

(70108) PUBLIC INTERNATIONAL LAW NOTES SPRING 2017

Sections covered in Notes (in order)

- 1. Nature and Subjects of International Law**
- 2. Sources of International Law**
- 3. Relationship between International and Municipal Law**
- 4. Personality and Legal Recognition**
- 5. Jurisdiction and Immunities**
- 6. Law of Treaties**
- 7. State Responsibility**
- 8. Peaceful Settlement of International Disputes**
- 9. Use of Force**
- 10. Exam Revision and Preparation**
 - a. Problem Question Scaffolds (Exam)**
 - b. Example Essay Responses (Exam)**

1.1.3 The Emergence of New International Actors

- Described as the body of rules and principles that determine the rights and duties of States in respect of their dealings with other States and the citizens of other States
- International law are largely concerned with treaties and customary international law while municipal lawyers are concerned with statutes and reports of court decisions
- Where the injured person is not an individual but a company, the company maybe better placed than its national government to pursue its claim
- Companies began to edge their way onto the international stage with the States and litigating against States as if they were their equals
- The rights of people have been promoted in agreements on national minorities and less directly by the development of areas of the law which are of particular importance when the rights of peoples and minority groups are under threat e.g. humanitarian law
- In principle, international law governs all activities of States that involve a foreign element → dealings by public authorities with foreign states or foreign citizens or with matters outside the borders of the States

1.1.4. Why do people comply with international law?

International law has no legislature NOR is there an international police force, or a compulsory system of courts before which States can be compelled to appear.

- The General Assembly of UN comprises of delegates from all the member states, but its resolutions are not legally binding for certain parts of the organs of the UN.

International law is not imposed on States against their will by an external legislature. Rules of international law mostly arise either from treaties or from customary international law. We have treaties that countries must abide by, if they are a signatory to it. Treaties are commitments that States have already decided that it is in their interest to comply with it.

- Additionally, rules of customary international law are in essence, simply international rules that are discerned as having this obligatory force
- Governments are repeat players in international relations. Each decision they take must make sense not in isolation but in the long term

- Generally, companies are interested in money. Individuals tend to have neither the breadth of interest nor the long term views of states

1.1.5 Why should people comply with international law?

The answer is always given in terms that seek to legitimise those in power → you should obey me not simply because if you do not I will tell the police to arrest you or the army to kill you, **BUT BECAUSE LAWFUL AUTHORITY IS VESTED IN ME.**

Law and Use of Force Scaffold

STRUCTURE

'In determining whether state 'x' actions of [*insert facts suggesting use of force has been used*] amount to a contravention on the prohibition on the use of force, as stipulated in Art 2(4) of UN charter and now reflecting CIL (Nicaragua), it must first be determined whether there has been a threat or use of force against the territorial integrity and political independence of state 'y'

- If question suggests parties are not party to UN charter: reinforce that it is CIL and therefore applies to any state

1. It must impinge upon the territorial integrity or political independence of a state

- Generally this prohibits the use of force that either:
 - Deprives a state of whole or part of its territory, or
 - Brings a state under the political control of another state
- Two interpretations
 - 1. Narrow interpretation (Bowett)
 - Consequence of view: use of force permitted if not impinging upon territorial integrity or political independence
 - Makes distinction between 'inviolability' and 'integrity'
 - Examples of what would be permitted:
 - Territory not seized
 - State not brought under another state's political control
 - Scenarios of this would include:

George Winterton, 'Limits to the Use of the "Treaty Power"', in Philip Alston and Madeline Chiam (eds), *Treaty Making in Australia: Globalisation versus Sovereignty?*

- Commonwealth's power regarding treaties can be stated:
 - In each case, to express and implied constitutional prohibitions
 - The commonwealth govt can execute (ratify or accede to)
 - Commonwealth parliament can legislatively implement an international treaty on any subject
- In regards to legislative power → additional qualification that the treaty must be 'genuine'
- Cth parliament can implement treaties pursuant to any of its powers and needs to rely on external affairs power (s51(xxix)) only when the treaty deals with a subject otherwise falling outside Cth legislative power
- There are a few legal limits to the Cth Parliament's power to implement treaties, the principal constraint being that the legislation must implement the treaty and not use it as a 'peg' upon which to hang legislation on the general subject matter regulated by treaty
- The treaty implementation power in s51(xxix) should not extend to treaties which are void under IL, as embodied in the Vienna Convention on the Law of Treaties (Australia ratified)

Tien v Minister for Immigration and Multicultural Affairs [1998] FCA 1552

Facts:

A matter concerning the cancellation of a number of visas issued under the Migration Act 1958 to members of a family.

Issue:

In the course of the proceedings an issue arose as to whether the Minister's delegate had erred in law by not taking into account the best interests of the child as required by the Convention on the Rights of Child.

Held: (Goldberg J)

- The Ministerial statement was an attempt to overrule the principle displayed in the Teoh case
- He rejects the statement nevertheless - it would be necessary for the statement to say something to the effect of the decision maker will not act in accordance with provisions of Conventions or treaties

Notes - Decisions such as Tien have cast doubt on the efficacy of the 1995 and 1997 Ministerial Statements, as have other decisions by the Federal Court. The High Court has not yet been called upon to consider the impact of the Ministerial Statements.

Collins v State of South Australia [1999] SASC 257

Facts:

Collins sought from the Supreme Court of SA a declaration that SA was bound to treat prisoners in accordance with the provisions of the Standard Minimum Rules for the Treatment of Prisoners adopted by the 1955 UN Congress on the Prevention of Crime and the Treatment of Offenders. Argued that SA breached article 10 of ICCPR - treatment as a prisoner

Held: (Millhouse J)

Used the *Administrative Decisions (Effect of International Instruments) Act 1995 (SA)*

2—Interpretation

In this Act—

"international instrument" means—

- (a) a treaty, convention, protocol, agreement or other instrument that is binding in international law; or
- (b) a part of such a treaty, convention, protocol, agreement or other instrument.

3—Effect of international instruments

(1) An international instrument (even though binding in international law on Australia) affects administrative decisions and procedures under the law of the State only to the extent the instrument has the force of domestic law under an Act of the Parliament of the Commonwealth or the State.

(2) It follows that an international instrument that does not have the force of domestic law under an Act of the Parliament of the Commonwealth or the State cannot give rise to any legitimate expectation that—

- (a) administrative decisions will conform with the terms of the instrument; or
- (b) an opportunity will be given to present a case against a proposed administrative decision that is contrary to the terms of the instrument.

(3) However, this Act does not prevent a decision-maker from having regard to an international instrument if the instrument is relevant to the decision.

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- There are 2 things clear with regards to the Act
 - 1. No redress for the plaintiff in this State arising from IL
 - 2. The effects of the Act in SA is to make Australia's involvement in international conventions 'merely platitudinous and ineffectual'.
 - **"Much as I regret it, as a single judge I am not able to give force to the basic human rights set out in these conventions."**