

Interest Group Discussion Session Papers
Moderator Comments

INTERNATIONAL LAW IN NATIONAL COURTS¹

Remarks of Lord Bingham of Cornhill²

The moderator, Lord Bingham of Cornhill, Senior Law Lord, introduced himself as an “impostor”: one without any specialised knowledge of international law, but as a “journeyman” judge who deals with a different subject matter every day of the week.

He prefaced his observations with the remark that when a significant difference arises between states that cannot be resolved by negotiation or compromise, it is highly desirable that it be resolved by a process of international decision, with a view to avoiding a souring of relations between nations.

His second observation was that it is highly desirable that wherever possible disputes between states should be resolved in an international tribunal. There are three powerful reasons why this is so: (1) members of international tribunals are versed in principles of international law to be applied, in contrast with a domestic tribunal, the members of which may or may not be experienced in such matters; (2) the diverse international membership of an international tribunal gives the appearance and perhaps a guarantee of impartiality, in contrast with a national tribunal, which is often adjudicating a cause in which the interests of its own state are affected; and (3) it permits more readily the representation of other states who regard their interests as potentially affected by the outcome of the dispute and would wish to be heard on the subject before it is decided. He noted that this had been the case when the European Court of Human Rights heard the case of *Behrami and Saramati*, where seven other states were represented as well as the United Nations.

¹ Cite as: Lord Bingham of Cornhill, 'International Law in National Courts' 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.

However, from time to time and with increasing frequency causes raising issues of international law do come before national courts for decision. This has always been so (for example, cases involving piracy, prize and immunities). Now other questions of international law were being raised with increasing frequency. His own experience was limited to one national system but a few examples from his own jurisdiction could be cited. He referred to *Buttes Gas*, *Pinochet*, *Iraqi Airways*, and a series of more recent cases: *Jones (Margaret)*, which involved the question whether waging an aggressive war was a crime under English law; *Jones v Saudi Arabia*, which raised the issue of whether agents of a foreign state were immune from civil proceedings arising out of torture committed abroad; *Al-Skeini*, which dealt with the extra-territorial reach of the European Convention on Human Rights and the Human Rights Act; and *Al-Jedda*, which concerned the responsibility of the UK and the effect of the United Nations Charter in relation to the conduct of British troops in Iraq.

These examples are only the tip of the iceberg, as there are countless cases which raise questions of international law (for example, those involving the Refugee Convention; the Hague Convention on Abduction of Children; Conventions on carriage by sea, air and land; the law of the European Community and the jurisprudence of the European Court of Human Rights. Some of these treaties are fully incorporated by statute, in which case there is no difficulty about the duty of the national court to give effect to them although the national court should be aware in construing these agreements that they are the result of an international agreement rather than a purely parliamentary decision. In some cases, direct parliamentary guidance is given to the courts. In other cases, treaties are not fully incorporated by statute (for example, the Refugee Convention and the Torture Convention). A fourth category of treaties is unincorporated treaties to which no effect is given in domestic law or by the rules of customary international law, both of which are areas of concern with regards to interpretation.

He was once told that every US State Department briefing paper gave three options: (1) war, (2) abject surrender, (3) carry on pretty much as we are. For courts dealing with questions of international law, they likewise have three choices. They may (1) refuse to adjudicate on questions which do not directly raise an issue of domestic law; (2) operate an open door policy and entertain any suit which parties bring before it with no filter of justiciability; or (3) operate a particular patchwork of non-systematic rules to decide whether a case can be entertained or not.

United Kingdom courts broadly apply the third approach. For example, there is a rule that if a public official is not bound to exercise discretion to make a decision in accordance with an

unincorporated treaty but it is open to him to do so, the courts can consider the unincorporated treaty in deciding whether the decision was right or wrong. Another particular rule is that a court will not entertain a claim by a foreign sovereign if it involves an assertion of sovereign power, but it will entertain a claim if it involves damage to life or property such as could be sustained by a private individual (*Emperor of Austria v Day*). This question arose recently in a suit brought by the President and State of Equatorial Guinea against five defendants who were accused of plotting to overthrow the government, although in the end the court did not have to decide it.

In this context, there are powerful voices urging judicial restraint. In the recent issue of the *Law Quarterly Review*, Philip Sales and Joanne Clement argue that international treaties are made by the executive and customary international law is based on the practice of states i.e. also the executive; therefore in giving effect to treaties and customary law courts are acting contrary to constitutional principle by permitting the executive to change the law. Attention was drawn to the case of *R v Lyons*, where the Court adopted an ‘abstinent’ approach with regard to international law principles applicable in domestic courts.

Alternatively, one could raise the argument that we want to live in a world where the rule of law prevails internationally; certainly Hersch Lauterpacht would have wanted this. It raises the question whether courts should be readier than they currently are to lend their authority to support the international rule of law. Should courts be more ambitious?

Those arguing in favour could suggest that national courts work on the same principles as international tribunals: they find out governing principles, then look for precedents and analogies. There is, for example, very little difference between the approach of national courts to interpretation and that laid down in the Vienna Convention on the Law of Treaties. In most cases national courts find that the truth lies somewhere in between the contentions of warring parties. There is little doubt that the areas of activity into which courts will refuse to enter is shrinking.