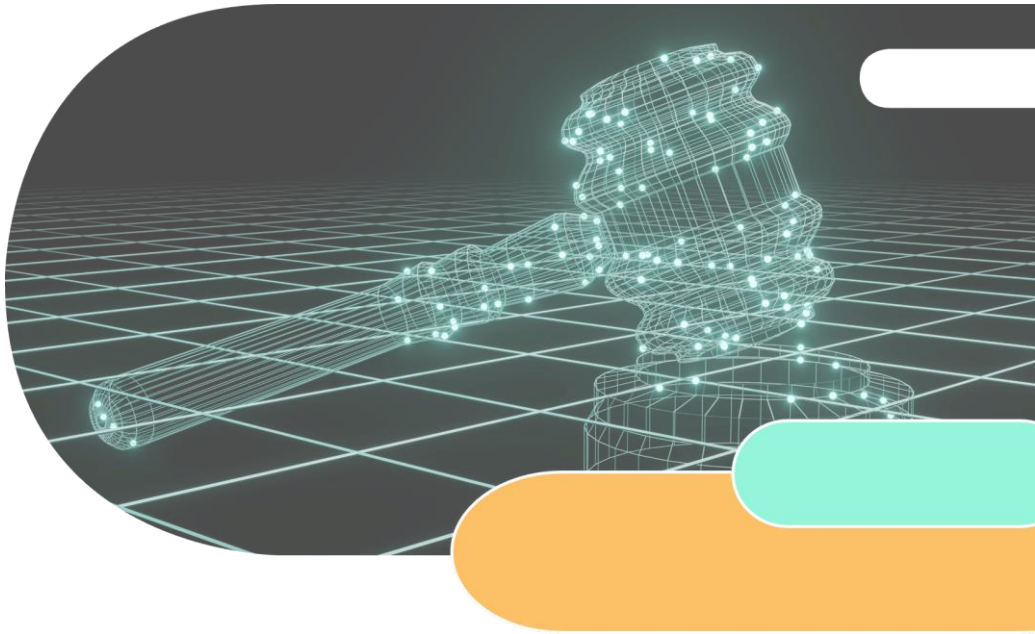
International Jurisprudence in Domestic Courts



Mr Adrian Lai JP

Deputy Secretary General and Co-Convenor of the Advisory Board
Asian Academy of International Law

Barrister
Des Voeux Chambers

International Jurisprudence in HK Courts

Chung Chi Cheung v. R [1939] AC 160 (PC, on appeal from HK) – immunities of foreign armed ship – a matter governed by domestic law or international law?

Lord Atkin:

> "It must be always remembered that, so far, at any rate, as the Courts of this country are concerned, **international law has no validity save in so far as its principles are accepted and adopted by our own domestic law**. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. **On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.** …"

Followed by HKCA in ***Ubamaka v. Sec for Security*** [2011] 1 HKLRD 539

International Jurisprudence in HK Courts

The Philippine Admiral [1977] AC 373 (PC, on appeal from HK) –
sovereign immunity of a commercial ship owned by a foreign state?

Lord Cross:

> "There here are clearly weighty reasons for not following [*The Porto Alexandre*]. … the trend of opinion in the world outside the Commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transactions. …"

International Jurisprudence in HK Courts

A Solicitor (24/07) v. Law Society of HK (2008) 11 HKCFAR 117

Li CJ:

> "After 1 July 1997, in the new constitutional order, it is of the greatest importance that the courts in Hong Kong should continue to derive assistance from overseas jurisprudence. This includes the decisions of final appellate courts in various common law jurisdictions as well as decisions of supra-national courts, such as the European Court of Human Rights. Compared to many common law jurisdictions, Hong Kong is a relatively small jurisdiction. It is of great benefit to the Hong Kong courts to examine comparative jurisprudence in seeking the appropriate solution for the problems which come before them. This is underlined in the Basic Law itself. Article 84 expressly provides that the courts in Hong Kong may refer to precedents of other common law jurisdictions."

International Jurisprudence in HK Courts

SJ v Zigo Yau (2007) 10 HKCFAR 335 (constitutionality of the offence of homosexual buggery – a discrimination and infringement to the right to equality?)

Bokhary PJ (minority concurring judgment):

> "My reasons for [holding the offence discriminatory] are these. Section 118F(1) has the effect of targeting a group defined by sexual orientation, namely homosexual men. Approached realistically, it has that effect even though it makes no mention of homosexuality. Indeed, it would have that effect even if it were to use the word 'person' rather than the word 'man'. **The relevant principle is to be found in the advisory opinion of the Permanent Court of International Justice in German Settlers in Poland PCIJ, Series B, No 6, 1923, p 5. This principle is succinctly put by Judge Schwebel in his book Justice in International Law (1994). Citing that advisory opinion, he says (at p 149) that 'discrimination in fact is debarred even if discrimination in form is absent'.**"

International Jurisprudence in HK Courts

Society for Protection of the Harbour Ltd. v. Town Planning Board [2003] 2 HKLRD 787 (issue: interpretation of the Protection of Harbour Ordinance – the interplay with the principle of sustainable development embedded in the Statement of Intent)

Chu J:

> "The position is succinctly encapsulated in the judgment of the International Court of Justice in *The Case Concerning the Gabcikovo-Nagymaros Dam (Hungary v. Slovakia)* 1997 ICJ Rep 7 at 78 para.140 …
>
> The case of *Gabcikovo-Nagymaros Dam* is the first occasion for the concept of sustainable development to receive attention in the jurisprudence of the International Court of Justice. The concept enables the Court to hold a balance between environmental protection and development considerations. Given that the concept is part of the Board's Statement of Intent and had been acknowledged by government officials since the enactment of PHO, **it is right that the court should have regard to the concept and take note of the international jurisprudence relating thereto in interpreting section 3.** …"

Cp. The CFA's approach (2004) 7 HKCFAR 1

International Jurisprudence in HK Courts

C v Director of Immigration [2011] 5 HKC 118
(whether the doctrine of non-refoulment forming part of the HK law)

CA's concern about state of evidence on CIL:

> "Without meaning to being respectful, the evidence presented in these appeals [on whether there was such a CIL] is mostly 'second-hand' because the appellants' primary source of evidence is from academic writings. However, given that there are some 190 nations recognised by the United Nations, it is understandable that 'primary', 'concrete' evidence of State practice would be logistically difficult to compile."

International Jurisprudence in HK Courts

C v Director of Immigration [2011] 5 HKC 118
(whether the doctrine of non-refoulment forming part of the HK law)

CA's question on practices of the "specially affected" States:

> "… I accept that the position in Asia is of particular relevance … because Asia has seen large-scale movements of displaced people. …
> …[the ICJ] in the *North Sea Continental Shelf Cases … held: 'a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected*."

CA held a CIL was established (despite 25 Asian States not having ratified RC) because no State has advocated against the proposition.

International Jurisprudence in HK Courts

C v Director of Immigration [2011] 5 HKC 118
(whether the doctrine of non-refoulment forming part of the HK law)

CA's question on the HKSAR's capacity to contract out the CIL:

- CA identified the principle of persistent objector, tracing to the *Anglo-Norwegian Fisheries Case*
- Doubt whether the HKSAR, not being a State, could be entitled to rely on the doctrine to contract out the CIL

International Jurisprudence in HK Courts

C v Director of Immigration [2011] 5 HKC 118
(whether the doctrine of non-refoulment forming part of the HK law)

CA's question on whether the CIL was a peremptory norm (*jus cogens*):

- CA referred to VCLT for the definition (a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted ….)
- CA accepted the "inherent difficulty" in establishing the status
- CA referred to academic writings and a NZ case in concluding that the CIL had not attained that status

International Jurisprudence in HK Courts

DR Congo v. FG Hemisphere (2011) 14 HKCFAR 95 (CFA), [2010] 2 HKLRD 66 (CA)
(whether "restrictive immunity" should be applied to the HKSAR)

CA's approach:

- Referring to *The North Sea Continental Shelf* case on the elements of CIL
- Stock VP: the absolutist approach no longer a general practice of States. Not an easy question on whether the restrictive approach has gained widespread acceptance
- Yeung JA referred to academic writings, UN Survey and States' comments and limited ratifications on the 2004 draft Articles on Jurisdictional Immunities of States and Their Properties and concluded that restrictive approach had not attained the status of CIL

Issues **not** decided by the CFA (majority):

- Whether restrictive immunity has attained the status of CIL (para.410) (for the majority resolved the issue as a matter of municipal law and constitutional principle)