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International Law in Human Rights Cases before the UK Courts

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International Law in Human Rights Cases before the UK Courts

This paper critiques the manner in which the UK courts have approached international law in several recent cases relating to human rights. Pinpointing their present attitudes to various international sources of law, it enables us to establish international law's reach into domestic law and its likely impact on future rights claims. Among the paper's findings it is demonstrated that in recent years the UK Supreme Court (UKSC) in particular has shifted towards a restrictive approach to the international law sources it is willing to consider in rights cases. By its fidelity to a strong model of Parliamentary Sovereignty the UKSC has created these significant restrictions in approach and brought them into the common law. It is argued that such a restrictive approach in unnecessary to satisfy the UK's constitutional rules. It is further argued that in several ways, including its rigidly formalist approach, the UKSC seems to have lost sight of the people behind rights claims. The paper highlights that there is a difference between domestic courts finding breach of unincorporated international norms, and enforcing those norms. It argues that there are several important advantages to an approach which would read, as far as possible, domestic law harmoniously with international rights norms. It further argues that an approach in rights cases which interprets law with compassionate priority to the weaker party - the rights-bearer rather than the state, - is appropriate.

Key words: International Human Rights Law; United Kingdom Courts; Domestic Law; Dualism; Unincorporated Human Rights Treaties; Non-Binding International Human Rights Law; ECHR.

I Introduction

When human rights issues come before the UK courts, international law, unless incorporated, holds a tenuous position. Only a few years ago the UK Supreme Court (UKSC) had taken a relatively encompassing approach to international human rights law sources. Although stopping short of applying them directly, it had seen merit in considering relevant unincorporated international sources, and where possible, reading domestic law harmoniously with them.[1] In more recent years however, the UKSC in particular has hardened its approach. Expressing its position through two key cases decided on the same day in 2021, - *R(SC, CB and 8 children) v Secretary of State for Work and Pensions, (R(SC)),*[2] and *R (AB) v Secretary of State for Justice,* (*R(AB)*),[3] - the UKSC unequivocally rejected an encompassing approach. Instead it chose to dismiss as irrelevant both unincorporated treaty law and non-binding international law (referred to frequently as 'soft law').[4] This resistance can be, and is, explained by the constitutional fact that the UK is a dualist state.

Beyond their rejection of these sources, the UKSC in these cases also called into question the purpose for which non-binding international law such as UN Treaty Body General Comments and UN Special Procedures' reports are written and by extension, the international institutions which frame it. The UKSC's 'Rwanda judgment' (*Rwanda*) in November 2023,[5] presents a notably contrasting position, placing significant value on the non-binding "opinion"[6] of the UN's High Commission for Refugees (UNHCR).[7] That opinion is referred to and made use of throughout the judgment as "evidence" rather than a normative source. Nevertheless, and as appropriate, the strikingly differential attitudes to the views and outputs of UN experts and expert bodies fits within a wider pattern and is discussed within the work.

It is a central contention in this paper, that by its rejection of unincorporated international human rights sources, including when their content is directly relevant to the immediate case before them, the UKSC has and may continue to miss important opportunities which could otherwise embed and enrich understanding and enjoyment of human rights within the UK. In particular it has missed opportunities: to enhance understanding of rights' interpretations and requirements; to embed such understanding more deeply into domestic judicial consciousness; and to create and maintain harmonious constructions of rights between international and UK domestic levels.

In a wider sense however, this paper is intended to shine a critical light specifically on the manner in which the UK courts have approached international law in some of the more recent human rights cases brought before them. Accordingly, it pinpoints precisely the courts' present attitudes to various international law sources, thereby enabling us to establish international law's reach into domestic law and its likely impact on future rights claims. In doing so inconsistencies within that case law are exposed and suggestions are offered as to how these can be reconciled to each other or otherwise addressed. However, differences between the cases feed into a deeper, more troubling finding. In the 2022 case of *Basfar v Wong*, (*Basfar*),[8] - a rights-based case brought between individuals and discussed below, - the

[1] See *Mathieson v SoS for Work and Pensions* [2015] UKSC 47, discussed below.
[2] [2021] UKSC 26.
[3] [2021] UKSC 28.
[4] For the avoidance of doubt, this refers to norms which are non-binding at the international level.
[5] *R(AAA (Syria)) v Secretary of State for the Home Department* [2023]UKSC 42.
[6] Ibid, [39].
[7] Ibid, for example [61]-[68].
[8] [2022] UKSC 20.

UKSC was willing to interpret the law if not creatively then certainly expansively, to the benefit of a rights claimant. Conversely, where individual's rights claims arose against the state, as they did in *SC* and *AB,* there is a strong sense that state institutions had been given priority over people.[9] If assessed purely on outcomes, the *Rwanda* judgment would seem more oriented towards rights claimants, but in fact rights-claimants themselves barely feature and so if anything this judgment is slightly more neutral. In *Rwanda*, the specific sources of law, their volume and their embeddedness in UK, ECHR and international law are vital to that outcome. Accordingly, the judgment reinforces many of the observations within this work that are based on the earlier judgments.

II Method and Structure

A doctrinal approach has been taken to this work and a critical focus is given to three key judgments from which can be discerned the courts' current attitudes to international law of various types when considering rights claims: *R(SC,)*[10] *R (AB)*[11] and *Basfar.*[12] At the time of writing, these are the UKSC's only decided cases since its changed leadership in January 2020 which deal with rights issues that occurred within the territorial jurisdiction of the United Kingdom *and* necessarily include detailed consideration of international law's application.[13] *Rwanda* and *Independent Workers Union of Great Britain v Central Arbitration Committee,* (*Independent Workers*)[14] are new additions to this, but do not alter the findings from these other judgments. It is argued the UKSC intended its judgments in *SC* and *AB* to set out unequivocally, its approach to different international human rights law sources. In what follows this approach is set out and examined with discussion supplemented by consideration, as appropriate, of those cases as decided in the lower courts, of other relevant cases, including *Rwanda* and *Independent Workers*, and with findings and reflections in the literature.

The paper first considers "hard" international law: incorporated and unincorporated treaty law, and customary international law and introduces the courts' shift in attitudes towards these types of law. Doing so, Section III introduces more fully the courts' shift in attitudes to these types of law. Focussing on *R(SC)* and *R(AB),* Section IV then elaborates and draws observations from the courts' resistance to even considering international human rights treaty law. In Section V *Basfar v Wong* is introduced as a counter-point to the seemingly closed off approach to rights in the preceding cases. Section VI offers some reflections on the inconsistencies found. Section VII outlines the role and influence of soft law domestically. Section VIII provides a synthesis of arguments within the paper and an overview analysis of the manner in which the UK courts approach, and can in future be expected to approach, international law in rights cases which come before them. Section IX briefly concludes.

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[9] See discussion below, particular in respect of *AB*.
[10] *SC* (n 2).
[11] *AB* (n 3).
[12] *Basfar* (n 9).
[13] *Robinson (Jamaica) (Appellant) v Secretary of State for the Home Department (Respondent)* [2020] UKSC 53, concerns a niche point under the EU Charter on Fundamental Rights, but since this no longer applies in the UK is excluded from the discussion.
[14] [2023] UKSC 43.

III "Hard" International Law: a hardened approach

(i) Treaty Law

The United Kingdom courts' approach to international law when deciding human rights claims has undergone a degree of change over the last few years. Although the previous approach never completely embraced international law sources as expressions of rights,[15] there have been some strongly liberalising judicial voices on the UKSC in particular. This had the power to drive the case law and no less vitally, thinking, in a progressive direction more embracing of international law norms underpinning human rights protection.[16] A radical example of such progressive judicial thinking was reflected in Lord Kerr's 2015 obiter statement in *R(SG (previously JS)) v Secretary of State for Work and Pensions*[17] (*JS*) that "the exception to the dualist theory in human rights conventions … [should now be] openly recognised."[18] Specifically, Lord Kerr had argued - against the orthodoxy - that the traditionally impenetrable boundary between unincorporated international law and UK domestic law should no longer apply strictly to human rights treaties. Although this particular position, expressed in a dissenting judgment, was never accepted, it illustrates an openness to the direct relevance, indeed applicability, of international norms as a basis for human rights protection domestically.

A more subtle approach, decided shortly after, was seen in *Mathieson v SoS for Work and Pensions,* (*Mathieson*).[19] In this, the UKSC sidestepped the need to apply an international treaty directly but, by reading the applicable law harmoniously with international law, nevertheless achieved an accordant outcome. Here a challenge had been brought against an executive decision to suspend disability payments to the parent carers of a severely disabled child once his lengthy stay in hospital exceeded 84 days. In the lead judgment delivered by Lord Wilson, the UKSC recognised that by failing to take properly into account the "best interests of the child" the Secretary of State had, by this policy, breached both the UN Convention on the Rights of the Child (CRC) and the UN Convention on the Rights of Persons with Disabilities (CRPD).[20] Finding this in respect of the CRC, the UKSC referred also to relevant non-binding international law,[21] a point returned to later in this discussion. Notably for the present, the breach of international treaty law was observed before the UKSC went on to consider whether this affected the child, Cameron's, claim in the immediate case.[22]

The directly applicable law was the Human Rights Act 1998 (HRA) which incorporates the European Convention on Human Rights (ECHR) into UK law. *Mathieson* pursued a discrimination claim reading Article 14 together with Article 1 of Protocol 1 ECHR, and alternatively Article 14 with Article 8. Looking to the jurisprudence of the European Court of Human Rights (ECtHR) the UKSC noted the Grand Chamber's view that the ECHR "cannot be interpreted in a vacuum and must be interpreted in harmony with the general principles of

[15] For example *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 and *R (DA) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289 make clear soft law is non-binding.
[16] For example (regionally) *Smith v MoD* [2013] UKSC 41 interpreted Art.1 ECHR expansively to grant Article 2 ECHR protection to UK military personnel serving overseas; *Mathieson v SoS for Work and Pensions* [2015] UKSC 47.
[17] [2015] UKSC 16.
[18] *JS* ibid, per Lord Kerr [254].
[19] *Mathieson* (n 1).
[20] *Mathieson* (n 1), [41].
[21] *Mathieson* (n 1), [39].
[22] *Mathieson* (n 1), [41].

international law."[23] Although acutely conscious that to do so meant disagreeing with both the Court of Appeal (CoA) and the Upper Tribunal,[24] the UKSC found the Secretary of State had unlawfully discriminated when suspending Cameron's disability payments. The finding, made "without reference to international Conventions", was nevertheless harmonious with the conclusion that rights under the CRC and CRPD had been breached.[25] However, hopes that international human rights norms, including treaty, might be more fully embraced by the UK courts have been firmly and decisively shut down.

In the 2021 cases *R(SC) v Secretary of State for Work and Pensions*,[26] and *R(AB) v Secretary of State for Justice,*[27] (respectively, *SC* and *AB*) the UKSC unequivocally reasserted the constitutional orthodoxy in which rigid dualism – which domestically prioritizes the sovereignty of the UK Parliament – is applied. The conservatism in these cases, characterised by a striking reversion to legal formalism, has several notable features. Firstly, there is almost unquestioning deference to the UK Executive and Parliament.[28] The shift particularly prioritises a strong model of unimpeded Parliamentary Sovereignty alongside a rigid and highly deferential attitude to Separation of Powers. Secondly, there is a refusal to extend rights protection beyond that directly articulated by the ECtHR, even when a novel situation is at issue. Thirdly, there is an insistence on rigid separation between domestic law and unincorporated international (human rights) law. The focus in this paper is specifically on international law sources and their reception by the UK courts in human rights claims. Therefore, deference in not examined directly herein. It is nevertheless argued that the second and third points are its logical consequences. Prioritising strong models of Parliamentary Sovereignty and Separation of Powers inevitably brings with it refusal to be expansive in either rights interpretation or the available sources of law from which to draw. All three aspects have important implications for the successful assertion of rights before the UK courts. The impact of these cases on the assertion of treaty law is examined below.

(ii) Customary International Law

In a recent article published extra-judicially, Lord Lloyd-Jones expounds the "quiet revolution" of the UK courts' engagement with international law, which has increased significantly over the past four decades.[29] As that discussion shows, international law is pervasive in the UK domestic sphere and extends far beyond human rights-based content. At the same time, human rights norms permeate the whole, both as (the main) cause for greater engagement by the courts with international law, and as content affected directly by that engagement. Relevant to the above discussion, Lord Lloyd-Jones identifies the enactment of the HRA as a key factor behind the volume of international law encountered in UK cases. As he highlights, and *Mathieson* itself exemplifies, UK courts necessarily consider international law to give effect to the ECHR.

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[23] *Mathieson* (n.1), [42], citing Grand Chamber in *Neulinger v Switzerland* (2010) 54 EHRR 1087, para 131.
[24] *Mathieson* (n.1), [45] - [47].
[25] *Mathieson* (n 1), [44].
[26] *SC* (n 2).
[27] *AB* (n 3).
[28] This was seen already in 2021 in *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7. On increased deference to the Executive (without reference to international law), including a changed approach to realise it: Paul Daly, "Firming up Judicial Review of Soft Law?" (2022) Cambridge Law Journal, 8-11.
[29] Lord Lloyd-Jones, "International law before the United Kingdom courts: a quiet revolution", (2022) 71(3) International and Comparative Law Quarterly, 503-529.

No less important is what Lord Lloyd-Jones has to say about customary international law. Specifically, he observes a partially contracted understanding in recent years of customary international law's status domestically. The longstanding approach, which he notes dates back to Blackstone in 1765, had been to regard customary international law automatically as part of the common law unless it conflicted with Statute. Now instead, customary international law is regarded as a "source of law which judges may apply when they consider it appropriate."[30] The modern interpretation seems far more accurate to reality and the nature of the common law: international custom can surely not become part of the common law unless or until implemented by UK courts. Moreover, this approach, whilst more restrictive, does not appear to be so sudden or motivated by the same thinking which has driven the restrictive approach to treaty law noted above. Since much human rights law is bound up in international custom however, this finding is important and returned to in the discussion.

IV *SC* and *AB* on the application of hard international law

(i) A conservative mindset

The judgments in *SC* and *AB* were delivered on the same day and have been variously interpreted as a means by which the UKSC under Lord Reed's leadership has reasserted a legal formalist orthodoxy.[31] There is relatively little literature on either case (yet), but the most detailed critical discussion focusses exclusively on *AB* as an illustration of the UKSC's deep conservatism.[32] Murphy identifies procedural, institutional, and substantive themes within the judgment and uses them as a framework to highlight its pervasive conservatism. Murphy argues this conservatism is at times misplaced. She also argues it is entrenched, and includes both *Miller* judgments[33] and *SC* to support her argument that it is rooted in fidelity to the "(too strong) commitment to the political constitution."[34] By comparison, Tan and Greene separately both find the conservatism in *SC* represents a sea change in approach, particularly when compared to *Mathieson*.

Irrespective of its genesis, it is the judicial mindset, accompanying approaches, and their consequences, captured as they appear to be now, which are important to the present purpose. On this, Murphy and Tan seem agreed, and the cases bear out: it is the UKSC's rigid insistence on Parliamentary Sovereignty as the UK's (sacred) constitutional cornerstone, that appears to be driving conservatism in these judgments. This should be remembered as we look to pinpoint the courts' present attitudes to various international law sources. As argued above, refusing to be expansive in either rights interpretation or the available sources of law from which to draw, are both inevitable consequences of deference to Parliament and the Executive. With this in mind let us look to the cases.

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[30] Lord Lloyd-Jones JSC, ibid, 525.

[31] Cian C. Murphy, "Human rights advocacy after AB and the Supreme Court's "conservative approach"" (2021) (5) European Human Rights Law Review 465-475; Donnchadh Greene, "Let there be no future doubt about it? Children's rights in the UK Supreme Court" (2021) 51 (November) Family Law 1349-1350; Joe Hume, "R(AB) v Secretary of State for Justice: a missed opportunity?", (2022) 165(2) Solicitors Journal 25-27; Gabriel Tan, "Children's rights and the influence of Lord Sales in the UKSC's political constitutionalist turn" (2022) 26(1) Edinburgh Law Review, 93-100; Conor Gearty, "In the Shallow End: Conor Gearty on the UK Supreme Court", (2022) 44(2) London Review of Books.

[32] Murphy, ibid.

[33] *R(Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; *R(Miller) v Prime Minister* [2019] UKSC 41.

[34] Murphy (n 34), 472.

(ii) *SC* and *AB* in outline

SC related to a cap imposed via legislation on a particular welfare benefit. Specifically, a two-child limit was imposed on a benefit called "child tax credit", meaning that families relying on the benefit but which had more than two children in their household would be impacted financially. This cap, as the UKSC acknowledged, disproportionately affected women and the claimants sought a declaration that it was incompatible with the ECHR under Articles 8 and 12 ECHR, as well as Article 14 read together with Article 8, and Article 1 of the First Protocol. Quite evidently, *SC* has strong similarities with *JS* which related to a cap on housing benefit and which also disproportionately affected women.

AB is not so obviously similar. It related to the segregation of a 15-year-old boy (AB) in a Young Offenders' Institution for an uninterrupted period of 55 days, during which he spent the majority of his time (around 23 hours a day) in his cell and isolated from anyone. Definitions are one of the controversial points within the judgments at its various stages. Nevertheless, and however it is framed legally, this paper proceeds on the basis that AB's regime constituted *de facto* solitary confinement for a prolonged period.[35] AB is a dangerous individual and was at the same time vulnerable to other inmates: the key reason for his restrictive detention regime.[36] Occasions during the relevant 55-day period when AB was engaged in an activity or interaction with other people include a brief talk with the Chaplin through the door of his cell, playing table tennis with a member of staff, and assessments from social workers and a trainee psychiatrist. From facts given in the case these number only 9 interactions. AB was also not given the education he needed, partly because he could not be left alone with a woman. With some variance in arguments before the CoA and the UKSC, the main contention was that AB's confinement constituted inhuman treatment within the meaning of Article 3 ECHR.

In three main ways, the claims put forward in *SC* and *AB* find their meeting point. Firstly, their content relates to rights articulated and protected *inter alia* under the ECHR. Secondly, that content affects a large number of other potential claimants. Thirdly, international law – both treaty and soft law – are discussed in the respective judgments, including their direct relevance to the claims. These similarities are in fact shared also with *Basfar v Wong*, (discussed below), although the nature and status of the relevant international law is different in that case. What significantly distinguishes *AB* from *SC*, but unifies it somewhat with *Basfar*, is that *AB* and *Basfar* relate to absolute rights: prohibitions respectively of torture and inhuman treatment, and (modern) slavery. Relatedly, this means customary international law, indeed norms of *jus cogens*, are relevant to both. It has already been noted that *Basfar* provides an important counterpoint to the approaches in *AB* and *SC*. *Basfar* also has the crucial difference of being an economic claim against a private individual. Accordingly, the remainder of this section looks only to the *AB* and *SC* judgments. *Basfar* is returned to later as a point of comparison.

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[35] The most accepted definition of "solitary confinement" is "the confinement of prisoners for 22 hours or more a day without meaningful human contact": UN Standard Minimum Rules on the Treatment of Prisoners (Nelson Mandela Rules), GA/RES/ 70/175 adopted on 17 December 2015, Rule 44; European Prison Rules, Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules, as r*evised and amended by the Committee of Ministers on 1 July 2020 at the 1380th meeting of the Ministers' Deputies,* para. 60.6(a). "Prolonged" solitary confinement according to the Mandela Rules is solitary confinement lasting more than 15 days.

[36] AB's regime is described in *R (AB (A Child) v Secretary of State for Justice* [2019] EWCA Civ 9, 18 January 2019, [113].

(iii) *SC:* A restrictive approach to treaty law in rights interpretation

The *SC* judgment addresses three issues of "general importance".[37] Although only the first of these is relevant to the present discussion, this is noteworthy. Taking all three issues together, the UKSC in this case was very much resetting the law.[38] Specifically, and in the starkest terms, it has given its interpretation of the *only* appropriate means of approaching legal determinations in the respective contexts. This has ramifications potentially for the outcome of cases, and more broadly for the embedment of rights discourse within the case law. It is argued that the particular approach deemed appropriate in the context of this discussion's focus is neither necessary nor especially helpful.

The issue relevant to this paper - as the judgment identified it - was:

> "whether it is appropriate for our domestic courts to determine whether the United Kingdom has violated its obligations under unincorporated international law when considering whether a difference in treatment is justified under the Human Rights Act."[39]

The short answer in this judgment is that it is not appropriate. This was not however, the original question put to the court. Indeed, both parties had agreed on the original issue which they believed needed determination:

> "whether the UK's obligations under the UNCRC have been breached in the present case, and if so whether in the circumstances the two child limit is compatible with Convention rights".[40]

Inescapably we see an understanding, based firmly on approaches in the preceding case law, that to ascertain whether a certain policy or approach was compatible with the ECHR, it was necessary first to decide whether the CRC (an unincorporated treaty) had been breached. Indeed, this was precisely the order of approach taken in *Mathieson*. Nevertheless, the *SC* judgment is unequivocal that the original question was misguided. By stating a different but related issue to the original, and then answering it at length, the UKSC took the opportunity to correct what it evidently saw as an erroneous approach to applying the law in this context.

It is not abundantly clear however, precisely what context the UKSC was concerned with, since it is capable of both narrow and wide construction. Narrowly, the judgment's stated interpretation of the issue is the "appropriateness" of finding breach of unincorporated international law when determining discrimination claims under the HRA. More widely however, the UKSC was concerned with the appropriateness of UK courts finding unincorporated treaties have been breached at all. The judgment's entire approach strongly

[37] *SC* (n 2), [73].
[38] One issue: the relevance of Parliamentary debate to statutory interpretation was given the exact opposite approach to that in the previous case law.
[39] *SC* (n 2), [73].
[40] *SC* (n 2), [74].

suggests that this latter, wider context was the true context intended, with the narrower point the vehicle for arriving at it.

In any event, to correct what it regarded as "mistaken", the UKSC approached the problem in three stages. The judgment considers first the "rights and obligations created by unincorporated treaties … on the international plane", and second, "whether unincorporated treaties create rights and obligations in domestic law." Both points are dealt with rather swiftly. Referring favourably to the *Tin Council* case, the UKSC observes "treaties … are not contracts which domestic courts can enforce."[41] and "it is a fundamental principle of our constitutional law that an unincorporated treaty does not form part of the law of the United Kingdom."[42] Neither of these points was ever controversial. The courts have never, including in the cases discussed above, directly given effect to rights in international treaties, and their enforcement has always had basis in law applicable in the UK. A related question, which the UKSC did not entertain, is whether it might in some other ways be helpful for the UK courts to at least to consider, and if relevant present an opinion as to whether international law has been breached. Whilst the tone and content of the judgment suggests this to be anathema, it need not be.

The third point is "whether the Human Rights Act has given domestic legal effect to unincorporated treaties."[43] The answer to this is also promptly given: "Clearly, it has not. …. The only treaty to which the Human Rights Act gives domestic legal effect is … the Convention."[44] As with the preceding points, this was never controversial or in doubt. However, since the relationship between unincorporated treaty law and the ECHR is the factor driving "misunderstandings" perceived by the UKSC, it takes care in the judgment to rehearse and critique cases that had either created or perpetuated the view that unincorporated human rights law was at least relevant. Accordingly, putting it beyond any doubt, Lord Carnwath's statements in *JS,*[45] Lady Hale's in *In re McLaughlin,*[46] and Lord Wilson's in *DA,*[47] are all declared to be, obiter dictum. Stingingly, Lord Wilson's remarks about international law in *Mathieson* "should not be regarded as forming the ratio of the decision … [and] must also be regarded as having been made per incurium."[48]

The *SC* judgment is unequivocal:

> "There is … no basis in the case law of the European court, as taken into account under the Human Rights Act, for any departure from the rule that our domestic courts cannot determine whether this country has violated its obligations under unincorporated international treaties."[49]

Importantly, there is a dividing ground between determining a point of law and enforcing it. A bar against making a determination, if any such rule exists, exists at common law and so by

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[41] *SC* (n 2) at [76], citing *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, p 499 ("*International Tin Council*"); *Miller (No.1)* (n 24) is also cited.
[42] *SC* (n 2), [77] referring to *Miller (No.1)* (n 24).
[43] *SC* (n 2), [75].
[44] *SC* (n 2), [79].
[45] *SC* (n 2), [88].
[46] *SC* (n 2), [93]
[47] *SC* (n 2), [94] referring to *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21.
[48] *SC* (n 2), [91]. Incidentally, Lord Reed who wrote the *SC* judgment, had agreed with Lord Wilson's judgment in *Mathieson*.
[49] *SC* (n 2), [84].

implication, can be adapted by the courts. Notably, counsel for both sides assumed a determination was not just possible, but – based on UKSC jurisprudence - required. The rule against determining breach of international human rights treaty therefore appears to be the creation of the UKSC in the *SC* judgment itself. Moreover, except in Lord Kerr's dissent in *JS*, there is no suggestion judicially that unincorporated treaty law should be enforced by the courts. In *Mathieson,* Lord Wilson did indeed express his considered judicial view that two international human rights treaties had been breached, and in this way he made a determination such as the *SC* judgment condemns. Crucially however, when making that finding, Lord Wilson was fully cognisant that the treaties could not be enforced by a UK court.[50] Accordingly, reaching a conclusion that there had been a breach did not in any way either offend the UK's constitutional arrangements or represent any degree of judicial overreach. The content was directly relevant even if not legally enforceable in the context, making its consideration appropriate, while at the same time dualism (and hence Parliamentary Sovereignty) was respected.

Considering whether international human rights law has been breached is not a neutral act, and this raises a key question: so long as dualism is respected, in what possible way can it be harmful for a UK court to identify when the UK has breached international law? There is nothing which is obvious and as Lord Lloyd-Jones (who agreed with Lord Reed's judgment in *SC*) has recently observed, the UK courts often find other states to be in breach of their international obligations.[51] It is argued further that where the content is international human rights law, identifying its breach is an approach with much to commend it. Firstly, the international content may aid a wider understanding of the rights at issue. So long as this international content is not directly enforced, taking it into account or even finding it has been breached breaks none of the UK's constitutional rules. Secondly, identifying a breach can call attention to faults in human rights implementation which, by that judicial recognition, offers a guide to the Executive and Parliament that they may wish to reconsider certain specific content. Without such finding it is highly possible these two institutions would remain either ignorant of any issues or (worse) able to pretend they do not exist. Whilst there is no statutory authority requiring the UK courts to do this, there is equally nothing in law (save for the *SC* judgment itself) which debars the practice either. Thirdly, continued reference to rights and their sources can have a deeply socialising effect,[52] bringing them more readily to mind for both citizens who might look to assert their rights, and the institutions charged with implementing and upholding them. Reference within the case law to rights, including as they are enshrined in international law, has the gentle power over time to embed rights-based thinking and to influence attitudes.

Finding breach of international human rights obligations would of course hand political capital to rights advocates, which many would find positive. Regrettably, for the UKSC this is precisely the point and – regarding it as political - *SC* delivers a direct warning against litigation from campaigning organisations.[53] However, judicial hostility to human rights

[50] *Mathieson* (n 1), [41] – [44].
[51] Lord Lloyd-Jones JSC (n 32).
[52] See in particular Goodman and Jinks' theory of "acculturation": Ryan Goodman and Derek Jinks, "Socializing States: Promoting Human Rights through International Law" (Oxford: OUP, 2013).
[53] *SC* (n 2), [162] The judgment states that 'almost any legislation is capable of challenge under article 14' ECHR and draws attention to campaigning organizations using it as a means of challenging politically sensitive matters that have since passed into statute. The essence of the UKSC's warning is a strong message that once a politically controversial matter has passed into legislation, the courts must avoid the 'risk' of interfering with 'political processes'. By implication this means the courts declining to engage with such types of challenge, even when their basis is in law.

enshrined in law which, at some level, the UK has accepted, makes very little sense. A court determining breach of law is a court dealing with law, not with politics. Any political consequences are exactly that - consequential - and hostility to questions of law because they may have political ramifications, particularly a refusal by a court to decide them, is itself a political choice. The UKSC's rule against determining a breach of international human rights law is not actually a self-imposed restriction, but a direct refusal.

(iv) *AB:* A restrictive approach to ECHR jurisprudence in rights interpretation

Unlike *SC*, the *AB* judgment says relatively little about the role and status domestically of unincorporated but nevertheless relevant, international treaty law. The argued importance of international law to the case is based primarily on soft law which clarifies specific content in the CRC and the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In this way, the *AB* and *SC* cases act together to confirm the UKSC's current thinking about the appropriate way to approach international law of different types. Non-binding international law is discussed below. For the present, because it relates to both hard and non-binding international law sources, it is helpful to reflect on what the judgment says about the ECtHR's jurisprudence. The UK courts have an obligation to consider this when applying the HRA,[54] and their specific approach to it influences the international law sources of rights that are or are not considered domestically.

On appeal from the CoA, two key questions were put before the UKSC in *AB*, but the primary argument for the appellant forms the main focus in the judgment and is most relevant to the present discussion. The argument was against a fact-sensitive assessment of AB's specific treatment, in favour of recognising:

> "solitary confinement of a person under the age of 18 is … always and inevitably a breach of article 3 [ECHR] as a rule of law, [and] … solitary confinement which is "prolonged"… is inevitably a breach of article 3."[55]

"Solitary confinement" and "prolonged solitary confinement" in the argument were defined by counsel for the appellant, based on international soft law which also indicates its prohibition. Nevertheless, drawing on the previous UK and ECtHR case law, the UKSC found that solitary confinement of a child cannot be deemed automatically to constitute inhuman treatment. The key determinant of this was, based on *R(Ullah)*[56] and *Al-Skeini*,[57] that the UK Courts are not prepared to extend rights protection under the HRA beyond that which is protected under the ECHR. The UK Courts must "keep pace" with ECtHR jurisprudence but not exceed it.[58] Indeed, in the most recent case of this nature, *Independent Workers* decided on 21 November 2023, the UKSC is entirely consistent with this approach.[59] An important implication is that the UKSC will be unwilling to consider relevant international law sources of rights if the ECtHR would not itself look to the same. The argument for this approach, which the UKSC in *AB* itself notes is "conservative"[60] is underpinned by two points. First is a perceived risk of the court construing Convention rights

[54] Human Rights Act 1998, s.2.
[55] *AB* (n 3), [2].
[56] *R (Ullah) v Special Adjudicator* [2004] UKHL 26.
[57] *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26.
[58] *AB* (n 3), [55].
[59] *Independent Workers Union* (n.17).
[60] *AB* (n 3), [57].

too generously: a concern not to overstep the authority granted to them by the HRA, and in this way a strict observance of Parliamentary Sovereignty. Second is that if the UKSC does not go far enough in interpreting rights, the applicant can appeal to the ECtHR which could, if needed, provide a remedy. An appeal is not an option open to the State.

Regrettably the *AB* judgment's conservatism heavily favours state institutions above people, who have lives, feelings and, very often where human rights cases are litigated, have suffered trauma. This begins to raise the question whether, in fidelity to its black letter reading of the law and the UK constitution, the UKSC is forgetting about people. Indeed, it has been observed elsewhere that in *SC*, the people themselves barely feature in the judgment.[61] Although AB is described a little more in *AB* than the claimants in *SC*, it is difficult to avoid the impression that the people in these cases are ancillary to the legal points being so firmly driven. There is certainly room for a great deal more humanity which a moderately different approach, that interprets the law with compassionate understanding of its possible implications for claimants, hence priority to the weaker party, could achieve with very little danger of compromising the constitutional rules.

In the first place, if following a case there is a view that the courts have interpreted rights too generously, it is always open to Parliament to intervene to correct that through legislation. This would at the very least avoid unnecessarily harsh decisions consequent to overcaution and, so long as sound judgment is made, rarely, if ever, would such intervention be necessary. Secondly, it may well be open to applicants to appeal to the ECtHR but this ignores the implications of time, cost, exhaustion and possibly re-trauma to those people. Litigating is vastly (frequently prohibitively) expensive[62] and as the state does not experience emotions, it also has much deeper pockets than private individuals. Fairness undoubtedly runs two ways, but the present approach prejudices against the weaker party and so does not achieve that balance. It would introduce greater fairness, and be certainly more humane for the state, not applicants, to shoulder the greater burden, including of any mistaken judgment against it.

Nevertheless, considering how the ECtHR might approach AB's case, the UKSC was unsurprisingly restrictive. Acknowledging there has never been a case before the ECtHR concerning juvenile solitary confinement, it stated that in such cases the court should try to "anticipate" how the ECtHR might decide the matter.[63] Accordingly, it drew parallels with the ECtHR's jurisprudence on adult solitary confinement and children in Article 3 cases. This confirmed another key underpinning of the judgment, that the ECtHR jurisprudence on Article 3 is invariably contextual: taking into account all relevant surrounding factors. Since the ECtHR "has never laid down precise rules governing the operation of solitary confinement", nor "a definition of a particular level of stringency (short of complete sensory isolation coupled with total social isolation), or a particular duration, which is sufficient in itself to violate article 3",[64] the UKSC declined to set a baseline themselves. Hence - and contrary to the dominant position of experts presented in non-binding international law, which was dismissed as irrelevant - the UKSC found that neither solitary confinement of a child nor prolonged solitary confinement are "inherently inhuman".

[61] Gearty (n 34).
[62] Tom Hickman, "Public Law's Disgrace" https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/
[63] *AB* (n 3), [59].
[64] *AB* (n 3), [51].

(v) *AB* and a consequence of excessive conservatism

Having made the above finding, the UKSC revealed its "procedural" conservatism[65] when it declined to consider whether on the facts in AB's specific circumstances, there had been inhuman treatment contrary to Article 3 ECHR. The Equality and Human Rights Commission intervening argued that this should be considered, as it had been before the CoA. However, because this argument for a contextual evaluation on the specific facts was the antithesis of AB's core argument to the UKSC, it declined to look into the matter further. By consequence, the CoA's approach to deciding contextually whether AB had suffered inhuman treatment has not been considered by the UKSC. This is especially regrettable because until issues in the CoA judgment have been properly assessed, it allows a concerning approach to evaluating Article 3 ECHR breaches in the context of detention to continue. Indeed, these issues are sufficiently important that it is relevant here to outline the CoA's approach. Firstly however, it is worth highlighting that the CoA in its judgment also demonstrated a high degree of conservatism especially in respect of non-binding international law. The treaty law also was considered irrelevant since neither the CAT nor the CRC add anything "material" to interpret Article 3 ECHR.[66]

More crucial however, not least because it currently sets a precedent approach for other UK courts, is the CoA's contextual assessment of AB's treatment. In spite of having only 9 interactions with other people during his 55 days of segregation, the CoA found that AB had not been "simply left to languish, isolated in his cell".[67] Critically, the purpose of AB's isolation "essentially for the protection of others and for his own protection",[68] significantly informed the CoA's decision. Given the absolute nature of the prohibition of inhuman treatment it is especially troubling that proportionality, specifically the financial cost of accommodating AB any other way, informed the judgment.[69] This was made possible because the CoA framed the context as one to which positive obligations apply. It asserted that, unlike the negative duty not to harm (when resources cannot be taken into account), resources *can* be taken into account when the matter concerns the state's positive obligation to prevent harm.[70]

When making this point, the CoA referred only to examples relevant to protecting others from AB. However, and as the Court had already explained the facts, AB was also being protected from other inmates: a positive obligation which nevertheless runs in tandem with the negative duty against the state causing harm. The CoA's position, based on the ECtHR's judgment *Osman v UK*, was that protecting others from AB should "not impose an impossible or disproportionate burden on the authorities".[71] The point which was missed however is that the direct cost of protecting others from AB was to incarcerate AB, a 15 year old boy recognized as vulnerable, alone in his cell without human contact for an extended, uninterrupted period without knowledge of an end point. Specifically, the cost of protecting others was potentially to breach the negative duty not to subject AB to inhuman treatment. The issue needed to be considered from its other angle, with AB as the focus: both in respect

[65] See Murphy (n.34).
[66] *AB* (n 3), [74] – [75].
[67] *AB* (n 3), [111].
[68] *AB* (n 3), [143].
[69] *AB* (n 3), [144] – [145].
[70] *AB* (n 3), [145].
[71] *AB* (n 3), [116], citing *Osman v United Kingdom* (2000), Appl No 23452/94, 28 October 1998, 29 E.H.R.R. 245.

of the state's negative obligation to do no harm to AB, and as a positive obligation to protect AB from other inmates. This simply was not done.

Taken together the UKSC and CoA judgments in *AB* highlight several points of relevance to this paper. Evidently judicial conservatism, including the sources of law that will be considered, is by no means confined to the UKSC, but a number of significant consequences flow directly from that conservatism. Firstly, and least controversially in light of UK's constitutional arrangements and the power granted to the courts under the HRA, there is a preference for ECtHR jurisprudence over international law of all other types. Incidentally, the *jus cogens* nature of the prohibition of inhuman treatment was not even mentioned. Secondly, the UKSC by its significant conservatism has placed itself unnecessarily in a self-imposed stranglehold which, in *AB*, prevented it from considering or addressing decision-making that, it is argued, is both faulty and dangerous. Thirdly, the conservative formalist approach grants priority to institutions above the people that they serve, and is capable of rendering the courts blind to the human being. Fourthly and relatedly, the approach which makes claims to orthodoxy and fidelity to Parliamentary Sovereignty, translates in practice into an unwillingness to look at what the law can do which will best serve the fundamental rights of people. The two ideas are surely not mutually exclusive, they certainly need not be.

Finally, it seems conservatism and legal formalism have been at times convenient. In *SC*, but especially *AB*, it is difficult to escape the impression there is a degree of creative decision-making at play. In *SC* the UKSC created a restriction against courts considering the UK's breach of its international human rights obligations. In *AB,* before the CoA in particular, the selectivity and incompleteness of considerations also points towards creativity. However, in stark counterpoint to the selective creativity and conservatism of *SC* and *AB*, *Basfar v Wong* reveals significantly divergent attitudes to rights and international law.

V *Basfar v Wong*: creative interpretation in counter-point to conservatism

Basfar, SC and *AB* share certain commonalities already highlighted, whilst *AB* and *Basfar* both also relate to absolute rights. In *Basfar* this is the prohibition of slavery, the modern interpretation of which is confirmed in the judgment to include domestic servitude.[72] Accordingly, not only treaty, but also customary international law and specifically norms of *jus cogens* are relevant to both cases, although not directly helpful in either to secure an outcome. Indeed, there is not a single mention of either customary international law or *jus cogens* in *AB*. In several ways however, *Basfar* is distinct from *SC* and *AB*. *Basfar* is not strictly a human rights case at all, but an economic claim complicated and internationalised by the fact the employer is a foreign diplomat. Moreover, it is a claim brought horizontally between private individuals and not, as in *SC* and *AB*, vertically against a state. Furthermore, the main treaty of relevance in *Basfar*, the Vienna Convention on Diplomatic Relations (1961) (VCDR), is incorporated into UK law by the Diplomatic Privileges Act 1964.

What is striking about *Basfar*, and makes it crucial to the present analysis, however, is the approach of the majority judgment when compared with that taken in *SC* and *AB*. *Basfar* was

[72] *Basfar* (n 9), [22], and [43]-[51]. Notably, in their explanation through [43]-[51] the UKSC rely heavily on a domestic report and the *Report of the [United Nations] Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences* , Gulnara Shahinian, A/HRC/15/20, 18 June 2010.

decided the year after *SC* and *AB,* cases which marked a shift in the UKSC's thinking. Yet inescapably the human rights abuses alleged within *Basfar* were decisive and drove both the reasoning and outcome in the majority judgment, which found in Wong's favour. Regardless of whether *Basfar* represents creative decision making (though that is argued), it is difficult to reconcile the judgment with features observed in *SC* and *AB,* namely: the UKSC's acknowledged conservatism and formalism, alongside its blindness to the personhood of the applicants. Moreover, any creativity in the decision-making of *SC* and *AB* which may have worked against the applicants is difficult to reconcile to creative decision-making in *Basfar* which favours a different claimant.

As already noted, *Basfar* was not a unanimous judgment, but decided by a majority of three UKSC judges, with two judges dissenting. Its facts are broadly as follows. Basfar is a diplomat and, materially, was still serving as such in the UK when the case was heard. Wong alleged she had been trafficked by Basfar to the UK from Saudi Arabia to work in his diplomatic household in conditions of domestic servitude. The allegation was not accepted, but the UKSC considered the case on the assumed facts. Although Wong had been given a contract of employment to secure a visa to the UK, the reality of her work did not match its details. Instead, on the assumed facts, Wong had worked for Basfar for almost two years and though initially she was paid some wage, for most of this time Wong received no pay. Critically, she was made to work in abusive and humiliating conditions from 7am to 11pm every day with no days off, isolated from contact with her family and unable to leave the house.[73]

Basfar's diplomatic role guaranteed immunity from any criminal liability.[74] Wong's claim against Basfar was instead made on employment grounds.[75] Accordingly, the question for the UKSC was whether, in the circumstances, an exception to diplomatic immunity from civil suit applied. Hence, *Basfar* is not, at least not directly, a human rights case, but a case concerning diplomatic immunity to which the human rights dimension nevertheless became centrally important.

The relevant exception from diplomatic immunity is under the Vienna Convention on Diplomatic Relations (VCDR), Article 31(1)(c) which applies when a diplomat is engaged in a "commercial activity". The UKSC confirmed that because treaties are "intended to be given the same meaning by all states", the incorporating legislation was to be interpreted according to international law principles of treaty interpretation.[76] The UN Special Rapporteur on trafficking in persons intervening had indicated that the VCDR should be interpreted in conformity with the UK's international obligations to prohibit, punish and produce a remedy for trafficking victims.[77] The UKSC acknowledged these arguments had previously been rejected and were not pursued by the appellant. Accordingly, neither did they take it further. In addition, the *jus cogens* nature of modern slavery was not relevant based on the established law that

[73] *Basfar* (n 9), [8].
[74] Vienna Convention on Diplomatic Relations (1961), Article 31(1).
[75] *Basfar* (n 9), [1]-[5].
[76] *Basfar* (n 9), [16].
[77] Article 6(6), Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, GA Res 55/25 2000, supplementing United Nations Convention against Transnational Organized Crime; Article 4 ECHR.

> "There is no inconsistency between the international obligations of the UK to prohibit and create liabilities for human trafficking [or other peremptory norms] and the immunity of diplomats in international law from the jurisdiction of the local courts."[78]

In spite of the reasoning which followed, the majority made very clear that it was not their role in this case to use human rights law to interpret the exception. The "sole" question before it was whether the alleged activity was commercial to the extent that the exception would apply.[79] The answer turned on whether domestic servitude such as Wong's on the assumed facts amounted to "commercial activity". At this point the majority judgment becomes quite creative. It is markedly less conservative or formalist than the judgments in *SC* and *AB*, whilst it is also far more conscious of the personhood and experience of Wong.

To begin, the majority demonstrated, in line with other UK and overseas case law, that employing domestic help is not "commercial activity", but "incidental to ordinary daily life". Accordingly, the exception does not apply. In light of the context of exploitation however, the majority then considered VCDR, Article 42, which sets out that a diplomat must not "practice for personal profit any professional or commercial activity" in the receiving state. Establishing a link between this and the Article 31(1)(c) exception, the majority's interpretation was that: if a diplomat breaches the Article 42 restriction, Article 31(1)(c) ensures immunity cannot apply.

On the assumed facts the majority was satisfied Basfar gained "personal profit" from Wong's exploitation.[80] They therefore refuted Basfar's argument that if ordinary employment of a domestic worker is not commercial activity, neither is it if the domestic worker is trafficked or exploited. They explained:

> "We cannot accept that exploiting a domestic worker by compelling her to work in circumstances of modern slavery is comparable to an ordinary employment relationship of a kind that is incidental to the daily life of a diplomat (and his family) in the receiving state. There is a material and qualitative difference between these activities. [In this context] the work is extracted by coercion and the exercise of control over the victim."[81]

Therefore, Wong's exploitation fell outside Basfar's diplomatic role (in breach of Article 42 VCDR) and consequently, via the relationship of Article 42 to Article 31(1)(c), diplomatic immunity did not apply.

This is problematic for a variety of reasons.[82] For present purposes it is critical that in spite of declaring they would not use human rights law to interpret the exception, the majority instead used the context of human rights *abuse* to inform it. As the dissent acknowledges, the majority's approach seems to have it that a person's employment conditions or the manner in which they came to be employed "can convert employment which is not of itself a "commercial activity" exercised by her employer into such an activity falling within the exception."[83] Whilst the dissenting judges agreed employing a domestic worker is not a

[78] *Basfar* (n 9), [23].
[79] *Basfar* (n 9), [25].
[80] *Basfar* (n 9), [41].
[81] *Basfar* (n 9), [43].
[82] Considered in detail in *Basfar* (n 9), [155] – [168].
[83] *Basfar* (n 9), [113].

commercial activity, they did not accept the context of the domestic worker having been trafficked or exploited was capable of altering this.[84] Indeed, the dissent applies sound logic, and since two opposite conclusions have been found possible this signals a further problematic consequence of the majority judgment. The majority acknowledged treaties should be given the same meaning by all states, but the judgment makes it difficult to envisage this exception will now be uniformly interpreted by states. In any event, the majority's expansive reasoning stands very much at odds with the approaches and tone of judgment observed in *SC* and *AB*.

The exception covers only a limited content, but importantly it illustrates that creative decision-making risks a loss of legal certainty. In this context it becomes unclear what would or would not be covered by the exception. Moreover, outside the purview of VCDR's limited exceptions, diplomatic immunity can yield some troubling results. For example the UK courts have been unable to make care orders in the context of child abuse,[85] and diplomatic immunity still lawfully applies even when peremptory norms including torture and war crimes have been breached.[86] Except for the creative approach of the majority in *Basfar*, diplomatic immunity would still have applied. Hence, the majority's particular interpretation of the exception introduces unevenness as well as uncertainty.

VI Making sense of *Basfar*

On the face of it, *Basfar* introduces either a significant anomaly or mixed-messaging to an analysis of the courts' attitudes and approaches to international law in rights claims brought before them. Most positively, *Basfar* challenges any view that the courts are exclusively either excessively conservative or anti-rights. The problem, however, is how far this extends, and how to make sense of the difference. First, it is important to approach *Basfar* cautiously as an illustration of judicial attitudes. It was decided by a majority judgment with three judges in favour and two dissenting (*SC* and *AB* had both been unanimous). Moreover, only one of the majority judges in *Basfar,* Lord Stephens, had decided *SC* and *AB*. Lord Briggs and Lord Leggatt who wrote the *Basfar* judgment were not present in either case. What this perhaps signals most is that, unsurprisingly, there is a mix of attitudes among the judiciary even at the highest level.[87]

Indisputably, the majority showed willingness to be expansive, even creative, when rights are at issue. *Basfar* can nevertheless be explained as still fitting within the wider pattern of conservatism observed in the other cases. Critically, *Basfar* is an employment claim against a foreign diplomat which required treaty interpretation for a judgment. Specifically, it is not a claim against a UK institution, and does not require interpretation of UK statute.

Throughout this paper it has been argued that the UKSC's deep conservatism is being led by its fidelity to a strong model of unimpeded Parliamentary Sovereignty aligned with a strict and orthodox (i.e. deferential) interpretation of the Separation of Powers doctrine. In *Basfar*, where international treaty is interpreted in a case against a private individual, neither principle is compromised by the decision taken. Conceivably this explains how such creative interpretation of the appropriate law remained possible. For the image it creates of the

[84] *Basfar* (n 9), [113].
[85] *A Local Authority v AG* [2020] EWFC 18; *Barnet London Borough Council v AG* [2021] EWHC 1253.
[86] *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 (torture); Jurisdictional Immunities of the State (Germany v Italy) [2012] ICJ Rep 99 (war crimes).
[87] Dissenting in *Basfar*: Lord Hamblen decided AB, and Lady Rose decided neither *SC* nor *AB*.

UKSC's current attitudes, *Basfar* is not therefore a blip on the landscape, so much as a picture of an entirely different landscape. Moreover, conservatism is still in evidence in the dissent.

VII Attitudes to Non-Binding International Law

Non-binding international law, also referred to frequently as "soft law" includes a vast array of different sources and types. In broad terms appropriate to this discussion, non-binding international law relevant to human rights is written often, - though not exclusively - by deep subject experts. In the context of international human rights law it often enriches applicable norms and standards by bringing detail to how their content can be understood and employed. In the introduction to this paper it was observed that in the recent UK case law the courts have questioned soft law's relevance to the case before them, even when the content is very obviously related. Additionally, they have called into question the purpose for which soft law is written and arguably by extension, the international institutions that frame it.

This was not always the case and in *Mathieson*, where Lord Wilson found that both the CRC and the CRPD had been breached, he did so with reference to relevant non-binding international law.[88] Moreover, in *JS* Lord Carnwarth described the CRC's analysis in its General Comments as "authoritative guidance".[89] By the time *AB* was decided however, dominant attitudes had changed and indeed, the UKSC took its opportunity within the judgment to set out its position regarding non-binding international law. It should be noted that the CoA had already been dismissive of such law. The UKSC applied ill-fitting ECtHR jurisprudence instead of directly relevant expert opinion which sets out not only a dominant international legal understanding of solitary confinement, but also the empirical evidence of its significant dangers which underpin the position. Specifically, that position is that solitary confinement of children and/or prolonged solitary confinement is inhuman and accordingly it should be prohibited absolutely.[90]

In any event, both the CoA and the UKSC were invited to consider whether solitary confinement of a child and prolonged solitary confinement are "inherently inhuman". The UKSC as we know, found that it is not. To help understand the UKSC's reception of non-binding international law however, the judgment directly offers "some comments" on assumptions within arguments for AB.[91] The UKSC acknowledges that the ECtHR takes other international treaties and materials into account when interpreting the ECHR. However, it then highlights that the choice of "which international instruments and reports it considers relevant and how much weight to attribute to them" is for the ECtHR to decide.[92] The UKSC's unwillingness to go beyond rights interpretation set by the ECtHR has been noted already. This same degree of limitation is evidently also applied to external sources of international law from which it is willing to draw, including soft law.

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[88] *Mathieson* (n 1) at [39].
[89] *JS* (n 20) at [105].
[90] See UN Special Rapporteur on Torture, Manfred Nowak's statement to the UNGA at its Sixty- third session, A/63/175, 28 July 2008; UN Special Rapporteur on Torture, Juan Méndez's statement to the UNGA at its Sixty-sixth session, A/66/268, 5 August 2011; *Istanbul Statement on the use and effects of solitary confinement*, adopted on 9 December 2007 at the International Psychological Trauma Symposium in Istanbul.
[91] *AB* (n 3) at [61] – [67].
[92] *AB* (n 3), citing from *AM-V v Finland* (2018) 66 E.H.R.R. 22, [74].

Indeed, *Independent Workers*[93] supports this. The judgment indicates that when evaluating an employment relationship within Article 11 ECHR, the non-binding ILO Recommendation No 198 should be considered.[94] Crucially the UKSC even state that the approach is 'not inconsistent with the strictures' of *SC* 'against reliance on the provisions of international treaties and instruments which have not been implemented into domestic law' because the relevant criteria had been 'expressly adopted and applied' by the ECtHR. As such they were 'incorporated into the Convention test' in the particular context, and so applicable by the UKSC. Conversely, the rule against relying on unincorporated international law sources is emphasised.

In *AB*, the UKSC's judgment expresses regret that the CRC's General Comments "have been described in some dicta in this court as "authoritative"."[95] Explaining its view that this has led to "exaggerated claims as to the comments' status and effect" the UKSC indicates its view that any such non-binding law was never intended to present legally applicable definitions or tests. Rather, it observes an important distinction between the latter and non-binding international law standards, namely that the underlying purpose and by extension the status of the CRC's General Comments - so of course all other similar non-binding international law - is different from that of interpretations of hard law made by a court. According to the judgment, the purpose and function of the non-binding international law referred to is to guide behaviour and although it may include definitions it is not written by lawyers or set out as binding law. As the judgment puts it, "The CRC … is not a judicial body."[96] Its suggestions and general recommendations have legitimacy under the UNCRC but "none of them gives it binding authority. … General Comments .. have no defined status, and they are not analogous to the rulings of an international court."[97] Moreover, several examples in the case law are referred to where similar conclusions have been drawn.

Basfar does not enable us to see in any great detail the UKSC's attitudes to the bodies which, as part of their work, create soft law, but two points are particularly notable. Firstly, when examining and elaborating whether domestic servitude fits within the definition of modern slavery, the UKSC the UKSC relied on two documents: a 2015 domestic report commissioned by the UK Government and prepared by James Ewins QC; and the *Report of the [United Nations] Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences* , Gulnara Shahinian, A/HRC/15/20, 18 June 2010 which focussed on domestic servitude. Secondly, the Special Rapporteur on trafficking in persons, especially women and children, intervened in the case and argued that the VCDR should be interpreted in conformity with the UK's international obligations related to trafficking. Unlike the definitional opinions, which were persuasive, the UKSC acknowledged and swiftly dismissed this argument.

It is at this point relevant to highlight the significant value placed on the opinions of the UNHCR in the *Rwanda* case.[98] Those opinions were little different from the expert opinions of other UN experts and/or expert agencies in their own respective fields. In the *Rwanda* case however, rather than being a normative source, the opinions were an expert interpretation of state behaviour and as such, "evidence". The key point for present purposes is that since the

[93] *Independent Workers* (n 17).
[94] *Independent Workers* (n 17), [61]
[95] *AB* (n 3), [64].
[96] *AB* (n 3), [65].
[97] *AB* (n 3), [65].
[98] *R(AAA (Syria)),* (n 5).

"evidence" was useful the UKSC was highly complimentary of the UNHCR's "status and role"[99] and its "expertise and experience".[100] This was so, even when the UNHCR, - a non-judicial body, - was presenting its view of compliance with non-refoulement obligation under different sources of law including the Refugee Convention[101] and the ECHR.[102] The vital difference is that they ECtHR has already previously given "considerable weight" to the UNHCR's evidence in relevant cases. Hence the UKSC found it "unsurprising" that the UNHCR's evidence has been described as "authoritative" by the ECtHR.

Ultimately, unless it has been deemed by the ECtHR to be of direct use to interpret the ECHR, non-binding international law, and the institutions which formulate it, are generally given short shrift in recent judgments of the UK courts. The latest judgments show only that the approach is in a process of reaffirmation and entrenchment.

VIII International law in UK Human Rights Cases

With the aim of pinpointing precisely the UK courts' present attitudes to various international law sources, and to establish international law's reach into domestic law and its likely impact on future rights claims, this paper to this point has provided a detailed critique primarily of three relatively recent cases: *SC*, *AB*, and *Basfar*. To achieve the greatest possible clarity, the discussion has considered different types of international law within the cases, handling them in turn as discrete categories. The analysis yields several critical findings which are pulled together in this section.

It cannot be ignored that whereas *SC* and *AB* signal a deeply conservative and formalist approach to the law, *Basfar* introduces a degree of mixed-messaging. *Basfar* is nevertheless instructive. Overall, there are several core themes which arise in *SC* and *AB* particularly. Firstly, *SC* and *AB* embrace and advance a strong model of unimpeded Parliamentary Sovereignty together with a deferential interpretation of the Separation of Powers. Secondly, they demonstrate an implicit recognition of a normative hierarchy. Thirdly, they reveal deep conservatism characterised by formalist application of the UKSC's perceived orthodoxy, but with several main consequences: a restrictive approach to rights interpretation; limited sources from which the UKSC is willing to draw; inability (or unwillingness) to review judgments from the lower courts citing procedural reasons; failure to see or take into account the human person behind claims; and relatedly, prioritisation of institutions above people. Finally, creative decision-making is in evidence. Critically it is argued that across all three cases these themes must be understood against the ever-present backdrop of the first and in particular: an orthodox version of unimpeded Parliamentary Sovereignty.[103]

(i) Normative hierarchy

The above critique focussed first on "hard" international law and yet customary international law is notable by its almost complete absence from the judgments. It should be recalled that *AB* and *Basfar* relate to such norms, even to norms of *jus cogens*. However, in *Basfar* the

[99] *R(AAA (Syria)),* (n 5), [65].
[100] *R(AAA (Syria)),* (n 5), [66].
[101] Convention Relating to the Status of Refugees (1951).
[102] Developed through the ECtHR's jurisprudence especially in relation to Articles 2 and 3 ECHR. For example *Soering v UK*, App No 14038/88, A/161, 7th July 1989, [1989] 11 E.H.R.R. 439.
[103] Without reference to international law, the 2023 case *Allister v Secretary of State for Northern Ireland* [2023] UKSC 5 reinforces a strong model of Parliamentary Sovereignty supported by the UKSC.

context of rules governing diplomatic immunity means neither customary international law, nor specifically norms of *jus cogens* can be applied, so lengthy discussion was neither needed nor relevant. In *AB* these types of law are not mentioned at all, meaning they barely featured or did not feature at all in the minds of judges as relevant. Instead, what we see across the cases is a normative hierarchy implicit in UKSC's thinking.[104] Placed at the very top of this hierarchy is domestic statute. Next down, because of the HRA, we see the ECHR and its jurisprudence to help interpret it. Because of the UKSC's currently rigid interpretation of both Parliamentary Sovereignty and Separation of Powers doctrine, it demonstrates a high level of deference to both Parliament and the Executive. Consequently, the UKSC has imposed a strict and significant limitation upon the reach and influence of ECHR law domestically. As it has been seen in the example of *AB*, even when a novel set of circumstances arises the UKSC has been unwilling to look beyond the limited related ECtHR jurisprudence to other international sources of law which might help it appropriately interpret the law in the given context. On the same facts, the CoA was more willing to apply ECHR jurisprudence in way that does not fit with the context, than to look to other international law sources.

Within this normative hierarchy it is to be supposed that incorporated treaty law would sit alongside the ECHR, as incorporated by the HRA. The finding in *Basfar* however, was that interpretation must be approached following the usual international law rules of treaty interpretation. Similar to the UKSC's approach to interpreting statute in *SC,* it is notable the UKSC in *Basfar* declined to take into account conformity with the UK's other international law obligations when interpreting the VCDR exception. Lower down the hierarchy is unincorporated treaty law since, as *Mathieson* shows, it used to be taken into account and at the very least it is still discussed in the present cases. Customary international law seems barely to feature, and although non-binding international law is discussed, it is almost summarily dismissed as an irrelevance unless endorsed in relevant case law by the ECtHR.

This evidence of hierarchy begins to illuminate how the UK courts are likely to receive the different types of international law in human rights cases before them.

(ii) Deep conservatism characterised by formalism

A strong model of Parliamentary Sovereignty appears as the dominant theme and manifests in the courts' approaches as a deep level of conservatism and legal formalism. The majority's creativity in *Basfar* compromises this narrative of conservatism. However, it was argued above that Parliamentary Sovereignty itself helps to unlock and comprehend the apparent disjoin between the cases. Before returning to this, let us first focus on the extent of the UKSC's significant conservatism in *SC* and *AB.* Whilst rooted in a particular understanding of Parliamentary Sovereignty it has implications for both the approach to rights interpretation, and the sources of rights from which to draw. As the discussion has demonstrated, the UKSC has opted to be extremely restrictive on both. It is somewhat ironic that in order to restrict the courts' approach to interpreting the law, - specifically locking out the possibility of "determining" whether the UK has breached international human rights law, - the UKSC in *SC* has created its own rule. It was argued above that, rather than presenting a risk, there is much advantage in the courts finding the UK to have breached its international obligations. There is nothing obviously harmful in doing so, and so long as that law is not

[104] On hierarchy of international law see: Theodor Meron, "On a Hierarchy of International Human Rights" (1986) 80 American Journal of International Law 1-23.

enforced dualism and/or Parliamentary Sovereignty is not compromised. The advantages however are significant enough that the practice should be reconsidered. To rehearse the advantages identified above: (i) the international content may aid a wider understanding of the rights at issue; (ii) identifying a breach can call attention to faults in human rights implementation which, by that judicial recognition, offers a guide to the Executive and Parliament that they may wish to reconsider certain specific content; and (iii) repetition of rights and their sources can have a positive and deeply socialising effect making people, the courts themselves, and other institutions more conscious of rights and more willing to assert and/or protect them.

A further consequence of the UKSC's conservatism is that, for procedural reasons, it has been unwilling to review judgments from the lower courts. As the above discussion has shown, revisiting the contextual assessment of AB's treatment would have been a welcome step. The Equality and Human Rights Commission had asked the UKSC to do just this, but it refused. As Murphy highlights, the question of whether or not there was a breach of Article 3 ECHR was clearly before the UKSC and it had all the materials it needed before it to consider this. Vitally, she observes, the UKSC had arguably a s.6(6) HRA obligation to do so.[105]

What is perhaps most unsettling about the UKSC's conservatism in *SC* and *AB* however, is its failure to see or take into account the human person behind claims. Relatedly, in these two cases, institutions and the legal points which the UKSC has aimed to assert have been given priority. *Basfar*'s close concern for the experience and suffering of Wong presents an opposite approach, and informed the creativity by which it arguably went too far. There is however a middle ground and there is room for conscience and compassion. The UKSC in *AB* gives two reasons for its restrictive approach to ECtHR jurisprudence: to avoid excessively generous interpretation of rights; and because the rights-bearers can appeal to the ECtHR whilst the state cannot. Together these represent deference to Parliament and the Executive but it is argued above that this inappropriately gives priority to the stronger party. In the interests of fairness, as well as recognition of alleged victims' personhood, the law should be read with compassionate priority to the weaker party not the stronger. This would need to be done whilst still avoiding the dangers of creativity that could compromise *inter alia*, legal certainty. The position argued for however, does not suggest creativity, but a more compassionate and slightly moderated approach which takes into account the humanity and particular challenges experienced by litigants, including through the litigation process itself.

(i) Creative decision-making

Finally, creative decision-making can be observed to differing degrees within the cases discussed. *SC* insists it is inappropriate and more critically, that there is a legal rule, which debars the UK courts from determining a breach of international human rights law. However, this appears to be norm-creation within the case itself and represents a retreat from international law towards overall sovereignty domestically, of the UK's Parliament.

The tone of the CoA's judgment in *AB* heavily suggests a court which wanted to find against AB. The judgment is both selective and incomplete in its consideration of norms and AB's direct experience. It is argued herein that the CoA misinterpreted and misapplied ECtHR jurisprudence. When the case came to the UKSC however, it was not so much creative as

[105] Murphy (n 34), 469.

restrictive. The UKSC declined to decide the case in light of AB's specific context because it did not fit with the argument put to them directly on behalf of AB. As noted, Murphy observes the UKSC may actually have failed to meet their own obligation under the HRA to consider the case contextually. Either way, creativity as well as conservatism in *AB* and *SC* have had the net effect of prioritising and prejudicing institutions above rights and their bearers.

By contrast, the significant creativity in *Basfar* moves in the opposite direction and favours rights-bearers in this context. It was argued above that *Basfar* can be reconciled with the conservatism of *SC* and *AB*. *Basfar* challenges the view that the courts are exclusively either excessively conservative or anti-rights. However, for several reasons it has to be considered that conservatism in human rights judgments is likely to remain the norm with the UKSC by its current composition. The impulse to be more expansive in the interpretation of rights appears to be confined to a minority in the UKSC. Moreover, *Basfar* has been explained as still fitting within the wider pattern of the UKSC's conservatism primarily because of the difference in its content. As an employment claim against a private individual which must be resolved by the interpretation of international treaty, any conflict with Parliamentary Sovereignty and/or Separation of Powers is naturally avoided. The judgment contains nothing to challenge the primacy of these principles. Perhaps *Basfar*'s greatest message therefore is of the dangers of too much creativity in decision-making. At the same time arguments in favour of a moderated and more humane approach to the law in human rights cases deserve to be taken seriously, and this can be done without stretching either the law or the UK's core constitutional principles too far.

IX Concluding Remarks

By critiquing the way in which the UK courts have approached international law in several recent cases relating to human rights, the present paper has pinpointed the currently dominant judicial attitudes to different sources of international law in this context. The analysis is presented in detail in the sections above, but it is evident that a fidelity to a strong model of unimpeded Parliamentary Sovereignty alongside a rigid and highly deferential interpretation of Separation of Powers has impacted judicial attitudes and approaches to international law sources. Where these principles were less obviously directly relevant to the case before it – i.e. in *Basfar* - the UKSC showed greater willingness to apply an expansive interpretation to the relevant law before it. However, expansive approaches to the law when human rights are at issue should now and for the foreseeable future, be considered unlikely and, if they occur, they will be the exception and not the rule. The expectation of how international law of different types will be approached by the courts can be confidently based on the findings of hierarchical understanding of those norms, and on the deep conservatism with all of its consequences observed within *SC* and *AB*. It cannot be avoided that these cases were intended to reset judicial approaches to the law.

In addition, several points of particular concern have been noted in this critique. Formalism, conservatism and a drive to advance a particular set of legal points has enabled the UKSC to lose sight of people. *Rwanda* presents only a limited counter-balance to this since it has its roots in law which is deeply embedded across the spectrum of domestic, ECHR and international law. That includes customary international law, and potentially even a *jus cogens* norm. From these other cases, UK institutions and legal argument appear to have been prioritised over rights-bearers with two main consequences.. Firstly, it has been demonstrated that the particular rigidity in approach, in the example of ECHR interpretation, has come at

the cost of fairness. Accordingly, it is argued that a moderated approach which interprets the law with compassionate priority to the weaker party, the human being, would be appropriate. Secondly, priority to institutions in the CoA combined with the UKSC's procedural conservatism has enabled faulty and incomplete reasoning to be applied and go without challenge, to the contextual evaluation of whether AB's prison regime was inhuman contrary to Article 3 ECHR. The approach to contextualised evaluation of this nature must be revisited if the UK is to comply with its international human rights obligations. Moreover, the UKSC would be well advised to consider closely whether it has a duty under Article 2 HRA to make a context-based evaluation itself without the applicant necessarily inviting it to do so.

It is possible to identify creativity in all the judgments considered, but *Basfar* in particular shows the risks that creative decision-making pose for legal certainty. Appropriate caution should therefore be exercised when interpreting any law, not just rights. However, creativity which works directly against right-bearers sits uncomfortably and, in the context of a statutory mandate under the HRA to protect human rights, makes little sense. Relatedly, it has been argued that the rule against UK courts determining whether the UK has breached international law is the creation of the *SC* judgment itself. It is argued that there is no risk to established constitutional principles if UK courts were to make such determinations. Instead, determinations of this kind have much to commend them, as they can: help guide understanding of the rights at issue; act as an early warning system to Parliament and the Executive that something may be amiss; and have potentially a deeply socialising effect. If the courts were to reinstate the approach which counsel in *SC* had already assumed to be correct, this would be both a positive, and constitutionally acceptable move. Decision-making which brings harmony between the UK's international and domestic human rights obligations should surely always been the ambition.