The Role of International Law in National Law

1. National law cannot justify a breach of an international obligation


   Vienna Convention on the Law of Treaties, Article 27

2. National law determines the means of compliance with international law

3. Varying characteristics of rules of international law

   (a) different functions (constitutions, legislation, conveyances, contracts): AD McNair (1930) 11 BYIL 100 and reprinted in his Law of Treaties (1961)

   (b) different subject matters (war and peace, disarmament and arms control, international trade, international finance, international commercial transactions, international communication, international spaces, the environment, human rights, labour right; other areas of economic and social cooperation)

   (c) different relationships (state-state; consequences for others even if not a direct party; state – individual, rights and obligations; individual-individual, rights and obligations)

   (d) capable or not of direct judicial enforcement:

      (i) law empowering state action (e.g. maritime zones)

      (ii) a programmatic character (e.g. International Covenant on Economic, Social and Cultural Rights)

      (iii) procedural obligations

      (iv) broad drafting – “pious declaration”

      (v) states rights and duties in a precise form capable of direct application without further legislative elaboration: Vienna Convention on the International Sale of Goods, Montreal (Warsaw) Convention on liability in respect of carriage by air, some human rights provisions, such as some precisely stated rights in the International Covenant on Civil and Political Rights
4. **National Legal Systems**

The varying characteristics of international law rules is important, sometimes decisive for their application in national law. Monism/dualism, incorporation, transformation, (non) self executing …

5. **Customary international law as part of common law**

"part of the law of the land" “source”?  
Common law crimes – non-recognition of new crimes *R v Jones* [2007] 1 AC 136 and Criminal Code (Canada) section 9 (a)

6. **Interaction of Constitutions, common law and legislation with international law**

US Constitution Article VI (2) ("treaties made … under the authority of the United States shall be the Supreme Law of the Land")

*Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, 347 ("the making of a treaty is an executive act, while the performance of its obligations, if they require alteration of the existing domestic law, requires legislative action")

Constitutions – “cruel and unusual punishment”

*Simmons v Roper*, 125 S. Ct. 1183 (2005)  
*The State v T Makwanyane and M Mchunu*, Case No. CCT/3/94, 6 June 1995

Common law -- customary title (*Attorney-General v Ngati Apa* [2003] 3 NZLR 643)

Legislation --- interpretation and application: prerequisite of ambiguity or in case of a treaty a legislative purpose to implement? Or read the legislation in context, including the international context – interpretation as much an art as a science?
7. Three cases to conclude

*R v William Dodd* (1874) 2 CA (NZ) 598


*R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 1