TOPIC FOUR: PUBLIC INTERNATIONAL LAW AND MUNICIPAL LAW

Monism and Dualism

The former automatically incorporates international law (with ‘hard’ and ‘soft’ variants). It is associated with natural law theories/civil law systems; the idea is that municipal law derives from international law. The latter means that international law has no direct automatic impact on municipal law, but there must be some process of transformation; it minimises discrepancies but reduces the efficacy of international law. The contemporary approach, a third, combines the two, having the *ius gentium* regulating laws between princes. The differences are often criticised for being useless and irrelevant. Fitzmaurice: international and municipal laws are on different planes and therefore never actually come into conflict, and only their obligations conflict — international does not purport to govern national law in the national field.

Municipal law as a source of international law

- Domestic law is evidence of state practice and potentially also *opinio juris*.
- Domestic law can be evidence of general principles of law recognised by civilised nations.
- Courts may at times be required to investigate the content of municipal law (*Brazilian Loans Case*), e.g. for the purposes of Art 46 of the VCLT.

Municipal law in international law

States can’t exempt themselves from international obligations by pleading some element of their domestic law (VCLT Art 27, 46; *Articles on State Responsibility* Art 3; *La Grand Case*; *Alabama Claims Arbitration*). This is because the ICJ can’t always be informed about municipal law (*Cameroon v Nigeria*).

*Sandline Arbitration* — PNG claims that an internationalised contract made by the executive and Sandline had not been approved by parliament. This was not a valid excuse. “It is a clearly established principle of international law that acts of a State will be regarded as such even if they are *ultra vires* or unlawful under the internal law of the State.”

Customary international law into municipal law

Two approaches: incorporation and transformation.

**CIVIL**

Customary international law is not automatically part of municipal law. However there is a ‘soft’ approach to this by which a court may include custom into Australian common law. Kirby says extra-curially that it’s “inconclusive”. Australia takes the hard transformation approach (*Chow Hung Ching v R*); UK uses incorporation (*Triquet v Bath; Buvot v Barbuit; Trendex Trading v Bank of Nigeria*).
Chow Hung Ching v R — Chinese army labourers could not enjoy the immunity of “visiting armed forces” because they were not actual soldiers in the Chinese military. Latham CJ: international custom is not a part of the law of Australia, but a universally recognised principle of international law would be applied by Australian courts. Dixon J: automatic incorporation is not incorporated to Australia but international custom is nonetheless a source of Australian law.

Mabo (No 2) — Brennan: custom is an important influence on the development of the common law, especially with regard to human rights, but is not automatically incorporated.

- Polites v Cth — courts should take every effort to interpret words in accordance with international law.
  - “It is a rule of construction that, unless a contrary intention appear, general words occurring in a statute are to be read subject to the established rules of international law”
- Minister v Tech — even if a statute is reasonably clear, you would still take into account international obligations (rejects a narrow conception of ambiguity and pushes the Polites principle forward)
- Kartinyeri v. The Commonwealth; Koowarta v. Bjelke-Petersen — however this will not trump the clear words of the statute, for the sovereign power of the Queen in Parliament extends to breaking treaties (Ellerman Lines v Murray).

CRIMINAL

(Cth) — Nulyarimma v Thompson — customary crimes (in this case, genocide) do not form a part of Australian law, even if they are ius cogens, and can only be implemented by treaty (which, of course, requires domestic legislation to implement it). Criminal law is a matter of statute (hence why it uses codes) to be passed by parliament, such that the courts can’t create new crimes. Merkel J dissented, suggesting that “not inconsistent” customary crimes could be incorporated.

(UK) — R v Jones — UK does not accept customary international crimes into domestic law because of the separation of powers.

Making treaties in Australia

Power to make treaties is an executive one. This is an unfettered prerogative power (s 61 Const; Koowarta v Bjelke-Petersen).

The power to implement them is an exclusively legislative one (called a hard transformation approach). This is derived from the separation of powers doctrine. The provisions of a treaty do not apply if not implemented by the legislature. There are a few very occasional exceptions (e.g. peace treaties).
**Bradley v Commonwealth** — Cth tried to withdraw services to Rhodesia Information Centre to comply with UNSC sanctions (and thereby the UN Charter). The HCA said that there was no authority to do this under Australian law and this was therefore unlawful. Executive acts must be justified by domestic legislation, not just international treaties like the UN Charter. Barwick CJ and Gibbs J: the act implementing the UN Charter in Australia was not sufficient to implement UNSC sanctions.

> Section 3 of the Charter of the United Nations Act 1945 was no doubt an effective provision for the purposes of international law, but it does not reveal any intention to make the Charter binding upon persons within Australia as part of the municipal law of this country, and it does not have that effect. Since the Charter and the resolutions of the Security Council have not been carried into effect within Australia by appropriate legislation, they cannot be relied upon as a justification for executive acts that would otherwise be unjustified, or as grounds for resisting an injunction to restrain an excess of executive power, even if the acts were done with a view to complying with the resolutions of the Security Council.

**Minister of State for Immigration and Ethnic Affairs v Teoh** —

But the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia’s obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia’s obligations under international law.

There is no constitutional requirement for parliament to be involved in treaty making (cf. the US). However, modern treaties are tabled and debated in Parliament (from 1961). The *Trick or Treaty* report advocated more consultation with Parliament, the public, and others. In response, JSCOT and the Australian Treaties Library were established. Treaties must now be tabled in Parliament for fifteen sitting days and a national interest analysis (NIA) of the treaty must be prepared.

**Implementing treaties**

Cth Parliament has the power to implement treaties by way of the external affairs power in s 51(xxix) Const.

**Application of foreign law in Australia**

*R v Disun; R v Nurdin* — the *MV Tampa* is not a floating island of Norway when it is in Australian territorial waters (citing *Chow Hung Ching v R*). A state possesses jurisdiction by virtue of territorial sovereignty.
Contrast this with *R v Governor of Brixton Prison; Ex parte Minervini* — QB decides that a ship is the territory of the flag it bears and also of the owner of the waters it travels in, if it is not on the high seas (although *Disun* would seem to be a superior authority).

**Constitutional issues**

The Cth constitution can only legislate where it comes under a head of power, but s 51(xxix) gives broad powers to enact international obligations. There are four aspects: Australia’s relationship with other countries, extraterritorial legislation, implementation of international law (including treaties, customs, resolutions).

(a) Any matter geographically external to Australia

*Horta v Commonwealth* — it does not matter whether the treaty supporting the legislation is void or unlawful because the minimal requirement is that it has some connexion to an area without Australia

(b) Implementing treaties in Australian law

*Tasmanian Dam Case* — external affairs power validates legislation on any topic giving effect to a treaty, provided that it is proportionate and adapted to the treaty.

**Statutory interpretation and international law**

- Legislation is presumed to conform with public international law (*Polites v Commonwealth; Jumbunna Coal Mine v Coal Miners Association*)
  - *Polites v Cth* — You can’t conscript aliens under international law, but the HCA said that this doesn’t trump the clear words of the statute and regulations. But courts should take every effort to interpret words in accordance with international law.
  - *Minister v Teoh* — even if a statute is reasonably clear, you would still take into account international obligations (rejects a narrow conception of ambiguity and pushes the *Polites* principle forward)
  - *Al-Kateb v Godwin* — man was going to be in immigration detention in Australia forever (*vide*)
- Kirby extra-curially says that courts can take international law into account in five circumstances
  - Where there is express implementation of the treaty
  - Where the statute translates the treaty into domestic law
  - Generally, with regard to any legislation, in accordance with *Polites*, and in particular with regard for human rights
  - Generally, with regard to developing the common law, except for the *Nulyarimma v Thompson* exception for criminal law
  - In administrative law (*non discendum*)
  - Perhaps in constitutional law