

HOT TOPICS

LEGAL ISSUES IN PLAIN LANGUAGE

This is the sixty-ninth in the series *Hot Topics: legal issues in plain language*, published by the Legal Information Access Centre (LIAC). *Hot Topics* aims to give an accessible introduction to an area of law that is the subject of change or public debate.

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AUTHOR NOTE: Jane Stratton currently leads corporate social responsibility programs in a leading Sydney law firm, teaches law students at a Sydney university and independently, undertakes community development projects in Western Sydney. Her work has included legal and policy roles in the Public Interest Advocacy Centre, the Australian Human Rights Commission, UN High Commission for Refugees and the ICTY. She has experience in litigious and political advocacy. Jane holds qualifications in law (Honours) and in Arts (Honours) from ANU and a Masters of Law from New York University.

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Other Authors/Contributors:

Pearson, Linda
Hammer, Cathy
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Overview

While it is true that international law deals with international disputes, like any other system of law the role of international law is to regulate relations and thus help to contain and avoid disputes in the first place. The substantial part of international law, therefore, does not concern dispute resolution but dispute avoidance. It focuses on the day-to-day regulation of international relations.

Sam Blay 'The Nature of International Law'¹

WHAT IS INTERNATIONAL LAW?

International law is the universal system of rules and principles concerning the relations between sovereign States, and relations between States and international organisations such as the United Nations.

HOT TIP

In international law, a 'State' is a recognised and independent country or nation. See States, page 8.

Although international law is mostly made between States or in relation to States, its effects are broader and can also affect other entities. Sometimes these are called 'non-State actors' and include individuals, corporations, armed militant groups, groups that wish to secede or break away from a State, and other collective groups of people, such as minorities (ethnic, religious, linguistic) and Indigenous peoples.

The modern system of international law developed in Europe from the 17th century onwards and is now accepted by all countries around the world.

The rules and principles of international law are increasingly important to the functioning of our interdependent world and include areas such as:

- > telecommunications, postal services and transportation (such as carriage of goods and passengers);
- > international economic law (including trade, intellectual property and foreign investment);
- > international crimes and extradition;
- > human rights and refugee protection;
- > the use of armed force by States and non-State actors;
- > counter-terrorism regulation (see *Hot Topics 58: Terrorism*);
- > nuclear technology;

HOT TIP

A 'legal person' is an entity on which a legal system confers rights and imposes duties. It includes a natural person and an artificial or statutory body, such as a company.

- > protection of the environment; and
- > use of the sea, outer space and Antarctica.

An important aspect of international law is resolving international disputes, but it is only one part. Like any legal system, international law is designed to regulate and shape behaviour, to prevent violations, and to provide remedies for violations when they occur.

DIFFERENCE BETWEEN INTERNATIONAL LAW AND DOMESTIC LAW

International law is concerned with the rights and duties of States in their relations with each other and with international organisations. **Domestic** (municipal or national) law, the law within a State, is concerned with the rights and duties of legal persons within the State.

International law differs from domestic law in two central respects:

1. The law-making process

There is no supreme law-making body in international law. Treaties are negotiated between States on an *ad hoc* basis and only bind States which are parties to a treaty. The General Assembly of the United Nations is not a law-making body, and so its resolutions are not legally binding. However, UN Security Council resolutions to take action with respect to threats to peace, breaches of the peace, and acts of aggression, are binding on the 192 member States: see UN Charter, Chapter 7.

In Australia, domestic law is made by legislation passed by the parliaments of the Commonwealth, states and territories, and by common law principles developed by the courts. Parliaments are the supreme law-making bodies with power to make the laws, while courts are empowered to interpret the law and apply it to individual cases.

HOT TIP

***Ad hoc* means 'for a particular purpose' or 'as needed'.**

1. In *Public International Law: An Australian Perspective*, S Blay, R Piotrowicz and B M Tsamenyi (eds), Oxford University Press, 2nd ed, 2005, p 3.

2. Enforcement

International law has no international police force to oversee obedience to the international legal standards to which States agree or that develop as international standards of behaviour. Similarly, there is no compulsory enforcement mechanism for the settlement of disputes. However, there are an increasing number of specialised courts, tribunals and treaty monitoring bodies as well as an International Court of Justice: see pp 12 & 29. National laws and courts are often an important means through which international law is implemented in practice. In some instances, the Security Council can authorise the use of coercive economic sanctions or even armed force. For example, in 1990–91 when Iraq invaded and occupied Kuwait the international community used armed force to enforce international law (resolutions of the Security Council). Subsequent controversy about the use of armed force against Iraq highlights how difficult it can be to obtain the necessary authorisation from the Security Council under the United Nations Charter. In international law, that is the only legitimate way that collective armed force can be used. In general, international law is enforced through methods such as national implementation, diplomatic negotiation or public pressure, mediation, conciliation, arbitration (a process of resolving disputes other than by agreement), judicial settlement (including specialised tribunals): see p 29 for more information.

WHY DO STATES OBEY INTERNATIONAL LAW?

Even though international law does not have the coercive enforcement processes available to domestic law, it is in the interests of most States to ensure stability and predictability in their relations with other States. By complying with their obligations, they help to ensure that other States comply with theirs. Aside from this mutual benefit, it is in every State's interests to abide by the rule of law applying to areas such as use of the sea and ocean resources and environmental protection.

In a field like human rights, States may uphold international law principles, even where there is no direct national interest, because they recognise the need to protect common and universal human values.

SUBJECTS OF INTERNATIONAL LAW

A **subject** of international law (also called an **international legal person**) is a body or entity recognised or accepted as being capable of exercising international rights and duties.

The main features of a subject of international law are:

- > the ability to access international tribunals to claim or act on rights conferred by international law;
- > the ability to implement some or all of the obligations imposed by international law; and
- > to have the power to make agreements, such as treaties, binding in international law;
- > to enjoy some or all of the immunities from the jurisdiction of the domestic courts of other States.

Although this is a somewhat circular definition, there are at least two definite examples of subjects of international law, namely, States and international organisations.

While States are the main subjects of international law, and have all of these capacities, there are other subjects of international law. Their legal personality, their obligations and rights need not be the same as a State. For instance, the International Court of Justice has recognised some international organisations as proper subjects of international law.

In the *Reparations Case*² the International Court of Justice confirmed that the United Nations could recover reparations in its own right for the death of one of its staff while engaged on UN business. International personality was essential for the UN to perform its duties, and the UN has the capacity to bring claims, to conclude international agreements, and to enjoy privileges and immunities from national jurisdictions. It is accepted that international organisations are subjects of international law where they:

1. are a permanent association of States, with lawful objects;
2. have distinct legal powers and purposes from the member States; and
3. can exercise powers internationally, not only within a domestic system.

Examples of this type of international organisation are the European Union, the Organisation of American States, the African Union, Organisation of the Islamic Conference and specialised UN agencies: see p 13.³

The International Committee of the Red Cross, based in Switzerland, has a unique status in international law as an inter-governmental organisation as guardian of the Geneva Conventions of 1949 for the protection of victims of armed conflict. It is neither an international organisation nor a non-governmental organisation, but

2. Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Reports 174.

3. For more detailed discussion of the criteria for the recognition of international organisations at international law, see *Principles of Public International Law*, Ian Brownlie, 7th ed., Oxford University Press, 2008, Chapter 31.

has a special legal status under treaty law by virtue of its important functions in upholding legal protections in situations of armed conflict.

Traditionally, individuals were not regarded as having the capacity to enjoy rights and duties under international law in their own right, but only as those rights and duties derived from the State to which they ‘belonged’. However, there is no principle in international law that prohibits individuals being recognised as subjects of international law. It will depend on the circumstances. The development of human rights law has advanced the recognition of individuals in international law because at its heart is the idea that individuals have rights and can assert them against States under international law (see *Hot Topics 65: Human rights*, page 12).

Corporations

Large multinational companies may operate all around the world, and their profits may outstrip the resources of some States. Corporations interact with States – they become legal entities under municipal law; they negotiate with States sometimes from a position of great power. Some companies are granted very favourable conditions (for example, in relation to minimum work standards, tax treatment, or immunity from legal suit) by States eager to attract inbound foreign investment. Sometimes corporations are closely connected to their home State or controlled by their home State’s government.

Traditionally, corporations have not been subjects of international law, although this issue is not resolved. Some jurists favour an approach by which issues of international law that involve a corporation are addressed through its home State, while others are willing to consider corporations as independent subjects of international law.

In recent years, the idea of ‘corporate social responsibility’ has developed to help ensure that multinational corporations follow basic human rights and environmental law standards when they operate in developing countries.

Non-governmental Organisations (NGOs)

Organisations such as Amnesty International and Greenpeace are known as ‘NGOs’ (non-governmental organisations). They do not have international legal personality, but are involved in international political activity, and on some occasions have taken part in international activities as members of a State delegation.

National liberation movements

The Palestine Liberation Organisation and Polisario (representing the people of Western Sahara, occupied by Morocco) are examples of organisations having a limited international personality through recognition by some States, or the United Nations, as representatives of their peoples.

HOW DO INTERNATIONAL AND DOMESTIC LAW INTERACT?

It is important to understand how international law principles become part of domestic law, and to explain what happens if the rules conflict. The theories of **monism** and **dualism** are the two main theories that explain the relationship between international and domestic law.

Monism

In this theory, all law is part of a universal legal order and regulates the conduct of the individual State. The difference in the international sphere is that the consequences are generally attributed to the State. Since all law is part of the same legal order, international law is automatically incorporated into the domestic legal order. Some monist theorists consider that international law prevails over domestic law if they are in conflict; others, that conflicting domestic law has some operation within the domestic legal system.

Dualism

This theory holds that international law and domestic law are separate bodies of law, operating independently of each other. Under dualism, rules and principles of international law cannot operate directly in domestic law, and must be transformed or incorporated into domestic law before they can affect individual rights and obligations. The main differences between international and domestic law are thought to be the sources of law, its subjects, and subject matter. International law derives from the collective will of States, its subjects are the States themselves, and its subject matter is the relations between States. Domestic law derives from the will of the sovereign or the State, its subjects are the individuals within the State, and its subject matter is the relations of individuals with each other and with government.

Harmonisation

Neither monism nor dualism can adequately explain the relationship between international and domestic law, and alternative theories have developed which regard international law as having a harmonisation role. If there is a conflict, domestic law is applied within the domestic legal system, leaving the State responsible at the international level for any breach of its international law obligations.

Sources of international law

International law is a living body of law and principle – it grows and develops in response to contemporary challenges informed by how States behave, by what States agree between themselves, by what the International Court of Justice and other national courts say, and also by what respected commentators think about how the law should develop. As there is no international parliament to pass law or the rules to make laws, we have to consider a variety of sources of law making and become comfortable with a degree of uncertainty about how the law can be described. There is debate about both the method and substance of international law amongst learned academics and jurists.

It is generally accepted that Article 38 of the Statute of the International Court of Justice is a complete statement of the sources of international law. Article 38 describes the following four sources:

1. international conventions and treaties that establish rules that States expressly recognise;
2. international custom as evidence of general practice(s) accepted by States as law;
3. general principles of law; and
4. judicial decisions and the teachings of highly qualified publicists of various nations.

(Each of the sources of international law is discussed separately below.)

The International Court of Justice (ICJ), which is the principal judicial organ of the United Nations, is authorised to consider these sources when deciding disputes.

However, a decision of the ICJ has no binding force except between parties and in respect of that particular case: Article 59, Statute of the International Court of Justice.

1. INTERNATIONAL CONVENTIONS AND TREATIES

Treaties, or international conventions, can be **bilateral** (between two States) or **multilateral** (between many States). Australia is currently a party to over 1300 treaties; 900 of which are bilateral and 300 multilateral. In addition to treaties, there are agreements between States that are not intended to be governed by international law. These agreements, known as ‘arrangements of less than treaty status’, are generally expressions of intention or political commitment. In the case of Australia, the ratio of agreements governed by international law to arrangements of less than treaty status is 2:5 or higher.

HOT TIP

A treaty is a written legal document (instrument) agreed between States and governed by international law. It may be in the form of a single instrument, or two or more related instruments.⁴ Although often used interchangeably, the term ‘convention’ is usually reserved for multilateral agreements, such as the Hague, Geneva and Vienna Conventions. Treaties can also be called agreements, protocols or instruments.

The *Vienna Convention on the Law of Treaties* came into force on 27 January 1980.⁵ Although it is not a complete code of the law of treaties, it declares existing law and also provides evidence of emerging norms of international law. It deals with the conclusion of treaties, the termination of treaty relationships, and the effect of breach of treaty obligations. It does not deal with treaties between States and non-State organisations; questions of State succession; or the effect of war on treaty obligations and relationships.⁶

The process for concluding a treaty generally includes the following steps:

Adoption – when the negotiators of the treaty finalise the text, the text is adopted. This may occur at a specially-called conference, or at a meeting of a body such as the UN General Assembly. The text will usually indicate how States are to consent to the terms of the

4. Vienna Convention on the Law of Treaties, Article 2(1)(a).

5. 8 ILM (1969), 679.

6. *Principles of Public International Law*, Ian Brownlie, 7th ed. Oxford University Press, 2008, p 608.

treaty, whether through signature, exchange of letters, ratification, acceptance, approval, accession, or other agreed means: see Article 11 of the Vienna Convention on the Law of Treaties.

Signature – signature indicates an intention to become a party to a treaty, and does not usually establish consent to be bound by the terms of the treaty, unless the treaty provides for the signature having that effect.

Ratification – this is the confirmation of the signature of the treaty, and is the formal act by which a State indicates that it consents to be bound by the treaty. It is usually carried out by the sovereign or head of State.

Before ratifying a treaty, a State will usually have carried out any necessary steps to enable it to comply, such as legislation or other forms of domestic approval. A State which has signed a treaty is obliged not to act in such a way that would defeat the object and purpose of the treaty. A State is not, however, bound by a treaty until ratification, and is not bound to ratify a treaty it has signed.

Accession – a State which has not signed a treaty can formally indicate its intention to be bound by the treaty before or after the treaty has come into force.

Entry into force – the terms of a treaty will usually specify how and when it comes into force. Many multilateral treaties require that a specified number of States consent to be bound before the treaty can enter into force. An example is the 1982 UN Law of the Sea Convention, which required 60 ratifications before it came into force in 1994.

Treaties are binding – the principle of *pacta sunt servanda* (from Latin, meaning ‘agreements are to be kept’ or ‘treaties are binding’) asserts that:

- > when treaties are properly concluded, they are binding on the parties, and must be performed by them in good faith;
- > the obligations created by a treaty are binding in respect of a State’s entire territory;
- > a State cannot use inconsistency with domestic law as an excuse for failing to comply with the terms of a treaty.

Reservations to treaties – once a treaty comes into force, a State cannot decide which parts of a treaty it chooses to be bound by. However, upon signing a treaty, a State may lodge a formal **reservation** to it which may modify the scope of the legal obligation owed by that State under the treaty.

A reservation cannot be made if the terms of the treaty exclude reservations, or if the reservation is incompatible

with the object and purpose of the treaty; and other parties to the treaty can also object to a reservation. A party objecting to a reservation may either not enter into a treaty relationship with the reserving State, or may enter into a treaty relationship, but not enjoy the provision to which the reservation relates.

2. CUSTOM

Customary international law describes general practices accepted as law by States.⁷ The development of customary international law is an ongoing process, making it more flexible than law contained in treaties. The task of identifying or describing customary international law, involves consideration of the following elements:

- > the degree of consistency and uniformity of the practice;
- > the generality and duration of the practice;
- > the interests of specially affected States; and
- > the degree to which the States who adopt the practice do so from a recognition that the practice is required by, or consistent with prevailing international law. The shorthand for the belief that the practice is required by law is *opinio juris et necessitates*, a Latin phrase.

How is custom proved?

State practice is determined by examining what States and their officials do, and also statements such as those contained in bilateral treaties, voting patterns on resolutions at the United Nations, conclusions of international conferences, and other documents. The *Universal Declaration of Human Rights*, for example, was adopted by the UN General Assembly in 1948 and, while it is not binding like a treaty, most of it is recognised as establishing fundamental human rights standards which are binding on States.

Sometimes customary international law is codified in a treaty – for example, the *Vienna Convention on the Law of Treaties*. But it need not be written down in the form of a treaty to be binding on States. Customary international law applies to every State.

Therefore, where customary law and treaty law are complementary, and cover the same or similar obligations, non-parties will be bound by custom, and parties to the treaty will be bound by both the treaty and custom.

Where custom and treaty law conflict, the situation is more complex. If the treaty is more recent than the customary law, the treaty will bind States that are parties. If the principle of customary law has developed after the adoption of a treaty, the treaty will generally continue to govern the relations between the parties.

7. For more detailed discussion of how customary international law is formed and evidenced, see *Principles of Public International Law*, Ian Brownlie, 7th ed., Oxford University Press, 2008.

Jus cogens

There are some principles of international law, however, that have become so widely accepted that they are now considered to be fundamental principles and rules that may not be altered or broken. Such principles currently include the prohibitions against slavery and torture, genocide, the use of armed force, and piracy on the high seas; and more positively, the principle of racial non-discrimination; and, the right to self-determination. These principles of international law are known as *jus cogens*. In Latin this means ‘compelling law’ and refers to so-called ‘peremptory norms’ of general international law. In time, new principles may become part of the *jus cogens*.

Not every principle of international law has the status of *jus cogens*. To begin to understand how compelling principles or rules of international law are and how they become so, it is important to make sense of how international law is formed.

3. GENERAL PRINCIPLES OF LAW

Another source of international law is ‘general principles of law’. The ICJ is directed to consider ‘the general principles of law recognised by civilised nations’ in its decision making; see *Statute of the International Court of Justice*, Article 38(1)(c).

What are ‘general principles of law’? Does it mean that the ICJ should search for what the legal systems of the world have in common and apply those principles? Or rather, should the ICJ use methods and doctrines of domestic legal decision making to the extent that they are useful in addressing the questions before the Court, to develop an international judicial method? The preferable view seems to be that international tribunals use domestic law selectively where situations are comparable to make the administration of international law work.⁸

For example, the ICJ in the *Chorzów Factory* case applied a concept that would be readily understood by most lawyers – ‘a breach of an engagement involves an obligation to make reparation.’⁹

Another good example is the use by the ICJ of the principles of estoppel or acquiescence to the relations between States. ‘Estoppel’ is a doctrine that comes from an equitable tradition in legal reasoning that concerns itself with fairness, conscionability and justice. Estoppel works like this. ‘State A’ acts or says something to encourage ‘State Z’ to believe in a particular legal or factual situation. State Z relies on what State A did or said. Now State A wants to go back on its word or its representation and State Z will suffer as a result. State Z

can ‘estop’ State A from changing its tune. An example is a boundary dispute and apparent acceptance of maps concerning the area in contention.¹⁰

4. JUDICIAL DECISIONS AND WRITINGS OF PUBLICISTS

The Statute of the International Court of Justice says that the Court shall apply judicial decisions and the teachings of the most highly qualified publicists as ‘subsidiary means for the determination of rules of law’: Article 38(1)(d). Traditionally, judicial decisions and writing of publicists do not themselves form a source of international law, but help the Court to identify the scope of customary law, proper interpretation of a treaty, or existence of general principles. According to a leading academic, the idea of a hierarchy of sources of international law with judicial decisions and academics at the bottom is misplaced.¹¹ The International Court of Justice (ICJ) is the main court of the UN and its decisions identify and articulate international law rules based on treaty, custom, general principles of law, judicial decisions of international and national courts and tribunals, and the writings of jurists.

Judicial decisions

The decisions of the ICJ have no binding force, except for between the parties in a particular case: Statute of the ICJ, Article 59. While this means that there is no formal and consistent system of binding precedent, the ICJ does have regard to its previous decisions and advisory opinions and to the law that it has applied in previous cases. It is also concerned to ensure procedural consistency.

Some ICJ decisions have been influential in developing new rules of international law. For example the *Reparations* case, which established the legal personality of the UN;¹² the *Nuclear Tests* cases, which concerned the circumstances in which a unilateral declaration is binding on the State that made it;¹³ and the *Anglo-Norwegian Fisheries case* concerning how the territorial sea is to be measured along a deeply indented coastline or coastal fringe of islands.¹⁴

Decisions of other bodies, including arbitration panels, specialist tribunals and regional courts such as the European Court of Justice and the European Court of Human Rights, assist in application of particular aspects of the law. Decisions of domestic courts, which interpret rules of international law can provide guidance as to the law, and provide evidence of the practice of that State in the development of customary international law.

8. *Principles of Public International Law*, Ian Brownlie, 7th ed., Oxford University Press, 2008, p 16.

9. *Chorzów Factory* (Merits), PCIJ, Ser. A, no. 17, p. 29.

10. Case concerning the Temple of Preah Vihear (Merits) (*Cambodia v Thailand*) [1962] ICJ Reports 6.

11. *Principles of Public International Law*, Ian Brownlie, 7th ed., Oxford University Press, 2008, pp. 5, 19.

12. Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Reports 174.

13. Nuclear Tests Cases (*Australia v France; New Zealand v France*) [1974] ICJ Reports 253.

14. Fisheries Case (*United Kingdom v Norway*) [1951] ICJ Reports 116.

Writings of publicists and jurists

The writings of publicists and jurists (that is, academics of international public law) are important in the ongoing refinement and development of international law. They inform the shape of legal advice given to governments and therefore inform State practice; they are used in pleadings and in argument before the ICJ by States.

Other sources treated similarly to the writings of eminent publicists, and at least as authoritative¹⁵ are:

- > the reports, research and draft articles produced by the International Law Commission (a subsidiary organ of the UN General Assembly responsible for the progressive development and codification of international law: UN Charter, Article 13(1)(a));
- > resolutions and working papers of expert bodies; and
- > the workings of secretariats providing the legal basis for conferences and working groups such as the Hague Codification Conference.

'HARD LAW' AND 'SOFT LAW'

The terms 'hard law' and 'soft law' are often used in writings about international law. 'Hard law' refers to binding law such as resolutions of the UN Security Council, treaty obligations to which a State has agreed and rules of customary international law: see page 4.

The term **soft law** is used in two different situations.

1. **Where treaty obligations are expressed in vague or flexible terms, rather than clear and concrete terms.** This type of drafting is used in many legally binding international law instruments, also known as 'framework' conventions. For example, the *Convention on Biological Diversity* (1992) states that each party is to 'as far as possible and as appropriate, cooperate with other Contracting Parties' (Article 5).

Some agreements envisage a further step. The *Vienna Convention for the Protection of the Ozone Layer* (1987) requires parties to '[c]ooperate in the formulation of agreed measures, procedures and standards for the implementation of this Convention, with a view to the adoption of protocols' (Article 2(2)(c)). Although this provision is vaguely worded, it can have legal effect.

In the *Tasmanian Dams Case*,¹⁶ a majority of the High Court decided that the Convention for the *Protection of the World Cultural and Natural Heritage* (1972) imposed obligations on the parties. This allowed the Commonwealth to pass legislation for the protection of an area that Australia had nominated for listing under the Convention.

2. **Where principles or guidelines are not legally binding but may still shape behaviour.** Principles of this kind can develop from international conferences, or be formulated in non-binding agreements. Soft law in this sense can articulate principles that may subsequently develop into binding customary law. An example of such an agreement is Agenda 21, an 800 page action plan relating to the environment and development, which was formulated at the 1992 Rio UN Conference on Environment and Development. Soft law in this sense can articulate principles that may subsequently develop into binding customary law. For an account of how sustainable development and climate change have been addressed in international law see page 19.

Resolutions and declarations of international organisations

Resolutions of international organisations are another example of soft law that can form the building blocks of hard law. Resolutions of the General Assembly are not binding even if they are unanimous, other than resolutions concerning the internal workings of the UN or matters within its competence, such as election to the Security Council. However, General Assembly resolutions may declare customary law or assist in its formation.

For example, in September 2007, Australia was one of four States that voted against the United Nations' Declaration on the Rights of Indigenous Peoples which was supported by 143 member States of the UN General Assembly. After a change of Federal Government, a statement of support of the Declaration was made on 3 April 2009 by the Minister for Indigenous Affairs, the Hon. Jenny Macklin MP. Although this does not create any binding obligation, it is an example of clear State practice in support of the rights and principles reflected in the Declaration. Although the Declaration does not yet reflect customary law in its entirety, over time it may generate new customary rules if there is sufficient State practice in support of it.

Similarly, the principles contained in resolutions of international organisations are not rules of law, although they may provide evidence of *opinio juris* in the development of binding international customary law. For example, in the *Nicaragua Case* the ICJ referred to a number of resolutions of international bodies, particularly the UN General Assembly, for evidence of *opinio juris*, supporting a prohibition on the use of force, and against intervention in the internal affairs of other States.¹⁷

15. *Principles of Public International Law*, Ian Brownlie, 7th ed., Oxford University Press, 2008, p 25.

16. *Commonwealth v Tasmania* (1983) 158 CLR 1.

17. Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States' of America) (Merits) [1986] ICJ Reports.

States

WHAT IS A STATE?

A State as an international person should possess the following characteristics:¹⁸

- > **Defined territory** – there is no minimum requirement as to the amount of territory. It is not necessary for all boundaries to be defined and settled, so long as there is a consistent, coherent area of territory over which the State exercises sovereignty (that is, administrative or governmental control). For example, Israel is accepted by a majority of nations and by the UN as a State, despite the fact that its frontiers are disputed. Since 1945, a State cannot lawfully acquire foreign territory by military force;
- > **Permanent population** – there is no minimum requirement as to population. A population may be nomadic, yet be regarded as sufficiently linked with the territory to be regarded as its population;¹⁹
- > **Government** – a State must have an effective government, or some coherent political structure able to exercise control over the permanent population within the State's territory. This requirement has not always been consistently applied and it sometimes depends on how other States respond to the situation. For example, Croatia and Bosnia-Herzegovina were recognised as independent States by European Community member States, and admitted to the UN in 1992, at a time when non-government forces controlled substantial areas of territory. An established State does not lose its Statehood when it no longer has effective government, for example through civil war; and
- > **Independence** – sometimes expressed as the capacity to enter into relations with other States. A State must be able to deal with other States on a basis of equality. Actual, as well as formal, independence is required. For example, the international community did not recognise the South African homeland States of Bophuthatswana, Transkei, Ciskei or Venda established during the apartheid period.

RIGHTS OF STATES

There are three fundamental rights of States:

Sovereignty

A State is entitled to exercise political control within its territory, and in relation to its citizens. States have a corresponding duty not to intervene in the internal affairs of other States. Matters within the internal competence of States are said to be within their reserved domain or domestic jurisdiction. The extent of a State's domestic jurisdiction has declined with the increasing membership of international organisations, the conclusion of treaties, and the development of rules of customary international law. For example, the protection and promotion of human rights within States are now legitimate matters for consideration at the international level, and not matters within a State's domestic jurisdiction.

Equality

All States have equal rights and duties and are equal members of the international community. In the General Assembly of the UN each State has one vote, irrespective of the realities of power.

Political independence and territorial integrity

Article 2(4) of the UN Charter requires States to refrain in their international relations from the threat of use of force against the political independence and territorial integrity of any State.

RESPONSIBILITY TO PROTECT

Traditionally, an important consequence of a State's sovereignty has been freedom from any type of interference from outside interests. Since 1945, that view of absolute sovereignty has been increasingly limited by the growth of modern human rights law and international criminal law. Most recently, the Canadian Government established the International Commission on Intervention and State Sovereignty to reconsider State sovereignty. The Commission issued its report in December 2001 entitled, 'The Responsibility to Protect' (R2P). It advocated a new position that disrupts the traditional norm of non-interference in favour of an understanding of sovereignty that demands that a State prevents and protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity.

18. Montevideo Convention on the Rights and Duties of States 1933.

19. Western Sahara (Advisory Opinion) [1975] ICJ Reports 12.

Failure to do so will justify collective international action and potentially military intervention, although the focus of R2P is on prevention.

The World Summit 2005 statement by the General Assembly reflected an acceptance of the basic ideas proposed by the Commission.²⁰ The Security Council

subsequently reaffirmed its support of the UN General Assembly's position in relation to R2P, which is that a State bears responsibility to prevent and to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.²¹ In February 2008, UN Secretary-General Ban Ki-moon appointed a Special

CASE STUDY: EAST TIMOR

East Timor was colonised by Portugal in the 16th century. The western side of the island was colonised by the Netherlands, and when Indonesia became an independent State it gained control of that part of the island, although the UN-sponsored process by which West Papua became part of Indonesia has been criticised for not properly reflecting the self-determination choice of the local people.

1970s – withdrawal and invasion

In mid 1975 Portugal withdrew from East Timor and in November FRETILIN, one of a number of independence movements, proclaimed independence. On 7 December 1975 the Indonesian army invaded East Timor, and claimed sovereignty over East Timor. Australia recognised Indonesia's sovereignty over East Timor in 1979, one of few States to do so. Resolutions of the UN General Assembly and Security Council condemned the invasion and reaffirmed East Timor's status as a non-self governing territory under Chapter XI of the UN Charter, with Portugal as administering power.

1999 – transition to independence

In May 1999 Indonesia and Portugal agreed that the Secretary-General of the UN should conduct a referendum of the people of East Timor to determine whether they would accept or reject a proposed constitutional framework for special autonomy within Indonesia. A large majority of the East Timorese voted against special autonomy and in favour of independence. Pro-Jakarta elements went on a rampage that saw villages burnt down and tens of thousands of Timorese fleeing their homes to escape the violence. The UN authorised the establishment of INTERFET (International force for East Timor) led by Australia, and Australian troops arrived in September to keep the peace and assist in rebuilding. On 20 October 1999 the Indonesian People's Consultative Assembly ratified the ballot result and accepted the separation of East Timor from Indonesia. On 25 October 1999 the UN Security Council voted to establish the UN Transitional Administration in East Timor ('UNTAET') to administer East Timor until its independence. The INTERFET deployment ended in February 2000 and elections were held in 2001. East Timor gained formal independence in 2002, with Xanana Gusmão as the country's President. East Timor became a member of the UN on 27 September 2002.

Issues raised

The transition to independence raises many issues, including the status of East Timorese individuals. An individual born in East Timor in 1969, arrived in Australia on an Indonesian passport in 1994, and applied for a protection visa. While East Timor was not recognised at that time as a sovereign independent State, the Administrative Appeals Tribunal found that it fulfilled the criteria of a 'country'.²² The individual, known as 'SRPP' had an unqualified right of entry and residence in East Timor, had lost Indonesian citizenship, and had no right to Portuguese citizenship. The tribunal was satisfied that SRPP had a well-founded fear of persecution if he was to return to East Timor, because of his Chinese ethnicity. He was therefore a person to whom Australia had protection obligations under the Refugees Convention, and was entitled to a protection visa: *Re SRPP and Minister for Immigration and Multicultural Affairs*.²³

The Timor Gap Treaty

In 1989, Australia and Indonesia entered into a treaty in relation to an area of the continental shelf between the coast of East Timor and the coast of mainland Australia, where both Indonesia and Australia claimed sovereign rights (the Timor Gap). The Timor Gap treaty designated the area a Zone of Co-operation and established arrangements for exploration for and exploitation of petroleum resources. When East Timor became independent from Indonesia, Australia and East Timor entered into a new treaty to replace the treaty that had been operating between Australia and Indonesia. This treaty was the Timor Sea Treaty (20 May 2002). It provides for the sharing of the proceeds of petroleum in a particular area of the seabed; and does not determine any maritime boundary or sovereignty over the seabed, since the two countries were unable to agree on the disputed boundary. East Timor is entitled to 90% of the proceeds, and Australia to 10% with the exception of one contentious area. A further treaty, the Treaty on Certain Maritime Arrangements in the Timor Sea, was entered into in 2007 and extended the effect of the Timor Sea Treaty until 2057. It also settled the apportionment of revenues in relation to the contentious area of the seabed giving each party 50% of the proceeds.

20. 2005 World Summit Outcome, UN GA (15 September 2005), UN Doc. A/60/L.1, paras 138–139.

21. UN Security Council Resolution 1674 on the Protection of Civilians in Armed Conflict (28 April 2006), UN Doc. S/RES/1674.

22. Convention relating to the Status of Refugees 1951.

23. [2000] AATA 878.

Adviser for the R2P. This may become an emerging doctrine of international law, although since being adopted, it has not been acted upon in places such as Darfur, Sudan, or the civil war in Sri Lanka, where serious international crimes have occurred.

SELF-DETERMINATION

The right of peoples to self determination is recognised in the UN Charter, resolutions of the General Assembly and decisions of the International Court of Justice, and is established as a norm of customary international law. The principle allows a people to determine their own form of economic, cultural and social development, free from outside interference, and requires governments to represent the whole population without distinction. It also maintains that peoples are entitled to choose their own political status. The principle has been applied by the ICJ in the process of decolonisation. In the *East Timor case*,²⁴ the ICJ confirmed that the principle of self determination of peoples is one of the essential principles of contemporary international law.

More controversial is whether self-determination should also apply to minority groups or Indigenous peoples living within the boundaries of an existing independent State. The conventional view is that self-determination cannot be claimed by such groups in order to break away from independent countries, although more limited notions of self-determination have emerged from the UN Declaration on the Rights of Indigenous Peoples, which refer to the capacity of those groups to exercise limited forms of autonomy within independent States.

CREATION AND RECOGNITION OF NEW STATES

During the 20th century many new States were created through decolonisation. In addition to the creation of a new State with the consent of the former sovereign government, new States can be created by *secession*, where part of a State secedes and the former sovereign State continues in existence, or *dissolution*, where the former sovereign State ceases to exist and its parts form new States. The dissolution of the former USSR and Yugoslavia at the end of the 20th century are examples of the latter. In some instances, new States can be created by agreement, such as the division of Czechoslovakia into the Czech and Slovak Republics at the end of 1992, and the merger of North and South Yemen to form the Republic of Yemen in 1990.

The principle of *uti possidetis*, which derives from Roman law, was first applied in international law to determine territorial boundaries resulting from armed conflict. At the end of a war each State retained as its territory the area it had actually possessed at the end of hostilities.

CASE STUDY: YUGOSLAVIA

Yugoslavia came into existence as a State after the First World War when areas which had not been part of pre-war Serbia sought unification with Serbia to form the Yugoslav State. By late 1991, the Socialist Federal Republic of Yugoslavia was in the process of dissolution. The European Community established an Arbitration Commission, headed by the French lawyer Robert Badinter. The commission ruled that where federal units of a State gain independence, the existing internal federal borders of those federal units are transformed into international borders. The first independent States were Croatia and Slovenia, which were recognised by the European Community in January 1992. The European Community then recognised Bosnia-Herzegovina in April 1992, and the former Yugoslav Republic of Macedonia in 1993. Until 3 June 2006, when Montenegro declared independence, Yugoslavia consisted of the two republics of Serbia and Montenegro. Now, Yugoslavia does not exist. Its members have become independent States. The application of the principle of *uti possidetis* to maintain internal federal borders as new international borders has not prevented conflict over those borders.

During the early 19th century, the principle was applied in the process of decolonisation of Central and South America from Spanish and Portuguese rule. The former colonial boundaries became the international borders of the new independent States, even if those boundaries did not match the reality of where similar groups of people lived, indicating that the principle privileges stability in international relations over the freedom of peoples to choose their own homelands.. The principle was applied in the decolonisation of Africa after the Second World War.

Recognition of a State as an international legal person by another State occurs formally through a letter of recognition, legislation, or a treaty, or informally through some form of diplomatic interaction. There are two theories on the effect of recognition:

- > *constitutive* – where the act of recognition confers international personality;
- > *declaratory* – if a State satisfies the factual criteria, then it exists as a legal person and recognition is simply a political act.

Australia claims the right to recognise whether or not a State exists. For example, Australia refused to recognise Slovenia and Croatia in June 1991 because they did not demonstrate adequate control over their claimed territory.

24. Case Concerning East Timor (*Portugal v Australia*) [1995] ICJ Reports 90.

Institutions

UNITED NATIONS MEMBERSHIP

The UN was established in 1945, with 51 members, including Australia. As at April 2009, it has 192 members which encompasses practically all States. Membership is open to any country that is 'peace-loving' and accepts the obligations of the Charter. States which do not recognise each other can be members of the UN without being considered to have changed their policies. Russia continued membership of the UN after the dissolution of the USSR in 1991. On the other hand, after the dissolution of the former Yugoslavia and the creation of the new States of Croatia, Slovenia, Bosnia-Herzegovina and Macedonia, the UN decided that the new Federal Republic of Yugoslavia (consisting of Serbia and Montenegro) was not entitled to continue the membership of the Socialist Federal Republic of Yugoslavia automatically. Yugoslavia's membership was suspended in 1992. A new application for membership of the UN was made and accepted by the Federal Republic of Yugoslavia (Serbia and Montenegro) in 2000, replacing instead of continuing the former membership of Yugoslavia. Montenegro has since declared independence (3 June 2006) and now Serbia continues that membership. Montenegro was admitted as a member of the UN on 28 June 2006.

Purposes

The purposes of the UN are:

- > to maintain international peace and security, including by prohibiting the use of force in international relations (article 2(4) of the UN Charter) and authorising collective security to restore peace (Chapter VII of the Charter);
- > to develop friendly relations between States;
- > to achieve international co-operation in solving international problems, and co-ordinate and harmonise actions to achieve these ends. (Article 1, UN Charter).

The UN is financed through membership dues, although many States are behind in payment. For example, as at April 2009, member States owed \$2.4 billion in current and back peacekeeping dues.

The UN Charter established six main organs of the UN:

- > Security Council
- > General Assembly
- > International Court of Justice
- > Secretariat
- > Trusteeship Council
- > Economic and Social Council.

SECURITY COUNCIL

The Security Council consists of 15 States – the five permanent members (USA, UK, France, Russian Federation and China), and ten States elected for two-year terms. When the USSR ceased to exist in 1991, Russia continued to sit in place of the USSR, without opposition from the other members. Decisions of the Security Council require nine 'yes' votes. A decision cannot be taken if there is a 'no' vote, or veto, by a permanent member (except in votes on procedural questions). The Security Council was intended to be a relatively small body that could meet as and when required, and respond promptly to situations. During the Cold War, the use by the permanent members of their veto effectively prevented the Security Council from acting.

From 1990 onwards, the Security Council became much more active, although there were still spectacular failures to prevent serious threats to peace and security during the Balkan wars, the Somalian civil war, and the Rwandan genocide.

The major functions of the Security Council are set out in the UN Charter and are:

- > the peaceful settlement of disputes between States (Chapter VI);
- > to authorise action in relation to threats to the peace, breaches of the peace and acts of aggression (Chapter VII).

In March 2005, in a paper called *In Larger Freedom* which discussed widespread reform of the UN, the then Secretary-General Kofi Annan called for reforms to the UN Security Council. In particular, the Secretary-General wanted to expand the Security Council's membership to 24 and he outlined two possible courses of action. States returned with ideas of their own, however a consensus has not as yet been reached.

GENERAL ASSEMBLY

All members of the UN are represented in the General Assembly and each has one vote. The role of the General Assembly is to consider, discuss and make recommendations. The General Assembly cannot make recommendations in relation to a dispute or other situation which is under consideration by the Security Council.

However, in the face of inaction by the Security Council (usually because of the veto of a permanent member) the General Assembly has created a means of sanctioning collective action where the Security Council fails to do so. In 1956, the General Assembly adopted the Uniting for Peace Resolution, under which it asserted that if the Security Council failed to exercise its responsibilities for international peace and security, the General Assembly could consider matters and make recommendations for collective action by members.

The General Assembly holds a regular annual session from September to December. When it is not meeting, the work of the General Assembly is carried out by its six main committees:

- > Disarmament & International Security;
- > Economic & Financial;
- > Social, Humanitarian & Cultural;
- > Special Political & Decolonisation;
- > Administrative & Budgetary; and
- > Legal.

INTERNATIONAL COURT OF JUSTICE (ICJ)

The ICJ was established with the UN in 1945. It succeeded the Permanent Court of International Justice and is located in The Hague. It has 15 permanent members, elected for a nine-year term. Elections are held every three years, and one-third of the judges retire each time. If the Court does not include a judge of the nationality of a State which is a party in a case, that State can nominate a judge *ad hoc* to sit on the case. Decisions are by majority vote, and there is no appeal.

SECRETARIAT

The Secretariat consists of the administrative staff of the UN, and is essentially an independent international public service. It is headed by the Secretary-General, who is appointed for a five-year term by the General Assembly on the recommendation of the Security Council. The Secretary-General can bring matters to the attention of the Security Council and is not only a bureaucrat but also a diplomat and peacemaker.

image unavailable

UN General Assembly, New York, 10 December 2008

UN Photo/ Eskinder Debebe

TRUSTEESHIP COUNCIL

The Trusteeship Council was established to supervise the administration of 11 non-self governing countries by other countries. Australia was trustee for New Guinea until its independence in 1975. By 1994 all trust territories had attained self-government or independence, either as separate States or by joining neighbouring independent countries. Palau was the last trust territory. The Trusteeship Council suspended its operations on 1 November 1994.

ECONOMIC AND SOCIAL COUNCIL

ECOSOC has 54 members elected by the General Assembly. The five permanent members of the Security Council are represented, and the other members are elected so as to achieve an equitable geographic distribution. ECOSOC co-ordinates the activities of specialised UN agencies. It also has a more general role in international economic and social co-operation, including initiating studies and reports on international economic, social, cultural, educational, health and related matters, and making recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms. ECOSOC has set up a number of subsidiary bodies.

HUMAN RIGHTS COUNCIL

The UN Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights were abolished in June 2006, and replaced by a new successor organisation, the UN Human Rights Council, as part of an ongoing reform process within the UN. The Human Rights Council reports directly to the UN General Assembly.

The creation of the Human Rights Council is intended to:

- > accord appropriate importance within the UN to human rights by creating a higher status, Council-level organisation, as for security (Security Council) and development (Economic & Social Council). All three concepts are central to the UN Charter;
- > address a perception that the Commission on Human Rights had become overly politicised, ineffective and selective in its work;
- > to make the Human Rights Council a smaller standing body (that means, always working rather than working during only one part of the year) with members elected by all members of the General Assembly, taking into account the candidate State's contribution to the promotion and protection of human rights and the need for equitable representation across the five UN geographic regions; and
- > establish a new system of universal periodic review of the human rights performance of UN member states (see *Hot Topics 65: Human Rights*, page 11).

In order to ensure that human rights violators do not use the Human Rights Council to evade international scrutiny, a member of the Council can now be suspended on a two-thirds majority vote by the General Assembly for gross and systematic violations of human rights. No member may serve more than two consecutive terms.

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

The UNHCR was established in 1951 to provide protection and assistance to refugees in States that are not parties to the Convention Relating to the Status of Refugees 1951, and to assist those States that are parties to implement the Convention. The UNHCR is a specialised agency of the General Assembly, and is subject to the directives of the General Assembly and the ECOSOC. UNHCR provides legal protection or other assistance for many millions of refugees and other displaced people around the world, including in large refugee camps.

SPECIALISED AGENCIES

Autonomous organisations linked to the UN through special agreements include:

- > **ILO** (International Labour Organisation) – Formulates policies and programs to improve working conditions and employment opportunities, and sets labour standards used by countries around the world.
- > **FAO** (Food and Agriculture Organisation) – Works to improve agricultural productivity and food security, and to improve living standards of rural populations.
- > **UNESCO** (UN Educational, Scientific and Cultural Organisation) – Promotes education for all, cultural development, protection of the world's natural and cultural heritage, international co-operation in science, press freedom and communication.
- > **WHO** (World Health Organisation) – Coordinates programs aimed at solving health problems and the attainment by all people of the highest possible level of health. It works in areas such as immunisation, health education and the provision of essential drugs.
- > **World Bank group** – Provides loans and technical assistance to developing countries to reduce poverty and advance sustainable economic growth.
- > **IMF** (International Monetary Fund) – Facilitates international monetary co-operation and financial stability and provides a permanent forum for consultation, advice and assistance on financial issues.
- > **ICAO** (International Civil Aviation Organisation) – Sets international standards for the safety, security and efficiency of air transport and co-ordinates international co-operation in all areas of civil aviation.
- > **UPU** (Universal Postal Union) – Establishes international regulations for postal services, provides technical assistance and promotes co-operation in postal matters.
- > **ITU** (International Telecommunication Union) – Fosters international co-operation to improve telecommunications of all kinds, co-ordinates usage of radio and TV frequencies, promotes safety measures and conducts research.
- > **WMO** (World Meteorological Organisation) – Promotes scientific research on the Earth's atmosphere and on climate change and facilitates the global exchange of meteorological data.
- > **IMO** (International Maritime Organisation) – Works to improve international shipping procedures, raise standards in marine safety and reduce marine pollution by ships.
- > **WIPO** (World Intellectual Property Organisation) – Promotes international protection of intellectual property and fosters co-operation on copyright, trademarks, industrial designs and patents.

- > **IFAD** (International Fund for Agricultural Development) – Mobilises financial resources to raise food production and nutrition levels among the poor in developing countries.
- > **UNIDO** (UN Industrial Development Organisation) – Promotes the industrial advancement of development countries through technical assistance, advisory services and training.
- > **UNDP** (UN Development Program) – works to generate and implement aid effectively, including working with States to improve their capacity to meet global and national development challenges.
- > **IAEA** (International Atomic Energy Agency) – An autonomous intergovernmental organisation under the umbrella of the UN, works for the safe and peaceful uses of atomic energy. The IAEA reports annually to the UN General Assembly and, when appropriate, to the Security Council regarding non-compliance by States with their safeguards obligations as well as on matters relating to international peace and security.
- > **World Trade Organisation (WTO)** – The WTO replaced the General Agreement of Tariffs and Trade (GATT) in 1995. The central principle of GATT was that countries should not discriminate between imported and locally produced goods. The WTO administers the Technical Barriers to Trade Agreement and the Code of Good Practice for Standardisation, which are intended to ensure that countries do not impose technical regulations and standards that would be obstacles to trade.

ASIA-PACIFIC ECONOMIC FORUM (APEC)

In 1989, APEC was formed by Australia and Japan. There are now 21 members, including the USA, China, Japan, Indonesia, Malaysia, Mexico and Russia. There is an annual Ministerial Meeting, and other Leaders Meetings and Specialist Ministerials to develop policy on particular issues.

APEC has two objectives:

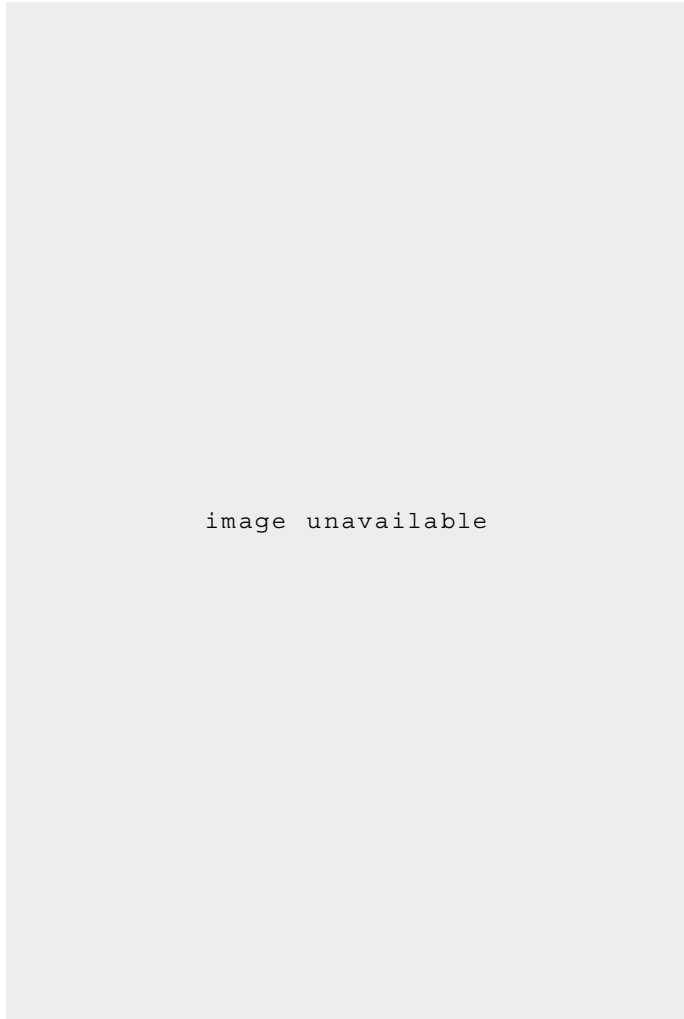
1. to liberalise trade and investment in the region; and
2. a program of economic and technical co-operation.

APEC has the goal of reducing tariffs by 2010 for developed countries and by 2020 for developing countries.

ASSOCIATION OF SOUTH EAST ASIAN NATIONS (ASEAN)

An association of ten South East States (Brunei Darussalam; Cambodia; Indonesia; Lao People's Democratic Republic; Malaysia; Myanmar; Philippines; Singapore; Thailand; Viet Nam) to accelerate economic, social and cultural development and progress, and to promote regional peace and stability (see <http://www.aseansec.org/index.html>).

For information on the **International Criminal Court** and **tribunals** see pages 15-19.



Nearly 250 000 Sudanese have fled Darfur since war broke out in 2003. They are living in refugee camps in Chad, bordering Sudan. The UNHCR is responsible for providing humanitarian aid and documentation for the refugees.

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International criminal & humanitarian laws

The law of armed conflict (also known as the law of war or international humanitarian law) governs what happens in situations of armed military conflict. Historically, there are two streams of law that govern armed conflict – the ‘Law of the Hague’ and the ‘Law of Geneva’. The Law of the Hague governs the use of military force and focuses on the behaviour and rights of combatants. The Law of Geneva is concerned with the principle of humanity, and the protection of civilians and other non-combatants, but also regulates and protects combatants in various ways. The law as a whole seeks to balance respect for human life in armed conflict against military necessity.

The Geneva Conventions, which are often discussed, provide a codified source of what has come to be known as international humanitarian law, or ‘Geneva’ law.²⁵ They are the result of a process that developed in a number of stages between 1864 and 1949 which focused on the protection of civilians and those combatants who can no longer fight in an armed conflict. In 1977, two additional Protocols to the Geneva Conventions were opened for ratification. They clarify the status of civilians in international conflict and importantly, in conflicts that are not international, for example, in civil war, or armed insurgency against a government.²⁶

NATIONAL PROSECUTION OF WAR CRIMES

Serious violations of the law of armed conflict attract individual criminal liability for those who breach the law, including for commanders who order their subordinates to commit war crimes. Under the Geneva Conventions, all States are required to criminalise war crimes in domestic law, and to assert ‘universal jurisdiction’ over such crimes. While national criminal law usually only

applies within that State’s own territory, the principle of universal jurisdiction allows States to criminalise war crimes which occur outside their territory, even where neither the victims nor the perpetrators are nationals of that State. The idea behind universal jurisdiction is to ensure that perpetrators of war crimes cannot escape justice by fleeing to another country, which would not have jurisdiction if international law did not permit universal jurisdiction to be exercised. The international community regards such crimes as so serious that there should not exist safe havens or impunity for those who commit such crimes. This is a good example of how international law is primarily implemented through national law and national courts, as discussed on p 29.

Australia passed the War Crimes Act 1945 (Cth) in order to prosecute war crimes committed during the Second World War. In fact, Australian national courts prosecuted hundreds of Japanese war criminals after that war. Subsequently, Australia passed the *Geneva Conventions Act 1957* (Cth) which asserted universal jurisdiction over war crimes in any international armed conflict after 1957, although no prosecutions have ever been brought under that legislation. In 2002, Australia also passed legislation to implement the most modern international crimes (including war crimes) into Australian law.

INTERNATIONAL PROSECUTION OF WAR CRIMES AND OTHER INTERNATIONAL CRIMES

International courts and tribunals have also been established to prosecute war crimes. In the wake of WWII, two military tribunals were separately established to try German Nazi officials and officers (International Military Tribunal or Nuremberg Tribunal) and Japanese officials and officers (International Military Tribunal for the Far East or Tokyo Tribunal) for serious crimes

25. Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field (August 12 1949) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (August 12 1949) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (August 12 1949) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (August 12 1949) 75 UNTS 287.

26. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [Protocol I] (June 8 1977) 16 International Legal Materials 1391; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [Protocol II] (June 8 1977) 16 International Legal Materials 1442.

COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS

Each Geneva Convention shares a common article, commonly referred to as 'Common Article 3'. Article 3 reads as follows:

Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. *Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.*

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
- (b) Taking of hostages;*
- (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment; and*
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*

The ICJ has held that the norms reflected in Common Article 3 apply in all situations of armed conflict, whether international or internal.²⁸

committed during the course of the war. These criminal trials are criticised by some commentators as an example of 'victors' justice' and retrospective criminal punishment, however, they established fundamental principles of international humanitarian law. Both tribunals recognised categories of international crimes, namely crimes against humanity, war crimes and crimes against the peace. The Nuremberg and Tokyo Tribunals also recognised that individuals could be held personally responsible for those crimes.

In the Nuremberg Tribunal, 'crimes against the peace' meant the planning, preparation, initiation, or waging of wars of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing. Today, the crime of aggression remains contentious and its definition cannot be agreed, although the 1974 General Assembly Declaration on the Definition of Aggression provides some sense of the scope of aggression. It remains undefined in the Elements of Crimes connected to the Rome Statute of the International Criminal Court even though aggression is recognised as a crime within the jurisdiction of the International Criminal Court.

At its most basic, the idea of aggression is the resort to military force against a State in violation of the prohibition of military force under the UN Charter. In that sense, the crime of aggression concerns a violation of the law prohibiting the resort to military force in

international relations (also known as the *jus ad bellum*), not a violation of international humanitarian law (the *jus in bello*, or the law which applies once an armed conflict gets underway, regardless of who caused it). International humanitarian law applies equally to all sides in an armed conflict, even to the soldiers of a country which is waging an aggressive war, precisely because all human beings have basic rights and protections and should be treated with dignity.

Although the Holocaust of WWII was by no means the first instance of mass extermination of a particular group of people by another (eg, the ruin of Carthage at the end of the Third Punic War (149–146 BC); the Armenian genocide at the hands of the Ottoman Empire (1915–1923)), the systemised killing, displacement and mistreatment of Jewish people by the Nazis during WWII was given the name of 'genocide' and prohibited in international law in the wake of WWII. Genocide was defined as doing certain acts with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group. It is prohibited under international law whether during wartime or peacetime, both by reason of treaty (Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention))²⁷ and customary international law. This prohibition has the status of *jus cogens*: see page 6 for explanation.

The elements of the crimes recognised by the Nuremberg and Tokyo Tribunals have developed in the ensuing period through the work of national courts, international

27. UN General Assembly, Off. Rec., 3rd Sess., Resol. 174 (A/180) (1948) December 9 1948, 78 UNTS 277.

28. The International Court of Justice opined that Common Article 3 'constitutes a minimum yardstick': Military and Paramilitary Activities in and against Nicaragua (Merits) (1986) ICJ Rep. 14, 114.

ad hoc tribunals and the development of the Rome Statute of the International Criminal Court (**Rome Statute**). For instance, today a broader range of acts are recognised as constituting a ‘crime against humanity’ than were at the end of the Second World War. Crimes against humanity are inhumane acts of a serious nature that are committed as part of a widespread or systemic attack against any civilian population on national, political, ethnic, racial or religious grounds. International legal opinion favours the view that crimes against humanity can be committed in times of peace or armed conflict. In addition, a wider range of war crimes are now recognised in non-international armed conflicts, when traditionally most war crimes were confined to international conflicts.

CRIMINAL TRIBUNALS

By the end of the twentieth century, there was a renewed energy for accountability for the commission of serious crimes. *Ad hoc* criminal tribunals began to proliferate in the 1990s, usually established by the UN, or the UN in partnership with a State. It seemed that there was no longer a political acceptance of inaction in the face of mass killings, rapes, and forced movements of populations. For example, tribunals have now been established for each of the areas listed below (as well as in some other places not covered here, such as Bosnia, Lebanon and Iraq).

UN International Criminal Tribunal for the Former Yugoslavia (ICTY)

In the face of atrocities, including so-called ‘ethnic cleansing’, committed during the war in the former Yugoslavia between 1992–1995, the UN established this tribunal in 1993 at The Hague, Netherlands by a Resolution of the Security Council. The ICTY indicted a total of 161 people. Two accused are still at large. See <http://www.icty.org/>

UN International Criminal Tribunal for Rwanda (ICTR)

The UN Security Council established this tribunal in 1994, to try those responsible for genocide and other serious violations of humanitarian law in Rwanda in 1994 in which an estimated 800,000–1,000,000 Tutsis and moderate Hutus were killed under the Hutu Power ideology the period of April–July 1994. The ICTR has indicted over 80 individuals. See <http://www.icty.org/>

The Security Council has passed resolutions to require the ICTY and the ICTR to conclude their work by 2010 (ICTY) or 2011 (ICTR). Both Tribunals are now working to implement completion strategies and reporting to the Security Council in relation to their progress.

Special Panels for Serious Crimes, Timor Leste

The UN Transitional Administration of East Timor (UNTAET) was established in the wake of the violence that marred the 1999 referendum on independence from Indonesia. In 2000, it created a criminal mechanism supported by a Serious Crimes Unit to try people responsible for serious crimes committed between January–October 1999. A mixture of international and local judges sat. No longer in operation, it issued indictments for almost 400 people. It put on trial 88 people, 84 of whom were found guilty. When its funding ceased, over 500 cases of alleged murder, rape, torture and serious violence were still being investigated.

Special Court for Sierra Leone

A court of international and Sierra Leonean judges established jointly by the UN and the Government of Sierra Leone in 2002 to try those bearing the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone since 30 November 1996. Currently, eleven people associated with all three of the former warring factions (the Armed Forces Revolutionary Council, Civil Defence Forces and Revolutionary United Front) have been indicted by the Special Court. They are charged with war crimes, crimes against humanity and other serious violations of international humanitarian law including murder, rape, extermination, acts of terror, enslavement, looting and burning, sexual slavery, conscription of children into an armed force, and attacks on UN peacekeepers and humanitarian workers. The trial of former Liberian President, Charles Taylor, is underway at the International Criminal Court in The Hague, The Netherlands. For more information see <http://www.sc-sl.org/>

Extraordinary Chambers in the Courts of Cambodia

A tribunal of international and Cambodian judges established jointly between the Royal Government of Cambodia and the UN, it began work in 2005 to reach back in time to address the so-called ‘Killing Fields’ of Cambodia of the 1970s under the Khmer Rouge during which an estimated 1.5 million Cambodians died. Two cases are currently before the Extraordinary Chambers. The substantive hearing of Guek Eav Kaing or ‘Duch’ began in March 2009. Duch is the former Deputy Secretary of the Communist Party of Kampuchea (CPK) and Secretary of S-21 between 1974–1979. S-21 is alleged to have been an interrogation and execution centre. Duch is charged with crimes against humanity, grave breaches of the Geneva Conventions, homicide and torture. The other defendant is Nuon Chea, who was from 1975–1979 amongst other things the Deputy Secretary of the Central Committee of the CPK, Chairman of the Democratic Kampuchea People’s Assembly, the acting Prime Minister and the Vice

Chairman of the CPK Centre Military Committee. He is alleged to have planned, instigated, ordered, directed or otherwise aided and abetted in the commission of crimes against humanity (namely, murder, torture, imprisonment, persecution, extermination, deportation, forcible transfer, enslavement and other inhumane acts) and grave breaches of the Geneva Conventions (namely, willful killing, torture, inhumane acts, willfully causing great suffering or serious injury to body or health, willful deprivation of rights to a fair trial, unlawful confinement and unlawful deportation or transfer). For more information see <http://www.eccc.gov.kh>

TRUTH & RECONCILIATION COMMISSIONS

During the same period, truth and reconciliation commissions also proliferated to bring to light stories of violations committed in the past – for example, when the apartheid regime was removed in South Africa, a Truth & Reconciliation Commission was established to deal with the legacy of apartheid. Typically, truth and reconciliation commissions allow victims to tell their stories, to face the perpetrators of the crimes, and may lead to criminal prosecutions or amnesties. They have been established or are in development in the following States: Argentina, Canada, Chile, El Salvador, Fiji, Ghana, Guatemala, Liberia, Morocco, Panama, Peru, Rwanda, Sierra Leone, Solomon Islands, South Korea, East Timor and the United States of America. Some of these processes have been controversial, since some regard the granting of amnesties to serious criminals as trading justice for peace.

INTERNATIONAL CRIMINAL COURT

A long-held dream of internationalists, of a permanent international body to hold perpetrators of serious crimes accountable, has now been realised. The International Criminal Court (ICC) is an independent, permanent court based at The Hague in the Netherlands.²⁹ On 17 July 1998, 120 States adopted the Rome Statute of the International Criminal Court (Rome Statute). On 1 July 2002, the Rome Statute came into force upon its ratification by 60 States. This is significant because it signals an international consensus on definitions of genocide, crimes against humanity and war crimes. Notably, the crime of aggression is within the jurisdiction of the Court and can be prosecuted as soon as the Assembly of States Parties agrees to a definition.

The ICC is responsible for trying people accused of the most serious crimes of international concern – genocide, war crimes and crimes against humanity. These crimes are detailed in the Rome Statute and the Elements of Crimes document, adopted by the Assembly of States Parties to the Rome Statute.³⁰

The ICC is a court of last resort. It is intended to complement national courts and it cannot try cases that a State is investigating or prosecuting domestically, unless the State is unwilling or genuinely unable to prosecute or investigate. This is called the principle of complementarity. The ICC will consider a State to be ‘unwilling’ if it is clearly protecting a person from responsibility for their actions. The ICC indicates that a State may be ‘unable’ when its legal system has collapsed.

Proceedings before the ICC may be initiated by a referral by a State Party or the UN Security Council, or by the Prosecutor on the basis of ‘communications’ received from individuals or organisations, or the United Nations Security Council. States and the Prosecutor can only refer a situation if the State where the crime occurred is a party to the Statute, or the accused person is a national of a State party. The Security Council may refer any situation for investigation where it relates to threats of the peace, breaches of the peace, and acts of aggression.

Several States have opposed certain aspects of the ICC. The USA and China, for example, object to the court having jurisdiction over non-State parties, which could arise where the offence has been committed on the territory of a party to the Statute. The USA has expressed concern that its own soldiers involved in UN peacekeeping operations may be vulnerable to politicised accusations of committing offences.

Finally, the ICC can only deal with events that have taken place since 1 July 2002.

In 2003, its inaugural Prosecutor, Mr Luis Moreno-Ocampo from Argentina, was appointed for a term of nine years

To date, three States parties to the Rome Statute – Uganda, the Democratic Republic of the Congo and the Central African Republic – have referred situations occurring on their territories to the court. In addition, the Security Council has referred the situation in Darfur, Sudan – a non-State Party.

The Prosecutor has decided to investigate each of the referred situations. A brief summary of each situation is set out below:

Democratic Republic of the Congo (DRC)

The first situation to be investigated by the ICC’s Prosecutor was referred by the Government of the DRC in 2004. Emerging from a bloody conflict that involved a number of neighbouring States from 1998–2003, the DRC is still at risk of falling into civil war particularly in its eastern regions.

29. The ICC website is <http://www.icc-cpi.int/>

30. Elements of Crimes, ICC ASP/1/3 (Part II-B), adopted and entered into force 9 September 2002.

The five-year conflict was about control of the DRC and its wealth of resources – gold, diamonds, tin and coltan (a metallic ore, used in electronic devices such as mobile phones) – and the unfinished business between the Tutsi and Hutus in neighbouring Rwanda. Government forces in support of President Kabila were backed by Angola, Namibia and Zimbabwe. They were opposed by rebel forces backed by Uganda and Rwanda.

It is estimated that the war claimed at least three million lives, directly or as a result of disease and malnutrition.

The ICC can only investigate matters that occurred since 1 July 2002, but it has investigated allegations of mass murder and executions, and a pattern of rape, torture, forced displacement and the illegal use of child soldiers.

As at May 2009, warrants have been executed against three of four leaders of various militias for war crimes and/or crimes against humanity. Three trials are currently underway and one accused is still at large.

Uganda

The Lord's Resistance Army (LRA) was formed in 1987 under the leadership of Joseph Kony. It is not clear what the LRA's beliefs are. It is based in northern Uganda and is engaged in an armed rebellion against the Ugandan Government. It is infamous for its bloody tactics and its use of child soldiers. The ICC issued arrest warrants in 2005 against five LRA leaders (at least two of whom are believed to have died subsequently). They are charged with crimes against humanity and war crimes, including murder, rape, sexual slavery, and enlisting of children as combatants.

Central African Republic

In 2002-2003, there was an armed conflict between government and rebel forces. Civilians were killed and raped and homes and stores were looted.

This situation is remarkable because allegations of sexual crimes outweighed alleged killings. The Prosecutor commented, 'The allegations of sexual crimes are detailed and substantiated. The information we have now suggests that the rape of civilians was committed in numbers that cannot be ignored under international law.'

Victims described being raped in public; being attacked by multiple perpetrators; being raped in the presence of family members; and being abused in other ways if they resisted their attackers. Many of the victims were subsequently shunned by their families and communities.

One accused is before the ICC facing charges of crimes against humanity (rape, torture and murder) and charges of war crimes (rape, torture, committing outrages on personal dignity, in particular cruel and degrading treatment, pillaging a town or place, and murder).

Darfur, Sudan

In Darfur, western Sudan, pro-government militias are accused of carrying out a campaign of ethnic cleansing against non-Arab groups. Since the conflict erupted in 2003, it is estimated that 300,000 people have been killed and more than 2 million displaced. The ICC has indicted the Prime Minister of Sudan, the Minister of State for the Interior, and for Humanitarian Affairs; the alleged leader of the Janjaaweid, the pro-government militia. They remain at large. The Court has also indicted a leader of a rebel group for war crimes for alleged attacks against African Union peacekeepers in Darfur. He surrendered voluntarily to the ICC in May 2009 and must next appear in late 2009.

Although the Security Council referred the Darfur situation to the ICC, the Council itself has not been prepared to authorise military intervention to stop the killing, suggesting that as in Rwanda and the Balkans, international courts are being used in the aftermath of violence in circumstances where the international community is not prepared to act to stop the violence while it is occurring.

image unavailable

The trial of Thomas Lubanga, leader of the rebel group Union of Congolese Patriots, began in 2009 in the International Criminal Court. He is pictured here in 2003 with his bodyguard behind him during a rally in Bunia, Congo. Lubanga is accused of using child soldiers in eastern Congo, 2002-2003.

Karel Prinsloo.

International environmental law

The foundations of the protection of the environment in international law are fundamental principles of customary international law, treaty law, judicial decisions, and 'soft law' or non-binding sources such as resolutions, recommendations and declarations of international organisations and conferences.

The first attempt to comprehensively address environmental issues on a global level was the UN Conference on the Human Environment held in Stockholm in 1972. The Conference resulted in the Stockholm Declaration on the Human Environment and led to the creation of the UN Environment Program (UNEP) which is based in Nairobi, Kenya.

The Stockholm Declaration set out a number of principles for safeguarding the natural environment, the use of renewable resources, protection of flora and fauna, restriction on discharge of toxic substances, prevention of marine pollution and the relationship of environmental protection to economic development.

In 1982, the UN General Assembly adopted the World Charter for Nature, based on the principle that the environment and living resources are to be protected for their own worth. In 1983, the UN established the World Commission on the Environment and Development, to address issues of development and environmental protection. The resulting Brundtland Report, published as *Our Common Future*, was adopted by the General Assembly in 1987, and recommended an integrated approach based on the principle of sustainable development.

The second UN Conference on Environment and Development was held in Rio in 1992. The key documents agreed to at UNCED were the Rio Declaration on Environment and Development and Agenda 21. The Rio Declaration is a statement of principles and goals.

Agenda 21 is a non-binding action plan to guide States in all aspects of the environment and development, and covers social and economic dimensions, conservation and management of resources, strengthening the role of major groups, and the means of implementation. UNCED also produced the Biodiversity Convention and the United Nations Framework Convention on Climate Change (UNFCCC) see p 21.

PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

It is a significant principle of customary international law that States may not allow their territory to be used in a way that is prejudicial to the rights of another State or States. This was applied in the *Trail Smelter Arbitration*,⁵⁴ in which the USA claimed compensation from Canada for damage caused by air pollution coming from a Canadian smelter. The principle extends beyond air pollution to other types of harm, and is not limited to adjacent States. States are required to cooperate to prevent and mitigate trans-boundary environmental harm. In the *Lac Lanoux Arbitration*,⁵⁵ France was obliged to consider the interests of, and advise Spain, when preparing a scheme for water diversion that would have adverse effects across the border.

PRINCIPLES OF ECOLOGICALLY SUSTAINABLE DEVELOPMENT

The Brundtland Report defined sustainable development as development which meets the needs of present generations while not compromising the ability of future generations to also meet their needs. The Rio Declaration sets out 27 principles to guide the international community in achieving sustainable development. Those principles include:

- > **precautionary principle:** where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation;

54. *Trail Smelter Arbitration (USA v Canada)* (1938) RIAA, Volume 3, 194; 9 ILR 315.

55. *Lac Lanoux Arbitration (France v Spain)* 24 ILR 101.

- > **intergenerational equity:** the needs of future generations must not be compromised through waste or damage to the environment by current users; and
- > **polluter pays:** environmental costs should be included in the valuation of assets and services and those who generate waste should bear the cost of containment, avoidance or abatement.

Component principles of sustainable development have been incorporated into other multilateral documents and into domestic legislation, although there remains uncertainty about precisely what the term means. In the *Danube Dam Case*,⁵⁶ the International Court of Justice said that the concept of sustainable development is a socio-political objective and not a binding norm. Vice President Weeramantry disagreed with the Court, and stated that sustainable development has received wide and general acceptance by the global community, and is a principle of customary international law.

PROTECTION OF THE ATMOSPHERE AND CLIMATE CHANGE

The two principal conventions on protection of the atmosphere and climate change are:

- > the *Vienna Convention for the Protection of the Ozone Layer* 1985, which resulted in the *Montreal Protocol on Substances that Deplete the Ozone Layer* 1987 (Montreal Protocol). The Montreal Protocol set targets for the elimination of the consumption and production of ozone-depleting substances, and includes financial and technical incentives to assist developing countries to adopt alternative substances and technologies; and
- > the Framework Convention on Climate Change 1992 (UNFCCC) recognises the atmosphere as a 'common resource of vital interest to mankind', and applies to all greenhouse gases not covered by the Montreal Protocol. The Kyoto Protocol to the Framework Convention was adopted on 11 December 1997 to reduce greenhouse emissions and came into force on 16 February 2005 when it was ratified by 55 parties to the Framework Convention, including parties in Annex I which accounted for at least 55 per cent of the total carbon dioxide emissions for 1990. The Kyoto Protocol covers six greenhouse gases and sets emission targets for the period 2008-2012. Most developed countries have committed to a decrease of between five to nine per cent over 1990 emissions, and Australia has agreed to allow its emissions to increase to no more than eight per cent above 1990 emissions. The Kyoto Protocol sets up a number of flexible mechanisms to

reduce emissions, including an international emissions trading scheme. Currently, States are negotiating a new regime of emission reductions to take effect after the first commitment period under the Kyoto Protocol ends in 2012. The process began in Bali in 2007 where the Conference of Parties produced the Bali Roadmap. They will continue to meet throughout 2009, culminating in the Copenhagen Conference of Parties in December 2009 to agree what should happen after the Kyoto Protocol.

These operate as general framework texts, setting out general principles and requiring further negotiation of detailed, specific protocols for implementation.

Australia is a party to the Vienna Convention and the Montreal Protocol, and has passed the *Ozone Protection Act* 1989 (Cth) with controls on the manufacture, import and export of ozone-depleting substances. Australia's state governments have also passed legislation to regulate the production and use of ozone-depleting substances. The *National Greenhouse and Energy Reporting Act 2007* (Cth) requires corporations to report on their greenhouse emissions, energy consumption and production. The first act of the newly elected Rudd Labor Government was to ratify the Kyoto Protocol in December 2007. Since then, the Australian Government has worked to develop a model for carbon trading. At the time of publication, the Carbon Pollution Reduction Scheme proposed by the Government was before the Parliament and its implementation was proposed to be delayed until 2011.

MARINE RESOURCES⁵⁷

Law of the sea

One of the principal functions of the law of the sea is to balance the competing interests arising from different uses of the sea, such as navigation, fishing, scientific research and waste disposal. The law of the sea has developed from customary international law and international conventions, some of which codify customary international law. The principal conventions are the four conventions developed at the First UN Conference on the Law of the Sea in 1958,⁵⁸ and the UN Convention on the Law of the Sea 1982 (UNCLOS), which entered into force in 1994. By the time it entered into force, many of its provisions had achieved sufficient acceptance to be regarded as principles of customary international law.

56. *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (1998) ILM 162.

57. The information in this section is taken from 'The Law of the Sea' B Opeskin and 'International Environmental Law' R Rayfuse in *Public International Law: An Australian Perspective*, S Blay, R Piotrowicz & B M Tsamenyi (eds), Oxford University Press, 2nd ed, 2005; *Environmental Law and Policy in Australia*, Ross Ramsay & Gerard Rowe, Butterworths, 1995.

58. The Convention on the Territorial Sea and the Contiguous Zone, the Convention on the Continental Shelf, the Convention on the High Seas, and the Convention on Fishing and Conservation of the Living Resources of the High Seas.

A coastal State's maritime zones are determined by reference to baselines. The normal baseline is the low-water line along the coast. There are special rules for determining the baseline around offshore islands and along bays and river mouths. The most important maritime zones are:

- > **internal waters:** the waters on the landward side of baselines are internal waters. They are subject to the sovereignty of the coastal State and other States have no general right of access;
- > **territorial sea:** under UNCLOS 1982 a State can claim a territorial sea of up to 12 miles. The majority of States claim a territorial sea of 12 miles, and Australia extended its territorial sea from three miles to 12 miles in 1990. The territorial sea is under the sovereignty of the coastal State, but other States have the 'right of innocent passage';
- > **contiguous zone:** a State can enforce its customs, fiscal, immigration or health laws over a zone extending up to 24 miles from baselines. Australia proclaimed a contiguous zone extending up to 24 miles from baselines in 1994;
- > **continental shelf:** is the shelf of land that projects from a continental land mass into the sea before falling away sharply to the deep sea bed. Under the UNCLOS 1982, a coastal State has a continental shelf zone beyond its territorial sea to a distance of 200 miles, whether or not the geological shelf extends that far. If the geological shelf in fact extends further than 200 miles, the continental shelf zone additionally comprises the sea bed and subsoil to the outer edge of the continental margin. Under the *Maritime Legislation Amendment Act 1994* (Cth), Australia adopted these provisions but has not yet proclaimed the outer limits of the continental shelf where it extends beyond 200 miles from baselines. A coastal State has exclusive sovereign rights over the continental shelf for the purpose of exploring in and exploiting its natural resources;
- > **exclusive economic zone (EEZ):** extends from the outer limit of the territorial sea to 200 miles from baselines. A coastal State has sovereign rights over natural resources in its EEZ, and other States have certain freedoms associated with the high seas, including navigation. Under UNCLOS 1982, a coastal State has preferential, but not exclusive, fishing rights in its EEZ. In 1972, Australia claimed jurisdiction over fisheries within 200 miles by declaring an Australian Fishing Zone (AFZ) and in 1994 declared a 200 mile EEZ.

The 'high seas' are the area that lies beyond the jurisdiction of coastal States. As a general principle of customary international law, which is now codified in the Convention on the High Seas 1958 and UNCLOS 1982, the high seas are open to all States.

Fisheries

Each coastal State has exclusive fishing rights within its territorial sea, and preferential fishing rights within its EEZ. The State must determine the total allowable catch, which is the degree of exploitation to maintain populations of harvested species at levels that can produce the maximum sustainable yield. A coastal State can regulate foreign fishing within its EEZ. Australia has entered into treaties with a number of countries within the Pacific region, including Japan, South Korea and the USA to allow vessels to fish within the EEZ or Australian Fishing Zone. UNCLOS 1982 makes special provision for highly migratory species (such as tuna and marlin), marine mammals (such as whales and seals) and other species of fish not confined to a single maritime zone. States have a special obligation of conservation individually and in cooperation with other States. At the Pacific Islands Forum held in Kiribati in October 2000, the members reaffirmed their commitment for the development of a South Pacific Whale Sanctuary, and adopted the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific.

Pollution

Marine pollution is regulated according to its source:

- > **Pollution from ships:** the principal convention is the *International Convention for the Prevention of Pollution from Ships 1973*, as amended by a 1978 Protocol (MARPOL). The *Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969* deals with accidental spillages from ships. Australia implemented the MARPOL Convention by passing the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth).
- > **Dumping of waste from land-based activities:** the *Convention on the Prevention of Maritime Pollution by Dumping of Wastes and Other Matter 1972* regulates sea dumping by establishing different categories of wastes: those that cannot be dumped in any circumstances (eg radioactive waste), those that can be dumped with a special permit, and those that can be dumped with a general permit. Permits can be granted by the State in which the waste is loaded or by the flag State of the vessel in which the waste is carried. The Convention is implemented in Australia through the *Environment Protection (Sea Dumping) Act 1981* (Cth); and
- > **Pollution from land-based activities:** The UNCLOS 1982 requires States to take measures to prevent, reduce and control pollution from land-based sources. There are a number of regional treaties. Australia is a party to the *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region 1986*, which applies to the 100 mile zones off the coast of its parties and to the high seas enclosed by those areas.

International law in Australia

Domestic law can have a bearing on international law (see General principles of law on page 16). The reverse is also true, that is, international law can affect domestic law both directly and indirectly. To what extent is international law part of Australian domestic law? What steps are required to allow international law to operate as a part of domestic law in Australia? Which law – domestic or international – takes primacy in Australian courts?

States take different approaches to the effect of international law in their domestic legal systems (see the discussion of monist and dualist approaches to international law on page 7). Different theories have been developed to explain the interaction between international and domestic or municipal law. The transformation theory says that each individual rule of international law must be ‘transformed’ or incorporated into domestic law by an Act of Parliament or judge-made law before it can have any domestic effect (dualist). This is the preferred approach in Australia although Australia is not entirely dualist and international law is a ‘source’ of or influence’ on domestic law in a variety of ways.³¹

We need to distinguish between the treatment of customary international law and treaty-based obligations. The starting point for rules of both customary international law and treaty is that neither will be applied domestically in the face of a clearly contradictory statutory provision.³²

HOW DOES AUSTRALIA ENTER INTO TREATIES?

Background

The Commonwealth Constitution is nearly silent as to how Australia can enter into treaties and incur international obligations. However, by custom and judicial interpretation of the Constitution, it is now clear that section 61 of the Constitution gives to the Executive the exclusive and unlimited power to enter into international treaties.³³

Historically, before Federation in 1901, the Australian colonies were not considered under international law to have the capacity to enter into treaties. By the end of the nineteenth century, the colonies could agree to, or decline to adhere to certain treaties entered into by the United Kingdom. The colonies had entered into some ‘technical’ treaties, such as those relating to postal and telegraphic services, but these were considered under international law to be agreements between postal administrations, and were not recognised as having international status. Federation in 1901 did not change the status of Australia as a British colony, and the new Commonwealth Government had no power to enter into treaties in its own right. The emergence of Australia as an independent State was a gradual process, and Australia obtained the power to enter into treaties during the period 1919 to 1931.

Who decides?

Formally under the Commonwealth Constitution, treaty-making power is exercised by the Governor-General, acting on the advice of the Federal Executive Council. The Federal Executive Council is made up of the Prime Minister, other Ministers and Parliamentary Secretaries, appointed by the Governor-General on the advice of the Prime Minister.³⁴

31. *Chow Hung Ching v The King* (1948) 77 CLR 449 at 477 per Dixon J; *Nulyarimma v Thompson* (1999) 96 FCR 153, particularly the dissenting judgment in favour of the incorporation theory by Justice Merkel; see also ‘A Stronger Role for International Customary International Law in Domestic Law?’, K Walker & A Mitchell in *The Fluid State: International Law and National Legal Systems*, H Charlesworth, M Chiam, D Hovell & G Williams (eds), 2005, Federation Press, p 110 at 125–126; ‘International Law as a Source of Domestic Law’ Sir Anthony Mason, in *International Law and Australian Federalism*, B Opeskin and D Rothwell (eds), 1997, Melbourne University Press 210, 212; ‘Treaties and the Internationalisation of Australian Law’, K Walker, in *Courts of Final Jurisdiction: The Mason Court in Australia*, C Saunders (ed.), 1996, Federation Press, p 204.

32. *Polites v Commonwealth* (1945) 70 CLR 60.

33. More detail is available in the Federal Executive Council Handbook: www.dpnc.gov.au/guidelines/docs/executive_handbook.pdf

In practice, the decision is usually taken by Cabinet, or by relevant Ministers, including the Minister for Foreign Affairs and the Attorney-General. Parliament has no formal role in the decision to enter into a treaty or the treaty-making process. However, Parliamentary approval is required for the appropriation of funds, or the passage of legislation to implement treaty obligations in domestic law.

In Australia, formal ratification is performed by the **Governor-General in Council**, on the advice of the Minister for Foreign Affairs. In practice, the Commonwealth Constitution operates using unwritten rules known as 'constitutional conventions'. While the power to ratify international treaties vests in the Governor-General in Council, the Governor-General typically follows the advice of the government of the day.

HOT TIP

Under the Commonwealth Constitution, the Governor-General in Council refers to the Queen's representative in Australia, exercising the executive power of the Commonwealth (sections 2 and 61), acting with the advice of the Executive Council.

Involvement of Parliament

Until the mid-1970s, the practice was for many important treaties to be the subject of debate in Parliament, as legislation was passed to approve the ratification of the treaty. For example, section 7 of the *Racial Discrimination Act 1975* (Cth) approves the ratification of the UN Convention on the Elimination of All Forms of Racial Discrimination.

During the 1980s and 1990s, the growth of the range and importance of treaties caused concern about the lack of parliamentary scrutiny of treaty making and the impact of treaties on domestic affairs and sovereignty. Treaties were being tabled in batches twice a year, with little opportunity for debate. In 1995, the Senate Legal and Constitutional Affairs Committee recommended major changes to the treaty-making process, including legislation to require that treaties be tabled at least 15 sitting days before they are entered into, and to require the government to prepare treaty impact statements on treaties tabled in Parliament.³⁴ In May 1996, the newly elected Coalition Government decided to introduce reforms to the treaty-making process by administrative procedures, rather than by legislation.

Since 1996, the arrangements for parliamentary scrutiny have required the following steps:

Tabling of treaties

All treaties (and related actions, including amendments to and withdrawal from treaties) are tabled in Federal Parliament for at least 15 sitting days before the Government takes binding action (with special procedures in cases of exceptional urgency). In most cases, this means that treaties are tabled for consideration after signature but before the final step (ratification or confirmatory exchange of notes) to bind Australia under international law.

National Interest Analyses

Each treaty is tabled with a National Interest Analysis (NIA). The NIA gives reasons why Australia should become a party to the treaty. Where relevant, the NIA contains a discussion of economic, environmental, social and cultural effects. Important elements include:

- > a description of the consultation undertaken during the treaty-making process; and
- > a certification that arrangements for domestic implementation (e.g. legislation, regulations) are or will be in place before the treaty enters into force.

Joint Standing Committee on Treaties

The Joint Standing Committee on Treaties (JSCOT) was formed on 17 June 1996. The Committee considers tabled treaties and National Interest Analyses, and other questions relating to international instruments that are referred to it by either House of Parliament or a Minister. The Committee conducts inquiries, including public hearings, and reports to Parliament, normally within the period of 15 sitting days although Australia is not entirely dualist and international law is a 'source' of or influence' on domestic law in a variety of ways. For more information about JSCOT and its work, see <http://www.aph.gov.au/house/committee/jsct/>

Treaties Council

The Treaties Council, agreed upon by the Council of Australian Governments, consists of the Prime Minister and all the State Premiers and Chief Ministers of the Territories. It has an advisory function and is coordinated by the Commonwealth-State Standing Committee on Treaties. The Council's inaugural meeting was held during 1997. It has not met again.

DOMESTIC IMPLEMENTATION OF TREATIES

Generally, treaties are *not* automatically incorporated into Australian law. There are some exceptions, such as treaties terminating a State of hostilities.

34. Senate Legal and Constitutional Affairs Committee *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* November 1995.

35. *Commonwealth v Tasmania* (Tasmanian Dams Case) (1983) 158 CLR 1, at 303 per Dawson J: 'It has not been questioned in recent years that the treaty-making power of [the Executive] of this country is unlimited'.

If the Executive arm can enter into treaties and international obligations without reference to Parliament, the Constitution gives to the Commonwealth Parliament the exclusive power to make legislation. It is Parliament that must pass an Act of Parliament to bring Australia's treaty obligations to life in domestic law. Australia may ratify a treaty and be bound as a State under international law, but without legislation to implement the treaty provisions, they will not give binding rights to, or impose binding obligations on members of the Australian community.³⁶ This position is similar to that of the United Kingdom and other common law countries. It differs from that of the United States of America, which distinguishes between 'self-executing' and 'non self-executing treaties'. A self-executing treaty operates in domestic law automatically, without the need for legislation, although in practice few treaties are regarded as self-executing under US law.

Treaty obligations can be implemented in a range of ways including:

1. **Legislative statement** – for example, the statute might say 'Treaty X has the force of law in Australia' (eg, *Diplomatic Privileges and Immunities Act 1967* (Cth) declaring certain provisions of the *Vienna Convention on Diplomatic Relations* (1961) to have the force of law);
2. **Annexing or scheduling a copy of the treaty to an Act of Parliament** – merely including a copy of a treaty in an Act does not necessarily implement its terms. It depends on what the Act says about the treaty as to whether it becomes part of domestic law or not (eg, *Human Rights and Equal Opportunity Commission Act 1986* (Cth) schedules certain international declarations and treaties that deal with human rights to define what 'human rights' means for the purposes of that Act. It does not incorporate the terms of each declaration or treaty into Australian law) nor does it give rise to any actionable human rights in Australian courts.
3. **Rewriting the terms of the treaty in an Act of Parliament** (eg, *Racial Discrimination Act 1975* (Cth) that incorporates the Articles of the *International Convention on the Elimination of All Forms of Racial Discrimination* into Australian law).

PARLIAMENT'S CONSTITUTIONAL POWER TO IMPLEMENT TREATIES

The Commonwealth Parliament has the power to legislate over a variety of subject areas set out in section 51 of the Commonwealth Constitution, including 'external affairs' (section 51(xxix)). The so-called 'external affairs power' has been interpreted by the High Court to mean the power to legislate in relation to:

1. *Laws giving effect to treaties and other international obligations; and*³⁷
2. *Laws with respect to matters physically external to Australia.*

For example:

- > legislation that enables prosecution for criminal conduct that took place in Europe during the Second World War was valid: *Polyukhovich Case*;³⁸
- > legislation implementing the Timor Gap treaty with Indonesia was valid, because it was a law in relation to area of the Timor Gap and the exploitation of petroleum resources in that area, each of which was geographically external to Australia: *Horta v Commonwealth*;³⁹
- > more recently, the High Court upheld the constitutional validity of laws that criminalised sex acts with a child committed by a resident Australian citizen in Thailand. That is, an Australian citizen or resident can commit a criminal offence under Australian law even if the acts the subject of the offence occurred outside Australia.⁴⁰ The majority of the High Court confirmed a wide view of the external affairs power in this case. If a 'place, person, matter or thing' is outside Australia, it may be the subject of federal legislation. It need not be a matter that concerns Australia's relations with another country or other countries; and

3. *Laws dealing with matters of international concern.*

For example, a matter that has the capacity to affect Australia's relations with other nations, and this may be sufficient for laws to be passed using the external affairs power. It may be difficult to establish that a subject matter is of international concern. In the *Polyukhovich case*, Chief Justice Brennan said it would be necessary to define the subject of the matter of international concern with some precision.⁴¹

36. See eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 74 per McHugh J. *Dietrich v R* (1992) 177 CLR 292, 305 per Mason CJ and McHugh J; 360; per Toohey J.; *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270, 274 per Mason J; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 193 per Gibbs CJ.

37. *Commonwealth v Tasmania* (1983) 158 CLR 1 in which the High Court said that the Parliament had the constitutional power to implement the Convention for the Protection of the World Cultural and Natural Heritage to ensure the protection of certain areas of Tasmanian wilderness.

38. *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

39. (1994) 181 CLR 183.

40. *XYZ v Commonwealth* [2006] HCA 25.

41. *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 561.

CASE STUDY: NULYARIMMA v THOMPSON (1999) 165 ALR 621

To what extent is customary international law part of Australian law?

This case was an appeal, by four individuals, against a decision to refuse to issue warrants for the arrest of certain politicians. It was alleged that the politicians had committed the criminal offence of genocide with their formulation, or support of, the Commonwealth Government's native title 'Ten Point Plan' and the *Native Title Amendment Bill (No 2) 1997*. The Federal Court agreed that genocide was a universal crime under international law that required all States to prevent and to prosecute. The prohibition on genocide was a peremptory norm of international law (or *jus cogens*, see page 6), and that obligation existed independently of the *Convention on the Prevention and Punishment of the Crime of Genocide 1948*. Australia has ratified the Genocide Convention, but not yet implemented the treaty obligations in legislation. The *Genocide Convention Act 1949 (Cth)* was passed to approve ratification of the Convention (before the current treaty approval process was in place), and does not incorporate its terms into domestic law. The Court was divided on whether the crime of genocide is part of domestic Australian law. The majority of the court (Wilcox and Whitlam JJ) decided that genocide, and other norms of international criminal customary law, can only be recognised as a crime under Australian law by legislation. The other member of the court, Justice Merkel, decided that rules of customary international law become part of domestic law unless they are inconsistent with domestic legislation or the common law. The decision of the court means that genocide is not a crime under Australian law. After the decision, the *Anti-Genocide Bill 1999 (Cth)* was introduced into Parliament to amend the *Genocide Convention Act 1949 (Cth)* to create a specific offence of genocide. It was not passed. However, since 2002, genocide has become a crime of universal jurisdiction under Australian law as a result of the passage of the International Criminal Court legislation.

CUSTOMARY INTERNATIONAL LAW

Customary international law is not a formal source of Australian law and it has not been applied by Australian courts directly. However, it has been used indirectly to influence the common law (or judge-made law) in Australia and to assist in the interpretation of statutes.

In the early 1990s, the *Mabo* cases were decided. Famously, *Mabo (No 2)* overturned the idea that Australia was *terra nullius* (land belonging to no one) at the time of colonisation, and recognised native title at common law (that is, traditional Indigenous rights in land which existed prior to white settlement in 1788). It marks the high point of the influence of international law on the common law of Australia. Justice Brennan said in *Mabo*:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially where international law declares the existence of universal human rights.⁴²

In a differently constituted High Court, former Justice Kirby consistently took an approach (usually dissenting from the other judges) by which he would have used statements of international law as a 'source of filling a lacuna [or gap] in the common law of Australia or for guiding the court as to the proper construction of the legislative provision in question'.⁴³

So, while Australian courts may refer to customary international law as an influence on common law, they will stop short of declaring enforceable rights or duties in the absence of Executive or legislative action.⁴⁴

INTERPRETATION OF LEGISLATION

Australian statute law that is clearly inconsistent with international law will override the relevant international law.⁴⁵

Courts have the task of interpreting legislation, and applying and developing the common law. There are a number of legal doctrines about how legislation should be interpreted to guide the Courts. But sometimes, legislation can be interpreted many different ways. The meaning of a statute is not always clear.

Where there is ambiguity or uncertainty about what the Parliament meant, that cannot be resolved from the statute itself, the Courts can consider so-called 'extrinsic materials' to help them to interpret the meaning of the legislation.⁴⁶ Extrinsic materials include the Second Reading speech of a Bill in Parliament that talks about the policy behind why the law should be passed. They also include Australia's treaty obligations and the rules and principles of customary international law. Judges can look to the nature of Australia's international

42. *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at p 42. (Justice Brennan with the support of the Chief Justice Mason and Justice McHugh.)

43. *Cachia v Hanes* (1991) 23 NSWLR 304, 313. See also Kirby P in *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262, 273 and, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol — A View from the Antipodes', Justice M Kirby (1993) 16 *UNSW Law Journal* 363.

44. For example, *Dietrich v R* concerned the right of an accused person who has no money publicly funded legal representation, consistent with international human rights jurisprudence. Justice Brennan said that '[t]he courts cannot, independently of the legislature and the executive, legitimately declare an entitlement to legal aid.' (1992) 177 CLR 292, 321.

45. *Polites v Commonwealth* (1945) 70 CLR 60.

46. In addition to the common law rule, see *Acts Interpretation Act 1901* (Cth), ss. 15AB(1)–(2).

obligations and as far as possible, interpret and apply legislation to conform, and not conflict, with those standards in international law.⁴⁷

This process of interpretation was expressed (in relation to treaty obligations) by the High Court in the *Teoh* case:

If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument [treaty] and the obligations which it imposes on Australia, then that construction should prevail.⁴⁸

The High Court case of *Al-Kateb*⁴⁹ may indicate a shift in the High Court towards a stricter and more narrow approach as to when there is ambiguity in a statute, and therefore when it is acceptable to look to international law in interpreting statutes. In that case, the High Court was asked to consider whether the *Migration Act 1958* (Cth) authorised the ongoing, perhaps indefinite, detention of an 'unlawful non-citizen' (section 189) where removal from Australia was not possible. The *Migration Act* requires 'unlawful non-citizens' to be detained in immigration detention (section 189) until such time as they receive a visa, or are removed or deported (s 196). Removal or deportation must occur 'as soon as reasonably practicable' (s 198).

One question before the High Court was whether the *Migration Act* was ambiguous enough to justify reference to international legal principles. Only Justice Kirby was prepared to accept the relevance of international law in this case.

When interpreting the treaty itself, the courts will use rules of interpretation recognised by international lawyers, codified in the *Vienna Convention on the Law of Treaties*.⁵⁰

ADMINISTRATIVE DECISION-MAKING

Some legislation requires administrative decision-makers to have regard to international law obligations when exercising their powers. For example, the *Broadcasting Services Act 1922* (Cth) required the Australian Broadcasting Authority to perform its functions 'in a manner consistent with Australia's obligations under any convention to which Australia is a party'. A television program standard that required a minimum proportion of Australian content was unlawful, as it was not consistent with Australia's obligations under the Closer Economic Relations Trade Agreement with New Zealand: High Court decision in *Project Blue Sky v Australian Broadcasting Authority*.⁵¹

CASE STUDY: RE WOOLLEY & ANOR (2004) 210 ALR 369

Children in immigration detention

What happens when an Act of Parliament, in this case the *Migration Act 1958* (Cth), authorises something that is a breach of a rule of international law? The *Migration Act* mandates the detention of 'unlawful non-citizens', whether they are children or adults.

This case was brought to seek the release of children in immigration detention. The argument in favour of release included reference to international human rights standards to which Australia is a signatory, including Article 37(b) of the Convention on the Rights of the Child (CROC) that provides:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

The High Court acknowledged the inconsistency between the international human rights standards and the *Migration Act*, but in the words of Justice Kirby:

It is evident that Parliament contemplated the precise conditions in which the applicant children were held, when it enacted the provisions of the Act obliging a universal policy of detention of 'unlawful non-citizens' with application to children as well as adults.

[I]t is legitimate for a court to interpret the law, so far as its language permits, to avoid departures from Australia's international obligations [under a treaty]. However, where, as here, the law is relevantly clear and valid ... a national court, such as this, is bound to give it effect according to its terms. It has no authority to do otherwise.'

Re Woolley (2004) 210 ALR 369, 419, 422-3 (Justice Kirby).

47. *Polites v Commonwealth* (1945) 70 CLR 60 at 68-9; and 80-81; *Minister of State for Immigration and Ethnic Affairs v Ab Hin Teoh* (1995) 183 CLR 273 at p 362.

48. *Minister of State for Immigration and Ethnic Affairs v Ab Hin Teoh* (1995) 183 CLR 273 at p 287.

49. *Al-Kateb v Godwin* (2004) 208 ALR 124.

50. *Thiel v Federal Commissioner of Taxation* 171 CLR 338 at p 356; *Commonwealth v Tasmania* (Tasmanian Dams Case) (1983) 158 CLR 1 at p 177.

51. (1998) 194 CLR 355.

Another way in which decision-makers may be required to have regard to international law obligations was outlined by the High Court in the *Teoh Case*.⁵² Australia had ratified the *Convention on the Rights of the Child 1989*, which stated that the best interests of children were to be treated as a primary consideration when making decisions affecting their interests.⁵³ Although the provisions had not been incorporated into domestic law, the court decided that the ratification created a 'legitimate expectation' that the executive government would consider its provisions. The Court believed that to require a decision to be made *in accordance with* a treaty would be legislating 'by the back door', and therefore would not be permissible. The most an applicant can expect is that the obligations Australia has assumed in relevant treaties will be *considered* when their application is assessed. An applicant should be given notice by the government, when deciding whether or not to deport a person, of the decision-maker's intention not to act in accordance with the Convention, and to be provided with an adequate opportunity to reply.

HOT TIP

'Prorogue' means to terminate a session of parliament, which places it in recess and causes all unfinished business before it to lapse. It differs from dissolving a parliament in that a prorogued parliament may be called back.

Since *Teoh*, government decision-makers have taken account of Australia's treaty obligations when making a decision, but have never been bound by them. There have been some Federal Court applications for review of immigration decisions which argue that the *Teoh* requirement has not been complied with, but the argument has rarely been successful.

Despite this limited role for treaties in administrative decision-making, the then Labor Government argued that the *Teoh* decision interfered with the proper role of Parliament in implementing treaties. In 1995 it introduced the *Administrative Decisions (Effect of International Instruments) Bill* to negate the effect of *Teoh*. This '*Teoh* Bill' lapsed in August 1998, but was reintroduced by the Coalition Government in 2001. It again lapsed with the proroguing of Parliament in October 2001.

CONSTITUTIONAL INTERPRETATION

Al-Kateb v Godwin (2004) 208 ALR 124 was a case that concerned the lawfulness of the potentially indefinite detention of a stateless person, Mr Al-Kateb, under the mandatory detention regime of the *Migration Act 1958*

(Cth). The High Court held in a majority of 4-3 that the potentially indefinite (perhaps permanent) detention of Mr Al-Kateb was lawful in Australia.

Justices McHugh and Kirby considered whether the Commonwealth Constitution should be interpreted in accordance with Australia's international obligations, relevantly, Australia's human rights obligations. Justice Kirby held that it should (since the Constitution should be interpreted dynamically in light of changing circumstances) and Justice McHugh that it could not (since the Constitution was drafted in 1901 and its meaning cannot change according to international law adopted after the Constitution). This issue remains unsettled.

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Prime Minister Kevin Rudd meets UN Secretary-General Ban Ki-moon at the United Nations Headquarters during the General Assembly, 26 September 2008, New York.

Renee Nowytarger, Northern Territory News.

52. *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273.

53. Article 3(1), *Convention on the Rights of the Child 1989*.

Enforcement of international law

International law is often implemented and enforced through national legal systems as well as through a variety of specialised international courts, tribunals and treaty bodies. The United Nations Charter is principally concerned with the preservation of world peace, including through various methods for resolving disputes peacefully (see Article 33 of the UN Charter). These methods range from informal, non-binding, diplomatic methods through to formal and binding judicial settlement.

The Charter also provides for special measures of coercive enforcement in response to the use of military force, including unilateral or collective self-defence (article 51 of the Charter) and collective security measures (such as sanctions, peacekeeping, and military force) under Chapter VII of the Charter.

DISPUTE RESOLUTION

Negotiation

A discussion of the issues between the parties, without the participation of any third party is a negotiation. Some organisational forums exist for States to raise issues in dispute as well as dealing with coordination of policy. Examples are the South Pacific Forum (regular meetings of the independent countries of the South-Western Pacific) and the Group of Eight (G-8) (regular meetings of the eight largest Western economic powers), increasingly with the input of the other States with emerging economies (China, India, Brazil, Mexico and South Africa) or 'G8+5'. G8 countries are France, the United States, United Kingdom, Russia, Germany, Japan, Italy and Canada.

Inquiry

If States agree to have a third party determine certain issues of fact which are relevant to their dispute, an inquiry is held. This mechanism can then be used as the basis of future negotiations between the parties.

Mediation and conciliation

These mechanisms all involve a third party, and range in formality from that third party acting as an honest broker between States in dispute, who may have severed diplomatic relations, through to the making of a binding determination by an arbitrator.

Arbitration

Arbitration is a more formal method of dispute settlement which involves the parties in dispute agreeing to submit to a binding decision by an arbitrator, while (unlike in a judicial court) retaining some degree of control over the selection of the arbitrator and the applicable law and procedure. One example of an arbitral body is the Permanent Court of Arbitration, set up under the Hague Conventions on Pacific Settlement of International Disputes, which provides experienced arbitrators and clear procedural rules for the conduct of arbitrations. Other arbitral bodies exist in specialised areas such as foreign investment disputes.

Judicial settlement

The world Court, the International Court of Justice can decide disputes between States. Its decisions are binding only on the parties to a particular dispute. States must agree to the ICJ having jurisdiction before it can hear a case:

- > a State can make an Optional Declaration, by forwarding to the Secretary-General a declaration that it unilaterally accepts the jurisdiction of the Court. Once a State has done so, it accepts the jurisdiction of the Court in disputes with other States that have made such a declaration. A State can limit the scope or subject matter of disputes that can go the Court by making a reservation. For example, New Zealand and the UK have made declarations with reservations excluding disputes with other Commonwealth countries; France's declaration excludes disputes relating to nuclear testing; and Australia's declaration excludes maritime boundary disputes.
- > the States in dispute can agree to bring a particular dispute to the Court;

- > a State may consent to the Court having jurisdiction where another State has commenced an action unilaterally;
- > a treaty or convention may specify that the Court has jurisdiction to decide disputes about the interpretation or application of the treaty (for example, the Convention on the Prevention and Punishment of the Crime of Genocide 1948).

The Court can refuse to hear a dispute if it decides that the presence of a third party is essential to the successful resolution of the proceedings. For example, in the *East Timor* case,⁵⁹ Portugal challenged the validity of the Timor Gap treaty between Australia and Indonesia. The Court decided that it could not determine the issue because Indonesia had not consented to appear, and the issues required consideration of Indonesia's actions in East Timor.

There is no mechanism for enforcement of orders of the ICJ other than the possibility of referral to the Security Council. States have usually been willing to obey the orders of the ICJ.

The ICJ can give a non-binding Advisory Opinion on issues when requested by the General Assembly, Security Council or other UN agencies. See for example the advisory opinion on the legal consequences of the Israeli wall, available at the ICJ website www.icj-cij.org

Other Binding Mechanisms

As noted earlier, there are a range of specialised international or mixed criminal tribunals which have enforced international criminal law. In addition, in other specialised areas of international law, there are also binding enforcement mechanisms. One example is the International Tribunal for the Law of the Sea in Hamburg, Germany, which hears disputes between States under the 1982 Convention on the Law of the Sea (see p 21). Another example is the dispute settlement panels of the World Trade Organisation (WTO), which determines trade disputes between member States of the WTO (see p 14). A further example is the European Court of Human Rights, which issues binding decisions concerning human rights violations involving member States of the European Convention on Human Rights.

Non-Binding Mechanisms

Various mechanisms have been established for supervising the implementation of international treaty obligations, particularly in the human rights area. These procedures include:

- > **reporting:** States parties may be required to submit periodic reports on their domestic implementation of treaty obligations;

- > **State complaints:** member States may be able to make complaints against other States;
- > **individual complaints:** some treaties provide an avenue for individuals to complain about the conduct of a State. The findings of human rights bodies in individual cases are not binding but they are regarded as highly persuasive and States frequently respond positively to the findings.⁶⁰
- > **independent monitoring of compliance:** some treaties provide for an independent mechanism to measure compliance with the treaty obligations.

USE OF FORCE

Before 1945, international law generally allowed States to resort to military force to settle their disputes, which often led to the escalation of military violence and ultimately to world wars. Since the adoption of the UN Charter, all member States are required to refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the purposes of the UN: Article 2(4) of the UN Charter. There are two basic exceptions to this general prohibition on the use of force: self defence in response to an armed attack (article 51) and collective security measures authorised by the UN Security Council (Chapter VII of the Charter). A third possible exception is not established: humanitarian intervention to protect human rights (as in NATO's attack on Kosovo in Yugoslavia in 1999), in circumstances where the intervening State is not exercising self-defence and there is no Security Council authorisation to use force.

Unilateral use of force

A State has the right of individual or collective self-defence 'if an armed attack occurs' under Article 51 of the UN Charter, meaning where military force is used by one State against another, or by non-State militant groups which are controlled by one State and sent to attack another. A State which is subjected to an armed attack can request assistance from other States ('collective self-defence').

There is disagreement as to whether this right is limited to situations where an armed attack has actually occurred, or includes action in anticipation of attack. The UN Secretary General accepts that States have a right to use force in self-defence if an armed attack is imminent (for example, there is good intelligence that an attack is about to happen and there are no other means available to prevent it).

In contrast, the outer limits of self-defence have been pushed by theories of 'pre-emptive self-defence' by which States seek to argue that they are justified to use force unilaterally to prevent more remote or distant threats, in

59. *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Reports 90.

60. For a detailed discussion of Human Rights, see *Hot Topics 65: Human rights*.

circumstances where the time or place of the attack is far more uncertain. This theory was most recently used by the United States in its invasion of Iraq in March 2003 to the extent that it relied on the existence of weapons of mass destruction, in circumstances where there was no evidence of an intention by Iraq to use those weapons against the US, and where evidence of the existence of any such weapons was in doubt.

Collective use of force

The Security Council is required to encourage States to resolve their disputes by peaceful means. If there is a threat to, or breach of international peace and security, the Security Council can respond, although the Council does not control its own military forces. The Security Council can impose non-forceful sanctions, or take forceful measures by authorising willing States to use delegated force on its behalf. Between 1945 and 1990, the Security Council only authorised forceful measures once, in response to North Korea's invasion of South Korea in 1950. In 1990, the Security Council authorised forceful measures against Iraq following its invasion of Kuwait. Since then the Security Council has authorised forceful measures in a number of situations, including in Bosnia-Herzegovina, Somalia, Rwanda and Haiti. These collective forceful measures are not under the command of the UN, but of one or more of the participating countries. For example, the international force authorised by the Security Council for East Timor in 1999 was led by Australia and consisted of troops from 22 member States.

In 1950, the General Assembly adopted the Uniting for Peace Resolution, under which it interpreted its power under the Charter to allow it to step into a situation where the Security Council was unable to act because of the use of the veto power by one of the permanent members.

The General Assembly has recommended collective action in relation to the following:

- > the Suez crisis in 1956;
- > Soviet invasion of Hungary;
- > Soviet invasion of Czechoslovakia in 1968; and
- > Soviet invasion of Afghanistan in 1980.

The Security Council can authorise regional organisations or agencies to undertake enforcement action. The Security Council has co-operated with NATO in relation to the conflict in the former Yugoslavia, and authorised NATO air-strikes against Bosnian Serb positions to help enforce Security Council resolutions establishing demilitarised zones and safe areas. More recently, in July 2007 the Security Council authorised the use of force by a hybrid UN and African Union force in Sudan to protect and ensure freedom of movement for its own personnel and humanitarian workers, prevent armed attacks and protect civilians in order to support implementation of the Darfur Peace Agreement.

PEACEKEEPING OPERATIONS

UN peacekeeping operations involve the deployment of armed troops to assist in the implementation of agreements reached between the UN and parties to a conflict. Consent from all parties to the conflict is needed, and the peacekeepers are impartial. Peacekeeping operations do not involve the use of force except in self-defence. Peacekeeping operations are under UN command, under the authority of the Security Council. Peacekeeping forces are multinational in composition, selected in consultation with the parties to the conflict, and traditionally exclude troops from the permanent five members of the Security Council.

UN peacekeeping operations have included monitoring cease-fires, organising and supervising elections, monitoring arms flows and demobilising troops, supervising government functions and disarmament, monitoring human rights obligations, and assisting in the delivery of humanitarian relief. All members of the UN are obliged to contribute to the costs of peacekeeping costs. Since 1948, 123 nations have contributed military and civilian police personnel at various times. There have been 53 UN peacekeeping operations since 1948, and 40 of those have been created since 1988. There are currently 14 peacekeeping operations in the field. In 1988 the Nobel Peace Prize was awarded to UN peacekeeping forces.

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Spanish UN soldier screams to get help for colleagues wounded at the site of a roadside bomb in the southern Lebanese Marjayoun-Khiam valley. Five Spanish UN peacekeepers were killed and three wounded by the roadside bomb. 24 June 2007, Lebanon.

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Further information

INTERNET SITES

AustLII (Australasian Legal Information Institute) www.austlii.edu.au

AustLII is one of the largest sources of free public legal information on the internet. AustLII aims to improve access to justice through access to information.

Australian Treaties are available from 1901 to present in full text at www.austlii.edu.au/au/other/dfat/

PUBLIC INTERNATIONAL LAW

Centre for International and Public Law, Australian National University

One example of a university site on international law, dealing with research, teaching, conferences and lectures in human rights law and international law.

www.law.anu.edu.au/CIPL/

Sydney Centre for International Law, University of Sydney

www.law.usyd.edu.au/scil

American Society of International Law

www.asil.org

See particularly the *ASIL guide to electronic resources for International Law*

www.asil.org/crim1.cfm

United Nations

www.un.org

International Criminal Court

www.icc-cpi.int/

International Court of Justice

Links to all contentious cases and advisory opinions since 1946.

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