3. International Law vs Domestic Law

General

- Australian Constitution is relatively silent on the status of international law.
  - Only makes it clear that the powers of the executive are sufficient wide to include a power to negotiate and conclude treaties and that the High Court has original jurisdiction in matters concerning treaties.
- Westminster parliamentary countries' common methods adopted in the case of treaties have included:
  - Direct implementation of the treaty into municipal law by way of an implementing statute.
  - Partial implementation of the treaty into municipal law by way of a statute which partially refers to certain international law obligations;
  - Broad reference in a statute to international law obligations or specific treaties without precise indication as to its application.
- Arguments based on international law and municipal law
  - Internationalist may argue that all international law should have municipal effect whether by constitutional process or thorough statutory implementation.
  - Nationalist would argue in favour of the retention of State sovereignty in which the Parliament or legislature remains supreme.
    - International law would only have influence if a conscious decision has been made to adopt it at a national level.

Dualism and Monism

- In international law, conflict between municipal law and international law often arise. There are two theories that attempt to address this conflict: the dualist theory and the monist theory.
  - Basically, the dualist theory holds international law and municipal law to be two distinct and separate laws.
  - The monist theory considers international law and municipal law to constitute only one system of law.

Dualist Theory

Under this theory, international law and municipal law are two distinct system of law.

	Municipal Law	International Law
Source	• Custom grown up within the boundaries of the State concerned, and • Statutes enacted by law-making authority.	• Custom grown up among States, and • Law-making treaties.
Social Relations	• State-person relations, and • Person-person (interpersonal) relations	State – State relations
Substance	The law of the sovereign is over individuals.	The law is not over, but between states, and therefore is the weaker law

According to most dualists, municipal law prevails. Dualists are positivists who put strong emphasis on sovereignty.

- Why? –> Positivism stresses the overwhelming importance of the state and tends to regard international law as founded upon the consent of states.

Monist Theory

- Municipal law and international law are essentially the same. There are two primary divisions with regard to the monist theory[1]
  - The ethical position on "human rights" (supported by Lauterpacht)
    - The 'naturalist' strand sees the primary function of all law as concerned with the well-being of individuals, and advocates that international law is the best way of achieving this well-being. It is an approach characterised by deep suspicion of an international system based upon the sovereignty and absolute independence of states, and by faith in

[1] Shaw, 2003. International Law, 5th ed.

the capacity of the rules of international law to imbue the international order with a sense of moral purpose and justice founded upon respect for human rights and the welfare of individual.

- *The formalistic logical approach (supported by Kelsen)*
  - *This approach finds its basis on Kant's philosophy. Under this approach, international law is superior to municipal law. Law is regarded as constituting an order which lays down patterns of behaviour that ought to be followed, coupled with provision for sanctions which are employed once an illegal act or course of conduct has occurred. Since the same definition appertains within both the internal sphere and the international sphere, a logical unity is forged, and because states owe their legal relationship to one another to the rules of international law, such as the one positing equality, since states cannot be equal before the law without a rule to that effect, it follows that international law is superior to or more basic than municipal law.*

The "no common field" approach *(supported by Fitzmaurice and Rosseau)*

- *There arises a third approach, under which there is no common field between International Law and Municipal Law. It considers municipal law and domestic law as distinct laws, much like the French Rule and the English Rule are different systems of law, one not being superior over the other. They are both the legal element contained within the domestic and international systems respectively, and they exist within different juridical orders.*
  - *Ultimately therefore, there can be no conflict between any two systems in the domestic field, for any apparent conflict is automatically settled by the domestic conflict rules of the forum. Any conflict between them in the international field, that is to say on the inter-governmental plane, would fall to be resolved by international law, because in that field international law is not only supreme, but in effect the only system there is.*

The Theory of harmonisation *(supported by O'Connell)*

- *It follows that a monistic solution to the problem of the relationship of international law and municipal law fails because it would treat the one system as a derivation of the other, ignoring the physical, metaphysical and social realities which in fact detach them.*
- *But a dualist solution is equally deficient because it ignores the all-prevailing reality of the universum of human experience.*
- *The correct position is that international law and municipal law are concordant bodies of doctrine, each autonomous in the sense that it is directed to a specific, and, to some extent, an exclusive area of human conduct, but harmonious in that in their totality the several rules aim at a basic human good.*

Municipal Law in International Law

- *The general rule is that a State may not invoke provisions of its own laws as a justification for the violation of its obligations under international law: VCLT art.27*
  - *Neither may it claim that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent: VCLT art. 46(1)*
- *The* ***exception*** *to the general rule is when there is a manifest violation of the fundamental laws of the State concerned.*
  - *It is manifest where it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith: VCLT art.46(2)*

International Law in Municipal Law

- *Dualism also applies in this regime. In order for international law to become part of domestic law, it has to be made part of the municipal law.*
- *There are two ways of making international law a part of domestic law: incorporation and transformation: Trendex Trading v Central Bank of Nigeria (1977)*
  - *Doctrine of incorporation*
    - *The rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament.*
      - ➡ *Under this doctrine, where the rules of international law change, our English law changes with them.*
  - *Doctrine of transformation*

- The rule of international law are not to be considered as part of English law except in so far as they have already been adopted and made part of our law by the decision of the judges, or by Act of Parliament, or long established custom.
  - ➡ Under this doctrine, the English law does not change. It is bound by precedent.

Australian Law and Customary International Law

- Relationship between common law and international law
  - International law is not as such part of the law of Australia: Chung Chi Cheung v The King (1939)
    - International law is one of the sources of our law, and: Chow Hung Ching v R (1948)
      - A rule will be adopted as a source of domestic law if it is 'not inconsistent with rules enacted by statutes or finally declared by the courts': Nulyarimma v Thompson (1999)
      - The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal fundamental rights: Mabo case
- Incorporation & transformation by the Court
  - ✳ Incorporate & transform international law to domestic common law
    - A universally recognised principle of international law would be applied by our courts: Chow Hung Ching v R (1948)
      - Such universally recognised principle of international law means 'a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decisions': Nulyarimma v Thompson (1999)
      - Two scenarios:
        - In terms of incorporation of international law, if the contemporary notion of the international law is not inconsistent with the domestic common law, the Court is free to adopt such rules: Mabo case
        - However, if the international law is inconsistent with domestic common law
          - Generally speaking, Australian courts will not adopt an international law which is inconsistent with domestic common law unless legislation transforms the international law into domestic system: Nulyarimma v Thompson (1999)
            - There is no requirement for the common law to develop in accordance with the international law: Western Australia v Ward (2002)
              - Rationale is that international law itself is often vague and conflicting.
          - In addition, further two questions may be asked when the contemporary international law is inconsistent with the domestic common law system: Mabo case
            - ✓ Whether the common law is an essential doctrine of our legal system, and
            - ✓ Whether it is disproportionate to the benefit flowing from the overturning
            - ★ If the answer is YES, the common law system should not be overturned.
  - ✳ Incorporate & transform international law to statute
    - When the statute is not ambiguous in itself, unincorporated international law should not be adopted in interpreting the statute: Western Australia v Ward (2002)
      - It is a matter for the Parliament to incorporate the international law, not the Court.
    - When the statute is ambiguous, unincorporated international law may assist in determining the content of the common law: Western Australia v Ward (2002)
  - ✳ Incorporate & transform international law to Constitution
    - International law in regards of fundamental rights should be taken into consideration when interpreting a provision of the Constitution if the provision is not clear enough and the so considered fundamental rights do not conflict with the provision of the Constitution: Newcrest Mining (WA) Ltd v Commonwealth.
      - Rationale is that international law is a legitimate and important influence on the development of the common law and constitutional law, therefore, when there is an ambiguity of the Constitution, it should be adopted as the fundamental rights is 'undergoing evolution'.
    - If the provision of the Constitution is clear, no unincorporated international law and personal opinion should be adopted: Newcrest Mining (WA) Ltd v Commonwealth.

3. International Law vs Domestic Law

Effect of incorporation and transformation

- *The rule of customary international law, once adopted or received into domestic law have the 'force of law' in the sense of being treated as having modified or altered the common law: Nulyarimma v Thompson [1999]*

1. *The High Court was asked to consider whether the rights of indigenous Australian to title over lands held prior to European settlement in 1788 were extinguished by action of the Crown, or whether indigenous rights to 'native title' were recognisable under the common law and could coexist with freehold and leasehold title to land.*

In considering these issues the Court considered the impact of international law upon the common law.

Mabo v Queensland (No.2) ('Mabo case') [1992] HCA 23

- *The Court is free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.*
- *If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied.*
  - *Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system, and*
  - *Whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.*

- *The common law does not necessarily conform with international law.*
  - ➡ *But international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.*

1. *The High Court was required to interpret s 51(xxxi) of the Constitution as to whether the acquisition of certain property was on 'just terms'.*

Kirby J considered the methods of constitutional interpretation.

Newcrest Mining (WA) Ltd v Commonwealth [1997] HCA 38

- *In interpreting a Constitution*
  - *If the Constitution is ambiguous, the Court should adopt that meaning which conforms to the principles of fundamental rights.*
    - *If the fundamental rights derived from the international law do not conflict with, but are consistent with, a provision of the Constitution, it should be adopted.*
  - *If the Constitution is clear, the Court must give effect to its term.*
    - *No individual opinion of a judge may be applied.*
    - *No international treaties or other international law concerning fundamental rights not yet incorporated in to Australian domestic law should be adopted.*

1. *The central issue for the HC was whether there could be partial extinguishment of native title claims for the purposes of the Native Title Act 1993 (Cth), and what principles should be applied in making that determination.*

A question arose as to whether international law had any relevance to these considerations.

Held, international law is irrelevant to this appeal.

Western Australia v Ward [2002] HCA 28

Whether international law should be applied in interpreting a statute even there is no ambiguity in the statute itself?

➡ *NO. The task for this Court and other courts in Australia is to give effect to the will of Australian Parliaments as manifested in legislation.*

- *Courts may not flout the will of Australia's democratic representatives simply because they believe that, all things considered, the legislation would "be better" if it were read to cohere with the mass of (often ambiguous) international obligations and instruments.*

★ *Consistency with, and subscription to, our international obligations are matters for Parliament and the Executive.*

Whether the common law was obliged to develop in accordance with international law?

➡ *NO. There is no requirement for the common law to develop in accordance with international law.*

- *International law may only occasionally assist in determining the content of the common law.*

1. *n 1948 there were present on Manus Island some 300 Chinese nationals, sent there to collect surplus war supplies sold to the Republic of China by the United States of America.*
2. *The body included Army personnel and labourers. There was evidence that they were subject to military discipline, exercised by officers of the Chinese Army, and that they were subject to Chinese military law.*
3. *They did not carry arms. The Army personnel acted as guards and the labourers as workmen.*
4. *Two labourers, members of this body, were charged in the Supreme Court of the Territory of Papua-New Guinea with having assaulted a native of the island and were convicted.*

An issue arose for consideration by the HC as to whether those person enjoyed sovereign immunities under international law.

Held: It did not appear that the accused were members of a military force of China, therefore they had no such immunity from the jurisdiction of the Supreme Court of the Territory as might have been possessed by a member of such a force.

Chow Hung Ching v R [1948] HCA 37

➡ *International law is not as such part of the law of Australia, but a universally recognised principle of international law would be applied by our courts.*

➡ *International law is one of the sources of our law.*

1. *A magistrate Court refused to issue warrants for the arrest of a number of federal parliamentarians on information that they had committed acts of genocide.*
2. *An appeal against the magistrate Court's decision.*

Held, the crime of genocide did not exist under the common law in Australia.

Nulyarimma v Thompson [1999] FCA 1192

Wilcox J

➡ *The prohibition of genocide is a peremptory norm of customary international law, giving rise to a non-derogatable obligation by each nation State to the entire international community.*

➡ *Ratification of a convention does not directly affect Australian domestic law unless and until implementing legislation is enacted.*

➡ *It is one thing, for courts of a particular country to be prepared to treat a civil law rule like the doctrine of foreign sovereign immunity as part of its domestic law, whether because it is accepted by those courts as being 'incorporated' in that law or because it has been 'transformed' by judicial act. It is another thing to say that a norm of international law criminalising conduct that is not made punishable by the domestic law entitles a domestic court to try and punish an offender against that law.*

23. It is at this point that the contest between the "incorporation" approach and the "transformation" approach becomes material. Merkel J reviews that contest in some detail. It appears the incorporation approach is now dominant in England, Canada and, perhaps, New Zealand. The Australian position is far from clear. However, in his paper "International Law as a Source of Domestic Law," published in Opeskin, International Law and Australian Federalism (1997), after reviewing the relevant High Court decisions, Sir Anthony Mason said (at p 218) "the difficulties associated with the incorporation theory and proof of customary international law suggest that, in Australia, the transformation theory holds sway". Statements made in Chow Hung Ching v The King (1949) 77 CLR 449, which have been criticised by commentators but not disavowed by the High Court, seem to justify that conclusion.

MerkeL J

'Source' view or the common law adoption approach:

- *A recognised prerequisite of the adoption in municipal law of customary international law is that the doctrine of public international law is 'a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decisions'.*
- *The rule must not only be established to be one which has general acceptance but the Court must also consider whether the rule is to be treated as having been adopted or 'received into and so become a source of English law'.*
- *A rule will be adopted or received into, and so a source of, domestic law if it is 'not inconsistent with rules enacted by statutes or finally declared by the courts'.*
- *The rule of customary international law, once adopted or received into domestic law have the 'force of law' in the sense of being treated as having modified or altered the common law.*