

Interest Group Discussion Session Papers
Group Discussion

INTERNATIONAL LAW IN NATIONAL COURTS¹

*Group Discussion*²

The Rapporteur, Professor Greenwood QC, London School of Economics, offered three thoughts on the relationship between international law and domestic courts.

First, he noted the capacity of any institution created by national law and which derived its authority from national law to apply a rule which emanated from a source outside the nation was necessarily confined by rules which circumscribed its jurisdiction. For example, in the UK, international law is not the law of the land if it conflicts with a statute of Parliament. This issue is fundamental to the operation of international law before national courts. Professor Greenwood referred to the US Supreme Court decision in *Medellin* as illustrative: the decision was not a refusal to apply international law, but it reflected the constitutional limits on the power of the executive within the United States. He suggested that when national courts apply public international law, there was an element of distortion not unlike a “fairground mirror”, since what is applied by national court is necessarily distorted by the relevant constitutional system.

However, this principle was subject to an important qualification, and that is the principle enunciated in the *Alabama* case, that a state may not rely on its own domestic law to justify its failure to comply with its international legal obligations. Courts are an organ of the state, and therefore a decision of a national court may engage the international responsibility of the state. The tension between the need for a state to comply with its international obligations and the constitutional limitations on national courts in applying international law is not fully sorted out. In some cases, there has been a failure on the part of national courts to grapple with this issue.

¹ Cite as: 'International Law in National Courts: Discussion' in James Crawford and Margaret Young (eds), *The Function of Law in the International Community: An Anniversary Symposium*, (2008), Proceedings of the 25th Anniversary Conference of the Lauterpacht Centre for International Law. Available at http://www.lcil.cam.ac.uk/25th_anniversary/book.php.

² Reported by: Ms Emily Crawford and Ms Kate Parlett.

Second, he discussed the role of non-justiciability in domestic law. In *The Function of Law in the International Community*, Hersch Lauterpacht had focussed primarily on non-justiciability in the international setting, where one could reasonably argue there was no role for it. It is different in the national context.

Professor Greenwood distinguished between two uses of the principle of non-justiciability. First, it is used to convey the maxim that within a state the issue is not allocated to the courts, but to some other body. For example, in this country the question whether the UK is at war is one usually allocated to the executive. Second, it is used to refer to the principle that there are certain questions of law which, although in principle they are allocated to the courts, the courts have to pass on them and decide they cannot express a view because the question is essentially an inter-state one, which is justiciable elsewhere. In this context he referred to the decision in *Buttes Gas*, expressing some doubt that it was one which would have impressed Hersch Lauterpacht, since the court could in constitutional theory adjudicate the question but decided not to because of some other aspect. He noted that the authority of *Buttes Gas* had been somewhat eroded in recent times, referring in particular to the Court of Appeal decision in *Occidental v Ecuador*.

The first use of non-justiciability, was in principle unimpeachable: this was a point with which Hersch Lauterpacht would agree, since in *Function* at page 386 he acknowledged that the fact that certain questions were dealt with by administrative bodies was not in conflict with the concept of the rule of law. The second use of the principle of non-justiciability was a great deal more troubled. It was not necessarily beneficial for courts to decide they are open for business as international courts of claims, resolving the disputes of anyone about the conduct of any government. In this context, he referred to the jurisprudence under the US *Alien Tort Claims Act*, suggesting that it might not be appropriate for US courts to act as global courts of claims.

Finally, Professor Greenwood noted that the application of international law in national court involves an important cultural element. Any court will place reliance on raw materials and methods of reasoning with which they are most familiar. So although in international courts, customary international law is in general proved by state practice of all or some of the 191 members of the UN, common law courts will tend to prove it by previous decisions from their own courts or other courts, and civil law courts will tend to emphasize the writing of publicists. The tendency to default to the most familiar materials is, however, being overcome in many jurisdictions, and this can be seen in the notion of reliance on subsequent practice under the Vienna Convention on the Law of Treaties, which is counter-cultural to common lawyers but is now more commonly applied.

Dr Melissa Perry QC, Barrister, Wentworth Chambers, Sydney, referred to the idea that often issues are approached by national courts on the basis that there is a fundamental distinction between rules of international law which are incorporated in national law by legislation and rules of international law which are not incorporated. This seems at times to lack subtlety, and the question of the relevance of international law to domestic decision-making may need to take account of the nature of the particular rule of international law. She gave an example of the question of native title rights in sea territory in an area of the territorial sea, which potentially involved three different legal systems: Australian law, Aboriginal customary law; and international law. The federal system in Australia adds a further level of complexity to interpreting statutes because there is a rule that one ought to interpret statutes consistently with Australia's international obligations to the extent to which it is possible to do so. This was also relevant to the topical question of the interpretation of treaties which had been incorporated by federal states within Australia.

Professor Colin Warbrick, Birmingham Law School, suggested that Professor Greenwood's division of the questions of non-justiciability omitted an important category. While some matters were allocated to another organ of government, it remained an important role for the national courts to decide whether they have jurisdiction or not, that is, to determine whether the matter *is* allocated to another organ. Professor Warbrick also noted that it must be questioned to what extent judges and practitioners on the domestic plane feel adequately equipped to deal with questions of international law.

Professor Christian Tomuschat, Humboldt University Berlin, cited German constitutional law which, in contrast to UK law, provides that general rules of international law take precedence over national law. In a recent case an officer in the army was given a disciplinary sanction because he decided he could not provide intelligence services in regards to the war in Iraq because it violated international law. He appealed the sanction, and the highest administrative court in Germany therefore dealt with the question whether the American invasion of Iraq was lawful or unlawful, deciding there were some doubts as to its lawfulness and therefore setting aside the sanction. He suggested that it would be wiser to allocate these kind of questions to governments, rather than courts.

Dr Abdulai Conteh, Supreme Court of Belize, gave an example from his own jurisdiction relating to indigenous rights. In circumstances where the common law regarded the territory as

terra nullius and the statute was silent, he had recourse to general principles of international law particularly those as pronounced in the organs of the United Nations, and held that there was a right to title by customary practice. In this instance, Justice Conteh noted that recourse was had to declarations of the UN General Assembly and Security Council, as well as the Australian High Court decision in *Mabo*, leading to the decision in the Supreme Court of Belize that indigenous persons have a right to title to their traditional lands. He said that the primary function of the judge is to apply the rule of law, whether from treaty, international law or domestic law, and in his case he regards international law as the “elephant in the room” in every relevant case.

Professor Krzysztof Skubiszewski, Iran-US Claims Tribunal, suggested that this is a part of a larger subject which is the place of international law in municipal law. In some countries customary international law is part of the law of the land. But in some cases there is not always a clear solution for the question of the place of international law in the municipal system, and there is a role for creativity in national courts. Referring to the *Alabama* principle, he suggested that the debates surrounding monism and dualism were not quite obsolete, and that the question of who generates the theory on the debate of ‘monism vs dualism’ should be investigated – where a Court adopts a monist or dualist approach, is such an approach a genuine reflection of practice or merely a self-generating theory?.

Dr David Berry, University of the West Indies, suggested that when faced with an unincorporated treaty, a municipal judge has three choices. First, he or she may treat it in the same way as jurisprudence from other jurisdictions, which is to say it has no real force but may be persuasive. Second, if the statutory provision is ambiguous, the presumption that parliament will not act in conflict with the state’s international obligations will apply. Third, it may be used to interpret the constitution, which can be seen as a transforming document in circumstances where it can be interpreted to accord with the provisions of the treaty. He suggested it was curious why this third argument had not been heard more frequently.

Professor Armand De Mestral, McGill University, suggested that the Canadian Supreme Court in a recent decision concerning the Convention on the Rights of the Child had taken a poor approach to incorporation, finding the convention was unincorporated because there were no specific legislative act relating to it. Subsequently it was successfully pleaded in the Ontario Court of Appeals that the ICCPR was also unincorporated. He raised the question whether this was also a problem in other jurisdictions, and urged that incorporation should not be strictly construed. He stated that the idea of a ‘bare minimum’ approach to whether a treaty has been

incorporated – that is to say, a treaty has been incorporated only when the legislation or statute draws specific attention to its origins in international obligations – has a troubling effect on domestic legislation. There are many ways to incorporate international treaty obligations beyond the explicit statement of obligations in statutory form. This raises a concern that it might be queried whether governments ratify treaties without being fully aware of the effects on their domestic legislation.

President Gilbert Guillaume, Former President of the ICJ, agreed with the statement of Professor Greenwood that the relationship between international law and national law is organised by the national constitution. He noted that in many continental systems, the approach was that courts apply treaties in preference to acts of parliament.

Professor Yuval Shany, Hebrew University Jerusalem, suggested that international law may also have a distorted application in specialised international courts, giving the example of the Advocate-General's Opinion in *Kadi* in the ECJ. In the domestic context, he suggested that a willingness to apply international judgments may encourage reinterpretation of the national constitutional framework to facilitate their application.

Sir Kenneth Keith, Member of the International Court of Justice, said he was struck by the huge change of culture in the House of Lords over the years, and noted it was now commonplace in New Zealand, drawing on that change, to acknowledge that there is an international obligation, that New Zealand is party to that obligation, and that the court should if it possibly can interpret legislation or common law consistently with that obligation.

Dr Roger O'Keefe, LCIL and the University of Cambridge, suggested that in light of comments made in the discussion, it was important to distinguish between the question of incorporation and the question of compliance with the international obligation. He gave an example of the right of children to life pursuant to the Convention on the Rights of the Child. There is no domestic legislation in this country specifically incorporating that right but it could not be said that the UK has not complied with its obligation because the law of murder protects children. He suggested that many treaties do not require a state to provide for a domestic right in exactly the same terms as the treaty.

Judge Hisashi Owada, Member of the International Court of Justice noted that the point that national courts operate within their constitutional framework is extremely important. He

suggested that treaties impose obligations in one of two ways: first, it may require a state to incorporate provisions in a national legal system; second, it may prescribe rights and duties in a direct way. In the latter case, whether the treaty is incorporated makes all the difference. He noted that in the Japanese system, treaties are the supreme law of the land, higher than legislation.

He made a second point that culture is important because the notion that customary international law is part of the law of the land is based on the premise that customary international law comprises those rules accepted by the community of civilised nations. Whether a particular rule is one of general international law is a problematic question even for the ICJ. How does a national court decide a claim that a particular rule is a rule of customary international law?

Sir Bernard Rix, Lord Justice of Appeal, asked whether some problems could be resolved by some clarity in the law. For example, if the statute was clear it would apply. If an unincorporated rule of international law is not in conflict with a statute but is also a clear rule of customary law, courts were also inclined to give it effect. If the statute was unclear, the court might be assisted in its interpretation by treaty obligations. If a party relies on international law doctrines which are disputed, the court may not be inclined to apply them because the national court is not an appropriate forum for dealing with those questions.

Professor Alan Boyle, University of Edinburgh, suggested that what is clear is a question of judgment. One could argue that any point of customary international law is unclear. Any legal dispute may involve arguments in which a treaty must be read in light of other treaties. Such complex questions of international law required judges skilled in international law theory and practice; judges in national courts do not come with the background, diversity, and authority to decide many of these questions and will shy away from them if they have any sense.

Lord Bingham stated that he had the impression that national courts virtually never decide whether something is a rule of customary international law, but suggested that parties usually agree that something is or is not such a rule.

Professor Greenwood noted that judges are indeed more likely to apply international law principles and rules if they are familiar with the law. Professor Greenwood also expressed agreement with Roger O'Keefe on the question of unincorporated treaties, and suggested that the House of Lords took a fundamentally wrong turn in the *International Tin Council* case. He suggested the underlying question should be approached from the perspective of the purpose for

which the treaty is being used. A claim for breach of a rule laid down in an unincorporated treaty cannot be brought unless it is given effect to by legislation.

He was not aware of attempt to enforce *Alien Tort Claims Act* judgments abroad but emphasised that this jurisprudence generally devalues the status of national courts in applying international law.

Several comments had brought out differences between common law and other approaches, which served to emphasise his point that the relationship between international law and national courts will necessarily determined by the state law which empowers that national court. In this context he suggested that theories of monism and dualism were unhelpful; questions classified as ones of “national law” vary enormously.

Lastly, he noted the need for greater penetration of the *Alabama* principle. National courts must not be criticised for saying that they cannot apply international law, but they need to have better recognition of the obligation of the state to comply with its international obligations. He suggested that this highlighted a need for more fruitful dialogue between national and international law.