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International law in domestic practice; some practical pointers

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What are we talking about?



- Applying international law and comparative law to everyday problems raised in practice.
- By international this means Treaties, case law, reports from Treaty Bodies, inter-Governmental Bodies, Regional Courts and Bodies etc, which may be directly applicable or simply persuasive.
- By Comparative we mean laws and case law from other jurisdictions, usually to help construction of domestic laws, principles or policy, and to build analogies.

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Applicability



- Used to be the case that the judge would ask if the instrument was incorporated into domestic law and that was determinative of whether it could be used at all.
- In 1861, in *Orley Farm*, Anthony Trollope described the prejudice of English lawyers against learning from international experience;

"It would be useless at present, seeing that we cannot bring ourselves to believe it possible that a foreigner should in any respect be wiser than ourselves. If any such point out to us our follies, we at once claim those follies as the special evidences of our wisdom. We are so self-satisfied with our own customs, that we hold up our hands with surprise at the fatuity of men who presume to point out to us their defects."
- Now the position has changed to a significant degree and increasingly judges appreciate other sources of law. Why?

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Why ? (1)

- Domestically, the realisation that context is crucial; in **A v Secretary of State for the Home Department (No 2)** [2006] 2 AC 221 *per* Lord Bingham;

A treaty even if ratified by the United Kingdom, has no binding force in the domestic law of this country unless it is given effect by statute or expresses principles of customary international law: [J.H Rayner \(Mincing Lane\) Ltd v Department of Trade and Industry](#) [1990] 2 AC 418; [R v Secretary of State for the Home Department, Ex p Brind](#) [1991] 1 AC 696; [R v Lyons](#) [2003] 1 AC 976. But they rely on the well-established principle that the words of a United Kingdom statute, passed after the date of a treaty and dealing with the same subject matter, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the treaty obligation and not to be inconsistent with it: [Garland v British Rail Engineering Ltd](#) [1983] 2 AC 751, 771.


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Why?(2)

- European *ius commune*. Direct applicability of EU treaty and Strasbourg means such law *has* to be considered.
- Globalisation and increased communications and the internet. Allows for much more ready comparison. A practical reason.


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Why ?(3)

- ECHR;
- Large number of references to viewing the Convention in context; *Al-Adsani v. the United Kingdom*, [GC] Appn No. 35763/97, at [55]; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC], no. 45036/98, at [150], *Saadi v UK* (GC), no.13229/03, ECHR 2008 at [62].


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Al-Adsani at [55]

- "The Court must next assess whether the restriction was proportionate to the aim pursued. It reiterates that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, and that Article 31 § 3 (c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, *mutatis mutandis*, *Loizidou v. Turkey* (merits), judgment of 18 December 1996, *Reports* 1996-VI, p. 2231, § 43). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part..."

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Why?(4)

- UN decisions; eg UN Security Council.
- UN bodies; in particular the Human Rights Committee (deals with individual complaints arising out of the ICCPR), and CEDAW which deals with complaints regarding discrimination against women. But also a large number of reports for example from Special Rapporteurs.


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Incorporated international instruments

- Where there is a directly incorporated treaty, international law effectively becomes part of the domestic law framework. Domestic law has to give effect to this.
- There are varying ways of doing this; eg the *Geneva Convention relating to the Status of Refugees (the Refugee Convention)* is directly applicable as it was incorporated by **Section 2, Asylum and Immigration Act 1993**.
- The **Human Rights Act 1998** incorporates the main Convention rights without incorporating the Convention, makes Convention case law super-persuasive rather than binding, and does not allow the Convention to dis-apply or strike down primary legislation to protect Sovereignty.


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Unincorporated treaties

- Where the treaty is not incorporated can you rely on it? It isn't directly applicable, but can be highly persuasive when construing or developing domestic law. The Convention was the best eg of this. Pre-HRA it was very influential. The argument was that it was part of the UK's international obligations and therefore Parliament would not have legislated contrary to it. This was fine where one could establish an area of uncertainty or an area where the common law needed to be developed or clarified; eg **A v SSHD** above.


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Is that it? (1)

- In fact if you can make it relevant you can refer to UN reports, ICCPR, etc
- Good example of this was the litigation regarding IPPs; **R (Walker and James) v Secretary of State for Justice [2010]** where the Court referred to the thematic; UN Report on Life Imprisonment 1994.


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Is that it? (2)

- Comparative law should not be overlooked either. In a recent case regarding 'life without parole' the argument is whether such a sentence is inhuman and degrading. There are very useful German, French and Italian constitutional law cases which deal with the issue of 'human dignity' in respect to life sentences.


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Breaking News

- Last Thursday (7 July 2011) the Grand Chamber delivered its final judgments in ground-breaking cases of;
- Al Skeini and Others v UK App No 55721/07, and
- Al Jeddah v UK App No 27021/08

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Conclusions

- Much easier to make international and comparative law arguments in public law today than it was previously.
- Need to consider whether there is a point of construction, an ambiguity in the common law or it is outmoded in your particular circumstance, or whether fundamental rights are engaged. If so can utilise these tools.

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