* Reid v. Covert, 354 U.S. 1, 18 (1957). The power of the U.S. Congress may be further curtailed by the division of power between U.S. federal and state authorities. *See generally* Bond v. U.S., 572 U.S. 844 (2014). For an analysis of the Supreme Court decision, see Curtis A. Bradley, *Federalism, Treaty Implementation, and Political Process:* Bond v. United States, 108 AM. J. INT'L L. 486 (2014).

28 A somewhat similar pronouncement can be found in the Constitution of Japan in Article 98 stating that "[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed." Nihonkoku Kenpō [Kenpō] [Constitution], art. 98, (Japan).

the application of the domestic law of Bangladesh.[29] It appears incongruous to assume that the drafters of the Bangladesh Constitution would make a pronouncement on the application of customary international law via a provision that is placed in a Chapter of the Constitution which is not judicially enforceable. This is, *a fortiori*, from the observations of the Appellate Division (AD) of the SCB in *Kudrat-E-Elahi Panir v. Bangladesh* that "[t]hey are in the nature of People's programme for socio-economic development of the country in peaceful manner, not overnight, but gradually. Implementation of these Programmes require resources, technical know-how and many other things including mass-education."[30] The AD further elaborated on the limited and ceremonial roles of this Part of the Constitution by drawing a distinction between fundamental principles of state policies (FPSP) as principles and laws.[31] It held that FPSP, not being laws, could not operate as a basis for challenging the *vires* of a law.[32] The AD stated, "It is the Law of the Constitution itself that the fundamental principles of state policy are not laws themselves but 'principles'. To equate 'principles' with 'laws' is to go against the Law of the Constitution itself.…Not being laws, these principles shall not be judicially enforceable."[33]

Regarding the signing and ratification of treaties, the executive has sole power, as Article 145A states, "All treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament . . . ." However, any treaties concerned with national security are only to be laid before any secret session of the Parliament.[34] In *Kazi Mukhlesur Rahman v. Bangladeshi*, the AD decided that the

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29 *Id.* art. 28; *Constitution of Bangladesh* art. 8.

30 Kudrat-E-Elahi Panir v. Bangladesh, (1992) 44 DLR (AD) 319, ¶ 81.

31 *Id.*

32 *Id.* This, of course, is not to argue that this author agrees that AD's formalistic distinction is not open to question.

33 *Id.* ¶ 84. The AD further said that:

> Article 8(2) proclaims the fundamental principles of State Policy as "principles," not "laws" and that is the mandate of this Constitution. Article 7(2) cannot be interpreted to mean that if any other law is inconsistent with the "principles" mentioned in Part II then that other law to the extent of the inconsistency, will be void. The Constitution is the supreme law and if the supreme law prescribes "principles" not "laws," and directs the use of these principles in [a] certain specific manner, then the other law cannot be made void on the ground of inconsistency with these principles. *Id.*

34 "The Cabinet . . . [c]onclude treaties. However, it shall obtain prior or, depending on circumstances, subsequent approval of the Diet." Nihonkoku Kenpō [Kenpō] [Constitution], art. 73 (Japan). Article 145 A of the Constitution of the People's Republic of Bangladesh, http://bdlaws.minlaw.gov.bd/act-367/section-24710.html [https://perma.cc/N7RD-UN87].

power to sign treaties was vested in the executive.[35] In *Major (retired) Akhtaruzzaman v. Bangladesh*,[36] the provision of laying a treaty before the Parliament was watered down even further by observing that

> Article 145A of our Constitution which we have quoted above does not make an international treaty conditional for its validity to be ratified by the Parliament. It merely says that the international treaty with foreign countries shall be submitted to the President who shall cause them to be laid before the Parliament. The obligation therefore is to lay the treaty before the Parliament but the validity of such treaty is not dependent on it being ratified or approved by the Parliament.[37]

Apart from these sketchy provisions, the Constitution does not lay down any specific provision on the mode of incorporation of international law in the domestic legal system of Bangladesh. Article 47(3) of the Constitution states:

> Notwithstanding anything contained in this Constitution, no law nor any provision thereof providing for detention, prosecution or punishment of any person, who is a member of any armed or defence or auxiliary forces [or any individual, group of individuals or organisation] or who is a prisoner of war, for genocide, crimes against humanity or war crimes and other crimes under international law shall be deemed void or unlawful, or ever to have become void or unlawful, on the ground that such law or provision of any such law is inconsistent with, or repugnant to, any of the provisions of this Constitution.[38]

According to Ahmed, using the application of domestic law in matters of international crimes indicates that the approach of the

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35 Kazi Mukhlesur Rahman v. Bangladesh (1974) 26 DLR (SC) 44 (Bangl.). In this case, Mr. Rahman, an advocate, challenged the legality of the Delhi Treaty of 1974, entered into between India and Bangladesh for the demarcation of the land boundaries between the two countries. Mr. Rahman alleged that the Treaty, involving *inter alia*, the cession of South Berubari and adjacent enclaves in exchange for Dahagram and Angarpota enclaves from India, was signed without any legal authority. The claim was based on the fact that it was not done with the authority of the Parliament which alone had the authority to cede any part of the territory of Bangladesh.

36 Akhtaruzzaman v. Bangladesh, WP No. 3774 of 1999 (Bangl.), ¶¶ 3–7. In this case, the Petitioner, Akhtaruzzaman, a Member of the Parliament, challenged the purchase of some military aircraft from Russia. He alleged that the aircrafts were purchased in a mala fide manner only to benefit some private interests and would not serve any military purpose. He also claimed that a military cooperation agreement signed between the governments of Russia and Bangladesh was a treaty and needed to be laid before the Parliament of Bangladesh. He filed a writ petition challenging the purchase.

37 *Id.* ¶ 26.

38 The Constitution of the People's Republic of Bangladesh, Part III ¶ 47(3).

Bangladesh Constitution toward international law is a dualist one.[39] That is a plausible argument. That being said, it is not implausible to argue that the same provision asserts the preeminence of national law by implication, which may suggest that in other areas, the approach of Bangladesh is a monist one. If one looks at the Long Title of the Children Act, 2013, it states that it is "[a]n Act to provide for a new law for the purpose of implementing the United Nations Convention on the Rights of the Child by repealing the existing Children Act."[40] Thus, it is evident that the Parliament viewed the need for an enabling domestic law to implement its treaty obligations. This might connote that the government does not see international legal obligations automatically finding a place in the corpus of national law. However, one problem with this line of interpretation is that a statute cannot be used to interpret the provisions of the Constitution.[41] And at any rate, it appears that a specific provision within a specific context was not meant to portray a definitive clue on the role of international law in the domestic legal system.

While somewhat simplistically, commentators have asserted that English law treats customary international law as part of its domestic law, British courts have not adhered to that principle without exceptions.[42] And thus, any claim that as a common law legal system,

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39 Ahmed, *supra* note 12, at 45.

40 This Act repealed the earlier Children Act, which many analysts suggested was incompatible with the UNCRC. The Children Act, No. XXIV (2013). A similar expression can be found when the Parliament passed the Overseas Employment and Migrants Act stating that it was

> [a]n Act to promote opportunities for overseas employment and to establish a safe and fair system of migration, to ensure rights and welfare of migrant workers and members of their families, to enact a new law by repealing the Emigration Ordinance, 1982 (Ordinance No. XXIX of 1982), and for making provisions in conformity with the International Convention on the Rights of Migrant Workers and the Members of Their Families 1990 and other international labour and human rights conventions and treaties ratified by the People's Republic of Bangladesh.

Overseas Employment and Migrants Act, No. VLVIII (2013).

41 Mansur Ali v. The Member Bd. of Revenue, (1959) 11 DLR 412 (Bangl.).

42 For instance, in R. v. Jones (Margaret) [2006] UKHL 16, the appellants who were either charged with or convicted of certain criminal offences, regarding their actions in relation to the United States and United Kingdom air force bases and a military port in the United Kingdom with a view to hindering the invasion of Iraq, pleaded that they were acting to prevent aggression, a crime under international law. Hence, according to them, they could rely on the defense provided in Section 3 of the Criminal Law Act, 1967 which permitted resorting to the use of reasonable force for preventing crime. Their claim was rejected, *inter alia*, on the ground that international law was not a part, but it was rather a source of English law. On this point Lord Bingham (at ¶ 11) observed:

Bangladesh's position on customary law is treating them as part of the corpus of national law is susceptible to questions.

A. A Reticence to Apply International Law

In some cases, the SCB has interpreted international law in almost clinical isolation from national law. In *Bangladesh and Others v. Somboon Asavaham*, the Bangladesh Navy captured Thai fishing trawlers in the Bay of Bengal for catching fish and smuggling them out of territorial waters of Bangladesh.[43] The owners of the trawlers claimed that at the time of the capture, the trawlers were not within the territorial waters of Bangladesh, which failed to persuade the quasi-judicial customs forum.[44] Then the High Court Division (HCD) of the Supreme Court found that the area in which the trawlers had been operating was not within the territorial waters of Bangladesh, it was rather the exclusive economic zone.[45] It had been held that the customs waters and territorial waters were synonymous but as the trawlers were captured outside the territorial waters but within the exclusive economic zone, the penal provisions of the Customs Act, 1969 (Bangladesh) could not be applicable. On appeal, in the course of determining the limits of the territorial waters of Bangladesh, the AD relied on the Territorial Waters and Maritime Zones Act, 1974 and observed that "[i]t is well settled that where there is municipal law on an international subject, the national Court's function is to enforce the municipal law within the plain meaning of the statute."[46]

> The appellants contended that the law of nations in its full extent is part of the law of England and Wales. The Crown did not challenge the general truth of this proposition, for which there is indeed old and high authority: . . . I would for my part hesitate, at any rate without much fuller argument, to accept this proposition in quite the unqualified terms in which it has often been stated. There seems to be truth in Brierly's contention ("International Law in England" (1935) 51 LQR 24, 31), also espoused by the appellants, that international law is not a part, but is one of the sources, of English law.

Hence, the assertion of Hossain & Bhuiyan, *supra* note 12, at 616, that there is an "English and common law tradition of treating customary international law as automatically forming part of . . . law as long as there is no inconsistent domestic legal provision" though in essence correct, may not hold in all cases.

43 Bangladesh v. Somboon Asavaham, 32 DLR (AD) 194 (1980) (Bangl.).

44 *Id.*

45 *Id.* The judgment did not use the term "exclusive economic zone," it simply used "economic zone," but it apparently was referring to "exclusive economic zone."

46 Bangladesh v. Somboon Asavaham, 32 DLR (AD) 194 (1980) ¶ 6 (Bangl.).

In *World Tel Bangladesh Limited v. Bangladesh*, the Ministry of Posts and Telecommunications (MOPT) floated a tender for the installation of land phones in the Dhaka multi-exchange area (MEA).[47] This happened in November of 1998. A clause in the tender provided that "[d]uring the first four years of the licence term, MOPT would not issue any licence for a fixed public wireline or wireless service operator to serve the Dhaka MEA other than the licensee and the Bangladesh Telegraph and Telephone Board."[48] World Tel Holding, Ltd. (World Tel), a company incorporated in London, succeeded in the bidding process. World Tel and World Tel Mauritius Ltd formed World Tel Bangladesh Ltd as a company incorporated in Bangladesh. The MOPT signed a license agreement with it on July 12, 2001.

The Telecommunications Act, 2001 (Bangladesh), coming into effect on July 8, 2001, established the independent Bangladesh Telecommunication Regulatory Commission (BTRC).[49] The BTRC, the new regulatory body formed in January 2002, assumed all the regulatory and licensing powers of the MOPT. In exercising its statutory power granted under the Telecommunications Act, the BTRC declined to accept the co-exclusivity clause of the license agreement, as in its view, it was anticompetitive and unable to cater to the market demand for fixed phone connections in the relevant region.

After the HCD rejected its writ petition, World Tel Bangladesh Ltd filed a petition before the AD.[50] The AD held that for the sake of ensuring healthy competition and preventing any discriminatory practice, the BTRC possessed the power to invalidate any license granted under the Wireless Telegraphy Act, 1933, the predecessor to the Telecommunication Act. The exclusivity clause in the license promoted a monopoly, and thus, it contravened Section 23 of the Contract Act, 1872, and the national telecommunication policy. Interestingly, the AD noted that the *pacta sunt servanda* principle, which formed the core of contractual relationships, should be respected.[51] However, the AD stated that this principle would not apply here because of the overarching national and public interest involved in the matter.[52] There is debate as to whether the *pacta sunt servanda* principle applies to contractual agreements between states and foreign

47 World Tel Bangl. Ltd. v. Bangladesh, (2005) 11 BLC (AD) 37, 38, ¶ 2 (Bangl.).

48 *Id.*

49 *Id.* ¶ 12.

50 *Id.* ¶ 1.

51 *Id.* ¶ 56.

52 *Id.* ¶ 57.

investors.[53] However, jeopardizing the contractual interest of World Tel by revoking the right granted by a license, particularly without any compelling evidence of wrongdoing by World Tel, would seem to run counter to contemporary jurisprudence on the protection of foreign private investment.[54]

In *Aminur Rahman Khan v. Trade Aris Insurance*, Aminur Rahman Khan (Khan) chartered a motor vessel, the Taeschorn, from Trade Aris Insurance (Trade Aris) to carry cargo of rock phosphate.[55] The vessel sustained damage while it was in the possession of Khan for more than two months. Through an arbitration in London, Trade Aris claimed the cost of the repair of the vessel as per the charter party. The three arbitrators, appointed per the arbitration agreement, directed Khan to file a defense, but he informed them through a solicitor that he would not participate in the arbitration. The arbitrators awarded compensation to Trade Aris. The award was then made an order of the High Court of Justice, Queen's Bench Division, England. Khan was a resident of Bangladesh with no assets within the United Kingdom. Hence, Trade Aris sued for recovery in the Bangladeshi courts. Before the HCD, Khan argued that as Bangladesh had acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),[56] a suit could be brought in Bangladesh to execute the foreign arbitral award, and thus, a fresh suit in the matter was not maintainable. However, relying on a domestic legal provision, the HCD held that a foreign arbitral award could not be executed in Bangladesh like that of a decree of a foreign court. In no ambivalent terms, it denied the application of the New York Convention by observing that

> [i]f statutory enactments are clear in meaning, they must be construed according to their meaning even though they are not contrary to International Law. We have, therefore, no hesitation in coming to the conclusion that a foreign arbitration award even if such award is enforceable as a decree or judgment of the United Kingdom cannot be executed in Bangladesh in view of clause (b), explanations-3 of section 44A of the Code of Civil Procedure . . . even if Bangladesh is

53 Md. Rizwanul Islam, Oxford ILDC 3089 (BD 2005). *See also* A.F.M. Maniruzzaman, *State Contracts with Aliens*, 9 J. INT'L ARB. 141 (1992).

54 *See World Tel Bangl. Ltd.*, (Bangl.). *Id.*

55 Aminur Rahman Khan v. Trade Aris Ins. (2002) 9 BLT (HCD) 206, (Bangl.), 207.

56 U.N. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (1958).

> a signatory of the New York Convention 1958 on the recognition and enforcement of foreign arbitral award.[57]

In *Saiful Islam Dilder v. Bangladesh*, members of law enforcement agencies of Bangladesh arrested Anup Chetia, a leading figure in the United Liberation Front of Assam, a separatist group in the Assam province of India, while he was in Bangladesh.[58] Mr. Safiul Islam Dilder, the Secretary General of the Bangladesh Human Rights Commission, a nongovernmental human rights organization, filed a writ petition to foil Chetia's possible extradition to India, arguing, *inter alia*, that it would violate Bangladesh's international legal obligations. Dilder claimed that since there was no extradition treaty between India and Bangladesh, extradition of any person to India could not legally happen and claimed that Mr. Chetia was fighting for the self-determination of the people of Assam. So, he was entitled to asylum. Dismissing the petition, the HCD observed that "we must say that observations made therein are pious expression to secure international fundamental human right norms obtaining in different declarations and covenants of different state parties to such instrument and have little binding force on the municipal Courts."[59] One can argue that the HCD settled this case on the basis of Bangladeshi law.[60] However, even if that may be so, there was a clear denouncing view of the applicability of international law in the aforementioned words of the HCD. And that negating message, arguably, *is* a signal of the HCD's lack of willingness to base its decisions on international law.

In *Babul Hossain v. Government of Bangladesh*,[61] the petitioner's son married (by following the Islamic religious method of solemnizing marriage) Rafiza, a Rohingya lady, who was living in the Kutupalong camp designated for the hundreds of thousands of Rohingyas taking refuge in Bangladesh. Due to the ban on registering any marriage between a Bangladeshi and a Rohingya, they could not register the marriage. The father of the bridegroom invoked the writ jurisdiction of the Supreme Court and sought direction so that his son and daughter-in-law could have a regular conjugal life. Interestingly, the SCB has dismissed the case and imposed a penalty on very narrow administrative grounds. It has not addressed the international legal issues apparent in this case and dealt with it in light of the Foreigners

57 Aminur Rahman Khan v. Trade Aris Ins. (2002) 9 BLT (HCD) 206 ¶18 (Bangl.).

58 Saiful Islam Dilder, *supra* note 3.

59 *Id.* ¶ 6.

60 Ahmed, *supra* note 12, at 55.

61 Babul Hossain v. Bangladesh, Writ Petition No 18163 of 2017 (2018) (Bangl.).

Act of Bangladesh. It is also at odds with the approach of other Bangladeshi court decisions[62] as well as foreign ones.[63] Of course, it is unknown if international legal provisions were pleaded by the parties, however, there appears to be no express bar for doing so even if none were pleaded. Of course, the idea of the HCD invoking international law on its own may sit at odds with the image of a common law judge as an umpire.[64] However, in some cases from the wordings in the judgment, it appears that the SCB has done this. Scholarly works' assertion that the SCB in some cases has omitted to refer to more relevant treaties to the case at hand[65] appears to imply that the SCB could have resorted to international law in this case.

B. National Law in Conjunction with International Law

In *Mst. Shirina Akhter v. The State*,[66] the accused was allegedly arrested from her home for possessing around 510 grams of heroin. Possession of heroin and other illegal drugs is an offence under Bangladeshi criminal law which may be punishable by death. The accused woman applied for bail in the lower court but got rejected.[67] She then filed a writ petition, pointing out *inter alia*, that her child (only nine months old at the time of the arrest and around three years during the writ petition) was also in jail with her. She argued that this confinement of the children was contrary to the United Nations Convention on the Rights of the Child, 1989 (UNCRC), and also the Children Act, 2013. The Court pointed to Article 37 of the UNCRC which provides, in essence, that no child shall be deprived of liberty arbitrarily and only as a last resort may be arrested, detained, or imprisoned.[68] It also referred to Section 26 of the Act which provides that a child may be put in safe custody only as a matter of last resort.[69]

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62 Refugee and Migratory Movements Research Unit (RMMRU) v. Bangladesh (2017), No. 10504 (Bangl.); (2020) 72 DLR (HCD) 402; *see also* Md. Rizwanul Islam, *The Humane Yet Ambivalent Attitude Towards Persecuted People: A Potential Threat to Stability?*, *in* INTEGRATED APPROACHES TO PEACE AND SUSTAINABILITY 103, 108 (Ayyoob Sharifi, Dahlia Simangan & Shinji Kaneko eds., 2023).

63 *See, e.g.*, PA and MA v. Ministry of Interior, Racc. uff. corte cost. 245.

64 Shohag, *supra* note 12, at 88.

65 Ahmed, *supra* note 12, at 56.

66 Mst. Shirina Akhter v. State, No. 526 (High Ct. Div. 2022) (Bangl.).

67 *Id.* ¶ 3.

68 *Id.* ¶ 7.

69 *Id.* ¶ 8.

Of course, one may argue that as the Children Act, 2013, was passed explicitly to give effect to the UNCRC, the HCD here was giving effect to the enabling law, *not* international treaty obligation. However, the HCD's observation that it may "rely on Article 37 of the United Nations Convention on the Right[s] of the Children, 1989, a treaty to which Bangladesh is a signatory [actually also a ratifying state] which mandates that the detention of children should only be a matter of last resort,"[70] was not relying on any provision of the Children Act. The HCD also observed, "The primary consideration of the best interests of the child in all actions concerning children taken by courts of law, enunciated in Article 3 of the convention."[71] Thus, it seems that in enlarging the petitioner on bail, the HCD was relying on the treaty provisions, not just as incorporated into domestic law through the enabling law.

Quite recently, in *Eriko Nakano, Tokyo, Japan v. Bangladesh and Others*,[72] the petitioner, a Japanese citizen, married a Bangladeshi-born U.S. citizen. Their conjugal relationship got strained due to a difference of opinion regarding the purchase of a property. There was a pending case regarding the custody of two of the couple's three children. The father allegedly fraudulently obtained the passports of the two children and then took them to Bangladesh without informing the mother or the Japanese authorities. The mother filed a *habeas corpus* writ in the HCD. The HCD ordered that the children would remain under the custody of the father essentially on the basis of a determination that they had a stronger attachment with him.[73] The mother appealed before the AD. In this cross-jurisdictional custody battle, the AD relied on UNCRC in conjunction with the Children Act, 2013, and domestic precedents. Based on these, the AD decided that the welfare of the child dictates that the children's mother gets custody until the final disposal of a family suit, which was pending in Bangladesh.

C. SCB Using International Law as Interpretative Tools

In *Hussain Mohammad Ershad v. Bangladesh and Others*,[74] a former President of Bangladesh was stopped at the Dhaka airport while he was about to fly to London for a health checkup. The police also

70 *Id.* ¶ 10.

71 *Id.*

72 Eriko Nakano v. Bangladesh, 16 SCOB [2022] AD 107 (Bangl.).

73 *LEX/BDHC/0036/2021*.

74 Hussain Mohammad Ershad v. Bangladesh, 21 BLD (AD) 69 (2001), ILDC 476 (BD 2000) (Bangl.).

seized his passport, allegedly claiming that there was a reasonable apprehension that he may not return to Bangladesh to avoid imprisonment due to a conviction. He filed a writ petition challenging the action of the government by invoking Universal Declaration of Human Rights (UDHR) along with several constitutional provisions which failed to persuade the HCD.[75] On appeal, the AD upheld his petition.[76] In the course of its judgment, the AD observed:

> True it is that the Universal Human Rights norms, whether given in the Universal Declaration or in the Covenants, are not directly enforceable in national courts. But if their provisions are incorporated into the domestic law, they are enforceable in national courts. The local laws, both constitutional and statutory, are not always in consonance with the norms contained in the international human rights instruments. The national court; should not., I feel, straightway ignore the international obligations, which a country undertakes. If the domestic laws are not clear enough or there is nothing therein the national courts should draw upon the principles incorporated in the international instruments. But in the cases where the domestic laws are clear and inconsistent with the international obligations of the state concerned, the national courts will be obliged to respect the national laws, but shall draw the attention of the law-makers to such inconsistencies.[77]

Then, in *Government of Bangladesh and another v. Sheikh Hasina and another*,[78] the former Prime Minister, Sheikh Hasina, filed a writ petition regarding an extortion case filed against her. She argued that the approval given by the Additional Secretary of the Ministry of Home Affairs, Government of Bangladesh to be tried under the Emergency Power Rules, 2007, *inter alia*, was violative of the prohibition of the ex post facto laws as enshrined in international human rights treaties and Article 35 of the Constitution.[79] An important issue was that in cases of "public importance," which were tried under the Emergency Power Rules, 2007, the right of courts to grant bail was curbed. The HCD held that the power and authority of courts to deal with bail and other matters in accordance with the existing laws in force could not be curtailed, and hence, the Emergency Power Rules, 2007, was *ultra vires*.[80] The

75 *Id.* ¶¶ 5–6.

76 *Id.* ¶ 15.

77 *Id.* ¶ 2.

78 Bangladesh v. Sheikh Hasina, (2008) 28 BLD (AD) 163 (Bangl.).

79 *Id.* ¶¶ 77–84.

80 *Id.* ¶¶ 35–42.

Government appealed before the AD.[81] The AD reversed the HCD's decision finding in essence that the extortion case was filed under existing provisions and did not fall foul of the prohibition of ex post facto laws. The AD held that

> [i]t is therefore obvious that the International Bill of Human Rights greatly influenced the decisions of the Supreme Court and other Courts in Bangladesh and the various Law Reports will provide mute testimony to the Niagara of words that has cascaded from the Supreme Court in the last 36 years dealing with human rights. . . . But our Courts will not enforce the covenants and convention even if ratified by the State unless these are incorporated in municipal laws. However[,] the Court looks into this convention while interpreting the provisions of Part III to determine rights to life, right to liberty and other rights enumerated in the Constitution.[82]

It is rather perplexing that although there was no real inconsistency between the human rights treaties and the Bangladeshi law in this case, the AD still sought to oust or at least curtail the scope of their application in the legal system of Bangladesh. Similar circumspection of the SCB to apply international law as permitted under the national law has been evident in *Government of Bangladesh and Others. v. Advocate Asad-uz-zaman Siddiqui and Others*.[83] In that case, the AD has observed that a "function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, *to the extent permitted* by the domestic law of each Commonwealth country."[84]

D. Direct Incorporation of International Law

In *Niko Resources, Bangladesh v. Professor, M. Shamsul Alam and Others*,[85] Professor M. Shamsul Alam filed a writ petition in the HCD challenging the legality of a joint venture agreement between Bangladesh Petroleum Exploration and Production Company Ltd. (BAPEX) and Niko Resources (Bangladesh) Limited, for developing and producing Petroleum from Chattak and Feni Gas Fields in Bangladesh. It also challenged the alleged gross negligence of the

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81 *Id*. ¶ 17.

82 *Id.* ¶¶ 89–90.

83 Bangladesh v. Advoc. Asaduzzaman Siddiqui, LEX/BDAD/0008/2017, 14 AADC (2017)1, 201710 ALR (AD) 1, 5 CLR (AD) (2017) 214, 71 DLR (AD) (2019) 52, 6 LM (AD) [2019] 272 (Bangl.).

84 *Id.* 272 DLR (AD) 52, ¶ 302.

85 Niko Resources, Bangladesh v. Professor, M. Shamsul, No. 4506, SUP. CT. BANGL. (2017), https://www.supremecourt.gov.bd/resources/documents/1267485_C.P.No.4506_of_2017.pdf [https://perma.cc/J73J-9BQZ].

government in securing compensation for the gas blowouts in 2005. It also alleged that the Bangladesh Oil, Gas, and Mineral Corporation acted against Bangladesh's interest in the proceedings at the International Centre for Settlement of Investment Disputes in collusion with NIKO Ltd. The HCD upheld the claim, declared the JVA as void ab initio, and attached the assets of Niko Resources (Bangladesh) Limited and Niko Resources Limited. Niko Resources (Bangladesh) Limited moved to the ICSID seeking, *inter alia*, payment for the gas supplied. They also filed a petition for leave to appeal against the decision rendered by the HCD. The AD declined to intervene. In deciding the case, the AD appears to have directly incorporated several provisions of the United Nations Convention against Corruption (UNCAC).[86] The AD first observed that the UNCAC required its "state parties to enable confiscation of instrumentalities, proceeds, and property of corresponding value to proceeds of convention offences."[87] It then observed that the seizure, confiscation, and return of the proceeds of corruption may operate as an effective deterrent to corruption.[88]

According to the AD, as a legally binding international treaty, UNCAC provides a comprehensive mechanism for states to prevent, combat, and prosecute corruption. It held that upon "ratification, the UNCAC created legal obligations for Bangladesh and those have to be enforced through the Executive branch and/or the Judiciary of Bangladesh."[89] It found that under Article 31 of the UNCAC, Bangladesh is duty bound to confiscate the proceeds of crime "Article 51 of the UNCAC makes the return of assets, which are proceeds of crime, a fundamental principle of the UNCAC."[90] In a similar manner, it held that Articles 51, 53, and 54 of the UNCAC provide for ensuring those proceeds of corruption are recovered, confiscated, and returned to the victim state. On the basis of these observations, the AD concluded that "[w]e find support for our decision to confiscate the assets of the respondents No.4 and No.5 in the principles laid down in UNCAC."[91] In a similar tone, in *State v. Md. Roushan Mondal*, the HCD has observed that since Bangladesh ratified the U.N. Convention

86 *Id.* at 47–49.

87 *Id.* at 47.

88 *Id.*

89 *Id.* at 48.

90 *Id.*

91 *Id.* at 49.

on the Rights of the Child in August of 1990, it was "duty bound to reflect the above Article as well as other articles of the CRC in our national laws. We are of the view that the time is ripe for our legislature to enact laws in conformity with the UNCRC."[92]

E. Is Void Tantamount to Ambiguity?

In some cases, it appears that the SCB has tacitly treated a void in the domestic law amounting to ambiguity and has sought to fill the void with reference to international law. In *Bangladesh National Women Lawyers' Association (BNWLA) v. Government of Bangladesh and Others*,[93] BLWLA filed a public interest writ petition alleging that many girls and women suffered sexual harassment in their educational institutions and workplaces without having any access to adequate legal redress. The petition claimed that the government must adopt guidelines or a policy, or pass a law to address the issue of sexual harassment to protect and safeguard the rights of women and young girls at workplaces and educational institutions as *inter alia*, Bangladesh was party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The HCD accepted the petition. It decided that unless international conventions contradict the national law, they would be read into the fundamental rights enshrined in the Constitution, and if domestic law was silent on a point, or the laws were not inconsistent with international law, there needs to be a harmonious interpretation. The HCD decided that by being a party to the CEDAW and adopting the National Women Development Policy in 2008, the government had asserted its commitment to protecting women's rights. Safeguards against sexual abuse and harassment of women in workplaces and educational institutions were insufficient and hampering gender equality. The HCD decided that it was a fit case to issue binding guidelines to be complied with at all workplaces until an adequate and effective law came into being.

Here, the HCD rather simplistically treated the incidents of harassment as an automatic indicator of the inadequacy or lack of existing laws protecting girls and women from sexual harassment.[94] This was made apparent by the Court's observation that its "directives

92 State v. Md. Raushun Mondal alias Hashem, (2006) 26 BLD (HCD) 549; ILDC 886 (BD 2006), ¶ 92 (Bangl.).

93 Bangladesh National Women Lawyers' Association (BNWLA) v. Bangladesh, No. 5916, ILDC 3088 (BD 1999), (2009) 29 BLD (HCD) 415 (Bangl.).

94 *Id.* at 425–26.

are aimed at filling up the legislative vacuum in the nature of Law declared by the High Court Division."[95] However, there was no definitive direct correlation between the inadequacy of the law and the prevalence of a crime. It would have been fitting if the HCD had analyzed why and how the other prevalent statutory provisions, like Section 509 of the *Penal Code*, 1860, deal with offenses. For example, why statutes that are against using a "word, gesture or act intended to insult the modesty of a woman" are inadequate to address the harassment of girls and women in workplaces and educational institutions? Arguably, the case study the HCD referred to concerning the plight of a young garment worker harassed by a factory manager and a supervisor would seem to fit within the ambit of Section 509. Thus, there can be legitimate debate as to whether the HCD here was filling a void in the domestic law or if it was resorting to the international law to plug a *perceived void*.

The approach of the SCB here may be contrasted somewhat with that of the Supreme Court of Nepal in *Rajendra Prasad Dhakal and Others v. the Government of Nepal*, where in dealing with a petition for remedies for enforced disappearances, it observed that

> [t]here seem to be no problem in internalizing the principles laid down in the said Convention for the sake of respecting and promoting the life, dignity, and freedom of [Nepal's] citizen . . . . This will demonstrate our sensibility towards our citizens and the feeling of responsibility of the state towards the international community in the process of protection of human rights.[96]

Thus, it seems to have signaled its intention to wholesale incorporation of international law into domestic law. But it then took a slightly more deferential approach to the national Parliament and observed that

> [t]he Interim Constitution of Nepal 2063 [2006/07], 2007 has conferred the absolute right to create or not to create laws about different issues by the legislative parliament. The legislative parliament provided exclusive power to the Legislature-Parliament as to whether a particular law is to be made or not. The Legislature-Parliament is competent enough to make law in this manner and it is always the expectation that highest level of making those laws prudence will entail, for the best use of parliament's resources in accordance with fulfilling the responsibility invested in it by the Constitution. In that regard, be used while making law in this bench's deliberations that making such and such a type of law will be appropriate, far from constituting an intervention or an

95 *Id.*

96 Rabindra Prasad Dhakal v. Nepal, No. 3775 (2007) (Nepal).

> encroachment, has to be seen as the constitutional manner. This Bench takes the view that to suggest that such a law on this subject is needed is not to interfere with or encroach upon the jurisdiction of the Legislature-Parliament, rather it should be taken as a legitimate expression of the judicial interest to advise the government that more concern to make additionally effective law needs to be made, taking account in view of the internationally established, international standards vis-à-vis for the protection of the citizen's freedom, to civil liberties for which the state has expressed its commitment.[97]

F. Wholesale Embrace of International Law on the Expansive Reading of the Latter

In *Refugee and Migratory Movements Research Unit (RMMRU) v. Government of Bangladesh and Others*,[98] police arrested Md Rafique, a member of the Rohingya community of Myanmar, for entering Bangladesh without having any valid travel documents. At trial, a Magistrate Court sentenced him to five years in prison and a fine.[99] Even serving his prison sentence, he was not allowed to return to Myanmar because the authorities did not recognize most Rohingyas as citizens. Therefore, he continued to languish in prison. Refugee and Migratory Movements Research Unit (RMMRU), a think tank working for refugee rights, challenged the validity of his detention. RMMRU argued that trying to push him back to Myanmar would be a violation of the principle of *non-refoulement*. The United Nations High Commissioner for Refugees (UNHCR) guaranteed that he would be kept in a refugee camp in Bangladesh if he were to be released from prison.[100] The HCD upheld RMRRU's petition and ordered that Md Rafique be released from prison, and the petitioner, in collaboration with the UNHCR, be placed in a refugee camp in Cox's Bazar.[101] Clearly, it put an end to a very unfortunate situation for the individual. However, rather oddly, the Court held that

> [t]hough Bangladesh has not formally ratified the Convention relating to the Status of Refugees, yet all the refugees and asylum-seekers from scores of countries of the world to other countries have been regulated by and under this Convention for more than 60 (sixty) years. This Convention [not merely the relevant Article] by now has become a part of customary international law which is binding upon

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97 *Id.*

98 Refugee and Migratory Movements Research Unit (RMMRU) v. Bangladesh (2017), No. 10504 (Bangl.)

99 *Id.* ¶ 14.

100 *Id.* ¶ 19.

101 *Id.* ¶ 21.

> all the countries of the world, irrespective of whether a particular country has formally signed, acceded to or ratified the Convention or not.[102]

The HCD's observation that the Refugee Convention codified customary international law seems to be squarely at odds with contemporary international law.[103] Indeed, if it were so, it would not have mattered whether a state had at all ratified the Refugee Convention. Even without ratifying or even signing the treaty, the state would have been found to follow the Convention as the embodiment of the customary law.[104] And while some other courts have observed that the principle of *non-refoulement* is a principle of customary international law, the observation that the Refugee Convention in its entirety is codification of the customary international law is rather unique.[105]

Under international law, it is well established that states are not obligated to uphold a treaty until it has been ratified.[106] However, seemingly, the HCD of Bangladesh views international treaty obligations in a way that turns this basic international legal obligation on its head. This is because the HCD has observed in *Bangladesh Legal Aid and Services Trust and another v. Secretary, Ministry of Education, Bangladesh and Others*,[107] that "being a signatory to the Convention Bangladesh is obliged to implement the provisions thereof."[108] Under international law, a state is only bound by the provisions of a treaty when it has ratified that treaty (unless the treaty is one where the signatories agreed to be bound by it from the date of signing).

G. Using National Court Precedent as a Catalyst to Reform International Law?

In *Tanzeen Bristy v. Government of Bangladesh and Others* (2020),[109] Tanzeen Bristy, a dual citizen of Bangladesh and Canada, alleged that Etihad Airways' staff at Abu Dhabi International Airport

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102 *Id.* ¶ 17.

103 Islam, *supra* note 62, at 108.

104 *Id.* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

105 Islam, *supra* note 62, at 108–09.

106 *See* Vienna Convention on the Law of Treaties, *supra* note 104, art. 14.

107 Bangladesh Legal Aid and Services Trust (BLAST) v. Secretary, Ministry of Education, No. 5864 [2011] (Bangl.).

108 *Id.* ¶ 45 (referring to *Bangladesh v Metropolitan Police Commissioner*, Suo Moto Judgment, (2008) 60 DLR (HCD) 660).

109 Tanzeen Bristy v. Government of Bangladesh, No. 6049 [2020] (Bangl.).

had harassed her and her mother while en route to Canada. They were forced to fly back to Dhaka at their own cost. This happened, allegedly, during a stopover at Abu Dhabi International Airport, when the staff at the check-in counter stamped Ms. Bristy's boarding pass but somehow forgot to stamp her mother's (which went unnoticed by Ms. Bristy and her mother). Upon returning to Dhaka, she lodged a general diary with the Bangladesh police. Then, she filed a writ petition seeking remedies for her sufferings allegedly attributable to the airline staff's negligence.

The HCD accepted her claim and observed that the International Civil Aviation Organization (ICAO) is more friendly to the international commercial airlines than to passengers. The HCD also determined that this should not continue to happen, and the ICAO needs to be more vigilant to protect the air passengers, their luggage, and cargo.[110] It reasoned that this was due to a disproportionate capacity of passengers compared to the airlines.[111] The HCD even asked the Registrar General of the Court to send a copy of the judgment to the ICAO via email.[112] As laudable as the HCD's objective may be, it is rather remarkable. Apparently, the HCD has implied that the ICAO regime on the protection of passenger and cargo needs reform. This is clear from the order to the Registrar-General of the Supreme Court of Bangladesh to send a copy of the judgment to the Judicial Administration Training Institute, the Bangladesh Law Commission, all foreign embassies of Bangladesh, the Civil Aviation Authority of Bangladesh, the Minister and the Secretary of the Ministry of Civil Aviation and Tourism, and the ICAO.[113] Suffice to say that a treaty is the embodiment of the agreement of many states and a particular state party's Court seeking to reframe the treaty provision or seeking the reform of its orientation is a remarkably bold step.[114]

H. Invoking International Law to Recommend Enacting a Provision in a Statute

In *Bangladesh Environmental Lawyers Association (BELA) v. Government of Bangladesh and Others* (2020),[115] BELA filed a writ petition alleging that the respondent housing company was engaged

110 *Id.* at 190–91.

111 *Id.* at 191.

112 *Id.* at 192.

113 *Id.*

114 *See* sources cited *supra* note 7.

115 Bangladesh Env't Laws Ass'n v. Bangladesh, [Dec. 12, 2020] (Bangl.) Writ Petition No. 1863 of 2014 (unreported).

in unauthorized earth filling in Naryanganj, near the capital of Bangladesh, while constructing Sonargaon Resort City, a housing project. BELA alleged that this illegal earth filling, continuing unabated for years, was destroying agricultural land, low land, and wetland thereby causing serious damage to the environment. BELA sought an injunctive order from the Court to stop this illegal earth filling. The HCD upheld the petition. It also opined that Ecocide should be incorporated as a crime under the International Crimes (Tribunals) Act, 1973.[116] It observed that although ecocide was included as part of the Rome Statute, it was later omitted from the list of crimes triable by the International Criminal Court. While it has been couched more like an *obiter*, due to the embryonic nature of ecocide as a concept in international law, the observations of the HCD would appear radical.

I. International Law as a Tool for Trumping National Law

In *Lutfor Rahman v. State and Others*,[117] the appellant was convicted of the offense of a dishonor of check (check fraud or bouncing a check) and was ordered to pay more than a million Bangladeshi takas. Then, the parties settled the matter and prayed to the HCD for disposing of the criminal case. Upon appeal, the HCD observed that check dishonor is a compoundable offense and directed the lower court to decide the case on the basis of the HCD's observations.[118] The main reason for the

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116 *Id.* at 118.

117 Criminal Appeal (H) 10852/2019, Judgment of August 28, 2022, https://www.supremecourt.gov.bd/resources/documents/1609919_CriminalAppealNo10852of2019.pdf [https://perma.cc/3F6M-79UG]. The judgment is in Bengali. As a factual development, it should be noted that the case is pending appeal, and this Article does not express any view regarding the merits of the appeal.

118 *Id.* It is important to note that the HCD in this case was dealing with criminal appellate jurisdiction, and thus did not possess the jurisdiction to declare that the relevant provision was unconstitutional. In another case, *Md. Abdul Hye v. Government of Bangladesh*, No. 932, 10 SCOB [2018] HCD, the HCD in holding a statute (though essentially by invoking constitutional provisions, also relied upon the international human rights treaties and customary international law. In relevant parts (¶¶ 109–112), it observed:

> The EPA and its subsequent adaptations have methodically violated the norms of fundamental human rights of Hindu community living in Pakistan and Bangladesh in breach of established human rights treaties and conventions. . . . Additionally, the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) encompass the key human rights treaties that prohibit discrimination based on religion, race, nationality, sex, colour, language, or political affiliation. Thus, it is to be noted that the right to property, equal protection under the law, and freedom of

HCD's decision has been that cheque dishonor is the failure to perform a contractual obligation and there can be no conviction for that.[119] In its reasoning, the HCD heavily relied on Article 11 of the International Covenant on Civil and Political Rights, 1966 (ICCPR).[120] It even observed that by not complying with Article 11 of the ICCPR, the image of Bangladesh was being tarnished internationally.[121] Interestingly, Bangladesh had a reservation to the relevant Article of the ICCPR.[122] This is very crucial because it is an elementary principle

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religion are some of the basic norms and principles which are broadly recognized and accepted as by most civilized nations around the world. Almost all countries ensure constitutional protections for minorities and prohibit discrimination based on religion or race. Therefore, as discussed above, the inequitable provisions, and discriminatory application of the EPA and VPA have obviously violated the legal standards created and practiced by the international community. Accordingly, the action under and use of the EPA and VPA by the Governments of Pakistan and then Bangladesh to stifle the rights of Hindus are infringement of obligations under customary international law as well.

119 The HCD noted that in many economically advanced states such as France, Singapore, and the U.K., dishonor or bounce of a check is a civil issue. However, in some legal systems, such as in the Middle East, even a contractual breach in some cases such as a failure to meet a financial obligation may lead to criminal imprisonment. And in the context of check dishonor, a criminal case for fraud may lie in many jurisdictions. Criminal Appeal (H) 10852/2019, *supra* note 117, at 5.

120 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

121 Criminal Appeal (H) 10852/2019, Judgment of August 28, 2022, https://www.supremecourt.gov.bd/resources/documents/1609919_CriminalAppealNo10852of2019.pdf [https://perma.cc/3F6M-79UG]. The HCD cited Queen v. Keyn [1876] UKHL 2 Ex. D. 63 stating that "The law of nations is that collection of usages which civilized states have agreed to observe in their dealings one another." The HCD, however, appears to view the applicability of treaties in England as more expansive than it is. A good illustration of English law's position on the application of international law may be found in the following words in United Kingdom: House of Lords Judgment in Australia & New Zealand Banking Group Ltd, et al. v. Australia, et al. (1990) UKHL 29 I.L.M. 670, 694:

[A]s a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation.

122 International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1996, art. 11, 999 U.N.T.S. 171 (1964) (Reservation by Bangladesh, 2000). The relevant reservation of Bangladesh states that

"no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation," is generally in conformity with the Constitutional and legal provisions in Bangladesh, except in some very exceptional circumstances, where the law provides for civil imprisonment in case of willful default in complying with a decree.

of international law that a state cannot be bound by international law to follow a provision of international treaty law to which it has given reservations unless that reservation is contrary to the treaty's express provisions or to its object and purpose, or the treaty happens to be a codification of customary law and the state was not a persistent objector.[123] If a state can be bound to follow an international treaty provision, even though it has expressed its reservations to that provision, a rather ludicrous situation may arise where a state would have a domestic legal obligation to abide by an international treaty obligation, even though it has no corresponding legal obligation under international law.[124]

In very emphatic terms, the HCD held that the absence of domestic law or contrary domestic provision cannot be invoked as a tool for avoiding legal responsibility under international law.[125] The HCD even radically observed that if a municipal law becomes inconsistent with a subsequently formulated international legal obligation, the inconsistent

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> The Government of People's Republic of Bangladesh will apply this article in accordance with its existing municipal law.

The judgment is silent on this issue, and it is not clear whether the fact of reservation was drawn to the HCD's attention. In a similar manner, *Shipra Chaudhury v. Bangladesh*, No. 7977 (2008), (2013) 21 BLT(HCD) 544; (2009) 29 BLD (HCD) 183 (Bangl.), the HCD did not consider the fact that Bangladesh has actually given reservations to Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, art. 1–2, Dec. 9, 1964,521 U.N.T.S. 231.

123 Vienna Convention on the Law of Treaties, *supra* note 104, at 13.

124 Even theorists like Kelsen—who expressed monist ideas and perceived treaties to take precedence over national constitutions—seem to support (though not regarding a treaty provision to which a state has expressed reservation), when he states:

> [W]e must conclude that the treaty takes precedence over national statute, and even over the national constitution, in so far as neither an ordinary statute nor a constitutional amendment can derogate from an international treaty, whereas the reverse is possible. An international treaty can – according to the principles of international law – lose its validity only through another international treaty or other matters of fact that are specially qualified as having that legal consequence by international law; but not through a unilateral act of one of the contracting parties, i.e. not through a national statute. If a national law, and be it a constitutional amendment, comes to contradict an international treaty, it is a legally defective law, and perhaps a legally defective constitutional law, as it fails to conform to international law.

Hans Kelsen, *Kelson on the Nature and Development of Constitutional Adjudication*, *in* GUARDIAN OF THE CONSTITUTION 22, 34 (Lars Vinx ed. & trans., 2015).

125 Criminal Appeal (H) 10852/2019, at 3, Judgment of August 28, 2022, https://www.supremecourt.gov.bd/resources/documents/1609919_CriminalAppealNo10852of2019.pdf [https://perma.cc/3F6M-79UG].

national law automatically becomes void and ineffective.[126] To avoid ambiguity and ensure proper legal benefit of the people, the ratifying state would render the inconsistent domestic legal provisions void.[127] These rather strong observations do not even seem to reflect the position of international law. At best, only if a new *jus cogens* norm emerges must a treaty or a treaty or customary international law that contradicts this norm give way. In the current case, neither the provision invoked had anything to do with *jus cogens*, nor did the Court limit its observation to the *jus cogens* norms. It is unclear from the judgment, what exactly was pleaded by the lawyers. One can argue that the decision was not just based on Article 11 of the ICCPR, as the Court also referred to Article 32 of the Constitution of Bangladesh.[128] However, as the Court has not really elucidated on the applicability of Article 32 in the case and emphasized international legal provisions, it would be logical to consider that its decision was firmly based on international law. And arguably, this case challenges a proposition in scholarly work that "courts or the administrative agencies in Bangladesh do not enforce or implement international treaty provisions directly."[129]

The HCD also surmised that if international law does not have primacy over local law, the meaning of ratifying an international treaty or legal instrument would be questionable.[130] Arguably, in some areas, states may sign treaties or international legal instruments to regulate their relations *inter se*, and national legal provisions may not have any direct correlation to it. For example, diplomatic conventions (of course, not consular) have hardly anything directly relevant to individuals.

Although some have argued otherwise, arguably, there is also no clearly noticeable trend that the SCB has invoked international law more in some areas than others.[131] At least, one may safely state that

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126 *Id.* at 3–4.

127 *Id.* at 4.

128 *Id.* at 6, 54. Art. 32 states "No person shall be deprived of life or personal liberty save in accordance with law."

129 Ahmed, *supra* note 12, at 49.

130 Lutfor Rahman, *supra* note 117, at 4.

131 *See* Jacyln L. Neo, *Incorporating Human Rights: Mitigated Dualism and Interpretation in Malaysian Courts*, 18 ASIAN Y.B. INT'L L. 1 (2012) (showing that in matters of human rights obligations, the Malaysian Courts have gradually been inclined to move away from strict dualist approach to international law). There is also a similar trend that often appears in matters pertaining to individual rights while declining to deal with issues such as the prohibition of use of force in international law. The prohibition of use of force is not interpreted or perceived as conferring rights on individuals. Nollkaempar, *supra*

there are some instances in which the state has not objected to the imposition of legal obligations on it through the invocation of international legal obligations.[132] Hence, these cases may be categorized as the application of international law with tacit backing of the executive.

1. Customary Law and the SCB

The SCB has apparently dealt with the questions of customary law much less than treaty law.[133] In *Bangladesh v. Unamarayen S. A. Panama*,[134] the Government of Bangladesh filed a money suit against the defendants to recover damages for wheat that was contaminated by sulfur from the respondent foreign ship. The Government alleged the shipowner had no property in Bangladesh; it was necessary to arrest the ship as security for any judgment that might be given against the company. The court of first instance dismissed the suit and the Government appealed. An issue arose as to whether a ship owned by private foreign companies enjoys immunity from arrest and seizures pursuant to a proceeding in a municipal court. Although scholarly works have claimed that the HCD in this case affirmed the application of customary law within the legal system of Bangladesh, indeed nothing in the judgment of the HCD (or the AD, when the matter went before the AD), dealt with that question.[135]

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note 10. This does not mean that a Court allowing a petition to be based on international law would lead the Court to adopt the treaty provision. For example, Iwasawa notes that although on numerous occasions human rights treaties (which the Japanese Courts treat as generally directly applicable in the domestic legal system) were invoked before Japanese courts, the Court did not accept that Japanese law was inconsistent with international law. Iwasawa, *supra* note 11, at 365. In the context of Bangladesh, the observation of the AD in *Sheikh Hasina* would imply that even in cases of human rights treaty obligations, the Court did not see any direct application of international law. But as this Article demonstrates, the approach of the SCB has been incoherent. Bangladesh v. Sheikh Hasina, (2008) 28 BLD (AD) 163 ¶¶ 88–89 (Bangl.).

132 Bangladesh National Women Lawyers' Association (BNWLA) v. Bangladesh, No. 5916, ILDC 3088 (BD 1999), (2009) 29 BLD (HCD) 415 (Bangl.).

133 Hossain & Bhuiyan, *supra* note 12, at 614.

134 Bangladesh v. Unamarayen S. A. Panama (1977) 29 DLR (AD) 252. (Bangl.).

135 Md. Mostafa Hosain, *Rohingya Refugees*, *in* BANGLADESH AND INTERNATIONAL LAW 267, 270 (Mohammad Shahabuddin ed., 2021), claims that "the Supreme Court in *Bangladesh v. Unimarayen S. A. Panama* held that [customary international law] (CIL) is binding on states," but no such assertion is present in the judgment. *See also* Emraan Azaad, *Customary International Law*, *in* BANGLADESH AND INTERNATIONAL LAW 65 (Mohammad Shahabuddin ed., 2021); *cf.* Ahmed, *supra* note 12, at 51.

It would appear that the SCB dealt with the application of customary international law in a direct way in *Government of the People's Republic of Bangladesh v. Abdul Quader Molla*,[136] the AD observed that "[c]ustomary international humanitarian law is a set of rules that come from a general practice accepted as law . . . [i]f the practice on which the rule is based is widespread, representative and virtually uniform then that rule is enforceable/adoptable by the states."[137] But at the same time, the AD observed that the "CIL cannot be applied by a domestic tribunal if those are inconsistent with an Act of Parliament or prior judicial decisions of final authority."[138] Thus, the AD not only dismissed the scope of applying customary law in conflict with the domestic law but probably also that of any decision inconsistent with a prior precedent of the AD. It further observed that "domestic courts have to make sure that what they are doing is consonant with the conditions of internal competence under which they must work. Thus, the rule of international law shall not be applied if it is contrary to a statute."[139] Thus, the position of customary law before Bangladeshi courts seems to comport with treaty law. However, the perfunctory nature of the AD's analysis of the role of customary international law in Bangladesh does not fully address the applicability of customary law in Bangladesh.[140] This uncertainty may be apparent from the AD's deferential approach to the Parliament when it denounced the scope of the application of the Polluter Pays Principle in *Nishat Jute Mills v. Human Rights and Peace for Bangladesh* by observing that "[w]e are of the view that there is no scope for declaring by the Court to treat the Precautionary Principle, Polluter's Pay Principle as part of the law of

136 *See generally* Bangladesh v. Abdul Quader Molla, No. 24–25 (2013) (Bangl.).

137 *Id.* ¶ 291.

138 *Id.* ¶¶ 25, 125.

139 *Id.*

140 Hossain & Bhuiyan, *supra* note 12, at 616. The reason for this is unclear, but a potential explanation may lie in the difficulty in proving the existence of customary international law. For example, see the Chief Justice of Singapore observing in Yong Vui Kong v. Public Prosecutor, [2010] 3 SGCA 30, ¶ 96 (Sing.):

> Although the majority of States in the international community do not impose the MDP for drug trafficking, this does not make the prohibition against the MDP a rule of CIL [customary international law]. Observance of a particular rule by a majority of States is not equivalent to extensive and virtually uniform practice by all States. The latter, together with opinio juris, is what is needed for the rule in question to become a rule of CIL.

this land as directed by the High Court Division in its direction No. 4. It is absolutely within the domain of the Parliament."[141]

The AD here based its deference to the Parliament by alluding to the theory of separation of powers.[142] In this case too, it may seem that the AD's assertion was principle-specific, but the generic nature of its reference to the division of power among three organs of the Government would imply that it conceived its limited role within a broader framework. This seems even clearer when one notes the AD's observation that "the High Court Division cannot direct the Parliament to enact or amend a law or declare any principle [by analogy, a principle of customary international law] to be a part of our law."[143]

J. Soft Law Instruments Used by the SCB

In *Professor Nurul Islam v. Bangladesh*, Professor Islam filed a writ petition asking that the HCD direct the government to pass a law prohibiting all forms of tobacco advertisements.[144] He also claimed that Bangladesh, as a member state of the World Health Organization (WHO), has a duty to give effect to the organization's resolutions. Rather enigmatically, without pointing out any specific provision, the HCD held that "Article 25(1) of our Constitution casts on obligation upon the State to respect for international law and the principles enunciated in the United Nations Charter and the WHO resolutions."[145] The nexus between the U.N. Charter[146] and tobacco advertisement is anybody's guess. While one may argue that the HCD has relied on the domestic law to direct the Parliament in this case, Article 25(1), as pointed out in an earlier part of this Article, only demands respect for international law and has no nexus to tobacco control. Thus, it seems safe to surmise that even with this inchoate reference to international law, the HCD based its decision (in conjunction with fundamental principles of state policy) on international law.

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141 Nishat Jute Mills v. Human Rights and Peace for Bangladesh, 202123 ALR (AD) 39; LEX/BDAD/0098/2020, ¶ 36 (Bangl.).

142 *Id.* The AD observed, "According to our Constitution, the State comprises 3 (three) organs—the Legislature, the Judiciary and the Executive. All the organs have separate, well-demarcated functions." *Id.* ¶ 37.

143 *Id.* ¶ 39.

144 Professor Nurul Islam v. Bangladesh, (2000) 52 DLR (HCD) 413.

145 *Id.* ¶ 9.

146 Charter of the United Nations U.N. Charter. June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945.

Another example of soft law instruments used by the SCB may be found in *Metro Makers and Developer Limited v. Bangladesh Environmental Lawyers Association and Rajdhani Unnyan Katripakhya (RAJUK)*.[147] In this case, Metro Makers and Developers Ltd., a private limited company, undertook a development project near Dhaka city that had been earmarked as a sub-flood flow zone with plans to make a satellite township. Metro Makers and Developers went ahead without obtaining the relevant regulatory authority's approval. BELA filed a writ challenging the legality of the project, and the HCD upheld the challenge. In the course of its judgment, the HCD relied on relevant provisions of environmental instruments, such as the Stockholm Declaration and the Rio Declaration, without any clear mention that these were soft law instruments (albeit some of their statements probably embodied customary law) or that they were nonbinding even under international law.[148]

III
SOME OVERARCHING FINDINGS FROM PRECEDENT

It is important to note that under Article 111 of the Constitution of Bangladesh, the decisions of both Divisions of the SCB have a binding effect as precedent. Thus, the incoherence and ad hoc approach, as would be evident from the foregoing analysis of the precedents, possess several challenges. The seemingly case-by-case approach followed by the SCB may affect the consistent development of case law and the application of international law in the domestic legal system in Bangladesh. And there seems to be no nuanced approach to the application of treaty or customary law in the Bangladeshi legal system. Of course, despite the incoherent or seemingly irreconcilable application of international law in the national courts, the SCB is not alone. This seems to be a part of a broader global trend. For instance, in the context of the Supreme Court of Canada, academic commentary has observed that international law should be invoked while interpreting national law. However, this often belies the real practice as the engagement of the Supreme Court with international law, which

147 Metro Makers and Developer Limited v. Bangladesh Environmental Lawyers Association and Rajdhani Unnyan Katripakhya (RAJUK), No. 256, (2013) 65 DLR (AD) 181. (Bangl.).

148 *Id.* ¶¶ 69, 73.

may vary from absent to significant.[149] In the context of Nepal—a neighboring state in South Asia—scholarly work has observed that "there is an ambiguity in Nepal's application of international treaties in national law."[150]

One explanation may be offered that in these cases is that the SCB has assumed the role of the law maker in applying international law and has not been as stringent as it would be expected as other courts sitting in other strata of the judicial system. This law maker function of the Supreme Court in the context of the United States (though not in the context of the application of international law), as explained in a scholarly work, is that "it's going to be hard to keep on teaching constitutional law as if the Justices took precedents as seriously as lower-court judges and common law judges do. It's going to be hard to keep pretending that Justices are like other judges rather than like other legislators."[151] Be that as it may, even fully accounting for and accepting the interpretative law-making role of the SCB, law-making in haphazard and incoherent ways may be fertile ground for compelling academic commentary or for smart lawyers to sift through and use them in selective ways, which can be anything but a good form of the progressive development of law. And it does not only pose a challenge to the litigants but may actually prevent them from playing a role in applying international law in the domestic legal system.[152] Moreover, this trend is likely to cause more confusion not just among the public but also professionals purportedly dealing with international law.[153]

Another trend appears to be that foreign law (or, more aptly, foreign precedents) is being invoked more than international law.[154] However,

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149 Gillian MacNeil, *Courting Transnational Criminal Law in Canada*, *in* TRANSNATIONAL AND CROSS-BORDER CRIMINAL LAW: CANADIAN PERSPECTIVES, 71–72 (Robert J. Currie ed., 2023). For a similar observation in a broader global perspective, see Peters, *supra* note 11, observing that while domestic courts often refer to international law, their attitude toward the application of international law has been rather ambivalent and inconsistent.

150 Pratyush Nath Upreti, Surya P Subedi, in Chesterman et al., *supra* note 12, at 635.

151 RICHARD A. POSNER, HOW JUDGES THINK 212 (2008).

152 MacNeil, *supra* note 149, at 72–73 (observing this in the context of Canada).

153 Sir Michael Wood, *What Is Public International Law?: The Need for Clarity About Sources*, 1 ASIAN J. INT'L L. 205, 207 (2011). *See also* Md. Rizwanul Islam, *Stretching the Boundaries of HR*, DAILY STAR (Dec. 8, 2015, 04:56 PM), https://www.thedailystar.net/law-our-rights/stretching-the-boundaries-hr-183784 [https://perma.cc/6GEV-5NB8] (commenting on the perils of passing off too many matters as human rights).

154 Shohag, *supra* note 12, at 85; RIDWANUL HOQUE, JUDICIAL ACTIVISM IN BANGLADESH: A GOLDEN MEAN APPROACH 206 (2011); Md. Rizwanul Islam,

that could have something to do with the Bar, rather than the Bench.[155] And with Bangladeshi lawyers consistently being trained across the world, even without the benefit of a crystal ball, it may be safe to predict that the invocation of international law before the SCB would continue to bloom at a greater frequency. Invocation, however, does not reveal how international law-based arguments would fare before the SCB. Thus, it would appear that observation in a scholarly work of "creeping monism" in Bangladesh,[156] may yet be uncertain, if not premature. And clearly, unlike neighboring India, there is no functional monism[157] in Bangladesh either. Moreover, the practice of the SCB of Bangladesh may have some similarities with Sri Lanka. Take for example, *Sepala Ekanayake v. Attorney General*,[158] where the Supreme Court of Sri Lanka upheld the validity of passing of an ex post facto law on the basis of a constitutional stipulation that "nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." Academic commentary suggested that this decision by the Supreme Court of Sri Lanka has paved the way for customary international law to be directly incorporated into the Sri Lankan legal system.[159] However, subsequent precedents seem to suggest that assumption was premature.[160]

Another interesting fact is that, at times, even very soft international legal instruments seem to have weighed heavily in the judgments of the SCB (e.g., in the case of environment). While in some cases they may have been just a tool for interpretation, in others they appear to have formed the core of the ratio of the judgment. At the same time, a very

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Reasonableness as Proportionality: More Intrusive Scrutiny in Civil-Political Matters than Socio-Economic Ones?, *in* PROPORTIONALITY IN ASIA 217, 218–19 (Po Jen Yap ed., 2020). Curiously, unlike international law, foreign law would appear to have no constitutional basis and would be solely a matter of using foreign precedents as persuasive authorities, which is entrenched in judicial culture.

155 Shohag, *supra* note 12, at 88.

156 M Ekramul Haque, *Current International Legal Issues: Bangladesh*, 23 ASIAN Y.B. INT'L L. (2017); *cf.* Ahmed, *supra* note 12.

157 *See* Chandra, *supra* note 11; Ranjan, *supra* note 11.

158 Sepala Ekanayaka v. Attorney-General, [1988], S.C. Appeal No. 68/86, CA No. 132/84 (Sri Lanka).

159 David Averbuck, *The Sepala Ekanayake Case–Domestic Sri Lankan Law Incorporates International Law*, 1 SRI LANKA J. INT'L L. 1 (1989).

160 Nallaratnam Singarasa v. Sri Lanka, No. 1033/2001, CCPR/C/81/D/1033/2001 (Sri Lanka).

basic human right such as the right to a family life seems to have received scant attention.

CONCLUSION

Although scholarly work has suggested that Bangladeshi Justices may have relied on international law due to a dearth of national legal precedents, this is far from certain for two reasons.[161] It is well known that Bangladeshi court treats pre-independence decisions of the Privy Council, Pakistan Supreme Court, and Federal Court of Pakistan as binding by dint of the Laws Continuance Enforcement Order, 1971, unless they have been invalidated by a decision of the SCB[162] or are incompatible with a subsequent statute. Again, the lack of existing precedent should be an influencing factor, and as time goes by, there should be incrementally less reliance on international legal provisions by the SCB. However, this does not appear to be the case. It is also not the case that the SCB's application of international law has leaned one or another way over a period of time. The early pronouncement in *Ashavam* or *Ullah* has also fared in more recent cases (e.g., in *Hasina*) or arguably in *Babul*. At best, one may say that in Bangladesh, the strict adherence to dualism is already somewhat mitigated. But if the question is to what degree and in what areas, one hardly has any cogent answer. One may praise cases like *Nurul Islam*,[163] where the invocation of international law has resulted in public benefit and that international law has been invoked to curb tobacco advertisement. However, without any systematic pattern it is not clear to what extent international law may serve as a beacon of hope for promoting good or "global values of justice." The terse manner in which the case of *Rafiza* has been dismissed may be the embodiment of this pattern.

Another noticeable feature of the judgments in Bangladesh is that they are not only somewhat incoherent, but at times they are steadfast in accepting or rejecting international legal provisions without carefully elaborating the reason for its choice. Another somewhat related point is that that unlike the position of some other common law jurisdictions, the SCB has often refrained from reading domestic law

161 Dr. Muhammad Ekramul Haque, *The Bangladesh Constitutional Framework and Human Rights*, 22 DHAKA UNIV. L.J. 55, 77 (2011).

162 Detenue A.K.M. Golam Kabir v. Bangladesh, (1975) 27 DLR (HCD) 199, ¶ 65 (Bangl.). The AD too has found the same in Terab Ali. v. Syed Ullah, ALR (AD) 91, 19 ADC (2022) 841 (Bangl.); (2023) 75 DLR(AD) 233; 13LM(AD) 2022 555.

163 Professor Nurul Islam v. Bangladesh, (2000) 52 DLR (HCD) 413.

and international law harmoniously even when arguably, there was a scope of doing so. Or the SCB has asserted the non-applicability of international law even when there was no inconsistency between national and international law.[164]

The existing state of precedents of the SCB things, which hardly appears to give any coherent direction in any way, would appear to be unsatisfactory both for those who advocate invoking international law in the municipal legal system and the opposing camp. This is not to argue that the judgments are Solomonic or improper. But the existing state of affairs is nonetheless hardly desirable. It would not make any contribution to the vision (however fluid that may be) of a global village, "where globalization comes an appreciation of the obligation of being part of common humanity and of protecting its universal values,"[165] nor it would be music to the ears of those who are convinced that within the domestic legal order, international law cannot be adopted unless they are incorporated. In any case, movement in every direction can hardly result in a *proper* movement.

164 Bangladesh v. Sheikh Hasina, (2008) 28 BLD (AD) 163 (Bangl.).

165 Kirby, *supra* note 11, at 122.