

**SUPREME COURT OF NEW SOUTH WALES**  
**ANNUAL CONFERENCE**

**International Law and Australian Domestic Law\***

**Chief Justice Robert French**

**21 August 2009, Hunter Valley, Pokolbin**

In the latest part of the *Yale Journal of International Law* Antigua is described as an 'island of seven working stoplights' and 'the principal haven for computer servers offering gambling to Americans'<sup>1</sup>. Attempts by the United States to prosecute the operators of Antiguan internet gambling services under US domestic law and to require that they have a physical establishment in the United States led Antigua to complain to the World Trade Organisation (WTO) under the General Agreement for Trade in Services (GATS). It contended that contrary to the GATS, the United States was failing to meet its national treatment obligation by discriminating against foreign providers. In the event, the WTO appellate body found against the United States in one narrow respect, namely that its laws authorised '*domestic* service suppliers, but not *foreign* service suppliers, to offer remote betting services in relation to

---

\* The general part of this paper substantially reproduces the author's Brennan Lecture, 'Oil and Water? – International Law and Domestic Law in Australia', delivered at Bond University on 26 June 2009.

<sup>1</sup> Chander, 'Trade 200', (2009) 34 *Yale Journal of International Law* 281 at 287.

certain horse races'<sup>2</sup>. The remedy won by Antigua was the right to suspend its obligations under the TRIPS Agreement with respect to US intellectual property rights in an amount corresponding to its lost revenue from cross-border horse racing. On that basis, as was said in the article in the *Yale Journal of International Law*, Antigua could lawfully be a Pirate of the Caribbean<sup>3</sup>.

The Antigua story is an appropriate starting point for this paper and not only because the Chief Justice of New South Wales will, barring stays or injunctions, soon be carrying out a commission of inquiry into corruption there. It is a good reminder of the variety of ways in which international law and domestic law may interface. Public discussion in Australia about international law tends to focus upon treaties or conventions in such areas as human rights and crimes against humanity. Sometimes these debates play out in the context of local culture wars and scepticism shading into hostility towards international organisations such as the United Nations. But human rights instruments, while of vital importance, are only one part of an array of international treaties and conventions and of international customary law which create the network of rules and obligations that we designate generically as international law. They affect a large range of State and individual activities, particularly in the area of trade and commerce. The multilateral conventions, particularly those affecting trade and

---

<sup>2</sup> Appellate Body Report, *United States, Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (April, 2005) cited in Chandler, op cit, p 290.

<sup>3</sup> Chandler, op cit, p 290.

commerce, seem to change relatively frequently with corresponding changes in domestic legislation giving effect to them.

The chapter plan of a recent book entitled the *Law of International Business in Australasia* gives a sense of the areas of trade and commerce in which international law is given effect in this country. For example, the 1980 United Nations Convention on Contracts for the International Sale of Goods has been adopted in all States and mainland Territories in Australia by Acts under the name *Sale of Goods (Vienna Convention) Act*<sup>4</sup>. In contracts between parties in Contracting States or where the law of a Contracting State applies, it provides default terms where the parties' intentions are not clear, or where they have elected to apply those terms<sup>5</sup>.

The international carriage of goods also attracts an array of international conventions and Commonwealth and State statutes. A prominent example is the *Carriage of Goods by Sea Act 1991 (Cth)* giving effect to the Conventions implementing the Hague Rules of 1924 and their revision into the Hague-Visby Rules of 1968. The wavefront of convention-making progressed beyond that to the United Nations Convention on Carriage of Goods by Sea made at Hamburg on 31 March 1978, which came into force internationally on 1 November 1992, has not been given legal effect in Australia. Most recently, on 11 December 2008, the General Assembly approved the Convention on

---

<sup>4</sup> Burnett and Bath, *Law of International Business in Australasia* (2009) p 4.

<sup>5</sup> Burnett and Bath, *op cit*, p 9.

Contracts for the International Carriage of Goods Wholly or Partly by Sea, containing what are known as the Rotterdam Rules. The application of the Hague-Visby Rules in force under the *Carriage of Goods by Sea Act 1991* is modified, in certain respects, by the *Carriage of Goods by Sea Regulations 1998*.

Carriage of goods by air is also regulated by international conventions, given legislative effect in Australia. The 1929 Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw Convention) was the first multilateral convention to set out rules for air traffic. It was amended in 1955 by the Hague Protocol. The *Civil Aviation (Carriers' Liability) Act 1959 (Cth)* gives legislative effect to the Convention and also to treaties relating to liability with respect to passengers and baggage<sup>6</sup>. A Convention for the Unification of Certain Rules for International Carriage by Air, the Montreal Convention signed on 28 May 1999, was acceded to by Australia on 25 November 2008 with effect from 24 January 2009. Implementation of this Convention is provided for in the *Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Act 2008 (Cth)*<sup>7</sup>.

In addition to international treaties and conventions governing international trade and commerce there are less formal agreed approaches to practice which, while not given statutory effect, are

---

<sup>6</sup> Burnett and Bath, *op cit*, p 178.

<sup>7</sup> Burnett and Bath, *op cit*, p 179.

important in international commercial practice. An example is the Uniform Customs and Practice for Documentary Credits developed by the International Chamber of Commerce and used by almost all banks. The 2007 version known as UPC 600, applies to documentary credits including, to the extent to which they may be applicable, any standby letter of credit. This may be read with the International Chamber of Commerce International Standby Practices (ISP 98). The provisions of these kinds of rules must be written into the terms of credit. I mention these simply to indicate the existence of what might be called international mercantile custom and practice which is not to be found in conventions or treaties but nevertheless may be of great commercial significance.

The complexity and diversity of international law and of its evolution and history in various areas was brought home to me in 2007 when I agreed, at the request of James Allsop, to prepare a paper for other judges of the Federal Court's Admiralty Panel, on compensation for marine pollution. I did not really think that there would be a great deal to it. To my surprise I found a history of treaties on maritime safety and the protection of the marine environment dating back to the 19<sup>th</sup> century. The most important, relating to the safety of life at sea, known as the SOLAS Convention, was made following the sinking of the Titanic in 1912. In 1948, an intergovernmental maritime consultative organisation was set up by a UN Convention. It later became the International Maritime Organisation, with some 169 Member States. The first Marine Pollution Convention was the Convention for the Prevention of Pollution of the Sea by Oil (OILPOL 1954), established at the instigation of the British Government following a Royal Commission.

I will not trouble you with the detail of the history that followed and the development of the MARPOL 73/78 Convention with its six technical annexes. Suffice it to say, there is a large number of Commonwealth, State and Territory laws giving effect to the Convention obligations. The State and Territory laws deal with the Convention obligations within the three mile zone<sup>8</sup>.

Examples may be multiplied. And yet oddly they do not feature a great deal in Australian jurisprudence. According to an article in a recent edition of the *Melbourne Journal of International Law*<sup>9</sup> only 12 Australian cases have mentioned the CISG and it was the applicable law in only eight of them<sup>10</sup>. Some commentators<sup>11</sup> have suggested that this has to do with a preference for non-judicial dispute resolution such as arbitration, mediation, or expert determination. Contractual choice of law other than Australian and the fact that Japan and the United Kingdom have not acceded to the Convention are thought to be factors. There is also said to be a practice in Australia of opting out of the CISG in choice of law clauses. Survey evidence in relation to opt-out choices

---

<sup>8</sup> French, 'Compensation for Marine Pollution', (2008) 82 *Australian Law Journal* 527 at 532.

<sup>9</sup> Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the *Vienna Sales Convention* for Australian Lawyers', (2009) 10 *Melbourne Journal of International Law* 141.

<sup>10</sup> Spagnolo, *op cit*, p 159-160.

<sup>11</sup> Jacobs, Cutbush-Sabine and Bambagiotti, 'The CISG in Australia-To-Date: An Illusive Quest for Global Harmonisation?' (2002) 17 *Mealy's International Arbitration Report* 24 at 2.3, cited in Spagnolo, *op cit*, p 159 fn 89.

in other parts of the world suggests that unfamiliarity with the CISG may be a factor behind this tendency.

The article, which is comprehensive, identified as the first and leading Australian case, the decision of the New South Wales Court of Appeal in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*<sup>12</sup>. Priestley JA implied a term of 'reasonableness in performance' in the contract there in issue. His decision was said to have 'signalled a promising level of judicial cognisance of the CISG in Australia 'and to have been overwhelmingly and widely hailed as such in international circles'<sup>13</sup>. However, according to the author things have been fairly patchy on the judicial front since then. Another case to which she referred was the 1995 decision of my former colleague on the Federal Court, von Doussa J, in *Roder Zelt-Und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd*<sup>14</sup>. Oddly, although CISG was the governing law of the contract in that case, it was only referred to in argument in passing and the pleadings were couched in the language and concepts of the common law rather than those of CISG<sup>15</sup>.

It may be that for many Australian lawyers the Conventions such as CISG and their associated domestic legislation are still outside their comfort zone. In any event, the scope and number of Conventions

---

<sup>12</sup> (1992) 26 NSWLR 234.

<sup>13</sup> Spagnolo, op cit, p 170 fn 154.

<sup>14</sup> (1995) 57 FCR 216.

<sup>15</sup> (1995) 57 FCR 216 at 220.

affecting international business and the Australian statutes which give effect to them, highlight the desirability of an enhanced awareness of the nature of international law and legal obligations and the principles governing their interaction with the domestic legal system. It is the object of this paper to revisit some of those basic principles, beginning with a brief consideration of the long-standing debate about the character of international law.

### **The character of international law**

Whether international law is properly called 'law' has been a live issue since it first became a subject of study. In what has been called the 'first systematic exposition'<sup>16</sup> of international law' Hugo Grotius said, in 1625<sup>17</sup>:

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

Blackstone described international law, 150 years after Grotius, as 'a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world...'<sup>18</sup>. 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

---

<sup>16</sup> Scott, 'Introduction' in Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, (trans Kelsey) (Oceania Publications, 1964), vpl 2 at xliii.

<sup>17</sup> Hugo Grotius, 'Prolegomena' in *ibid*, at 9.

<sup>18</sup> Blackstone, *Commentaries on the Laws of England*, (Clarendon Press, 1769), vol IV at 66-67.



every nation' or 'on compacts or treaties'. International law today still faces taxonomical challenges<sup>19</sup>. It sometimes seems to be regarded as little more than an emergent property of the coincident self-interest of collections of States<sup>20</sup>. Its critics frequently focus their scepticism, sometimes bordering on cynicism, on the institutions which administer particular areas of it. On occasions the criticisms reflect domestic debates about the orientation and priorities of some of the international institutions. Some protagonists of international law on the other hand seem to see it as embodying norms superior to those of domestic law and contend for its greater recognition in our legal system.

Definitional issues have to be considered in any debate about whether international law is properly called 'law'<sup>21</sup>. 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'<sup>22</sup>. But perspectives have changed over time. Shifts of emphasis from law to rules, to standards of conduct, were reflected in successive Digests published by the United States State Department throughout the 20th century<sup>23</sup>.

---

<sup>19</sup> Goldsmith and Posner, *The Limits of International Law*, (Oxford University Press, 2005) at 3.

<sup>20</sup> Ibid.

<sup>21</sup> Jessup, *A Modern Law of Nations: An Introduction*, (McMillan, 1948) at 5.

<sup>22</sup> Hall, *A Treatise on International Law*, 3<sup>rd</sup> 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.

<sup>23</sup> Rosenne, *The Perplexities of Modern International Law*, (Martinus Nijhoff, 2004) at 4-6; Moore, *A Digest of International Law as Embodied in Diplomatic Discussions, Treaties and Other International Agreements, International Awards, the Decisions of Municipal Courts, and*

In 1960, Hersch Lauterpacht described international law as 'immature' in character, imprecise and uncertain in its rules. It lacked a legislature, an executive and a judiciary with compulsory jurisdiction. HLA Hart in *The Concept of Law*<sup>24</sup>, writing at about the same time as Lauterpacht, also referred to the absence of an international legislature, of courts of compulsory jurisdiction, and of centrally organised sanctions. He said<sup>25</sup>:

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.

Those concerns were echoed a decade later by Richard Falk who pointed to the 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 question<sup>26</sup>:

---

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

<sup>24</sup> Hart, *The Concept of Law*, (Clarendon Press, 1961).

<sup>25</sup> *Ibid*, at 209.

<sup>26</sup> Falk, *The Status of Law in International Society*, (Princeton University Press, 1970) at 3.

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.

The question is live in 2009. Professors Goldsmith and Levinson in a recent part of the *Harvard Law Review*, referred to the divide between international and domestic law which 'runs deep in Anglo-American legal thought'<sup>27</sup>. 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

An answering point with ample support from international law jurists, is that international law is law because States and non-State actors treat it as obligatory in their international relations. As Professor Gillian Triggs has written<sup>28</sup>:

---

<sup>27</sup> Goldsmith and Levinson, *Law for States: International Law, Constitutional Law, Public Law* (2009) 122 *Harvard Law Review* at 1792.

<sup>28</sup> 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*

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 acknowledged. If it did not, as she said, 'No mail would go from State to State, no currency or commercial transactions would take place'<sup>29</sup>. This emphasises the need to bear in mind that the interaction of international law and domestic law is likely to be observed far more extensively in administrative policies and practices than in litigation.

### **Is international law like constitutional law?**

Professors Goldsmith and Levinson have posed what to some would seem a provocative question whether the so-called shortcomings of international law are shared with constitutional law. They 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 said<sup>30</sup>:

---

*Law of Peace*, 6<sup>th</sup> ed, (Oxford University Press, 1963) at 72; Henkin, *International Law: Politics and Values* (Martinus Nijhoff Dordrecht, 1995) at 320.

<sup>29</sup> Quoting Franck, *The Power of Legitimacy Among Nations*, (Oxford University Press, 1990) at 20 cited in Triggs op cit at 4.

<sup>30</sup> Goldsmith and Levinson, *Law for States: International Law, Constitutional Law, Public Law* (2009) 122 *Harvard Law Review* 1792.

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.

Stalin is said to have posed the rhetorical question, 'how many divisions does the Pope have?' in answer to Roosevelt's suggestion that he be consulted on the fate of post-war Europe. An executive government contemplating disregarding the finding of a constitutional court could well ask a similar question – 'how many policemen does the court have?'

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 generally<sup>31</sup>. 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. Its origin

---

<sup>31</sup> Goldsmith and Levinson, *op cit* at 1794.

informed its characterisation by Sir Owen Dixon in 1935 in the following terms<sup>32</sup>:

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.

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*<sup>33</sup>. 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

---

<sup>32</sup> Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590 at 597.

<sup>33</sup> (1945) 70 CLR 60.

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.

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 that<sup>34</sup>:

... 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 defence power, Dixon J said<sup>35</sup>:

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

---

<sup>34</sup> (1945) 70 CLR 60 at 77 per Dixon J.

<sup>35</sup> (1945) 70 CLR 60 at 78.

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'"<sup>36</sup>. 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 said<sup>37</sup>:

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.

---

<sup>36</sup> (1945) 70 CLR 60 at 74, citing *Hodge v The Queen* (1883) 9 AC 117 at 132; see also at 175 per Starke J.

<sup>37</sup> (1945) 70 CLR 60 at 75-76.



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 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'<sup>38</sup>. 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* case<sup>39</sup>. He said that the *Australia Act* 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

---

<sup>38</sup> *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.

<sup>39</sup> *Australian Capital Television v The Commonwealth* (1982) 177 CLR 106 at 138.

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 as<sup>40</sup>:

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

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.

### **The sources of international law**

International law and domestic law differ in the character of their sources. Domestic law is derived from and legitimated by the

---

<sup>40</sup> Winterton, 'Popular Sovereignty and Constitutional Continuity', (1998) 26 *Federal Law Review* 1 at 7.

constitutional machinery of law-making<sup>41</sup>. 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 law<sup>42</sup>.

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 said<sup>43</sup>:

The sources from which international law is derived include treaties between various States, State papers, municipal Acts

---

<sup>41</sup> Brownlie, *Principles of Public International Law*, 7th ed, (Oxford University Press, 2008) at 3.

<sup>42</sup> Ibid, at 3.

<sup>43</sup> *In re Piracy Jure Gentium* [1934] AC 586 at 588.

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.

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 say<sup>44</sup>:

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.

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.

In ascertaining rules or principles of international law or

---

<sup>44</sup> [1934] AC 586 at 588-589.

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.

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 ICJ<sup>45</sup>.

Underpinning these sources is what Lauterpacht called a 'superior source' namely 'the objective fact of the existence of an independent community of States'<sup>46</sup>. 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'<sup>47</sup>. 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**

Historically, discussions about the interaction between

---

<sup>45</sup> Schwarzenberger, *International Law*, (Steven and Sons, 1957) vol. 1 at 26.

<sup>46</sup> Lauterpacht, above note 17, at 58.

<sup>47</sup> *Yorta Yorta v Victoria* (2002) 214 CLR 422 at 445 [49] footnote 92.

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 State<sup>48</sup>.

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

... 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 bills<sup>49</sup>:

---

<sup>48</sup> See generally Lauterpacht, above note 17, at 216-217.

<sup>49</sup> Blackstone, Commentaries on the Laws of England, Book IV at 67.

... 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.

Blackstone was invoked in the House of Lords recently in *R v Margaret Jones*<sup>50</sup>. 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 piracy<sup>51</sup>. 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.

Over a century after Blackstone's writings, the *Franconia* case was decided and dualism achieved apparent, although not uncontested, judicial sanction<sup>52</sup>. 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

---

<sup>50</sup> [2007] 1 AC 136.

<sup>51</sup> [2007] 1 AC 136 at 158 [20].

<sup>52</sup> *R v Keyn* (1876) 2 Ex D 63.



members of the Court of Crown Cases Reserved held that the Central Criminal Court had no jurisdiction 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.

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 wrote<sup>53</sup>:

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'<sup>54</sup>. Brownlie wrote:

Yet as a general condition he does not require express assent or a factual transformation by act of parliament. In case of

---

<sup>53</sup> Lauterpacht, above note 17, at 219.

<sup>54</sup> Brownlie, above note 39, at 3.

first impression the courts are ready to apply international law without looking for evidence of assent.

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*<sup>55</sup>. In substance, they were as follows:

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 individuals<sup>56</sup>.

---

<sup>55</sup> (1992) 112 ALR 529 at 534-535.

<sup>56</sup> 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.

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*<sup>57</sup>. 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 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 written<sup>58</sup>:

... 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

---

<sup>57</sup> (1949) 77 CLR 449.

<sup>58</sup> Guilfoyle, '*Nulyarimma v Thompson*: Is Genocide a Crime at Common Law in Australia?' (2001) 29 *Federal Law Review* 1 at 17.

'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 theory<sup>59</sup>. 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.

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*<sup>60</sup>. 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 amendments<sup>61</sup> to the *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.

The Full Court of the Federal Court held by majority that absent

---

<sup>59</sup> 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.

<sup>60</sup> (1999) 96 FCR 153.

<sup>61</sup> *Native Title Amendment Act 1998* (Cth).

legislation, genocide was not a crime cognisable in Australian courts<sup>62</sup>. Wilcox J held that as a matter of policy in criminal cases courts should decline, in the absence of legislation, to enforce international norms<sup>63</sup>. Whitlam J wrote to similar effect<sup>64</sup>.

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 Convention<sup>65</sup>. 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, that<sup>66</sup>:

---

<sup>62</sup> (1999) 96 FCR 153 at 161 [17], 162 [20], 166[32] per Wilcox J and at 173 [57] per Whitlam J.

<sup>63</sup> (1999) 96 FCR 153 at 164 [26].

<sup>64</sup> (1999) 96 FCR 153 at 173 [57].

<sup>65</sup> (1999) 96 FCR 153 at 161 [18].

<sup>66</sup> (1999) 96 FCR 153 at 163 [23]. See also *Chow Hung Ching v The King* (1949) 77 CLR 449.

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 law<sup>67</sup>:

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

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.

---

<sup>67</sup> (1999) 96 FCR 153 at 164 [25].

- (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.

*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'<sup>68</sup>. He also agreed with the following observation about the capacity of customary international law to create a crime directly triable in a national court<sup>69</sup>:

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

---

<sup>68</sup> [2007] 1 AC 136 at 160 [23]. Citing O'Keefe, 'Customary International Crimes in the English Courts', (2001) BYIL 293 at 335.

<sup>69</sup> [2007] 1 AC 136 at 160 [23] citing Berman, 'Jurisdiction: The State' Capps, Evans and Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives*, (Hart Publishing, 2003) at 11. And see further Triggs, 'Lord Bingham: of swallows and international law', in Andenas and Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum*, (Oxford University Press, 2009) 509-531.



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.

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**

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*<sup>70</sup> 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 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 as<sup>71</sup>:

... 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.

Freedom of expression is one such fundamental freedom by the common law<sup>72</sup>. Another is personal liberty<sup>73</sup>. 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,

---

<sup>70</sup> [2000] 2 AC 115 at 131.

<sup>71</sup> *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309 at 329.

<sup>72</sup> *Evans v New South Wales* (2008) 168 FCR 576, especially at 595-596 and cases cited therein.

<sup>73</sup> *Minister for Immigration v Haneef* (2007) 163 FCR 414 at 442-444 and cases cited therein.

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.

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*<sup>74</sup>. 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.

That application was questioned in *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*<sup>75</sup>. Beyond drawing attention to the issue, I do not propose to comment further on it.

### **International law and the constitutionalisation of indigenous land rights**

A number of the preceding themes can be drawn together by looking at the legal developments underpinning the recognition of native

---

<sup>74</sup> (1995) 183 CLR 273.

<sup>75</sup> (2003) 214 CLR 1.

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.

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).

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.

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

said<sup>76</sup>:

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 said<sup>77</sup>:

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.

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.

---

<sup>76</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 220.

<sup>77</sup> (1982) 153 CLR 168 at 220.

This became important for the protection of native title rights and interests.

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)*<sup>78</sup>, 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 said<sup>79</sup>:

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.

The High Court in *Mabo v Queensland (No 2)*<sup>80</sup> 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 bear international law norms on the 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

---

<sup>78</sup> (1988) 166 CLR 186.

<sup>79</sup> (1988) 166 CLR 186 at 218-219.

<sup>80</sup> (1992) 175 CLR 1.

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.

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*<sup>81</sup>.

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

## **Conclusion**

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

---

<sup>81</sup> *Western Australia v The Commonwealth (The Native Title Act Case)* (1995) 183 CLR 373.

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.

That intersection is multifaceted, complex and difficult to encompass within any all embracing theory<sup>82</sup>. 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.

---

<sup>82</sup> 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.