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Précis Paper

The Use of International Law by Australian Courts and International Tribunals

This presentation is for all practising lawyers. Everyone should watch – it is interesting, it is technical, it is important if you are in practice. Both Counsel are very experienced – it was a gripping 45 minutes for me as I watched the session being recorded in our studio.

Discussion Includes

- What is the jurisdiction of Federal and State courts regarding international law?
- When is international law incorporated as part of Australian law?
- What other effect can international law have on Australian law, even if it is not directly incorporated?
- Can international law be used to interpret the Constitution of the Commonwealth of Australia?
- What principles of construction apply when Australian courts are considering international law?
- Where does the body of law come from that is applied in international tribunals?
- Will Australian courts enforce the orders of international tribunals or otherwise work in aid of international tribunals?

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Précis Paper

The Use of International Law by Australian Courts and International Tribunals

1. In this edition of BenchTV, Dr Christopher Ward SC (Barrister) and Dr Stephen Tully (Barrister) discuss the interaction of international law and the Australian legal system.

Jurisdiction to Apply International Law

2. The jurisdiction of the State and Federal Courts depends upon their constituent statutes.

3. For example, s 23 of the *Supreme Court Act 1970* (NSW) provides that "The [Supreme] Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales". In other words, the State Supreme Court has a plenary jurisdiction.

4. The jurisdiction of the Federal Court is somewhat more limited because section 19 of the *Federal Court Act 1976* (Cth) provides that "The Court has such original jurisdiction as is vested in it by laws made by the Parliament".

5. Accordingly, neither the Federal Courts nor the State and Territory Supreme Courts have a specific jurisdiction to enforce international law.

6. By contrast, the High Court does have an original jurisdiction relating to international law by virtue of s 75(i) of the Constitution of the Commonwealth of Australia which provides that the High Court has original jurisdiction "in all matters arising under any treaty". That provision has only rarely been invoked and has been the subject of limitation by the High Court. Kirby J in *R v East; Ex parte Nguyen* (1998) 196 CLR 354 said at [72]:

> *A matter arises under a treaty if, directly or indirectly, the right claimed or the duty asserted owes its existence to the treaty, depends upon the treaty for its enforcement or directly or indirectly draws upon the treaty as the source of the right or duty in controversy.*

7. Dr Ward SC explains that it is a very unusual circumstance for a right or duty to owe its existence to a treaty because in Australia the general position is that treaties do not give rise to rights or obligations in a directly enforceable sense unless and until they are transformed by a legislative act into some piece of domestic parliamentary legislation and that legislation will give rise to the rights and obligations. This system was a vestige of the British common law.

8. The case of *Bradley v Commonwealth* (1973) 128 CLR 557 concerned the Post Master General of Australia withdrawing services from the self-proclaimed Rhodesian Information Centre in Sydney because the Post Master General believed he was complying with a Security Council resolution of the United Nations. The High Court found that a Security Council resolution in and of itself gave rise to no enforceable rights or obligations unless and until it was implemented by legislation in Australia.

The Incorporation of International Law

9. The incorporation of international law differs according to whether the source of the law is a treaty or customary international law.

10. Treaties between States look like contracts. They can be bilateral (between two States) or multi-lateral (between many States). Treaties can also be the subject of reservations, whereby a State will enter into a treaty but decline to consent to certain aspects of the treaty.

11. Customary international law is the universal or nearly universal practice of States done in the belief that the practice is required by law. Well-known rules of customary international law include prohibitions against acts of piracy and genocide.

Treaties

12. Australian legislation may incorporate a treaty by reference, so consideration must be had to the terms of the implementing legislation. The legislation might also stipulate that a treaty is to have effect under Australian law. This occurs to varying degrees as follows:

    (i) The treaty may be used to define legislative words or expressions. Absent any contrary parliamentary intention, the Australian legislative provision should ordinarily be construed in accordance with the meaning to be attributed to the treaty provision under international law.

    (ii) Legislation expressly incorporates treaty text. Where treaty text is transposed into legislation so as to enact the treaty as part of Australian law, the prima facie Parliamentary intention is that the transposed text carries the same meaning in the legislation as it bears in the treaty.

    (iii) The treaty text is annexed or scheduled to an Act. Annexing or scheduling the text of a treaty to legislation does not create justiciable rights for individuals.

(iv) Australian legislation might stipulate in its object and purpose clause that its provisions are intended to be construed consistently with a particular treaty. However, preambular words which refer to a treaty do not make that treaty part of Australian law.

(v) A treaty may be part of the extrinsic materials to legislation. Extrinsic materials which can be used during the process of statutory interpretation includes treaties and other international agreements referred to within legislation. Consider the elements of s 15AB of the *Acts Interpretation Act 1901* (Cth):

SECTION 15AB:

Use of extrinsic material in the interpretation of an Act

(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:

…

(d) any treaty or other international agreement that is referred to in the Act;

…

(vi) Legislation may be enacted in anticipation of ratifying a treaty. Where legislation is ambiguous, then it is permissible to refer to that treaty to resolve the ambiguity, but not to displace the plain words of the legislation.

Customary international law

13. There are two theories on the relationship between customary international law and Australian law:

(i) transformation or adoption. Customary international law becomes a part of Australian law only when formally adopted or positively recognised by Parliament or Australian courts through legislation or the common law.

(ii) automatic incorporation. Customary international law is automatically a part of or a 'source' of Australian law unless inconsistent with legislation or a common law rule.

14. Lord Denning in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 was favourable to the automatic incorporation theory. However, Australian courts have not clearly adopted either approach: see *Nulyarimma v Thompson; Buzzacott v Hill & Ors* [1999] FCA 119.

15. Dr Ward SC notes that the dispute in *Nulyarimma* was not an appropriate vehicle as a test case for the status of customary international law in Australia. The case concerned members of the Aboriginal community alleging that members of the Australian Parliament had committed genocide.

<u>The Effects of International Law on Australian Law, Even if Not Directly Incorporated</u>

16. Australia is 'dualist' insofar as the international legal system and the Australian legal system are considered separate and distinct legal systems. But one does not need to incorporate treaties directly into Australian law in order to give them effect. The interaction between international law and Australian law is as follows:

(i) International law as such does not form part of Australian law.

(ii) Effect is first and foremost given to Australian law. Australian courts resolve legal issues by considering the Australian legal position.

(iii) Australian courts can refer to international law in certain circumstances, including:

(a) the statutory interpretation process: In the absence of any contrary indication, Australian law is to be interpreted consistently with Australia's international obligations. By this means Australian courts can ensure conformability with international law. However, international law must be clearly established before Australian courts will consider giving effect to it. But in the event of conflict, international law cannot be invoked to override clear and valid Australian legal provisions (even where doing so may cause Australia to be in breach of its international obligations).

(b) international law as a guide to developing the common law:

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 (*Mabo v The State of Queensland* [No 2] (1992) 175 CLR 1, Brennan J at 42 (Mason CJ, McHugh J agreeing at 15)).

(c) doctrine of legitimate expectations: Treaty ratification may create a legitimate expectation of international legal compliance by the executive and administrative agencies. In the absence of legislative or executive indications to the contrary, if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, then procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course: see *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20 and *Minister for Immigration and Ethnic Affairs; Ex parte Lam* [2003] HCA 6.

(d) Constitutional interpretation: there is a divergence of opinions in the High Court as to whether international law can influence the interpretation of the Commonwealth Constitution. Kirby J expressed the view on more than one occasion that international law is a legitimate influence on the interpretation of the Constitution. However, McHugh J in *Al-Kateb v Godwin* (2004) 219 CLR 562 strongly expressed the opposite view.

<u>Applicable Principles of Construction when Australian Courts Consider International Law</u>

17. When construing Australian legislation in light of a treaty:

(i) The provisions of a treaty to which Australia is a party do not form part of Australian law unless and to the extent that those provisions have been legislatively implemented.

(ii) A treaty to which Australia is a party does not grant rights for or impose obligations upon Australians under Australian law. Treaties do not generally have a 'direct effect' or are 'self-executing' under Australia law.

(iii) A treaty cannot be used to qualify or modify an express statutory definition or be referred to for the purposes of statutory interpretation where it is not apparent that the legislation was intended to give effect to that treaty.

(iv) Where legislation purports to give effect to a treaty, Australian courts may look at the treaty as an aid to interpretation in order to resolve any legislative ambiguity.

(v) Legislation is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with international law. The presumption of compliance or compatibility provides that consistency with Australia's international obligations will be assumed in the absence of clear words to the contrary.

(vi) Effect will be given to clear and unambiguous legislation even if that may be inconsistent with or contrary to international law. Australian courts will attempt to avoid constructions which could occasion a breach of Australia's international obligations. However, an interpretation or application of Australian law may unavoidably put Australia in breach of its international obligations, which then becomes a matter for the executive.

(vii) Human rights and fundamental freedoms can only be curtailed or abrogated by clear and specific words. Australian courts will not impute to Parliament an intention to abrogate or curtail certain human rights or fundamental freedoms, including rights and privileges recognised under the common law, unless such an intention is clearly manifested by unambiguous and unmistakable language. This approach is consistent with the principle of legality which provides that general words in legislation should be construed in accordance with fundamental human rights.

<u>The Jurisdiction of International Courts and Tribunals & their Constitution</u>

18. International tribunals and courts are constituted by the consent of Nation States to establish particular dispute resolution mechanisms. International tribunals could either be standing tribunals (e.g. the International Court of Justice established under the UN Charter) or ad hoc tribunals for particular legal disputes.

19. In the case of the International Court of Justice, Article 36 of *the Statute of the International Court of Justice* (annexed to the United Nations Charter) provides that the jurisdiction of the Court arises in one of two ways. Jurisdiction either arises in cases which are specifically referred to it by States or where States have consented in advance for categories of case to be brought before the Court. For example, States may agree within a treaty to resolve disputes of interpretation via the Court. Australia has accepted the jurisdiction of the Court to determine any dispute brought by any State subject to a reservation regarding disputed maritime boundaries and resources within those boundaries.

20. An example of an arbitral, ad hoc tribunal occurred in the dispute between the Philippines and China regarding the South China Sea. The Philippines sought the establishment of a UN tribunal under the *United Nations Convention on the Law of the Sea* (UNCLOS) regime. China refused to participate in the establishment of the tribunal but nevertheless, because of the rules in UNCLOS, the Philippines was able to cause the establishment of the tribunal which was able to consider the Philippines' claims and give a very well-reasoned award, finding that most of the land features claimed by China were not actually capable of giving rise to maritime zones because they were not islands but simply rocks or submerged features.

21. In summary, an international tribunal will only have the jurisdiction given to it by States and no greater jurisdiction than that.

Applicable Principles of Construction when an International Court or Tribunal Considers International Law, and the Approach of Australian Courts

22. Reference should be made to the 1969 *Vienna Convention on the Law of Treaties* (**VCLT**) ratified by Australia in 1974 and entered into force for Australia in 1980 for legal questions involving the interpretation, application, withdrawal and validity of treaties as well as the mechanics of treaty formation. Many of the VCLT provisions are declaratory of customary international law. The key principles are:

(i) Every treaty in force is binding upon a State party (the principle of pacta sunt servanda) and must be adhered to or performed in good faith.

(ii) Rules of treaty interpretation under the VCLT:

> **ARTICLE 31:**
> ***General rule of interpretation***
>
> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
> *2. Context includes the text, preamble and annexes, and any agreement or instrument made between all the parties*
> *3. Also consider:*
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and*

(c) any relevant rules of international law applicable in the relations between the parties.

ARTICLE 32:
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

23. Resort to the preparatory material may not always be of assistance because such materials may be partial, incomplete or misleading. A cautious approach is advisable given the primacy given to the treaty text.

24. The presenters note that international tribunals tend to have resort to preparatory materials and the like without explicitly satisfying the requirements under Article 32.

For Australian courts:

25. The VCLT generally applies when Australian courts interpret a treaty: see *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225. Australian courts generally follow the approach envisaged by Articles 31 and 32 of the VCLT.

26. International law must be capable of providing assistance in construing the meaning and effect of an Australian legal provision - there may be no ambiguity in Australian law or international law may be the same as Australian law.

27. Treaties should be interpreted in a liberal manner. Treaty wording may reflect a lack of precision. As a product of diplomatic negotiation and political compromise, treaties are not drafted with the same degree of precision as legislation. Accordingly, technical principles of common law construction are generally disregarded in construing a treaty text.

28. Practitioners should strive for consistency in treaty interpretation in light of the position taken by international bodies and other States.

29. Australian courts may be influenced by several doctrines of Australian law which may not trouble an international court or tribunal:

(a) Non-justiciability: Judicial proceedings involving international legal questions can give rise to controversies concerning the functions or responsibilities of the executive. These questions may be beyond the competence of Australian courts on the basis that there are no judicially-manageable standards for resolving such questions.

(b) Acts of State:

- the foreign act of State doctrine: every State will respect the independence of every other sovereign State, and Australian courts will not judge another government's acts done within its own territory.
    - Executive certificates can be accepted by Australian courts as evidence of certain matters in litigation involving foreign relations.
- the domestic act of State doctrine: certain acts committed by Australia in conducting foreign affairs may raise issues about the exercise of prerogative powers by the executive (eg territorial boundaries; recognising the status of diplomatic representatives; treaty-making and ratification; recognition). Australian courts are mindful of separation of powers considerations.

(c) Immunity: reflecting the contemporary doctrine of restrictive State immunity, a foreign State can be made a party to proceedings in certain cases e.g. commercial transactions. See further *Foreign States Immunities Act 1985* (Cth).

<u>The Enforcement of International Court Orders in Australia</u>

30. An Australian court will not assist in the enforcement of an international tribunal decision between two States given the doctrine of foreign state immunity and the *Foreign States Immunities Act*.

31. That does not mean that an international tribunal decision is not enforceable. These decisions are enforced as a matter of international law per the *pacta sunt servanda* principle and are generally complied with.

32. The recent whaling decision between Australia and Japan that went to the International Court of Justice resulted in orders against Japan requiring Japan to cease commercial whaling activities and to revoke any existing permits issued by Japan to commercial whaling vessels. Japan complied with the order of the Court.

33. On other hand, China has indicated that it will not be complying with the South China Sea Arbitration Tribunal because it did not recognize the jurisdiction of the tribunal at all. China considered that a reservation it took to UNCLOS took the dispute outside the jurisdiction of the arbitration panel. The arbitration panel disagreed with China's view on its jurisdiction and proceeded to hear the matter ex parte. Dr Ward SC notes that this example might demonstrate the ultimate failing of the international legal system when dealing with very powerful states which cannot be forced to comply with an award.

Investor State Dispute Settlement Clauses

34. Investor State Dispute Settlement (ISDS) clauses have been controversial recently notwithstanding their existence dating to the 1950's. The concept is to allow a private investor to protect its investment overseas. In the 1970's, there were a series of very large oil companies that were significantly impacted by the nationalization of oil production in many Middle Eastern countries. The compensation processes employed by the companies to try and recoup the hundreds of millions of dollars which the governments legislated away were complex and not very effective. This situation gave rise to the popularity of ISDS clauses which establish in advance the possibility of an investor being able to sue for value to protect investments made in foreign countries.

35. Although ISDS clauses are not new, what is new is that they are being placed within multi-lateral treaties including NAFTA and the Trans-Pacific Partnership (TPP) (proposed). These ISDS clauses open up the possibility of investors bringing suit against countries such as Australia for normal policy positions, as opposed to the Middle Eastern nationalization of entire industries. Recently, the tobacco company Phillip Morris took Australia to an International Arbitration pursuant to an ISDS clause and argued that Australia had infringed upon the company's intellectual property rights following plain-packaging legislation. The tribunal there considered that there was no jurisdiction to bring suit against Australia because the matter fell outside the ISDS clause but the dispute involved Australia employing significant resources to meet the challenge.

BIOGRAPHY

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Dr Christopher Ward SC was admitted as a solicitor in 1993 before being called to the Bar in 1998 and appointed as a Senior Counsel in 2015. He is a recognised expert in international law (public and private) and has particular expertise in cases which involve the domestic and international law interface. He has worked regularly in areas such as human rights, maritime boundary and diplomatic immunity.

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Dr Stephen Tully was admitted as a solicitor in 2006 before being called to the Bar in 2014. Dr Tully was previously a solicitor with the Migration and Refugee Tribunals, Commonwealth tribunals practising administrative and immigration law. He became an Accredited Specialist in Government and Administrative Law in 2011. He is also the section editor on Immigration and International Aspects for the Australian Journal of Administrative Law. He has a broad public and private law practice.

BIBLIOGRAPHY

Cases

Al-Kateb v Godwin (2004) 219 CLR 562
Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225
Bradley v Commonwealth (1973) 128 CLR 557
Mabo v The State of Queensland [No 2] (1992) 175 CLR 1
Minister for Immigration and Ethnic Affairs; Ex parte Lam [2003] HCA 6
Minister for Immigration and Ethnic Affairs v Teoh [1995] HCA 20
Nulyarimma v Thompson; Buzzacott v Hill & Ors [1999] FCA 119
R v East; Ex parte Nguyen (1998) 196 CLR 354
Trendtex Trading Corporation v Central Bank of Nigeria [1977] QB 529

Legislation

Acts Interpretation Act 1901 (Cth)
Commonwealth Constitution
Federal Court Act 1976 (Cth)
Foreign States Immunities Act 1985 (Cth)
Statute of the International Court of Justice
Supreme Court Act 1970 (NSW)
United Nations Convention on the Law of the Sea (UNCLOS)
Vienna Convention on the Law of Treaties