Avoidance and Contestation in the Engagement between International and Domestic Law

1. **AI Disclosure Statement:** AI has been used to improve sentence structure.

2. **Abstract:** The interaction between international and domestic law continues to generate tensions concerning the authority, applicability, and legitimacy of international legal norms within national legal systems. This paper examines these tensions through the conceptual framework of avoidance and contestation, focusing comparatively on the United Kingdom and India. It investigates how both jurisdictions respond to conflicts between domestic law and international law by examining two dimensions: the domestic recognition and application of international treaties, and the judicial treatment of customary international law (CIL). The paper adopts a comparative doctrinal methodology, analysing constitutional principles, legislative frameworks, judicial decisions, and relevant scholarly literature in the two jurisdictions. The analysis demonstrates that although both the UK and India exhibit broadly dualist approaches towards treaties, their judicial practices reveal important divergences. The UK predominantly adopts an avoidance stance grounded in parliamentary supremacy, whereas India exhibits a more complex interplay between formal dualism and a judicial tendency towards the monistic incorporation of international norms. In relation to CIL, both jurisdictions demonstrate a stronger monistic tendency, yet their courts retain the authority to contest international norms where they conflict with fundamental domestic principles. The paper argues that these inconsistent approaches reveal the continuing tension between international legal obligations and domestic constitutional authority, necessitating clearer secondary rules governing the recognition, interpretation, and domestic application of international law.

3. **Keywords:** International Law; Domestic Law; Customary International Law; International Treaties.

I. INTRODUCTION

"The domestic interpretation of international law is not merely the transmittal of the international, but a process of translation from international to national."[1]

In a formal dispute between two individuals, each may attempt to avoid or contest the other's position in order to resolve the conflict. These are arguably the most fitting approaches to resolving the potential tensions arising in the relationship between international and domestic law. The **avoidance stance** indicates that domestic law is favoured in order to displace international law while the **contestation stance** involves the invocation of domestic regulation for contesting the content of international law rules.[2] In recent decades, international law has been used as an "interpretative tool for challenged legislation,"[3] which has a **decisive influence** within the domestic legal regimes. The relationship between international and domestic law brings forth the inherent tensions of misalignment and incompatibility, compounded by uncertainty.

Historically, the legal systems across the world have a '**monist or dualist** construction,'[4] which has created legal and practical perplexity in the relationship between international and domestic law. While international law is growing unceasingly with advancing globalisation, the commitment to domestic law has been unwavering, avoiding and contesting nuanced engagement with international law.

Taking this context into account, the purpose of this paper is to evaluate the stances of avoidance and contestation adopted by the States of the United Kingdom (UK) and India in the face of potential tensions that arise when international law interacts with domestic law within their respective jurisdictions. The evaluation focuses, first, on the recognition and application of international treaties in the domestic domain and, second, on the **judicial practice** of implementing **customary international law (CIL)**. The paper then presents a comparative perspective to critically analyse the common tendencies and differences in the approaches adopted by both states in resolving conflicts between international and domestic law. The paper concludes that both legal orders require attention and development, which makes it crucial for

[1] Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L & POL. 501, 516 (2000).
[2] Mariela Apostolaki & Antonios Tzanakopoulos, Greece, *in* DUELLING FOR SUPREMACY: INTERNATIONAL LAW VS. NATIONAL FUNDAMENTAL PRINCIPLES 106, 112 (Fulvio Maria Palombino ed., 2019).
[3] Yuval Shany, Israel, *in* DUELLING FOR SUPREMACY: INTERNATIONAL LAW VS. NATIONAL FUNDAMENTAL PRINCIPLES 167, 174 (Fulvio Maria Palombino ed., 2019).
[4] Hisashi Owada, *Problems of Interaction between the International and Domestic Legal Orders*, 5 ASIAN J. INT'L L. 246, 251 (2015).

States oscillating between avoidance and contestation to map their engagement with international law.

II. THE ENGAGEMENT OF INTERNATIONAL LAW WITH THE DOMESTIC LEGAL SYSTEM

In this section, I will assess the legal status of international law within domestic legal systems. As stated above, I have adopted a comparative country-study approach by choosing the UK and India. Although the national legal systems of the UK and India have their own distinctive features, the aspects of parliamentary supremacy and common law tradition operate similarly in both. The dualist and monist approaches rationalise the interaction of international law within the national jurisdictions.[5] Under **dualism**, the reception and status of international law are kept separate from domestic law. In **monism**, international law is automatically accorded the status of being embedded in domestic law. However, the approaches also reflect the tensions between the two legal orders through the avoidance and contestation stances chosen by Britain and India. Moving on, I shall demonstrate how the inconsistency in applying the monist-dualist approaches in both States underpins the conflicts in the engagement of international law within their respective domestic legal systems.

III. UNITED KINGDOM

The geopolitical tension in the UK, highlighted by the Brexit Movement, has changed the narratives[6] regarding the status of international law within the British legal system. Although the UK has no codified constitution, certain fundamental constitutional principles create conflicts at the interface between international and domestic law. Here, I will investigate how the constitutional principles of **parliamentary supremacy and the doctrine of sources insist on adopting stances of avoidance and contestation when municipal law engages with** international law.

A. Parliamentary supremacy for the incorporation of international treaties

[5] René Provost, *Judging in Splendid Isolation*, 56 AM. J. COMP. L. 125, 128 (2008).
[6] James Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 209 (9th ed. 2019).

The UK doctrine of parliamentary supremacy reflects democratic accountability[7] and entails a **dualist** approach in the application of international law domestically. Here, I shall illustrate how the UK has taken the avoidance stance in resolving the conflict between the obligations encapsulated in international treaties and the competing demands of domestic law.

The UK Supreme Court's 2017 decision in *R (Miller) v. Secretary of State for Exiting the European Union*[8], explains the treaty-making power in the UK: "the power to make or unmake treaties is exercisable without legislative authority, and the exercise of that power is not reviewable by the courts."[9] The **Executive** is conferred with the prerogative to sign or ratify treaties, which is not amenable to judicial review.[10] Treaties that are incorporated in legislation form a part of the British legal system, reflecting the UK's dualist approach. Parliament, as the domestic law-making institution in the UK, enjoys primacy in incorporating treaties, which can be seen from Lord Hoffmann's observation in *Lyons*[11] that "it is not the treaty but the statute which forms part of English law"[12].

The **breach of international obligations** arising from unincorporated treaties is not amenable to judicial process, which shows that the UK avoids **compliance with international treaties in favour of incorporated domestic regulation**. For example, in *R v. Secretary of State for the Home Department, ex parte Brind*[13], the issuance of a statutory direction by the Home Secretary against the obligation under Article 10 of the ECHR was called into question. The direction prevented broadcasters, including the BBC, from airing the voices of spokespersons of proscribed organisations. According to Article 10, every person is entitled to freedom of speech and expression. However, the provision remained unincorporated.[14] The claimant alleged a violation of Article 10. The Court here held that the direction issued by the Home Secretary was not invalid as it was done in pursuit of the protection of national interest.[15] Although the UK was a signatory to the ECHR, its failure to comply with treaty obligations due to the absence of statutory incorporation indicates an avoidance stance. The Court was restrained because unincorporated treaties are non-justiciable. Therefore, the tension that arises

[7] Eirik Bjorge & Ewan Smith, United Kingdom, *in* DUELLING FOR SUPREMACY: INTERNATIONAL LAW VS. NATIONAL FUNDAMENTAL PRINCIPLES 355, 358 (Fulvio Maria Palombino ed., 2019).
[8] R (Miller) v. Secretary of State for Exiting the European Union, [2017] UKSC 5 (UK).
[9] *Id*. ¶ 55.
[10] Shaheed Fatima, The Domestic Application of International Law in British Courts, *in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 485, 492 (Curtis A. Bradley ed., 2019).
[11] R v. Lyons, [2002] UKHL 44, ¶ 26.
[12] *Id*. ¶ 27.
[13] R v. Secretary of State for the Home Department, ex parte Brind, [1991] 1 AC 696, ¶ 3 (HL) (UK).
[14] The ECHR was later incorporated through the Human Rights Act 1998, c. 42 (UK).
[15] Brind, [1991] 1 AC, ¶ 7 (UK).

from engaging with international law is avoided by upholding UK law, which includes bringing the Crown into breach of an international treaty.

B. The conflict of sources in applying customary international law

In any legal system, the sources determine what counts as law and are used to interpret rules. *Blackstone's Commentaries*[16] has endorsed the view that international law is 'to the fullest extent' part of England's law, which has been reaffirmed several times.[17] CIL is a source of domestic law that aids in interpreting statutes and the development of common law.[18] For ascertaining the existence of a rule of CIL, its existence is determined by reference to "a general practice accepted as law."[19] In the UK, CIL applies when it does not undermine any legislative enactment and is permissible under **fundamental constitutional principles**.[20]

UK law does not place any limitations on the use of international law. As J.L. Brierly mentions, "international law is not a part, but one of the sources of English law"[21]. CIL is automatically incorporated in domestic law as it **forms part of a source of law**. However, this does not make the UK a monist nation. Rather, the Courts in the UK are tasked with determining the extent and application of CIL. The duty is constrained by the **doctrine of source,** which supports the stance of **contestation**.

In *Keyu*,[22] the claimants sought a judicial review of the government's decision to abstain from conducting an inquiry into the killing of civilians in the Malayan Emergency. Lord Mance stated that there is an inherent "policy issue in *deciding whether to recognise and enforce a rule of international law."*[23] There is an imposition of a duty on courts to acknowledge that "CIL, once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt"[24]. Furthermore, Lord Neuberger observed that although CIL had imposed the duty on the Executive to hold an inquiry, which is supported by the Inquiries Act 2005, it would be 'inappropriate' for the Courts to impose that duty on the Secretaries of State.[25]

[16] 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 67 (1769).
[17] Trendtex Trading Corporation v. Central Bank of Nigeria, [1977] QB 529, at 368 (CA) (UK).
[18] Fatima, *supra* note 10, at 487.
[19] Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.
[20] Fatima, *supra* note 10, at 491.
[21] J.L. Brierly, *International Law in England*, 51 LAW Q. REV. 24, 31 (1935).
[22] Keyu v. Secretary of State for Foreign and Commonwealth Affairs, [2015] UKSC 69 (UK).
[23] *Id*. ¶ 149 (Lord Mance) (quoting Nulyarimma v. Thompson, [1999] FCA 1192 (AUS), ¶ 26 (Wilcox J)).
[24] *Id*. ¶ 150 (Lord Mance).
[25] Id. ¶ 117 (Lord Neuberger); Inquiries Act 2005, c. 12 (UK).

Therefore, when it comes to the conflict between CIL and domestic law, the UK adopts the contestation stance wherein the doctrine of source delineates the duty on the Courts to "apply the rule of English law whose source lies in international law."[26]

IV. INDIA

The relationship between domestic fundamental values and international law in the Indian legal order has been termed 'unusual'[27] or 'exotic'[28], which creates a constant tension. While the Indian Constitution recognises a **dualistic** approach for incorporating international treaties and a **monistic** approach concerning the application of CIL.[29] It has been observed that there is a genuine inconsistency in how these approaches are understood. India has thereby adopted a sophisticated stance of avoidance and contestation in its engagement with international law, as substantiated below.

A. The unwarranted monistic tendency in using international treaties

The constitutional provisions of India point to a dualist approach to engaging with international treaties. **Article 246**[30]**, read with Entry 14 of the Union List in the Seventh Schedule of the Constitution**[31]**,** empowers the **Executive** to enter into treaties. Further, **Article 51(c)**[32] **adopts a dualistic approach, wherein the Indian Supreme Court plays an intriguing role in the interaction between international** and domestic law. In recent years, judicial activism has enabled the Supreme Court to retain its position as the Guardian of the Constitution by "affirming its constitutional superiority with deference to the competence of the executive"[33].

However, the Court, under the influence of judicial activism, is leaning towards recognising monism vis-à-vis treaties, which has become a cause for concern regarding domestically construed national fundamental principles.

[26] Robert Lloyd-Jones, *International Law before United Kingdom Courts: A Quiet Revolution*, 71 INT'L & COMP. L.Q. 503, 515 (2022).
[27] B. S. Chimni, India, *in* THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ASIA AND THE PACIFIC 551, 553 (Simon Chesterman et al. eds., 2019).
[28] V.G. Hegde, *Indian Courts and International Law*, 23 LEIDEN J. INT'L L. 53, 59 (2010).
[29] Vinai Kumar Singh, India, *in* DUELLING FOR SUPREMACY: INTERNATIONAL LAW VS. NATIONAL FUNDAMENTAL PRINCIPLES 127, 133 (Fulvio Maria Palombino ed., 2019).
[30] India Const. art. 246.
[31] India Const. sch. VII, List I, entry 14.
[32] India Const. art. 51(c).
[33] Prabhakar Singh, Finding Foreign Relations Law in India, *in* ENCOUNTERS BETWEEN FOREIGN RELATIONS LAW AND INTERNATIONAL LAW: BRIDGES AND BOUNDARIES 86, 91 (H.P. Aust et al. eds., 2021).

Originally, the Court expressly held that **statutory incorporation** is paramount for treaties to become a part of Indian law.[34] However, since 1990, the Court has categorically applied the dictum that "international law not ratified by India will be applicable if it is not in conflict with domestic law".[35] This envisages the **doctrine of incorporation,** which was applied in cases of *Vishaka*,[36] *NALSA*[37] and *Sundarrajan*,[38] wherein the Court placed reliance on international treaties regardless of their domestic status, while remaining consistent with Indian law in that particular area. From a dualist viewpoint, this approach of incorporating international law domestically consistently crept towards monism, asserting the supremacy of international law.

The **shift towards monism is problematic** because it undermines parliamentary scrutiny and the executive's accountability.[39] Moreover, distinct approaches have been adopted by the judiciary and the legislature to address conflicts between international and domestic law. The discrepancy in approaches throws a spotlight on how India suffers from a democratic deficit, in which the Supreme Court has diluted the principles of the rule of law and the separation of powers.[40] The Parliament continues to endorse dualism. The Parliamentary Standing Committee (PSC) on Personnel, Public Grievances, Law and Justice, in its report submitted in 2016, recommended the creation of a **Department of International Obligations and Implementation (DIOI)**, which would send international treaties for parliamentary scrutiny to determine the effects on national fundamental principles and national interest. Therefore, the **contestation** stance has been reclaimed by the Parliament, wherein domestic implementation of treaties is favoured for suppressing the effect of international law.

B. A delicate approach in prioritising customary international law

[34] State of Madras v. G. G. Menon, AIR 1954 SC 517 (India); Maganbhai Ishwarbhai Patel v. Union of India, AIR 1969 SC 783 (India); Jolly George Verghese v. Bank of Cochin, AIR 1980 SC 470 (India).
[35] Vishaka v. State of Rajasthan, (1997) 6 SCC 241, 253 (India).
[36] Vishaka v. State of Rajasthan, (1997) 6 SCC 241 (India) (establishing the Vishaka guidelines for prevention of sexual harassment at workplace).
[37] National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (India) (establishing NALSA guidelines for transgender persons).
[38] G. Sundarrajan v. Union of India, (2013) 6 SCC 620 (India) (India did not sign the Joint Convention on the Safety of Spent Fuel Management).
[39] Aparna Chandra, *India and International Law: Formal Dualism, Functional Monism*, 57 INDIAN J. INT'L L. 25, 26 (2017).
[40] Vayuna Gupta, *Using International Law in Domestic Indian Courts*, 54 N.Y.U. J. INT'L L. & POL. 1077, 1082 (2022).

Article 372[41] of the Indian Constitution provides that pre-constitutional laws involving the British practice of incorporating CIL remain valid unless repealed by a controlling statute. Alexandrowicz had also observed that "India continues to act upon the common law in many fields and has hardly changed her mind in the matters of basic principles governing the relationship between international law and municipal law"[42]. However, this position is not entirely correct. The postcolonial State of India is sceptical about the domestic effects of applying CIL.

In the 1980s, the Apex Court, following the incorporation doctrine, held that "customary international law which is not contrary to the municipal law shall be deemed to have been incorporated in the domestic law."[43] However, the Court has shown "**reasonable resistance**"[44] in internalising CIL under domestic law. A prominent example is a situation in which CIL overlaps with the domestic legal order. The **prohibition of torture** has been espoused as a CIL owing to *state practice and opinio juris*.[45] However, there is no explicit prohibition of torture in India in either the Constitution or statutory law. Since 2017, the Bill on Prevention of Torture [46] has not been enacted, which makes the prohibition of torture unenforceable. Although the Court has pronounced judgments condemning torture in situations of custodial death, there is hesitancy in recognising the customary status of the prohibition of torture due to various reasons.

Firstly, legal imperialism has complicated the application of CIL, as international legal materials on CIL are not readily available, making it burdensome for the Court. ***Secondly***, the reality of resorting to international legal norms of CIL at the domestic level is limited to constitutional and statutory provisions corresponding to rights stipulated under CIL. ***Lastly***, the adversarial system is an insufficient basis for the Apex Court to ascertain the contents of the rule under CIL. The Indian Courts, therefore, do not recognise CIL, which exacerbates tensions in the interaction between domestic law and CIL.

The above exposition leads us to the conclusion that the Indian Apex Court has adopted a contestatory stance, maintaining a delicate approach in which constitutional principles prevail over CIL.

[41] India Const. art. 372.
[42] C.H. Alexandrowicz, *International Law in India*, 1 INT'L & COMP. L.Q. 289, 292 (1952).
[43] Gramophone Co of India Ltd. v. Birendra Bahadur Pandey, (1984) 2 SCC 534, ¶ 27 (India); Vellore Citizens Welfare Forum v. Union of India, (1996) 5 SCC 647, ¶ 9 (India).
[44] Vinai Kumar Singh, *supra* note 29, at 132.
[45] Malcolm N. Shaw, INTERNATIONAL LAW 96 (8th ed. 2017).
[46] The Prevention of Torture Bill, 2017, Bill No. XXIX of 2017, Rajya Sabha (introduced Dec. 15, 2017), https://sansad.in/getFile/BillsTexts/RSBillTexts/Asintroduced/torture-E-151217.pdf?source=legislation (last visited Aug. 20, 2026).

V. THE COMPARATIVE ANALYSIS

After looking at the bigger picture of how the domestic legal systems in the UK and India are influenced by international law, let us assess it from a comparative perspective. Firstly, I would like to recapitulate the approaches taken by both the States and then proceed to highlight my observations on points of similarities and divergence.

***Table 1**: Comparison on the approaches by UK and India in addressing the conflict between international treaties and domestic law.*

PARAMETER	**COUNTRY**	
International Treaties	**UK**	**India**
Approach [Monism/Dualism]	Dualism	Dualism in text but monistic tendency (in judicial practice)
Doctrine [Transformation/Incorporation]	Transformation of international treaties in domestic law.	Transformation of international treaties is a mandate for Executive. Courts imply that international treaties are directly imported in domestic law.
What happens during engagement of domestic law with international treaties?	Courts invoke parliamentary supremacy against unincorporated treaties.	Courts give supremacy to international treaties irrespective of whether they have been ratified, which is problematic.
Stance in the conflict [Contestation/ Avoidance]	Avoidance	Contestation (by Legislature) and Avoidance (by Judiciary)

Observations

- Both India and the UK follow the dualist model for giving domestic effect to international treaties, which is an impetus for the **avoidance stance**.

- However, the Courts in the UK are restricted by the national fundamental value of parliamentary supremacy, wherein unincorporated treaties, although affecting rights, are non-justiciable.
- A divergence is seen in India, where, surprisingly, the judicial practice shows an inclination towards monism, posing significant hurdles.

Table 2: *Comparison on the approaches undertaken by UK and India in addressing the conflicts between CIL and domestic law.*

PARAMETER	**COUNTRY**	
CIL	**UK**	**India**
Approach [Monism/Dualism]	Monism	Monism
Doctrine [Transformation/Incorporation]	CIL is deemed to be incorporated in domestic law.	CIL in tune with domestic law is deemed to be incorporated.
What happens during engagement of domestic law with CIL?	Emphasis on source from which CIL is derived in England.	Cautious approach by Courts showing reasonable resistance in accepting CIL.
Stance in the conflict [Contestation/ Avoidance]	Contestation	Contestation

Observations

- The approach of both the States in recognising CIL is entrenched in monism.
- The Courts in both jurisdictions express their traditional faith in **constitutional principles** and uphold their organic position. This incites the **contestation** stance where the content of CIL is invalidated against the fundamental domestic rules.

General Observations

- The legal culture of UK and India operates differently wherein UK lacks a codified Constitution and India has a written Constitution. However, **an inconsistency between**

constitutional principles and their practical application when engaging with international law is witnessed.

- The judicial treatment of conflicts between international treaties and CIL with the respective domestic law equivalents is distinctive in both States.
- While in the UK, a breach of any unincorporated treaty will have nil effect on its domestic legal system, India has prioritised international treaties having supremacy over domestic law.
- The Courts in both states will still consider the **extent to which CIL fits with their national fundamental principles**, although it insists on the doctrine of incorporation.

VI. CONCLUSION

The preceding discussion underscores how the tussle between domestic and international law has become a contemporary concern for legal systems worldwide. Undoubtedly, we can see the relevance of international law in serving as both a **shield and a sword** when it interacts with the domestic legal system. As a shield, the international values identified in treaties and CIL become susceptible to being nationalised. As a sword, the national values are susceptible to being internationalised. The conflict that arises in the domestic legal system when engaging with international law has prompted States to adopt stances of avoidance or contestation. In this paper, I assessed how the UK and India have adopted positions on resolving conflicts arising from the interaction between international and domestic law. Unfortunately, the "slow and unplanned evolution of international law"[47] has led to the supremacy of domestic law over international law.

The instances of conflict and the stances taken by the States propel us to think that there is a need for analogous secondary rules[48] of adjudication, change, and recognition in the use of international law in the domestic legal system. Such rules will inculcate openness and international law-friendly interpretations in pursuit of an ambivalent relationship between international and domestic law.

[47] Keith Suter, *The Successes and Limitations of International Law and the International Court of Justice*, 20 MED., CONFLICT & SURVIVAL 344, 348 (2004).
[48] H.L.A Hart, THE CONCEPT OF LAW 94 (2d ed. 1994).