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BLAME THE DRAFTER OR THE TREATY? Towards
uniformity in the implementation of treaties in domestic law.

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Contents

I	INTRODUCTION.....	5
II	PACTA SUNT SERVANDA	7
A	The nature of treaties	7
B	The status of treaties in domestic law: Distinction between monism and dualism	9
C	The legislative drafting techniques used to implement treaties.....	12
III	WHAT IS WORTH REWORDING IS WORTH REWORDING WELL – AN ANALYSIS OF THE IMPLEMENTATION OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION IN NEW ZEALAND.....	14
A	The purpose of the Hague Convention and the meaning of its terms	16
B	Incorporation by New Zealand	20
C	Criticism by New Zealand’s judiciary	25
D	Incorporation in the United Kingdom and its criticism of New Zealand’s approach	27
E	New Zealand’s first attempt to rectify a blunder? The Guardianship Amendment Act (No 2) 1994.....	32
F	New Zealand’s second attempt to rectify a blunder? The Care of Children Act 2004	34
G	A third attempt for New Zealand?	38
H	Conclusion	39
IV	SAME CHARTER DIFFERENT TECHNIQUE - AN EXAMINATION OF THE IMPLEMENTATION OF THE CHARTER OF THE UNITED NATIONS IN AUSTRALIA, THE UNITED KINGDOM, THE UNITED STATES, NEW ZEALAND AND CANADA.....	41
A	An analysis of the terms of the Charter for the purposes of implementation.....	42
B	Overview of findings.....	48
C	Implementation in the United Kingdom	49
D	Implementation in the United States.....	52
E	Implementation in New Zealand.....	54
F	Implementation in Canada.....	56
G	Implementation in Australia	56
H	Conclusion	60
I	Proposed draft	61
V	THE DIFFERENT APPROACHES TO THE IMPLEMENTATION OF THE UNESCO CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY	68
A	An analysis of the terms of the UNESCO Convention for the purposes of implementation.....	69
B	Implementation in the United Kingdom - No change to existing legislation.....	72
C	Implementation in the United States - In accordance with several reservations and understandings	75

D	Implementation in Australia, Canada and New Zealand.....	81
E	Conclusion	87
VI	THEREFORE WHAT IS A DRAFTER TO DO? A GUIDE TOWARDS GREATER CONSISTENCY IN THE IMPLEMENTATION OF TREATIES IN DOMESTIC LAW	89
A	Overview of findings.....	89
B	Proposed guide	93
1	Assess the constitutional framework of the state, the Interpretation Act and any Standing Orders that govern the procedure in Parliament.....	93
2	Examine the terms of the treaty along with existing legislation	95
3	Select the technique or combination of techniques for implementation	95
4	Some finer stylistic details which can be used to emphasise the intention to implement the terms of an international agreement	104
VII	CONCLUSION.....	108

Abstract

Domestic courts are often confronted with circumstances in which their interpretation of municipal legislation which purports to implement an international treaty differs significantly from that of other jurisdictions that have implemented that same treaty. States parties often come to realise these differences when they are called upon to cooperate in facilitating the execution of the relevant treaty. This is clearly undesirable as it defeats the purpose of treaty negotiation which is to attain consistency in approach amongst states parties.

This dissertation proposes a solution to that problem. It is based on the hypothesis that uniformity in the drafting techniques used to implement different types of international treaties will eliminate, or at least reduce, the incidence of domestic legislation's deviating from the true intentions of the treaty it proposes to implement. The dissertation tests this hypothesis by examining the approach taken by different jurisdictions in implementing selected treaties. The study reveals that there is merit to the hypothesis. However, there are several factors which determine which drafting technique will best implement the terms of a treaty in a particular jurisdiction. Therefore, the same implementation technique may not be suitable for all contracting states. What is required is a structured approach to treaty implementation. This comes with an appreciation of the factors that will indicate and should be used to determine which drafting technique is the most suitable.

By way of solution to the problem posed, a guide is formulated. It provides a set of best practices for treaty implementation.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 34 600 words.

Subjects and Topics

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I Introduction

The purpose of this dissertation is to determine whether a particular legislative drafting technique¹ - for example the formula method, the wording method or the subordination method - can always be identified as the most appropriate one to be used to implement a specific treaty.

This paper uses examples of the implementation of three different types of treaties to test this. Poorly drafted implementing legislation results in an inaccurate representation of treaty terms in domestic law. This problem manifests itself in different ways. One is in the distortion of the meaning of treaty terms and another is in a divergence in the extent of implementation of a particular treaty by contracting states. The examples are also used to illustrate how these problems may arise.

The first example is the Hague Convention on the Civil Aspects of International Child Abduction² for which the formula method would seem to be the most appropriate technique for implementation. The Hague Convention is used to demonstrate how the meaning of treaty terms may be altered in one contracting state where its legislature selects an inappropriate implementing technique.

The second example is the Charter of the United Nations³ for which the wording method and the subordination method appear to be the most appropriate techniques for implementation. The examination of the implementation of the Charter in different jurisdictions reveals that whilst a prohibition on reservations suggests that all implementing states would fully implement all treaty terms, other factors might influence the legislature to craft implementing legislation such that treaty terms are incorporated only to the extent to which it is desired that the treaty has some bearing on domestic law.

The third example is the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.⁴

¹ A list of the different drafting techniques that can be used is set out in Part II C.

² Hague Convention on the Civil Aspects of International Child Abduction (opened for signature 25 October 1980, entered into force 1 December 1983)[Hague Convention].

³ Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October, 1945) [Charter].

⁴ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (opened for signature 14 November 1970, entered into force 24 April 1972).[UNESCO Convention].

This example illustrates how the use of different implementation techniques by contracting states can affect the extent of the implementation of a treaty in each state. The UNESCO Convention also shows the difficulties in anticipating the assignment of the same implementation technique to all contracting states. It illustrates how factors such as the existing legislative framework in each state and the lodging of reservations influence the implementation technique that is selected.

With each example, the dissertation demonstrates how to evaluate treaty provisions and use the results of that evaluation to determine the implementation technique. However, it is recognised that there are internal factors that should also be taken into account and those internal factors also influence the selection of a particular implementation technique. Circumstances may vary in each contracting state. Thus, the study reveals that the goal should not necessarily be for uniformity in implementation technique, but for uniformity in the construction of treaty terms in domestic law. It answers the question of how this uniformity can be achieved by formulating a guide. The guide outlines a step-by-step proposal as to the approach drafters should take.

This dissertation does not merely bring structure to the selection of an appropriate implementation technique. It goes a step further by identifying the stylistic features which should be used in drafting to signify the intention to implement a treaty. The guide can serve as a tool which drafters may consult to implement treaties in a manner which is cost-effective, efficient and ultimately demonstrates the good faith mandated by art 26 of the Vienna Convention on the Law of Treaties.⁵

⁵ Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 7 January 1980).

Man is not confined by the State, but lives his life within the community of mankind, and if international law for the most part deals with the corporate activities of the State as a primary form of human organisation, it still aims at harmonising human relationships.¹

*II Pacta sunt servanda*²

A The nature of treaties

The world consists of states with different cultural backgrounds and languages. However, other states cannot be ignored as their actions affect lifestyles across the globe. Some of the most significant areas which call for a collaborative approach include environmental protection, security, trade and transport. This has become even more apparent with technological and scientific advancement. Shaw elucidates this point when he states:³

In reality, with the phenomenal growth in communications and consciousness, and with the constant reminder of global rivalries, not even the most powerful of states can be entirely sovereign. Interdependence and the close-knit character of contemporary international commercial and political society ensures that virtually any action of a state could well have profound repercussions upon the system as a whole and the decisions under consideration by other states.

This raises the question of how states harmonise their relationships⁴ given their vast differences and fondness for state sovereignty. Shaw answers this question by drawing a comparison with the process by which human beings set rules to govern their own relations and impose penalties to ensure that these rules are enforced. He advises: “[a]nd so it is with what is termed international law, with the important difference that the principal subjects of international law are nation states, not individual citizens.”⁵

International law constitutes the legal machinery by which states regulate their international relations. By virtue of art 38(1)(a) of the Statute of the International Court of

¹ D P O’Connell *International Law* (2nd ed, Stevens & Sons, London, 1970) at 3.

² “Every treaty in force is binding upon the parties to it and must be performed in good faith.”
Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 7 January 1980), art 26.[Vienna Convention]

³ Malcolm N Shaw *International Law* (6th ed, Cambridge University Press, New York, 2008) at 129.

⁴ See O’Connell, above n 1.

⁵ Shaw, above n 3, at 1.

Justice, international conventions constitute one of the factors that the International Court of Justice must have regard to when determining questions of international law. Shaw and O'Brien indicate that the term international convention is but one of many used to describe an international treaty.⁶ Perhaps the most authoritative definition of a treaty is set out at art 2(1)(a) of the Vienna Convention which provides that for the purposes of that Convention:⁷

“treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation; ...

Shaw explains that in times past, legal relations amongst states were governed largely by accepted behavioural patterns which developed into custom. He adds that the *opinio juris* or conviction of the binding nature of the agreements gave credence to the significance of customary practices to the extent that they evolved into customary international law. Shaw maintains that as states became more sophisticated in their practices, much of the uncertainty as to the terms of their agreements was removed by the emergence of the treaty, the distinguishing factor being that the terms of these customary arrangements were reduced into writing.⁸

Sinclair describes the Vienna Convention as: “... a major work of codification and progressive development ...”.⁹ Shaw affirms that it constitutes “the basic framework for any discussion of the nature and characteristics of treaties.”¹⁰ The Vienna Convention covers a number of key principles which regulate the operation of treaties. These include the capacity of states to be bound by treaties, full powers, consent to be bound by treaties, reservations, withdrawal and the invalidity of a treaty.¹¹ Shaw highlights the significance of art 2(1)(a) as he states: “the binding nature of treaties is founded upon the customary international law principle that agreements are binding (*pacta sunt servanda*).”¹²

⁶ See Shaw, above n 3, at 88; John O'Brien *International Law* (Cavendish Publishing Ltd, London, 2001) at 80.

⁷ See the Vienna Convention, above n 2, at art 2(1)(a).

⁸ Shaw, above, n 3, at 72-93.

⁹ M Sinclair “Vienna Conference on the Law of Treaties” (1970) 19 ICLQ 47 at 47.

¹⁰ Shaw above n 3, at 903.

¹¹ See the Vienna Convention, above n 2, arts 6,7,11,19, 54 and 65 respectively.

¹² Shaw, above n 3, at 94.

Villiger describes *pacta sunt servanda* as: “the cornerstone of international relations.”¹³ He advises that it “lies at the heart of the Convention” and “applies without exception to every treaty including its annexes and appendices”.¹⁴ (footnotes omitted). The *pacta sunt servanda* rule prescribes that on entering any treaty arrangement the parties are expected to use their best endeavours to comply with treaty obligations. It is contended that a state demonstrates the intention to do so by the manner in which that state gives effect to the treaty in domestic law. This is reflected in the legislative drafting technique used and the content and structure of implementing legislation. It is therefore argued that in order to achieve the goal of capturing the true meaning of a treaty, the legislature ought to give careful consideration to the suitability of the implementation technique that is used. The constitutional basis upon which a treaty is implemented in the domestic law of a state depends on whether it is a monist or dualist state.

B The status of treaties in domestic law: Distinction between monism and dualism

(a) Monism

Aust describes monism as a characteristic of the constitution of a state which allows for a treaty to have the force of law within that state upon ratification and without the need for further implementing legislation.¹⁵ He explains that such a treaty is referred to as a self-executing treaty. Aust advises that not all treaties are self-executing as further legislation may be required to give them the force of law even in a monist state.¹⁶ He adds that although there may be variations, the three common features of monist states are:¹⁷

- (1) the treaties usually require parliamentary approval;
- (2) the treaties are categorised according to whether they are self-executing or not; and
- (3) there may be instances where a self-executing treaty overrides conflicting national legislation or vice versa.

¹³ Mark E Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, The Hague, 2009) at 363 and 365 respectively.

¹⁴ Villiger, above n 13. Emphasis in the original.

¹⁵ Anthony Aust *Modern Treaty Law and Practice* (2nd ed, Cambridge University Press, Cambridge, 2007) at 183.

¹⁶ Ibid.

¹⁷ Ibid.

Monism appears to almost conveniently divorce the willingness to comply with treaty obligations from the process that enables compliance. For this reason, this dissertation does not investigate treaty implementation in monist states. Instead, it focuses on treaty implementation in dualist states, where decisive measures must be taken before treaty terms can have the any effect in domestic law.

(b) Dualism

In contrast to the monist approach, it is only where the dualist state takes the necessary legislative steps to impose international law rules on the domestic legislative order, that such international law rules will have legal effect internally.¹⁸ This principle was reinforced by Lord Diplock as follows:¹⁹

Where by a treaty Her Majesty's Government undertakes either to introduce domestic legislation to achieve a specified result in the United Kingdom or to secure a specified result which can only be achieved by legislation, the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty's Government has taken steps by way of legislation to fulfil its treaty obligations. Once the government has legislated, which it may do in anticipation of the coming into effect of the treaty ... the court must in the first instance construe the legislation, for that is what the court has to apply.

O'Connell used the doctrine of parliamentary supremacy to explain that where a dualist state enacts legislation that is inconsistent with international law, this does not render the domestic legislation invalid.²⁰ Instead, it means that the sovereign is in violation of its international obligations.²¹ Lord Diplock captured the interaction between parliamentary supremacy and the observance of the *pacta sunt servanda* rule when he warned:²²

If the terms of the legislation are clear and unambiguous, they must be given effect to whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties (see *Ellerman Lines Ltd v Murray* [1931] AC 126), and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts.

¹⁸ See Aust, above n 15, at 150.

¹⁹ *Salomon v Commissioners of Customs and Excise* [1966] 3 All ER 871(CA) at [875] per Diplock LJ.

²⁰ O'Connell, above n 1, at 42.

²¹ *Ibid.*

²² *Salomon v Commissioners of Customs and Excise*, above n 19, at [875] per Diplock LJ.

The above indicates that the doctrine of parliamentary supremacy gives a dualist state the power to determine its internal laws even to the extent that it overlooks treaty obligations. That notwithstanding, the *pacta sunt servanda* rule presupposes that having expressed an intention to be bound through ratification, the dualist state will not deliberately legislate in a manner that would contravene its treaty obligations.

Article 27 of the Vienna Convention can be described as reinforcing the *pacta sunt servanda* rule. It provides:²³

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Villiger suggests that: “[t]o hold otherwise would result in a state being able to free itself of its treaty obligations by its own unilateral legislative action”.²⁴

The Law Commission of New Zealand made special mention of this in its report of May 1996²⁵ and recommended that governments put the necessary measures in place to ensure that their internal laws adequately complement their treaty obligations.²⁶ The Law Commission highlighted the safeguards used in New Zealand by indicating that where a government minister puts a new legislative proposal to the Cabinet Legislation Committee, he must establish that the proposal is in compliance with New Zealand’s treaty obligations.²⁷ This requirement is clearly set out in New Zealand’s Cabinet Office Manual.²⁸ The Law Commission pointed out that another safeguard used in New Zealand is the requirement to check draft legislation against the Bill of Rights Act 1990.²⁹ This presents another opportunity to examine the extent of compliance with treaty obligations, as the New Zealand Bill of Rights Act 1990 has a role in the implementation of the International Covenant on Civil and Political Rights.³⁰ The Law Commission further recommended that “appropriate and timely consultation during the process of developing

²³ Vienna Convention, above n 2, at art 27.

²⁴ Villiger, above n 13, at 372.

²⁵ Law Commission *A New Zealand Guide to International Law and its Sources* (NZLCP34, 1996) at para 5.[Law Commission].

²⁶ Ibid.

²⁷ Ibid.

²⁸ Cabinet Office *Cabinet Manual 2008* at para 7.60.

²⁹ The Law Commission, above n 25, at para 5.

³⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976).

legislation is therefore important to ensure that international obligations are not being overlooked or breached”.³¹

In light of the above, it is contended that the *pacta sunt servanda* rule is observed, or good faith is manifested, by choosing sound legislative practices which support the effective implementation of treaty terms in domestic law. Therefore, this process ought to be approached purposefully in a dualist state. The legislative drafting techniques which may be used for that purpose are set out below.

C The legislative drafting techniques used to implement treaties

Academics and legislative drafters have identified a range of legislative drafting techniques which may be used to implement treaties in domestic law.³² The main techniques are:

- (1) Direct implementation or the formula method;
- (2) The wording method;
- (3) The subordination method;
- (4) Reliance on pre-existing legislation;
- (5) The amendment of several pieces of legislation;
- (6) Scheduling the text of a treaty and referring to all or part of it in the body of the legislation;
- (7) Enacting anticipatory legislation;
- (8) Enacting non-legislative powers;
- (9) Legislation may contain no reference to the treaty being implemented.

Mendis rightly advises that the list is not exhaustive and that there is a need for further classification given the legislative practices in Commonwealth countries.³³ Each

³¹ The Law Commission, above n 25, at para 5.

³² See generally GC Thornton *Legislative Drafting* (4th ed Tottel Publishing, West Sussex, 2005) at 310; DL Mendis “The Legislative Transformation of Treaties” (1992) 13(3) Stat LR 216 at 221-223; The Law Commission, above n 25, at para 45; Armand De Mestral and Evan Fox-Decent “Implementation and Reception: The Congeniality of Canada’s Legal Order to International Law” in Oonagh E Fitzgerald (ed) *The Globalised Rule of Law: Relationships between International and Domestic Law* (Irwin Law, Toronto, 2006) at 45-55; John Mark Keyes and Ruth Sullivan “A Legislative Perspective on the Interaction of International and Domestic Law” in Oonagh E Fitzgerald (ed) *The Globalised Rule of Law: Relationships between International and Domestic Law* (Irwin Law, Toronto, 2006) at 310.

technique has its advantages and disadvantages. Also, a combination of techniques may be used to implement the same treaty. It is argued that to achieve uniformity, drafters must be able to discern which method will best transpose treaty terms into their respective domestic legislative orders. This paper seeks to highlight the consequences of the failure to appreciate this. Part III presents the implementation of the Hague Convention in New Zealand as an illustration.

³³

See Mendis, above n 32, at 222.

III What is worth rewording is worth rewording well – An analysis of the implementation of the Hague Convention on the Civil Aspects of International Child Abduction in New Zealand

The wording method presents a drafter with the freedom to rewrite treaty provisions into domestic law. It allows a drafter to reconstruct the words and phrases of a treaty and the general structure of the treaty itself. It is agreed that there are instances where it is best to transcribe treaty provisions into local parlance. However, it is also suggested that where a decision is taken to reword treaty provisions, no effort should be spared in ensuring that the meaning and effect of the treaty is not distorted in the process. The reformulation of treaty provisions in domestic legislation should be approached with caution, bearing in mind that domestic legislation may not be invoked as justification for non-compliance with treaty terms.¹ This fosters adherence to the *pacta sunt servanda* rule, as it demonstrates a commitment to capture treaty terms in domestic law accurately.

This paper examines whether there are any indicators within a treaty or factors relating to the legislative scheme already in place within a particular jurisdiction, which could assist drafters in determining whether the wording method is the most appropriate technique to be used. Thornton advises that the wording method permits the use of language that complements legislative drafting practices that are specific to a particular jurisdiction.² He emphasises that “[t]he effects of loose language and construction in the Convention can be ameliorated [and existing] laws and practices can be accommodated more smoothly”.³ The Legislation Advisory Committee indicates that treaties are often expressed in general language for the purposes of reaching an agreement and therefore made the following recommendation:⁴

Some treaties are designed to be incorporated directly into domestic legislation. The majority are not, and can contain references that are not normally used in New Zealand legislation. Care should be taken, however, in deciding whether or not to replace such references with the more familiar domestic ones, as this may alter the meaning and affect New Zealand’s compliance with the relevant international rule.

¹ See the Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 7 January 1980), art 27. [Vienna Convention].

² GC Thornton *Legislative Drafting* (4th ed, Tottel Publishing, West Sussex, 2005).

³ *Ibid*, at 309.

⁴ Legislation Advisory Committee “Legislation Advisory Committee Guidelines on Process & Content of Legislation” (2001) Ministry of Justice 6.2.1 <www.justice.govt.nz>.

These sentiments were echoed by Thornton who warned: “[t]he modern trend is to follow the direct approach in the absence of good reason not to ... [if] the contents of the Convention are capable of effective application in this way, the direct approach should be favoured”.⁵ The Legislation Advisory Committee states quite cogently:⁶

[i]f a treaty amounts to a self-contained body that does not require any operational machinery to support it, the ‘force of law’ formula method can be used to implement the treaty. If a treaty requires operational machinery to support it or its terms require some form of translation to be effective, the wording method should be used.

Thus, the learning on this matter suggests that a treaty that is not worth rewording should be left as is. In light of the above, the implementation of the Hague Convention on the Civil Aspects of International Child Abduction⁷ in New Zealand is of interest. The Hague Convention was implemented in New Zealand’s municipal law by the wording method. This is at variance with the approach taken in other jurisdictions such as the United Kingdom and most provinces in Canada, which used the formula method to implement it.

Thornton proposes that “[t]he test of whether the domestic law accords with the Convention comes when the domestic law is interpreted in the domestic courts.”⁸ It is interesting that the New Zealand legislature has been criticised for its approach by its own judiciary and that of other jurisdictions. That notwithstanding, some have come to its defence.⁹ It is submitted that in this case, the New Zealand legislature was wrong. Not only was a poor choice made in terms of the legislative drafting technique used, but further, it was not executed well. This manifests itself repeatedly as judicial pronouncements on the matter indicate that the provisions of the Hague Convention have a different meaning in New Zealand’s domestic law than they do in other contracting states.

This Part highlights the level of inconsistency in state practice that results when parliament, consciously or otherwise, alters the meaning of treaty provisions during the process of implementation. It also assesses the strength of arguments proffered in support of the use of the wording method for the purposes of implementing the Hague

⁵ Thornton, above n 2, at 309 and 310.

⁶ Legislation Advisory Committee, above n 4, at para 6.23.

⁷ Hague Convention on the Civil Aspects of International Child Abduction (opened for signature 25 October 1980, entered into force 1 December 1983)[Hague Convention].

⁸ Thornton, above n 2, at 309.

⁹ See Margaret Nixon “Legislation and the Hague Convention” [2007] NZLJ 91.

Convention in New Zealand. The recommendation is that not only must the wording method be recognised as the most appropriate technique to implement a particular treaty, but where it is selected, it should be well executed.

A The purpose of the Hague Convention and the meaning of its terms

In order to determine which implementation technique is the most appropriate for the implementation of a treaty, a drafter must first evaluate the terms of that treaty. In that regard, Professor Elisa Pérez-Vera sets out the background to the Hague Convention in the explanatory report of 1982.¹⁰ As she explains, child abductors often assume that the act of removing a child to another jurisdiction will be viewed more favourably in law by the competent authorities in the jurisdiction they have moved to, than the one that the child was taken from.¹¹ Professor Pérez-Vera advises that in view of this, the Hague Convention seeks to deprive child abductors of the perceived legal benefits of their actions by restoring the status quo. This is achieved by mandating the “prompt return of children wrongfully removed from or retained in any Contracting State”.¹² Thus, the objectives of the Hague Convention were set out in art 1 as follows:¹³

The objects of the present Convention are –

- (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

Article 1(a) suggests that the prompt return of children will only be required where it is established that such children have been wrongfully removed to or retained in a contracting state. However, art 1(b) suggests another, more general purpose. In this regard, the Hague Convention also appears to serve as a guard keeping watch over custody and access rights to ensure that they are respected in other contracting states. It is submitted that upon further reading of the terms of the Hague Convention, the distinction

¹⁰ Elisa Pérez-Vera, “Explanatory Report on the 1980 Hague Child Abduction Convention” (1982) Hague Conference on Private International Law < www.hcch.net >.

¹¹ Ibid, at para16.

¹² Ibid.

¹³ The Hague Convention, above n 7, at art 1.

between its two separate purposes becomes less clear. This view finds support in the explanatory report which provides:¹⁴

The Convention reflects on the whole a compromise between two concepts, different in part, concerning the end to be achieved. In fact one can see in the preliminary proceedings a potential conflict between the desire to protect factual situations altered by the wrongful removal or retention of a child, and that of guaranteeing, in particular, respect for the legal relationships which may underlie such situations. The Convention has struck a rather delicate balance in this regard.

The meaning of the term “wrongful removal” is relevant to the task of determining the kind of action that will prompt the return of a child under the Hague Convention. Article 3 provides:¹⁵

The removal or the retention of a child is to be considered wrongful where –

- (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Therefore, the ambit of the term “wrongful removal” is limited to the breach of custody rights as opposed to access rights. The explanatory report indicates that the Hague Convention was careful to define the terms “rights of custody” and “rights of access” because its objectives would be compromised by a misinterpretation of their respective meanings.¹⁶

It is therefore vital that a drafter who purports to implement the Hague Convention by the wording method has a firm grasp of the difference in the meaning of each of the terms, the definitions of which are set out in art 5 of the Hague Convention as follows:¹⁷

¹⁴ Pérez-Vera, above n 10, at para 9.

¹⁵ The Hague Convention, above n 7, at art 3.

¹⁶ Pérez-Vera, above n 10, at para 83.

¹⁷ The Hague Convention, above n 7, at art 5.

For the purposes of this Convention –

- (a) “rights of custody” shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence;
- (b) “rights of access” shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.

With regard to the definition of the term “rights of custody,” the explanatory report indicates that the Hague Convention “merely emphasises the fact that it includes in the term, ‘rights relating to the care of the person of the child,’ leaving aside the possible ways of protecting the child’s property.”¹⁸ However, the explanatory report also confirms that “the Convention seeks to be more precise by emphasising as an example of the ‘care’ referred to, the right to determine the child’s place of residence.”¹⁹ It would seem therefore, that under the Hague Convention, a holder of custody rights is identified as one who not only cares for a child, but ultimately, has the right to decide where that child is to live.

The Hague Convention assists contracting states by providing a definition for the terms “rights of custody” and “rights of access.” If a contracting state wishes to implement and therefore align its internal laws with the Hague Convention, the meaning of the terms “custody rights” and “access rights” should not depart from that set out under it. This is because it is only a person who has the right to determine a child’s place of residence and has exercised that right prior to the child’s removal, who can cite wrongful removal as the basis for that child’s return pursuant to the Convention. This position is affirmed in the explanatory report which provides: “[t]he duty to return a child arises only if its removal or retention is considered wrongful in terms of the Convention.”²⁰

It is expected that an explanatory report would clarify any perceived ambiguities in a Convention. However, it is submitted that this explanatory report does very little in terms of clarifying the reference to respect for custody and access rights in art 1(b). Instead, it seems to concede the point that the Convention does not adequately define its objectives. Professor Pérez-Vera simply states:²¹

¹⁸ Pérez-Vera, above n 10, at para 84.

¹⁹ Ibid.

²⁰ Pérez-Vera, above n 10, at para 64.

²¹ Ibid, at para 17.

Now, since the Convention does not specify the means to be employed by each State in bringing about respect for rights of custody which exist in another Contracting State, one must conclude that, with the exception of the indirect means of protecting custody rights which is implied by the obligation to return the child to the holder of the right of custody, respect for custody rights falls almost entirely outwith the scope of the Convention. On the other hand, rights of access form the subject of a rule which, although undoubtedly incomplete, nevertheless is indicative of the interest shown in ensuring regular contact between parents and children, even when custody has been entrusted to one of the parents or to a third party.

It is contended that art 1(a) is sufficient to imply that respect for a person's custody rights forms the basis for the composition of the Hague Convention. Therefore, phrasing art 1(b) as is, serves no further purpose than to reduce the level of clarity in the drafting of the Convention. If, as is suggested in the explanatory report, respect for custody rights is outside of the scope of the Convention, it submitted that it should not have been expressly stated as an objective in art 1(b). Perhaps reference could have been made to the fact that its scope was limited to the extent provided for in art 1(a). Further, if the rule in art 1(b) is undoubtedly incomplete, then it should not have remained as drafted, because a drafter who is unable to grasp the very subtle intricacies in the drafting of the Hague Convention may carry that confusion to the implementing legislation.

It is contended that the clarity in the drafting of the Hague Convention becomes even more clouded at art 4 which provides:²²

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

It can be argued that art 4 suggests that a breach of either custody or access rights can trigger action under the Hague Convention. This is correct. However, art 4 falls short of stating precisely what kind of action either breach would generate. It is submitted that the drafters of the Hague Convention could have been more direct by specifying that the breach of access rights referred to under art 4 and elsewhere in the Convention²³ is incapable of bringing about the return of children wrongfully removed to or retained in a contracting state. The explanatory report does not address this potential anomaly resulting from drafting of art 4. It merely states that art 4 relates to the scope of the Hague

²² The Hague Convention, above n 7, at art 4.

²³ See for example, the Hague Convention, above n 7, at art 29.

Convention in terms of the class of children that are protected.²⁴ The focus is then diverted to a discussion on identifying the category of persons described as protected children and the category of persons who can have custody and access rights.²⁵ That notwithstanding, the breach of access rights referred to in art 4 appears to be relevant to art 1(b) to the extent that these rights should be respected and as such, they would be protected under the Convention. It is submitted that matters such as these ought to have been dealt with more carefully in the Hague Convention to facilitate its smooth implementation in domestic law.

Despite the observations regarding the level of assistance given by the explanatory report, it does confirm that the Hague Convention has two objectives, one remedial insofar as it facilitates the return of children wrongfully removed from their habitual place of residence and the other preventative, insofar as it advocates respect for rights of custody and access exercised in contracting states.²⁶ These two distinct elements must be captured in the provisions of domestic legislation without overlapping. The question therefore is which drafting technique will best implement the Hague Convention given the suggested inadequacies in its drafting. Is such a Convention worth rewording? Alternatively, are there factors within a particular jurisdiction requiring that it be reworded? It remains to be seen how various jurisdictions approached this matter. An examination of New Zealand's approach will reveal that the difficulty arises where the two objectives of the Convention appear to overlap when reformulated in domestic legislation.

B Incorporation by New Zealand

The Hague Convention was first incorporated in New Zealand by the wording method. This was facilitated by the Guardianship Amendment Act 1991²⁷ which amended the Guardianship Act 1968. The text of the Hague Convention was annexed in the Schedule to the Act and the very important term “rights of custody” was defined as follows:²⁸

For the purposes of this part of this Act, a person has rights of custody in respect of a child if, under the law of the contracting State in which the child was, immediately before his or her removal, habitually resident, that person has, either alone or jointly with any other person or persons,

²⁴ Pérez-Vera, above n 10, at para 58.

²⁵ Ibid, at paras 75–79.

²⁶ Pérez-Vera, above n 10, at para 35.

²⁷ Guardianship Amendment Act 1991 [the Act]. Now repealed.

²⁸ Guardianship Amendment Act 1991, s 4.

- (a) the right to the possession and care of the child, and
- (b) to the extent permitted by the right referred to in paragraph (a) of this subsection, the right to determine where the child is to live.

Since then, the legislature has made several amendments to the statute book in an effort to strengthen the incorporation of the Hague Convention in New Zealand's domestic law. These amendments are discussed below in detail. The legislative instrument which now incorporates the Convention is the Care of Children Act 2004. In an article of 2007 Nixon proffered several reasons to support the approach taken by New Zealand under the Guardianship Amendment Act 1991.²⁹ This paper finds little support for Nixon's reasoning. Her arguments are set out below to facilitate a critical review of the same.

With regard to the choice of the wording method, Nixon argues that "the Convention itself produced the conflict of opinion, but the first s 4 did try to avert it."³⁰ She then suggests that the Select Committee considered a proposal to use the formula method but was satisfied that amongst other things, the use of the wording method would help "deal promptly with applications made under the Convention."³¹ Nixon appears to justify her support for the Select Committee's reasoning when she adds:³²

[t]he committee acknowledged that lawyers, judges and officials would be helped to deal with applications expeditiously if the legislation were in a form with which they were familiar; if interpretation questions apparent on the face of the Convention were resolved in the legislation; and if the provisions of the Convention were arranged in a manner that assisted understanding of them.

She also suggests that in order to assist the reader, the provisions setting out the grounds for the court refusing to order the return of a child are arranged in one clause in the Act, as opposed to several articles, in the Convention.³³ Another argument raised by Nixon is that if international precedent is unavailable or irrelevant, it will not assist in the interpretation of a treaty implemented by the formula method.³⁴ Nixon also claims that family lawyers in New Zealand must have been satisfied with the approach taken by the legislature since they did not take issue with it and claims that "the Care of Children Act

²⁹ See Nixon, above n 9.

³⁰ Ibid, at 93.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

2004 re-enacts the Guardianship Amendment Act 1991, in nearly identical language, in ss 95 to 124”.³⁵

In relation to the language of the Act, not only does Nixon insist that s 4(1) captured the intentions of the Hague Convention, she maintains that it “was expressed as it was to capture the Convention’s intention not to enforce the access rights and guardianship rights of non-custodial parents”.³⁶ Nixon therefore suggests that the framers of s 4(1) believed that the meaning of terms of the Hague Convention remained intact, despite s 4(1) being worded as it was. In other words, it was considered that the *pacta sunt servanda* rule was being observed. Nixon further adds that this formulation “did not treat the right to determine the child’s place of residence as an access right or guardianship right”.³⁷ To support her argument, she refers to the Minister of Justice’s speech at the second reading of the Guardianship Amendment Bill.³⁸ To further buttress her argument Nixon cites the judgment of the District Court in the case of *Gross v Boda*³⁹ where the court held that s 4(1) of the Act prevented the applicant from enforcing access rights.

It is submitted that much of Nixon’s reasoning is flawed and produces a very weak argument. As regards the use of the wording method, it has been suggested in this paper that the Hague Convention is probably not the best example of elegant treaty drafting. Nixon indicates that the wording method was used to avert the problems caused as a result. The difficulty with that argument is that the legislature must never purport to correct ambiguities in a treaty by writing what ought to be in that treaty into domestic legislation. There is a very thin line between elaborating on general terms within a treaty to bring clarity to treaty provisions in domestic legislation and altering treaty terms. By framing her argument as she did, Nixon is effectively admitting that this line may have been crossed. Thornton has emphasised that “[w]here the purpose of domestic legislation is to implement an obligation under an international agreement, the role of the legislature is restricted, in a practical, if not in a legal sense, to that of a law-transformer rather than a law-giver.”⁴⁰ It is therefore submitted that it is incorrect to suggest that possible ambiguities in the Convention would have been dealt with in that way. It is further

³⁵ Ibid.

³⁶ Nixon, above n 9, at 91.

³⁷ Ibid.

³⁸ Ibid.

³⁹ *Gross v Boda* [1994] NZFLR 704.

⁴⁰ Thornton, above n 2, at 309.

submitted that it would have been best not to tamper with the provisions of the Hague Convention given its tendency towards ambiguity.

Nixon indicates that she agrees with the approach taken by the Select Committee.⁴¹ Whilst her assertions are correct, there appears to be a disconnection which makes the argument seem forced. It is agreed that lawyers will be assisted if treaty provisions are reworded using language with which they are familiar. It is also agreed that the rearrangement of treaty provisions may assist in their understanding when incorporated into domestic law. However, these factors are relevant to treaty implementation in any dualist state. It is submitted that Nixon's argument would have been stronger had she outlined exactly what specific features of New Zealand's existing legislation supported the use of the wording method in this instance.

It is further submitted that the proposal that the wording method would facilitate the prompt dealing with applications made pursuant to the Hague Convention is a weak argument. The expeditious handling of cases is desirable. However, delay is a matter that is largely within the purview of the local courts, and there are many other factors which directly affect and therefore cause it. It can be argued that the courts would be assisted in handling cases expeditiously if they have a better understanding of the implementing legislation, but arguing the use of the wording method on the point of delay is unconvincing.

Nixon's reasoning can be strongly challenged on the point of the actual wording that was used in the Act and whether it properly captured the terms of the Hague Convention. In contrast to Nixon's support for the Select Committee's approach, the Legislation Advisory Committee advised against the use of the wording method because the proposed Bill contained different words from that used in the Hague Convention, but that advice was not taken.⁴² The Legislation Advisory Committee feared that the court would have deduced from these differences an intention to deliberately part from the wording of the Convention.⁴³ The Legislation Advisory Committee reported that New Zealand courts did find these differences to be "significant."⁴⁴ This is the kind of issue that ought to have exercised the mind of the Select Committee when deciding on the most suitable drafting

⁴¹ See Nixon, above n 9, at 93.

⁴² See the Legislation Advisory Committee, "Report of the Legislation Advisory Committee: 1 January 1994 to 31 December 1995" (1996) Ministry of Justice, Part III < www.justice.govt.nz >.

⁴³ Ibid.

⁴⁴ Ibid.

technique to use to implement the Convention. The Legislation Advisory Committee's standpoint is supported. It is agreed that the wording used in the Act did not enhance the understanding of provisions of the Hague Convention. Instead, it seemed to have altered the meaning of terms such as "rights of custody."

It is submitted that Nixon's supposition that had the formula method been used, the unavailability of international jurisprudence on the subject would hamper the interpretation of the implementing legislation lacks logic. First, international jurisprudence addressing interpretation questions on the Hague Convention did exist prior to the enactment of the Guardianship Amendment Act 1991.⁴⁵ Secondly, further international jurisprudence would have evolved and did evolve over time.⁴⁶ Thirdly, a dearth of international jurisprudence is insufficient to substantiate the exclusion of the wording method where more pertinent factors support its use. In *Hunter v Murrow*⁴⁷ the Court of Appeal in the United Kingdom noted that the Convention had been implemented by the formula method in other jurisdictions and gave the example of the United Kingdom in 1985. This predated the enactment of New Zealand's implementing legislation by over five years. Further, the judgment of the House of Lords in *Fothergill v Monarch Airlines Ltd*⁴⁸ delivered ten years prior to the enactment of the Act, is clear authority that the courts may refer to travaux préparatoires to resolve ambiguities in legislation implemented using the formula method and that a purposive approach should be taken.⁴⁹

It appears that Nixon presupposes that interpretation questions would be raised, when the primary goal should always be to enact implementing legislation that properly represents treaty terms and therefore in itself raises no interpretation questions. It is therefore submitted that electing the formula method may have been the more prudent means of managing any ambiguities in the Hague Convention. To do otherwise, is to run the risk of binding the courts to the will of parliament, notwithstanding its disharmony with the Convention. An analysis of the comments from the judiciary in New Zealand illustrates that this is precisely what happened in New Zealand.

⁴⁵ See for example *Re J(A Minor)(Abduction: Custody Rights)*[1990] 2 All ER 961 (HL), on the distinction between "rights of custody" and "rights of access".

⁴⁶ See for example *Thomson v Thomson* [1994] 3 SCR 551(SCC), a Canadian authority, and *Hunter v Murrow* [2005] EWCA Civ 976 (CA), 3 FRC 1, an English authority.

⁴⁷ *Hunter v Murrow*, above n 46.

⁴⁸ *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696 (HL).

⁴⁹ *Ibid*; see also *Re H (Abduction: Custody Rights)* [1991] 3 All ER 230 (HL).

C Criticism by New Zealand's judiciary

Under s 4(1)(a) of the Act, a person with custody rights had the right to possession and care of a child. It is contended that a person with access rights as defined under s 2 of the Act also had the right to possession and care of a child. The wording of s 4(1)(b) was “to the extent permitted by the right referred to in paragraph (a) of this subsection, the right to determine where the child is to live.” This is slightly different from the Hague Convention which states “and in particular.” It suggests that if in the exercise of rights to possession a person is, by chance, allowed to determine where the child lives, then that person has custody rights too. Thus, it can be argued that “custody rights” and “access rights” overlapped under the Act. There is a wealth of judicial authority supporting this view including *Gross v Boda*,⁵⁰ the very case upon which Nixon relies.⁵¹ Nixon alluded to the final judgment in *Gross v Boda*.⁵² However, the examination of the reasoning which preceded that court’s final determination reveals that even the District Court criticised the manner in which the Hague Convention was incorporated in New Zealand.

In this regard, Whitehead J appreciated that the drafters of the Convention aimed to bring precision to the definition of “rights of custody” by indicating that a person who had custody rights had the right to care for a child to the extent that he could determine where that child was to live. This can be deduced from Whitehead J’s statement: “[t]here is a special emphasis on the right to determine the child’s place of residence above any other right including the right to the care of the person of the child.”⁵³ It is also notable that although Judge Whitehead was able to identify arts 1, 3 and 5 of the Hague Convention as the articles which were relevant to establishing whether an applicant had rights of custody,⁵⁴ he reasoned that the definition of “rights of custody” in s 4(1) of the Act constituted a combination of “parts of arts 3, 4 and 5 of the Convention.”⁵⁵ It may be recalled from the brief discussion above, that art 4 of the Hague Convention appears to cloud the clarity in the Hague Convention and that that possibility is not considered in the explanatory report. However, Whitehead J observed that there are elements of art 4 of the Convention in s 4(1) of the Act.

⁵⁰ *Gross v Boda*, above n 39.

⁵¹ See Nixon, above n 9, at 91.

⁵² Ibid.

⁵³ *Gross v Boda*, above n 39, at [708] per Judge Whitehead.

⁵⁴ Ibid.

⁵⁵ Ibid.

Whitehead J demonstrated that he was fully aware of the need for implementing legislation to be in line with the Convention it purports to implement when he referred to the learning in Burrows and Carter's *Statute Law New Zealand*.⁵⁶ He noted that Burrows and Carter explained that the factor setting implementing legislation apart from other legislation is that it is governed by a treaty which is an international document that may have been implemented in other jurisdictions.⁵⁷ Whitehead J also noted Burrows and Carter's advice that courts should be mindful of the desire to maintain uniformity in interpretation throughout contracting states.⁵⁸ He cited Lord Diplock's reference to *Ellerman Lines Limited v Murray*⁵⁹ in *Salomon v Commissioners of Customs and Excise*⁶⁰ and reasoned that:⁶¹

As the New Zealand Act is specifically clear in respect of its definition of rights of custody, it would appear that the decision of *Ellerman Lines Limited v Murray* ... would still apply. The net result of this is that the desirability of international uniformity in such cases must be eroded by the New Zealand definition of rights of custody and as a result New Zealand may stand on its own in that regard.

This indicates that even Whitehead J deduced that as formulated, s 4(1) of the Act did not reflect the intentions of the Hague Convention. Thus, his reasoning does not support Nixon's position.⁶²

The New Zealand legislature got a further scolding from its judiciary when *Gross v Boda* was heard on appeal. It was there that the court pointed out the defect in the draft composed by the legislature. As Hardie Boys J lamented:⁶³

The issue in this Court has been as to the meaning of s 4(1) which enacts, but in a more extended form and with one particular difference, art 5 of the Convention. The difference is that while the Convention defines rights of custody in a single formula, the statute has a twofold cumulative formula.

⁵⁶ *Gross v Boda*, above n 39, at [710] per Judge Whitehead; JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009).

⁵⁷ See *Gross v Boda*, above n 39, at [710] per Judge Whitehead .

⁵⁸ Ibid.

⁵⁹ *Ellerman Lines Limited v Murray* [1931] AC 126 (CA).

⁶⁰ *Salomon v Commissioners of Customs and Excise* [1966] 3 All ER 871(CA).

⁶¹ *Gross v Boda*, above n 39, at [710] per Judge Whitehead .

⁶² It is curious that despite his reasoning, Judge Whitehead was somehow unable to find that this incorrect formulation of "rights of custody" in New Zealand's internal law also included "rights of access." See *Gross v Boda*, above n 39.

⁶³ *Gross v Boda* [1995] NZFLR 49 (CA) at [53] per Hardie Boys J.

Cooke P observed that that construction of s 4(1) could result in an overlapping of the definitions of “rights of access” and “rights of custody.” As he stated:⁶⁴

... those definitions are not mutually exclusive. A right of intermittent possession and care of a child will fall within s 4(1)(a) and to that extent will fall within the definition of rights of custody also. No doubt it may also fall within the definition of rights of access so there is a possibility of overlap.

McKay J also recognised that New Zealand had parted company with other jurisdictions which had implemented the Convention. He commented:⁶⁵

It is unfortunate that for reasons which are not readily discernible the Act has departed from the wording of the Convention, instead of simply adopting it as has apparently been done in other countries. Some of the differences appear to be significant.

The above indicates that the New Zealand judiciary was well aware of the weaknesses in the drafting of the Act. Thus, contrary to Nixon’s assessment of the matter, this was not a question of the New Zealand courts misinterpreting well-drafted legislation. The courts were bound to conform to the will of parliament and did so regrettably, because the domestic legislation was clear and unambiguous. An examination of the approach taken by the judiciary in the United Kingdom reveals that they too appreciated the dilemma faced by the New Zealand judiciary.

D Incorporation in the United Kingdom and its criticism of New Zealand’s approach

In contrast to the implementation technique used in New Zealand, the Hague Convention was implemented in the United Kingdom by the formula method. Nixon suggested that the formula method was not an appropriate implementation technique for implementation in New Zealand, because if international precedent is unavailable that might hamper the interpretation of the Convention.⁶⁶ She proposed that despite criticism by the English judiciary, the New Zealand legislature was not to be blamed.⁶⁷ In view of Nixon’s comments, the purpose of the analysis of the English case law below is twofold. First, it underlines the procedure by which the courts go about answering interpretation questions

⁶⁴ At [56] per Cooke P.

⁶⁵ At [51] per McKay J.

⁶⁶ Nixon, above n 9, at 93.

⁶⁷ Ibid.

on Convention terms where the formula method is used. Secondly, it highlights pronouncements from the English judiciary which indicate that it in fact sympathised with New Zealand's judiciary having recognised that despite the defects in the implementing legislation, New Zealand's judiciary was obliged to succumb to the will of its parliament.

By using the formula method, the English legislature imported the exact wording used in the Hague Convention into its legislative scheme. This was achieved through the enactment of the Child Abduction and Custody Act 1985(UK). The Hague Convention was set out in sch 1 to that Act and was given the force of law under s 1(2). Other provisions of the Child Abduction and Custody Act 1985(UK) provided for the operational machinery. Section 3 provided for the central authority who is the Lord Chancellor, s 4 judicial authorities, s 5 the courts' interim powers and s 6 reports.

Therefore, when the English courts are called upon to determine matters relevant to the Hague Convention, they have regard to the wording used in the Hague Convention itself, as opposed to a reconstruction of it composed by the legislature. The phrase "rights of custody" is construed as set out in art 5 of the Hague Convention, which is appended in schedule 1 of the Child Abduction and Custody Act 1985(UK).⁶⁸ Murphy indicates that the term "rights of custody" under the Hague Convention is akin to the English concept of parental responsibility.⁶⁹ He explains that this is consistent with "rights relating to the care of the person of the child and in particular, the right to determine the child's place of residence: Hague Convention Art 5."⁷⁰ This was the approach taken by the English court in *S v H (Abduction: Access Rights)*⁷¹ where it was held that the parent who was left behind and whose consent was not required to have the child removed from the jurisdiction, did not have parental authority and therefore did not have custody rights under the Convention.⁷²

⁶⁸ See the Child Abduction and Custody Act 1985 (UK), sch 1.

⁶⁹ John Murphy *International dimensions in Family Law* (Manchester University Press, UK, 2005) at 214.

⁷⁰ Ibid.

⁷¹ *S v H (Abduction: Access Rights)*[1998] Fam 49 (Family Division).

⁷² Ibid.

The English practice⁷³ has been to maintain a distinction between “rights of custody” and “rights of access.” Murphy was careful to warn that “the correlation between custody rights and parental responsibility should not be supposed to be an exact one.”⁷⁴ A similar line was taken in the case of *Re V-B (minors)(abduction: rights of custody)*⁷⁵ in which the court also maintained a distinction between “rights of custody” and “rights of access,” and recognised that in order to determine whether a parent had either of these rights, the first step was to determine what rights the requesting parent held under the domestic law in which the child was habitually resident. The second step was to determine whether these rights amounted to rights of custody under the Convention as a matter of law within the jurisdiction in which the Convention is invoked. The third step was to determine whether those rights had been breached by the removal of the child.⁷⁶ In so doing, the court was guided by the advice of Lord Browne-Wilkinson in the *Re H (minors)(abduction: acquiescence)*:⁷⁷

An international Convention, expressed in different languages and intended to apply to a wide range of differing legal systems, cannot be construed differently in different jurisdictions. The Convention must have the same meaning and effect under the laws of all contracting states. I would therefore reject any construction of Article 13 which reflects purely English law rules as to the meaning of the word acquiescence. I would also deplore attempts to introduce special rules of law applicable in England alone ... which are not to be found in the Convention itself or in the general law of all developed nations.

The court determined that this was in keeping with the second conclusion of the Report of the Second Special Commission meeting to review the operation of the Hague Convention in January 1993. Ward J reproduced this excerpt from the report:⁷⁸

The key concepts which determine the scope of the Convention are not dependent for their meaning on any single legal system. Thus the expression “rights of custody,” for example does not coincide with any particular concept of custody in

⁷³ See *Re W(a minor)(unmarried father)*, *Re B(a minor)(unmarried father)*[1999] Fam 1(CA); *Hunter v Murrow*, above n 46; *Re V-B (minors)(abduction: rights of custody)* [1999] 2 FCR 371(CA); *Re D (a child)(abduction: foreign custody rights)*[2007] 1 All ER 783 (HL).

⁷⁴ See Murphy, above n 69.

⁷⁵ *Re V-B (minors)(abduction: rights of custody)*, above n 73.

⁷⁶ *Ibid*, at 375–376 per Ward LJ.

⁷⁷ *Re H (minors)(abduction: acquiescence)*[1998] AC 72 (HL) at [87] per Lord Browne-Wilkinson.

⁷⁸ See *Re V-B (minors)(abduction: rights of custody)* above n 73, at 375 per Ward J.

domestic law, but draws its meaning from the definitions, structure and purposes of the Convention.

The court therefore considered the purpose of the Hague Convention and referred to its preamble for guidance. Lord Browne-Wilkinson's exposition of the approach to be taken provides a direct response to Nixon's comment on the interpretation of Convention terms when implemented by the formula method. As he explained, the definitions, structure and purpose of the relevant Convention should be considered and a purposive, general construction of its terms is to be assumed. This is the approach which ought to have been taken by New Zealand courts had the formula method been used.

In addition to the above, the explanatory material relevant to the Hague Convention should also be considered to address interpretation questions where the formula method is used. In *Re D(a child)(abduction: foreign custody rights)*⁷⁹ the House of Lords referred to art 5 of the Hague Convention to determine the meaning of the words "rights of custody" and "rights of access" and also consulted the explanatory report by Professor Pérez-Vera as a guide. The court determined that the explanatory report confirmed that there was a deliberate distinction between "rights of custody" and "rights of access" under the Convention.⁸⁰ It was also affirmed in that case that contracting states should aim for uniformity in the interpretation of Conventions which have been implemented in domestic law.⁸¹ Upon assessing the approach taken in many other jurisdictions, the House of Lords noted that New Zealand had to be separated from the others since it had "gone still further and held that rights of access can in themselves amount to rights of custody."⁸²

In her commentary, Nixon referred to *Hunter v Murrow*⁸³ as an example of English authority in which the New Zealand legislature's approach was criticised, but she maintained that the New Zealand statute was not to be blamed.⁸⁴ A closer examination of the judgment in that case reveals that the English court appreciated that the New Zealand courts were bound to accede to the will of their parliament, when its intentions were presented in clear and unambiguous terms. The distinguishing factor in *Hunter v Murrow* was that the English court also recognised that it was not bound by the New Zealand

⁷⁹ *Re D (a child)(abduction: foreign custody rights)*, above n 73.

⁸⁰ At [25], per Baroness Hale.

⁸¹ At [28], per Baroness Hale.

⁸² At [35], per Baroness Hale.

⁸³ *Hunter v Murrow*, above n 46.

⁸⁴ Nixon, above n 9, at 93.

court's ruling on a Hague Convention question, where such a question had been referred pursuant to an application made under the English court's inherent jurisdiction.⁸⁵

Thorpe LJ investigated the basis upon which the New Zealand court determined that the removal of the child in the instant case was wrongful pursuant to art 3 of the Convention. In furtherance of his objective, Thorpe LJ referred to New Zealand's implementing legislation and asserted:⁸⁶

In incorporating the Convention many jurisdictions have taken the same path as this jurisdiction, the path of more or less wholesale incorporation. Thus, the majority of the Convention is simply a schedule to our 1985 statute. However, other jurisdictions have preferred to achieve the effect of incorporation by independent legislative provisions. New Zealand has followed that latter course. Thus it was through the Guardianship Amendment Act 1991 that the Hague Convention was implemented ... Thus the decision of the Family Court determining whether or not the removal of Xavier had been wrongful required the application to the agreed facts of section 4 of the Act rather than Articles 3 and 5. The desirable goal of a uniform construction of the Convention amongst all the Contracting States may obviously be impeded by the preference of some States to embark on a redrafting exercise in the process of implementation.

Thorpe LJ's analysis of the New Zealand judiciary's approach was so thorough that he located and proffered evidence of the New Zealand judiciary's discomfort with the legislative drafting technique preferred by its legislature. In so doing, he noted that English authority as to the distinction between the terms "rights of custody" and "rights of access" had been put to the High Court in New Zealand. However, the judge in that case found himself bound by the precedent set by New Zealand Court of Appeal. Thus, Thorpe LJ recited the reasoning of the judge in New Zealand's High Court as follows:⁸⁷

... the fact remains that the (New Zealand) Court of Appeal has fashioned an approach in this country which may well be different to that in other jurisdictions, but which is nonetheless binding on both the Family Court and this court.

⁸⁵ *Hunter v Murrow*, above n 46, at [47] per Dyson LJ.

⁸⁶ *Ibid*, at 15-18 per Thorpe LJ.

⁸⁷ *Hunter v Murrow*, above n 46, at [21] per Thorpe LJ.

This refutes Nixon's claim that the blame should not rest with New Zealand's legislature. It underscores the principle handed down in the *Salomon*⁸⁸ case that where the sovereign's intentions are clearly stated in implementing legislation, the courts have no jurisdiction to remedy an apparent breach of international obligations.⁸⁹

E New Zealand's first attempt to rectify a blunder? The Guardianship Amendment Act (No 2) 1994

The Legislation Advisory Committee strongly advocated that drafters be careful to compose implementing legislation that accurately captures New Zealand's international obligations from the outset, because of the strain on resources that results from attempts to rectify poorly drafted legislation.⁹⁰ It further predicted that "[i]f New Zealand is in breach, the government of the day will have to use some of its precious parliamentary resources to revisit and amend the non-compliant legislation;"⁹¹ and so they did in relation to s 4 of the Act.

The Law Reform (Miscellaneous Provisions) Bill (No 3) 1994 was introduced in parliament in 1994. Insofar as it contained amendments to the Act, the explanatory note to the Bill provided that the new s 4 which repealed s 4 of the Act would be "modelled more closely than the existing section on Articles 3 and 5 of the Convention on the Civil Aspects of International Child Abduction".⁹² The Legislation Advisory Committee expressed strong criticism of this move not only because it was indicative of the wastage of resources which could have been avoided, but because it took the view that not even that attempt at rewording s 4(1) of the Act was done well. As stated in its report of 1996:⁹³

The Explanatory Note to the Bill stated that the new section 4 'is modelled more closely than the existing section on Articles 3 and 5 of the Convention on the Civil Aspects of International Child Abduction' ... As clause 39 of the Law Reform (Miscellaneous Provisions) Bill (No. 3) 1994 recognised, the law had to be put right. However to quote the Explanatory Note, the new section 4 was still only to be

⁸⁸ *Salomon v Commissioners of Customs and Excise*, above n 60.

⁸⁹ At [875] per Diplock LJ.

⁹⁰ Legislation Advisory Committee, above n 4, at para 6.1.2.

⁹¹ *Ibid.*

⁹² Law Reform (Miscellaneous Provisions) Bill (No 3) 1994 (38-1) (explanatory note) at v.

⁹³ Legislation Advisory Committee, above n 42, at Part III.

‘modelled more closely’ on the wording of the Convention-it did not directly invoke the wording of the Convention.

The Legislation Advisory Committee seems to have aired its frustrations because it had already determined and advised five years before, that there was no reason New Zealand could not have emulated the approach taken by the United Kingdom, Canada and the United States and used the formula method. Even further, the Legislation Advisory Committee considered that the wording used in the amendment still allowed for the courts to interpret in a manner that was inconsistent with the Hague Convention.⁹⁴ Section 39(1) of the Law Reform (Miscellaneous Provisions) Act (No 3) 1994 was worded as follows:

The Guardianship Amendment Act 1991 is hereby amended by repealing section 4, and substituting the following:

For the purposes of this Part of this Act, the term ‘rights of custody,’ in relation to a child, shall include rights relating to the care of the person of the child, and in particular, the right to determine the child’s place of residence, attributed to a person, institution or other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention of the child.

This later became the Guardianship Amendment Act (No 2) 1994. It appears that the above is worded more closely to s 3 and 5 of the Convention than the previous s 4.⁹⁵ Nixon suggested that: “[t]he second s 4 was not needed.”⁹⁶ In a later article she wrote:⁹⁷

Unfortunately, the original section 4 was replaced in 1994 as part of the Guardianship Amendment Act (No 2) 1994. A vital message disappeared from the law. New Zealand Courts were no longer told that the Article 5(a) right to determine the child’s place of residence was not the guardianship right, but rather, an aspect of the custody right. *Fairfax* illustrates the problem that the removal of the message caused.

⁹⁴ Ibid.

⁹⁵ See Law Reform (Miscellaneous Provisions) Bill (No 3) 1994 (38-1) (explanatory note), above n 92, at v.

⁹⁶ Nixon, above 9 at 92.

⁹⁷ Margaret Nixon “Hague Convention Hares-time for the gamekeeper?”[2009] NZ Lawyer 22 at 23.

It is submitted first that the explanatory note to the Law Reform (Miscellaneous Provisions) Bill (No 3) 1994 proves that it was parliament's intention to correct the earlier error by effecting that amendment. Secondly, Nixon's comments confirm that the framers of s 4 of the Act overstepped their boundaries as law transformers by attempting to write into domestic legislation what they considered ought to have been in the Hague Convention. Thirdly, the analysis of criticisms from the New Zealand judiciary and English judiciary confirms that the wording used in s 4 of the Guardianship Amendment Act 1991 rendered it unsuccessful at conveying the vital message which Nixon argues was lost because of the amendment of 1994. Fourthly, Nixon uses the *Fairfax*⁹⁸ case as judicial authority which supports her contention. However, that case was decided on the basis of s 97 of the Care of Children Act 2004 and not the Guardianship Amendment Act (No 2) 1994.

It is questionable whether the 1994 amendment achieved much and was worth doing, not because the original s 4 was adequate as Nixon suggests, but because it still avoided the wording used in the Hague Convention. The 1994 amendment seems to have simply rearranged two articles of the Hague Convention. It is further submitted that the 1994 amendment did not justify the expenditure of the financial resources, the human resource and the time which had to have been used to compose it. The judiciary's view on the effectiveness of the 1994 amendment is reflected in *Dellabarca v Christie*⁹⁹ in which the court stated obiter that the legislature had acted too quickly to benefit from the advice in *Gross v Boda* that the formula method ought to have been used as in many other states.¹⁰⁰

F New Zealand's second attempt to rectify a blunder? The Care of Children Act 2004

New Zealand's legislature seems to have made yet another attempt to align its domestic implementing legislation with that of other contracting states when the Care of Children Act 2004 was passed. It is apparent from the Select Committee Report on the Care of Children Bill 2003¹⁰¹ that this enactment arose out of the desire to reform and modernise the law relating to the care of children and guardianship.¹⁰² The primary focus in terms of law reform was "to promote children's welfare and best interests and facilitate their development, by helping to ensure that appropriate arrangements are in place for their

⁹⁸ *Fairfax v Ireton* [2009] 3 NZLR 289 (CA).

⁹⁹ *Dellabarca v Christie* [1999] 2 NZFLR 97 (CA).

¹⁰⁰ At [100] per Keith J.

¹⁰¹ Care of Children Bill 2003 (54-2) (select committee report).

¹⁰² *Ibid*, at [1].

guardianship and care.”¹⁰³ It is further stated in the Select Committee Report that the Care of Children Act 2004 “implements in New Zealand law the Hague Convention on the Civil Aspects of International Child Abduction and reforms and replaces the Guardianship Act 1968 including the Guardianship Amendment Act 1991.”¹⁰⁴

The Hague Convention was implemented at s 94. The term “rights of custody” is defined at s 97 as follows:¹⁰⁵

For the purpose of this subpart, rights of custody in relation to a child, include the following rights attributed to a person, institution, or other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the child’s removal or retention:

- (a) rights relating to the care of the person of the child (for example, the role of providing day-to-day care for the child); and
- (b) in particular, the right to determine the child’s place of residence.

The only assistance provided by the explanatory note with regard to wording used in the Care of Children Act 2004 is that: “subpart 4 re-enacts in a form consistent with current drafting practice, the Guardianship Amendment Act 1991.”¹⁰⁶ It is submitted that changing the definition of Hague Convention terms does not equate to drafting in a form consistent with current drafting practice. It is notable that even on its second attempt at aligning its domestic legislation with the provisions of the Hague Convention, the legislature still chose not to reproduce the wording of the term “rights of custody” under the Hague Convention.

Contrary to Nixon’s position, it is submitted that there is a major difference between the drafting of s 97 of the Care of Children Act 2004 and s 4 of the Guardianship Amendment Act 1991. The phrase “and to the extent permitted by the right referred to in paragraph (a) of this subsection” has been deleted. This removes the possibility of a person acquiring custody rights from having had the chance to determine where a child is to live by virtue of having cared for that child. It is contended that it was necessary to correct that error in the Guardianship Amendment Act 1991. However, there is included within the redraft in s 97 an example of the kind of act which constitutes caring for the

¹⁰³ Ibid, at [10].

¹⁰⁴ Ibid, at [25].

¹⁰⁵ Care of Children Act 2004, s 97(a).

¹⁰⁶ Care of Children Bill 2003 (54-1) (explanatory note) at 16.

person of the child. The legislature may have taken its cue from s 5(3) of the Interpretation Act 1999 which provides that examples can be used as indicators of the meaning of legislation.¹⁰⁷ However, it appears that by including this example, the legislature introduced yet another alteration to the definition of “rights of custody” under the Hague Convention into New Zealand’s domestic legislation.

An evaluation of the judgment in *Fairfax* in relation to the effectiveness of drafting of the implementing legislation before the court, illustrates that the defect in the judgment can be linked to the defect in the implementing legislation. In *Fairfax v Ireton*¹⁰⁸ it was noted that “the concept of day-to-day care referred to in s 97(a) is defined in s 8: ...care that is provided only for 1 or more specified days or parts of days.”¹⁰⁹ It is submitted that in light of the learning from the explanatory note to the Hague Convention and the reasoning offered by English authorities, the Hague Convention could not have intended to confer custody rights on a person who cared for a child for only one day or part of a day. It is further submitted that this dilutes the concept of parental responsibility alluded to in the case of *S v H (Abduction: Access Rights)*,¹¹⁰ which is closer to what was contemplated under the Hague Convention. Burrows and Carter explain that the Personal Property Securities Act 1999¹¹¹ makes provision for possible inconsistencies between examples and a provision by specifying that the provision prevails.¹¹² They add that “[t]he Interpretation Act 1999 could of course be amended to include a single default provision on the status of all explanatory provisions.”¹¹³ Until the New Zealand legislature exercises that option, it is strongly recommended that an example should only be used if it will assist in the interpretation of the provision in question.

In *Fairfax*¹¹⁴, the Court of Appeal’s assessment of whether the rights held by a father pursuant to an agreement constituted custody rights, depended on the question whether he had had day-to-day care of the child as defined under s 8. Chambers J reasoned:¹¹⁵

¹⁰⁷ See the Interpretation Act 1999, s 5(3).

¹⁰⁸ *Fairfax v Ireton*, above n 98.

¹⁰⁹ At [314] per Baragwanath J.

¹¹⁰ *S v H (Abduction: Access Rights)* above n 71.

¹¹¹ Personal Property Securities Act 1999, s 21(3).

¹¹² Burrows and Carter, above n 56, at 124.

¹¹³ *Ibid.*

¹¹⁴ *Fairfax v Ireton*, above n 98.

¹¹⁵ At [48] per Chambers J.

... the father's agreed parenting role was squarely within the definition of 'day-to-day' care, as set out in s 8 of COCA ... The New Zealand Parliament could not jettison the use of the old fashioned term 'custody' in this context, but did make clear in the definition of 'rights of custody' for the purpose of Hague Convention applications that the Convention's definition of rights of custody,' namely 'rights relating to the care of the person of the child,' equated with the new concept of 'day-to-day' care used elsewhere in COCA.

It was held that the agreement between the parents did confer the day-to-day care of the child on the father. Further, on each of these days the child would have to live at a place to be determined by the father, thus the father had custody rights with respect to the child. Caldwell¹¹⁶ pointed out that the Court of Appeal in *Fairfax* appreciated that the ruling in the *Dellabarca v Christie*¹¹⁷ case was different from overseas authorities, but did not directly address the question whether the ruling in that case regarding the weight to be given to a person's ability to determine place of residence was correct. He concludes: "the findings of the Court of Appeal meant that New Zealand ... will remain out of step with other jurisdictions on the critical jurisdictional Convention question of rights of custody."¹¹⁸ It has been noted in this paper that even in the *Dellabarca* case, the court posited that the formula method should have been used to implement the Hague Convention.¹¹⁹ Therefore, it is agreed that New Zealand is out of step with other jurisdictions. However, the courts cannot be blamed where the tools before them, the implementing legislation, is defective.

A further observation ought to be made in relation to the implementation of the Hague Convention under the Care of Children Act 2004. It creates a possible overlap between guardianship rights and custody rights. In this regard, s 16 (a) of the Care of Children Act 2004 provides:¹²⁰

The duties, powers, rights and responsibilities of a guardian of a child include without limitation, the guardian's having the role of providing day-to-day care for the child.

¹¹⁶ John Caldwell "Family Law *Fairfax v Ireton* [2009] NZCA 100" [2009] NZLJ 147 at 148.

¹¹⁷ *Dellabarca v Christie*, above n 99.

¹¹⁸ Caldwell, above n 116 at 148.

¹¹⁹ See *Dellabarca v Christie*, above n 99, at [100] per Keith J.

¹²⁰ Care of Children Act 2004, s 16.

As noted above, the example of actions which constitute custody rights given in s 97, was also the day-to-day care of a child. Therefore, from a legislative drafting standpoint and on the strict construction of ss 16 (a) and 97, a guardian may also have custody rights. It is submitted this is where the conflict arises. This was never contemplated under the Convention.

G A third attempt for New Zealand?

The above analysis suggests that there is a need for the Care of Children Act 2004 to be further amended to properly capture the intentions of the Hague Convention in New Zealand's domestic legislation. Two main points can be gleaned from it. First, New Zealand's legislature insists on using the wording method to implement the Hague Convention. Secondly, throughout the process of amending legislation, parliament has managed to alter definitions and by extension, change the meaning of Hague Convention terms. The most recent amendment formed part of a process of law reform. It is understood that with the passage of time, legislative provisions have to be updated so that they complement the modernised systems which they are intended to regulate. However, it is unwise to interfere with the definitions of terms given under any Convention during the process of legislative implementation.

Since New Zealand seems resolute in its submission to the wording method it might have followed the example of Quebec¹²¹ which also preferred this legislative drafting technique. As the Law Library of Congress reports:¹²²

Unlike the other provinces, Quebec enacted the Convention by restating its major provisions in a provincial statute ... However, Quebec's law appears to be substantially the same as that of the other provinces [which used the formula method]. It did not simply adopt the Convention, because it tries to conduct a separate, but not always different, foreign policy.

The Quebec Act commences with an interpretation and application section which mirrors the wording of art 1, objectives of the Convention. It is noteworthy that although the

¹²¹ An Act respecting the Civil Aspects of International and Interprovincial Child Abduction RSQ c A- 23.01.[The Quebec Act].

¹²² Law Library of Congress Canada "Hague Convention on International Child Abduction"(2004) Law Library of Congress <www.kinder-nach-nause.de>.

wording method was used, the definitions of “rights of custody” and “rights of access” set out under the Hague Convention were not altered. Thus, the exact wording used in the Hague Convention is reflected in s 2. The provisions regarding wrongful removal or retention are set out in ss 3 and 4.

Unlike in the Hague Convention, the heading “Applicability” is inserted before s 5 which contains the same wording as s 4 of the Hague Convention. This alerts the reader to the fact that the provision seeks to define the children the Hague Convention applies to. It was argued earlier that this is not as clear in the Hague Convention. The matter of Central Authorities is provided for in Chapter 2, which contains ss 6-12. The legislature not only designated a Central Authority as required under the Hague Convention and set out its duties, it also elaborated on and set out the ambit of its functions. To this end, ss 8 and 9 provide for the expeditious handling of matters, set out procedures for seeking information about the whereabouts of a child and address the matter of protected or confidential information. The issuance of warrants, urgent measures and duration are also provided for in Chapter 2 of the Quebec Act. In addition s 28 expressly provides that it is the law of the requested state which obtains as regards the determination of whether there has been a wrongful removal or retention. In general, the Quebec Act continues with this approach of elaborating on issues covered within the Convention. In relation to rights of access these matters include the exercise of access and conditions of access at ss 31 and 32 respectively.

H Conclusion

In conclusion, it is submitted that the results of the comparative study of the implementation of the Hague Convention make it difficult to subscribe to the argument that the drafters are not to be blamed for New Zealand’s unique interpretation of Convention terms. Nixon stated that: “[t]he source of misinterpretations of the Convention may well lie in the method of implementation that declares an international convention to be domestic law.”¹²³ The differences in New Zealand’s interpretation of Convention terms can certainly be traced to its choice of the wording method, particularly because despite several attempts, the legislature was unable to retain the meaning of terms as defined under the Convention. This supports the argument that uniformity in the legislative drafting technique used to implement international treaties fosters coherence in the manner in which they are interpreted in domestic law. It is recognised that uniformity in approach across implementing states may not always be possible, but there is little

¹²³

See Nixon, above n 97, at 23.

justification for the use of limited resources to execute an assault on the definition of the terms of an international agreement in the process of implementation. Convincing evidence of matters specific to New Zealand's legislative drafting scheme which supported the use of the wording method is yet to be proffered.

In light of the above, the recommendation is the same as the advice given to the Select Committee by the Legislation Advisory Committee which was ignored, the observations of the English courts which have been disregarded and the admissions of the New Zealand judiciary which seem to be masked by suggestions that it is the courts which are misconstruing soundly drafted legislation. The Hague Convention should be implemented by the formula method because it is a self-contained body of law. Apart from the United Kingdom, this was the approach taken in South Africa under the Hague Convention on the Civil Aspects of International Child Abduction Act 1996 (SA) and most provinces in Canada. In Alberta the Convention was implemented under the International Child Abduction Act 1986 SA c1-6.5 and in New Brunswick, under the International Child Abduction Act 1982 SNB c1-12.1.

Had the formula method been used in New Zealand, a combination of the explanatory report to the Hague Convention and precedent founded on the international body of law would have decided matters relevant to its interpretation and assisted New Zealand's judiciary. The judicial authority examined supports the position that the Hague Convention did not require rewording, but if the legislature was inclined to do so, this ought to have been done well, as it was in the case of Quebec. What is worth doing is worth doing well.

IV Same Charter different technique - An examination of the implementation of the Charter of the United Nations in Australia, the United Kingdom, the United States, New Zealand and Canada

The United Nations is an organ through which member states and world leaders exercise extensive powers in a collaborative effort to end all forms of suffering and bring about peace. The work of the United Nations spans environmental concerns, human rights, humanitarian affairs, economic affairs and many other areas. The Charter of the United Nations¹ is the international agreement by which the United Nations was founded. Simma notes that one of the unique characteristics of the Charter relates to the making of reservations. He indicates that whilst there is no express provision to that effect, it is generally accepted that reservations are not permissible under the Charter.² This suggests that its provisions would have anticipated a wholesome embrace from member states on the matter of its implementation in domestic law. However, the analysis below reveals that this is not what transpired.

A comparative study of the implementation of the Charter in Australia, the United Kingdom, the United States, New Zealand and Canada indicates that different approaches were taken. This has not distorted the meaning of Charter terms, as with Hague Convention in New Zealand. Rather, it has varied the extent to which the Charter is incorporated in the domestic law of these states. This study illustrates how implementation techniques can be used as a means of controlling the impact of the Charter on the domestic legal order. Of all the Charter provisions which are worthy of mention and require legislative support to be of real legal significance, most states addressed only art 41 which speaks to the imposition of economic sanctions. Even then, art 41 of the Charter was implemented in different ways. This begs the question why, despite the prohibition of reservations, internal laws have not addressed the Charter provisions on the imposition of military sanctions in the same way that they have provided for economic sanctions. A common feature is that most states resorted to the subordination method as the drafting technique to give effect to resolutions of the Security Council not requiring the use of force.³

¹ Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October, 1945). [The Charter].

² Bruno Simma (ed) *The Charter of the United Nations: a commentary* (2nd ed, Oxford University Press, New York, 2002) at 1351.

³ See for example in New Zealand, the United Nations Sanctions (Al Qaida and Taliban) Regulations 2007; the United Nations Sanctions (Iraq) Regulations 1991 and the United Nations Sanctions (Iran) Regulations 2010.

The techniques which have been used to implement the Charter are considered here. The consequences of each will be examined, and a draft which seeks to reflect the implementation of Charter provisions without reservation, is suggested.

A An analysis of the terms of the Charter for the purposes of implementation

In approaching the implementation of the Charter the starting point should be the Charter itself, since clues as to the most appropriate implementation technique are provided there. The structure of the Charter should be carefully considered by those proposing to implement it. Drafters should also identify any differences in the text of the provisions and determine whether it is necessary and if so, in what manner, each of these provisions should be implemented. The purpose of the following analysis of the Charter is to demonstrate how drafters should use the terms of an international agreement as a guide to determining the most appropriate technique to implement it in domestic law.

Chapters I to IV, X, XIII, XIV and XV appear to be constitutive in nature as they speak to the formation, composition and regulation of organs of the United Nations including the Security Council, the General Assembly, the Economic and Social Council, the Trusteeship Council and the International Court of Justice. Chapter XVI sets out the miscellaneous provisions. Articles, 103, 104 and 105 provide as follows:

103. In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

104. The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purpose.

105. (1) The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

(2) Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

Articles 104 and 105 are the types of provisions that alert a drafter to the fact that internal laws ought to provide for the recognition of the United Nations as a legal person. Drafters should also be mindful that internal law should confer the necessary privileges and immunities on the United Nations and its representatives, for the fulfilment of its purpose. The conferment of full legal capacity on the United Nations could be addressed either in specific implementing legislation or by statutory instrument made pursuant to existing diplomatic privileges and immunities legislation, under which the diplomatic privileges and immunities referred to in arts 104 and 105 could also be addressed. In New Zealand all of these matters were addressed under the Diplomatic Privileges (United Nations) Order 1959 which was made pursuant to the Diplomatic Immunities and Privileges Act 1957.⁴

The constitutive provisions of the Charter also signal the need to provide for the payment of financial contributions to the United Nations as an international organisation. Article 17 is instructive as it requires that members provide for the expenses of the United Nations. In addition, art 19 sets out the penalties faced by a member in default. Chapters VI, VII, VIII, IX, XI, XVII and XIX seem declaratory in nature as they set out the objectives, principles and ideals of the United Nations. Some of these matters may only require executive action. The Law Commission advises that it is not necessary to enact domestic legislation to address this type of provision.⁵

Thus far, the analysis of the provisions of the Charter indicates that most are either constitutive or declaratory in nature. The constitutive provisions need to be restated in domestic law whilst the declaratory provisions do not. There are other provisions of the Charter which require member states to regulate activities internally and therefore need to be restated in domestic legislation. This is indicative that the formula method would not be the most appropriate technique for the implementation of the Charter as it does not allow for the restatement of Charter terms to the extent required for their effective application in domestic law. The wording method provides more scope for this.

One of the most influential organs of the United Nations is the Security Council which, pursuant to art 24, has the mandate of maintaining international peace and security. In order to facilitate the attainment of its objectives, the Security Council is given extensive

⁴ Diplomatic Immunities and Privileges Act 1957, repealed by the Diplomatic Privileges and Immunities Act 1968.

⁵ See Law Commission *A New Zealand Guide to International Law and its Sources* (NZLC PP 34, 2006) at para 47. [The Law Commission].

powers to impose both military and non-military sanctions on states which pose a threat to peace. The provisions of the Charter that are relevant to the imposition of non-military sanctions are:⁶

39. The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

40. In order to prevent an aggravation of the situation, the Security Council may, before making the recommendation or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable...

41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.

These provisions set out the action that the Security Council may take in its peacekeeping efforts. They also extend an appeal to member states to give effect to decisions insofar as they relate to the imposition of sanctions that do not require the use of force.⁷ Article 41 can be described as the type of provision which creates obligations for member states that extend to individuals within the member state.⁸ It follows that to properly transpose art 41 into domestic law a drafter must appreciate the obligation which it sets, then capture it using the proper wording. This seems to be an example of the type of provision to which Keyes and Sullivan refer when they indicate that the terms of an agreement may have to be restated to achieve what it requires.⁹ If a member state is called upon to act but fails to respond, the Security Council's efforts will be flouted. However, a state is obliged to

⁶ See the Charter, arts 39-41.

⁷ See Simma, above n 2, at 739.

⁸ See The Law Commission, above n 5, at para 36.

⁹ See John Mark Keyes and Ruth Sullivan "A Legislative Perspective on the Interaction of International and Domestic Law" in Oonagh E Fitzgerald (ed) *The Globalised Rule of Law: Relationships between International and Domestic Law* (Irwin Law, Toronto, 2006) at 317.

respond only if its domestic laws so prescribe.¹⁰ This reinforces the importance of following the *pacta sunt servanda* rule.

Articles 43 and 45 outline the more draconian measures that are available to the Security Council in pursuit of its objectives. They set out the conditions under which a direction to use armed forces should take effect. In this regard, art 43 provides:

(1) All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

(2) Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

(3) The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 43 is a similar type of provision to art 41 in that it touches the rights of individuals within member states. Again, a drafter must have a firm grasp of the nature of the requirement set by art 43 to properly reflect it in domestic law. In that regard, art 43 should be construed as a whole. Simma explains that art 43(1) constitutes an undertaking by member states to make armed forces and assistance available to the Security Council upon request.¹¹ However, he is quick to point out that this is qualified as it “exists only in accordance with one or more special agreements, and it is therefore transformed into a duty *de negotiando et de contrahendo*.”¹²

It would seem therefore that the obligation on member states is to negotiate agreements which would set out terms under which an undertaking under art 43(1) would be given effect. Simma therefore stresses: “member States must conduct negotiations in order to

¹⁰ See *Salomon v Commissioners of Customs and Excise* [1966] 3 All ER 871(CA) at [875] per Diplock LJ and Simma, above n 2, at 747.

¹¹ Simma, above n 2, at 761.

¹² Ibid. [Footnotes omitted].

facilitate the conclusion of the relevant agreement but no State may be coerced into accepting particular provisions in such agreements.”¹³ It is recommended that as drafted, art 43 should not be copied verbatim into the text of implementing legislation because the language does not refer to any particular state directly. A drafter will have to restate this kind of provision in domestic law to achieve what it requires.¹⁴ It is the obligation to conduct negotiations created by art 43 which a drafter must capture in implementing legislation and impose directly on the implementing state.

Article 45 is a similar type of provision to arts 41 and 43 as it affects the rights of individuals within member states. Article 45 provides:

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Simma indicates that there are diverging opinions on the relationship between arts 43 and 45 of the Charter.¹⁵ Whilst he presented the opposing views he has not indicated a preference for either of them.¹⁶ In order to inform the drafting of the proposed legislation submitted at the end of this analysis, it is necessary to determine the obligation set out under art 45. In that regard, it is contended that the posture of the Soviet Union which stressed that an agreement has to be concluded under art 43 before air forces could be released for the purposes of art 45,¹⁷ is more accurate. Thus, it is the duty to negotiate an agreement or agreements pursuant to art 43, for the purposes of art 45, which needs to be captured in domestic legislation.

It is notable that arts 40, 41, 43 and 45 do not prescribe that member states are obliged to respond to such requests from the Security Council. It is art 25 of the Charter that must be referred to in order to appreciate the binding nature of decisions taken by the Security Council. Article 25 provides:

¹³ Simma, above n 2, at 767.

¹⁴ See Keyes and Sullivan above n 9, at 317.

¹⁵ Simma, above n 2, at 767.

¹⁶ Ibid.

¹⁷ Simma, above n 2, at 767.

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Simma also highlights the importance of art 48 of the Charter insofar as it seeks to reaffirm the binding nature of decisions of the Security Council upon its members.¹⁸

Article 48 provides:

- (1) The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all Members of the United Nations or by some of them as the Security Council may determine.
- (2) Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Provisions such as arts 25 and 48 reinforce the importance of understanding the interconnectivity of Charter terms. This is relevant to the implementation process as it sets out the extent of the obligation which is imposed on member states as champions of the United Nations mission. As noted in *Salomon v Commissioners of Customs and Excise*,¹⁹ in construing implementing legislation the courts' approach is that parliament would not legislate in contravention of its international obligations. Further, where the provisions of the implementing legislation are ambiguous, the courts will refer to the relevant treaty provisions for clarification.²⁰

Keyes and Sullivan recommend that the text of an agreement should be attached in a schedule to implementing legislation as it "makes the text as readily available as the legislation itself."²¹ It is submitted that attaching an international agreement in a schedule preserves the interconnectivity of its provisions for the purposes of referral by the judiciary. If this is adopted in the implementation of the Charter it will highlight the significance of art 25 which sets out the obligation that member states implement decisions of the Security Council.

Another notable provision is art 108 which speaks to the amendment of the Charter. If a decision is taken to attach the Charter in a Schedule, as advised, even for reference

¹⁸ Simma, above n 2, at 776.

¹⁹ See *Salomon v Commissioners of Customs and Excise*, above n 10.

²⁰ Ibid.

²¹ Keyes and Sullivan, above n 9, at 314.

purposes only, a drafter should be prompted to include in the implementing Act such legislative provisions as are necessary for the amendment of the text of the Charter which is set out in the Schedule.²² In some cases the definition section is used for that purpose. Not only is an international agreement defined, but there is also an indication that it includes any amendments to that agreement. An example from New Zealand is s 2 of the International Energy Agreement Act 1976 which provides:

International Energy Agreement means the Agreement on an International Energy Program signed at Paris on the 18th day of November 1974, a copy of the English text of which is set out in the Schedule to this Act, and any amendment to that Agreement ...

Whilst this appears to be a satisfactory means of managing amendments to an agreement, it does not adequately address the question of how the text of the agreement attached in a Schedule will be updated. It is therefore recommended that this matter be addressed by including provisions authorising the appropriate administrative authority to notify the public of any amendment to the agreement by notice published in the *Gazette*.

B Overview of findings

The analysis above indicated that different provisions of the Charter require different kinds of legislative responses in order to be properly implemented in domestic law. It also indicated that in general, the wording method would be the most appropriate technique to address the requirements under the Charter. Matters such as the implementation of decisions of the Security Council would be best addressed by subordinate legislation as they arise, whilst other declaratory provisions require no legislative action. Some of the factors which have been identified from this exercise in relation the Charter are as follows:

- (1) identify the types of provisions in an agreement and determine whether the formula method is appropriate or whether the substance of certain provisions must be determined then restated in domestic law to be given proper effect;
- (2) include financial provisions;
- (3) include provisions recognising the United Nations, as a legal person of full age and capacity;
- (4) include provisions conferring the relevant diplomatic immunities and privileges;

²² See DL Mendis “The Legislative Transformation of Treaties” (1992) 13(3) Stat LR 216 at 219.

- (5) attach the Charter in a schedule to the implementing Act, even for reference purposes only; and
- (6) provide for the amendment of the text of the Charter if annexed in a schedule to the implementing Act.

It is with these factors in mind that the approach taken by different jurisdictions will be considered.

C Implementation in the United Kingdom

The Charter was implemented in the United Kingdom by the United Nations Act 1946 (UK), using a combination of the wording method and the subordination method. The Charter is not annexed in a schedule to the implementing Act. It has been stated that reservations are prohibited with respect to Charter terms.²³ That notwithstanding, the restrictive nature of the implementation of the Charter in the United Kingdom is first indicated by the long title to the United Nations Act 1946 (UK), which sets the parameters of the enactment as follows:

An Act to enable effect to be given to certain provisions of the Charter of the United Nations.

This long title suggests that notwithstanding the prohibition of reservations, the legislature's intention is to limit the scope of the application of the Charter in the United Kingdom. It is submitted that an intention to give full effect to the provisions of the Charter would have been reflected in words to the effect that it was an enactment "to give effect to the United Kingdom's obligations under the Charter." That option was not taken. The long title speaks to the implementation of certain provisions. In the analysis above it was determined that it is absolutely necessary to address only the constitutive provisions of the Charter and those which needed to be restated for effect, in implementing legislation. However, in the United Kingdom's implementing legislation art 41 was the only provision addressed. It will be recalled that arts 25 and 48 of the Charter create an obligation to accept and carry out all decisions of the Security Council and not just those made pursuant to art 41.

In that regard, arts 43 and 45 constitute two other avenues through which the Security Council can make decisions regarding the use of military force known to member states,

²³ See Simma, above n 2.

yet the United Kingdom put itself under no domestic legal obligation to give effect to decisions made pursuant to either of those provisions. Therefore, until the United Kingdom takes the necessary legislative steps to enable the incorporation of Security Council resolutions made pursuant to arts 43 and 45 of the Charter in domestic law, such resolutions will not be binding in the United Kingdom.²⁴ This is a clear example of the use of drafting techniques to tailor the level of compliance with treaty obligations to suit the requirements of the implementing state. It is difficult to reconcile this with the *pacta sunt servanda* rule.

The United Nations Act 1946 (UK) contains a mere two sections. Section 1 contains five subsections and s 2 sets out the short title of the Act. Many of the factors drawn from the analytical exercise undertaken in Part IV A and B have not been addressed in that Act. An examination of the actual wording used to implement art 41 of the Charter, the only provision which has been addressed, illustrates how restrictive the United Nations Act 1946 (UK) is. Section 1(1) provides:

If ... the Security Council of the United Nations call upon His Majesty's government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order.

The use of the word “may” in s 1(1) gives the sovereign the discretion as to whether or not the United Kingdom will respond to a request from the Security Council to take legislative steps towards the implementation of non-military sanctions. This constitutes a further mechanism by which the United Kingdom has avoided being bound by decisions of the Security Council. Therefore, if the relevant subordinate legislation is not enacted Security Council decisions are binding only in international law. This brings to mind observations made by Keyes and Sullivan who, speaking of Canada, noted that it was under no constitutional obligation to implement international agreements.²⁵ The same is true for the United Kingdom. However, De Mestral and Fox-Decent, recalling art 24 of

²⁴ See Christopher Greenwood “United Kingdom” in Vera Gowlland-Debbas (ed) *National Implementation of United Nations Sanctions* (Martinus Nijhoff Publishers, The Hague, 2004) at 585.

²⁵ Keyes and Sullivan, above n 9, at 282.

the Vienna Convention, propose that: “[g]ood-faith performance suggests that all the law-making organs of a state should participate in ensuring respect for a ratified treaty.”²⁶

Another factor omitted from the United Nations Act 1946 (UK) is provisions defining the relationship between that Act and other relevant pieces of legislation. It is particularly necessary to include such provisions as art 103 of the Charter provides that a state’s obligations under the Charter prevail in the event of a conflict with its obligations under another international agreement. The United Kingdom’s legislative palette is similar to other jurisdictions in that there are legislative instruments other than the United Nations Act 1946 (UK) which enable the imposition of non-military sanctions. These include the Import, Export and Customs Powers (Defence) Act 1939 (UK) and the Emergency Laws (Re-enactments and Repeals) Act 1964 (UK). That notwithstanding, the United Nations Act 1946 (UK) is silent on how instruments made pursuant to these other pieces of legislation are to be construed in relation to those made under the United Nations Act 1946(UK). It is submitted that this ought to have been provided for to avoid doubt.

A further observation can be made regarding the mechanism whereby the United Kingdom can discontinue its imposition of non-military sanctions. Section 1(3) of the United Nations Act 1946 (UK) provides:²⁷

Any Order in Council made under this section may be varied or revoked by a subsequent Order in Council.

Section 1(3) falls short of stipulating exactly what would trigger the variation or revocation of an Order in Council made pursuant to s 1(1). It begs the question whether the United Kingdom can unilaterally determine that it no longer wishes to comply. It is arguable that as drafted, s 1(3) could provide the legal basis for such action. It will be recalled that art 25, which declares the binding nature of Security Council decisions, has not been made a part of United Kingdom law. Keyes and Sullivan recommend that care should be taken in drafting de-implementation provisions as they signal the level of commitment by and the good faith of a party to an international agreement.²⁸ There is justification for this position if the United Kingdom’s implementing legislation is

²⁶ Armand De Mestral and Evan Fox-Decent “Implementation and Reception: The Congeniality of Canada’s Legal Order to International Law” in Oonagh E Fitzgerald (ed) *The Globalised Rule of Law: Relationships between International and Domestic Law* (Irwin Law, Toronto, 2006) at 39.

²⁷ United Nations Act 1946 (UK), s 1(3).

²⁸ See Keyes and Sullivan, above n 9, at 327.

compared to that of Australia.²⁹ Australia's implementing legislation clearly provides that it is art 25 of the Charter, and therefore the Security Council, which determines when Australia is no longer required to comply with its decisions. It therefore appears that although the United Kingdom is a permanent member of the Security Council and Australia is not, Australia's drafting technique suggests a greater commitment to respond to Security Council decisions.

Greenwood has commended the United Kingdom on its adoption of United Nations sanctions, indicating that it has been a "relatively simple task and has not required primary legislation or given rise to any constitutional debate."³⁰ The same can be said for many other dualist states. However, the analysis has shown that when this is viewed through a legislative drafting microscope, further implementing provisions could have been added to make the United Kingdom's internal legislative response mechanisms even stronger.

D Implementation in the United States

The Charter was implemented in the United States under the United Nations Participation Act 22 USC §§ 287–287e. The implementation of the Charter in the United States was similar to the United Kingdom in that a combination of the wording method and the subordination method was used and the Charter was not annexed in a schedule. The United States implementing legislation might be described as being only slightly less restrictive than that of the United Kingdom. It is lengthier and has a deeper content, yet questions can be raised as to how far the legislation meets the United States' international obligations under the Charter. This will become more apparent upon an evaluation of the provisions of the United Nations Participation Act 22 USC §§ 287–287e. The long title provides:

An Act to provide for the appointment of representatives of the United States in the organs and agencies of the United Nations and to make other provision with respect to the participation of the United States in such organisation.

An initial observation is that the long title contains no express statement indicating that the purpose of the Act is to implement the United States' obligations under the Charter. It leans towards providing the legal framework whereby the United States can participate in

²⁹ Charter of the United Nations Act 1945 (Cth).

³⁰ Greenwood, above n 24, at 583.

matters concerning the United Nations. Sections 2 to 4 of the Act go on to set out the administrative support mechanisms by which this can be achieved.

The first semblance of an intention to implement obligations set under the Charter appears at s 5 which applies to Security Council resolutions made pursuant to art 41 of the Charter. Section 5(a) of the United Nations Participation Act 22 USC §§ 287–287e provides:

Notwithstanding the provisions of any other law, whenever the United States is called upon by the Security Council to apply measures which said Council has decided, pursuant to Article 41 of said Charter, are to be employed to give effect to its decisions under said Charter, the President may, to the extent necessary to apply such measures, through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit, in whole or in part, economic relations...

Like the United Kingdom, the United States has several other legislative instruments that allow for the imposition of non-military sanctions.³¹ The major difference is the circumstances under which powers set out under each enactment may be invoked. In contrast to United Kingdom's implementing legislation, section 5(a) sets the United Nations Participation Act 22 USC §§ 287–287e apart from these other enactments through the use of the words “[n]otwithstanding the provisions of any other law.” It therefore prescribes that this is the legislation that must be applied in response to requests from the Security Council which are made pursuant to art 41 of the Charter. That is commendable. On the construction of s 5(a), the President has the discretion as to whether he will respond. This apparent departure from the obligatory nature of decisions made by the Security Council in implementing legislation was also noted in the United Kingdom's implementing legislation. Thus, there is no clear undertaking to provide non-military assistance as and when requested under art 41 as contemplated under the Charter.

In contrast to the United Kingdom, the United States has, albeit very cautiously, addressed art 43 of the Charter which speaks to negotiating agreements for the provision of military forces to the United Nations. In that regard, s 6 of the United Nations Participation Act 22 USC §§ 287–287e provides:

³¹ Trading with the Enemy Act §5(b), 50 USC App §5(b); Export Administration Act, 50 USC App §§ 2401–2420; International Emergency Economic Powers Act 50 USC §1701.

The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress ... providing for the numbers and types of armed forces ... to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with Article 43 of said Charter. The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under Article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: Provided, that ... nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces ... in addition to the forces ... provided for in such special agreement or agreements.

It is important to emphasise that the obligation under art 43 is to negotiate agreements in an effort to determine the processes under which military forces will be made available to the United Nations, but there is no duty to make armed forces available to the United Nations upon request. Section 6 is worded “[t]he President is authorized to negotiate ...”. As drafted, the provision gives the President the power to negotiate, but it does not require that he enters negotiations once called upon to do so. It may therefore be argued that this too falls short of the measure of commitment envisaged by the drafters of the Charter.

It appears that the proviso at the end of s 6 was added out of an abundance of caution, to signal that s 6 does not permit the President to dispatch resources other than those identified in the agreement or agreements. Section 7 as amended sets out the circumstances under which resources may be made available to the Security Council notwithstanding the proviso in s 6. However, none of the measures listed involve the use of force and the President’s powers are discretionary in any event. Further, the United Nations Participation Act 22 USC §§ 287–287e is silent on art 45 of the Charter. All of these factors serve as another illustration of the way in which a dualist state can use implementation techniques to regulate its internal affairs only to the extent that it is prepared to, to meet treaty obligations.

E Implementation in New Zealand

The Charter was implemented in New Zealand under the United Nations Act 1946. The implementation of the Charter in New Zealand is similar to that of the United Kingdom and the United States in that a combination of the wording method and the subordination

method was used and the Charter was not appended in a schedule to the implementing Act. The title to New Zealand's implementing legislation is:³²

An Act to confer on the Governor-General in Council power to make regulations to enable New Zealand to fulfil the obligations taken by it under Article 41 of the Charter of the United Nations.

This is an indication that of all the Charter provisions which require legislative support, New Zealand legislated for art 41 only. The title is followed by a preamble which also does not extend the scope of the Act beyond the implementation of art 41 of the Charter. The preamble seems contradictory in terms because it begins by declaring New Zealand to be a member of the United Nations which is bound by the Charter, but acknowledges only art 41, reproduces its text and concludes that "it is desirable that provision should be made to enable New Zealand to fulfil its obligations under the said Article." It is contended that since there can be no reservations to Charter terms, this approach raises the question whether arts 42, 43 and 45 are not as much a part of the Charter as art 41.

The language of s 2, which purports to implement art 41 of the Charter, is similar to the implementing legislation of the United Kingdom and the United States. The phrase "the Governor-General in Council may ... by Order in Council, make all such regulations as appear to him to be necessary ..." is used. Again, the power to respond to a call from the Security Council is discretionary. This does not constitute an undertaking to respond. It is notable, however, that the implementing legislation delineates the status of regulations made pursuant to the United Nations Act 1946 relative to other legislation in force by indicating that regulations made pursuant to s 2 are valid notwithstanding the fact that they deal with matters already covered by these other pieces of legislation.³³ It is submitted that the United Nations Act 1946 could have addressed that point even more precisely by indicating whether regulations made pursuant to that Act override regulations made under the other enactments that deal with the same matter. It should be further noted that offence provisions are included at s 3 and provision is made for the application of the United Nations Act 1946 in the territories in which New Zealand had jurisdiction.

³² Title to the United Nations Act 1946.

³³ See the United Nations Act 1946, s 2(2). See also the Terrorism Suppression Act 2002, s 72 for another legislative provision which enables the imposition of Security Council sanctions in New Zealand.

F Implementation in Canada

The Charter was implemented in Canada under the United Nations Act RSC 1985 cU-2. Like the United Kingdom, the United States and New Zealand, a combination of the wording method and the subordination method was used. On the point of extent of implementation, the United Nations Act RSC 1985 cU-2 is similar to the implementing enactments of United Kingdom and New Zealand in that it addresses the implementation of art 41 only. The long title to the United Nations Act RSC 1985 cU-2 is one of the components of that enactment which was used to limit the focus to art 41. The wording is: “An Act respecting Article 41 of the Charter of the United Nations.” Unlike the United Kingdom, the United States and New Zealand, the Charter was set out in the Schedule to the United Nations Act RSC 1985 cU-2, albeit only in part. Article 41 was severed from the rest of the Charter and is the only provision which was reproduced. Thus, although the United Kingdom, the United States and New Zealand did not include any of the text of the Charter in their implementing legislation, the text in the Schedule to the United Nations Act RSC 1985 cU-2 was adjusted to restrict the focus to art 41. This is yet another example of how drafting techniques have been used to control the extent of implementation.

Canada’s implementing legislation is the shortest of all that have been examined. Section 2 gives the Governor in Council the discretion as to whether he will take action requested by the Security Council. Offence and punishment are addressed in s 3(1), and forfeiture in s 3(2).

G Implementation in Australia

The Charter was implemented in Australia under the Charter of the United Nations Act 1945 (Cth). The original form of the Act contained a mere three sections. The title indicted that the purpose of the Act was to approve the Charter and this was provided for under s 3. Keyes and Sullivan indicate that there is uncertainty as to the effect of approving an international agreement in implementing legislation, without more.³⁴ In reaching this conclusion they referred to the work of James Crawford³⁵ who suggests that this has no substantive legal effect as it “merely approves the conclusion or ratification of

³⁴ See Keyes and Sullivan, above n 9, at 312.

³⁵ James Crawford, “The International Law Standard in the statutes of Australia and the United Kingdom” (1979) 73 AJIL 628.

a particular treaty, or participation in international organisations.”³⁶ Thus, the original form of the Charter of the United Nations Act 1945 (Cth) can hardly be described as implementing the Charter.

Australia’s parliament recognised the limitations of the Act in its original form because several amendments have been made to make Australia’s implementation of the Charter more robust.³⁷ The Charter of the United Nations Act 1945 (Cth) in its current form can be described as rather comprehensive compared to any of the other states examined. It contains extensive provisions addressing a number of the matters drawn from the provisions of the Charter and identified as requiring a legislative response, through the analytical exercise above. It implements the Charter using a combination of the wording method and the subordination method.

The definition section is one component of the Act which was used to give meaning to a number of terms referred to in the enactment. One such term is “UN sanction enforcement law” which is defined as “[a] provision that is specified in an instrument under subsection 2B(1).”³⁸ Section 2B(1) provides: ³⁹

The Minister may, by legislative instrument, specify a provision of a law of the Commonwealth as a UN sanction enforcement law.

Subsections (2)-(5) of section 2B outline the circumstances under which the Minister may specify a provision as a UN sanction enforcement law and the conditions under which such provisions cease to have effect.

The definition section also assists the reader to locate the text of the Charter through the use of notes. Charter of the United Nations is defined in s 2 as follows:

³⁶ Ibid, at 629.

³⁷ See for example the Charter of the United Nations (Amendment) Act 1993 (Cth) and the Charter of the United Nations (Amendment) Act 2002 (Cth)

³⁸ See the Charter of the United Nations Act 1945 (Cth), s 2.

³⁹ See for example the Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 (Cth).

Charter of the United Nations means the Charter of the United Nations, done at San Francisco on 26 June 1945 [1945] ATS 1.

Note: The text of the Charter of the United Nations is set out in Australian Treaty Series 1945 No. 1. In 2007, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII Internet site (www.austlii.edu.au).

The Legislation Advisory Committee advises that notes may be used to enhance the interpretation of legislative provisions.⁴⁰ It is contended that this is an example of Australian legislation in which notes were used appropriately. In comparison, s 8 of the Care of Children Act 2004 constituted the use of examples as interpretative aids in which it was suggested that it was not done successfully.⁴¹

The implementation of sanctions authorised by the Security Council is addressed at s 6. Section 6(1) provides:

The Governor-General may make regulations for and in relation to giving effect to decisions that:

- (a) the Security Council makes under Chapter VII of the Charter of the United Nations; and
- (b) Article 25 of the Charter requires Australia to carry out;

in so far as those decisions require Australia to apply measures not involving the use of armed force.

Note: Articles 39 and 41 of the Charter provide for the Security Council to decide what measures not involving the use of armed force are to be taken to maintain or restore international peace and security.

It appears that although the significance of art 25 of the Charter in prescribing the obligation to carry out decisions of the Security Council is expressly provided for, the Governor-General may only make regulations to implement those decisions that do not require the use of force. Further, the Governor-General's powers are discretionary. Therefore, whilst the drafting of s 6(1) is different from similar provisions of the implementing legislation in the United Kingdom, the United States, New Zealand and Canada, the effect is the same. The enforcement of military sanctions is excluded from the implementing legislation despite the exclusion of reservations. The note at the end of

⁴⁰ See the Legislation Advisory Committee "Legislation Advisory Committee Guidelines on Process & Content of Legislation" (2001) Ministry of Justice 3A.1.3 <www.justice.govt.nz>.

⁴¹ See Part III above.

s 6(1) reinforces this. Sections 6(2) and (3) elaborate on the ways in which regulations under s 6(1) may give effect to Security Council decisions.

The Charter of the United Nations Act 1945 (Cth) is high on content. A number of commendable points can be gleaned from it. One is its treatment of the de-implementation of Security Council decisions. In contrast to the United Kingdom's implementing legislation, s 8(1)(a) of the Charter of the United Nations Act 1945 (Cth) prescribes that regulations made for the purposes of giving effect to a decision made by the Security Council "cease to have effect when Article 25 of the Charter of the United Nations ceases to require Australia to carry out that decision ...". This is an indication of the Australian legislature submitting to the Charter at least for the purposes of deactivating obligations set under it.

Another commendable point is the way in which the status of other legislation which gives effect to Security Council decisions is managed under the Charter of the United Nations Act 1945 (Cth). Like the United Kingdom and the United States, there are other legislative instruments in Australia through which UN sanctions can be implemented.⁴² This matter is dealt with methodically from ss 9-11 of the Act. Sections 10 and 11 provide that later enactments do not override the Charter of the United Nations Act 1945 (Cth). Australia's implementing legislation has extensive provisions on the enforcement of regulations made pursuant to s 6 in Part 3, Division 1. Division 2 starts by setting a limit on the number of penalty units that can be prescribed for offences against the regulations. It continues by setting a regime for granting injunctions against persons engaged in the contravention of the regulations. Part 4 speaks specifically to Security Council decisions that relate to terrorism and dealing with assets. Parts 5 and 6 provide for offences and information relating to UN sanctions. A third point is that unlike any of the other states examined, the text of the Charter is fully set out in the schedule to the Charter of the United Nations Act 1945 (Cth). This makes it readily available for reference purposes.

⁴² See for example the Migration Act 1958 (Cth); Migration (United Nations Security Council Resolutions) Regulations 2007(Cth); Customs Act 1901(Cth); Customs (Prohibited Exports) Regulations 1958 (Cth); Customs (Prohibited Imports) Regulations 1956 (Cth).

H Conclusion

The examination of the implementation of the Charter in the five states considered revealed that they each took slightly different approaches. All five used the wording method to implement the terms of the Charter and the subordination method to implement decisions of the Security Council made pursuant to art 41. The United Kingdom, the United States and New Zealand did not annex the Charter to the implementing Act. Canada annexed art 41 only. Of the five, Australia was the only state that has annexed the full text of the Charter in a schedule. Its implementing legislation was the most detailed. The implementing legislation in the United Kingdom and Canada was very short and restrictive in comparison. That of the United States and New Zealand included a few additions which did not feature in any of the others. For example, the United States addressed the matter of negotiating agreements regarding the deployment of military forces to the Security Council pursuant to art 43 of the Charter.

Most states limited their implementation to art 41 only and did not legislate for the provision of armed forces to the Security Council. These matters reflect the extent of the implementation of the Charter in each jurisdiction and illustrate the way in which the legislature can use drafting as a tool to implement in domestic law only those provisions that they are willing to be bound by. This was done despite art 25 and despite the prohibition on reservations.

Simma suggests that art 43 is “far from being implemented.”⁴³ He indicates that it is “one of the most important innovations of the UN Charter over the Covenant of the League [which] still remains to be realized in practice.”⁴⁴ Simma explains that the reason is that member states seem to prefer to decide on a case-by-case basis whether military forces will be deployed to the United Nations for peace-keeping missions.⁴⁵ He also highlights the fact that no member state has ever implemented art 45 of the Charter. Simma reasons that in the early years of the establishment of the United Nations, agreements made pursuant to art 45 would have become obsolete due to technological advancement in the weapons industry.⁴⁶ He also suggests that another reason is that it is impossible to predict when emergencies will arise and, by extension, it is impractical to expect the Military

⁴³ Simma, above n 2, at 763.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Simma, above n 2, at 767.

Staff Committee to plan for them in advance.⁴⁷ Simma's views are not without merit. In the case of the United Kingdom, a defence may arise on constitutional grounds, by virtue of the Bill of Rights 1688 which prevents the raising or keeping of a standing army in peacetime, without the consent of Parliament.⁴⁸

I Proposed draft

The comparative analysis of the implementation of the Charter started with an evaluation of the different kinds of provisions that make up the Charter. Some were constitutive, others declaratory and the majority needed to be restated in domestic law to be of legal effect. These provisions have been categorised, and the results set out in Part IV B have been used to formulate a design for the model legislation below. The provisions which did not require legislative action were excluded from the model whilst those requiring legislative support were addressed. This exercise was done with a view to bringing some measure of uniformity to the implementation of the Charter across member states by giving full effect to the Charter in light of the prohibition on reservations.

The aim is to set out fundamental provisions. The draft is modelled closely on the legislative requirements in New Zealand and for the sake of an example New Zealand is taken as the state concerned. If this model was to be used in another jurisdiction, all necessary adjustments would have to be made to ensure that it sits well within that jurisdiction's constitutional framework. Drafters should also consult the Interpretation Acts in their respective jurisdictions for guidance.

As regards provisions for the commencement of the implementing Act, the Interpretation Act 1999 provides that an Act comes into force on the date stated in the Act, and if there is no such statement, on the day after the date of assent.⁴⁹ A specific date is provided for in this model and the Governor-General is given the power to determine that commencement date. The power was conferred upon the Governor-General because of New Zealand's constitutional framework.

The law regarding New Zealand's constitutional regime is contained in a number of pieces of legislation.⁵⁰ It is based on the Westminster model and the Head of State is the

⁴⁷ Ibid.

⁴⁸ Bill of Rights 1688 (Eng) Will & Mar c 2, s1.

⁴⁹ See the Interpretation Act 1999, s 8.

⁵⁰ See for example the Constitution Act 1986, the New Zealand Bill of Rights Act 1990, the Supreme

Sovereign in Right of New Zealand, Queen Elizabeth II, who is represented by the Governor-General.⁵¹ Where the Queen is not the Head of State, an adjustment would have to be made, if provision is being made for the Head of State to determine the commencement date of the implementing Act.

New Zealand's constitutional framework is also relevant to the issue of providing for the extension of the implementing Act to other countries. The Realm of New Zealand constitutes New Zealand, the Ross Dependency, Tokelau, the Cook Islands and Niue.⁵² The model therefore makes provision for the extension of the Act to those countries as appropriate. When undertaking an implementation exercise for another jurisdiction, a drafter should be mindful of extending the provisions of the implementing legislation to the countries that the implementing state has jurisdiction over or international responsibility for. Such provision would be irrelevant to a state that does not have several jurisdictions. Drafters should also consult any legislation governing constitutional matters in that other country to determine whether, for instance, after constitution day, a formal request and consent to legislate on its behalf is required before legislative provisions extend to that country.⁵³

As regards the question of binding the Crown, New Zealand's Interpretation Act 1999 provides that no Act binds the Crown unless the enactment specifically provides for that.⁵⁴ Therefore, a provision to that effect is included in the model. As noted above the legal status of a body corporate is conferred upon the United Nations under the Diplomatic Privileges (United Nations) Order 1959.⁵⁵ Therefore, legal capacity is not provided for in this model. If another implementing state requires that legal capacity is reflected in the implementing instrument, a provision such as the following should be inserted:

Court Act 2003, the Electoral Act 1993, the Imperial Laws Application Act 1988, the Judicature Act 1908, Letters Patent Constituting the Office of Governor-General of New Zealand (SR 1983/225).

⁵¹ See the Constitution Act 1986, s 2; Letters Patent Constituting the Office of Governor-General of New Zealand (SR1983/225).

⁵² See for example the Niue Constitution Act 1974, s 3 and the Niue Constitution, art 36 and the Tokelau Act 1948, s 3. The Cook Islands and Niue are both self-governing states in free association with New Zealand.

⁵³ See for example the Niue Constitution.

⁵⁴ Interpretation Act 1999, s 27.

⁵⁵ See the Diplomatic Privileges (United Nations) Order, s 3.

The United Nations shall have all the powers, rights and duties of a natural person of full age and capacity.

The process of drafting the obligations under the Charter into domestic law should also cause drafters to think about the consequences of a failure to comply with the law. Offence provisions should therefore be included in implementing legislation.⁵⁶ It is also advisable to include in the purpose clause, provisions that signal the legislature's intention to implement obligations under a treaty in domestic law.⁵⁷ It is with all the above issues in mind that the following model is proposed.

⁵⁶ See for example the United Nations Act 1946, s 3(1) and the United Nations Act 1945 (Cth), Part 4.

⁵⁷ See Keyes and Sullivan, above n 9, at 285.

United Nations Act [Date]

Contents

1. Title
2. Commencement

Part 1
Preliminary Provisions

3. Interpretation
4. Purpose
5. Extension to other territories
6. Act binds the Crown

Part 2
Decisions of the Security Council

7. Regulations to give effect to decisions made under Article 41
8. Minister to negotiate special agreement or agreements for the purpose of Articles 43 and 45

Part 3
Miscellaneous

9. Financial provision
10. Inconsistency with other legislation
11. Offences
12. Amendment of Charter

Schedule
Charter of the United Nations

The Parliament of New Zealand enacts as follows:

1 Title

This is the Charter of the United Nations Act [Date]

2 Commencement

This Act comes into force on a date to be appointed by the Governor-General by Order in Council.

Part 1
Preliminary Provisions

3 Interpretation

In this Act-

Act includes any regulations made under it

Charter means the Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October 1945), a copy of the English text of which is set out in the Schedule, and any amendment of the Charter of the United Nations

Minister means the Minister responsible for foreign affairs

public notification means a notice published in the *Gazette*.

4 Purpose

The purpose of this Act is to implement New Zealand's obligations under the Charter.

5 Extension to other territories

(1) This Act shall be in force in every territory for the time being administered by New Zealand.

(2) This Act shall be in force in Tokelau.

6 Act binds the Crown

This Act binds the Crown.

Part 2

Decisions of the Security Council

7 Regulations to give effect to decisions made under Article 41

- (1) Notwithstanding any other law, where, pursuant to Article 41 of the Charter, the Security Council of the United Nations calls upon New Zealand to apply any measures to give effect to any decisions of that Council, the Governor-General shall, by Order in Council, make all such regulations as are necessary to enable those measures to be effectively applied.
- (2) All regulations made under subsection (1) cease to have effect when under Article 25 of the Charter New Zealand is no longer required to give effect to a decision of the Security Council.
- (3) Where, under article 25 of the Charter, New Zealand is no longer required to give effect to a decision of the Security Council, the Governor-General shall give public notification to that effect.

8 Minister to negotiate special agreement or agreements for the purpose of Articles 43 and 45

Where, pursuant to Articles 43 and 45 of the Charter, the Security Council of the United Nations calls upon New Zealand to make available to the Security Council any assistance necessary for the purposes of maintaining international peace and security, the Minister shall negotiate a special agreement or special agreements with the Security Council in order to determine the terms under which such assistance will be provided.

Part 3

Miscellaneous

9 Financial provision

- (1) All sums required to be paid by the Government for the purpose of meeting New Zealand's obligations under the Charter shall be paid by the Minister of Finance out of the Consolidated Fund without further appropriation than this section.
- (2) All sums received by the Government under or by virtue of the Charter shall be paid into the Consolidated Fund.

10 Inconsistency with other legislation

- (1) In the event of an inconsistency between any provision of this Act and the operation of any other law, this Act shall prevail to the extent of the inconsistency.
- (2) No regulation made under this Act shall be deemed to be invalid because it deals with any matter already provided for by any other Act.

11 Offences

Every person commits an offence who fails, without reasonable excuse, to comply with any regulation made under this Act and is liable on summary conviction, in the case of an individual, to imprisonment for a term not exceeding [] or to a fine not exceeding[], or, in the case of a company or other corporation, to a fine not exceeding [].

12 Amendment of Charter

The Governor-General shall give public notification of any amendment to the Charter.

Schedule

Charter of the United Nations

WE THE PEOPLES ...

V The Different Approaches to the Implementation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property¹ was adopted by the General Conference of UNESCO on 14 November 1970. The UNESCO Convention covers not only items which have been stolen but also regulates the movement of cultural property from one state to another. It has been argued that the UNESCO Convention is limited by reference to the protection of a bona fide purchaser who acquires property which is either stolen or unlawfully acquired.² O’Keefe explains that the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects³ developed from the need to supplement the UNESCO Convention in that regard.⁴

Like the Charter, there has been little uniformity in the drafting techniques that have been used to implement the UNESCO Convention. Australia, Canada and New Zealand passed specific implementing legislation, but the United Kingdom made no changes to existing legislation.⁵ The United States lodged one reservation and several understandings in relation to the terms of the UNESCO Convention. This is reflected in the implementing legislation. It is argued that there are other omissions and changes in the definitions of certain terms of the United States’ implementing legislation which depart from the Convention.⁶

This Part will first identify the various types of provisions which make up the UNESCO Convention. The implementation techniques used in each of the five jurisdictions will then be considered in greater detail. This analysis shows the variation in extent of implementation that can result where different techniques are used.

¹ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (opened for signature 14 November 1970, entered into force 24 April 1972)[UNESCO Convention].

² See Patrick J O’Keefe *Commentary on the 1970 UNESCO Convention* (2nd ed, Institute of Art and Law, Great Britain, 2007) at 13.

³ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (opened for signature 24 June 1995, entered into force 1 July 1998).

⁴ O’Keefe, above n 2.

⁵ O’Keefe, above n 2, at 99.

⁶ See O’Keefe, above n 2, at 111.

A An analysis of the terms of the UNESCO Convention for the purposes of implementation

Article 1 outlines the meaning of the term “cultural property” for the purposes of the UNESCO Convention. It contains a general formula and also prescribes eleven specific categories into which cultural property falls. This type of provision can be and has been incorporated into implementing legislation without being restated.⁷ Countries such as Australia have taken a slightly different approach by stating that “... protected object of a foreign country means an object forming part of the movable cultural heritage of a foreign country.”⁸ In most cases this matter was addressed by delegating the power to create control lists which specify the protected cultural heritage of each state to the relevant authority. Article 4 is a similar type of provision. It defines the scope of property which forms part of the cultural heritage of a state. Like arts 15 and 17, art 2(1) is declaratory in nature and does not require specific implementing provisions in national legislation. Article 2(2) speaks to the main purpose of the UNESCO Convention as it sets out the obligation to take such measures as are necessary to protect cultural heritage. All other provisions of implementing legislation ought to be drafted with the purpose of fulfilling this obligation in mind.

O’Keefe describes art 3 as “[o]ne of the most difficult provisions of the 1970 Convention to interpret.”⁹ This is due to the use of the word “illicit.” Article 3 provides:

The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit.

O’Keefe suggests that art 3 may be interpreted such that “[s]tates Parties are required in their national law to render imports illicit when they are illicit exports from another State.”¹⁰ This kind of provision needs to be restated in domestic law in order to be given effect. It requires the creation of offences penalising the prohibited activity. Article 11 is a similar type of provision to art 3. Articles 6(a) and (b) also need to be restated in domestic law. They provide for the issuance of a certificate to verify that an item may be exported. Therefore, provisions prescribing the issuance of such certificate ought to be drafted.

⁷ See Protected Objects Act 1975, s 2.

⁸ See Protection of Movable Cultural Heritage Act 1986, s 3 (Cth).

⁹ O’Keefe, above n 2, at 41.

¹⁰ Ibid.

Drafters seeking to implement arts 5(b),(c),(d),(f) and (g), 6(c) and 14 of the UNESCO Convention should note that these provisions are administrative in nature. They call for the institution of the necessary administrative measures to facilitate the protection of cultural property. Article 5 contains the words “as appropriate for each country.” This allows for varying approaches in different jurisdictions. Article 14 requires that the necessary budgetary allowances are made to support the administrative functions set out under the UNESCO Convention. Although this may be achieved without legislative support it is a hint that implementing legislation might contain such financial provisions as are necessary to fulfil that obligation.

Article 7 contains several obligations which regulate the illegal importation of cultural property. It is notable that the phrase “consistent with national legislation” appears in para (a). A similar phrase appears in arts 10 and 13. Where this type of provision appears a drafter is required to analyse existing legislation and fill legislative gaps in order to bring a state into compliance with the Convention it implements, in a manner that complements the existing legislative palette. Convention terms constructed in this way serve as an indication that legal rules regulating this area may differ from state to state.

The obligation set out in art 7(a) which needs to be captured in implementing legislation is twofold. The first is to prevent museums and similar institutions from acquiring unlawfully exported cultural property. The second is to inform a state which is party to the UNESCO Convention of an offer of cultural property that was unlawfully taken from that state, if possible. For the purposes of implementing art 7(b) the requirements are as follows:

- (1) to prohibit the importation of stolen cultural property;
- (2) to ensure that any claim that property belongs to a particular institution is supported by proper documentation;
- (3) to set out procedural measures whereby stolen cultural property may be recovered and returned to a requesting State; and
- (4) to provide for the payment of just compensation by a requesting State to an innocent purchaser or a person with valid title to cultural property.

A drafter should therefore be alert to providing for the designated diplomatic authority who will administer the Act, the seizure and forfeiture of stolen property and the assessment of compensation to be paid to an innocent purchaser. It is also advisable to assess existing customs legislation to determine whether it already addresses some of

these issues, whether consequential amendments need to be made and whether customs legislation can be factored into implementing legislation. O’Keefe rightly suggests that art 7(b)(ii) is somewhat controversial as the Convention then “reaches into domestic rules as to transfer of property.”¹¹ The law on the transfer of property varies in different jurisdictions. It is therefore expected that the method used to implement this provision would also vary from state to state. In addition, reservations or understandings may be made, as in the case of the United States.

Article 8 requires that implementing legislation includes offences and penalties for infringement of the terms of the UNESCO Convention. Article 9 requires that there be cooperation amongst states to prevent the illicit import of cultural property where there is some evidence of a potential risk. This is another matter which must be properly captured and requires restatement in implementing legislation. O’Keefe noted that there has been much debate as to the true meaning of art 9 and whether states such as Australia and Canada have taken proper steps to implement it.¹² He takes the view that compared to the United States which requires the conclusion of additional agreements for the purpose of art 9, Australia and Canada have taken a broader view of art 9. Thus, the principle can be accommodated by operation of the provisions of the implementing legislation in these states without more.¹³

Article 10 contains obligations which need to be implemented through both legislative and non-legislative means. Article 10(a) requires some form of legislative enforcement in terms of the enactment of penal clauses. It also calls for accountability from retailers by requiring them to provide details of the property which they offer for sale. Article 10(b) requires implementing states to introduce public education programmes to sensitise the public to the value of safeguarding cultural property. Article 12 signals that countries which have dependent territories should make provision in implementing legislation, for the application of the Convention in their dependent territories.

The analysis above signals that the formula method would not be the most appropriate drafting technique to implement this type of Convention. The UNESCO Convention recognises that there will be differences in state practice on certain matters and in some cases it requires that states legislate for specific matters. Therefore, the wording method

¹¹ O’Keefe, above n 2, at 143.

¹² O’Keefe, above n 2, at 72-73.

¹³ Ibid.

which allows for the harmonisation of Convention terms with local legislative practice, would be more appropriate.

B Implementation in the United Kingdom - No change to existing legislation

Unlike Australia, Canada and South Africa which all passed specific legislation to implement the UNESCO Convention, the United Kingdom was satisfied that its existing legislation and administrative measures sufficiently complied with the Convention.¹⁴ Further legislation was passed only for the purposes of creating criminal offences for the unlawful import of certain cultural property.¹⁵

With regard to exports, O'Keefe indicates that export control is regulated by the Waverly criteria, which consist of two systems of law operating simultaneously.¹⁶ One is the Export of Objects of Cultural Interest (Control) Order 2003 (UK), which prohibits the export of cultural objects without the requisite community licence granted by the Secretary of State. This Order was made pursuant to the Export Control Act 2002 (UK) and it regulates the export of cultural property outside of the United Kingdom. The other is the European Union Council Regulation on the Export of Cultural Goods.¹⁷ This instrument regulates the export of cultural property outside of the European Union. Thus, a licence obtained under this instrument negates the requirement for a licence issued by any member of the European Union including the United Kingdom.¹⁸

Insofar as it relates to export control, O'Keefe takes the view that the United Kingdom's statutory regime satisfies the requirements of the UNESCO Convention. He takes a different line with regard to the control of unlawful imports. After making reference to the United Kingdom's policy against the enactment of legislation to specifically address the unlawful importation of cultural property, O'Keefe suggests that the United Kingdom's legislation is less adequate.¹⁹ He makes out his case by outlining the procedure for the return of cultural property upon a request made pursuant to art 7(b)(ii) of the UNESCO Convention. He indicates that the first point of reference is the Foreign and Commonwealth Office, which then refers the matter to the Department for Culture,

¹⁴ See O'Keefe, above n 2, at 99.

¹⁵ Ibid.

¹⁶ O'Keefe, above n 2, at 99.

¹⁷ Regulation 3911/1992 on the Export of Cultural Goods [1992] OJ L 395/1.

¹⁸ O'Keefe, above n 2, at 139.

¹⁹ Ibid.

Media and Sport.²⁰ The seizure of items is dealt with under the Police and Criminal Evidence Act 1984 (UK), where a criminal offence has been committed. The item is then returned by Order of the Court made pursuant to s 148 of the Powers of Criminal Courts (Sentencing) Act 2000 (UK) or the Police (Property) Act 1897 (UK).

It would seem that there is merit in O’Keefe’s line of reasoning. Since the unlawful importation of cultural property is subsumed within a more general legislative regime, it is more difficult to trace the safeguards that are in place, especially for a person who is not familiar with that area of law. It appears that there are no obvious indicators to draw attention to the fact that there is an international convention in operation and that these are the pieces of legislation under which it is being administered. O’Keefe provides further examples by way of s 22 of the Theft Act 1968 (UK) and the Proceeds of Crime Act 2002 (UK), under which respectively, the offences of handling stolen cultural property and money laundering could be addressed.²¹ He also makes specific mention of the Dealings in Cultural Objects (Offences) Act 2003 (UK), the operative provision of which is:²²

A person is guilty of an offence if he dishonestly deals in a cultural object that is tainted knowing or believing that the object is tainted.

O’Keefe argues that one of the shortfalls in the drafting of this provision is that proof of knowledge or belief that an object is tainted is a difficult evidential hurdle to surmount.²³ He stresses that although the argument that the Act does not prohibit the import of tainted objects has been countered by a response from the Government, the Act does not confer powers to refuse an export permit for a tainted cultural object from outside the European Union, where there is reason to believe that the object is tainted.²⁴

²⁰ Ibid.

²¹ O’Keefe, above n 2, at 140.

²² Dealing in Cultural Objects (Offences) Act 2003 (UK), s 1.

²³ O’Keefe, above n 2, at 141.

²⁴ Ibid.

A further observation made by O’Keefe is that the United Kingdom has done very little in relation to the implementation of art 9 of the UNESCO Convention.²⁵ He recounts the United Kingdom’s reasoning that the requirement under art 9 that it participates in a concerted international effort would require some endorsement from the European Union.²⁶ O’Keefe responds by highlighting a recommendation from Chamberlain²⁷ who suggests that import controls can be imposed by the relevant minister pursuant to s 1(1) of the Import, Export and Customs Powers (Defence) Act 1939 (UK).²⁸ He concludes with this advice:²⁹

It would be necessary for the State whose cultural patrimony is in jeopardy to negotiate with the UK Government and seek to persuade the Minister to make an Order after having requested concerted international action. An object falling under the Order when made would become a prohibited import and be liable to seizure and forfeiture by Customs.

It is interesting to note that whilst the United Kingdom has been criticised for not taking decisive measures to implement art 9 of the UNESCO Convention, the United States has been criticised on the basis that its implementing legislation speaks to art 9 and 7(b)(i) only, and even then that implementation was unsatisfactory.³⁰

The above illustrates that a state may opt to enact no legislation to implement a Convention. Whilst there may be an advantage in the sense that it would not be necessary to go through a protracted parliamentary process, Keyes indicates that one disadvantage is that there is less scope for legislative scrutiny or control.³¹ Another disadvantage noted by O’Keefe is that it requires the commissioning of a search through a compilation of instruments which were enacted for a different purpose. This makes it very difficult to identify those pieces of legislation under which a treaty is being administered.³²

²⁵ Ibid.

²⁶ O’Keefe, above n 2, at 142.

²⁷ K Chamberlain “UK Accession to the 1970 UNESCO Convention” (2002) 7 AA & L 231.

²⁸ O’Keefe, above n 2, at 142.

²⁹ Ibid.

³⁰ See O’Keefe, above n 2, at 109.

³¹ John Mark Keyes, “Drafting laws to implement international Agreements” (paper presented to Lawyers at the Department of Justice, Ottawa, January 2003) at 23.

³² See O’Keefe, above n 2, at 143.

C Implementation in the United States - In accordance with several reservations and understandings

Aust claims that “... reservations are generally not so numerous or so extensive as to jeopardise the effectiveness of a treaty.”³³ O’Keefe notes that the United States outlined its position with regard to the terms of the UNESCO Convention by lodging one reservation as follows:³⁴

The United States reserves the right to determine whether or not to impose export controls over cultural property.

In addition to this reservation, the United States lodged six understandings regarding its perception of the terms of the UNESCO Convention. It would follow that the United States’ implementing legislation was drafted with the reservation and understandings in mind. O’Keefe has pointed out that Mexico considers the United States objections to be excessive and has put its concerns regarding the United States level of compliance with the UNESCO Convention on record.³⁵ The implementation technique adopted by the United States will be assessed with a view to considering the legitimacy of these concerns.

The UNESCO Convention was implemented in the United States using the wording method. The Convention on Cultural Property Implementation Act 19 USC § 2601³⁶ is the major legislative instrument under which its implementation was facilitated. The long title to the Act seems imprecise in defining its purpose. It reads:

An Act to reduce certain duties, to suspend temporarily certain duties, to extend certain existing suspensions of duties, and for other purposes.

With regard to export control, it was determined earlier in this paper that art 3 needs to be properly captured in implementing legislation. It is notable that the United States’ implementing legislation is silent on arts 3 and 6 of the UNESCO Convention. O’Keefe maintains that this omission is a result of the United States reservation on the right to

³³ Anthony Aust *Modern Treaty Law and Practice* (2nd ed, Cambridge University Press, Cambridge, 2007) at 133.

³⁴ O’Keefe, above n 2, at 107.

³⁵ O’Keefe, above n 2, at 108.

³⁶ Convention on Cultural Property Implementation Act 19 USC § 2601[Convention on Cultural Property Implementation Act].

determine whether export controls on cultural property would be imposed.³⁷ He identifies the Archaeological Resources Protection Act 16 USC § 470aa³⁸ as legislation under which export controls on cultural property may be managed, but warns that this legislation has not yet been used for that purpose. Whilst concerns regarding the United States compliance with the obligation to impose export controls on cultural property are valid, an argument condemning its approach would be weak since the reservation appears to have been accepted by the UNESCO Secretariat.³⁹ It is therefore not surprising that the United States' implementation of the Convention varies substantially from that of states which have not lodged such a reservation.

With regard to import control, perusal of the Convention on Cultural Property Implementation Act seems to confirm O'Keefe's claim that arts 9 and 7(b)(i) are the main provisions of the UNESCO Convention which have been addressed. Article 7(b)(i) provides:

The States Parties to this Convention undertake to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention ... provided that such property is documented as appertaining to the inventory of that institution

Section 2607 of the Convention on Cultural Property Implementation Act implements art 7(b)(i) of the UNESCO Convention as follows:⁴⁰

No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the United States.

O'Keefe suggests that this provision was unnecessary as foreign stolen property could have been dealt with under existing legislation in the National Stolen Property Act 18 USC §§ 2314.⁴¹ O'Keefe's view serves as a reminder that in order to avoid duplication, it

³⁷ O'Keefe, above n 2, at 109.

³⁸ Archaeological Resources Protection Act 16 USC § 470aa [Archaeological Resources Protection Act].

³⁹ O'Keefe, above n 2, at 108.

⁴⁰ Convention on Cultural Property Implementation Act, above n 36.

⁴¹ See the National Stolen Property Act 18 USC §§ 2314 and 2315 [National Stolen Property Act].

is important to conduct a thorough survey of the statute book before new implementing legislation is enacted.

Article 7(b)(ii) of the UNESCO Convention requires that requesting states compensate innocent purchasers for stolen items upon a request for the return of the items. The United States lodged the following understanding in relation to art 7(b)(ii):

The United States understands that Article 7(b) is without prejudice to other remedies, civil or penal, available under the laws of the States Parties for the recovery of stolen cultural property without payment of compensation. The United States is further prepared to take the additional steps contemplated by Article 7(b)(ii) for the return of stolen cultural property without payment of compensation, except to the extent required by the Constitution of the United States, for those States Parties that agree to do the same for the United States institutions.

Article 7(b)(ii) is implemented at s 2609 of the Convention on Cultural Property Implementation Act as follows:

In any action for forfeiture under this section regarding an article of cultural property imported into the United States in violation of section 2607 of this title, if the claimant establishes valid title to the article, under applicable law, as against the institution from which the article was stolen, forfeiture shall not be decreed unless the State Party to which the article is to be returned pays the claimant just compensation for the article. In any action for forfeiture under this section where the claimant does not establish such title but establishes that it purchased the article for value without knowledge or reason to believe it was stolen, forfeiture shall not be decreed unless –

- (A) the State Party to which the article is to be returned pays the claimant an amount equal to the amount which the claimant paid for the article, or
- (B) the United States establishes that such State Party, as a matter of law or reciprocity, would in similar circumstances recover and return an article stolen from an institution in the United States without requiring the payment of compensation.

The additional clause at s 2609(c)(1)(B) makes the United States' implementation of art 7(b)(ii) different from that of Canada, Australia and New Zealand. O'Keefe explains that in United States law, an innocent purchaser of stolen items who does not acquire good title is not entitled to compensation, yet the requirement under art 7(b)(ii) of the

UNESCO Convention is that such a purchaser is compensated by a state requesting the return of the stolen item.⁴² Hence the reason for the understanding to the effect that stolen goods would be returned without compensation, except to the extent required by the Constitution of the United States, for those states parties that agree to do the same for the United States' institutions.⁴³ The United States lodged this understanding to set out its position with regard to art 7(b)(ii). Section 2609(c)(1)(B) sets out that understanding in legislative terms. Again, these differences in approach can be pointed out but they are difficult to challenge as the understanding has been accepted by the UNESCO Secretariat.

Article 9 of the UNESCO Convention is implemented by ss 2602–2607 of the Convention on Cultural Property Implementation Act. These provisions cover a range of matters including the authority of the President, restrictions on entering agreements, the extension of agreements, information of Presidential action, emergency implementation of import restrictions, designation of materials covered by agreements or emergency action and the establishment of the cultural property advisory committee. Section 2602(2) sets out the President's powers as follows:

For the purposes of paragraph (1), the President may enter into-

- (A) a bilateral agreement with the State Party to apply the import restrictions set forth in section 307 to the archaeological or ethnological material of the State Party the pillage of which is creating the jeopardy to the cultural patrimony of the State Party found to exist under paragraph (1)(A); or
- (B) a multilateral agreement with the State Party and with one or more other nations (whether or not a State Party) under which the United States will apply such restrictions, and the other nations will apply similar restrictions with respect to such material.

The United States lodged no reservation or understanding with regard to art 9 of the UNESCO Convention, yet there are differences in its approach to the implementation of this provision when compared to states such as Canada, Australia and New Zealand, as provision is made for the conclusion of bilateral or multilateral agreements. O'Keefe suggests that art 9 does not require that further agreements be made in order to achieve its purpose. He comments that the United States approach formulates an agreement to agree, when the UNESCO Convention already constitutes the agreement.⁴⁴

⁴² O'Keefe, above n 2, at 109.

⁴³ Ibid.

⁴⁴ O'Keefe, above n 2, at 110.

Contrary to O’Keefe’s reasoning, the language of art 9 does seem to suggest that the cooperation envisaged is to be defined by agreements. Article 9 provides:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

It is further contended that the words “[p]ending agreement” are indicative of the need for details of any concerted international effort to be set out in an agreement. There is merit in O’Keefe’s observation that s 2602 (c) limits the United States response in a manner that is not intended under the UNESCO Convention. The words “to carry out the necessary concrete measures, including the control of exports and imports” support this position. Clearly, export and import control were not the only remedial measures envisaged by the UNESCO Convention. Another convincing argument put forward by O’Keefe is that the United States has wrongly associated the last sentence of art 9 with an emergency situation and enacted provisions in this respect, when there is no such reference in the UNESCO Convention.⁴⁵

Other notable deviations in the United States implementing legislation which do not seem to result from the reservation and understandings made are the seemingly restrictive definitions of “archaeological and ethnological material,”⁴⁶ for which there is no definition in the UNESCO Convention and “object of an archaeological interest” which, as O’Keefe rightly observes, is defined in more general terms under the UNESCO Convention.⁴⁷

⁴⁵ See O’Keefe, above n 2, at 111. See also the Convention on Cultural Property Implementation Act 19 USC §2603.

⁴⁶ See the Convention on Cultural Property Implementation Act 19 USC §2601.

⁴⁷ O’Keefe, above n 2, at 111. See also the UNESCO Convention, art 1.

The United States lodged another understanding as follows:⁴⁸

The United States understands the words ‘as appropriate for each country’ in art 10 (a) as permitting each State Party to determine the extent of regulation, if any, of antique dealers and declares that in the United States that determination would be made by the appropriate authorities of state and municipal governments.

O’Keefe warns that the use of the words “as appropriate for each country” in the understanding does not authorise non-compliance with art 10 and that the United States should recognise the undertaking which it signed up to upon ratification of the UNESCO Convention.⁴⁹ He further notes that the United States’ implementing legislation is silent as regards art 13(a), (c) and (d) of the UNESCO Convention and instead, reliance is placed upon existing actions under which stolen property can be recovered.⁵⁰ This is a result of yet another one of the understandings lodged by the United States.⁵¹

O’Keefe states that the United States restricted its obligations under the UNESCO Convention by a combination of reservations, understandings and its interpretation of Convention terms.⁵² He also indicates that questions as to whether the United States has satisfactorily implemented the UNESCO Convention have been raised on that basis.⁵³ However, he maintains that there are other legislative instruments including customs legislation, the National Stolen Property Act⁵⁴ and the Archaeological Resources Protection Act⁵⁵ which support the implementation of the UNESCO Convention. O’Keefe therefore takes the view that collectively these legislative instruments properly implement the UNESCO Convention, despite the reservation and understanding.⁵⁶ In light of the above, the only comment to be added is that which has been voiced by O’Keefe himself,⁵⁷ that where this implementation technique is used, the successful litigant will be the one who knows how to navigate the system in order to achieve his or her purpose.

⁴⁸ See O’Keefe, above n 2, at 107.

⁴⁹ See O’Keefe, above n 2, at 109.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² See O’Keefe, above n 2, at 111.

⁵³ See O’Keefe, above n 2, at 113.

⁵⁴ National Stolen Property Act, above n 41.

⁵⁵ Archaeological Resources Protection Act, above n 38.

⁵⁶ O’Keefe, above n 2, at 123.

⁵⁷ O’Keefe, above n 2, at 123 and 143.

The analysis above illustrates the way in which reservations and understandings as to provisions of a Convention shape implementing legislation. In such cases it is likely that there will be a stark difference in implementing legislation. It is difficult to challenge a state on the basis of its approach to implementation where reservations or understandings have been accepted by the relevant international organisation administering a Convention. Differences that are not associated with reservations or understandings are good grounds upon which compliance with a Convention may be tested. One example in the case of the United States is the limiting or extension of definitions under the UNESCO Convention.

D Implementation in Australia, Canada and New Zealand

Australia, Canada and New Zealand also used the wording method to implement the UNESCO Convention and passed specific legislation for that purpose.⁵⁸ The implementing legislation in all three states can be cited for the comprehensive handling of matters under the UNESCO Convention. However, New Zealand's Protected Objects Act 1975 seems to be particularly thorough. The UNESCO Convention is not attached in the Schedule to Australia and Canada's implementing legislation, but both the UNESCO Convention and the UNIDROIT Convention are reproduced in Schedules to New Zealand's Protected Objects Act 1975.

The benefits of including a purpose clause in legislation were noted earlier in this paper. The purpose clause at s 1A of the Protected Objects Act 1975 serves as a reinforcement of this and provides:

The purpose of this Act is to provide for the better protection of certain objects by –

- (a) regulating the export of protected New Zealand objects; and
- (b) prohibiting the import of unlawfully exported protected foreign objects and stolen protected foreign objects; and
- (c) providing for the return of unlawfully exported protected foreign objects and stolen protected foreign objects; and
- (d) providing compensation, in certain circumstances, for the return of unlawfully exported protected foreign objects; and
- (e) enabling New Zealand's participation in –
 - (i) the UNESCO Convention; and
 - (ii) the UNIDROIT Convention ...

⁵⁸ See Protection of Movable Cultural Heritage Act 1986 (Cth), Cultural Property Export and Import Act 1974-75-76 c 50 and the Protected Objects Act 1975 respectively.

This purpose clause gives a clear indication that the intention is to implement the major terms of the UNESCO Convention including the regulation of both exports and imports, the return of items whether stolen or not, the payment of compensation and New Zealand's participation in the UNESCO Convention. Even the UNIDROIT Convention, which covers a similar subject matter, has been incorporated into New Zealand's implementing legislation.

It is commendable that the definitions of export and import are set in wide terms in s 2 of the Protected Objects Act 1975. This increases the likelihood of unlawful activity being picked up. The definition of protected foreign object is identical to that of cultural property in art 1 of the UNESCO Convention. Part 1 entitled "Protected New Zealand objects, unlawfully exported protected foreign objects, and stolen protected foreign objects" systematically addresses each of these issues with purpose and precision. The relevant export controls, offences and penalties for non-compliance with the same are provided for at s 5. The note at the end of s 5 indicates that it implements art 3 of the UNESCO Convention. It directs the reader to the exact term of the UNESCO Convention which is being implemented by that section of the Protected Objects Act 1975. It is been pointed out that the Legislation Advisory Committee endorses the use of notes in legislation as an interpretative aid.⁵⁹ It is submitted that this is an example of notes being used appropriately for that purpose.

The institution of administrative safeguards as required by arts 5 and 6 of the UNESCO Convention is addressed by ss 6 to 9 of the Protected Objects Act 1975. Sections 6 to 9 provide for the appointment of a chief executive whose role is to make a determination as to the granting of an application for permission to export protected New Zealand objects. Provision is also made for consultation with expert examiners when determining applications for permission to export and the issuance of a certificate of permission. In contrast, the United States implementing legislation provides for the establishment of an administrative body in the Cultural Property Advisory Committee.⁶⁰ However, this is for the purposes of art 9 of the UNESCO Convention and not art 6 which it is silent on.

A similar trend can be identified in Australia's implementing legislation. Part II, "Control of Exports and Imports" and Part III "Administration," are notable in this regard. Again, both exports and import are covered, as required under the UNESCO Convention. The

⁵⁹ See Legislation Advisory Committee "Legislation Advisory Committee Guidelines on Process & Content of Legislation" (2001) Ministry of Justice 3A.1.3 < www.justice.govt.nz >.

⁶⁰ See the Convention on Cultural Property Implementation Act 19 USC § 2605.

definition of movable cultural heritage of Australia set out in s 7 of the Protection of Movable Cultural Heritage Act 1986 (Cth) seems wider than that prescribed under art 1 of the UNESCO Convention. The designated categories are different and s 7(2) allows for the addition of even more categories. It provides:

The generality of paragraph (l)(j) is not limited by any of the other paragraphs of subsection (l).

The legislation goes on to provide for the formulation of a National Heritage Control List which consists of objects which may not be exported without the relevant certificate or permit.⁶¹ The prohibition on unlawful exports and the offences and penalties which follow from that are set out at s 9. Section 10 provides for the granting or refusal of an export permit by the Minister and, as in New Zealand's implementing legislation, for consultation with an expert examiner. The National Cultural Heritage Committee, established under s 15 of the Protection of Movable Cultural Heritage Act 1986 (Cth) has a role in determining whether a permit will be granted. However, the powers of this Committee extend to the fulfilment of the requirements of art 5 of the UNESCO Convention. These include the classification and reclassification of objects to be included in the Control List⁶² and its duty to "consult and cooperate with appropriate authorities of the Commonwealth, of the States and of the Territories ... on matters related to its functions."⁶³ Canada's implementing legislation contains similar features to that of Australia and New Zealand. These include the establishment of a Canadian Cultural Property Export Control List,⁶⁴ provision for the issuance of export permits,⁶⁵ the designation of expert examiners⁶⁶ and the establishment of a Review Board.⁶⁷

The implementing legislation of Australia,⁶⁸ New Zealand,⁶⁹ the United States⁷⁰ and Canada⁷¹ all make reference to the application of their respective Customs Acts or customs laws. Article 3 of the UNESCO Convention which requires the imposition of

⁶¹ See the Protection of Movable Cultural Heritage Act 1986 (Cth), s 8.

⁶² Ibid, at s 16(a)(iii).

⁶³ See the Protection of Movable Cultural Heritage Act 1986 (Cth), s 16(d).

⁶⁴ See the Cultural Property Export and Import Act 1974-75-76 c 50, s 4.

⁶⁵ Ibid, at s 5.

⁶⁶ Ibid, at s 6.

⁶⁷ Ibid, at s 18.

⁶⁸ Protection of Movable Cultural Heritage Act 1986 (Cth), s 27.

⁶⁹ Protected Objects Act 1975, s10.

⁷⁰ Convention on Cultural Property Implementation Act 19 USC § 2606 and 2609.

⁷¹ Cultural Property Export and Import Act 1974-75-76 c 50, ss 50 and 51.

import restrictions, is an example which can be used to compare the wording used to implement a particular provision of a Convention. In this regard, the relevant sections of New Zealand's implementing legislation are ss 10A and 10F(1) which provide:

10A A person may not import into New Zealand an unlawfully exported protected foreign object.

10F(1) Sections 10A to 10C only apply to unlawfully exported protected foreign objects that are exported from a reciprocating State on or after the commencement of this section.

An observation can be made regarding the drafting of s 10F(1). Based on s 7 of the Interpretation Act 1999 which provides that "[a]n enactment does not have retrospective effect",⁷² it is unnecessary to use the phrase "on or after the commencement ...". Even further, the section takes effect on commencement and will continue in effect after commencement in any event, unless it is repealed.⁷³ Canada's implementing legislation contains slightly different wording at ss 37(2) and 43 respectively, but the concept is the same.

37(2) From and after the coming into force of a cultural property agreement in Canada and a reciprocating State, it is illegal to import into Canada any foreign cultural property that has been illegally exported from the reciprocating State.

43 No person shall import or attempt to import into Canada any property that is illegal to import into Canada under subsection 37(2).

Section 14(1) and (3) of the Protection of Movable Cultural Heritage Act 1986 (Cth) provides:

(1) Where:

- (a) a protected object of a foreign country has been exported from that country;
- (b) the export was prohibited by a law of that country relating to cultural property; and
- (c) the object is imported;

⁷² See the Interpretation Act 1999, s 7.

⁷³ See the Interpretation Act 1999, ss 3, 6, 8(1) and 10(1).

the object is liable to forfeiture.

- (3) This section does not apply in relation to the importation of an object if:
- (a) the importation takes place under an agreement between:
 - (i) the Commonwealth, a State, a Territory, a principal collecting institution or an exhibition co-ordinator; and
 - (ii) any other person or body (including a government); and
 - (b) the agreement provides for the object to be loaned, for a period not exceeding 2 years, to the Commonwealth, State, Territory, principal collecting institution or exhibition co-ordinator, as the case may be, for the purpose of its public exhibition within Australia.

Not only did New Zealand, Canada and Australia use the wording method, they also used similar language to give effect to this provision. Thus, there are obvious similarities in the manner in which the provision is construed in the domestic law of each of these states. Whilst this uniformity in approach may not always be possible, the advantage of certainty in the law across contracting states, at least with regard to this particular point, is commendable.

O’Keefe explains that given the approach taken by Australia and Canada with regard to the implementation of art 3 of the UNESCO Convention, there have been questions as to whether their implementation of art 9 is as rigorous as the United States of America.⁷⁴ He argues that such questions were unfounded as these states had the legislative platform under which a request under art 9 could be facilitated.⁷⁵ It will be recalled that the United States approach was to provide for the conclusion of agreements to apply certain restrictions. It will be further recalled that O’Keefe criticised the United States’ approach, claiming that it amounted to an agreement to agree.⁷⁶ O’Keefe’s reasoning was not supported. It is further submitted that the provisions set out above with reference to art 3, are provisions under which a request pursuant to art 9 may be accommodated. It is interesting that although the UNESCO Convention does not require the conclusion of agreements for purposes of art 3, it seems to do so for the purposes of art 9. That notwithstanding, the implementing provisions in New Zealand, Australia and Canada, seem to require some form of reciprocity or agreement in fulfilment of the obligations under art 3.

⁷⁴ O’Keefe, above n 2, at 73.

⁷⁵ Ibid.

⁷⁶ See O’Keefe, above n 2, at 110.

In comparison to the United States, New Zealand, Australia and Canada are not limited by understandings with regard to their handling of the vexing issue of the payment of compensation to innocent purchasers. New Zealand's Protected Objects Act 1975 implements art 7 of the UNESCO Convention and the UNIDROIT Convention simultaneously, under s 10. Unlawfully exported protected foreign objects and stolen protected foreign objects are dealt with under separate headings. Section 10 sets out the general import prohibition and s 10B sets out the procedure by which claims for the return of unlawfully exported protected foreign objects are to be made. A claim is to be brought before a court which, pursuant to s 10B, will determine whether the object is to be returned. Compensation for and the costs of returning unlawfully exported protected foreign objects provided for under arts 6 and 9(1) of the UNIDROIT Convention are addressed under s 10C of the Protected Foreign Objects Act 1975. The restitution of stolen protected foreign objects provided for under arts 3 and 4 of the UNIDROIT Convention is addressed under s 10E.

Section 10D restates art 7(b) (i) and (ii) of the UNESCO Convention using language which is similar to that used in the Convention, as follows:

This section applies if-

- (a) a protected foreign object that is documented as being part of the inventory of a foreign cultural institution is stolen and imported into New Zealand; and
- (b) the relevant reciprocating State provides New Zealand with the documentation and other evidence to establish its claim for the recovery and return of that object to the chief executive.

If this section applies, the chief executive must,-

- (a) at the request of the relevant reciprocating State, ask the New Zealand Customs Service to –
 - (i) seize that object pursuant to its powers under the Customs and Excise Act 1996 ...; and
 - (ii) transfer that object to the Ministry; and
- (b) if that object is seized, return that object to that State if that State pays –
 - (i) just compensation to any person who –
 - (A) has valid title to that object; or
 - (B) is an innocent purchaser; and
 - (ii) all costs with respect to the return and delivery of the object.

Similar language is used at s 37 of Canada's implementing legislation which also provides for the assessment of compensation by the court. O'Keefe observes that "[t]he Australian legislation is silent on the question of payment of compensation and therefore leaves within the discretion of the Minister the question as to whether compensation will be insisted upon as is possible under the Convention."⁷⁷

E Conclusion

The analysis above illustrates the various techniques which have been used to implement the UNESCO Convention and the advantages and disadvantages of each. Where no specific legislation is enacted to implement the UNESCO Convention, as in the United Kingdom, there are no indicators that the purpose of existing legislation is to fulfil obligations arising under an international agreement. Another point is that the terms of the UNESCO Convention may be regulated by more than one piece of legislation and a person must be aware of this in order to have a proper understanding of how the Convention terms are incorporated into domestic law.

In Australia, Canada and New Zealand, which all enacted specific legislation to implement the UNESCO Convention, it was much easier to make out trends in the content of that implementing legislation and therefore pinpoint which provisions implemented particular terms. For example, the provisions which implemented major issues such as the establishment of control lists, import and export prohibitions and the setting up of administrative bodies, could be identified in the implementing legislation of each jurisdiction. In some cases, the actual wording used was quite similar. It is also notable that the UNESCO Convention was not mentioned at all in Australia's implementing legislation, it was attached in a schedule to New Zealand's implementing legislation and, although it was not mentioned in Canada's implementing legislation, the long title clearly indicates that the purpose was to implement the UNESCO Convention.

The observations above must be qualified, however, where reservations have been made. This was illustrated in the example of the United States. Compared to other jurisdictions, there was a marked difference in the way the terms of the UNESCO Convention were construed in the United States. However, the United States legislated on the basis of accepted reservations and understandings and so it is difficult to challenge its approach.

⁷⁷ O'Keefe, above n 2, at 63.

The implementation of the UNESCO Convention indicates some of the challenges in always anticipating uniformity in implementing techniques across jurisdictions. It indicates that drafters must take internal legislative systems into account and tailor implementation techniques to suit the requirements under the treaty being implemented. This suggests the need for drafters to take a systematic approach to the implementation process. A proposal setting out this systematic approach is outlined in Part VI, to provide guidance to drafters faced with the task of implementing treaties in domestic law.

VI Therefore what is a drafter to do? A guide towards greater consistency in the implementation of treaties in domestic law

A Overview of findings

This paper was inspired by the idea that uniformity in the legislative drafting techniques used to implement international treaties fosters coherence in the way in which treaty terms are construed in domestic law. It was driven by the proposition that the *pacta sunt servanda* rule requires implementing states to legislate in a manner that is consistent with treaty obligations. It was further proposed in Part II that good faith is demonstrated through the selection of suitable legislative techniques to achieve compliance with a treaty. This paper tested the plausibility of using the same drafting technique to implement a treaty in different jurisdictions and used examples to explore this. The result was that the process is not nearly as simple as it might appear.

The merit of the proposal was made out in the first example of the implementation of the Hague Convention on the Civil Aspects of International Child Abduction¹ in New Zealand. The analysis of the terms of the Hague Convention and the explanatory report by Professor Pérez-Vera indicated that the Hague Convention was a “self-contained body of law suitable for domestic application with little ... supporting operational machinery.”² Burrows and Carter recommend that this kind of treaty should be given direct effect.³ It was argued that there was little justification for New Zealand’s parting company with many other jurisdictions which implemented the Hague Convention using the formula method. It was further surmised that terms of the Hague Convention had a different meaning in New Zealand because of the difference in the legislative drafting technique used to implement it and, even more, because the restatement of the law was unsatisfactory. Hence the goal of uniformity across implementing jurisdictions was not achieved. There was strong judicial support for that position both in New Zealand⁴ and elsewhere.⁵

¹ Hague Convention on the Civil Aspects of International Child Abduction (opened for signature 25 October 1980, entered into force 1 December, 1983). [The Hague Convention]

² See JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 490 and the Legislation Advisory Committee “Legislation Advisory Committee Guidelines on Process & Content of Legislation”(2001) Ministry of Justice 6.2.3 <www.justice.govt.nz>.

³ Burrows and Carter, above n 2, at 490.

⁴ See *Gross v Boda* [1994] NZFLR 704 (HC) at [710] per Whitehead J.

⁵ See *Hunter v Murrow* [2005] EWCA Civ 976 (CA) at [15] per Thorpe LJ.

The second example, the implementation of the Charter of the United Nations,⁶ demonstrated that differences in implementation technique can result in a divergence in the extent of the infiltration of treaty terms into domestic law. A similar exercise to that of the Hague Convention was undertaken. The nature of the Charter terms was examined and the implementation techniques used by different jurisdictions was compared. It was determined that the Charter had different kinds of provisions. Some were constitutive in nature and required implementing legislation to contain certain fundamental provisions relating to legal personality, financial provisions and diplomatic privileges and immunities. Other provisions were declaratory. They set out the aims of the United Nations and required no legislative support.

The Charter also contained terms which created obligations for member states which extended to citizens of the state. Such provisions needed to be restated in domestic legislation in order to be of any legal effect internally. All of these factors pointed to the need for substantial supporting operational machinery to be provided for in implementing legislation. Unlike the Hague Convention, the Charter is not a self-contained body of law. Therefore, the formula method would not be an appropriate implementation technique, but the wording method would be ideal.

Another observation about the Charter was that reservations were generally prohibited. Despite this, the analysis revealed that most states did not fully implement all of the Charter terms. There were also variations in terms of whether or not the Charter was attached in a schedule to implementing legislation. Australia's implementing legislation seemed to be the most complete whilst that of the United Kingdom and Canada were short and restrictive. Section 8 of the Charter of the United Nations Act 1945 (Cth), spoke directly to the relevance of art 25 of the Charter, which sets out member states' obligation to be bound by decisions of the Security Council. No other jurisdiction demonstrated this level of commitment to abide by Security Council measures through its domestic implementing legislation, albeit only with respect to the imposition of non-military sanctions.

Like the United Kingdom, New Zealand and Canada used the long title and preambles to their respective implementing legislation to indicate that the purpose of the implementing legislation was to implement just art 41. All states used the subordination method to implement decisions of the Security Council made pursuant to art 41 of the Charter. The

⁶ Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October, 1945). [The Charter].

United States' implementing legislation went a little further than other jurisdictions by addressing not only art 41 of the Charter, but art 43 also.

Having noted the differences in approach which had been taken and the variations in the level of compliance which member states subjected themselves to through their domestic legislation, a model which sought to fully implement the Charter was produced. This is intended to be a guide for states that are yet to incorporate the Charter in domestic law. The aim was to produce a model which included the fundamental provisions which should feature in an instrument implementing the Charter. However, as the Charter is an instrument that has enormous political and economic implications, it is unlikely the uniformity in approach which is aspired to will be realised.

The third example, the UNESCO Convention⁷ presented another case in which contracting states used different legislative drafting techniques to implement a Convention. The result was a variation in the extent of the implementation of the UNESCO Convention in contracting states. The UNESCO Convention is not a self-contained body of law and a number of provisions needed to be restated to be of effect in domestic law. Implementation techniques ranged from the enactment of specific legislation, as was done in Australia, New Zealand and Canada, to the passage of no legislation at all as in the United Kingdom. The term "UNESCO Convention" was not mentioned in Australia's implementing legislation. The implementation of the UNESCO Convention by the United States might be described as passive, but it was due to extensive reservations and understandings that had been lodged with respect to certain provisions of a UNESCO Convention.

Another notable point is that some of the states studied had existing legislation which covered a number of issues that were addressed under the UNESCO Convention. In this case drafters had to consider how existing legislative provisions could be incorporated into the main implementing instrument. Drafters ought to be aware of all of these fine distinctions. The study revealed a number of points:

- (1) When no specific legislation is passed it is difficult for a person to identify which legislation incorporates obligations under a treaty;

⁷ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (opened for signature 14 November 1970, entered into Force 24 April 1972) [The UNESCO Convention].

- (2) Where a state's existing legislation already covers some Convention matters it is unwise to duplicate this in the process of implementation;
- (3) Some jurisdictions have adopted different legislative drafting styles such that they may or may not attach the text of a treaty to a schedule to an enactment;
- (4) States such as Canada still use preambles whilst others use purpose clauses. Some rely on the long title to indicate the purpose of an Act whilst others such as New Zealand have discontinued the use of long titles.

The goal of uniformity in approach cannot be achieved when some states make reservations which others have not made. It is difficult to challenge a state on apparent differences in the provisions of their implementing legislation where the reservations have been endorsed by the institution administering the Convention in question. Furthermore, there are matters specific to each contracting state that will determine the implementation technique used and the drafting style adopted. It can be argued therefore, that what is required is uniformity in the effect of a treaty in domestic law, that is, in the end result, as opposed to uniformity in the legislative drafting technique used to implement a treaty. Even that is a high aspiration to set due to the making of reservations. This suggests the need for some compromise, since it appears that there is no one technique that will always be ideal for all implementing states. It is therefore recommended that the best way to resolve any unnecessary divergence in approach or distortion of the meaning of treaty terms is for drafters to adopt a methodical approach to the process of treaty implementation.

The following guide proposes a systematic approach to the process of implementing treaties in domestic law. First, it identifies the fundamental factors which must be considered not only for treaty implementation but for the purposes of drafting legislation in any jurisdiction. These are assessing the constitutional law, Interpretation Act and Standing Orders of the state. This is to be followed by an examination of the terms of the treaty against existing legislation. The guide sets out the way in which the results of that assessment should be used to determine the implementation technique that is the most suitable to incorporate the treaty in a specific jurisdiction, having considered both the treaty and the domestic legislative infrastructure. It then highlights some stylistic points in legislative drafting that can be used to enhance the indication of an intention to implement international obligations into domestic law.

B Proposed guide

1 Assess the constitutional framework of the state, the Interpretation Act and any Standing Orders that govern the procedure in Parliament

De Mestral and Fox-Decent rightly indicate that the first step a drafter should take to find guidance regarding the process by which an international treaty should take effect in domestic law is to assess the constitutional framework of that state.⁸ It is from there that answers to the question whether a state is of the monist or dualist school will come. Early in this study there was some discussion of the differences in treaty implementation in monist and dualist states. The main points that resulted from it are as follows:⁹

- (a) if it is a monist state, a self-executing treaty will become part of national law upon ratification. However, further legislation will be required where the treaty is not self-executing.
- (b) if it is a dualist state, the treaty will have legal effect only for the purpose of international law. It will be unenforceable in domestic law until implementing legislation is enacted.

De Mestral and Fox-Decent acknowledge the importance of analysing the Constitution by citing examples.¹⁰ They point out that international law supersedes domestic law by virtue of the constitutional provisions of some jurisdictions.¹¹ They also indicate that constitutional provisions such as that of Mexico,¹² put treaties on an equal status to domestic legislation if the treaties are approved by parliament.¹³ De Mestral and Fox-Decent further point out that the constitution of the dualist state of Canada makes no mention of anything on international law.¹⁴ The United Kingdom has no entrenched constitution. It was noted earlier that it is a prime example of the dualist school. Its

⁸ Armand De Mestral and Evan Fox-Decent “Harmonizing the International and Domestic effect of International Law” in Oonagh E Fitzgerald (ed) *The Globalised Rule of Law: Relationships between International and Domestic Law* (Irwin Law, Toronto, 2006) at 33.

⁹ See Anthony Aust *Modern Treaty Law and Practice* (2nd ed, Cambridge University Press, Cambridge, 2007) at 181-192.

¹⁰ De Mestral and Fox-Decent, above n 8, at 33.

¹¹ See for example the Constitution of the Netherlands 1983 (as amended to 2002), art 94 and the Constitution of the Republic of Turkey 1982, as amended to 2001, art 90(5).

¹² See the Political Constitution of the United Mexican States 1917, as amended to 2003.

¹³ De Mestral and Fox-Decent, above n 8, at 33.

¹⁴ *Ibid*, at 34.

constitutional framework is based on the doctrine of the separation of powers. This doctrine prescribes that the executive is empowered to negotiate and enter agreements to manage the international relations of a state, but only the legislature has the power to bind the state through the enactment of internal laws. The role of the judiciary is to interpret the law when called upon to do so. Aust makes special mention of Antigua and Barbuda in which the Ratification of Treaties Act 1987(Antigua and Barbuda) provides that treaties affecting the international affairs of the state must be approved by parliament and that a treaty is unenforceable in Antiguan law except by Act of Parliament.¹⁵

A drafter should also be familiar with the rules set in the Interpretation Act of the jurisdiction for which he will draft implementing legislation. Thornton stresses that Interpretation Acts are relevant to the drafting process for the following reasons:¹⁶

- (1) They set rules which help shorten and simplify legislation by reducing repetition;
- (2) They promote consistency of form and language of legislation by setting standard definitions for certain terms; and
- (3) They enact rules of construction which clarify the effect of laws.

Drafters must be aware of the default rules set by an Interpretation Act so that these rules can be applied to implementing legislation.

Another standard tool which should be consulted to facilitate the implementation process is any Standing Orders of the House of Representatives. The Standing Orders of New Zealand contain general rules on legislative procedures¹⁷ including guidelines as to the form of legislation.¹⁸ They also set out the procedure by which treaty terms are to be examined by Parliament before legislative steps can be taken to implement a treaty. In that regard, the Standing Orders of the House of Representatives provide that the Government must present international treaties to the House of Representatives before ratification.¹⁹ The treaty is then subject to national interest analysis and consideration by the Foreign Affairs Defence and Trade Committee.²⁰ The Foreign Affairs Defence and Trade Committee must then submit a report to the House setting out any reasons the

¹⁵ See Aust, above n 9, at 194.

¹⁶ GC Thornton, *Legislative Drafting* (4th ed, Tottel Publishing, West Sussex, 2005) at 112.

¹⁷ See Standing Orders of the House of Representatives 2008, SO 249-315.

¹⁸ See Standing Orders of the House of Representatives 2008, SO 249-255.

¹⁹ Standing Orders of the House of Representatives 2008, SO 388.

²⁰ Ibid, at SO 389 and SO 390 respectively.

treaty should be brought to the special attention of the House of Representatives.²¹ A drafter who is aware of these rules will better appreciate his or her role in the overall process of treaty implementation.

2 *Examine the terms of the treaty along with existing legislation*

This study has focused on the implementation of international treaties in a dualist state. The question therefore is how to go about determining which implementation technique will best reflect the true meaning of a treaty. The many implementation techniques which can be used were set out above. Keyes and Sullivan advise that: “these techniques can be used separately or in combination with one another.”²² In order to determine exactly what method will be used, it is necessary to examine the terms of the treaty being implemented. This was the approach taken in the analysis of the treaties considered in this study. It was a deliberate attempt to categorise treaty terms into different groups. That exercise showed that different types of provisions call for different legislative responses. A word of caution should be added here. The examination of treaty terms should not be done in isolation. Drafters should simultaneously review their own statute books to determine whether matters dealt with in a treaty are already covered in domestic law.

3 *Select the technique or combination of techniques for implementation*

The following approach to the selection of an appropriate implementation technique is suggested:

- (a) No further legislation is necessary-²³
 - (i) Where the treaty deals with the rights and obligations of contracting states as opposed to individuals within the states and therefore requires executive action only;²⁴

²¹ Standing Orders of the House of Representatives, at SO 391.

²² John Mark Keyes and Ruth Sullivan “A Legislative Perspective on the Interaction of International Domestic Law” in Oonagh E Fitzgerald (ed) *The Globalised Rule of Law: Relationships between International and Domestic Law* (Irwin Law, Toronto, 2006) at 310.

²³ See Thornton, above n 16, at 310; Keyes and Sullivan, above n 22, at 324.

²⁴ See Law Commission *A New Zealand Guide to International Law and its Sources* (NZLC PP34, 1996) at para 47.[The Law Commission]

- (ii) Where, after evaluating the domestic legislation in force, the drafter is satisfied that treaty matters are already properly addressed.

The disadvantage of not enacting specific legislation for the purpose of implementing a treaty is that existing legislation would make no reference to the treaty it implements. Thus, the courts are not alerted to the fact that the legislation is meant to introduce rules of international law into domestic law.²⁵ Further, a drafter charged with the task of amending an Act may be unaware of the underlying treaty obligations which it addresses and treaty obligations could be violated unintentionally.²⁶ It is recommended that consideration is given to whether there could be an insertion into the relevant pieces of legislation, perhaps in the purpose clauses, to reflect the legislative intention to implement a treaty into domestic law.²⁷ This recommendation will be further explored in this guide where the need to amend legislation is considered.

- (b) Use the formula method if the treaty constitutes a self-contained body of law that creates rights for and imposes obligations on individuals within the state²⁸ and can therefore stand alone.²⁹

Keyes and Sullivan point out that the phraseology used to give direct effect to a treaty is to provide that it “has the force of law.”³⁰ An example of the use of this drafting technique in New Zealand is the Sale of Goods (United Nations Convention) Act 1994 which implemented the United Nations Convention on Contracts for the International Sale of Goods.³¹ Maher indicates that there may be instances where it is necessary to include additional provisions which supplement the terms of the treaty being implemented.³² He cites the Child Abduction and Custody Act 1985 (UK) and the Recognition of Trusts Act 1987 (UK) as examples. Supplementary provisions tend to provide for matters including the setting up of bodies which facilitate the administration of treaty terms, financial

²⁵ See John Mark Keyes “Drafting Laws to Implement International Agreements” (paper presented to lawyers in the Department of Justice, Ottawa, January 2003).

²⁶ The Law Commission, above n 24, at para 61.

²⁷ See De Mestral and Fox-Decent, above n 8, at 49.

²⁸ See Burrows and Carter and Legislation Advisory Committee, above n 2.

²⁹ See Thornton, above n 16.

³⁰ Keyes and Sullivan, above n 22, at 311.

³¹ United Nations Convention on Contracts for the International Sale of Goods (opened for signature 11 April 1980, entered into force 1 January 1988).

³² See G Maher “Implementation of Hague Conventions in domestic law: the United Kingdom Approach” (1995) 14 CJQ 21 at 31.

provisions and the fixing of penalties for the breach of treaty matters provided for in the implementing legislation.³³

Keyes proposes that two advantages of direct implementation are its relative simplicity in drafting and that it maintains consistency, not only with the treaty being implemented, but in implementing legislation across contracting states.³⁴ Conversely, direct implementation does not always properly deal with the impact of the relevant treaty on existing legislation. Also, there may be inconsistencies due to translation if the treaty was not written in the language of the implementing state and the interpretation of the treaty in question may be governed by international law rules that are broader than the interpretive rules of national courts.³⁵ In his joint paper with Sullivan, Keyes further warns that hardly any international treaty can be drafted to fit comfortably with the administrative system, the court system and the related internal laws of all contracting states.³⁶ Keyes' point is highly relevant to this paper. It suggests that it is fanciful to expect the same implementation technique to work well in all contracting states. Hence the need for a reasoned approach to the process.

In light of the foregoing, where the formula method is being considered, the recommendation is to undertake a careful evaluation of the treaty with a view to identifying which provisions of the treaty require further legislative support. Keyes and Sullivan prescribe that the administrative and enforcement measures set out in internal laws should also be assessed to determine whether they adequately support the purpose of the treaty being implemented.³⁷ Supplementary provisions should be added only if they do not because the aim should be to implement the treaty not merely in form but also in substance.³⁸

(c) The wording method should be used –

- (i) if the treaty is not self-executing;
- (ii) if the treaty expressly provides that states take the necessary legislative steps to give effect to certain provisions within it; or

³³ Ibid.

³⁴ John Mark Keyes, above n 25.

³⁵ Ibid.

³⁶ Keyes and Sullivan, above n 22, at 316.

³⁷ Ibid.

³⁸ Ibid.

- (iii) if the language used in the treaty is so far removed from that commonly used in the relevant jurisdiction that the treaty terms would not sit well with existing legislation.

Mendis indicates that treaties are very often set in general terms for the purpose of facilitating agreement amongst participating states.³⁹ In such instances the detail required to achieve the purpose of the treaty is omitted. Keyes and Sullivan advise that a restatement of the terms of a treaty may be necessary to expound upon the principles that a treaty sets.⁴⁰ They add that this can be achieved through the enactment of one piece of implementing legislation or the amendment of several pieces of legislation.⁴¹

De Mestral and Fox-Decent maintain that the wording method is very often used because of the need to have the language used in implementing legislation complement that of existing statutes governing the same area of law.⁴² In support of this they give the example of the Canadian domestic legislation implementing treaties governing trade remedies and insist upon “the desire to have the law on all fours with Canadian administrative law, which forms the basic regulatory matrix and deep structure of the law.”⁴³ Maher takes a similar line. He discusses the use of the wording method for the purpose of implementing Hague Conventions in the United Kingdom. Maher’s contribution to that discussion is as follows:⁴⁴

This approach has the advantages of stating the law in the terms and principles familiar to United Kingdom lawyers and is particularly appropriate when used in a statute which deals not only with the implementation of a Hague Convention but also with related matters, as with the Acts on divorce recognition and evidence abroad.

The Law Commission explains that some characteristics of a treaty that require implementation using the wording method are that it may either empower a state to take action or create a duty to take internal legislative action.⁴⁵ The Tokyo Convention on Offences and certain other acts Committed on Board Aircraft⁴⁶ is cited as an example of a

³⁹ See DL Mendis “The Legislative Transformation of Treaties” (1992) 13(3) Stat L R 216.

⁴⁰ See Keyes and Sullivan, above n 22, at 317.

⁴¹ Ibid.

⁴² See De Mestral and Fox-Decent above n 8, at 48.

⁴³ Ibid.

⁴⁴ Maher, above n 32, at 31.

⁴⁵ The Law Commission, above n 24, at para 50.

⁴⁶ Tokyo Convention on Offences and certain other acts Committed on Board Aircraft (opened for

treaty which calls for internal responses by legislative means.⁴⁷ The Commission cites art 4 of the International Convention on the Elimination of All Forms of Racial Discrimination⁴⁸ as a provision which creates a duty to enact domestic legislation in response to it.⁴⁹ Article 4(a) provides:

States Parties ... shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities including the financing thereof;

This provision clearly requires the creation of different kinds of offences. This can be best achieved by the wording method.

The above constitute some guidelines as to how to determine whether the wording method is appropriate and the advantages of its use. However, there are drawbacks of which drafters must be equally aware. Keyes and Sullivan warn that the process of restating treaty terms should be undertaken with caution because the meaning of certain words may change depending on the context in which they are used.⁵⁰ They indicate that when treaty terms are transposed into domestic legislation that domestic legislation is subject to domestic rules of interpretation as opposed to international interpretative rules.⁵¹ Another caveat closely related to this is that the meaning of treaty terms could be distorted if they are replaced by words that do not capture their true meaning. This was illustrated in the first example of the implementation of the Hague Convention⁵² in New Zealand.

The recommendation, therefore, is that drafters be aware of the slight variances in the meaning of words when choosing those which would replace treaty terms. Drafters should also be mindful of the role of domestic courts when called upon to interpret implementing legislation and ensure that the drafting is expedited in a matter which

signature 14 September 1963, entered into force 4 December 1969).

⁴⁷ The Law Commission, above n 24, at para 50.

⁴⁸ International Convention on the Elimination of All Forms of Racial Discrimination (opened for signature 21 December 1965, entered into force 4 January 1969).

⁴⁹ The Law Commission, above n 24, at para 50.

⁵⁰ Keyes and Sullivan, above n 22, at 317.

⁵¹ Ibid.

⁵² The Hague Convention, above n 1.

reflects the true meaning of the treaty concerned. Keyes and Sullivan emphasise that drafters also should be very thorough where the wording method is selected because: “[i]f nothing is said about a particular provision in the implementing legislation, it is not implemented.”⁵³

(d) Amend existing legislation –

- (i) if the subject matter covered in the treaty is dealt with in domestic legislation that needs to be reviewed or updated;
- (ii) if the treaty covers more than one subject matter which is addressed in more than one piece of legislation.

Another feature of the wording method is the amendment of several pieces of legislation. Where amendments are being made there should also be some indication that the purpose was to give effect to a treaty. This can be done by modifying the purpose clauses. De Mestral and Fox-Decent warn that even this may not be enough, because Canadian courts have been known to disregard such legislative statements where the text of the legislation itself does not clearly use treaty terms.⁵⁴ As they have indicated: “despite including the express statement in the NAFTA Act that ‘[t]he purpose of this Act is to implement the Agreement,’ NAFTA⁵⁵ has never been given direct effect by Canadian courts ...”⁵⁶ They give the examples of the cases of *Industries Hillenbrand Canada Ltée v Québec*⁵⁷ and *Pfizer Inc v Canada*⁵⁸ as illustrations. These examples reinforce the point that every effort must be made to properly capture the meaning of treaty terms in domestic legislation if the wording method is being used.

Thornton acknowledges the merits of the arguments noted above. However, he advises that it may be impractical to refer to the treaty being implemented and indicate the purpose of the legislation where a treaty covers very wide areas of law.⁵⁹ He makes special reference to the human rights treaties in this regard. This view is supported by the Law Commission which recommends that this approach be taken for the implementation

⁵³ Keyes and Sullivan, above n 22, at 317.

⁵⁴ De Mestral and Fox-Decent, above n 8, at 49.

⁵⁵ North American Free Trade Agreement (entered into force 17 December 1992).

⁵⁶ Ibid.

⁵⁷ *Industries Hillenbrand Canada Ltée v Québec (Bureau de normalization)* [2002] JQ no 3811 at 191(CS).

⁵⁸ *Pfizer Inc v Canada* [1999] 4 FC 441 at 45(TD).

⁵⁹ Thornton, above n 16, at 311.

of human rights conventions including the 1966 International Conventions and the Convention on the Elimination of All Forms of Discrimination Against Women.⁶⁰ Most of the provisions of the Convention on Discrimination Against Women are prefixed by the phrase “[s]tates parties shall take all appropriate measures to... .” It insists upon protection for women in a cross-section of areas including family, education, social and cultural patterns of conduct, trafficking in women, exploitation of prostitution of women, eligibility for employment and equality in the field of health care. This gives some indication of the impracticability of referring to the Convention on Discrimination Against Women in all of the legislative instruments that will require some form of amendment.

(e) The subordination method should be used –

- (i) if the subject matter covered by the treaty is highly technical and requires further detail in order to take effect;
- (ii) if matters dealt with under a treaty are highly regulatory and would require frequent amendments or updating.⁶¹

Where the subordination method is used, the power to implement a treaty is typically delegated to an executive or administrative authority. As the Law Commission advises, this drafting technique is particularly appropriate where Parliament has already endorsed the general policy being implemented and need not be involved with its routine application.⁶² In the example of the implementation of art 41 of the Charter, almost all contracting states considered were settled on the policy, which was to implement Security Council decisions not involving the use of force. Hence the similarity in approach regarding the use of the subordination method to gave effect to these decisions as they were being made from time to time. The subordination method is often used in the areas of civil aviation, shipping and environmental protection.

De Mestral and Fox-Decent⁶³ and Keyes and Sullivan⁶⁴ make recommendations similar to the Law Commission regarding the appropriateness of the use of the subordination

⁶⁰ Convention on the Elimination of All Forms of Discrimination Against Women (opened for signature 18 December 1979, entered into force 3 September 1981)[Convention on Discrimination Against Women]; The Law Commission, above n 24, at para 56.

⁶¹ See the Law Commission, above n 24, at para 62.

⁶² Ibid.

⁶³ De Mestral and Fox-Decent, above n 8, at 51.

⁶⁴ Keyes and Sullivan, above n 22.

method of implementation. They both proffer the example of s 35(1)(d) of the Canada Shipping Act 2001⁶⁵ which provides:

The Governor in Council may, on the recommendation of the Minister of Transport, make regulations implementing ... an international convention, protocol or resolution that is listed in Schedule 1, as amended from time to time, including regulations

- (i) implementing it in respect of persons, vessels or oil handling facilities to which it does not apply,
- (ii) establishing stricter standards than it sets out, or
- (iii) establishing additional or complementary standards to those it sets out if the Governor in Council is satisfied that the additional or complementary standards meet the objectives of the convention, protocol or resolution;

In their consideration of the merits of the subordination method De Mestral and Fox-Decent and Keyes and Sullivan seem to overlook an important point which Mendis raises in his work. That is the question of judicial review of executive action where extensive powers are granted for the purposes of implementing a treaty.⁶⁶ Mendis indicates that such executive action is not usually scrutinised by the courts for illegality based on a contravention of the intentions of a treaty. He notes Crawford's justification for this position in which he explains that courts are slow to challenge the executive on that basis as it would "result in the elevation of a treaty to the status of a higher law."⁶⁷ Keyes raises the important question of what becomes of regulations that are made to give effect to an agreement which is subsequently terminated.⁶⁸ The regulations may have to be immediately revoked. All of these issues suggest that drafters must be particularly vigilant when the subordination method is used to implement a treaty.

(f) Use a combination of methods –

- (i) for the purpose of incorporating the meaning of expressions used in a treaty in domestic law;
- (ii) to adapt treaty terms to distinctive characteristics of the jurisdiction implementing a treaty.

⁶⁵ Canada Shipping Act SC 2001 c 26.

⁶⁶ Mendis, above n 39, at 225.

⁶⁷ Ibid.

⁶⁸ Keyes, above n 25, at 29.

Keyes and Sullivan state that: [t]here is no requirement to use only one technique to implement a particular treaty.”⁶⁹ One such example is the implementation of the Charter of the United Nations for which most implementing jurisdictions used a combination of the wording method and the subordination method. Also, there may be instances where the wording method is the most suitable method to transpose most of the terms of a treaty into domestic law, yet the legislature may wish to incorporate its definitions directly. One example is s 2(2) of the Chemical Weapons Convention Implementation Act 1995⁷⁰ which provides:

Unless the context otherwise requires, all words and expressions used in this Act have the same meaning as in the Convention.

Keyes and Sullivan give s 3(1) of the Geneva Conventions Act 1985⁷¹ as another example of the combination of the wording method and the formula method being used. Section 3(1) provides:

Every person who, whether within or outside Canada, commits a grave breach referred to in Article 50 of Schedule 1, Article 51 of Schedule II, Article 130 of Schedule III, Article 147 of Schedule IV or Article 11 or 85 of Schedule V is guilty of an indictable offence, and

- (a) if the grave breach causes the death of any person, is liable to imprisonment for life; and
- (b) in any other case, is liable to imprisonment for a term not exceeding fourteen years.

As they explain: “[b]y making a person ‘guilty of an indictable offence,’ this provision engages the provisions of the Criminal Code for the investigation and prosecution of such offences.”⁷² This reflects a combination of the Geneva Conventions which were directly incorporated and the Criminal Code which is a creature of Canada’s domestic law.

⁶⁹ Keyes and Sullivan, above n 22, at 325.

⁷⁰ Chemical Weapons Convention Implementation Act SC 1995 c 25, s 2(2).

⁷¹ Geneva Conventions Act RSC 1985 c G-3.

⁷² Keyes and Sullivan, above n 22, at 326.

4 *Some finer stylistic details which can be used to emphasise the intention to implement the terms of an international agreement*

The foregoing outlined the matters to be considered by drafters in the process of deciding which legislative drafting technique should be used to implement a treaty. For the actual drafting of the implementing provisions, a drafter should ensure that the aids to construction of the implementing legislation are properly used to indicate that the rules set out in an international treaty are in operation. All matters that are relevant to the operation of the treaty should be evident on the face of the legislation. In that regard, it is recommended that close attention is paid to the following:

(a) The long title

The long title should be used to indicate that the object of the implementing enactment is to incorporate treaty terms into domestic law.

(b) The definition section

The treaty being implemented should be located and defined in the definition section and a shorter reference name may also be given. This helps shorten the text of the enactment by avoiding the repetition of the full title of the treaty.

(c) The purpose clause

As far as possible, the implementation of a treaty in domestic law should feature as one of the purposes of any enactment implementing a treaty. In some jurisdictions such as Canada, preambles are still being used for this purpose. Thornton advises that preambles are archaic and should be gradually replaced by purpose clauses.⁷³ One example in New Zealand legislation is s 3 of the Terrorism Suppression Act 2002 which provides:

The purpose of this Act is –

- (a) to make further provision in New Zealand law for the suppression of terrorism; and
- (b) to make provision to implement in New Zealand law New Zealand's obligations under –

⁷³ See Thornton, above n 16, at 312.

- (i) the Bombings Convention; and
- (ii) the Financing Convention; and
- (iii) the Anti-terrorism Resolution; and
- (iv) the Nuclear Material Convention; and
- (v) the Plastic Explosives Convention; and
- (vi) the Nuclear Terrorism Convention ...

(d) Make provision to eliminate inconsistencies with other legislation in force.

The Caribbean Community Act Cap 19.21 of Saint Lucia implements the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy⁷⁴ in Saint Lucia's domestic law. The treaty is defined in the interpretation section, attached in the Schedule to the Act and given the force of law in s 3. Inconsistency with other legislation is provided for in s 7 as follows:

In the event of any inconsistency between the provisions of this Act and the operation of any other law, the provisions of this Act shall prevail to the extent of the inconsistency.

Another example is s 6 of Saint Lucia's Mutual Assistance (Extension and Application to USA) Regulations Cap. 3.03, which provides:

Where there is any inconsistency or conflict between the treaties referred to in regulations 4 and 5, and the Mutual Assistance in Criminal Matters Act or the Proceeds of Crime Act, the Treaty shall prevail to the extent of the inconsistency or conflict.

(e) Make provision to avoid inconsistencies between the official text of the treaty and unofficial translations of the text of the treaty.

The meaning of certain words may be lost when translated from one language to another. Thornton advises that any possible adverse effects of this kind should be countered by providing for these kinds of inconsistencies in implementing legislation.⁷⁵ He gives the example of the s 1(8) of the Carriage by Air Act 1961(UK) which provides:

⁷⁴ Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy (entered into force 1 January 2006).

⁷⁵ Thornton, above n 16, at 314.

If there is any inconsistency between the text in English in Part 1 of Schedule 1 or 1A and the text in French in Part II of that Schedule, the French text shall prevail.

(f) Attach the treaty in a schedule to the implementing legislation, even if for reference purposes only, wherever possible.

It is advised that the text of a treaty being implemented in domestic law is appended in a schedule to the implementing legislation particularly where the formula method is used.⁷⁶ This makes the work of the court easier as a copy of the text of the treaty is annexed to the enactment that incorporates it into domestic law. It may sometimes be impractical to attach the text of a treaty in a schedule.⁷⁷ One example is where implementation is effected by amending several pieces of legislation. Drafters should therefore use their judgment in determining whether or not it is appropriate to attach a treaty to an Act which implements a treaty. However, the recommendation is that it be done whenever it is possible.

(g) Indicate what reservations have been made to the treaty.

Maher stresses that omitting treaty terms with regard to which reservations have been made from implementing legislation is insufficient to alert the court that such reservations have been made.⁷⁸ He further notes that the court can have regard to a treaty provision that is omitted from implementing legislation and therefore recommends that wherever a reservation has been made this should be expressly stated in the enabling legislation. Maher highlights the following as an example which is well drafted:⁷⁹

The United Kingdom having made such a reservation as is mentioned in the third paragraph of Article 26 of the Convention, the costs mentioned in that paragraph shall not be borne by any Minister or other authority in the United Kingdom ...

The Hague Convention is located and defined at s1(1) of the Child Abduction and Custody Act 1985(UK) and is attached at sch 1. This is an example of drafters using the aid to construction to fully indicate the extent to which the Hague Convention applies in the United Kingdom's domestic law. Van Loon refers to the *Westinghouse*⁸⁰ case to

⁷⁶ See Mendis, above n 39, at 219.

⁷⁷ See the Legislation Advisory Committee, above n 2, at para 6.2.2.

⁷⁸ See Maher, above n 32, at 33.

⁷⁹ Child Abduction and Custody Act 1985 (UK), s 11.

⁸⁰ *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] 1 All ER 434 (HL).

highlight the problems that can arise when implementing legislation does not expressly state which reservations have been made with regard to a treaty.⁸¹

The enactment considered by the court in that case was the Evidence (Proceedings in Other Jurisdictions) Act 1975 (UK) which implemented the Hague Convention on the taking of Evidence Abroad in Civil or Commercial Matters.⁸² The United Kingdom entered a reservation with respect to pre-trial discovery of documents pursuant to art 23 of the Convention, but there was no indication of this in the enabling legislation. The Court of Appeal mistakenly assumed that the United Kingdom had not lodged such reservation and made a ruling on the basis of that supposition. Fortunately, the judges of the House of Lords were aware of the reservation and were therefore able to consider submissions with this in mind.

(h) Consider drafting provisions in anticipation of the conclusion of other treaties dealing with same subject matter.

Keyes and Sullivan suggest that where a state anticipates concluding further agreements of a similar nature with a number of other states, the interpretation section of the implementing enactment should be used to provide a general definition characterising the kinds of agreements which will be covered by the Act.⁸³ The example of the Mutual Legal Assistance in Criminal Matters Act 1985⁸⁴ is cited in this regard. The word “agreement” is defined as follows:

“agreement” means a treaty, convention or other international agreement that is in force, to which Canada is a party and that contains a provision respecting mutual legal assistance in criminal matters;

The word “agreement” is used throughout the enactment and the meaning set out above applies. The advantage is that it allows for a tidier statute book by making provision for the implementation of more than one agreement by the same statute, immediately upon ratification.

⁸¹ JHA Van Loon “The Hague Conference and its Conventions” in Francis G Jacobs and Shelley Roberts *The Effect of Treaties in Domestic Law* (Sweet & Maxwell, London, 1987).

⁸² Hague Convention on the taking of Evidence Abroad in Civil or Commercial Matters (opened for signature 18 March 1970, entered into force 7 October 1972), at 232.

⁸³ Keyes and Sullivan, above n 22, at 321.

⁸⁴ Mutual Legal Assistance in Criminal Matters Act RS 1985 c 30, s 1(1).

VII Conclusion

This study has found support in academic literature⁸⁵ and in the judgments of the court⁸⁶ for the general principle of international uniformity in the legislation implementing treaties. It shows that uniformity in legislative implementation techniques used in contracting states does promote consistency and that it should therefore be aspired to. The study also underscored the disparity that can result not only in the meaning of treaty terms, but also in the extent of implementation, when one state deviates from the approach taken by other implementing states without proper justification.

A step-by-step analysis of three examples was undertaken to demonstrate how drafters should go about identifying and categorising treaty terms. In the process, the study showed that not only are there different kinds of provisions in a treaty, but that each requires a different kind of legislative response. In addition, states' legal systems differ and may differ significantly. Therefore, it is not always practical for all contracting states to conform to the same technique in implementing a particular treaty. In light of the foregoing, this study has formulated a guide to assist drafters in the legislative implementation of treaties in a manner that will bring about greater coherence in the construction of treaty terms in domestic law.

Uniformity in implementation techniques should be followed where internal legislative schemes permit. Where this is not possible, differing techniques may be used but uniformity in the construction of treaty terms should not be compromised.⁸⁷ This approach is in keeping with the objective of good faith in the implementation of treaties amongst contracting states. The paper has identified the best practices to ensure that it is achieved. *Pacta sunt servanda!*

⁸⁵ See JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 487.

⁸⁶ See *Re H(minors)(abduction: acquiescence)* [1998] AC 72 (HL) at [87] per Lord Browne-Wilkinson; *Hunter v Murrow* [2005] EWCA Civ 976 (CA) at 15-18 per Thorpe LJ; *Gross v Boda* [1995] NZFLR 49 (HC) at 51, per McKay J; *Re D (a child)(abduction: foreign custody rights)* [2007] 1 All ER 783 (HL) at [28] per Baroness Hale.

⁸⁷ See DL Mendis, "The Legislative Transformation of Treaties" (1992) 13 (3) Stat LR 216 at 224-225.

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