

This PDF is auto-generated for reference only. As such, it may contain some conversion errors and/or missing information. For all formal use please refer to the official version on the website, as linked below.

# Public International Law – A Liberalist View

<https://www.e-ir.info/2014/01/13/public-international-law-a-liberalist-view/>

ARSHAD SALMAAN ALI, JAN 13 2014

## Introduction

While the concepts of international law can be traced back thousands of years,[1] the modern structure of international law developed in the seventeenth century through the work of scholars such as Hugo Grotius,[2] culminating in the Peace of Westphalia in 1648. At its foundation was the notion of international law regulating sovereign, equal states free to govern without external interference.[3] This classical notion of international law has increasingly been challenged by liberalism,[4] critical of the dichotomist view of the law separating the international and domestic spheres and in the process perpetuating the state-centric approach to the law.[5] The tension between the two dominant theories of realism and liberalism in describing and directing the evolution of the law is explored; and we posit, consistent with the liberal view, that the state-centric *realist* paradigm of international law is inconsistent with the increasing emphasis placed on the rights of individuals.

## The Classic Model – Diplomatic Immunity

As mentioned above, the focus of international law has been inter-state relations.[6] Despite the rights of individuals being considered by classical scholars,[7] the lack of standing of individuals in relation to violations of treaties,[8] unless the treaty provided for individual rights and obligations,[9] perpetuated the state-centric nature of international law. This position was illustrated by twentieth century assertions of scholars that states exclusively are the subjects of international law.[10]

Diplomatic protection allows a state to bring an action on behalf of its citizen based on the *Vattelien Fiction*,[11] that a wrong committed against a national is a wrong committed against the national's state.[12] This was reiterated in the Draft Articles on diplomatic Protection which was adopted by the International Law Commission in 2006,[13] and which the General Assembly took note of.[14]

This somewhat ameliorates the difficulty that standing non-state entities face. However, it is clear from the *Barcelona Traction* case that the decision to exercise diplomatic protection is at the discretion of the state,[15] and the state may choose not to exercise this protection due to political or indeed any other reasons unrelated to the case.[16]

Commentators have suggested that the absence of a legal duty compelling a state to exercise diplomatic protection on behalf of an injured national is illuminatory of the distinction between what the law is ('*lex lata*') as opposed to what it should be ('*lex ferenda*').[17] An early version of the *Draft Articles on Diplomatic Protection*[18] proposed just such an obligation for a state wherein there is a grave breach of a *jus cogens* norm in the absence of extenuating circumstances.[19] While not ultimately included in the final version, it is indicative of the trajectory of international law in the attempt to accommodate the rights of sub-state entities.

## Contemporary Challenges

It is clear that the state-centric paradigm is evolving to one that is more inclusive of the role of non-state entities such as NGOs, interest groups and global corporations possessed of rights and responsibilities.[20] This is reflective of the greater power of non-state entities in influencing the world order. However, in most instances the claim of an

# Public International Law – A Liberalist View

Written by Arshad Salmaan Ali

individual must still be subsumed within that of the national state,[21] which continues to constrain the ability of non-state entities from participating fully in the international legal arena.

## Intersection of International Relations and Law

The nature of international law, created as it is by states through treaties or a preponderance of state practice, is influenced by politics.[22] International law and politics together comprise the international system which is studied and manipulated by political scientists, lawyers and policy makers.[23] Given this characteristic of international law, theories used to describe it become instrumental in dictating the direction in which the law evolves.[24]

The two dominant international relations theories that explain state behaviour are *Realism* and *Liberalism*. [25] The realist approach is characterised by self-interested states, interacting in an anarchical system like billiard balls, opaque and unitary entities colliding with each other.[26]

Liberalism, by contrast, has three main assumptions:[27]

1. Actors in politics are individual members and groups of domestic society promoting their self-interest;[28]
2. Governments represent a sub-section of society, whose interests are reflected in foreign policy;[29]
3. Behaviour of States, especially pertaining to conflict and co-operation, reflect the nature and configuration of state preferences.[30]

The genesis of the liberalist movement in international law can be traced back to the seminal work of Kant's perpetual peace.[31] His thesis that liberal states would coalesce into a confederation of peace conserving states ('*foedus pacificum*'),[32] has been tremendously influential. For example, when speaking before the British Parliament, the President of the United States of America, Ronald Regan, claimed that governments founded on liberal principles of individual liberty exercise restraint in foreign policy before proceeding to declare a crusade for freedom and democratic development.[33] This was coupled with the use of force – despite its illegality[34] – against the illiberal state of Nicaragua.[35] The potency of Liberal theory in both describing but also influencing international relations, and to a lesser degree the international legal system, is apparent.

## Relationship Between International and Municipal Law

The relationship between international and domestic law is not settled,[36] with the two dominant theories being monism and dualism.[37] Monism asserts that there is a single body of law that regulates human interaction, with international law residing at the apex of this system.[38] In diametric contrast, dualism claims international and domestic law are separate,[39] with international law requiring incorporation by a state before it operates in the national sphere.[40] A third explanation – the *harmonisation theory* – has emerged to address deficiencies in the dominant paradigms. This assumes that international law forms part of domestic law, but that in the case of conflict domestic law prevails.[41]

States are required to conform to international law in good faith,[42] and are responsible for any breaches that will not be excused through an invocation of its constitution or any other domestic law.[43] The increased ambit of international law in the domestic sphere can be discerned by treaties and *jus cogens* norms that require domestic implementation by states – such as the Geneva Conventions of 1949 in relation to war victims,[44] Statutes of the International Criminal Tribunal for Rwanda,[45] and of the former Yugoslavia,[46] in addition to the ICC.[47] In relation to *jus cogens* norms against torture for example, states are compelled to implement legislation to criminalise torture.[48] However, this argument is tempered by the reality that international law does not generally prescribe or regulate implementation of international obligations.[49]

With latitude in terms of implementation of international law, two distinct trends can be observed from a comparative analysis of state practice.[50] In the first case, *automatic standing incorporation*, international law is automatically incorporated into domestic legislation without requirement of domestic legislation.[51] The second method is *legislative ad hoc incorporation*,[52] also known as *transformation*,[53] which allows international law domestic

## Public International Law – A Liberalist View

Written by Arshad Salmaan Ali

application only where it has been implemented by an act of parliament.[54]

In Australian jurisprudence, a definite adoption of either theory has not occurred,[55] but there has been a preference for the transformation theory,[56] with a rejection of automatic incorporation doctrine.[57] This has been elucidated by statements asserting that international law, while not a part of the body of domestic common law, is nonetheless one of the sources of English law.[58] More recent judicial pronouncement has confirmed this, with the proviso that in the case of a clash between domestic common law and customary international law, the court may choose to adopt international law.[59] Such a view can constrain international law from applying domestically even in cases where a fundamental breach of the laws of nations, such as genocide for example, [60] is alleged to have occurred, because the crime might not part be part of the domestic law.

### State Immunity

This doctrine, also known simply as *sovereign immunity*, allows foreign states to enjoy jurisdictional immunity as it proscribes litigation which might result in a state appearing as a defendant.[61] The historical basis for the immunity derives from the fact that a head of state was not subject to the authority of the courts, and by extension through the principle of sovereign equality, from the courts of other states.[62] State immunity, as part of customary international law, is underpinned by the principle of sovereign equality,[63] respect and dignity of other states,[64] and encompasses criminal and civil proceedings.[65] This aspect of customary international law has been incorporated in Australia through federal legislation,[66] and the immunity extends to the conduct of foreign nationals acting in the official capacity of a state.[67]

The scope of the immunity has narrowed over the years, from an absolute immunity to one requiring a state to be acting in a sovereign capacity (*'jure imperii'*) as distinguished from private activities (*'jure gestionis'*) usually entailing commercial activities.[68] State immunity is not generally afforded for commercial, employment contracts, personal injury or infringement of intellectual property.[69]

The application of this rule can be a cause of consternation. For example, the House of Lord in *Jones v Saudi Arabia*,[70] decided when applying *The Arrest Warrant* case[71] that immunity was not to be denied to Saudi Arabia or its agents for torture.[72] This was followed in *Fang v Jiang Zemin*. [73] By shielding a state and her agents through state immunity, gross violations of international law breaching *jus cogens* norms such as torture can be carried out without effective judicial censure. This perpetuates the state-centric paradigm at the cost of the rights of individuals.

### Act of State Doctrine

Articulated as the *act of state doctrine*, [74] state practice particularly in common law nations requires respect for the independence of other sovereign states without an examination of the acts of such states in domestic courts.[75] While it has been argued by some academics that this doctrine is of common law import rather than a product of customary international law,[76] in *A-G (UK) v Heinemann Publishers Australia Pty Ltd* [77] (*'Spycatcher'*) the Australian High Court, relying on *Oetjen v Central Leather* [78] (*'Oetjen'*), held that the doctrine is founded on *international law* principles of comity and expediency.[79]

In *Oetjen* the court utilised such a reasoning to refuse enforcement of intellectual property rights in the form of a patent issued by a foreign state.[80] This was a somewhat puzzling decision given that the philosophical basis of the doctrine is respect and courtesy of other states, which one might expect to lead to enforcement of a patent granted by a foreign state. This reluctance was demonstrated again in *Spycatcher* where the High Court refused to enforce penal laws of a foreign state.

It has been suggested that this doctrine is unjust due its denial of private rights,[81] as occurred in *Dagi v Broken Hill Proprietary Company Limited (No 2)*. [82] In this case, the action of the plaintiffs in Papua New Guinea against a mining company was barred, as it would involve examination of whether a foreign state had committed a breach of trust by not pursuing compensation claims of residents as permitted under the contract.[83] This prevented what was

# Public International Law – A Liberalist View

Written by Arshad Salmaan Ali

ostensibly the private right of a non-state entity from succeeding, and which arguably would fall within the *jure gestionis* exception to state immunity if the state had been sued directly .

## Liberalism – Limitations?

Liberalism, in seeking the expansion of the role of non-state entities and which by consequence would dilute state sovereignty, may lead to unexpected consequences. As explained by Kingsbury:[84]

State sovereignty as a normative concept is increasingly challenged...but discarding sovereignty...will intensify inequality, weakening restraints on coercive intervention...and redivide the world into zones.

## Conclusion

The view espoused by certain international law scholars[85] is that the classic conception of international law fails to adequately deal with contemporary circumstances. This appears to be a justified claim, especially given the heightened emphasis on the protection of individual rights. The multifaceted reasons for this view have been touched upon briefly, which encompass issues of standing, state sovereignty and immunity, in addition to the complex interplay between municipal and international law. A brief reference has also been made to the critique of liberalism – that the dilution of state sovereignty might impose costs of its own.

## Bibliography

### Books

Bederman, David, *International Law in Antiquity* (Cambridge University Press, Cambridge, 2001)

Boas, Gideon, *Public International Law Contemporary Principles and Perspectives* (Edward Elgar Publishing Limited, United Kingdom, 2012)

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

Cassese, Antonio, *International Law* (Oxford University Press, Oxford, 2<sup>nd</sup> ed, 2005)

Fox, Hazel QC, *The Law of State Immunity* (Oxford University Press, Oxford, 2002)

Higgins, Rosalyn, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994)

Grotius, Hugo, *De Jure Belli ac Pacis Libris Tres* (1625), cited in Neff, Stephen C, 'A Short History of International Law', in Malcolm D Evans (eds), *International Law* (Oxford: Oxford University Press, 2006, 2<sup>nd</sup> ed)

Kant, Immanuel, 'Perpetual Peace: A Philosophical Sketch' in Reiss, Hans (eds), H.B. Nisbet (trans) *Kant's Political Writings* (Cambridge University Press, Cambridge, 1970)

Kelsen, Hans, *General Theory of Law and State* (Russell & Russell, New York, 1961)

Kelsen, Hans, *Pure Theory of Law* (University of California Press, Berkeley, 1967)

Lord McNair, *International Law Opinions: Selected and Annotated* (Cambridge University Press, Cambridge, 1956)

Mann, Fritz *Foreign Affairs in English Courts* (Clarendon Press, United Kingdom, 1986)

Mason, Anthony, 'International Law as a Source of Domestic Law' in Opeskin, Brian and Donald Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, Melbourne, 1997)

## Public International Law – A Liberalist View

Written by Arshad Salmaan Ali

Nussbaum, Arthur, *A Concise History of the Law of Nations* (Macmillan, New York, 3<sup>rd</sup> ed, 1961)

Oppenheim, Lassa, *International Law* (Longmans and Co., London, 1905) [13]; Hersch

Lauterpacht, *International Law: Collected Papers*, Volume II (Cambridge University Press, Cambridge, 1975)

Shaw, Malcolm, *International Law* (Cambridge University Press, Cambridge, 2008, 6<sup>th</sup> ed)

Stellios, James, 'International law and Municipal Law' in Fonteyne, Jean-Pierre, Anne McNaughton and James Stellios (eds), *Harris – Cases and Materials on International Law: An Australian supplement* (Lawbook Sydney, 2003)

Wolfers, Arnold, *Discord and Collaboration: Essays on International Politics* (John Hopkins Press, Baltimore, 1962)

### Journals

Alderton, Matthew, 'The Act of State Doctrine: *From Underhill to Habib*' (2011) 12 *Melbourne Journal of International Law* 1

Blank, Yishai, 'Localism in the New Global Legal Order' (2006) 47(1) *Harvard International Law Journal* 26

Cederman, Lars-Erik, 'Back to Kant: Reinterpreting the Democratic Peace as a Macrohistorical Learning Process' (2001) 95 *The American Political Science Review* 15

Doyle, Michael W., 'Liberalism and World Politics' (1986) 80(4) *The American Political Science Review* 1151

Garnett, Richard, 'Foreign States in Australian Courts' (2005) 29(3) *Melbourne University Law Review* 704

Kingsbury, Benedict, 'Sovereignty and Inequality' (1998) 9 *European Journal of International Law* 599

Slaughter, Anne-Marie, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503

Slaughter, Anne-Marie and William Burke-White, 'The future of international law is domestic (or, the European way of law)' (2006) 47(2) *Harvard International Law Journal* 327

Trimble, Phillip R, 'Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy' (1997) 95(6) *Michigan Law Review* 1944

### Cases

*A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30

*Ahmed Ali Al-Kateb v Godwin* 219 CLR 562

*Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (Judgment)* [2002] ICJ Rep 3

*Barcelona Traction, Light and Power Company Limited (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3

*Chow Hung Ching v The King* (1948) 77 CLR 449

*Dagi v Broken Hill Proprietary Company Limited (No 2)* [1997] 1 VR 428

## Public International Law – A Liberalist View

Written by Arshad Salmaan Ali

*Danzig Railway Officials (Advisory Opinion)* [1928] PCIJ (ser B) No 15

*Exchange of Greek and Turkish Populations (Advisory Opinion)* (1925) PCIJ, (ser B) No 10

*Fang v Jiang Zemin* (2006) 141 ILR 702

*Finnish Ships Arbitration (Finland v United Kingdom)* (1934) 3 RIAA 1479

*Holland v Lampen-Wolfe* [2000] 1 WLR 1573

*Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another; Mitchell and others v Al-Dali and others* [2007] 1 AC 270

*Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (2012) ICJ No 143

*Mabo v Queensland (No. 2)* 175 CLR 1, 42.

*Mavrommatis Palestine Concessions (Greece v United Kingdom) (Jurisdiction)* [1924] PCIJ (ser A) No 2

*Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14

*Nottebohm (second phase) (Liechtenstein v Guatemala)* [1955] ICJ Rep 4

*Nulyarimma v Thompson* (1999) 96 FCR 153

*Oetjen v Central Leather* 246 US 297 (1918)

*Panevezys – Saldutiskis Railway (Estonia v Lithuania) (Judgment)* [1939] PCIJ, (ser A/B), No 76

*Potter v The Broken Hill Proprietary Company Ltd* (1906) 3 CLR 479

*Prosecutor v Blaskic (Trial Judgment)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I, Case No IT-95-14-PT, 18 July 1997)

*R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [2000] 1 AC 61

*R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147

*Sadiqi v Commonwealth [No 2]* (2009) 181 FCR 1

*Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529

*The Parlement Belge* (1880) 5 PD 197

*Underhill v Fernandez* 168 US 250 (1897)

*United States v Noriega*, 746 F Supp 1506 (1990)

*Legislation*

*Foreign States Immunities Act 1985* (Cth).

*Treaties, Declarations & Conventions*



## Public International Law – A Liberalist View

Written by Arshad Salmaan Ali

sm\_working.pdf&ei=TgxFUuKfD4TtiAe52ID4BA&usg=AFQjCNHB-ksQLWkWkwD0-InV3uvUD0G-Dw&bvm=bv.53217764,d.dGI>.

[5] Anne-Marie Slaughter and William Burke-White, 'The future of international law is domestic (or, the European way of law)' (2006) 47(2) *Harvard International Law Journal* 327.

[6] Hugo Grotius, *De Jure Belli ac Pacis Libris Tres* (1625), cited in Stephen C Neff, 'A Short History of International Law', in Malcolm D Evans (eds), *International Law* (Oxford: Oxford University Press, 2006, 2<sup>nd</sup> ed) 35.

[7] Hugo Grotius, *De Jure Praedae Commentarius* (1604), cited in Erica-Irene Daes, *Report by Special Rapporteur The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights: A Contribution to the Freedom of the Individual under International Law*, UN Doc E/CN.4/Sub.2/432/Rev.2 (May 1983), 44.

[8] *United States v Noriega*, 746 F Supp 1506, 1533 (1990).

[9] *Danzig Railway Officials (Advisory Opinion)* [1928] PCIJ (ser B) No 15, 17, 287.

[10] Lassa Oppenheim, *International Law* (Longmans and Co., London, 1905) [13]; Hersch Lauterpacht, *International Law: Collected Papers*, Volume II (Cambridge University Press, Cambridge, 1975) 489.

[11] *Le Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (1758) at Bk. II, Ch.VI, § 71 cited in Nicholas Hooge, *Responsibility to Protect (R2P) As Duty to Protect? – Reassessing the Traditional Doctrine of Diplomatic Protection in Light of Modern Developments in International Law* (Masters Thesis, The University of Toronto, 2010) 2 <[https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&sqi=2&ved=0CC0QFjAA&url=https%3A%2F%2Fspace.library.utoronto.ca%2Fbitstream%2F1807%2F25618%2F1%2FHoo%2FHooge\\_Nicholas\\_T\\_201011\\_LLM\\_thesis.pdf&ei=ydEUuu9OluRigfK1YCQAg&usg=AFQjCNEESvtBvOreOFJ1Bu\\_96DQZIEU8\\_g&bvm=bv.53217764,d.aGc&cad=rja](https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&sqi=2&ved=0CC0QFjAA&url=https%3A%2F%2Fspace.library.utoronto.ca%2Fbitstream%2F1807%2F25618%2F1%2FHoo%2FHooge_Nicholas_T_201011_LLM_thesis.pdf&ei=ydEUuu9OluRigfK1YCQAg&usg=AFQjCNEESvtBvOreOFJ1Bu_96DQZIEU8_g&bvm=bv.53217764,d.aGc&cad=rja)>.

[12] *Mavrommatis Palestine Concessions* (Greece v United Kingdom) (Jurisdiction) [1924] PCIJ (ser A) No 2, 12; *Nottebohm (second phase) (Liechtenstein v Guatemala)* [1955] ICJ Rep 4, 24.

[13] International Law Commission, *Draft Articles on Diplomatic Protection*, 58<sup>th</sup> sess, UN Doc. A/61/10, (2006), article 1.

[14] GA Res. A/Res/6135 (4 December 2006).

[15] *Barcelona Traction, Light and Power Company Limited (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 45.

[16] *Ibid.*

[17] John R Dugard, *First report on diplomatic protection by Special Rapporteur*, UN Doc. A/CN.4/506 (18 August 2000), [88] cited in Nicholas Hooge, *Responsibility to Protect (R2P) As Duty to Protect? – Reassessing the Traditional Doctrine of Diplomatic Protection in Light of Modern Developments in International Law* (Masters Thesis, The University of Toronto, 2010) 22.

[18] International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries*, 58<sup>th</sup> sess, UN Doc. A/61/10 (2006), article 4.

[19] Nicholas Hooge, *Responsibility to Protect (R2P) As Duty to Protect? – Reassessing the Traditional Doctrine of Diplomatic Protection in Light of Modern Developments in International Law* (Masters Thesis, The University of

## Public International Law – A Liberalist View

Written by Arshad Salmaan Ali

Toronto, 2010) 21.

[20] Yishai Blank, 'Localism in the New Global Legal Order' (2006) 47(1) *Harvard International Law Journal* 263, 265; Phillip R Trimble, 'Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy' (1997) 95(6) *Michigan Law Review* 1944, 1946.

[21] *Panevezys – Saldutiskis Railway (Estonia v Lithuania) (Judgment)* [1939] PCIJ, (ser A/B), No 76, 308; *Mavrommatis Palestine Concessions (Greece v United Kingdom) (Jurisdiction)* [1924] PCIJ (ser A) No 2, 27.

[22] Gideon Boas, *Public International Law Contemporary Principles and Perspectives* (Edward Elgar Publishing Limited, United Kingdom, 2012) 17.

[23] Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503, 503.

[24] Hans Kelsen, *General Theory of Law and State* (Russell & Russell, New York, 1961) 363-88.

[24] Gideon Boas, *Public International Law Contemporary Principles and Perspectives* (Edward Elgar Publishing Limited, United Kingdom, 2012) 17.

[25] *Ibid* 18.

[26] Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (John Hopkins Press, Baltimore, 1962) 19-24.

[27] *Moravcsik*, above n 4.

[28] *Moravcsik* above n 4, 6.

[29] *Moravcsik* above n 4, 9.

[30] *Moravcsik* above n 4, 10.

[31] Immanuel Kant, 'Perpetual Peace: A Philosophical Sketch' in Hans Reiss (eds), H.B. Nisbet (trans) *Kant's Political Writings* (Cambridge University Press, Cambridge, 1970) 132-75.

[32] Lars-Erik Cederman, 'Back to Kant: Reinterpreting the Democratic Peace as a Macrohistorical Learning Process' (2001) 95 *The American Political Science Review* 15, 16.

[33] Michael W. Doyle, 'Liberalism and World Politics' (1986) 80(4) *The American Political Science Review* 1151, 1151, citing 'Address to Parliament', *New York Times*, 9 June 1982.

[34] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14.

[35] Michael W. Doyle, 'Liberalism and World Politics' (1986) 80(4) *The American Political Science Review* 1151, 1152.

[36] Hans Kelsen, *General Theory of Law and State* (Russell & Russell, New York, 1961) 363-88.

[37] Gideon Boas, *Public International Law Contemporary Principles and Perspectives* (Edward Elgar Publishing Limited, United Kingdom, 2012) 120.

## Public International Law – A Liberalist View

Written by Arshad Salmaan Ali

- [38] Antonio Cassese, *International Law* (Oxford University Press, Oxford, 2<sup>nd</sup> ed, 2005) 215; Hans Kelsen, *Pure Theory of Law* (University of California Press, Berkeley, 1967) 332-4.
- [39] Antonio Cassese, *International Law* (Oxford University Press, Oxford, 2<sup>nd</sup> ed, 2005) 214.
- [40] Ian Brownlie, *Principles of Public International Law* (Oxford University Press, Oxford, 7<sup>th</sup> ed, 2008) 32.
- [41] James Stellios, 'International law and Municipal Law' in Jean-Pierre Fonteyne, Anne McNaughton and James Stellios (eds), *Harris – Cases and Materials on International Law: An Australian supplement* (Lawbook Sydney, 2003) 19, 20.
- [42] *Draft Declaration on Rights and Duties of States*, GA, 375 (IV), UN GAOR, 4<sup>th</sup> sess, , 270<sup>th</sup> plen mtg, UN Doc A/RES/375 (6 December 1949) Article 13 < <http://www.refworld.org/docid/3b00f1ec54.html>>; for treaties see *Vienna Convention on the Law of Treaties*, opened for signature on 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) Article 2 which reiterates that a state may not excuse itself of compliance with treaty obligations by reference to domestic law.
- [43] *Exchange of Greek and Turkish Populations (Advisory Opinion)* (1925) PCIJ, (ser B) No 10, 20; *Finnish Ships Arbitration (Finland v United Kingdom)* (1934) 3 RIAA 1479, 1484.
- [44] See *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, opened for signature on 12 August 1949, 75 UNTS 287 (entered into force on 21 October 1950) Articles 49.1, 50.1, 129.1, and 146.1.
- [45] SC Res 955, UN SCOR, 49<sup>th</sup> sess, 3453<sup>rd</sup> mtg, UN Doc S/RES/955 (8 November 1994) annex (*Statute of the International Criminal Tribunal for Rwanda*) Article 28.
- [46] SC Res 827, UN SCOR, 48<sup>th</sup> sess, 3217<sup>th</sup> mtg, UN Doc S/25704 (25 May 1993) annex (*Statute of the International Tribunal for the Former Yugoslavia*) Article 29.
- [47] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) Article 88.
- [48] Antonio Cassese, *International Law* (Oxford University Press, Oxford, 2<sup>nd</sup> ed, 2005) 219.
- [49] *Ibid* 219.
- [50] *Ibid* 220.
- [51] Ian Brownlie, *Principles of Public International Law* (Oxford University Press, Oxford, 7<sup>th</sup> ed, 2008) 41; Malcolm Shaw, *International Law* (Cambridge University Press, Cambridge, 2008, 6<sup>th</sup> ed) 140.
- [52] Antonio Cassese, *International Law* (Oxford University Press, Oxford, 2<sup>nd</sup> ed, 2005) 220-1.
- [53] *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 553-4.
- [54] Antonio Cassese, *International Law* (Oxford University Press, Oxford, 2<sup>nd</sup> ed, 2005) 221.
- [55] Anthony Mason, 'International Law as a Source of Domestic Law' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, Melbourne, 1997) 215; See also the contrasting views of J McHugh and J Kirby in *Ahmed Ali Al-Kateb v Godwin* 219 CLR 562, [63], [190].
- [56] *Ibid*.

## Public International Law – A Liberalist View

Written by Arshad Salmaan Ali

[57] *Nulyarimma v Thompson* (1999) 96 FCR 153, [26], [32], [54].

[58] *Chow Hung Ching v The King* (1948) 77 CLR 449.

[59] *Mabo v Queensland (No. 2)* 175 CLR 1, 42.

[60] *Nulyarimma v Thompson* (1999) 96 FCR 153, [26], [32], [54].

[61] *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (2012) ICJ No 143; Richard Garnett, 'Foreign States in Australian Courts' (2005) 29(3) *Melbourne University Law Review* 704, 704.

[62] Gideon Boas, *Public International Law Contemporary Principles and Perspectives* (Edward Elgar Publishing Limited, United Kingdom, 2012) 268.

[63] *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1588.

[64] *The Parlement Belge* (1880) 5 PD 197, 214-5.

[65] *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 201.

[66] *Foreign States Immunities Act 1985* (Cth).

[67] Lord McNair, *International Law Opinions: Selected and Annotated* (Cambridge University Press, Cambridge, 1956) 230; *Prosecutor v Blaskic (Trial Judgment)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I, Case No IT-95-14-PT, 18 July 1997), [41]-[42]; Gideon Boas, *Public International Law Contemporary Principles and Perspectives* (Edward Elgar Publishing Limited, United Kingdom, 2012) 272-3.

[68] *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529.

[69] Hazel Fox QC, *The Law of State Immunity* (Oxford University Press, Oxford, 2002) 22.

[70] *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another; Mitchell and others v Al-Dali and others* [2007] 1 AC 270 ('Jones').

[71] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (Judgment)* [2002] ICJ Rep 3 ('Arrest Warrant').

[72] *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another; Mitchell and others v Al-Dali and others* [2007] 1 AC 270, 290.

[73] (2006) 141 ILR 702, 706-7.

[74] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [2000] 1 AC 61, 106; *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 40-1; *Sadiqi v Commonwealth [No 2]* (2009) 181 FCR 1, 53; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994), 217. Antonio Cassese, *International Law* (Oxford University Press, Oxford, 2<sup>nd</sup> ed, 2005) 219.

[75] *Underhill v Fernandez* 168 US 250 (1897), [252]; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994), 217.

[76] Ian Brownlie, *Principles of Public International Law* (Oxford University Press, Oxford, 7<sup>th</sup> ed, 2008) 504; Fritz A Mann, *Foreign Affairs in English Courts* (Clarendon Press, United Kingdom, 1986) 164, 705; Matthew Alderton, 'The Act of State Doctrine: From Underhill to Habib' (2011) 12 *Melbourne Journal of International Law* 1, 3, 17.

## Public International Law – A Liberalist View

Written by Arshad Salmaan Ali

[77] (1988) 165 CLR 30, 40.

[78] 246 US 297 (1918).

[79] Ibid 41.

[80] *Potter v The Broken Hill Proprietary Company Ltd* (1906) 3 CLR 479.

[81] Richard Garnett, 'Foreign States in Australian Courts' (2005) 29 *Melbourne University Law Review* 704, 716; Fritz Mann *Foreign Affairs in English Courts* (Clarendon Press, United Kingdom, 1986) 181-2.

[82] [1997] 1 VR 428, 453.

[83] Ibid; Richard Garnett, 'Foreign States in Australian Courts' (2005) 29 *Melbourne University Law Review* 704, 720.

[84] Benedict Kingsbury, 'Sovereignty and Inequality' (1998) 9 *European Journal of International Law* 599, 599.

[85] Anne-Marie Slaughter and William Burke-White, 'The future of international law is domestic (or, the European way of law)' (2006) 47(2) *Harvard International Law Journal* 327; Moravcsik, above n 4.

—

*Written by: Arshad Salmaan Ali*

*Written at: Queensland University of Technology – Law School*

*Written for: Bridget Lewis*

*Date written: September 2013*