

The Brennan Lecture

Bond University

OIL AND WATER?

- INTERNATIONAL LAW AND DOMESTIC LAW IN AUSTRALIA

Chief Justice RS French

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Introduction

1 It is a privilege to be invited to deliver this 7th lecture in the series of annual lectures in honour of Sir Gerard Brennan. His great contribution to the law in Australia is too well known to repeat. I am also honoured to be presenting the lecture under the auspices of the Bond University Law School on the occasion of its 20th anniversary.

2 My topic concerns the interface of international and domestic law, a subject to which Sir Gerard made a substantial contribution. In his historic judgment in *Mabo*, he referred to the decline of the concept of terra nullius at international law and its implications for the common law of Australia¹. His frequent observations about the effect of international law on the developed common law were no mere rhetorical flourish. He said²:

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. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.

¹ *Mabo v The State of Queensland [No 2]* (1992) 175 CLR 1 at 40-43, referring at 40-41 footnotes 101 and 102 to the decision of the International Court of Justice in its *Advisory Opinion on Western Sahara* [1975] ICJR 12 at 39 and 85-86.

² (1992) 175 CLR 1 at 42 (Mason CJ, McHugh J agreeing at 15).

He revisited the topic in *Dietrich v The Queen*³ which recognised the right of an accused person to a fair trial and the power of a court to stay proceedings where the accused person is unrepresented and where such representation is essential to a fair trial. He referred to Art 14 of the International Covenant on Civil and Political Rights, which includes the right to have legal assistance in any cases where the interests of justice so require. Citing what he had written in *Mabo*, he said⁴:

Although this provision of the Covenant is not part of our municipal law, it is a legitimate influence on the development of the common law.

In the same case, Mason CJ and McHugh J also referred to international instruments defining the attributes of a fair trial⁵.

3 The judgments in *Mabo* and *Dietrich* discussed the effects of international human rights instruments on the development of the common law. Their effects are perhaps more powerfully evidenced in the human rights statutes, particularly those imposing substantive legal prohibitions against forms of unfair discrimination, including racial and sexual discrimination. However, the engagement of international law and domestic law in Australia is multifaceted.⁶ It goes far beyond human rights, to trade and commerce, competition policy, intellectual property, maritime law, the international movement of peoples, the enforcement of the criminal law including measures against war crimes, the environmental protection of the planet, the conservation of living and natural resources, mutual judicial assistance and recognition and the defence of nations. As Sir Ninian Stephen said in *Koowarta* in 1982⁷ no nation, even an entire island continent, can be an "Island entire of it self". The economics and politics of the international community affect all. The nature and coherence of international law is subject to debate, but there can be no debate about its importance for the community of nations. Its intersections with our domestic law are inescapable but the nature of that intersection is complex and evolving⁸. In this lecture I try

³ (1992) 177 CLR 292.

⁴ (1992) 177 CLR 292 at 321 at footnote 10.

⁵ (1992) 177 CLR 292 at 300.

⁶ See Horrigan and Fitzgerald, 'International and Transnational Influences on Law and Policy Affecting Government', in Horrigan (ed.), *Government Law and Policy: Commercial Aspects*, (Federation Press, 1998), at 10 and following.

⁷ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 211.

⁸ See for example Sir Gerard Brennan, "The Role and Rule of Domestic Law in International Relations" (1999)

to offer an overview of some issues surrounding the nature of international law and its sources, and the ways in which it impacts upon Australian domestic law.

4 It is important at the outset that we recognise that the story about the role of international law and our domestic law is not told simply by describing its consideration in the courts. Much of the interaction takes place at the level of legislative, administrative and commercial practice which will never see the inside of a courtroom.

5 It is also important that we do not allow legal insularity to hamper our national engagement with international legal systems. We should derive from these systems such benefits as they may offer to the development of our own law and our more effective interaction with other countries, particularly those in our region. Insularity is seen by some astute Australian observers as a current and significant impediment to a fuller and more beneficial engagement. Chief Justice Spigelman speaking earlier this month at Sydney University Law School, referred to the importance of a global perspective on commercial matters and expressed regret "that there are still areas of the law which remain inward looking and parochial. From time to time there emerge particular reforms that indicate a global outlook, but they occur on an ad hoc basis in particular categories of reference"⁹. Justice Paul Finn has also drawn attention to barriers to Australian engagement in areas of international legal thought which have the potential to bear upon the shaping and development of our common law. He has focussed particularly on the law of contract and its self-evident international dimension. He said and I agree¹⁰:

This international dimension is becoming of increasing importance as international commercial law falls increasingly under the influence of internationally accepted general principles and trade practices and usages, particularly in the context of international commercial arbitration.

The character of international law

6 The concept of international law is elusive. The legitimacy of its claim to be law has

¹⁰ *Public Law Review* 185.

⁹ Spigelman, "Corporate Governance and International Business Law: Book Launch", Sydney Law School, University of Sydney, 18 June 2009.

¹⁰ Finn, "Internationalisation or Isolation: The Australian Cul de Sac? The Case of Contract Law", Bond University 20th Anniversary Symposium, 26-27 June 2009.

been questioned since it first became a subject of study. In 1625, Hugo Grotius said¹¹:

... there is no lack of men who view this branch of law with contempt as having no reality outside of an empty name.

Grotius' work *Law of War and Peace*, has been called "first systematic exposition"¹² of international law.

7 One hundred and fifty years after Grotius, Blackstone, perhaps optimistically, defined international law by reference to rationality, consent and natural justice. He described it as "a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world..."¹³. These rules could not be dictated by one State to another but necessarily resulted from principles of natural justice agreed upon by "the learned of every nation" or "on compacts or treaties". Now, nearly 400 years after Grotius and notwithstanding Blackstone, international law still faces taxonomical challenges¹⁴. It sometimes seems to be regarded as little more than an emergent property of the coincident self-interest of collections of States¹⁵. Its critics frequently focus their scepticism, sometimes bordering on cynicism, on the institutions which administer particular areas of international law. On occasions the criticisms reflect domestic culture wars relating to the orientation and priorities of some of the international institutions.

8 There are undoubtedly serious definitional issues which have to be considered in any debate about whether international law is properly called "law"¹⁶. The writers of the late 19th and early 20th centuries spoke of it in terms of rules of conduct regarded as binding between themselves by civilised states. They spoke of the "the law of the *society* of states or nations"¹⁷. But perspectives have changed over time. Shifts of emphasis in definition were reflected in successive Digests published by the United States State Department throughout

¹¹ Hugo Grotius, 'Prolegomena' in *ibid*, at 9.

¹² Scott, 'Introduction' in Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, (trans. Kelsey) (Oceania Publications, 1964), vpl. 2 at xliii.

¹³ Blackstone, *Commentaries on the Laws of England*, (Clarendon Press, 1769), vol IV at 66-67.

¹⁴ Goldsmith and Posner, *The Limits of International Law*, (Oxford University Press, 2005) at 3.

¹⁵ *Ibid*.

¹⁶ Jessup, *A Modern Law of Nations: An Introduction*, (McMillan, 1948) at 5.

¹⁷ Hall, *A Treatise on International Law*, 3rd edition (Clarendon Press, 1890) at 1; and Westlake, *International Law*, (Clarendon Press, 1904) part 1 at 1; both cited in Lauterpacht (ed.), *International Law – Being the Collected Papers of Hersch Lauterpacht* (Cambridge University Press, 1970) at 1 footnote 1.

the 20th century¹⁸. Moore's Digest in 1906 referred to international law as "something more than positive legislation of independent States", denoting "... a body of obligations which is, in a sense, independent of and superior to such legislation"¹⁹. Hackworth's Digest in 1940 called it "... a body of rules governing the relations between States" but questioned whether it could be called "law" in a legal or Austinian sense²⁰. In 1963, Whiteman's Digest spoke of "... a standard of conduct, at a given time, for states and other entities subject thereto. A notable shift was from "law" to "rules" to "a standard of conduct".

9 The system of international law was described in 1960 by Hersch Lauterpacht, one of the foremost jurists in the field, as "immature" in character, imprecise and uncertain in its rules. It lacked the legislature, an executive and a judiciary with compulsory jurisdiction. These "shortcomings" as Lauterpacht called them nearly 50 years ago persist in varying degrees today despite the immense amount of development in the content, diversity and complexity of international law and its institutions²¹. HLA Hart in his classic text, *The Concept of Law*²², writing at about the same time as Lauterpacht made his observations, applied the domestic law model in a manner which cast doubt upon the character of international law as law. He too referred to the absence of an international legislature, of courts of compulsory jurisdiction, and of centrally organised sanctions. These absences, he said, inspired misgivings in the breast of the legal theorist. He wrote²³:

It is indeed arguable ... that international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules. These differences are indeed striking and the question 'is international law really law' can hardly be put aside.

10 Those concerns were echoed a decade later by Richard Falk who pointed to the

¹⁸ Rosenne, *The Perplexities of Modern International Law*, (Martinus Nijhoff, 2004) at 4-6. The Digest references cited in footnotes 19 and 20 below are taken from the footnotes provided by Rosenne.

¹⁹ Moore, *A Digest of International Law as Embodied in Diplomatic Discussions, Treaties and Other International Agreements, International Awards, the Decisions of Municipal Courts, and the Writings of Jurists, and Especially in Documents, Published and Unpublished, Issued by Presidents and Secretaries of State of the United States, the Opinions of the Attorneys-General, and the Decisions of Courts, Federal and State*, (Government Printing Office, 1906) vol 1 at 2.

²⁰ Hackworth, *Digest of International Law* (United States Government Printing Office, 1940) vol 1 at 1.

²¹ Lauterpacht, above note 17, at 31-33.

²² Hart, *The Concept of Law*, (Clarendon Press, 1961).

difficulty posed to the development of a comprehensive theory of international law, by the absence of mechanisms for its authoritative interpretation and by problems of non-compliance. Falk posed the question²⁴:

In a government of laws we do not authorise officials to depart from domestic law to promote certain urgent policies. Can we find a rationale for such departure for international law? Are we prepared to acknowledge that international law is less binding upon government officials than domestic law.

- 11 The question is live in 2009. Professors Goldsmith and Levinson in the most recent part of the *Harvard Law Review*, have referred to the divide between international and domestic law which "runs deep in Anglo-American legal thought"²⁵. In that thought, domestic law is regarded as the paradigm of a working legal system:

Legal rules are promulgated and updated by a legislature or by common law courts subject to legislative revision. Courts authoritatively resolve ambiguities and uncertainties about the application of law in particular cases. The individuals to whom laws are addressed have an obligation to obey legitimate lawmaking authorities, even when legal rules stand in the way of their interests or are imposed without their consent. And in cases of disobedience, an executive enforcement authority, possessing a monopoly over the use of legitimate force, stands ready to coerce compliance

- 12 Professor Gillian Triggs of the Sydney University Law School has made the answering point, which has ample support among international law jurists, that international law is law because States and non-State actors treat it as obligatory in their international relations²⁶:

A feature of all organised legal communities is that commands properly issued will be obeyed. It has remained true that most States abide by the rules of international law almost all of the time.

Her contention about the extent to which international law works in practice must be

²³ *Ibid*, at 209.

²⁴ Falk, *The Status of Law in International Society*, (Princeton University Press, 1970) at 3.

²⁵ Goldsmith and Levinson, *Law for States: International Law, Constitutional Law, Public Law* (2009) 122 *Harvard Law Review* at 1792.

²⁶ Triggs, *International Law, Contemporary Principles and Practices*, (LexisNexis, 2006) at 4; citing also Waldoph, (ed), *Brierly's The Law of Nations: An Introduction to the International Law of Peace*, 6th ed, (Oxford University Press, 1963) at 72; Henkin, *International Law: Politics and Values* (Martinus Nijhoff Dordecht, 1995) at 320.

acknowledged. If it did not, as she said, "No mail would go from State to State, no currency or commercial transactions would take place"²⁷.

- 13 This reflects the caution offered earlier about the extent to which international law finds its place in domestic law, policies and practices which are never or rarely litigated.

Is international law like constitutional law?

- 14 It has been suggested that some of the so-called shortcomings of international law are shared with constitutional law. Professors Goldsmith and Levinson point to the absence of a centralised legislature to specify and update legal norms, and the limitations faced by constitutional courts in resolving the existence and meaning of constitutional norms in a way that provides authoritative settlement. They said²⁸:

As a result, constitutional law suffers from the same kinds of foundational uncertainty and contestation over meaning that are viewed as characteristic of international law. Constitutional law also shares with international law the absence of an enforcement authority capable of coercing powerful political actors to comply with unpopular decisions.

It seems, however, something of an over-generalisation to propose that the basic features of international law which call into question its efficacy and legitimacy are shared by constitutional law generally²⁹. After all, there are constitutions and then there are constitutions. This brings me to the Australian Constitution and its nature and, relevantly to the present topic, whether and how it interfaces with international law.

International law and the interpretation of the Constitution

The Australian Constitution is statutory in origin. It is part of an Act of the United Kingdom Parliament. The powers it creates are distributed among the elements of the Australian federation and between the different branches of the Commonwealth government.

²⁷ Quoting Franck, *The Power of Legitimacy Among Nations*, (Oxford University Press, 1990) at 20 cited in Triggs op cit at 4.

²⁸ Goldsmith and Levinson, *Law for States: International Law, Constitutional Law, Public Law* (2009) 122 *Harvard Law Review* 1792.

²⁹ Goldsmith and Levinson, op cit at 1794.

Its origin informed its characterisation by Sir Owen Dixon in 1935 in the following terms³⁰:

It is not a supreme law purporting to obtain its force from the direct expression of a peoples' inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions.

If viewed simply as a statute, the occasions for the application to its construction of the rules of international law would seem to be limited to those rules which predated its coming into force. The rejection by the High Court of the suggestion that the powers conferred by the Constitution can be read down by reference to international law runs deeper than a confession and avoidance of the long-standing rule of statutory construction.

15 The relationship between rules of international law and the scope of the legislative powers conferred upon the Commonwealth Parliament by the Constitution was considered in *Polites v The Commonwealth*³¹. That case concerned s 13A of the *National Security Act* 1939-1943 (Cth) providing for compulsory military service and the question whether it extended to aliens present in Australia. It was argued that the Act and the constitutional power to make laws with respect to defence should be construed in accordance with a rule of customary international law that restricted the right of nations to conscript aliens within their borders. This was a rule which predated the enactment of the Constitution by the United Kingdom Parliament.

16 In rejecting a construction of a *National Security Act* which would have accorded with international law, the Court accepted the applicability of the well-established rule of statutory interpretation expressed by Dixon J that³²:

... unless a contrary intention appear, general words occurring in a statute are to be read subject to the established rules of international law and not as intended to apply to persons or subjects which, according to those rules, a national law of the kind in question ought not to include.

In relation to the effect of the rule of international law upon the scope of the constitutional

³⁰ Dixon, "The Law and the Constitution" (1935) 51 *Law Quarterly Review* 590 at 597.

³¹ (1945) 70 CLR 60.

³² (1945) 70 CLR 60 at 77 per Dixon J.

defence power, Dixon J said³³:

The contention that s 51(vi) of the Constitution [the defence power] should be read as subject to the same implication, in my opinion, ought not to be countenanced. The purpose of Part V of Chapter I of the Constitution is to confer upon an autonomous government plenary legislative power over the assigned subjects. Within the matters placed under its authority, the power of the Parliament was intended to be supreme and to construe it down by reference to the presumption is to apply to the establishment of legislative power a rule for the construction of legislation passed in its exercise. It is nothing to the point that the Constitution derives its force from an Imperial enactment. It is none the less a constitution.

Rich J in similar vein would not construe the legislative powers of the Commonwealth as "anything but as plenary and ample within their ambit 'as the Imperial Parliament in the plenitude of its power possessed and could bestow'"³⁴. Starke J also rejected the proposition that the legislative power of the Commonwealth and its legislation "... is limited by or must be construed so as not to contravene the rules of the law of nations". He said³⁵:

So to limit the constitutional power of sovereign States or their subordinate authorities denies the supremacy of those States within their own territory, which is contrary to the principles of the law of nations itself. And to refuse to give words in legislation their grammatical and ordinary signification because of some practice or rule of the law of nations is contrary, as I think, to settled principles of construction. Cases of ambiguity I leave on one side, for there is no ambiguity in the meaning of the present regulations.

The common theme of the court's rejection of the proposition that limitations derived from international law were imposed upon the law making power of the Commonwealth was that the grant of power to the parliament was plenary. It was not in that respect a lesser parliament than its progenitor.

17 It is questionable, and it might be an open question, whether the continued force of these propositions would be materially affected by the view taken of the source of the Constitution's continuing authority; whether it depends on the United Kingdom Parliament or on the continuing imputed consent of the people. In the latter case, however, the source of

³³ (1945) 70 CLR 60 at 78.

³⁴ (1945) 70 CLR 60 at 74, citing *Hodge v The Queen* (1883) 9 AC 117 at 132; see also at 175 per Starke J.

³⁵ (1945) 70 CLR 60 at 75-76.

the authority becomes more diffuse. The latter view may perhaps be capable of supporting argument about the contemporary susceptibility of the Constitution to a wider range of normative influences. An early proponent of popular sovereignty was Murphy J. His Honour thought that the United Kingdom Parliament ceased to be an Imperial Parliament in relation to Australia at the inauguration of the Commonwealth, and that the existing authority of the Constitution was "its continuing acceptance by the Australian people"³⁶. For some years he was a lone judicial voice for that proposition. But in 1992, the concept of the Constitution as a framework for the exercise of sovereign power on behalf of the Australian people was propounded by Mason CJ in the *Australian Capital Television* case³⁷. He said that the *Australia Acts* 1986 marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people. On the other hand, Professor George Winterton cautioned against breaking the chain of legal authority from the British Parliament. He was concerned about moving it into what he called an "extra-legal realm", which he described as³⁸:

... a world of legal fiction in which there are no boundaries except, practically, political power and, theoretically, the limits of imagination.

- 18 Professor Winterton's caution might raise the question whether the interpretation of a constitution based upon popular sovereignty could be informed by such shifting conceptions as "community values" or "community attitudes" and thereby rendered more permeable to international influences than the constitution regarded simply as a statutory instrument. Some might also say in such a case, that a shift of the foundation of the constitutional authority into popular sovereignty would bring it within the scope of the Goldsmith and Levinson analogy, and difficulties of the kind that attach to the sources and determination of international law. It seems to me that whatever view is taken of the source of authority of the Constitution today, contestation over meaning is inevitable.

³⁶ *Bisticic v Rokov* (1976) 135 CLR 522 at 566; *Robinson v Western Australia Museum (The Gilt Dragon Case)* (1977) 138 CLR 283 at 343-344; *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351 at 383; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 231-239 (Murphy J). See Commentary in Kelly, "The Queen of the Commonwealth of Australia", (2001), 16(1) *Australian Parliament Review* 150 at 164. See also the more moderately expressed view of Deane J in *University of Wollongong v Metwally* (1984) 158 CLR 447 at 476-477; *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351 at 442.

³⁷ *Australian Capital Television v The Commonwealth* (1982) 177 CLR 106 at 138.

³⁸ Winterton, "Popular Sovereignty and Constitutional Continuity", (1998) 26 *Federal Law Review* 1 at 7.

The sources of international law

19 International law and domestic law differ in the character of their sources. Domestic law is derived from and legitimated by the constitutional machinery of law-making³⁹. In common law countries the incremental and interstitial law-making function of the judiciary must also be taken into account. It is not expressed in any formal constitutional rule but is so intrinsic to the judicial function that it may be said to have a constitutional character about it. On the other hand there is no global constitutional machine which acts as a formal source of international law⁴⁰.

20 There has been a post-war explosion of international law reflected in the growth of international institutions, treaties, conventions and instruments. But the particular challenges it poses for interpretation by domestic courts where interpretation is required were recognised well before that explosion. In 1934, the Judicial Committee of the Privy Council was required by an Order in Council dated 10 November 1935 to provide what amounted to an advisory opinion on a question of international law relevant to the exercise of domestic jurisdiction. The question was whether actual robbery was an essential element of the crime of *piracy jure gentium*. In holding that it was not, the Judicial Committee acknowledged the wider range of sources available to it than if it were examining a question of domestic law. The Lord Chancellor, Viscount Sankey said⁴¹:

The sources from which international law is derived include treaties between various States, State papers, municipal Acts of Parliament and the decisions of municipal Courts and last, but not least, opinions of *jurisconsults* or text-book writers. It is a process of inductive reasoning.

21 The disparate sources and want of a legislature, an executive and a defining supranational judiciary had its own impact on the attitude of the Privy Council in the process of ascertaining the content of international law. Viscount Sankey went on to say⁴²:

Speaking generally, in embarking upon international law, their Lordships are to a great extent in the realm of opinion, and in estimating the value of opinion it is permissible not only to seek a consensus of views, but to select what appear to be the better views upon the question.

³⁹ Brownlie, *Principles of Public International Law*, 7th ed, (Oxford University Press, 2008) at 3.

⁴⁰ *Ibid*, at 3.

⁴¹ *In re Piracy Jure Gentium* [1934] AC 586 at 588.

⁴² [1934] AC 586 at 588-589.

Since that time, 75 years ago, there has been a massive expansion in the number and variety of sources of international law and the number of quasi lawmakers in particular subject areas. There are institutions, including regional bodies, involved in interpreting international law generally or in particular subject areas. International or regional courts or tribunals concerned with war crimes, competition law and the law of the sea are examples of such bodies. The Courts of the European Union are perhaps leading-edge examples of this phenomenon. The rise of international commercial arbitration also coincides with the development of a global jurisprudence informing commercial transactions.

22 In ascertaining rules or principles of international law or obligations arising from it in particular cases, it is necessary to look to sources not organised into any clear hierarchy. To some sceptics, particularly in relation to customary international law, this may seem to sanction self-serving searches of the entrails of State practice and the opinion of learned writers for anything that might yield a helpful proposition. That scepticism may be exacerbated by the sheer volume of material in the field and the corresponding difficulties of discerning principles of customary international law which is a challenge even for the expert in the field.

23 There is a basic set of recognised sources which appear to be largely common ground. These were referred to by the Privy Council. They were set out in Article 38 of the Permanent Court of International Justice and are now found in Article 38 of the Statute of the International Court of Justice (ICJ). They are primary sources of law upon which the Court acts. Article 38 provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
 - (b) international custom, as evidence of a general practice accepted as law;
 - (c) the general principles of law recognised by civilised nations;
 - (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono* if the parties agree thereto.

Article 38 of the ICJ Statute assumes the existence of a body of international law to be applied by the ICJ. Although it is not in terms an exhaustive statement of the sources of international law, it has been treated as such so far as it relates to the ICJ⁴³.

- 24 Underpinning these sources is what Lauterpacht called a "superior source" namely "the objective fact of the existence of an independent community of States"⁴⁴. The existence of a societal vessel as a condition of a legal system is well recognised. It was recently restated by the High Court in relation to the recognition, at common law, of traditional Aboriginal laws and customs. The Court, citing Professor Honore, said "... all laws are laws of a society or group"⁴⁵. The concept of an international community or society sometimes seems like an aspirational metaphor when attention is focussed upon conflict and disregard of the rules by States. It also becomes perhaps a little more problematical when extended to non-State actors.

General conceptions of the interaction between international law and municipal law

- 25 Historically, discussions about the interaction between international and municipal law produced two camps, designated "Monists" and "Dualists". Like those who warred in Gulliver's Travels over the relative merits of cracking boiled eggs at the big end and the little end, their views sometimes seem mutually exclusive. The pure Monists regarded international and municipal law as part of a single idea of law which binds individuals albeit in international law their conduct is attributed to States. Dualists, on the other hand, maintained that the sources and content of international law and municipal law differ so greatly that the former can never become part of the latter unless so made by the legislative power of the State⁴⁶.

- 26 Blackstone adopted the Monist view of the relationship between the law of nations and domestic law:

⁴³ Schwarzenberger, *International Law*, (Steven and Sons, 1957) vol. 1 at 26.

⁴⁴ Lauterpacht, above note 17, at 58.

... the law of nations (wherever any question arises which is properly the subject of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land.

Statutes to enforce the "universal law" were merely "declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be part of the civilized world". Examples of the applications of the law merchant as a branch of the law of nations were cited such as bills of exchange and marine causes. In disputes about prizes, ship wrecks, hostages and ransom bills⁴⁷:

... there is no other rule of decision but this great universal law, collected from history and usage and such writers of all nations and languages as are generally approved and allowed of.

27 Blackstone was invoked in the House of Lords recently in *R v Margaret Jones*⁴⁸. Protestors against Britain's involvement in the Iraq war were charged with criminal damage and aggravated trespass at various military bases. They argued that what they were doing was not a crime under the *Criminal Law Act* 1967 (UK) because they were resisting acts by the United Kingdom amounting to the crime of aggression under customary international law. They quoted Blackstone's listing of the "principal offences against the law of nations, animadverted on as such by the municipal laws of England" which included violation of safe conducts, infringement of the rights of ambassadors and piracy⁴⁹. They did not succeed in establishing the proposition that the crime of aggression was part of the law of England in the absence of statutory intervention.

28 Over a century after Blackstone's writings, the *Franconia* case was decided and dualism achieved apparent, although not uncontested, judicial sanction⁵⁰. The *Franconia* was a German ship which collided, as a result of its captain's negligence, with a British vessel offshore from Great Britain. A passenger on the British ship drowned. Thirteen members of the Court of Crown Cases Reserved held that the Central Criminal Court had no jurisdiction

⁴⁵ *Yorta Yorta v Victoria* (2002) 214 CLR 422 at 445 [49] footnote 92.

⁴⁶ See generally Lauterpacht, above note 17, at 216-217.

⁴⁷ Blackstone, *Commentaries on the Laws of England*, Book IV at 67.

⁴⁸ [2007] 1 AC 136.

⁴⁹ [2007] 1 AC 136 at 158 [20].

⁵⁰ *R v Keyn* (1876) 2 Ex D 63.

to try the captain of the *Franconia* for manslaughter. Cockburn CJ said that the sea beyond low water mark was not part of the territory of Britain. And if international law were to the contrary, there was no evidence of assent to it by Britain. The adoption of a contrary principle of international law by the courts would amount to their exercising a legislative function.

29 It has been said that the statement of the dualist principle was beside the point because the rule of international law propounded in the *Franconia* case was too uncertain and unsettled to be adopted by the court. Lauterpacht wrote⁵¹:

It is clear ... that the insistence on the necessity for an act of parliament was due not to the desire to challenge the established doctrine enunciated by Blackstone, but to the uncertainty of international law on the subject.

Professor Ian Brownlie has argued, in like vein, that Cockburn CJ's judgment is consistent with a doctrine of incorporation "if it is seen that he was concerned with the proof of the rules of international law".⁵² Brownlie wrote:

Yet as a general condition he does not require express assent or a factual transformation by act of parliament. In case of first impression the courts are ready to apply international law without looking for evidence of assent.

30 Australian jurisprudence, consistently with *Polites*, embodies a clear cut dualism in relation to the incorporation of treaty or convention obligations into domestic law. As that case made clear however, it does not exclude the application of rules of customary international law and of unincorporated treaty obligations to the interpretation of domestic statutes. The application of the latter to the exercise of discretionary powers under statute is still a matter of debate. Six propositions going to the extent and limits of dualism in Australia were set out by Gummow J in 1992 in *Minister for Foreign Affairs and Trade v Magno*⁵³. In substance, they were as follows:

⁵¹ Lauterpacht, above note 17, at 219.

⁵² Brownlie, above note 39, at 3.

⁵³ (1992) 112 ALR 529 at 534-535.

1. It is for Parliament not the Executive to make or alter domestic law. Legislation is necessary to render international obligations enforceable in the courts.
2. Mere legislative approval of treaties or other obligations assumed by the Executive does not render the treaties or obligation binding on individuals within Australia nor does it create justiciable rights for individuals⁵⁴.
3. Absent parliamentary incorporation by legislation of a convention which has been ratified by Australia, the terms of the convention may still be used in interpreting domestic legislation. The underlying principle is that parliament should be presumed as intending to legislate in accordance with, and not in conflict with, international law.
4. In some cases a statute may adopt the language of a convention in anticipation of Australian ratification. The provisions of the convention may be used to assist resolution of an ambiguity in the interpretation of the statute but not so as to displace its plain words.
5. Administrative decision-makers may have regard, in exercising discretions under international law to international obligations or agreements which have not been incorporated into the domestic law.
6. There may be cases in which an expression used in a domestic statute is given the meaning it bears in a particular convention.

Incorporation of customary international law

The question whether, and if so how, customary international law impacts on Australian domestic law has been the subject of limited judicial consideration. *Polites* has already been mentioned. The question also arose in *Chow Hung Ching v The King*⁵⁵. The appellants were two Chinese nationals who had been convicted of offences on Manus Island, which was part of the Australian Territory of Papua New Guinea. They had been working

⁵⁴ An example is to be found in the *Charter of the United Nations Act 1945* (Cth) which says that the Charter is "approved". This does not make it binding on individuals in Australia.

⁵⁵ (1949) 77 CLR 449.

with a Chinese army team recovering surplus war equipment. They claimed immunity from jurisdiction under customary international law on the ground that they were members of a visiting armed force. The Court denied the claim of immunity, primarily because they were not engaged in the military task. There were some observations in the judgments on the status of customary international law in Australia. The observations taken together did not spell out a single clear position. Douglas Guilfoyle has written⁵⁶:

... in *Ching* three of five judges found that Australian common law could contain customary rules. The question was whether this occurred automatically through qualified incorporation (as Latham CJ and Starke J appeared to hold), or only when a judicial act created a new domestic rule from the 'source' of international law (as Dixon J appeared to find).

Dixon J, in a passage frequently cited, said:

The theory of Blackstone that 'the law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land' is now regarded as without foundation. The true view, it is held, is 'that international law is not a part, but is one of the sources, of English law'. In each case in which the question arises the court must consider whether the particular rule of international law has been received into, and so become a source of, English law.

It has been suggested that Dixon J's comments are indicative of a 'soft' version of either the incorporation or transformation theory⁵⁷. Others are of the opinion that the source view is broadly consistent with transformation because it requires a judicial act to implement customary international law into domestic law.

31 The proposition that a rule of customary international law could be incorporated directly into the common law of Australia to create a criminal offence was rejected by the Full Court of the Federal Court in *Nulyarimma v Thompson*⁵⁸. In two matters dealt with in that judgment, Aboriginal activists sought to charge Commonwealth Ministers with the crime of genocide. The offences were said to have arisen out of the 1998 amendments⁵⁹ to the

⁵⁶ Guilfoyle, "Nulyarimma v Thompson: Is Genocide a Crime at Common Law in Australia?" (2001) 29 *Federal Law Review* 1 at 17.

⁵⁷ Mitchell, "Genocide, Human Rights Implementation and the Relationship between International and Domestic Law: *Nulyarimma v Thompson*" (2000) 24 *Melbourne University Law Review* 15 at 30.

⁵⁸ (1999) 96 FCR 153.

⁵⁹ *Native Title Amendment Act 1998* (Cth).

Native Title Act 1993 (Cth) and the failure of Commonwealth Ministers to apply to the UNESCO World Heritage Committee for inclusion of certain Aboriginal lands on the World Heritage List.

32 The Full Court of the Federal Court held by majority that absent legislation, genocide was not a crime cognisable in Australian courts⁶⁰. Wilcox J held that as a matter of policy in criminal cases courts should decline, in the absence of legislation, to enforce international norms⁶¹. Whitlam J wrote to similar effect⁶².

33 Wilcox J accepted that prohibition of genocide is a peremptory norm of customary international law, giving rise to a non-derogable obligation by each nation State to the entire international community and that the obligation was independent of the Genocide Convention⁶³. He accepted also that the obligation imposed by customary law on each nation state was to extradite or prosecute any person found within its territory who appeared to have committed any of the acts cited in the definition of "genocide" set out in the Convention. He accepted that the definition reflected the concept of genocide as understood in customary international law. He distinguished, however, between the proposition that there was an international legal obligation to prosecute or extradite a genocide suspect and the proposition that a person could be put on trial for genocide before an Australian court without legislation. He referred to the observation by Sir Anthony Mason, writing extra-curially in 1997, that⁶⁴:

the difficulties associated with the incorporation theory and proof of customary international law suggest that, in Australia, the transformation theory holds sway.

He referred also to the difficulty of making a general statement covering the diverse rules of international customary law⁶⁵:

It is one thing, it seems to me, 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

⁶⁰ (1999) 96 FCR 153 at 161 [17], 162 [20], 166[32] per Wilcox J and at 173 [57] per Whitlam J.

⁶¹ (1999) 96 FCR 153 at 164 [26].

⁶² (1999) 96 FCR 153 at 173 [57].

⁶³ (1999) 96 FCR 153 at 161 [18].

⁶⁴ (1999) 96 FCR 153 at 163 [23]. See also *Chow Hung Ching v The King* (1949) 77 CLR 449.

⁶⁵ (1999) 96 FCR 153 at 164 [25].

conduct that is not made punishable by the domestic law entitles a domestic court to try and punish an offender against that law.

34 Merkel J dissented and held that the offence did exist at common law. He did this on the basis that:

- (i) International customary civil law and criminal law relating to universal crimes can be adopted and received into Australian domestic law without legislation by recognition and adoption into the common law by domestic courts.
- (ii) Such a rule of international customary law will be adopted and received into domestic law if it is not inconsistent with domestic law, the policy of the common law or public policy.
- (iii) Adoption of the universal crime of genocide was not inconsistent with domestic rules enacted by statute or any requirement of the common law in respect of a crime.
- (iv) Adoption of the universal crime of genocide was also not inconsistent with public policy.

35 *Nulyarimma* was referred to in the decision of the House of Lords concerning the anti-Iraq war protestors to which reference was made earlier. The argument advanced in *R v Jones* that the offence of aggression had become, by incorporation of customary international law, an offence against English law suffered the same fate as the like argument in *Nulyarimma*. Lord Bingham said he thought it true that "customary international law is applicable in the English courts only where the Constitution permits"⁶⁶. He also agreed with the following observation about the capacity of customary international law to create a crime directly triable in a national court⁶⁷:

The first question is open to a myriad of answers, depending on the

⁶⁶ [2007] 1 AC 136 at 160 [23]. Citing O'Keefe, "Customary International Crimes in the English Courts", (2001) BYIL 293 at 335.

⁶⁷ [2007] 1 AC 136 at 160 [23] citing Berman, *Asserting Jurisdiction: International and European Legal Perspectives*, ed P Capps, M Evans and S Konstantinidis (2003) at 11. And see further G Triggs Lord Bingham of Swallows and International Law in Andenas and Fairgrieve (eds) *Tom Bingham and the Transformation of the Law*.

characteristic features of the particular national legal system in view. Looking at it simply from the point of view of English law, the answer would seem to be no; international law could not create a crime triable directly, without the intervention of parliament, in an English court. What international law could, however, do is to perform its well-understood validating function, by establishing the legal basis (legal justification) for Parliament to legislate, so far as it purports to exercise control over the conduct of non-nationals abroad. This answer is inevitably tied up with the attitude taken towards the possibility of the creation of new offences under common law.

And further:

There are, besides, powerful reasons of political accountability, regularity and legal certainty for saying that the power to create crimes should now be regarded as reserved exclusively to Parliament, by statute.

36 I express no view on the questions raised in *Nulyarimma* or for that matter *Jones*, save to say that they illustrate some of the difficulties associated with the interaction between customary international law and domestic law so far as it is sought to give direct effect to customary international law in municipal courts.

International law and the interpretation of statutes

37 The effects of rules of international law and obligations on the interpretation of statutes has already been referred to. These may interact to a degree with other common law rules affecting statutory interpretation. One area which awaits further exploration is the interface between human rights norms in Conventions to which Australia is a party or in customary international law and the presumption against statutory displacement of fundamental rights and freedoms of the common law. If the former can inform the latter through developmental processes of the kind mentioned in *Mabo* then the content of the so-called principle of legality may be deepened. The principle of legality was explained by Lord Hoffman in *R v Secretary of State for the Home Department; Ex parte Simms*⁶⁸ as follows:

[T]he principle of legality means that parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed

⁶⁸ [2000] 2 AC 115 at 131.

unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

It was described by Gleeson CJ as⁶⁹:

... not merely a commonsense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.

38 Freedom of expression is one such fundamental freedom by the common law⁷⁰. Another is personal liberty⁷¹. It does not take a great stretch of the imagination to visualise intersections between these fundamental rights and freedoms, long recognised by the common law, and the fundamental rights and freedoms which are the subject of the Universal Declaration of Human Rights and subsequent international Conventions to which Australia is a party.

39 Beyond the effects of international law upon statutory interpretation is the still controversial area of its impact upon the exercise of statutory power. This was the question raised in *Minister of State for Immigration and Ethnic Affairs v Teoh*⁷². There, a majority of the High Court held that ratification of a Treaty could give rise to a general legitimate expectation that administrative decision-makers would act in accordance with the terms of the Treaty. The international obligations did not therefore give rise to mandatory relevant considerations nor to a substantive right to the exercise of the discretion in accordance with international law. Rather, they informed the application of procedural fairness in the decision-making process.

40 That application was questioned in *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*⁷³. Beyond drawing attention to the issue, I do not propose to comment further on it.

⁶⁹ *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309 at 329.

⁷⁰ *Evans v New South Wales* (2008) 168 FCR 576, especially at 595-596 and cases cited therein.

⁷¹ *Minister for Immigration v Haneef* (2007) 163 FCR 414 at 442-444 and cases cited therein..

⁷² (1995) 183 CLR 273.

⁷³ (2003) 214 CLR 1.

International law and the constitutionalisation of indigenous land rights

41 A number of the preceding themes can be drawn together by looking at the legal developments underpinning the recognition of native title rights and interests. They provide a case study of the interaction between international law, both conventional and customary, constitutional law and the common law in Australia.

42 Australia is a party to the International Convention on the Elimination of all Forms of Racial Discrimination. The Convention was entered into force on 2 January 1969. In 1975 the Commonwealth Parliament enacted the *Racial Discrimination Act* 1975 (Cth). In the Preamble to the Act, the Parliament expressly invoked the Convention and its power to make laws with respect to external affairs under s 51(xxix).

43 In 1974, a Commonwealth body, the Aboriginal Land Fund Commission, made an agreement to take a transfer of a Crown Lease of a pastoral property in Queensland with a view to its management by an Aboriginal group of which John Koowarta was a member. The Minister for Lands in Queensland refused to consent to the transfer under the *Land Act* 1968 (Qld). He did so pursuant to government policy opposing the acquisition by Aborigines of large areas of land in the State. Koowarta commenced proceedings against the Premier of Queensland and other members of the Queensland Government claiming damages under the *Racial Discrimination Act* Queensland challenged the claim on the basis that the Act was invalid.

44 The validity of the Act was upheld by a 4/3 majority in the High Court as an exercise of the external affairs power giving effect to international obligations under the Convention. Stephen J referred to the idea of racial equality as the one which more than any other had come to dominate the thoughts and actions of the post-World War II world. He said⁷⁴:

In our time, the idea of racial equality has acquired far greater force than its eighteenth-century companions of (personal) liberty and fraternity. The aim of racial equality has permeated the law- making, the standard-setting and the standard-applying activities of the United Nations family of organisations since 1945.

He went on to say that even were Australia not a party to the Convention, it would not

necessarily exclude the topic of racial discrimination as part of its external affairs upon which the Commonwealth would have power to legislate. The Commonwealth had argued that the norm of non-discrimination on the grounds of race had become part of customary international law. Stephen J said⁷⁵:

There is, in my view, much to be said for this submission and for the conclusion that, the Convention apart, the subject of racial discrimination should be regarded as an important aspect of Australia's external affairs, so that legislation much in the present form of the *Racial Discrimination Act* would be supported by power conferred by s 51(xxix). As with slavery and genocide, the failure of a nation to take steps to suppress racial discrimination has become of immediate relevance to its relations within the international community.

45 The *Racial Discrimination Act* being a valid exercise of Commonwealth legislative power in reliance upon Australia's international obligations, State laws inconsistent with it would be invalid to the extent of the inconsistency by virtue of s 109 of the Constitution. This became important for the protection of native title rights and interests.

46 After Eddie Mabo commenced his litigation in the High Court in 1982 claiming a declaration of the native title of the Miriam people over Murray Island which was part of Queensland, Queensland responded by enacting the *Queensland Coast Islands Declaratory Act* 1985. The effect of that Act if valid would have been to extinguish native title throughout Queensland if it existed at all. However in *Mabo v Queensland (No 1)*⁷⁶, the High Court held the State Act to be invalid for inconsistency with s 10 of the *Racial Discrimination Act* 1975. In a joint judgment, Brennan, Toohey and Gaudron JJ said⁷⁷:

In practical terms, this means that if traditional native title was not extinguished before the *Racial Discrimination Act* came into force, a State law which seeks to extinguish it now will fail.

47 The High Court in *Mabo v Queensland (No 2)*⁷⁸ held that native title rights and interests could be recognised at common law and made the declaration as to the entitlement of the Miriam people. In so doing it brought to bare international law norms on the

⁷⁴ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 220.

⁷⁵ (1982) 153 CLR 168 at 220.

⁷⁶ (1988) 166 CLR 186.

⁷⁷ (1988) 166 CLR 186 at 218-219.

⁷⁸ (1992) 175 CLR 1.

development of the common law. There followed the enactment of the *Native Title Act* 1993 (Cth). Its objectives were the establishment of a process for the recognition of native title, the protection of native title in respect of future legislative or executive acts of the Commonwealth and the States and the validation of past acts of the States or Territories which, if valid, would have extinguished native title in a way that was contrary to the provisions of the *Racial Discrimination Act*. It also validated past Commonwealth Acts which would have constituted acquisition of property otherwise than on just terms.

48 Western Australia commenced proceedings in the High Court against the Commonwealth seeking a declaration that the *Native Title Act* was beyond legislative power. The Act was upheld under the race power. West Australian legislation purporting to substitute a form of statutory title for native title at common law was struck down as inconsistent with the *Racial Discrimination Act*⁷⁹.

49 What may be seen at work here is a fascinating interaction between international law, the Commonwealth Constitution, statute law and the common law.

Conclusion

50 The legislative incorporation of treaties and conventions and the acceptance of customary international law extends well beyond the fields I have surveyed. Judges, private and government legal practitioners, academics, lawyers and people in many walks of private life will and have encountered some of the immense variety of legislation which involves the application of international Conventions and Treaties. This legislation is to be found not only in Commonwealth statutes but also in State laws. I have already referred in opening to the range of topics upon which our domestic law intersects with international law.

51 That intersection is multifaceted, complex and difficult to encompass within any all embracing theory.⁸⁰ There is no doubt a continuing need for greater consciousness of it in our legal community and of the opportunities and challenges which it presents.

⁷⁹ *Western Australia v The Commonwealth (The Native Title Act Case)* (1995) 183 CLR 373.

⁸⁰ See Markesinis and Fedtke, *Engaging with Foreign Law*, (Hart Publishing, 2009); see also the recent debate as to the appropriateness and methodology of judicial reference to foreign and international law: Posner, *How Judges Think*, (Harvard University Press, 2008), chapters 11 and 12; and Sunstein, *A Constitution of Many Minds* (Princeton University Press, 2009), chapter 8.